COURT OF APPEALS

PRISTINA

IN THE NAME OF THE PEOPLE

Case number: **PAKR 266/14**

Date: **26 January 2016**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Piotr Bojarczuk as Presiding and Reporting Judge, and EULEX Judge Roman Raab and Kosovo Court of Appeals Judge Vahid Halili as Panel Members, with the participation of Dr. Bernd Franke, EULEX Legal Officer, as Recording Officer,

in the case concerning the defendants:

1. **A.K., born on […], in the village of […], Kosovo Albanian, father's name […], mother's name […], residing in […];**

2. **N.K., nickname […], born on […] in the village of […], Kosovo Albanian, father's name […], mother's name […], residing in […];**

3. **N.K., call sign during the war […], born on […] in the village of […], Kosovo Albanian, father's name […], mother's name […], residing at […];**

4. **B.L., born on […] in the village of […], Kosovo Albanian, father's name […], mother's name […], residing in […];**

5. **F.L., nickname […], born on […] in the village of […], Kosovo Albanian, father's name […], mother's maiden name […], residing at […];**

6. **R.M., nickname […], born on […] in […], Kosovo Albanian, father's name […], mother's name […], residing in […];**

7. **N.S., nickname […], born on […] in the village of […], Kosovo Albanian, father's name […], mother's name […], residing at […];**

8. **S.S., nickname […], born on […] in the village of […], Kosovo Albanian, father's name […], mother's name […], residing in […];**

9. **S.S., born on […] in the village of […], Kosovo Albanian, father's name […], mother's name […], residing in […];**

10. **B.S., born on […] in the village of […], Kosovo Albanian, father's name […], mother's name […], residing in […];**

charged under the Indictment of the Special Prosecutor Office PPS no. 07/2010 dated 25 July 2011 and confirmed in a ruling dated 26 August 2011 *with* committing one or more counts of the following criminal offences: *War Crime against the Civilian Population*, under Articles 22, 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (hereinafter "CCSFRY"), currently criminalized under Articles 31, 152 of the Criminal Code of the Republic of Kosovo (hereinafter "CCRK"), in violation of Common Article 3 of the four Geneva Conventions of 12 August 1949 and Articles 4, 5 (1) of Additional Protocol II and *War Crime against Prisoners of War*, under Articles 22, 144 CCSFRY, currently criminalized under Articles 31, 152 CCRK, in violation of Common Article 3 of the four Geneva Conventions of 12 August 1949 and Articles 4, 5 (1) of Additional Protocol II, adjudicated in first instance by the Basic Court of Pristina with the Judgment P. no. 766/12, dated 17 September 2013;

deciding upon the appeal of the SPRK Prosecutor, filed on 29 November 2013, against the Judgment of the Basic Court of Pristina P. no. 766/12 dated 17 September 2013;

having reviewed the responses filed on behalf of defendants **N.K.**, **N.K.**, **N.S.**, **S.S.**, **F.L.** and **R.M.**;

and the motion of the Appellate Prosecutor filed on 3 June 2014;

after having held a public session of the Appellate Panel on 1 and 2 December 2015;

having deliberated and voted on 26 January 2016;

pursuant to Articles 409, 410, 411, 415, 417, 420, 421, 423, 424, 426 and 427 of the Provisional Criminal Procedure Code of Kosovo (hereinafter "PCPC");

renders the following:

JUDGMENT

I. The Appeal of the SPRK Prosecutor is <u>rejected as unfounded.</u>

II. The Judgment of the Basic Court of Pristina no. P. no. 766/12 dated 17 September 2013 is <u>affirmed.</u>

REASONING.

I. RELEVANT PROCEDURAL BACKGROUND

On 25 July 2011 the EULEX Special Prosecutor filed the Indictment PPS no. 07/10 charging the defendants **A.K.**, **N.K.**, **N.K.**, **B.L.**, **F.L.**, **R.M.**, **N.S.**, **S.S.**, **S.S.**, and **B.S.** (hereinafter, collectively, "the defendants") with crimes allegedly committed from early 1999 until mid-June 1999 against Serbian and Albanian civilians and Serbian military prisoners detained in the Kosovo Liberation Army (hereinafter "KLA") controlled prison in the village of Kleçkë/Klečka, Lipjan Municipality, in Kosovo.

Count 2 against **A.K.** was withdrawn on 9 November 2011.

On 21 March 2012, the Basic Court issued a ruling where it found that the statements and diaries of cooperative witness **A.Z.**, who committed suicide on […], were inadmissible.

On 30 March 2012, the Basic Court severed the proceedings and issued a Judgment where it acquitted the defendants **A.K.**, **B.L.**, **R.M.**, **S.S.**, **S.S.**, and **B.S.** of all offences.

On 2 May 2012, the Basic Court issued a Judgment where it acquitted the defendants **N.K.**, **N.K.**, **F.L.**, and **N.S.** of all offences.

On 20 November 2012 and 11 December 2012 respectively, the Supreme Court annulled both of the Judgments and the ruling on admissibility of evidence of **A.Z.**, and remitted the cases against all ten defendants back to the Basic Court for retrial. The cases were rejoined. On 17 September 2013 in the impugned Judgment the Basic Court again acquitted all the defendants.

After public main trial sessions between April and September 2013, deliberations took place on 16 September 2013 and the Judgment of the Basic Court was pronounced on 17 September 2013.

In the impugned Judgment, the Basic Court found that it had not been proven that the defendants committed the criminal offences with which they were charged in the Indictment, and acquitted them pursuant to Article 390(3) of the PCPC. More particularly, the Basic Court found that in 1999 a prison/detention center was operated by the KLA in the village of Kleçkë/Klečka. The Basic Court further found that conditions of detention in Kleçkë/Klečka 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 **S.A.** were subject to cruel treatment.

The Basic Court also found that it was established by the evidence that **D.T.**, **D.V.**, **B.C.**, **Z.F.**, **Z.T.**, **N.D.** and **V.M.** were unlawfully killed, and that the only evidence regarding the identity of the perpetrators of those crimes is the evidence of **A.Z.** As to **A.A.**, the Basic Court found that the only evidence concerning his alleged unlawful killing is that of **A.Z.** The Basic Court stated that a body has not been found, and that **A.A.** is officially missing.

The Basic Court found that **A.Z.**'s statements and diaries constituted admissible evidence, as previously determined by the Supreme Court. However, the Basic Court found that **A.Z.** was not a credible witness and that therefore it would be unsafe to rely upon his evidence in determining the guilt of the defendants. The Basic Court added that in any event, even if the Trial Panel had concluded that he was a credible witness, it could not have found the defendants guilty based solely on his evidence as cooperative witness pursuant to Article 157 (4) of the PCPC, and that there is no corroborating evidence regarding the identity of the perpetrators of unlawful killings in Kleçkë/Klečka prison.

The EULEX Prosecutor announced on 23 September 2013 that he will appeal the impugned Judgment.

The written Judgment was served to EULEX Prosecutor on 18 November 2013. His appeal, dated with 28 November 2013, was filed on 29 November 2013.

On 16 December 2013 defence counsel Florin Vertopi and Xhafer Maliqi on behalf of defendant **N.K.** filed a response. On 20 December 2013 defence counsel Mahmut Halimi filed a response on behalf of defendant **N.K.** On 23 December 2013 defence counsel Bajram Tmava filed a response dated 21 December 2013 on behalf of defendant **N.S.** On 26 December 2013 defence counsel Mexhit Syla filed a response on behalf of defendant **S.S.** On 31 December 2013 defence counsel Karim A.A. Khan, Tahir Rrecaj, and Tomë Gashi filed a joint response on behalf of defendant **F.L.** Finally, on 3 January 2014 defence counsel Haxhi Millaku filed a response dated 31 January 2013 on behalf of defendant **R.M.**

The case was transferred to the Court of Appeals for a decision on the appeal on 14 May 2014. An Appellate Panel was assigned on 19 May 2014. On 3 June 2014, the EULEX Appellate Prosecutor filed his motion dated 30 May 2014.

On 9 July 2014 a Panel of the Court of Appeals held a public session. In a ruling dated 26 August 2014 the Court of Appeals announced that it would hold a hearing to hear evidence previously examined by the Basic Court pursuant to Article 411 (2) and Article 412 of the PCPC, and eight witnesses were summoned to appear on 17, 18, 23 and 25 September 2014.

On 17 September 2014 the Court of Appeals held the first session of the hearing and one witness was examined.

On 18 September 2014, defence counsel Karim Khan on behalf of defendant **F.L.**, seconded by defence counsel Florin Vërtopi on behalf of defendant **N.K.**, filed a motion requesting the disqualification of the appeal bench.

On 30 September 2014 the President of the Court of Appeal granted the request for disqualification pursuant to Article 40 (3) and Article 42 of the PCPC, and ruled that a differently constituted Panel would be assigned to decide on the appeal. On 24 April 2015 a new Appellate Panel was assigned to the case.

The session of the Court of Appeals Panel was held on 1 and 2 December 2015 in the presence of all the defendants, their defence counsel and the Appellate Prosecutor Anca Stan.

The Appellate Panel deliberated and voted on 26 January 2016.

II. SUBMISSIONS OF THE PARTIES.

A. Appeal of the SPRK Prosecutor.

SPRK Prosecutor Maurizio SALUSTRO on 29 November 2013 filed an appeal with the Basic Court on the grounds of:

- Substantial violation of the provisions of criminal procedure;
- Erroneous or incomplete determination of the factual situation.

All these grounds relate to cooperative witness **A.Z.** Firstly, with regard to the **allegations of violation of the provisions of the criminal procedure**, the SPRK Prosecutor contends that the Basic Court erred: (i) in drawing adverse conclusions from the fact that **A.Z.** was not available at trial, namely in finding that the defence did not have a full opportunity to cross-examine him. He states that the Supreme Court adjudicated on the issue and ruled to the contrary, and also that it would amount to deprive the rule of its meaning that statements of a deceased witness can be admitted into evidence; (ii) in ruling that the standard of corroboration required was "independent evidence which implicates the accused in the commission of the offence" given that some previous decisions from the Basic Court of Pristina relied on corroboration that did not implicate the accused and also that Article 157 (4) PCPC does not impose such a requirement; and (iii) in adopting an illogical method for assessing the evidence since it focused on the existence of corroboration rather than first assessing the credibility of **A.Z.** *per se*. With regard to this last point, the SPRK Prosecutor claims that the Basic Court resorted to selective reading, focused on alleged contradictions in **A.Z.**'s statements while ignoring the clarifications he provided, and never assessed the evidence as a whole.

Secondly, the SPRK Prosecutor argues that the Basic Court came to an **erroneous and incomplete determination of the factual situation** in concluding that **A.Z.**'s evidence was not credible. In this regard, he contends that the Basic Court erred in finding that: (i) there was no sufficient corroboration to **A.Z.**'s evidence; (ii) his "diaries" were not reliable; (iii) he lied about his medical condition and about giving a statement to KFOR; (iv) forensic evidence contradicts his statements concerning the killing of five Serbian prisoners and **A.A.**; and (v) his evidence is contradictory as to the killing of two Serbian police officers.

Of significant importance, the SPRK Prosecutor contends that there is a large amount of generic corroboration, notably from independent official KLA documents, concerning the existence of the Kleçkë/Klečka prison, the presence of prisoners, **A.Z.**'s role as guard, the fact that people were killed, dates of admission and release of prisoners, etc. He states that there is also specific corroboration as regards the killing of five Serbian military officers, whose bodies were found in

the mass grave indicated by **A.Z.**, the killing of one of them with a scythe which was also found in the grave, the killing of two Serbian police officers whose bodies were also found in the location indicated by **A.Z.**, the presence of the names of these victims in the diary, the torture of anonymous witness H and the killing of his brother. The Prosecutor finally submits that there is also specific corroboration as to the defendants' involvement in Kleçkë/Klečka prison since witnesses testified to having seen **N.K.**, **N.K.**, **R.M.**, **A.K.**, **F.L.**, and others in Kleçkë/Klečka during the war.

With regard to **A.Z.**'s diaries in particular, the SPRK Prosecutor stresses that it has never been his case or the cooperative witness' evidence that **A.Z.** wrote the so-called "diaries" alone. According to the Prosecutor, not a single charge in the Indictment is based on a diary entry. He further claims that **A.Z.** never said that all the entries in the diaries were contemporaneous to the events. The Prosecutor clarifies that among the documents handed over to the investigators by **A.Z.**, namely documents /001 through /036, **A.Z.** was only questioned in depth on the "war diaries" labelled /011 to /014, which are the only ones over which he ever claimed authorship. It is only for these specific entries that **A.Z.** indicated that no one knew about them and that no one had any access to them. Therefore, the SPRK Prosecutor contends that the Basic Court, in order to discredit the entire diary, erred in taking extracts of **A.Z.**'s evidence out of context, in distorting his testimony, and in erroneously drawing general conclusions out of them.

The title "diary" does not reflect the reality since among these documents there are a lot of loose papers, for which **A.Z.** never claimed authorship and about which he was never questioned. The SPRK Prosecutor recalls that graphology expert Professor **B.** found that diaries /011 and /012 were entirely written by **A.Z.**, to the exception of the signature of **I.Q.** on page 4 of diary /011, and that the methodology adopted by defence expert witness Dr. **H.K.** had to be discarded. The Prosecutor claims in this respect that Dr. **K.** is not a graphologist but a criminologist and that his findings are not supported by scientific evidence. He further submits that the Basic Court erroneously considered that editing one's personal diary equaled tampering with evidence. Finally, the SPRK Prosecutor raises concerns as to why the Basic Court did not summon Professor **B.** to put questions to him instead of "passively" accepting his written report. He contends that the Basic Court erred in substituting itself for the experts Dr. **K.** and Professor **B.**, in departing from their conclusions, and in focusing its analysis only on the external appearance of the handwriting without any scientific foundation.

Turning to **A.Z.**'s two periods of hospitalization, the SPRK Prosecutor contends that the Basic Court erred in finding that **A.Z.** lied and failed to differentiate between the two hospitalizations. With regard to the hospitalization in Prizren, he recalls that the doctors' diagnosis of Post-

Traumatic Stress Disorder was perfectly consistent with the car accident **A.Z.** had experienced. He further states that **A.Z.** never said that he went to the hospital to defraud the insurance or to fake PTSD symptoms. In the view of the Prosecutor, getting a medical certificate to claim financial compensation is a perfectly legitimate procedure which should not undermine **A.Z.**'s credibility, and that the cooperative witness' admission that he wanted to kill **F.L.** rather shows sincerity.

As to his hospitalization in Pristina, the SPRK Prosecutor clarifies that **A.Z.**, as he constantly stated himself, was forced to go to the hospital by **F.L.** in order to discredit his reliability as a witness and, as part of this plan, he had to pretend that he was mentally ill. He claims that these facts are supported by the evidence and were wrongly assessed by the Basic Court.

The SPRK Prosecutor further argues that the Basic Court erred in negatively assessing **A.Z.**'s credibility when it stated that he was a "*manipulative liar*" because, according to the Basic Court, "*he persuaded three psychiatrists that he was mentally ill when he was not*", and that he lied to doctors at the Pristina hospital "*in order to discredit a statement that, in fact, he had never made*".

The SPRK Prosecutor points out that **A.Z.**'s testimony that he did not give a formal written statement is corroborated by the KFOR letter dated 3 September 2013, and also by two different entries on his diary (/006 and /001), as well as the police report dated 25 November 2006 which establishes the existence of a meeting between UNMIK and **A.Z.**. The Prosecutor clarifies that given that KFOR is not an investigative agency, this explains why they do not record what a potential witness says.

Finally, he opines that the Basic Court erred in holding that "*the diary entries of **A.Z.** depict a man suffering mental illness*" while the relevant entry when correctly translated rather indicates that **A.Z.** told his wife that the children should not understand that he was *not* sick.

Turning to the killing of five Serbian soldiers and of **A.A.**, the SPRK Prosecutor contends that there is undisputed evidence that five bodies were exhumed from the grave site indicated by **A.Z.**, that the DNA analysis revealed that these were five Serbian soldiers, two of them with their hands tied, that the names of four out of five of these victims appeared in a diary's entry as prisoners of Kleçkë/Klečka prison, that military clothing and a scythe were found in the grave, and that the date of their admission to the prison in the diary matches with the *ante mortem* evidence. He then addresses in turn several alleged contradictions in **A.Z.**'s evidence with respect to these killings.

With regard to the fact that **A.Z.** said that nine bodies were buried in the grave while only four were found, the Prosecutor asserts that this does not undermine the credibility of the cooperative witness given that **A.Z.** had no knowledge of what happened to the grave after the bodies were dumped in it, that he never said he closed the grave, nor that he constantly monitored its location.

The SPRK Prosecutor also stresses that forensic archeologist expert **C.C.** testified that traces of early disturbance of the grave within the first six months could not have been detected. He further submits that there are strong indications that some bodies may have been removed.

Contrary to the Basic Court's statement, he clarifies that **A.Z.** had never testified that the grave in question had been disturbed in 2002, since **A.Z.** was referring to another grave.

As to the order in which the bodies were found in the grave which does not match **A.Z.**'s account, the Prosecutor recalls that expert witness **C.C.** stated that "*if bodies were removed before they were covered it would be very difficult to say if there were more bodies there*". Contrary to the Basic Court's conclusion, **A.Z.** did not testify that after each victim the bodies were buried but rather covered with some soil.

Furthermore, while **A.Z.** stated that the four Serbians were killed 20 days before **A.A.** in contradiction with the evidence, the Prosecutor specifies that **A.Z.** actually referred to two distinct groups of four Serbs, and that he admitted that he was not sure as to the dates and the identities of the two groups of Serbs. He contends that the apparent contradiction is easily explained by the fact that **A.Z.** made a mistake as to the date "20 days before the killing of **A.A.**".

As to the apparent contradiction between **A.Z.**'s statement involving **A.K.** in two events and **A.K.**'s alibi, the Prosecutor contends that his alleged involvement was marginal and that **A.Z.** most likely made a mistake.

With respect to the fact that **A.Z.** testified that only one prisoner was killed with a scythe when forensic evidence established that two prisoners were, the SPRK Prosecutor stresses that **A.Z.** never said that he eye-witnessed the execution of the group of four Serbs.

With regard to the fact that **A.Z.** first stated that he did not see the killing of the two Serbian police officers **V.M.** and **N.D.** while he later admitted that he personally killed them, the SPRK Prosecutor points out that the cooperative witness explained his initial reluctance to admit his responsibility, the reasons for which are easily understandable. He adds that the forensic evidence is compatible with **A.Z.**'s account that he shot at the victims several times. The Prosecutor further stresses that his evidence is corroborated by independent elements such as the

exhumation of the bodies at the location he indicated, the mention of the names of the victims in his diary, the autopsy reports, and the evidence of witness U.

In addition, the SPRK Prosecutor claims that the Basic Court also erred in its findings regarding: (i) **A.Z.**'s evidence concerning **S.D.** and **B.K.**; (ii) the fact that he was shown ICTY statements from **F.L.**; (iii) his evidence on alleged payments by **F.L.**; (iv) the threats he received from **F.L.**; and (v) the fact that he admitted having lied to ICTY investigators.

More specifically, with respect to **S.D.**, while the Prosecutor acknowledges that **A.Z.** was confused about the identity of **P.U.**, which is **S.D.**'s nickname, he recalls that two of **S.D.**'s closest collaborators during the war testified that they knew him under his real name, that they did not know if he had a nickname, and that they did not know any **P.U.**

Regarding the ICTY statements, while it has been established by the Basic Court that **F.L.** and **I.M.** never gave a statement to the ICTY, the SPRK Prosecutor outlines that **A.Z.** testified that he only read part of **H.B.**'s statement, and that the answers that the Basic Court received from the ICTY do not mention **H.B.** He further claims that **A.Z.** may have identified as "statement" documents that could in fact have been defence memoranda or records of initial hearings.

Finally, the SPRK Prosecutor highlights that if **A.Z.** had wanted to take revenge on **F.L.** by bringing false accusations against him, he would not have incriminated himself and he would not have implicated **F.L.** in such a limited way.

The Prosecutor moves the Court of Appeal to admit as evidence two judicial decisions from the Pristina District Court, a newly-found UNMIK officer's report dated 25 November 2006, a newly found EULEX officer's report dated 19 November 2013, and also the Prosecutor's closing speech.

For these reasons, the SPRK Prosecutor proposes that the Court of Appeals hold a hearing in order to admit evidence, reverse the Basic Court's Judgment and convict all the defendants of the counts specified in the Indictment, or annul the impugned Judgment and send the case back to the Basic Court for retrial.

B. Response of **F.L.**.

In a combined response to the appeal filed by the SPRK Prosecutor, **defence counsel Karim A.A. Khan, Tahir Rrecaj, and Tomë Gashi** on behalf of **F.L.** outline that the Judgment of 17 September 2013 is the second time that the defendant has been unanimously acquitted by a

EULEX Trial Panel in relation to the present charges. The first acquittal was overturned by the Supreme Court in a Judgment dated 20 November 2012, where the reasoning was limited to an issue of admissibility of the diaries and statements of cooperative witness **A.Z.** The defence counsel claim that it is clear from this Judgment that the factual findings of the original Trial Panel were left untouched, and were not reversed by the Supreme Court. Further, they continue in detailed manner with a description of the legal and ethical duties imposed upon the parties. In this regard, they contend that the SPRK Prosecutor failed to fairly and accurately present his appeal in a candid and accurate manner to the Court of Appeals, that he misrepresented facts, and that he deliberately failed to disclose facts which he knew to be true in breach of his professional code of conduct.

In particular, the defence counsel assert that it was the defence who insisted during the trial that the diaries of **A.Z.** should be subjected to forensic evaluation and that the SRPK Prosecutor stubbornly insisted that this was unnecessary, and only reacted during the retrial when the defence adduced evidence to raise doubt as to the reliability of the said diaries. Similarly, the SPRK Prosecutor rejected the concerns of the defence relating to the mental health of **A.Z.** It is notable that it was the Trial Panel and not the SPRK Prosecutor that sought to obtain evidence on the mental health of **A.Z.**, and whether or not **F.L.**, **H.B.** and **I.M.** had given statements to the ICTY, and whether or not **A.Z.** had given a statement to KFOR, and issues relating to the forensics in the case.

The defence counsel then describe in detailed manner the standards of appellate review governed by Articles 402, 403 and 405 of the PCPC, and finds that the SPRK Prosecutor's appeal consists of a litany of arguments that are imprecise and fail individually or cumulatively to meet the requirements of these Articles. In this regard, the defence counsel draw particular attention to the established standards articulated in the ICTY jurisprudence, and which outline that the parties on appeal must limit their arguments to legal errors that invalidate the Judgment of the Trial Chamber and to factual errors that result in a miscarriage of justice i.e. that invalidate the decision of the Trial Chamber. They claim that the SPRK Prosecutor has failed to do so. With regard to alleged errors of fact, the defence counsel also point to the fact that the ICTY Appeals Chamber will only substitute its own findings when no reasonable trier of fact could have reached the original decision. The defence counsel submit that the Basic Court truthfully and completely established the facts in the instant case pursuant to Article 7 (1) of the PCPC. While the SPRK Prosecutor bears the burden of proof, he failed to properly argue how any alleged errors "influenced or might have influenced the rendering of a lawful and proper Judgment", or to demonstrate that there is a situation of considerable doubt as to the accuracy of the factual determination, as would be required in order to annul the decision and order a new trial.

Regarding the unavailability of **A.Z.** at trial and the allegations of the SPRK Prosecutor that the Basic Court erred pursuant to Article 403 (2.1), Article 368 (1.1), and Article 387 (2) of the PCPC, the defence counsel note that the Court committed no error at all. Looking at the evidence in its entirety the Basic Court correctly assessed that **A.Z.** was not a credible witness, which is hardly a ground of appeal, but a mere disagreement of the SPRK Prosecutor with the Basic Court's evaluation of evidence, and the fact that it acknowledged that the suicide of **A.Z.** denied the Basic Court`s opportunity to put additional questions to him.

Turning to the SPRK Prosecutor's allegations that the Basic Court applied the wrong legal standard to the issue of corroboration contrary to Article 403 (2.1) and Article 157 (4) of the PCPC, the defence counsel assert that the Basic Court's application of the law is legally correct and that it made no error. Contrary to the submission of the SPRK Prosecutor that the Basic Court did not address what could amount to corroborating evidence, the defence finds that it meticulously reviewed all the evidence in the case and determined that the SPRK Prosecutor had failed to discharge his burden to prove the case against **F.L.** beyond reasonable doubt. The defence counsel reject the SPRK Prosecutor's reference to other cases from the Pristina Basic Court given that the principle of *stare decisis* does not apply and that he failed to raise these cases with the Trial Panel during the original trial or the retrial. In particular, they stress that the Basic Court in the present case noted numerous inconsistencies in the account of **A.Z.** and did not find him credible as his evidence was in fact contradicted by other evidence.

The defence counsel note that the SPRK Prosecutor concedes that the nature of the required corroboration is not described by Article 157 (4) of the PCPC or anywhere else in the law. They claim that where there is a lacuna in the written law and in the provisions of the PCPC, the existing jurisprudence on the requirements of corroboration would become applicable. The defence counsel refer in this regard to the decision *Al-Khawaja and Tahery v The United Kingdom* rendered by the Grand Chamber of the European Court of Human Rights emphasizing that the more significant a piece of evidence is, the greater is the necessity of ensuring that its reliability is sufficiently tested. According to the defence, the SPRK Prosecutor's argument that the Basic Court erred in giving its own interpretation of the legal standard required under Article 157 (4) and in finding that "it is trite law that evidence in corroboration must be independent evidence which implicates the accused in the commission of the offence" is erroneous and ought to be rejected.

The defence counsel submit that the Basic Court has properly applied the legal principles of corroboration based upon established jurisprudence and higher authority. They refer to the case *R v Baskerville* which held that "*the evidence in corroboration must be independent testimony*

which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it". The defence finds that the SPRK Prosecutor's contention that the decision of the Trial Panel is a "U-Turn compared to the current case law in Kosovo" is without legal merit and stresses that while the finding of mortal remains might support the Prosecution case that crimes were committed, it does not corroborate the evidence given by **A.Z.** regarding the identity of the perpetrators of the crimes.

The defence counsel submit that the two cases relied on by the SPRK Prosecutor, namely the decisions of the Pristina District Court PN. 371/2010 against **F.G.** dated 23 November 2011 and PN. 592/11 against **S.A.** dated 17 December 2011, are not applicable in the present instance for the following reasons: in **F.G.**'s case, the cooperative witness, **N.B.**, was found to be credible and the Trial Panel was satisfied that the inconsistencies were of a minor nature, unlike the inconsistencies in the statements of **A.Z.** and that of the other Prosecution witnesses. In Sadik Abazi's case, the cooperative witness, **N.B.**, appeared in court and was found to be credible, and the Court found his testimonies to be detailed, comprehensible, and trustworthy, unlike in the present case where the Basic Court found the account of **A.Z.** not credible. The Basic Court further found that **N.B.** was able to explain the inconsistencies in his evidence in a plausible way, while in the present case contradictions were not resolved given **A.Z.**'s absence at the trial.

The defence counsel refer in this respect to Annex 1 attached to the response, which contains a list of the alleged material inconsistencies and contradictions between the account of **A.Z.** and other Prosecution evidence.

According to the defence counsel, at the time the defence questioned **A.Z.** in July 2011, and despite many requests from the defence, the SPRK Prosecutor had not made any attempt to obtain: (i) any evidence regarding the handwriting of the diaries purportedly authored by **A.Z.**; (ii) any independent evidence regarding the psychological well-being and mental health of **A.Z.** at the time the statements were recorded and at the time the diaries were allegedly written; (iii) no investigation was done regarding inquiries to KFOR relating to whether or not a statement had actually been given by **A.Z.**; and (iv) no inquiries had been made at the ICTY to verify whether or not the defendants **F.L.**, **H.B.**, and **I.M.** had in fact given statements to the ICTY as alleged by **A.Z.** It was the Basic Court that made these investigative steps of its own motion, not the SPRK Prosecutor.

Regarding the assessment of evidence, in the view of the defence counsel the Basic Court, in accordance with Article 387 (1) of the PCPC, truthfully and completely established the facts and

assessed each item of evidence separately and in relation to other evidence, and made a reasoned decision as set out in Article 387 (2) of the PCPC. The defence counsel submit that a fair reading of the Judgment discloses no error of law or of fact.

Turning to the sufficiency of available corroboration, the defence counsel recall the standard of proof applicable to alleged errors of fact and stress that the SPRK Prosecutor has singularly failed to discharge his burden of proof. According to the defence, it is noteworthy that the Basic Court did not exclude any evidence presented by the SPRK Prosecutor and it is only after assessing independently and impartially all that evidence and hearing submissions from the parties that it rendered its verdict.

As to the reliability of the diaries of **A.Z.**, the defence counsel contend that the findings of the Basic Court are well reasoned and founded upon evidence. They further recall that a margin of deference is to be accorded to the Trial Panel's evaluation of the evidence, which is entrusted with the primary responsibility of making factual findings.

The defence counsel note that the SPRK Prosecutor's representation that "the evidence of the crimes comes entirely from **Z.**'s memory and testimony, not from the diaries", is entirely fallacious and misleading, and recalls that **A.Z.** himself admitted during cross-examination that without the diaries he would have no recollection. The defence counsel stress that at no time did the SPRK Prosecutor differentiate between the diaries, notes and personal notes of **A.Z.** They point to the SPRK Prosecutor's admission that he never asked **A.Z.** to confirm or deny whether he wrote the entirety of the diaries while he had the obligation to present his case clearly. They further outline that for the very first time, on appeal, the SPRK Prosecutor is stating that the diaries may emanate from someone other than **A.Z.** while he dismissed the defence's concerns related to the diaries' authorship during **A.Z.**'s examination in July 2011. They finally argue that the SPRK Prosecutor's remaining arguments are devoid of merit and merely amount to disagreement with the Basic Court's findings.

With regards to **A.Z.**'s psychiatric illness, the defence counsel submit that the SPRK Prosecutor has failed to demonstrate that there was an erroneous or incomplete determination of the facts. As to the new translation proposed by the SPRK Prosecutor concerning what **A.Z.** told his wife before his admission into hospital, they contend that this argument was not presented at trial and should have been raised at the appropriate time. In addition, they point to the fact that the SPRK Prosecutor remained silent regarding witness Y's own evidence concerning the mental health of her husband. The defence counsel submit that the SPRK Prosecutor deliberately misrepresents the testimony of **A.Z.** as to the reasons for his admission to the psychiatric hospital, and they outline that **A.Z.** inconsistently mentioned that he admitted himself: (i) so that his statements to

KFOR be rendered worthless; (ii) so that he could benefit from an insurance claim; and (iii) so that he would have a defence for killing **F.L.**

With regards to the UNMIK police report presented by the SPRK Prosecutor as new evidence, the defence counsel find that the SPRK Prosecutor made no attempt to obtain this evidence at the original trial or the retrial. Indeed, it was the Basic Court that contacted KFOR in order to determine whether or not **A.Z.** had given a statement to KFOR.

The defence counsel object to the introduction of any new evidence at this late stage of the proceedings, and argue that the SPRK Prosecutor failed to show good cause and to demonstrate that the evidence was not available through the exercise of reasonable diligence. They recall that the right of adducing new evidence must be restrictively interpreted and applied in order to ensure that the right of an expeditious trial without undue delay is properly respected. In any event, they contend that the SPRK Prosecutor presented no evidence regarding the chain of custody or the authenticity of the purported documents, and that on the SPRK Prosecutor's own admission, the UNMIK police report of 25 November 2006 is not signed, the officer has not been spoken to and the report does not exist in hard copy format in the UNMIK archives. Nor is a record of the report present in the "EULEX WCIU Zy Find Library".

Furthermore, the defence counsel submit that there is no technical or independent analysis of evidence to verify: what electronic material was handed over by UNMIK during a transitional period, when in October 2008 the handover process started, in what circumstances it was originally created, how and by whom the material was received, where it was stored, who had access to it, why it is absent from the paper archives and why it is not present on the Zy Find Library. Additionally, they contend that the information is insufficient and inadequate to be properly questioned. In any event, the defence counsel stress that it cannot be asserted that the Basic Court's decision not to find **A.Z.** credible was solely or decisively based upon the absence of any evidence from KFOR to support the account he gave.

Regarding **A.Z.**'s statement about the killing of five Serbian soldiers and **A.A.**, the defence counsel submit that the arguments presented by the SPRK Prosecutor merely characterize a disagreement with the Basic Court. They opine that the alternative hypothesis proposed by the SPRK Prosecutor was expressly considered and rejected by the Basic Court. They contend that this alternative is legally irrelevant as it is the Trial Panel – and not the Prosecution – that is mandated to independently and impartially assess evidence.

With regards to the two Serbian police officers allegedly killed by **A.Z.**, the defence counsel find that no error of fact was committed. They stress that the SPRK Prosecutor's alternative

hypothesis is insufficient to displace carefully considered findings by the Basic Court, and that he has failed to establish that no reasonable trier of fact could have come to the decisions contained in the impugned Judgment.

The defence counsel submit that the appeal filed by the SPRK Prosecutor is largely based upon unfounded speculation, considered and rejected hypothesis, and unreliable evidence. They further highlight that the appeal is largely silent on the evidence presented by the defence, and that no mention is made regarding the evidence demonstrating that **F.L.** had no command or other responsibility over the Kleçkë/Klečka prison.

The defence concludes that the SPRK Prosecutor's appeal is without merit and should be summarily dismissed.

C. Response of **N.K.**

In his response to the appeal filed by the SPRK Prosecutor **defence counsel Mahmut Halimi** on behalf of **N.K.** finds that the appeal has been filed only with regard to the defendant **F.L.** who is the main subject in each single paragraph of the appeal. The defence counsel opines that when an appeal is filed against a Judgment concerning numerous individuals, the appellant must provide grounds related to each accused and that reference must be made to material evidence in order to establish the charges. He submits that the Basic Court has read all the statements of witness **A.Z.** in a detailed manner pursuant to Article 387 PCPC, and has assessed this evidence in light of further evidence, which led it to the conclusion that the statements are too ambiguous to support a verdict of guilt. He further states that the SPRK Prosecutor's allegations related to the possibility of the defence to question the witness can in no way be the subject of Article 157 (4) of the PCPC, as this provision is explicit and clear, and as these are two different matters as assessed by the Basic Court.

The defence counsel outlines that the reasoning of the impugned Judgment is very clear and detailed with regard to the inconsistencies between **A.Z.**'s statements and further evidence, such as the diaries, the statements of other witnesses and further material evidence, i.e. exhumation reports. That being so, he claims that no one could have come to the conclusion that the statements of **A.Z.** should have been considered as reliable. The claims of the SPRK Prosecutor at pages 7 and 8 of the appeal do not constitute a substantial violation of the criminal proceedings under Article 403 (1.12) in connection with paragraph (2.1) of the PCPC.

Regarding allegations of erroneous and incomplete establishment of the factual situation, the defence counsel submits that the Prosecutor is rather instructing the Court as to the manner the evidence should be evaluated. Rather, he claims that the Basic Court made a fair and complete assessment of the factual situation that leaves no room for an alternative opinion. In this regard, he points to the part of the impugned Judgment pertaining to the statements of **A.Z.** regarding the time of alleged killings, the order in which the remains were found, and the exclusion of the likelihood that the graves were disturbed. The defence counsel states that the findings of the Basic Court pertaining to the graphology and neuropsychiatric expertise are comprehensive and unequivocal in this respect.

He contends that the Basic Court also gave comprehensive grounds with regards to the mental state of **A.Z.** More specifically, the defence counsel opines that the findings of the Basic Court related to the fact that **N.K.** allegedly had a KFOR informant and transmitted information to **F.L.**'s group, and the fact of **A.Z.**'s hospitalization in a psychiatric hospital leave no room for a different opinion. Moreover, he stresses that **A.Z.** gave two versions of the same events concerning **N.K.**'s involvement or not in his transport from Prizren to the psychiatric hospital in Pristina, making it impossible to come to a proper conclusion.

The defence counsel summarizes that the requests outlined in the said appeal are unfounded and legally unsubstantiated and that the SPRK Prosecutor merely attempts to compel or instruct the Court of Appeals as to the manner it should act in the case. He finally argues that the Prosecutor's proposal that the Court of Appeals hold a hearing in order to admit evidence is groundless.

The defence counsel proposes to reject the SPRK Prosecutor's appeal as ungrounded and to confirm the challenged Judgment.

D. Response of **N.K.**

Defence counsel Florin Vertopi and Xhafer Maliqi on behalf of **N.K.** submitted a combined response to the appeal filed by the SPRK Prosecutor. They contend that the Basic Court properly considered all the statements of **A.Z.** pursuant to the procedure established under Article 368 of the PCPC. They recall that the Prosecutor, when he amended the Indictment, himself admitted that **A.Z.** could have explained the objections during the trial but that this was not possible since he was no longer alive. They further state that the absence of **A.Z.** during the main trial is not the sole factor considered by the Basic Court when assessing his credibility. Rather, his evidence was deemed not credible due to its numerous contradictions. The defence counsel also argue that

the Prosecutor erroneously referred to Article 147 (4) of the PCPC as the Basic Court assessed that **A.Z.**'s evidence was not credible in the first place.

Turning to the alleged erroneous and incomplete determination of the factual situation, the defence counsel submit that the SPRK Prosecutor fails to point to any concrete evidence which was disregarded by the Basic Court that would have led to a different outcome if it had been taken into account. They argue that the Basic Court has properly assessed the evidence through a complete and detailed reasoning and did not err in finding **A.Z.** untrustworthy. As an illustration, they highlight contradictions in **A.Z.**'s evidence concerning the killing of four Serbian prisoners. They further submit that the criminal reports submitted by **N.K.** contradict **A.Z.**'s evidence, and also confirm the statements of witness **S.D.** concerning the legal work of **N.K.** in his capacity of KLA member.

Concerning the graphologist expert Professor **B.**, they claim that it was the Prosecutor's responsibility to request a direct examination of the expert by the Trial Panel, which he failed to do. Therefore, the SPRK Prosecutor cannot blame the Basic Court for not having summoned the expert witness. As to the psychiatric condition of **A.Z.**, they recall that the Basic Court accepted the opinion of expert witnesses Dr. **L.** and Dr. **R.**, who stated that they cannot exclude the possibility that **A.Z.** lied. In their view, the Basic Court properly found that this greatly undermined **A.Z.**'s credibility.

The defence counsel also outline that the documents that the SPRK Prosecutor seeks to admit into evidence do not meet the requirements under Article 412 (1) of the PCPC, and should be considered as inadmissible. They stress that, as admitted by the Prosecutor, the report of the police officer dated 25 November 2006 is not even signed.

For these reasons, the defence counsel move the Appellate Panel to reject the appeal of the SPRK Prosecutor in its entirety and to confirm the impugned Judgment.

E. Response of **N.S.**.

Defence counsel Bajram Tmava on behalf of **N.S.** submitted his response to the appeal filed by the SPRK Prosecutor. He contends that the SPRK Prosecutor should have differentiated the capacity of **A.Z.** as suspect or as cooperative witness when he gave his statements. The defence counsel claims that the Prosecutor mainly repeats the arguments which he raised at the trial. He recalls that the Basic Court found that the defence was denied the possibility to cross-examine **A.Z.** The defence counsel refers to all his arguments made during his closing speech. In this

regard, he contends that none of the evidence presented at trial establishes beyond a reasonable doubt that **N.S.** committed the criminal offences he was charged with in the Indictment. Finally, as to the documents the SPRK Prosecutor seeks to have admitted into evidence, he argues that the Judgments cannot be treated as evidence given that **A.Z.** did not testify in these cases and since the suspects have nothing to do with the present case.

The defence counsel proposes that the Court of Appeals reject the appeal of the SPRK Prosecutor as ungrounded and confirm the impugned Judgment.

F. Response of **S.S.**

Defence counsel Mexhit Syla on behalf of **S.S.** submitted his response to the appeal filed by the SPRK Prosecutor. The defence counsel submits that the SPRK Prosecutor fails to raise any new circumstances in his appeal and merely repeats submissions already made at trial. He stresses that it has never been part of the Prosecution case in the Indictment, nor has it been established in the evidence, that **S.S.** had any authority or held any superior position in the Kleçkë/Klečka detention center. He adds that the witness **U.K.** never testified to this fact, nor did he indicate that he saw **S.S.** beating detainees. In this regard, the defence counsel points out that **U.K.** testified that he also saw **S.S.** in other places during the war, and that there was nothing more than the possibility that he was in Kleçkë/Klečka in 1999. He also recalls that the Basic Court rightly found that the conditions of detention in Kleçkë/Klečka did not amount to cruel treatment.

The defence counsel concurs with the Basic Court's findings as to the lack of reliability of **A.Z.**'s evidence. He further recalls that **S.S.** is not mentioned in any of the so-called diaries of **A.Z.** except concerning times of war.

The defence counsel thus moves the Appellate Panel to reject the appeal of the SPRK Prosecutor in its entirety as ungrounded and to confirm the appealed Judgment.

G. Response of **R.M.**

Defence counsel Haxhi Millaku on behalf of **R.M.** submitted his response to the appeal filed by the SPRK Prosecutor that he received on 10 December 2013. He refers to alleged instructions given by the Court of Appeals with regard to the term for filing a response. He contends that the SPRK Prosecutor should have differentiated the capacity of **A.Z.** as suspect or as cooperative

witness. The defence counsel claims that the Prosecutor mainly repeats the arguments which he raised at the trial. He recalls that it was found that the defence was denied the possibility to cross-examine **A.Z.** He outlines that he entirely stands by his submissions presented in his closing statement dated 9 September 2013. He stresses in particular that testimonies from other witnesses reveal discrepancies with regard to the evidence of witness X and the acts undertaken by the defendant as alleged in the Indictment. Neither the testimonies nor the material evidence provided by the witnesses during the main trial have established clearly and beyond reasonable suspicion that the defendant **R.M.** has committed the criminal offences as specified in the Indictment. Furthermore, the defence counsel remarks that the SPRK Prosecutor refers to several Judgments attached to the appeal. In his view, these Judgments cannot be treated as evidence given that witness X did not testify in these cases and since the suspects have nothing to do with the present case. The stance of the defence has already been confirmed by the Trial Panel. Therefore, he contends that it is unnecessary to make a new assessment.

The defence counsel proposes to reject the appeal filed by the SPRK Prosecutor as ungrounded and to confirm the impugned Judgment in its entirety.

H. Motion of the Appellate State Prosecutor.

Appellate Prosecutor Kari Lamberg on 3 June 2014 filed a motion requesting the Court of Appeals to grant the appeal of the SPRK Prosecutor and to modify the impugned Judgment as requested or, in the alternative, to send it back to the Basic Court for retrial.

Notably, the Appellate Prosecutor asserts that **F.L.** was the head of the KLA Military Police in the area and had control over the Kleçkë/Klečka prison. In this regard, he contends that **S.D.**'s evidence is unreliable as regards **F.L.**'s position and the existence of killings and acts of torture at the prison. He submits that **F.L.** bears superior responsibility for the criminal offences committed by his subordinates at the Kleçkë/Klečka prison.

With respect to the evidence of **A.Z.**, the Appellate Prosecutor recalls that the Supreme Court confirmed the admissibility of his statements and his "diary". He avers that the Basic Court erred in requiring "independent" corroborating evidence to the evidence of a cooperative witness, pointing to a precedent that relied on "supporting and indicium evidence". He argues that in the present case forensic discovery and other witnesses provided supporting evidence.

The Appellate Prosecutor stresses that the Basic Court took a very negative attitude towards the statements of **A.Z.** and that it put weight on minor points, disregarding objective and important

issues. He further claims that there is undisputable evidence that people have been tortured and killed in the KLA controlled prison in Kleçkë/Klečka.

He finally submits that the statements of **A.Z.** very much match the detailed findings of the forensic investigations.

III. FINDINGS OF THE APPELLATE PANEL.

A. Applicable Procedural Law in the Case.

On 1 January 2013 a new procedural law entered into force in Kosovo – the Criminal Procedure Code, Law no. 04/L-123. This Code repealed the previous Provisional Criminal Procedure Code of Kosovo. Article 545 of the current Criminal Procedure Code stipulates that the determination of whether or not to use the present Code of criminal procedure shall be based upon the date of the filing of the Indictment. Acts which took place prior to the entry of force of the present Code shall be subject to the current Code if the criminal proceeding investigating and prosecuting that act was initiated after the entry into force of this Code.

On 25 July 2011 the EULEX Special Prosecutor filed the Indictment PPS no. 07/10 charging the defendants **A.K.**, **N.K.**, **N.K.**, **B.L.**, **F.L.**, **R.M.**, **N.S.**, **S.S.**, **S.S.**, and **B.S.** with crimes allegedly committed from early 1999 until mid-June 1999 against Serbian and Albanian civilians and Serbian military prisoners detained in the prison in the village of Kleçkë/Klečka. Thus, the Indictment was filed prior to the entry into force of the current Criminal Procedure Code. Pursuant to Article 545 of the current Criminal Procedure Code the applicable procedural law is therefore the UNMIK Provisional Criminal Procedure Code of Kosovo, as the trial in this case commenced prior to the entry into force of the current Code. The Court of Appeals accordingly conducted the proceedings pursuant to the Provisional Criminal Procedure Code of Kosovo.

B. Competence of the Panel.

Pursuant to Article 121, paragraph 1 of the PCPC the Panel has reviewed its competence, and since no formal objections were raised by the parties the Panel makes only the following comments. In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo – Law no. 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, the Panel concludes that

EULEX has jurisdiction over the case and that the Panel is competent to decide the respective case in the composition of two EULEX Judges and one Kosovo Judge.

By his letter dated 24 April 2014, the President of EULEX Judges, Malcolm Simmons, correctly assigned the criminal case to EULEX Judge Piotr Bojarczuk as Presiding Judge to conduct the appellate proceedings. The competence of the Panel as well as the composition was not challenged and was accepted by all defendants, defence counsel and the State Prosecutor.

C. Admissibility of the Appeal and of the Responses.

The appeal filed by the SPRK Prosecutor is admissible.

Pursuant to Article 398 (1) of the PCPC, authorized persons may file an appeal against a Judgment within fifteen (15) days of the day the copy of the Judgment has been served. The impugned Judgment was announced on 17 September 2013 and served to the SPRK Prosecutor on 18 November 2013. The Prosecutor filed his appeal, dated 28 November 2013, on 29 November 2013. Therefore, the appeal was filed within the 15-day deadline pursuant to Article 398 (1) of the PCPC. Moreover the Prosecutor is an authorized person in accordance with Article 398 (1), Article 399 (2) of the PCPC; the appeal contains all information required by law pursuant to Article 401 *et seq* of the PCPC. The appeal is therefore admissible.

As to the responses, the Court of Appeals recalls that according to Article 408 of the PCPC, the parties, after having served with a copy of the appeal, may file a reply to the appeal within eight days of the service of the copy.

However, the Panel takes into account the additional instructions of the Basic Court given to the defence counsel via email on 12 December 2013. According to these instructions the defence may file a response until "Close of Business" on 31 December 2013, which would still be considered by the Court of Appeals as validly and timely filed within the timeframe, even if the eight days deadline had expired.

Given that the date of 31 December 2013 falls beyond the eight day period prescribed by the PCPC to file a response and is in favor of the defendants, the Panel will consider this date as the valid time limit. Therefore, the Appellate Panel finds that the responses filed on behalf of the defendants **N.K.**, **N.K.**, **N.S.**, **S.S.**, and **F.L.** are timely and admissible, notwithstanding the fact that some responses were filed after the eight day time limit prescribed by Article 408 of the PCPC.

However, the Panel notes that the response filed on behalf of **R.M.** is belated. The defendant was served with the SPRK Prosecutor's appeal on 14 December 2013. His defence counsel was served with the appeal on 10 December 2013. While the response is dated 31 December 2013 and mentions that it was filed on that date pursuant to the Court's instructions, the date of sending as established by the date stamp on the envelope being 3 January 2014, therefore later than the time limit of 31 December 2013.

Article 94 (3) of the PCPC provides that when a statement is sent by post, the date of mailing or sending shall be considered as the date of service on the person to whom it has been sent. Therefore it has to be considered that the defence handed the response over to the postal service after the 31 December 2013 and is therefore not validly and timely filed. In light of Article 94 (3) of the PCPC the Court of Appeals therefore considers this response as belated.

D. Determination of the Factual Situation.

The SPRK Prosecutor submits that the Basic Court came to an **erroneous and incomplete determination of the factual situation** when concluding that **A.Z.**'s evidence was not credible. In this regard, he contends that the Basic Court erred in finding that: (i) there was no sufficient corroboration to **A.Z.**'s evidence; (ii) his "diaries" were not reliable; (iii) he lied about his medical condition and about giving a statement to KFOR; (iv) forensic evidence contradicts his statements concerning the killing of five Serbian prisoners and **A.A.**; and (v) his evidence is contradictory as to the killing of two Serbian police officers.

Before assessing the merits of the arguments presented by the Prosecutor on the alleged erroneous or incomplete determination of facts, the Panel reiterates the standard of review regarding the factual findings made by the Trial Panel.

Taking the legal concept of Article 366 LCP and the preceding jurisdiction, it is not sufficient for an appellant to demonstrate only an alleged error of fact or incomplete determination of fact by the Trial Panel. Rather, as the PCPC requires that the erroneous or incomplete determination of the factual situation relates to a "material fact", the appellant must also establish that the erroneous or incomplete determination of the factual situation indeed relates to a material fact, i.e. is critical to the verdict reached.[1]

[1] See also B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366, para. I. 3.

Furthermore, it is a general principle of appellate proceedings that the Court of Appeals gives a margin of deference to the finding of fact reached by the Trial Panel because it is the Trial Panel which is best placed to assess the evidence. The Supreme Court of Kosovo has frequently held that it must "*defer to the assessment by the Trial Panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the Trial Panel assessment of credibility of those witnesses unless there is a sound basis for doing so.*" The standard which the Supreme Court applied was "*to not disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous*" (Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, para. 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, para. 30).

Generally, the Court of Appeals remarks that the Basic Court analyses in detail in the impugned Judgment the evidence administered during the main trial. The Panel examined the thorough analysis of the credibility of **A.Z.** as cooperative witness X, his statements and his diaries which is set out particularly in paragraphs 66 to 136 of the impugned Judgment (English version pagination). In the view of the Panel, the Basic Court reached, in general, logical conclusions in its assessment of that evidence and the Panel finds generally no contradiction in the stance of the Basic Court. The Panel furthermore reviewed the evidence in accordance with provisions of the PCPC. After this careful evaluation the Panel is principally fully persuaded by the conclusions and reasoning of the Basic Court. The Panel finds that there is not sufficient evidence to prove beyond a reasonable doubt that the defendants are guilty of committing *War Crime against the Civilian Population*, under Articles 22, 142 of the CCSFRY, currently criminalized under Articles 31, 152 of the CCRK, in violation of Common Article 3 of the four Geneva Conventions of 12 August 1949 and Articles 4, 5 (1) of Additional Protocol II and *War Crime against Prisoners of War*, under Articles 22, 144 of the CCSFRY, currently criminalized under Articles 31, 152 of the CCRK, in violation of Common Article 3 of the four Geneva Conventions of 12 August 1949 and Articles 4, 5 (1) of Additional Protocol II for killings, beatings and inhumane treatments against Serbian and Albanian war prisoners and civilians detained in the detention center located in Kleçkë/Klečka.

The Panel, therefore, sees no need to repeat the complete detailed analysis of the Basic Court, but will only elaborate on the following points.

(1) Legal Standard of Corroboration under Article 157 (4) of the PCPC.

The Prosecutor submits that the Basic Court used an incorrect standard of corroboration when concluding that even if the Trial Panel had found **A.Z.** to be a credible witness that would not, in and of itself, provide the corroboration required by law (p. 136 English version pagination). The Prosecutor refers to Article 157 (4) of the PCPC and deems that the evidence given by a cooperative witness *per se* is not sufficient to ground a verdict of criminal liability. The nature of the required corroboration is not described by Article 157 (4) or anywhere else in the law. As the law maker did not give any indication, in this matter the Panel is free to decide on a case by case basis (judicial discretion) what sufficiently corroborating evidence might be. The lack of any sort of indication by the law maker vests the Judge with the task to identify the necessary level of corroboration.

The Prosecution finds that the Basic Court did not address the crucial problem at all. Instead the Court made the declaration that "*…it is trite law that evidence in corroboration must be independent evidence which implicates the accused in the commission of the offence..".* The Court took for granted that in each and every case where there is a cooperative witness, the related corroboration must relate to the identity of the perpetrators and their involvement in the criminal offence. However, the Prosecution believes that in the absence of any parameter set by law, there is no room for such an inflexible standard. In other words, any element that in the Judge's opinion supports the already established credibility of the cooperative witness may be sufficient to meet the legal condition for a conviction. Had the law maker wanted to bind the Judge to a specific standard, he would have just stated it. The finding that even if **A.Z.** had been considered a credible witness "*….that would not, in and of itself, provide the corroboration required by law (p. 136)*….", clearly is a major flaw in the entire reasoning.

The Appeals Panel concurs with the Prosecutor and finds that the Basic Court erred in applying the wrong standard for corroboration, namely in finding that corroboration as to the identity of the perpetrators was required to enter a conviction on the basis of the evidence of an anonymous witness or a cooperative witness under Articles 157 (3) and (4) of the PCPC respectively.

The First Instance Court in its Judgment took the position that corroboration in identity is required for supporting the evidence given by a cooperative witness. On page 68 (English pagination) of the impugned Judgment the Basic Court opines that:

> *"The finding of mortal remains in or near the village of Kleçkë/Klečka 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 ***A.Z.*** *regarding the identity of the perpetrators of those crimes."*

From that it is clear that the Basic Court had found that corroboration on the identity of the perpetrators seemed to be a necessary requirement to enter a conviction based on the evidence of a cooperative witness under Article 157 (4) of the PCPC.

However, the Panel finds that such a condition is not postulated by law literally. Article 157 (4) of the PCPC reads as follow: "*The court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness*." In light of the wording of the provision the Court of Appeals opines that the law does not require corroboration in identity. Rather it is reasonable to assume that not only corroboration in identity, but any kind of corroboration, is deemed by the law maker as sufficient. There are no legal reasons to strictly interpret the provision to mean that corroboration in identity is always required. Such an interpretation is not supported by the wording of the law. Apart from that there is also no need for a teleological reduction of the provision. The sense and purpose of Article 157 (4) of the PCPC is to prevent the conviction of a perpetrator solely on the statement of one single cooperative witness. The testimony of a cooperative witness alone should never be deemed as sufficient for a conviction. The reason for this is that even if a cooperative witness is found strongly reliable and trustworthy, he cannot reach that level of trust a regular witness can reach. His testimony therefore has to be supported by some kind of corroborative evidence. On the contrary, the requirement of two or more further testimonies in identity would compromise effective law enforcement. Therefore the Court of Appeals, in interpretation of Article 157 (4) of the PCPC, finds that any kind of corroborative pieces of evidence is sufficient, but still all of them must be reliable and proven beyond reasonable doubt.

This stance is supported by the jurisprudence of the Kosovo Supreme Court which has clearly stated that:

... Interpretation that there must be corroboration at least on the identity of the perpetrators is not supported by the Law.[2]

In its Ruling *Sadik Abazi et al.* the Kosovo Supreme Court Ruling noted:

[2] Supreme Court of Kosovo, Ruling, 11 December 2012, para. 78.

> *On the issue whether there should have been other evidence particularly on the identity of the perpetrators. Namely, there is no other witness than the cooperative witness who has identified the perpetrators.*[3]

In Para 4.12, the Supreme Court points out that Article 157 (4) of the PCPC does not set any further rules to specify what kind of corroborative evidence is required, or for which elements or facts related to the criminal offence. Thus, the Supreme Court considers that this question, whether there is sufficient corroborative evidence presented, has to be assessed in each case separately. In doing so, the Trial Court must take into consideration all the evidence presented in the case and the reliability of that evidence. Therefore, depending on the case, if the testimony of the cooperative witness is found to be strongly reliable and trustworthy, and the testimony is in some parts supported by other evidence, there may be no need to require supporting evidence for all other pieces of relevant facts, for example on the identity of the perpetrator.[4]

Finally, the Supreme Court remarked:

> *The District Court has in an extensive manner studied the credibility of the cooperative witness and found his testimony trustworthy, credible and plausible. The cooperative witness knew the other perpetrators previously and the District Court did not find any uncertainty with his testimony on the identity of the other perpetrators. There is other evidence which the District Court found as supporting some parts of the events described in the testimony of the cooperative witness. The Supreme Court agrees with the Court of Appeals that the defendants were not found guilty based solely on the testimony given by the cooperative witness. The fact that no other evidence directly proved the identity of the perpetrators doesn't mean that the defendants were found guilty based solely on the testimony of the cooperative witness.*[5]

Additionally, the Court of Appeals observes the jurisprudence of the Appeals Chambers of the ICTR and the ICTY which support the stance of the Court of Appeals and the Supreme Court.

The ICTR in its *Ndahimana Appeal Judgment* stated:

> *In the Appeals Chamber's view, a finding that a witness's evidence is not sufficiently credible or reliable to be relied upon on its own, and therefore needs corroboration, does not amount to a finding that the witness cannot be relied upon at all, but merely denotes the adoption of a cautious approach by the trial chamber in its evidentiary assessment of*

[3] Supreme Court of Kosovo, Ruling, 3 September 2014, para. 4.11.
[4] Supreme Court of Kosovo, Ruling, 3 September 2014, para. 4.12.
[5] Supreme Court of Kosovo, Ruling, 3 September 2014, para. 4.13.

> *the evidence. Absent any contrary finding, a trial chamber's decision to ultimately rely upon the cumulative evidence of witnesses whose evidence required corroboration reflects the trial chamber's determination that, taken as a whole, the evidence was sufficiently credible and reliable.*[6]

In its *Munyakazi Appeal Judgment*, the ICTR stated:

> *The Appeals Chamber further recalls that corroboration may exist even when some detail differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.*[7] […] *Corroboration does not require witnesses' accounts to be identical in all aspects. Rather, the main question is whether two or more credible accounts are incompatible.*[8]

The ICTY in its *Haradinaj et al. Appeal Judgment* stated:

A Trial Chamber may enter a conviction on the basis of a single witness, although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness.[9] […] *The Appeals Chamber recalls that a Trial Chamber is at liberty to rely on the evidence of a single witness when making its findings. The testimony of a single witness may be accepted without the need for corroboration, even if it relates to a material fact*.[10]

In its *Popovic Appeal Judgment*, the ICTY stated:

> *A trial chamber has to consider relevant factors on a case-by-case basis, including the witness's demeanour in court; his role in the events in question; the plausibility and clarity of his testimony; whether there are contradictions or inconsistencies in his successive statements or between his testimony and other evidence.*[11]

The jurisprudence on this issue makes it clear that if a witness's evidence needs corroboration, a cautious approach must be adopted by the Trial Chamber in its evidentiary assessment of the evidence. The corroboration has to be considered on a case-by-case basis. The purpose of

[6] ICTR, *Grégoire Ndahimana v. Prosecutor, Appeal Judgment*, 16 December 2013, para. 45.
[7] ICTR, *Prosecutor v. Yussuf Munyakazi ,Appeal Judgment*, 28 September 2011, para. 71.
[8] ICTR, *Prosecutor v. Yussuf Munyakazi, Appeal Judgment*, 28 September 2011, para. 103.
[9] ICTY, *Prosecutor v. Ramush Haradinaj et al., Appeal Judgment*, 19 July 2010, para 145.
[10] ICTY, *Prosecutor v. Ramush Haradinaj et al., Appeal Judgment*, 19 July 2010, para 219.
[11] ICTY, *Prosecutor v. Vujadin Popovic et al., Appeal Judgment*, 30 January 2015, para. 132.

corroborative evidence is to determine whether the testimony of the cooperative witness, and thus the evidence, was sufficiently credible and reliable or not.

In light of the above, the Court of Appeals finds that corroboration in identity is not required by law. Any kind of corroboration may be sufficient, and this has to be considered on a case-by base basis. The Appellate Panel is therefore of the view that the Trial Panel erred in finding that corroboration was needed for the identity of the perpetrators and agrees with the Prosecution in that respect. As a legal result of this error the Basic Court did not assess the evidence in its entirety. This provides the legal basis for the Appellate Panel to review the evidence adduced at trial.

(2) Admissibility of A.Z.'s Statements and Diaries.

The Panel notes that the question whether or not **A.Z.**'s statements and diaries are admissible has already been adjudicated by the Supreme Court. The Basic Court, in a separate ruling, had initially declared **A.Z.**'s statements and diaries inadmissible. The Supreme Court in its rulings from 20 November 2012 and 11 December 2012 declared the statements and diaries fully admissible and stated that the Basic Court had made a legal error when speculating that even though **A.Z.**'s evidence was credible that there was no sufficient corroboration. Therefore, the Basic Court should not be permitted to make hypothetic predictions on the outcome. The Supreme Court noted:

> *In on one hand declaring a large amount of evidence as inadmissible and at the same time predicting that even if it had been admitted the outcome would still be the same, the court not only violates Article 405 of the PCPC but also indicates a preconceived opinion that a continuation of the evidentiary procedure would be futile in the case. Such an attitude puts into serious doubt the impartiality of the Panel* [as trying to convince that any continuation of the evidentiary procedure would be futile in any case].[12]

The Court of Appeals observes that in the Judgment at hand the Trial Panel has considered **A.Z.**'s statements and diaries as admissible evidence. However, absolutely correctly the Panel remarks that a distinction must be drawn between admissibility and reliability of evidence. While the admissibility of the evidence of **A.Z.** is no longer an issue, the weight and extent to which the Trial Panel can rely on his evidence in its determination of the matters upon which he give evidence. The First Instance Panel correctly noticed that reliability of the evidence has not been

[12] Supreme Court of Kosovo, Ruling, 11 December 2012, para. 77.

assessed by the Supreme Court. Therefore, the Court of Appeals in a first step had to assess and evaluate the reliability of **A.Z.**'s statements and his diaries before, in a second step, assessing the evidence as well as the corroborative evidence in relation to the criminal responsibility of the defendants.

(3) Credibility and Reliability of Cooperative Witness A.Z.

In its Judgment the Basic Court found the corroborative witness **A.Z.** unreliable and untrustworthy when concluding:

> *"… in numerous material respects, to which reference is made herein, the evidence* ***A.Z.*** *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.*[13] *"*

The Court of Appeals recalls that a Trial Panel generally has a broad discretion to consider all relevant factors in determining the weight to attach to the evidence of any given witness. It is within the discretion of each single Judge and the Panel to evaluate the evidence as a whole, without explaining its decision in detail.[14]

Further, the Court of Appeals notes that a Judge has the discretion to rely upon evidence which is given by a cooperative witness. However, when weighing the probative value of such evidence, the Trial Judge is bound to carefully consider the totality of the circumstances in which it was tendered.

Moreover, the Court of Appeals recalls that minor inconsistencies commonly occur in witness testimony without rendering it unreliable.[15] The Appellate Panel recalls that a Judge is required to "carefully articulate the factors relied upon in support of the identification of the accused and

[13] Basic Court of Pristina, Judgment, 17 September 2013, p. 135 (English pagination).
[14] ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Appeal Judgment, 4 December 2012, p. 5; ICTY, *Prosecutor v. Kvoćka et al.*, Appeal Judgment, 28 February 2005, para. 23, referring to *Čelebići* Appeal Judgment, paras 481, 498; ICTY, *Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgment, 23 October 2001, para. 32.
[15] ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Appeal Judgment, 4 December 2012, p. 5; ICTY, *Prosecutor v. Ramush Haradinaj et al. Appeal Judgment*, 19 July 2010, para. 134.

adequately address any significant factors impacting negatively on the reliability of the identification evidence".[16]

In this case the reliability and credibility of the cooperative witness **A.Z.** is crucial for the outcome of the case due to the fact that the Indictment, as well as the Judgment, is mainly based on his evidence. In light of the above, the Court of Appeals remarks that it first has to address the question whether the cooperative witness **A.Z.** is reliable and trustworthy. In a second step the Panel has to assess whether or not there are single pieces of evidence with a specific credibility the Panel can rely on.

Based on these general remarks the Court of Appeals has thoroughly assessed **A.Z.**'s statements and finds him to be neither reliable nor credible. Bearing in mind the above it must be said that the decision of the First Instance Court is correct and generally properly reasoned.

The Panel of the Court of Appeals bases the decision on the following main reasons:

(3.1) Hospitalization / Psychiatric Records of A.Z.

The psychiatric history and the hospitalization of **A.Z.** are important as they indicate whether he can be generally assessed as credible and reliable.

A.Z. was hospitalized for the first time to the psychiatric hospital in Prizren from 15 December 2005 until 4 January 2006 with the following final diagnosis: *post-traumatic stress disorder*, PTSP (F.43) and *cephalea post traumatic* (S09). The Trial Panel referred to clinical records and noted that **A.Z.** was admitted due to headaches and other disorders that had been ongoing for three weeks following a road traffic accident. He was "released with improved condition" and prescribed *Fluoxeting*, which is a medication used as a treatment against depression.

A.Z. was admitted for treatment on a second occasion between 30 November 2006 and 19 January 2007 in Pristina. He was briefly admitted to the hospital in Prizren and then transferred by ambulance to Pristina, where he was admitted to the psychiatric ward "A". He was transferred to the psychiatric intensive care, and then he was transferred back to ward "A" on 11/12/2006. The discharge list indicated the following diagnosis *Acute disturbance, psychotic episode*, F23.8, ICD-10 which describes "any other specified acute psychotic disorders for which there is no evidence of organic causation and which do not justify classification to F23.0-F23.3."

[16] ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Appeal Judgment, 4 December 2012, ibid.; ICTY, *Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgment, 23 October 2001, para. 39.

He was treated with *Haldol* (antipsychotic), *Lorazepam* (hypnotic), and *Largactil* (antipsychotic) and the description of his condition included *insomnia, disorganized behavior, pursuing ideas that started before one month, 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.*[17]

Two experts, Dr. **L.** (tasked by the Court) and Dr. **R.** (tasked by the Prosecution), analysed the medical documentation and other available evidence and gave evidence regarding the issue of whether or not the available medical documentation showed that **A.Z.** was affected by any mental problem that could have impaired his ability to recall and reports facts dating back to 1998/99.

- Dr. **L.** came to the conclusion that the psychiatric evidence showed nothing that may have impacted on the reliability of **A.Z.**'s testimony. There should be no significance applied to **A.Z.**'s mental state in assessing his credibility (pp. 84, 85).
- Dr. **R.** concluded that "there is no evidence of mental health disease in general, and, in particular, no evidence of a condition that could produce any significant impairment in past events recalling" (page 86).

Dr. **L.** and Dr. **R.** agreed that they could not exclude the possibility **A.Z.** simply lied when he gave evidence.

Based mainly on the testimony given during the cross-examination and on the expert evidence provided, the Basic Court found that it is possible that **A.Z.** was not mentally ill in 2005 and 2006, but that he merely pretended to have the symptoms of a psychiatric illness. The Trial Panel found that whether or not **A.Z.** 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. In other words, there are no indications that **A.Z.** was mentally ill in 2009 and 2010. Further, the Trial Panel found no evidence of his suffering any psychiatric illness prior to 2005.

However, the Panel concluded that when **A.Z.** gave evidence he said he pretended to have the symptoms of a psychiatric illness in order: (a) to inflate a damages claim following a road traffic

[17] Basic Court of Pristina, Judgment, 17 September 2013, p. 79 (English pagination).

accident; (b) to provide himself with a partial defence to the killing of **F.L.**; (c) to discredit a statement that he said he had given to KFOR.[18]

Ultimately, the Court of Appeals shares the opinion of the Trial Panel conclusion that the psychiatric history of **A.Z.** was not a decisive issue in this case. Even if the physicians who treated **A.Z.** 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. The Trial Panel considered of greater concern a) the fact **A.Z.** may have feigned any illness and even greater b) the numerous factual inconsistencies in his evidence.[19]

The Prosecutor submits that the Court`s analysis of **Z.**`s mental state and "lies" is completely wrong, affected the overall evaluation of the factual situation, and therefore tainted the entire Judgment. There are no lies. **Z.** never told lies to the Prizren hospital staff about anything. He said the truth when he said that he went to KFOR. He said the truth when he said that he met UNMIK investigators. He said the truth when he said "pa deshmi" ("*no statement*") because there was no formal statement recorded by UNMIK. He spoke the truth when he said that he simply pretended to be sick in Pristina, because two psychiatric experts confirmed that indeed he was not mentally sick. He spoke the truth when he said that this was all part of **L.**`s plan, because this is confirmed by two other witnesses.[20]

The Court of Appeals fully concurs with the Basic Court and finds that there is no sufficient evidence proving that **A.Z.** was mentally ill during his hospitalization. However, the Panel concludes that in 2006 **A.Z.** pretended to have the symptoms of a psychiatric illness. The conclusion is based on the statement during the Cross-Examination he underwent on 7 July 2011. He stated:

> Q. *…the 1st admittance to the hospital was to prepare your defence for the murder of **F.L.** or to manufacture an insurance claim. Is that right?*
>
> AZ. *The first one? Both are true.*[21]

A.Z. stated that the second hospitalization was "to throw out my statement which I gave to KFOR"[22].

[18] Basic Court of Pristina, Judgment, 17 September 2013, p. 88 (English pagination).
[19] Basic Court of Pristina, Judgment, 17 September 2013, ibid.
[20] SPRK, Appeal, p. 27.
[21] SPRK, Record of the Co-operative Witness, Hearing in an Investigation, **A.Z.**, 7 July 2011, p. 35, point 470.
[22] SPRK, Record of the Co-operative Witness, Hearing in an Investigation, **A.Z.**, 7 July 2011, p. 35, point 469.

Moreover, the Court of Appeals observes that **A.Z.** was interviewed on 10 March 2010. He gave testimony:

> Q. *On page 20 you wrote: "I was in the psychiatric hospital in Prizren not to get recovered but to get a stamp that I am sick as a justification, in case I kill **F.** I said to the doctor **X.D.**, Head of Psychiatric Department and to the doctor of the room **B.B.** that I am in danger from **F.L.** and his gang." Can you explain better?*
>
> AZ. *It is true that right after the car accident that happened to me in Carralevo, I was so angry that for so time I even considered to kill **F.** I was constantly under threat by **F.**'s group. He had made my life miserable. Plus a friend of mine, **E.** from **S.** (he is a nurse at the hospital) had advised me that if I went to the psychiatric hospital I could get a certificate of sickness and get a higher compensation for my accident*[23].

The Court of Appeals finds that the reasons for the hospitalization given by **A.Z.** clearly undermine his credibility. He feigned illness as preparation for a claim of compensation and to discredit the statement given to KFOR and UNMIK. His unreliable behaviour regarding the hospitalization diminishes his credibility. It is not proven by experts that he had psychiatric disorders, and he was not mentally ill, but we cannot consider that he was in good psychological condition at this time. He confirmed during the Cross Examination in 2011 that in 2006 he had pretended to have the symptoms of a psychiatric illness in order to a) inflate a damages claim following a road traffic accident; (b) to provide himself with a partial defence to the killing of **F.L.**; (c) to discredit a statement that he said he had given to KFOR. His admission about lying in 2006 definitely diminishes his credibility, and the assessment of the First Instance Panel on this point is absolutely correct. When we have the person who openly admits in 2011 that he lied in 2006 and pretended sickness, then this cannot be used as more of a proof of his credibility. Such a statement decreases his credibility instead of establishing it.

On this point the Appeals Panel has to openly point out that the Prosecution Office has made the obvious mistake of not securing the presence of psychologist at the time of the interrogation of **A.Z.** (*which correctly is underlined by the **F.L.**'s defence counsels in their response for the appeal*). This witness was the person who, according to the medical description, suffered from: *…….insomnia, disorganized behavior….., disoriented, external view he looks confused, anxious, verbal contact with difficulties, gives inadequate answers within the context of the question, inadequate affective report……* (Even if we do not have the declaration that this person is mentally ill, it would have been enormously beneficial to the Court to have had as assessment

[23] SPRK, Record of the Suspect Hearing in an Investigation, **A.Z.**, 10 March 2010, pp. 7.

from a psychologist who had been present at his interrogation). This opinion would have offered the Court a psychological description of the reaction of examined person, a description of his state of feelings, his demeanour, his voice etc., which, in turn, would have supported the Court in its assessment of the credibility of the witness in every aspects of his evidence. Since this was not done, the Court could only base its assessment on the bare recording of those testimonies and statements. The Court of the Appeals is of the opinion that the First Instance Panel assessed and reasoned his mental state, so even if the Prosecution could present its own, and opposing interpretation of this issue, it is not enough to counter the reasoning of the Basic Court Panel.

(3.2) A.Z.`s Statement to kill F.L.

The Court of Appeals concludes that **A.Z.** is not credible as he had personal motives for **F.L.** to be punished. During the cross examination on 7 July 2011 **A.Z.** gave the following answers:

> Q. *You told the PP when you were asked "why did you come to EULEX". You said "to tell the truth". Remember saying that?*
>
> AZ. *Yes.*
>
> Q. *If that is the reason you came to give your account, when did you form this new desire to tell the truth?*
>
> AZ. *From the moment I removed the idea to kill **F.**, I handed over my gun, I was unarmed and after I always thought of reaching an end through an agreement.*[24]

During the cross-examination done by Karim Khan about **F.L.**'s alleged involvement, **A.Z.** answered:

> Q. *So the first time you went to a hospital was to prepare a defence for the murder of **L.**, right?*
>
> AZ. *Yes*
>
> Q. *and you said you tried many times to kill **F.L.**?*
>
> AZ. *I did not. I thought about it.*

[24] SPRK, Record of the Co-operative Witness, Hearing in an Investigation, **A.Z.**, 7 July 2011, p. 24, points 327 and 328.

Q. *I am looking at page 8 of the 10 March 2010 interview. The PP reads one of your previous statements. The PP is trying to find the truth. He reads that you stated "I also tried several times to go and kill* ***F.****". That's what you wrote, right?*

AZ. *I thought about it.*

Q. *We'll come to your thoughts later. I am now saying what you wrote: "I also tried several times to go and kill* ***F.****". Is that right?*

AZ. *What is written there is there. I don't deny, but it was my mistake. If I wanted to kill him I would have done so.*

Q. *We are talking about your diaries. You admit that you wrote "I also tried several times to go and kill* ***F.****" in your diary?*

AZ. *I admit to writing whatever I wrote, but I never attempted to kill him.*[25]

On 10 March 2010, **A.Z.** was interviewed and gave the following answers:

Q. *...on page 20 you wrote: "I was in the psychiatric hospital in Prizren not to get recovered but to get a stamp that I am sick as a justification, in case I kill* ***F.*** *I said to the doctor* ***X.D.****, Head of Psychiatric Department and to the doctor of the room* ***B.B.*** *that I am in danger from* ***F.L.*** *and his gang." Can you explain better?*

AZ. *It is true that right after the car accident that happened to me in Carralevo, I was so angry that for so time I even considered to kill* ***F.*** *I was constantly under threat by* ***F.****'s group. He had made my life miserable.*

Plus a friend of mine, ***E.*** *from* ***S.*** *(he is a nurse at the hospital) had advised me that if I went to the psychiatric hospital I could get a certificate of sickness and get a higher compensation for my accident.*

AZ. *However, I later reconsidered my intention and decide to go instead to KFOR, give in my weapon, and tell them my story reporting* ***F.*** *and his group.*

Q. At page 30 you wrote "I also tried several times to go and kill ***F.****". Did you actually try to kill him?*

[25] SPRK, Record of the Co-operative Witness, Hearing in an Investigation, **A.Z.**, 7 July 2011, p. 22, points 302-307.

AZ. *No, it was just an idea, but I never even started to plan the possible murder.*[26]

After a careful assessment of the evidence the Court of Appeals finds that **A.Z.** is not credible as he sought revenge and subsequently cleared his conscience. He admitted having had the intention to kill **F.L.** That means he had clear motives to falsify his testimonies and discredit the defendants and specially **F.L.** If somebody is contemplating the killing of another person and declares it, such a person can easily falsely testify against that person (his alleged enemy) just to burden him/her and to see him/her criminally convicted. In the view of the Appels Panel this assessment of the First Instance Court is correct, and it is based on other pieces of evidence collected in the case files. The includes **A.Z.**'s report of his car accident, where there is no trace at all of **L.**'s involvement, but **A.Z.** constantly claimed that **L.** was the organizer of this event.

(3.3) Car Accidents.

A.Z. gave evidence about road traffic accidents that he averred were orchestrated by **F.L.** in order to silence him. In particular, these accidents are as follows: during **A.Z.**'s cross examination on 7 July 2011 he testified that in 2005 his daughter was involved in a car accident. He conceded that following that accident, and because he thought it had been done deliberately, he moved out of his house. He was convinced that his daughter had been deliberately targeted and that **F.L.** was behind the accident.[27]

Moreover, **A.Z.** was involved in the following accidents:

On 24 November 2005 **A.Z.** was driving his motor vehicle in Shtime when he collided with another vehicle driven by **S.F.** The police attended the scene, and according to the police report the third party driver was responsible for the car accident.

On 28 October 2006 **A.Z.** was driving his motor vehicle in Prizren when he had a collision with another vehicle. The police attended the scene. The police appear to hold **A.Z.** responsible for the accident.

On 3 October 2007 **A.Z.** had a further car accident when driving his vehicle in Komorane. He had a collision with a vehicle being driven by **B.S.** The police attended the scene. The police report appears to hold the third party responsible for the car accident.

A.Z. was asked about a further accident when his vehicle was hit by a lorry.

[26] SPRK, Record of the Suspect Hearing in an Investigation, **A.Z.**, 10 March 2010, p. 7 and 8.
[27] SPRK, Record of the Co-operative Witness, Hearing in an Investigation, **A.Z.**, 7 July 2011, page 18.

He believed that **F.L.** was behind all of these accidents with the purpose of threatening and silencing him. However, he conceded that on two occasions the drivers of the vehicles had waited for the Police. They had spoken with the Police, who recorded their personal details.

The Basic Court very correctly has concluded that there was no evidence that **F.L.** or any of the defendants were involved in or responsible for the accidents.

The Court of Appeals finds that it has been proven that **A.Z.** was involved in a number of car accidents. However, there is no evidence that **F.L.** or one of the defendants were involved in or responsible for these accidents. The Panel stresses that according to the Police reports in all cases the third party drivers had caused the accident (apart from one). In all cases the third party driver waited for the Police and cooperated. It is unlikely that the third party driver deliberately caused the accident and then cooperated with the Police. A perpetrator who had been instructed by the defendants to involve **A.Z.** in a car accident would have left the spot in order to hide. But this was not the case. It seems that **A.Z.** really believed and, what is more important, openly declared that **F.L.** was behind the car accidents. However, we are aware that, on at least one occasion on 28 October 2006, the Police appeared to hold **A.Z.** responsible for the accident. As a result, this definitely diminishes his credibility. This was a personal assumption or impression, but also it is proof that he had lied and that he was ready to blame **L.** for every wrong which he faced.

(3.4) Statements at KFOR/UNMIK.

The Prosecutor submits that the Basic Court attached a crucial importance to the following three factors:

- A diary entry made by **A.Z.** on 24 November 2006 refers to his contacts with KFOR and UN; the same entry states "Pa deshm" literally translated as "*without testimony/evidence*"; the only logical interpretation of that sentence is that he did not give a statement – written or oral. In conclusion, **Z.**`s own diary contradicts his later evidence that he had revealed everything and that was the reason for his subsequent hospitalization;
- KFOR confirmed that **A.Z.** never gave any statement during the period 24-30 November 2006;
- Both UNMIK and ICTY confirmed that **A.Z.** had given no statement during the relevant period.

The Court continues with its reasoning as follows: "….*if* **Z.** *gave an oral statement, (A) "it is improbable he would have admitted himself to a psychiatric hospital in order to discredit it. He would have simply denied it…..*". (B) war crime investigators would have documented in some way the content of the statement.[28]

According to the Prosecutor **A.Z.** gave testimony on the occasions that a) he warned **F.L.** of his intention to report "everything" to KFOR; b) immediately after he indeed went to KFOR in Prizren; c) there, he surrendered his weapon and a hand grenade; d) he told KFOR about war crimes committed by **F.L.** and others; e) at that point KFOR took him to UNMIK; f) a few days later, he met with **F.L.**, **Z.** was hospitalised and it was decided to discredit his statement.

The Prosecutor refers to a letter dated 03/09/2013 in which KFOR confirmed exactly what **A.Z.** said. Namely that on 24 November 2006 **Z.** visited KFRO in Prizren, he surrendered a firearm, he informed KFOR that he had a hand grenade, and he was subsequently handed over to war crime unit Pristina. As a matter of fact **Z.**`s testimony is fully corroborated by the above mentioned KFOR letter dated 03/09/2013, which reports exactly the same sequence of events as narrated by **Z.**

The Prosecutor asserts that as a matter of fact the Basic Court completely failed to correctly reconstruct the events. The Court opined that in the note in the diary "*no testimony*" indicates that **Z.** did not give any statement to KFOR and that the whole story is not credible. This would be confirmed by the information received from KFOR and UNMIK that there is no trace of a statement given by **Z.** KFOR is not an investigative agency and therefore does not take any records about statements. Therefore, **Z.** was handed over to UNMIK. The fact that according to UNMIK there is no record of a statement only shows that the witness did not give a formal written statement.

In this context the Prosecution refers to an unsigned police report dated 25/11/2006 which proves the meeting between UNMIK and **Z.** According to the Prosecution the report matches exactly what was narrated by **Z.** himself. According to the UNMIK police report:

- **Z.** was transferred by KFOR to UNMIK at 23.55 on 24 November 2006;
- **Z.** declared earlier on that day, before going to KFOR, he had called **L.** and informed him that he would go to KFOR and tell them "everything";
- **Z.** indeed went to KFOR and gave an oral statement;
- KFOR escorted **Z.** to the war crime investigators in Pristina;

[28] SPRK, Appeal, page 24.

- UNMIK proposed to record his statement on a Dictaphone;
- **Z.** refused to give a statement in this manner, stating that he wanted to give a public statement;
- In the end no statement was recorded.

An UNMIK investigator named Sasha contacted **Z.** for a follow up meeting. They agreed to meet but never did due to the fact that **Z.** went to the psychiatric hospital before the meeting could take place. The UNMIK report reveals that the Basic Court erred when concluding that he invented the whole story. On the contrary, the report shows that **Z.** told the truth.

In connection with the hospitalization, the Basic Court dealt with the KFOR statement on pages 120-123 of the impugned Judgment. The Trial Panel noted that when **Z.** was interviewed by the 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 declared to tell the truth.

In his statement to the Police on 16 July 2007, **Z.** said **F.L.** had asked him how much money he wanted to order to "withdraw the statement in KFOR". During the interview on 16 March 2010 he said that he told **F.L.** that he "wanted to go to KFOR in order to "report them". He said **F.L.** insisted they meet to discuss "the issue". He said that during that meeting **F.L.** told him that he had to go to the psychiatric hospital, stating that it was the only way to discredit the story he told KFOR. He said he was "supposed" to go to the hospital the day after the meeting.

The Basic Court made its conclusions on the fact that **A.Z.** never gave a statement to KFOR and had lied (p. 120-123). Additionally, on page 133 in its Judgment, the Basic Court concluded that **A.Z.** had lied when he testified that he had told KFOR "the full story". The Basic Court found that he had never given a statement to KFOR.

First of all, the Court of Appeals remarks that the newly submitted evidence – the UNMIK Report dated 25/11/2006 – is rejected as evidence since no good reason was shown as to why these documents were not submitted at the trial. The "second" main trial commenced in April 2013 and continued until September 2013 – so more than 6 months. This period of time was long enough to submit all pieces of evidence which were considered by the parties as important. The Prosecutor was obliged to deliver reasons why he was not able to submit the evidence at the first instance trial. As the Prosecutor has now submitted the evidence to the Court of Appeals without any sufficient reasons, the Court of Appeals cannot consider it as new evidence.

On this point, however, without detailed analysis of this document it has to be noted that this evidence is of minor importance for the general assessment of the credibility of **A.Z.** What is already established, and what is confirmed by the First Instance Court and the Prosecution in its appeal, is that there has not been any statement or testimony ("Pa deshm"). It means that **A.Z.** has not filed any oral or written declaration which could be used directly in the trial by either of the Courts (the District Court or the Court of Appeals). What we have is indirect confirmation that on 24 November 2006 he visited KFRO in Prizren, he surrendered a firearm, he informed KFOR that he had a hand grenade, and he was subsequently handed over to war crime unit in Pristina. This part of his statement could be considered as credible, but it has changed nothing about the general overview of his credibility since we do not have any statement or testimony (documents signed by him) which was given before an official authority, and which could be used in the trial, and which is somehow related to the charges in the Indictment.

The Court of Appeals wishes to note another issue which seems to have gone unnoticed by any of the parties in these judicial proceedings. According to the UNMIK Police Report, **Z.** refused to give a statement in this manner, stating that he wanted to give a public statement. Why did he do that? He was at the UNMIK Police Station (an international organization and a very safe and secure place), and he was not under pressure or fear of anyone. He could say everything, but he did not want to – he was waiting for "a public statement". Is this the behaviour of trustful person, who earlier declared that was attacked and frightened by the persons (**L.** and/or other defendants) who could have the right to be present or, at least, informed, about this legal action? The only possible answer is "NO". The outcome of this meeting was "no statement was recorded", which means that no evidentiary material was collected which could be used at a criminal trial. This attitude of **Z.**, and his reluctance to give a statement to an independent international authority definitely, in the view of Appellate Panel, diminishes his credibility. It also means that the declaration of the Basic Court that **A.Z.** wasa not credible or reliable as a witness is correct and should be confirmed, despite the defective material findings (the Trial Panel approached NATO HQ in Pristina, and the Chief LEGAD answered that there is no report existent in the NATO data base, but KFOR Prizren is a German military camp and is not a NATO camp).

(3.5) ICTY Statements.

The Basic Court concluded that the cooperative witness **A.Z.** had lied with regard to statements that **F.L.** and **I.M.** had allegedly had given to the ICTY. The Trial Panel opined that **F.L.** and **I.M.** never gave any statements to the ICTY.[29]

The Court of Appeals notes that when **A.Z.** was cross-examined on 7 July 2011 he testified: "*I only read **B.**'s, all the others were there*".[30]

On 17 February 2010 **A.Z.** said:

> *Demir brought along a copy of the statements that **F.**, **B.** and **M.** had given to the ICTY. He told me to read them and to prepare my version of the facts in case I got arrested.*[31]

During the cross-examination on 7 July 2011, **A.Z.** gave the following evidence in response to Karim Khan's questions:

> Q. *Did you read those statements?*
>
> AZ. *I read them.*
>
> Q. *They were taken by investigators of the ICTY, taped?*
>
> AZ. *I don't know. I have no knowledge of who did this.*
>
> Q. *You have seen your statements haven't you, it says on this date, at this location, who is present, the prosecutor is here, and often there is a statement that this statement made of 10 pages for example is truer and I make it believing it to be true. You know what I am talking about, don't you? An official statement made 14 times to this prosecutor?*
>
> AZ. *I understand what you are saying but I did not look at the importance of those statements.*
>
> Q. *Did you read the statements?*
>
> AZ. *I read part of it which concerned me in order how to behave if I went to The Hague.*
>
> Q. *Let's go step by step. You say these were the statements that these three individuals gave to the ICTY, is that correct?*

[29] Basic Court of Pristina, Judgment, 17 September 2013, p. 124.
[30] SPRK, Record of the Co-operative Witness, Hearing in an Investigation, **A.Z.**, 7 July 2011, p. 30.
[31] p. 5 A137.

AZ. *An explanation – I only took* ***H.****'s statement which I needed to read.*

Q. *You say you were told to read the statements, were they left with you?*

AZ. *They took them.*

Q. *And so you say* ***D.*** *who is threatening you comes to your house with three statements and says read them? Do you read all three or not?*

AZ. *No. Just* ***H.****'s.*

Q. *Did you physically see the other statements; you just read* ***B.****'s is that right?*

AZ. *I only read* ***B.****'s. All the others were there.*

Q. *Are you aware that* ***F.L.****,* ***I.M.*** *and* ***H.B.*** *did not give statements to the ICTY?*

AZ. *No, I don't.*

Q. *They did not accept to be interviewed, did you know that?*

AZ. *I don't.*

Q. *So I put to you another piece of evidence that this account is fabricated that there are no such statements in existence. You are making it up aren't you Sir?*

AZ. *For me they did exist and based on that I gave my statement to the ICTY.* [32]

In the view of the Court of Appeals it has been proven beyond reasonable doubt that **H.B.** gave a statement to ICTY investigators. In the ICTY Judgment *Prosecutor v. Limaj, Bala, Musliu* the Trial Chamber referred to a motion to exclude a statement given by **H.B.** to an investigator with the OTP during an interview on 17 February 2003.[33]

The Panel also notes that from the Judgment that it is also clear that the accused **M.** filed an alibi notice on 1 March 2005.[34] Moreover, the defence for **F.L.** filed a Motion on 5 September 2005

[32] SPRK, Record of the Co-operative Witness, Hearing in an Investigation, **A.Z.**, 7 July 2011, p. 29 and 30.
[33] ICTY, *Prosecutor v. Limaj, Bala, Musliu*, Judgment, 30 November 2005, para. 769; Decision on Defence Motion to Exclude Statements Made by Haradin Bala in Interview of 17 February 2003, 17 November 2004.
[34] ICTY, *Prosecutor v. Limaj, Bala, Musliu*, Judgment, 30 November 2005, para. 770; Alibi Notice of Isak Musliu Submitted pursuant to Rule 67(A) (i) (a), 1 March 2005.

for the Provisional Release of the Accused, pending Judgment or for such shorter period as the Chamber saw fit.[35]

In conclusion, the Court of Appeals finds that the Basic Court partially erred in negatively assessing **A.Z.**'s evidence that he read statements from **B.** before the ICTY, because **H.B.** gave a statement to the ICTY and because **A.Z.** confirmed that he read that specific statement. This error, however, cannot change the correct assessment of the First Instance Court in regards to the statements of Musilu and **F.L.** which simply do not exist. On 7th of July 2011 he expressly testified: "*I only read Bala's, all the others were there*" and on 17th of February 2010 said: "….*a copy of the statements that **F.**, **B.** and **M.** had given to the ICTY……"*. He was not talking about one statement but about the statements (plural), with the indication that these were by **L.** and **M.** The fact that both accused refused to give any statements at the ICTY is proof that **A.Z.** was not able to see them and that he had simply lied with regard to this issue. In conclusion, the Appellate Panel considers **A.Z.** as partially not credible and unreliable with regard to the ICTY "Statements".

(3.6) Conclusion about A.Z.`s Credibility.

Based on the above, the Court of Appeals fully concurs with the findings of the Basic Court and finds that the evidence **A.Z.** gave is inconsistent and substantially contradicted by other evidence. Therefore, the Court of Appeals has good reasons to consider his statements not to be reliable or credible. In light of the above it has been proven that **A.Z.** was not credible as a witness and who provided many facts which are not confirmed by other pieces of evidence. When he gave testimony in the period 2009-2011 he told lies with regard to his hospitalization in 2006. The sickness which he pretended to have in 2006 is a very strong argument to assume that he is not credible/unreliable/untrustworthy regarding the statements he gave between 2009-2011, and also regarding his evidence about the car accidents, and the ICTY statements strongly support and confirm this kind of reasoning. It is clear that **A.Z.** had had own personal motives for **F.L.** and other defendants being convicted which, in consequence, makes his statements unreliable/untrustworthy/not credible.

The Court of Appeals is not the First Instance Court, so it will not analyze every contradiction between the account of **A.Z.** and other Prosecution evidence. This was correctly done by the First Instance Panel and also by the defence counsel on behalf of **F.L.** on the last 14 pages of

[35] ICTY, *Prosecutor v. Limaj, Bala, Musliu*, Judgment, 30 November 2005, para. 775; Defence Renewed Motion for Provisional Release of **F.L.**, 5 September 2005.

their response to the Prosecution Appeal. Bearing in mind the above, the Appeals Panel concludes that **A.Z.** is not fully reliable as a witness. A further assessment of his statements is elaborated in the following points.

(4) Reliability of A.Z.'s Diaries.

The Prosecution submits that the Trial Panel attached to the diary a life of its own, independent from the testimony of its author, which from the Prosecutor`s point of view was a clear mistake. What **A.Z.** wrote are his personal notes. Taken alone, they have an extremely low probative value. Not a single charge in the Indictment is based on a diary entry. The evidence of the crimes comes entirely from **Z.**`s memory and testimony, not from the diaries.

Despite the rather clear factual situation, the Panel based its entire analysis of what they interchangeably called "the diary" or "diaries" on completely wrong assumptions. The Prosecution stresses that they never claimed that the diary entries were written by **A.Z.**

The Prosecutor remarks that in the early stage of the investigation **A.Z.** gave investigators a pile of documents of various shape, form and nature. They were labelled 0096/09/EWC2/0001 through /036, and are both typewritten and handwritten. The Police and the Prosecutor questioned **A.Z.** on a very limited part of this massive volume of documents. He was asked in-depth questions regarding only two of these diaries: numbers /011 and /012. They contain names of prisoners detained in the Kleçkë/Klečka prison. **Z.** claimed he wrote them, and an independent graphology expert confirmed that this is true. **Z.** never claimed that he wrote the entirety of the documents from /0001 through /036. The Prosecution never asked him to confirm or deny this, and neither did they claim this in the Indictment or at the trial.

The Prosecutor notes that the Court, on page 73 of the Judgment (and elsewhere) referred to **A.Z.**'s quote: *I was taking notes but they were my personal notes. No one knew I was writing in my diaries*. However, this quote is referred exclusively to the diaries kept in the Kleçkë/Klečka prison. It cannot be applied to the life diaries which were written in a completely different time period and set of circumstances. When **Z.** speaks of the diaries which he hid, and to which no one had access, he is only speaking about diary /011 and /012.

The Prosecution refers to the graphology expert Professor **B.**, who concluded that diaries /011 and /012 were entirely written by **Z.**, just as **Z.** himself claimed. In addition, certain pages of the other "war diaries" and the "life diaries" were also subjected to graphology expertise. The expert`s finding was that all of them were written by **Z.**, with one single exception: page 4 of

"diary "/003-a longhand annotation "**I.Q.**". **Z.** was never questioned regarding this authorship, and he never said that he wrote the totality of the documents he gave to the investigators, including diary /003.

With regard to the appointed second expert, the Prosecution notes that Dr. **K.** is not a graphologist, but rather a criminologist specialized in crime scene investigations and other forensic activities. The weight of his professional expertise cannot be put at the same level as that of a professional graphologist such as Professor **B..** Dr. **K.**`s findings are not as persuasive as those of Professor **B.**`s, and are not supported by scientific evidence. Against this background it is not clear why that Court found it surprising that Professor **B.** did not tackle the different findings of Dr. **K.**, but rather referred to the methodology adopted by the latter. Professor **B.** radically demolished the scientific value of Dr. **K.**`s report, which means that he demonstrated that Dr. **K.**`s conclusions, whatever they are, must be discarded.

For the Prosecution it is not clear why the Court then found, departing from the conclusions of both Dr. **K.** and Professor **B.**, that only four pages attributed by Dr. **K.** to another author are in fact written by another author. The Court analysed the appearance of the handwriting by sight, and concluded that four pages are written by three different authors, other than **Z.** The Panel`s finding on this point is deprived of any scientific foundation and must be dismissed.

Only a malicious reading of the graphology expertise, which totally disregards the context and the reasons why this signature appears on **Z.**`s diary, can lead to the absurd conclusion reached by the Court, that **Z.**`s diary is a sort of "collective" product. In any case, the Panel assumed that **Z.** said that he wrote the entirety of the "diaries". He never said that. Even if some pages of diary (/013) were not written by him, this would not contradict any of his evidence.

In any case, the fact that **Z.** kept a diary to help his memory does not exclude the possibility that he may have asked others to write something in it. The Trial Panel concluded that the so-called war diary was a collection of records to which other persons have contributed. The Panel uses its incorrect conclusions about the four irrelevant pages of diary /013 to discredit the entirety of **Z.**`s diaries.

However, the Prosecution submits that **Z.** simply supported his memory with the diaries. The Prosecution case is based on **Z.**`s recollection, possibly helped by the diaries, but not on the diaries *per se*.

The Prosecutor refers to the quote of the First Instance Court: "…*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 other persons contributed and which ***A.Z.*** *kept after the war and simply adopted as his own…..*"[36]

In the view of the Prosecution the First Instance Court reaches the peak of incongruous reasoning by stating that **Z.** said what he never actually said (that he wrote the entire diary /013), and by applying a wrong scientific method (appearance of the handwriting) to four (irrelevant) pages, and by doing so the Court reaches a wrong conclusion (**Z.** did not write four of diary /013 pages) and infers *that this was more likely a record of events at the detention centre to which others persons contributed*. The Court does not explain if this applies to diary /013 only. Instead, it keeps referring to the "war diary" or the "diary", without indicating which finding applied to which documents.

With regard to the "life diaries" the Prosecutor finds that, contrary to the findings of the Court, **A.Z.** never said that all the entries were contemporary to the events.

Moreover, one of the two documents was tendered by **L.**`s defence at the first trial, but the defence was never able to explain where it got the document from. So at this moment the origin of the document is still unknown, and should not even be considered as evidence.

Finally, the Prosecutor remarks that he never considered the "diaries" as part of **Z.**`s testimony. The diaries were used as the starting point of some questions. They become a statement of truth when incorporated in the official statements given by **Z.** Not a single charge in the Indictment is based on a diary alone. The description of the criminal offences comes entirely from **Z.**'s memory and testimony, and not from the diaries.

The Basic Court referred to its assessment and to the reports of Professor **B.** and Dr. **K.**, and concludes that against the backdrop of the deviation of the evidence of the experts, 0096-09-EWC2-013, pages 1, 12, 16 and 16a and the annotations in 0096-09-EWC2-011, page 4 in the so-called war diaries were clearly not written in the same hand as the majority of the documents attributed to **A.Z.** The Trial Panel found that these documents were made by three different authors.[37] Otherwise the Trial Panel found, *inter alia*, that the diaries /011 and /012 were written by **A.Z.** The Court found it surprising that Professor **B.** did not address these findings in his subsequent report. Instead, he simply referred to the methodology adopted by Dr. **K.** when evaluating other documents.

[36] Basic Court of Pristina, Judgment, 17 September 2013, p. 76.
[37] Basic Court of Pristina, Judgment, 17 September 2013, p. 75.

Furthermore, the Basic Court concluded that the so-called war diary was a collection of records to which other persons had contributed. The Trial Panel referred to the interview **A.Z.** gave to the police on 3 December 2009, when he was asked why he had kept the diaries. He replied: *Just to have them to help my memory if I would need some information later on*. The Panel then concluded that some entries in the diary where not written by **A.Z.** If entries were made by other persons then clearly this was not a personal diary that **A.Z.** kept *to help his memory*. The Basic Court finally concluded that his statement was simply a lie.[38]

The Trial Panel in its Judgment referred then to the diary entries for 15, 18, 21 and 26 December 2006, written on a single sheet of paper and inserted into the diary. On the reverse of the page there was a further entry that refers to payments he alleged had received from **L.** The Court concluded that the entry was inserted later and was an obvious and crude attempt to fit an event into the chronology of later diary entries.

Furthermore, the Panel referred to two further documents and found that the first document is dated 29 December 2010.The second document was clearly written later because it refers to a telephone conversation with the Prosecutor on 6 July 2011. The Panel found that the second, later document is a partial transcription of the first one. Both documents contain a list of dates when **A.Z.** 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 crucial sentence is omitted. The Panel raised an obvious concern on the part of defence counsel that an entry in the diary had been altered.

The Court of Appeals notes that the Trial Panel assessment of the contemporaneity of the diaries is not focussed at all on the "war diaries" but on more recent entries, which are not relevant to the charges. **A.Z.** was not questioned on them. Furthermore, the Appellate Panel finds that there is no contradiction between **A.Z.**'s testimony that he wrote these diaries himself and that no one had access to it, and the results of the handwriting expertise. He was questioned only on diaries /011 and /012. The signature of **I.Q.** on page 4 of "diary /003" is easily explained and does not distort the content of the diary. In addition, the Court of Appeals remarks that **A.Z.** was not asked to explain the presence of the signature, just if he remembered about this person, and the page of the diary was not shown to **A.Z.**

> Q. *Do you know anything more about **I.Q.** mentioned at page 4 of diary 0096-09EWC2/011?*

[38] Basic Court of Pristina, Judgment, 17 September 2013, p. 76.

AZ. *(…)* ***I.*** *was then released and I don't know what happened to him afterwards.*[39]

Also during the cross-examination **A.Z.** was questioned about **Q.**, but he was never shown the page of his diary.[40]

The Court of Appeals concludes that **A.Z.** was clearly answering as to the written notes, not to the signature. **A.Z.** never said he wrote them all. The Basic Court came to a wrong conclusion. Therefore, the Court of Appeals stresses that **A.Z.** told the truth. There is no lie and no contradiction visible.

Furthermore, the Court of Appeals concurs with the Prosecutor finds that the quote "….*I was taking notes but they were my personal notes. No one knew I was writing in my diaries…"* is referred exclusively to the diaries kept in the Kleçkë/Klečka prison. It cannot be applied to the "life diaries" which were written at a completely different time period and set of circumstances. When **Z.** speaks of diaries which he hid, to which no one had access, he is only speaking about diary /011 and /012. Against this backdrop the Court of Appeals disagrees with the Basic Court when labelling the diaries as collective product. **Z.** simply supported his memory with the diaries, which are his diaries, but also includes some documents with a different authorship.

Moreover, the Court of Appeals notes the following. On 30 November 2009 **A.Z.** was questioned on 0096-09-EWC2/011 (15 pages) and 0096-09-EWC2/012 (5 pages) specifically:

> Q. *Can you be sure that nothing has been added to them later?*
>
> AZ. *I have kept them in secret, hidden places and I am 100 % sure that nobody has had access to the diaries since I hid them. My wife is the only person who has been aware of the diaries, but even she did not know what the contents of them were.*
>
> *I wrote these diaries in Kleçkë/Klečka 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.*[41]

On 9 February 2010 **A.Z.** testified the following:

> *I was taking notes but they were my personal notes. No one knew I was writing in my diaries. I wrote whatever I could. My notes are not necessarily complete. Sometimes I could not write.*[42]

[39] SPRK, Record of the Suspect Hearing in an Investigation, **A.Z.**, 11 February 2010, p. 16.
[40] See also: SPRK, Record of the Co-operative Witness, Hearing in an Investigation, **A.Z.**, 6 July 2011, p. 17, questions 181-188.
[41] Interrogation Statement of the Witness, **A.Z.**, 30 November 2009, p. 10.

And further:

> Q. *Where exactly have you kept your diaries?*
>
> AZ. *I wrapped them up in some paper and tape and gave everything to my wife. I did not tell her what was inside. I told her to give the package to the court if I ever get killed. She first put them in a drawer in the kitchen and later inside a mattress.*
>
> *My father also knew that these diaries existed but he did not know where I hid them.*[43]

Based on this the Court of Appeals states that the Trial Panel unfortunately erred in its overall assessment of the authenticity and authorship of **A.Z.**'s diary, as it should have conducted this assessment distinctly for each diary. In this regard, the Court of Appeals concludes that the war diaries 0096-09-EWC2/011 (15 pages) and 0096-09-EWC2/012 (5 pages) specifically are authentic, written by **A.Z.**, and that they constitute credible evidence insofar as they confirm the identity of the prisoners, and the dates of the detention and release of such prisoners from Kleçkë/Klečka.

Moreover, it is not clear to the Court of Appeals why the Basic Court found it surprising the fact that Professor **B.** did not tackle the different findings of Dr. **K.**, but rather referred to the methodology adopted by the latter. Professor **B.** criticised the scientific value of **K.**`s report. He stated that Dr. **K.**`s results do not have any probative value and therefore his conclusions have to be discarded. In this context the Court of Appeals notes that the Trial Panel erred when concluding that the documents 0096-09-EWC2-013, pages 1, 12, 16 and 16a were clearly not written in the same hand as the majority of the documents attributed to **A.Z.** Generally the Trial Panel is free how to assess evidence. However, there are limited cases in which the expertise of an expert has to be deferred to. The conclusion of the appointed expert is based on scientific value and methodology; in this case the court is not permitted to make a deviating decision and to make an own conclusion that the documents 0096-09-EWC2-013, pages 1, 12, 16 and 16a were clearly not written in the same hand.

In this point it has to be said, however, that those errors of the First Instance Court have no impact on their rendering of a proper decision, as well as on the decision of the Court of Appeals since even Prosecutor says that, "…***Z.*** *simply supported his memory with the diaries. The Prosecution case is based on* ***Z.****`s recollection possibly helped by the diaries, but not on the diaries per se…..*" and "…*no count is based on the diaries*…". This means that the assessment

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[42] SPRK, Record of the Suspect Hearing in an Investigation, **A.Z.**, 9 February 2010, p. 22.
[43] SPRK, Record of the Suspect Hearing in an Investigation, **A.Z.**, 9 February 2010 p. 23; SPRK, Record of the Co-operative Witness, Hearing in an Investigation, **A.Z.**, 9 July 2011, p. 14, point 159.

of **A.Z.**'s statements is crucial for the final decision, and that the process of valuation of the evidence was properly done.

Furthermore, the Court of Appeals has to stress that a professional lawyer using in an official document, which an appeal surely is, words such as, "…*only a malicious reading of the graphology expertise*…", "…….*the first instance court reaches the peak of incongruous reasoning*…" does not strengthen the force of arguments but rather could be seen as a lack of them.

(5) No Opportunity for Cross-Examination of A.Z.

The Prosecution avers that the First Instance Court considered **Z.**'s absence from the trial as a factor impacting his credibility, and that this makes the entire Court reasoning tainted.

In its appeal the Prosecution referred to the Court`s remark that **A.Z.** was not available for trial. The Trial Panel had been denied the opportunity of putting additional questions to **A.Z.** in order to test his evidence. The Panel had no opportunity to put additional questions to him, evaluate his behaviour, assess the full extent of his capacity to perceive, to recollect or to communicate events, to assess his character for honesty or veracity, or to test the existence or nonexistence of a bias, interest or other motivation.

The Court can draw no adverse consequences from the mere fact that the witness was not heard at trial. Stating the contrary would mean to *de facto* deprive of any weight the rule that when a witness dies his statements are read into the evidence. **A.Z.**`s written statements are the evidence, which must be assessed conscientiously as they are (Article 368 par. 1.1 and Article 387 par. 2).

Taking for granted that **Z.**`s credibility must be based on his written statements as foreseen by the law, the Court did have a good opportunity to form its own opinion on the credibility of **A.Z.** by viewing the videos of his cross-examination. The Prosecution remarks in this context that when a witness is no longer available for questioning, possible gaps or contradictions in the evidence are bound to remain unexplained.

The Prosecution refers to the statement of the Basic Court that the defence counsel did not have available to them at the time of cross-examination the statements made by **A.Z.** on 20 and 30 November 2009, and continued on 3 December 2009, and then refers to the Supreme Court

ruling which stated: "…*while the admissibility of the evidence of* ***A.Z.*** *is no longer an issue, the weight to be attached to his evidence is*…..[44]

The Prosecution submits that **Z.**`s evidence, once admitted, has the same weight as the evidence of any other co-operative witness. No adverse conclusion can be drawn from the lack of cross-examination at trial. The Supreme Court has dealt with the issue and has confirmed that the defence had a fully adequate opportunity to cross examine **A.Z.** in July 2011.

The Prosecution concludes that the second Trial Panel should have assessed and evaluated **Z.**'s evidence in the exact same manner as it would have been evaluated any other co-operative witness evidence, and that his allegations have the same weight as the allegations of any other co-operative witnesses. The fact that that he was not present at trial does not mean that the Court, merely on that fact, must or may trust him less. The Court had the opportunity to cross-examine him in July 2011 for four days, and the defence had a perfectly adequate opportunity to cross-examine him and exploit any weaknesses in his testimony. On that occasion over 1,000 questions were asked. The fact that the Court considered **Z.**'s absence from the trial as a factor impacting his credibility makes the entire Court reasoning tainted.

The Court of Appeals notes that the Supreme Court, in its ruling dated 20 November 2012, has already dealt with the requirement of the Court regarding the legal level of an opportunity to challenge to be given to the defence in accordance with Article 156 paragraph 2 of the KCCP. The District Court, in its ruling on "Admissibility of **A.Z.**'s Statements and Diaries" dated 21 March 2012, and following that also in the Judgment dated 2 May 2012, has interpreted the legal standards of an "Opportunity to Challenge" as required by Article 156 paragraph 2 of the KCCP as to be a legal term requiring to be filled with content by the Judge. It therefore establishes numerous additional requirements regarding the question when such opportunity fulfils the standards of Article 156 paragraph 2 of the KCCP. In particular, the District Court had developed the idea that the content of opportunity would depend, among other factors, on the complexity of the case and the status of a possible witness as alleged co-perpetrator. Therefore, on a case-by–case basis, the requirements of opportunity pursuant to Article 156 paragraph 2 of the KCCP would be flexible and varying in intensity. Given that there allegedly is no corroborating evidence for all aspects addressed in **A.Z.**`s statements, and that the latter has

[44] Basic Court of Pristina, Judgment, 17 September 2013, page 68; see Supreme Court of Kosovo, Rulings dated 20 November and 11 December 2012.

passed away, the legal standards of opportunity *may require almost as much as a full cross-examination as would occur at the main trial*.[45]

The Supreme Court found that these additional requirements, as developed by the District Court, are mostly baseless. For methodological reasons, it disagreed with a requirement of a *flexibility of the legal level of opportunity* for the admissibility of evidence. The fact that the witness has passed away cannot have any relevance for the opportunity to challenge, since this is a fact that could not possibly have been known in advance by any of the parties. The Supreme Court stressed that it is the explicit meaning of Article 156 paragraph 2 KCCP to secure the knowledge of the witness who at a later stage may no longer be available. Article 156 para. 2 of the KCCP does not require any cross-examination at all, neither based on its wording nor resulting from the interpretation of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR).

The Supreme Court concurred with the assessment of the District Court to the extent that the expression "opportunity", as used in Article 156 paragraph 2 of the KCCP, includes that the opportunity must be real and meaningful, enabling the defence to engage substantively with the witness evidence. The preparation time must be considered in relation to the complexity of the case and to the relative importance and the status of the witnesses. The Supreme Court took into consideration that the defence was provided with all relevant documents and had sufficient preparation time to plan their questioning accordingly.

The Supreme Court noted that the total length of the four sessions was approximately 19 hours, during which all defence counsel were present and had the possibility to participate in the questioning, to listen to the questioning by their colleagues and supplement their questioning in turn. The SPRK Prosecutor placed no restrictions whatsoever on the questions that could be asked, and therefore the defence counsel and defendants were free to ask any questions they wanted, and in their vast majority did so. Indeed, over 1,000 (one thousand) questions were asked, including over 500 questions by the defence for **F.L.**, and the questions and answers take up approximately 86 pages of transcripts in the English version. The sessions were also video recorded. The SPRK Prosecutor waived his right to ask any questions of the witness, but left the floor immediately and exclusively to the defence. The Supreme Court has concluded that although this situation did not at all amount to the requirements of a cross-examination, it

[45] District Court of Pristina, Ruling on Admissibility of **A.Z.**`s Statements and Diaries, dated 21 March 2012, p. 25, no. 47.

nevertheless meets the requirements of an opportunity to challenge as provided for by Article 156 paragraph 2 of the KCCP.[46]

The Court of Appeals concurs with the Supreme Court and the Prosecution, and stresses that the Court as well as the defence had the opportunity to see **A.Z.** while testifying when being cross-examined by the defence in July 2011 for four days. Over 1,000 questions were asked during the session.

In any event, this has no bearing on the assessment of the credibility of **A.Z.** Although the style of wording used by the Basic Court might be inappropriate, given the admissibility issue this is no longer an issue. The statements from the Basic Court regarding the cross-examination of **A.Z.** have no impact on the ultimate determination of the facts of the case, or on the assessment of the credibility of **A.Z.** A careful reading of the Judgment shows that this had no impact. It is true that Court erred when concluding that the defence counsel were denied the opportunity to cross-examine **A.Z.**, but it is not true either that the decision is based on a wrong legal assumption and the entire Court reasoning is tainted, as claimed by the Prosecutor. This conclusion could only be reached if the First Instance Court had not assessed the evidentiary material at all and had stated that defence counsel were denied the opportunity to cross-examine **A.Z.**, and that the principle of "*equality of arms*" was breached. The First Instance Panel assessed all pieces of evidence and very clearly explained why **Z.**'s statements are not credible, and the lack of opportunity for the Cross-Examination of **A.Z.** was not the only or crucial reason for this (in fact, it was rather marginal).

In this point the Court of Appeals highlights that careful reading of the reasoning gives the impression that the intent of the Court touching this issue was little different from this, and indeed the wording style of the Basic Court might be misleading.

It is true that the opportunity to cross-examine **A.Z.** by the defence counsel is not the issue, but here appears another legal principle – principle of immediacy.

The principle of immediacy is one of the guiding principles of the criminal procedures of EU Countries, and provides a directive addressed to the Courts and to the Prosecutors. This principle is based on two aspects: formal and substantive. The formal aspect is the stipulation for the court to meet personally and directly with the evidence at the time of the trial.The substantive aspect requires the Court to make findings of facts on the basis of primary, original evidence which comes from direct sources.

[46] Supreme Court of Kosovo, Ruling, 20 November 2012, p. 20, 24.

Considering this definition, the Court of Appeals notices that the Basic Court wanted to directly examine **A.Z.** because of doubts regarding his statements. The existence of these discrepancies and the lack of the possibility of clarification of them might cause the violation of another crucial principle, that of "*in dubio pro reo*", which would definitely trigger the annulment of the Judgment. Considering this, the Court of Appeals notes the mistake which was made by the Basic Court, but decides that this mistake does not have a fundamental impact on the rendering of a lawful decision.

(6) Killing of Four Serbian Soldiers.

The Prosecutor contends that there is undisputed evidence that five bodies were exhumed from the grave site which was indicated by **A.Z.** The DNA analysis revealed that these were five Serbian soldiers. According to the forensic examination, two of the soldiers had their hands tied, that military clothing and a scythe were found in the grave, and that the date of their admission to the prison in the diary matches with the *ante mortem* evidence. The names of four out of five of these victims appeared in a diary's entry as prisoners of Kleçkë/Klečka prison.

With regard to the fact that **A.Z.** said that nine bodies were buried in the grave while only five were found, the Prosecutor asserts that this does not undermine the credibility of the cooperative witness given that **A.Z.** had no knowledge of what happened to the grave after the bodies were dumped in it, that he never said he closed the grave, nor that he constantly monitored its location.

The Prosecutor also stresses that forensic archeologist expert **C.C.** testified that it would not have been possible to detect traces of early disturbance of the grave within the first six months. He further submits that there are strong indications that some bodies may have been removed. Contrary to the Basic Court's statement, he clarifies that **A.Z.** had never testified that the grave in question had been disturbed in 2002, since **A.Z.** was referring to another grave.

As to the order in which the bodies were found in the grave, which does not match **A.Z.**'s account, the Prosecutor recalls that expert witness **C.C.** stated that "….*if bodies were removed before they were covered it would be very difficult to say if there were more bodies there*….". Contrary to the Basic Court's conclusion, **A.Z.** did not testify that after each victim the bodies were buried, but rather were covered with some soil.

Furthermore, while **A.Z.** stated that the four Serbians were killed 20 days before **A.A.**, in contradiction with the evidence, the Prosecutor specifies that **A.Z.** actually referred to two distinct groups of four Serbs, and that he admitted that he was not sure as to the dates and the

identities of the two groups of Serbs. He contends that the apparent contradiction is easily explained by the fact that **A.Z.** made a mistake as to the date "20 days before the killing of **A.A.**".

As to the apparent contradiction between **A.Z.**'s statement involving **A.K.** in two events and **A.K.**'s alibi, the Prosecutor contends that there is no contradiction. According to the diary entry, the Serbs were killed on 18 April 1999. On the same day **A.K.** was wounded in Lapushnik, a location close to Kleçkë/Klečka. The two events could well have happened on the same day. Even assuming that the Serbs were killed on 18 April 1999, **A.K.** could have easily been present in Kleçkë/Klečka that day, before being wounded. However, this does not detract from **A.Z.**`s credibility.

The Basic Court refers to **A.Z.**'s testimony, where he stated that **A.A.** was killed one day after his release. A diary entry records his date of release as 2 April 1999, which was 20 days before he had witnessed the killing of four Serbian prisoners. Describing the killing of the four Serbian prisoners, he said he was approximately 40-50 meters away. He said that the prisoners were dressed in regular Serbian army uniform; two prisoners had their hands tied behind their backs, and the other two were tied together with wire. **Z.** testified that **N.K.**, **N.K.** and two further persons had taken the Serbs and brought them down the meadow to the hole in the ground. Then he heard the shots fired by several Kalashnikovs. "**V.D.**" was also present. With regard to the burial site, **A.A.** was buried in the "location where 9 got buried".

The Basic Court concluded that the remains of **D.T.**, **B.C.**, **Ž.F.**, **Ž.T.** and **D.V.** were found at site KER01, which **A.Z.** identified as the grave containing the bodies of the Serbian soldiers whose killing he said he had witnessed 20 days before the killing of **A.A.** However, **D.T.**, **B.C.**, **Z.F.**, **Z.T.** and **D.V.** were not captured by the KLA until 11 April 1999.

A.Z. was asked about a diary entry that said "**D.N.**, **T.S.Z.**, **S.**, **B.S.** and **F.P.Z.** were "released on 18 April 1999". Later he heard that those prisoners had been killed. He believed that they worked for an electricity company, and that they were civilians. The four Serbian prisoners whose killing he had witnessed and whose bodies he had helped bury in the grave were not civilians. They were killed wearing their military uniform. When he was interviewed in 2009 he stated that he had only heard about the killing of the four Serbian prisoners who had been released on 18 April 1999. When he was examined on 11 February 2010 he said "I am pretty sure that two different groups of four Serbs were brought to Kleçkë/Klečka".

The Basic Court concluded that the evidence regarding the killing of the four Serbian prisoners is inconsistent and contradictory, and is contradicted by other evidence including forensic evidence.

The Court of Appeals notes generally that it is clear from the forensic evidence that grave site KER01 indicated by **A.Z.** was exhumed, and that five bodies were recovered from it. Through DNA analysis the bodies have been identified as **D.T.**, **D.V.**, **B.C.**, **Ž.F.** and **Ž.T.** Military clothing was recovered from the grave. Furthermore, the forensic experts revealed that two bodies had their hands tied behind their backs and that ligatures were recovered. The names of four of the five Serbian victims found appear on one of **Z.**'s diaries as being prisoners in Kleçkë/Klečka.

With regard to the fact that **A.Z.** had testified that nine bodies were buried in the grave while only five were found, the Court of Appeals finds that this definitely undermines the credibility of the statement of the cooperative witness. **A.Z.** had described and declared that he had knowledge about the grave, and that, what was said by him, differs from what was discovered. The Appeals Panel refers to **Z.**`s statement that he closed the grave, which means that he knew who was buried there. Later on, **Z.** told the Prosecutor that he had information that bodies were removed from that location:

> AZ: *I know nothing about that. […] have to warn you however that according to the information that I have the bodies were removed from the site*.[47]

The First Instance Panel is absolutely right in noting and indicating the discrepancies in this statement. In analysing the excerpt above it is only possible to say that **Z.** knew nothing about disturbance of the grave, but he has some general knowledge that: "… *according to the information that I have the bodies were removed from the site*….". In this point the question should be put: according what kind of information?, from whom does the information come?, *were removed from the site*…… by whom? There are no answers to any of these questions, and therefore the lack of those pieces of information should definitely be interpreted to the benefit of the defendants, which is what was correctly done by the Basic Court.

The Appeals Panel notes that forensic archeologist **C.** testified that if the grave was disturbed in the first six months she would not have noticed it when excavating the site. Traces of such an early disturbance of the grave would not have been detected. The general report by the forensic expert answered the questions which were put by the Prosecution on this issue, and they state that this answer changes in their case since they do not have any single piece of evidence that

[47] Interview, 16 March 2010, page 5.

any such disturbances took place. To accept the Prosecutor's opinion on this issue would be the acceptance of events which would be based on Prosecution speculation.

The Court of Appeals cannot even allow for such speculation such as, "…….*it is very likely that some bodies may have been removed at a later time*…….", and "…….*it is very likely that after the killings and the first covering with soil the perpetrators decided to separate Albanian and Serbian victims and to rebury them in different graves*…...". This would be in flagrant breach of the one of the most important principle of criminal procedure code, which is "*in dubio pro reo*". Since we do not have any clues that such events took place, we simply cannot assume that they did. Of course the Prosecutor Office, vindicating the Indictment, can propose such an interpretation of the facts, but the denial of it by the Basic Court cannot be assumed to be in error.

As a conclusion, the Appeals Panel can decide that, upon the facts that were presented at the main trial, there is crucial contradiction and inconsistency in the testimony of **A.Z.** about the number of buried victims and the number of remains found in the grave. The fact that only five bodies were retrieved from that location, instead of nine, is a contradiction in **Z.**`s statement and it also does undermine his credibility. The finding of only five Serbian bodies instead of the nine declared by **Z.** does not corroborate his account on this point, and his overall credibility. The absence of the other mentioned four bodies cannot be explained on the basis of collected pieces of evidence, and obviously does diminish his credibility.

Moreover, the Court of Appeals notes that **A.Z.** erred on the date when he said that the four Serbian soldiers were killed 20 days before **A.A.** From the diary entries it is proven that **A.A.** was killed on 3 April 1999. According to **A.Z.**'s statement, that would mean that the Serbian prisoners had been killed at around 14 March 1999. However, the diary entries clearly reveal that the KLA did not capture **D.T.**, **D.V.**, **B.C.**, **Ž.F.** and **Ž.T.** before 11 April 1999. Therefore, the dates given by **A.Z.** do not match the evidence, and it is proven beyond reasonable doubts that he erred with regard to the date.

Referring to **A.K.**`s alibi, the Court of Appeals finds that the Basic Court does not err in any way when concluding that **A.K.** could not have been present to cover the bodies because he was wounded the same day that the Serbs were killed. Therefore, **A.Z.** lied and his evidence is inconsistent and contradictory. In this point the Basic Court concluded:

*If he was not lying about **A.K.** but merely mistaken the end result is the same – his evidence is unreliable*.[48]

It is clear from the evidence that **A.K.** was wounded in Lapushnik on the 18th April 1999. It is proven fact. Therefore the Appeal Panel cannot concur with the Prosecutor and finds that, theoretically, **A.K.** could have been wounded after the killings and after having supported **A.Z.** with the covering of the remains with soil. To conclude otherwise would be to accept speculations which do not have the support of any evidence. Of course, it is possible that he first helped **A.Z.** to bury the killed prisoners and then was wounded at a later time of the same day. It is as possible as many another scenarios which could be proposed to explain this aspect of the case, but without evidence it simply cannot be done without of breaching fundamental principles, which the Court of Appeals cannot do.

Additionally, and mostly with the same reasoning, the Court of Appeals agrees with the Trial Panel that **A.Z.**'s evidence as to the perpetrators of the killings cannot be relied upon. **A.Z.** testified that he was 40-50 meters away when he heard shots of Kalashnikovs and that the prisoners were wearing Serbian army uniforms. He testified that he saw **N.K.**, **N.K.** and two others as well as "**V.D.**". There are no other pieces of evidence, besides **Z.** statements, supporting the fact of the presence of these individuals at this place. It is very important that even if **Z.** testified that he only saw **N.K.**, **N.K.** and two others as well as "**V.D.**", he did not say what they exactly did since he was 40-50 meters away. Could only this statement be the basis for the conviction of any one? The only answer is "NO". We have already established and explained that we cannot rely on **A.Z.**`s evidence since he is not a reliable and credible witness. The District Court has presented many legal arguments to say that **A.Z.** told a lie with regard to **N.K.**, **N.K.**, "**V.D."** and two others. The Appeal Panel also concludes that **A.Z.** had clear motives to act against **F.L.**, as well as the rest of defendants, and so the Panel concludes that **A.Z.** was not truthful.

(7) Killing of a Fifth Serbian Soldier.

With respect to the fact that **A.Z.** testified that only one prisoner was killed with a scythe when forensic evidence established that two prisoners were killed in this manner, the Prosecutor submitted that **A.Z.** never said that he eye-witnessed the execution of the group of four Serbs. According to the Prosecution, **A.Z.** gave evidence about a fifth Serbian prisoner who was killed

[48] Basic Court of Pristina, Judgment, 17 September 2013, page 132.

with a scythe ten days after the four Serbian prisoners whose remains were found in grave KER01.

The Prosecutor finds that the diary entry is *per se* not so clear. There is a fifth name repeated, indicating that there was some kind of mistake in the diary entry. The date indicated on **Z.**`s diary as "release" (18 April 1999) is written on the side of the page, and it is not clear to which prisoners it refers to. However, the Basic Court had concluded that the evidence of **A.Z.** is contradicted by a diary entry. **A.Z.** gave evidence that **D.T.** was not killed on 18 April 1999 but 10 days later. A diary entry records "**D.N.**, brought in on 11 April 1999, released 18 April 1999". That diary entry suggests that **D.T.** was one of the four Serbian prisoners who were shot 10 days before the fifth Serbian prisoner was killed by **N.S.** using the scythe blade.

The Prosecutor finds that the Court is focusing on all the purported discrepancies it could find, and is blatantly missing the main point. **Z.** told the story of five Serbian prisoners. Four were killed before, one after. He says how they are killed and where their bodies were dumped. He said four were killed with gunshots and one with a scythe. He mentioned the approximate dates, which are entirely compatible with the *ante mortem* evidence. The independent witness **U.K.** also saw a group of four Serbs in Kleçkë/Klečka in the same time period, and also saw **Z.** there. The five bodies were found. Clothing and ligatures match and a scythe were also found. Two of the victims were killed with it, the others with gunshot wounds. The names of four out of five victims were found in **Z.**`s diaries. Therefore, the story is coherent and credible. It is corroborated by material, forensic and testimonial evidence.

The Prosecutor refers to a further contradiction in **Z.**`s account. The Basic Court had noted that according to **A.Z.** the victim was wearing civilian clothes, while according to the DFM Report the victim had army clothing. However, the Basic Court reached a wrong conclusion, because the DFM Report has two columns: *ante-mortem* and *post-mortem*. *Ante-mortem* of the victim indicates "army clothing", the *post-mortem* indicates "multi-coloured jumper" and a "green sock". A similar mistake was made with regard to the second victim, **D.V.** "Military clothing" and "military shoes" refer to the *ante mortem*. There was no relevant clothing indicated in the post-mortem column.

The Prosecutor submits that the Basic Court tried to insinuate that someone told **Z.** what to say, and referred to **A.Z.**`s statement about the use of the scythe and the wire ligatures. He finds that that sort of irresponsible insinuation should never be written in a Judgment because they cannot belong by definition to judicial reasoning, which knows only the categories "proven/not proven". The rest is merely speculation.

The Prosecution recalls that **Z.** never said that he saw the killing of the four prisoners. He gave evidence that he first saw a group of four Serbs marched to the hole in the ground. He did not see their killing. He just heard gunshots. Days later, he eye witnessed the killing of a fifth Serbian prisoner with a scythe. Therefore, he could not see that overall two victims were killed with a scythe. As a result there is no contraction as assumed by the Basic Court.

According to the Prosecution the Basic Court concluded that at least two persons were involved in the slashing of the two victims. However, **Z.** never mentioned anyone's involvement in the killing apart from **N.S.** He did not see the moment of the execution of the first group of four Serbs. In any case, he said that on both occasions there was a group of perpetrators.Otherwise, it would be normal after 10 years to not remember precisely all of the movements of each and every perpetrator.

The Prosecution summarized that the Court attached disproportionate weight to supposed contradictions which the Prosecutor has now clarified. The recovery of seven bodies counts for nothing. The Panel literally turned upside down the rules of common logic. The evaluation made by the Panel clearly led to a wrong assessment of the factual situation and on the overall credibility of **Z.**

The Basic Court concluded that **A.Z.**'s evidence regarding the chronology of events and identity of victims is contradicted by his diary entry and other evidence. **A.Z.** gave evidence that less than 10 days after the killing of the four Serbian prisoners **N.S.** asked him to find a scythe.

Referring to the fifth Serbian prisoner, **N.S.** told him "I will slash this pig". He also testified that **F.L.** was also interviewing this Serb with the others. After the prisoner had been beaten **N.S.** shouted "Find me a scythe and I will slaughter him". **A.Z.** gave evidence that he found a scythe blade in a burned out house. He gave the blade to **A.K.** who gave it to **N.S.**, **N.S.**, **N.K.**, **N.K.** and "**V.D.**" took the Serbian prisoner to the field. The prisoner was sitting down whereupon **N.S.** began slashing him with the scythe. The Basic Court concluded that his account of a fifth Serbian prisoner being killed with a scythe blade is consistent with the forensic evidence.

However, **A.Z.** testified that less than a week after, he heard gunshots and he saw the bodies of three Albanians in civilian clothing. When asked about the three Albanians and if it was the same hole where the four Serbs were "dumped" he said "yes". When asked about the sequence of killings "first **A.A.**, then the four Serbs, then the Serb with the scythe and then the three Albanians" he said "yes". 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 **A.A.** He gave the same evidence on two occasions.

The Basic Court found it proven beyond reasonable doubts that the four Serbian victims found at KER01 were: **D.T.**, **D.V.**, **B.C.**, **Ž.F.** and **Ž.T.** If the Serbian soldiers were killed 20 days before **A.A.** they were killed in the first half of March 1999. The Trial Panel is sure about the date **A.A.** was released from Kleçkë/Klečka because evidence was given by other witnesses who were released on the same day. However, **D.T.**, **D.V.**, **B.C.**, **Ž.F.** and **Ž.T.** were not taken by the KLA until 11 April 1999.

The Trial Panel concluded that the fifth Serbian prisoner who was killed by a scythe was **D.T.**, and then noted some contradictions between **A.Z.**`s evidence and the entry in the diary. **A.Z.** said he was not killed on 18 April but ten days later, while the entry suggests that he was one of the four Serbian shot 10 days before the 5th Serbian with the scythe. The forensic evidence shows he was the first body deposited in the grave.[49]

A.Z. also said that to the best of his knowledge the Serb was the only killed with a scythe, while two bodies were found to have died this way: **D.V.** as well. Therefore, the Basic Court found that the forensic evidence "contradicts" **A.Z.**'s evidence regarding the scythe.[50]

The Basic Court finally expressed doubts about **A.Z.** mention of the wire ligatures after the excavation. The Trial Panel cannot exclude the possibility that **A.Z.** became aware of this evidence for the first time after the grave was exhumed.

The Court of Appeals concludes that **A.Z.** saw a group of four Serbs marched to the hole in the ground. He did not personally see their killing but he heard gunshots fired. Days later, he eye witnessed the killing of a fifth Serbian prisoner with a scythe. His testimony matches the evidence found by the forensic experts and his statements are therefore credible and reliable. The forensic examination revealed that the Serbian victims found at KER01 were **D.T.**, **D.V.**, **B.C.**, **Ž.F.** and **Ž.T.** Clothing and ligatures match the evidence and a scythe was also found. Two of the victims were killed with it, the others with gunshot wounds. The names of four out of five victims were found on **Z.**`s diaries. Therefore, the Court of Appeals notes that **A.Z.**'s story is in this part coherent and credible. It is corroborated by material, forensic and testimonial evidence.

Furthermore, the Appeals Panel does not see any contradiction when **A.Z.** testified that he saw the killing of one prisoner with a scythe although the forensic experts found two victims killed with a scythe. **A.Z.** never saw the killing of the four Serbian prisoners; he only heard the gunshots. Then, a few days later **A.Z.** eye witnessed the killing of a further prisoner with a

[49] Basic Court of Pristina, Judgment, 17 September 2013, page 111.
[50] Basic Court of Pristina, Judgment, 17 September 2013, page 110.

scythe. As a conclusion he could not see that overall two victims were killed with a scythe. As a result in this part there is no contradiction as assumed by the Basic Court.

The Appeals Panel finds that **A.Z.** eye witnessed the killing of **D.T.** His birth date matches with the diary entries. Furthermore, he has been described by **A.Z.** as "high ranking". The forensic examination revealed that he had the military rank of a Captain and thus he can be considered as a military officer and, compared to the other victims, as high ranking.

In this context the Court of Appeals finds the wording of the Basic Court inappropriate and concerning when insinuating that the Panel "cannot exclude the possibility **A.Z.** became aware of this evidence for the first time after the grave was exhumed".[51] **A.Z.** mentions the scythe for the first time eight weeks after the grave had been exhumed. The Court of Appeals recalls that **A.Z.** was ever interrogated about that before. The first interview took place on 30 November 2009 and thus after the exhumation. Therefore, there is no "addition" from **A.Z.**, as concluded by the Basic Court. He was just not interrogated about the matter previously. As a matter of fact, the Trial Panel erred in negatively assessing that he mentioned the presence of a scythe after the exhumation because no statement was recorded prior to the exhumations.

However, the Court of Appeals does not see those errors as crucial within the overall comprehensive assessment of the decision of the Basic Court. **A.Z.**'s evidence in relation to this element of the case is still insufficient to be the basis of a conviction. Even the Prosecutor in his appeal highlights that **Z.**'s statement contains discrepancies that cannot be explained without interpreting them to the detriment of the defendants.

However, while this part of **Z.**'s evidence is generally credible, it contains some substantial weaknesses – particularly the doubts about his evidence concerning dates, which was mentioned by the Basic Court. We cannot forget that if the Serbian soldiers were killed 20 days before **A.A.**, then they were killed in the first half of March 1999. Since we are sure about the date when **A.A.** was released from Kleçkë/Klečka - because evidence was given by other witnesses who were released on the same day, how can it be explained that **D.T.**, **D.V.**, **B.C.**, **Ž.F.** and **Ž.T.** were not taken by the KLA until 11 April 1999? **A.Z.** did not explain this disrepancy and this doubt has to be assumed in favour of defendants. In this point the Appeal Panel has to remind the Appelants that the general principal is to give a substantial degree of deference to the finding of fact of the Trial Panel, as it is the Trial Panel which has heard the evidence and is in the best position to assess its weight and value.

[51] Basic Court of Pristina, Judgment, 17 September 2013, page 106.

(8) Killing of V.M. and N.D.

The Prosecutor contends that as to the finding on whether or not **Z.** killed the two Serbs, the Court completely ignored elementary rules of judicial reasoning. The conclusion of a judicial assessment of evidence is "proven/not proven". Surprisingly the finding of the Panel is that it is "possible" that **A.Z.** killed the two Serbs. On the contrary, the Prosecution states that there is no doubt that **A.Z.** killed **V.M.** and **N.D.**, whose remains were retrieved exactly in the location indicated by the witness.

The doubts which resulted in a mere "possibility" seem to be based on two main arguments:

1) **Z.**`s story is inconsistent because he told EULEX Police that he did not see when the two were killed, but he just heard gunshots; later on to the Prosecutor he said that he personally killed them, upon **F.L.**`s order.
2) **Z.** said that he shot the victims when they were both facing him, however, the autopsy clarified that **M.** suffered two gunshots wounds to the right side of his head and one to the rear of his head.

With regard to the first argument, the Prosecution submits that there is no contradiction as averred by the Basic Court. In his first statement there is no reference to his responsibility. **Z.** did not falsely incriminate anyone in his first statement. He was reluctant to confess to this crime, which is understandable not only because of the legal implications of it, but also because of the emotional stress of admitting such an act. When he decided to admit it, he gave a precise, detailed and vivid account of what happened. He incriminated himself for the killing in a moment when a) he was a defendant; b) he knew nothing about the possibility of becoming a cooperative witness; and c) there was absolutely no evidence against him or anyone else for the criminal act. All of the above circumstances strongly support **Z.**`s credibility: the story is spontaneous, the story is very detailed, the reluctance to admit responsibility is perfectly understandable; the remorse is genuine.

The Court negatively assessed the fact that **Z.**, in his first statement, did not mention **L.** at all. This is, in the view of the Prosecutor, bizarre. According to the Court, **Z.**`s credibility is diminished because he did not involve **L.** in the killing that he did not admit.

With regard to the second argument, the Prosecutor points out that the Court made a clear mistake when it affirmed that **M.**`s skull had traces of two gunshot wounds to the right side and one to the rear. In reality, those traces refer to the body coded KEQ 01/001B, which was identified as **N.D.**

Z.`s statement on that point ("I shot them from a two meter distance with my 9mm Walter pistol. […] 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") is absolutely compatible with the results of the autopsy and with the technical characteristics of the weapon. The traces found on the remains of the two victims show that at least six rounds were shot. **N.D.** was hit at least three times.

The Courts neglected the following aspects of common knowledge: 1) someone who is aimed at with a gun does not necessarily stay still "facing the assailant"; 2) when traces of multiple gunshot wounds are found on a body or the remains of a body, it is impossible to establish the chronological order, or sequence of the shots; and 3) when someone is hit by a bullet, especially to the head, his/her body inevitably moves (due to the violence of the impact of the bullet, the damaged caused and the subjective reaction of the victim); this makes it impossible to establish with certainty the reciprocal positions of the victim and the shooter during the entire action.

The forensic evidence, when properly assessed, does not contradict **Z.**`s account at all. On the contrary, it strongly corroborates it.

In conclusion, the Prosecution holds that **Z.**`s evidence regarding the killing of the two Serbs is fully credible and powerfully corroborated by a series of independent elements. If, like the Court supposes, **Z.** was so angry and determined to send **L.** to prison as an act of revenge, he would have certainly given **L.** a bigger part in his story. In fact, **Z.** did not have to incriminate himself at all. He could have simply said that **L.** killed the prisoners. Instead, he just said that **L.** told him to kill the two victims.

The Basic Court concluded that on 30 November 2009 and 11 February 2010 **A.Z.** gave two contradictory accounts of the killing of **V.M.** and **N.D.** In 2009 he told investigators that "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 **F.L.** When this inconsistency was put on 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." However, he failed to explain the obvious contradiction in his evidence.

When he was interviewed on 11 February 2010, referring to **N.D.** and **V.M.** he said they were "civilians". They were not. They were both policemen. They were taken by the KLA on 9 February 1999.

Moreover, the Panel concluded that according to the autopsy report **V.M.** 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 **N.D.** records a gunshot wound to the head and a gunshot wound to the trunk. 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 it.

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 **F.L.**

The Court of Appeals notes that on 3 December 2009 **A.Z.** was asked about **L.G.** [**N.D.**] and **V.M.** [**V.M.**] being released on 5 April 1999:

> AZ: *5 April 1999 these two prisoners were released by me. I had received an order from **F.L.** to do so.*[52]

> AZ: *Half an hour after **G.** and **M.** were released, I heard some gunshots being fired from two Kalashnikov from the direction of Shala village. **A.S.** had left somewhere with **A.K.** with shovels just before the prisoners were taken out from the prison by **N.K.**, **N.S.** and **B.L.** Sometime later **A.S.** came and said: We finished them and we covered them*.[53]

However, on 11 February 2010 **A.Z.** gave a contrary statement and admitted that he killed both prisoners:

> *I confirm but I want to add something further. I did not tell the entire truth when I was interviewed because I reality I killed these two Serbs myself and I want to tell the whole truth now*.[54]

> *I shot a whole magazine. They were facing me, I don't remember where I hit them because I was shocked.*[55]

When confronted with this inconsistency about who killed the soldiers, **A.Z.** said on 7 July 2011 that both versions of his evidence were true. The Basic Court noted that he failed to explain the contradiction in his evidence. The Court of Appeals concurs with the First Instance Panel. However, in his first statement he did not falsely incriminate anyone and he was very reluctant to confess to the crime at all, which is in the view of the Court of Appeals completely incomprehensible. There were no any legal implications for him since he had already decided to testify about those facts.

[52] EULEX Police Statement, **A.Z.**, 3 December 2009, point 85.
[53] EULEX Police Statement, **A.Z.**, 3 December 2009, point 86.
[54] SPRK, Record of the Suspect Hearing in an Investigation, **A.Z.**, 11 February 2010, p. 11.
[55] SPRK, Record of the Suspect Hearing in an Investigation, **A.Z.**, 11 February 2010, p. 12.

During his examinations **A.Z.** said: *I did not tell the entire truth when I was interviewed because in reality I killed these two Serbs myself and I want to tell the whole truth now*.[56]

During the cross examination on 7 July 2011 **A.Z.** gave evidence:

> Q. *You told the PP when you were asked "why did you come to EULEX", you said "to tell the truth". Remember saying that?*
>
> AZ. *Yes.*
>
> Q. *If that is the reason you came to give your account, when did you form this new desire to tell the truth?*
>
> AZ. *From the moment I removed the idea to kill* ***F.L.****, I handed over my gun, I was unarmed and after I always thought of reaching an end through an agreement.*
>
> Q. *From that moment, you were committed to the truth?*
>
> AZ. *Yes*
>
> Q. *the whole truth, is that right?*
>
> AZ. *Yes*
>
> Q. *The whole and nothing but the truth?*
>
> AZ. *Yes*
>
> Q. *So why did you lie about no killing those two Serbs?*
>
> AZ. *I did not try to hide that but I was thinking whether it would be better to tell the PP or the court.*[57]

Considering and very carefully analyzing the evidentiary material, and seeing many discrepancies in **Z.**'s statements in this regard. This conclusion is in no way invalidated by the forensic examination and autopsy. The Court of Appeals notes that the remains of **V.M.** and **N.D.** were found at KEQ01. The autopsy report for **V.M.** shows gunshots to the head and trunk, the autopsy report for **N.D.** reveals gunshots to the head, that is, three gunshots including one at the back of the head. The Basic Court had noted that **M.** autopsy records two gunshot wounds to

[56] SPRK, Record of the Suspect Hearing in an Investigation, **A.Z.**, 11 February 2010, p. 11.
[57] SPRK, Record of the Co-operative Witness, Hearing in an Investigation, **A.Z.**, 7 July 2011, point 327-332, page 24.

the right side of the head and one gunshot wound to the rear. For **D.** the autopsy shows a wound to the head and a wound to the trunk. Those elements, assessed globally, allow the Appeals Panel to reach the conclusion that **A.Z.** may killed the two prisoners.

However Appeals Panel also agrees with the Basic Court that **Z.** gave two contradictory accounts of the killing of **V.M.** and **N.D.** It is absolutely true that in 2009 he told investigators he had "*half an hour after **G.** 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 **F.L.** It is also true that when this inconsistency was put on him on 7 July 2011, he said that both versions of his evidence were true – which is simply impossible, and it is also true that he failed to explain the obvious contradiction in his evidence. Those contradictions, and also the constant involvement of **L.** in every offence which was reported by him, makes his statements not credible and unreliable.

(9) Killing of A.A.

The Court of Appeals remarks that the name of **A.A.** is mentioned in diary /012 p. 2. It is proven beyond reasonable doubt that he was brought into the Kleçkë/Klečka prison facility on 21 March 1999, and was released 2 April 1999. **A.Z.** testified that one day after his release he was again arrested and killed near Kleçkë/Klečka village. He gave evidence that he had witnessed the killing of **A.A.** from a distance of 50 meters. He had been shot by **N.K.** and **N.K.** who had used AK47`s. He testified that beside "**V.D.**", **N.S.** was also present but that he did not see if he was shooting.[58]

A.Z. testified that "…some 20 days before the killing of **A.A.** there were four Serbs being executed on that spot he had earlier shown to EULEX investigators…". He then indicated he did not see the body because he did not dare to go.[59]

In conclusion the Court of Appeals finds that **A.Z.**'s evidence is reliable in so far as it confirms that **A.A.** was killed. This further matches the dates in his diary. However, his evidence involving the defendants as perpetrators cannot be found credible and reliable. He did not give any details about this crime. Considering the distance, which was report by him, from where he was from where the crime took place, there is no sufficient evidence to conclude that **N.K.**, **N.K.**, **R.M.** and **N.S.** committed this crime.

[58] SPRK, Record of the Suspect Hearing in an Investigation, **A.Z.**, 9 February 2010, page 25; EULEX Police Statement, **A.Z.**, 3 December 2009.
[59] SPRK, Record of the Suspect Hearing in an Investigation, **A.Z.**, 9 February 2010, page 26.

(10) Killing of S.A. and Y.G.

With regard to the killing of **S.A.** and **Y.G.**, the Court of Appeals notes that on 30 November 2009 **A.Z.** said:

> ***I.G.****: From Piran village. Worked for Prizren MUP. Received to Kleçkë/Klečka 16.02.1999. He was taken out from Kleçkë/Klečka prison by* ***A.K.****,* ***N.K.*** *and* ***N.K.****. Less than half hour later I heard some shots being fired by AK 47 and I thought that* ***G.*** *had been killed". "Next day I went to check a location with fresh soil (1st location, second grave). The area is called Livadhi I Canit. On page 3 of my diary is the release date, i.e. 03.04.1999. There is a + sign in front of the name, that means he got killed.*[60]
>
> ***S.A.****: Prison director from Mitrovica. Detained 21.03.1999. On page 3 of my diary is the release date, i.e. 03.04.1999. There is a + sign in front of the name, this means he got killed. He was taken out from the prison same time with* ***G.***[61]

On 9 February 2010 he said they were taken by **N.K.**, **N.K.**, **N.S.** and remarked:

> *I am not sure if* ***A.K.*** *was in the group which took the prisoners away*.[62]

The Basic Court considered that there was a contradiction, as on 30 November 2009 "*he seemed sure*" that **A.K.** was there, while on 9 February 2010 he said they took the prisoners in a car towards the mountains, he doesn't mention hearing gunshots, and they told him that they had killed them. [63]

The Court of Appeals finds that **A.Z.**`s testimony matches with the diary entries. The name of **S.A.** is listed in the diary /012 p. 2 with the following remarks: Detained from 21.03.1999, released on 03.04.1999. On page 3 **S.M.** is listed with a "+" sign and with the date 3 April 1999.

The name of **I.G.** [**I.G.P.**] appears in the diary /012 on page 1 with the information: Received on 16.02.99, released on 03.04.99. At page 3 "*edhe imeri piranë*" appears with a "+" sign and the date 3 April 1999. On 30 November 2009 **A.Z.** indicated that the "+" sign means that the prisoner was killed.

In light of the above, the Court of Appeals finds **A.Z.**`s evidence is partially credible and reliable insofar as **S.A.** and **Y.G.** were detained in Kleçkë/Klečka detention facility and killed on 3 April 1999. However, the Appellate Panel does not find **A.Z.**'s evidence reliable insofar as it involves

[60] Interrogation Statement of the Witness, **A.Z.**, 30 November 2009, p 11, point 60.
[61] Interrogation Statement of the Witness, **A.Z.**, 30 November 2009, p 11, point 62.
[62] SPRK, Record of the Suspect Hearing in an Investigation, **A.Z.**, 9 February 2010, p. 24.
[63] Basic Court of Pristina, Judgment, 13 September 2013, p. 97 and 113.

one or all of the defendants in the perpetration of the crimes. As mentioned above, he did not give any details about this crime. He did not say anything apart from the declaration that **N.K.**, **N.K.**, **N.S.** took those prisoners, but he did not see defendants killing them. The lack of those details creates doubts which have to be interpreted in the favour of the defendants.

(11) S.D.

According to the Prosecution, the Basic Court attached negative value to some contradictions in **Z.**`s testimony regarding **S.D.**, the military Judge during the war, and the story of **B.K.**, a former Commander who had been sentenced to death.

The Prosecutor believes that there is no doubt that **Z.** and **D.**, in their different capacities, had contact with each other during the war. **Z.** had in his possession a number of documents related to the prison (including lists of prisoners and signed Court decisions that were recognized also by **D.**). **Z.** gave a detailed and correct physical description of **D.** (*he was a good man and like a father to me*). **D.** remembers both **Z.**`s real name and his nickname during the war.

It is true that **Z.** was confused about the identity of **P.U.** However, two of the closest collaborators of **S.D.** during the war testified that a) they do not know if **D.** had a nickname, b) everybody knew him as **S.** c) they do not know anybody by the name of **P.U.** The reasonable conclusion is that the use **D.** made of that pseudonym was rather limited, and in any case that was not the name by which people knew him. There is no real contradiction in **Z.**`s testimony.

It is not contradictory that **Z.** did not want to send the convicted person to **D.**, and found a solution that would not expose him. Actually, after **Z.** sent the prisoner to him, **D.** released **K. D.** testified that a) though nobody interfered with his work, not everybody within the KLA was happy with his decision not to execute **K.**; and b) the coordinator of the prison had concerns about the **K.** case, so much so that, as already pointed out, **D.** went to the prison in order to personally reassure him. There is no contradiction in **Z.**`s statements.

The Basic Court concluded that the description given by **A.Z.** of his relationship with **S.D.** seems rather hollow. **S.D.** and **P.U.** were one and the same person. **S.D.** gave evidence that **P.U.** was the name he used in order to conceal his true identity. Moreover, it is odd that **A.Z.** would refuse an order to take **B.K.** before that very court. **A.Z.** received an order from **S.D.** to bring **B.K.** to him. However, he said that 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 **S.D.** and told him he was not willing to "take a bullet" for **B.K. F.L.** had told him: *if you release this one I will kill you. This one has to*

be executed. Referring to the occasion when he had refused to take **B.K.** to **S.D.**, **A.Z.** gave evidence that **S.D.** had subsequently sent four military police officers to collect **B.K.** On the Prosecution case, the military police charged with escorting **B.K.** to **S.D.** were under the command of **F.L.** These accounts of this event by **A.Z.** are obviously inconsistent. **A.Z.** refused to comply with the order to take **B.K.** before the military court because he was afraid of the reaction of **F.L.**, whereupon **S.D.** sent the military police to collect him. **S.D.** was asked if **A.Z.** had ever stated that he would not "take a bullet" for **K.** In reply he said "No. Never."

The Court of Appeals, as did the District Court, finds the relationship between **S.D.** and **A.Z.** as a superficial one. **A.Z.** was not able to give a clear, detailed, and correct physical description of **D.** besides the general remark that "…*he was a good man and like a father to me…"*. There is also a contradiction when **S.D.** testified that he "remembered **M.** very well" but he could not match the name **A.Z.** with the face. As a matter of fact, there is no need for the Appeals Panel to elaborate further on this issue. However, the Panel observes further inconsistency insofar as when **A.Z.** testified that **D.** was "like a father". He said when answering the question whether he knew **P.U.**:

Q. *You said he is about 30-35 years of age?*

AZ. *This is what I think.*

When Defence Counsel Karim Khan confronted **A.Z.** that **S.D.** is **P.U.**, and as to whether **S.** is lying, **A.Z.** said he does not lie. He provided an explanation: *it is possible from the person I received the decision, from **P.U.**, that person who came with that I thought it was from **P.U.** because I did not receive it directly from **S.D***. This fact definitely diminishes the credibility of **A.Z.** He said that he knew him as *"…..like a father to me…."* but he did not know that **S.D.** is **P.U.**

With regard to **B.K.**, the Court of Appeals concludes that he was a prisoner in the Kleçkë/Klečka detention facility. He had been convicted by the Military Court presided over by **S.D.**, who had sentenced him to death. While being a prisoner in Kleçkë/Klečka detention centre **A.Z.** was asked to bring him to **D.** The Appeals Panel finds **A.Z.** not credible when he testified that he was threatened by **F.L.** with the sentence: *If you release this one I will kill you. This one has to be executed*. In light of the above it is totally incomprehensible that **Z.** had concerns about sending the prisoner, as he believed he would face a very harsh reaction if he did not, which includes even that he would be killed himself. Further, the prisoner had to be sent not to **L.** but to **D.** (**S.D.** was asked if the prison coordinator refused to transfer him from the prison to the Court, and he replied that he could not recall). As a conclusion there is clear contradiction in **Z.**`s statements. The Appeals Panel finds it not only odd but unbelievable that **A.Z.** had good reasons not to send

B.K. to **S.D.** There is no explanation as to why **A.Z.** was concerned about the consequences of this deed. **S.D.** was military Judge, who are men of honour, he was also "…*a good man and like a father ….",* and so **Z.**'s behaviour cannot be explain rationally. In light of the above, the Court of Appeals observes there are many contradictions in **Z.**'s statements with regard to **S.D.** and **B.K.**, agrees with and confirms the assessment of the First Instance Court on this issue.

(12) Existence of Systematic Beatings at Kleçkë/Klečka.

The Basic Court concluded that, while certain detainees were subjected to mistreatment, there is no evidence of a systematic mistreatment of detainees on an arbitrary basis. The witness` statements are not sufficient to infer that by reason of being detained in Kleçkë/Klečka they would be under a constant fear of being subjected to physical abuse or death. In light of the foregoing evidence, the Trial Panel found that conditions of detention *per se* did not amount to cruel treatment.[64]

The Basic Court further noted that whether particular conduct amounts to cruel treatment is a question of fact to be determined on a case by case basis.[65] In this regard, the Indictment names individuals subjected to inhumane treatment; the former prison director **S.A.**, the former police officer **Y.G.**, the three brothers **B.**, **E.** and **N.K.**, the civilians anonymous witness H and his brother, the five Serbian militaries **D.T.**, **D.V.**, **B.C.**, **Ž.F.**, **Ž.T.**, **V.M.** and **N.D.** The evidence submitted by the Prosecutor indicates that certain other individuals were possibly subject to cruel treatment.[66]

The Court of Appeals concurs with the Basic Court, and notes that it has been proven beyond reasonable doubt that beatings took place in Kleçkë/Klečka detention facility. Witness D testified that he was mistreated several times. Soldiers entered his room and beat him. There were around six other prisoners, all of them Albanians. They were in bad condition and one could see that they were beaten. Soldiers came to his room and he witnessed the beating of "**S.**", another prisoner. The beatings happened around 20 March 1999. Witness V gave evidence that a young man was beaten by KLA soldiers. Anonymous witness M testified that he was beaten in Kleçkë/Klečka detention facility. Furthermore, he heard screaming from the 1st floor. Anonymous witness L confirmed that a prisoner had been badly beaten. According to rumours, 5 or 6 soldiers had been badly beaten in Kleçkë/Klečka. Witness **N.R.** confirmed he heard

[64] Basic Court of Pristina, Judgment, 13 September 2013, p. 163.
[65] ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Trial Judgment, 30 November 2005, para. 232.
[66] Basic Court of Pristina, Judgment, 13 September 2013, p. 164.

prisoners screaming. He testified that one day he heard very scary screaming from the upper floor, and he thought that the two prisoners were being beaten up. Witness C confirmed that a guard took the prisoners for interrogations and beat them. Other prisoners said that they were beaten by someone small with glasses and that all of their cellmates were badly beaten.

From the above it is very clear that numerous beatings took place in the detention centre. However, and contrary to the findings of the First Instance Court, the Appeals Panel opines that these beatings reached a worrying proportion which is considered as systematic with regard to specific prisoners. The Panel is convinced that beatings in Kleçkë/Klečka detention facility were more or less a usual treatment to intimidate or mentally break specific prisoners.

This conclusion is in no way invalidated by **S.D.**`s statement. He testified that prisoners did not complain. However, **A.Z.** said that **D.** did not know about Serbian prisoners and was not aware of the presence of some prisoners, that he did not interview Serbian prisoners, and generally he did not deal with civilians, and that he did not see the Serbian prisoners in the burnt houses.[67]

However, **A.Z.** said that the detained Serbs were kept in the house only for an hour or two, perhaps one night, and then sent to the basements of two burnt houses 100-200 meters away.[68] **A.Z.** said that there were illegal or unofficial interviews during which the inmates were beaten and tortured. Therefore, the fact that **S.D.** testified that he was not aware of any mistreatments of prisoners does not challenge the testimonies of numerous witnesses confirming that systematic beatings took place at Kleçkë/Klečka.

Finally, the Court of Appeals remarks that there is insufficient evidence which proves the involvement of any of the defendants in the beatings. Except for **A.Z.**, none of the witness was able to give evidence that one or all of the defendants actively participated in the beatings. Witness V testified that he was interrogated by **F.L.**, **H.S.** and **S.D.** However, he did not see an involvement of these persons in the beatings. Witness **U.K.** testified that military police members such as **A.Z.**, **F.L.**, "**F.**", and "**N.**" came and took care of prisoners in order to put them in the basement. An active involvement in the beatings was not testified to at all.

Taking the above into consideration, the Court of Appeals concludes that the assessment of the First Instance Court regarding the systematic beatings at Kleçkë/Klečka as detailed in the Indictment is correct and should be confirmed.

[67] SPRK, Record of the Suspect Hearing in an Investigation, **A.Z.**, 9 February 2010, p. 15, 17, 18, 20.
[68] Report, Interrogation Statement of the Witness, **A.Z.**, 30 November 2009, p. 9.

(13) Hierarchy and Chain of Command at Kleçkë/Klečka Prison.

The Court of Appeals finds the evidence inconsistent as to the Hierarchy and Chain of Command at Kleçkë/Klečka Prison. From the evidence it is not clear who had higher and direct command over the detention centre.

U.K. gave evidence that the military police stayed on the top floor. He saw **F.L.** a few times in 1999 in Kleçkë/Klečka. He was based in the building where the kitchen was. With regard to "**B.F.**", he testified that he was able to investigate anyone he wanted. He was a very powerful person. He belonged to **F.L.**'s group. Early in April 1999, he saw four Serbian officers being brought to Kleçkë/Klečka. Members of the military police such as **A.Z.**, **L.**, "**F.**", "**F.**" and "**N.**" came out, took care of them and put them in the basement. He remembers these names because they had a higher position. He said that **A.Z.** was a guard at the prison.

S.D. stated that **A.Z.** was responsible for the day to day management of the prison, and refers to the "director" without giving his identity (he later confirmed in Court that it was actually the same person, namely **A.Z.**). He further stated that the prisoners were under the physical control of the military police. With regard to **L.**, he testified that he was the only one (with the power of releasing someone) who had such power, as he was the head of military police. About "**F.**" he said, "I know he was a military police officer. I saw him in Kleçkë/Klečka. He has been in the HQ as well. I would issue him guidelines on how to act and how Police should behave". He very often saw "**F.**" in Kleçkë/Klečka.

However, the Court of Appeals observes inconsistencies. In his testimony to the Court given on 23 April 2013, **S.D.** explains he was misunderstood during his statement to SPRK concerning the involvement of **F.L.** He specifies that the prison was under the legal service and the military Court, not under the military police. He also minimized **N.K.**'s role.

Witness B testified that **N.K.** was the head of the military police. He stated that **A.Z.** was the supervisor of the prison.

Witness G said that the Commander at Kleçkë/Klečka was **H.S.T.**

Witness H testified that whe he was arrested he mentioned that the UCK soldiers were waiting for their Commander to come. The Commander was very young, around 25-30 years old. He described "**B.**" with dark hair, 1.80 m tall, and an athletic type.

Witness C testified that "**F.**" interrogated him. He was later released from Kleçkë/Klečka by **A.Z.** He thought that **A.Z.** was the director of the detention center.

Witness M gave evidence that he was interrogated in Kleçkë/Klečka by Shaban Shala, who spoke with **N.**, who told everyone (incl. the Judge) that the prisoners were **A.Z.**'s responsibility and that he would release them, and then they were released. The Camp was under the responsibility of **F.L.** because the units were under his control. However, he did not know who was in charge of the prison. He stated: "I know that in Kleçkë/Klečka there was the HQ of Brigade 121 and as far as I know **F.L.** was in charge of the Brigade."

Witness L gave evidence that when interrogated by **O.** in Kleçkë/Klečka, "**N.**" interrupted the questioning and released him.

Witness V testified that the Commanders of the Brigade from highest to lowest rank in 1998 were: **F.L.** and **H.S.** He was arrested and transported to Kleçkë/Klečka, maltreated during the way by five soldiers from the military police, that he stayed 56 days in the prison and was not maltreated there, and he identified a "**B.H.**" as a prison guard called "**G**". He testified that the prison Commander was "**M.**" (**A.Z.**). During his detention he was interrogated by **F.**, **H.S.** and **S.D.** and **M.**

Witness **N.M.** identified on photo board 2A picture 6 **N.K.** as a member of the military police. He thinks that he was a Commander in Brigade 121.

B.Z. testified that from January until April 1999 **F.L.** was the head of the entire KLA military police. The Commander in Kleçkë/Klečka was **H.S.** of the Brigade 121. He remembers "**B.F.**" as a member of Brigade 121 under the command of **H.S.**, and that he saw him at the headquarters in Kleçkë/Klečka. Regarding "**N.**", he gave evidence that he was a member of Brigade 121 under the direct command of the military police directorate headed by **F.L.**, and he identified "**F.**" as an officer.

A.O. gave evidence that **H.S.** was the Commander of Brigade 121.

A.H. testified that he was an administrator of the KLA military police in the framework of Brigade 121. He stated that his direct supervisor was **U.G.**, and that **N.K.** was higher up in the chain of command than **G.**

S.B. was a member of Brigade 121 and a simple soldier. He testified that his immediate supervisor was **R.K.** and then **A.S.** He said that **N.K.** was higher in command than **A.S.**

In light of the above, the Appellate Panel finds that the evidence is inconsistent as to who held a superior position at Kleçkë/Klečka. The evidence does not allow the identification, *per se* or *de facto* or *de jure*, of the Commander, although the Appeals Panel finds the witnesses mentioned

above to be credible. The question of who had command over Kleçkë/Klečka is decisive for the charges of the Indictment. It has been partially proven that the crimes were committed by members of the military police who were located in Kleçkë/Klečka. Since, however, the Commander and clear hierarchy cannot be established, the criminal responsibility cannot be assigned to any of the defendants and the decision of the First Instance Panel in this respect is correct and has to be affirmed.

E. Commander`s Responsibility.

In Count 1 of the Indictment against the defendant **N.K.**, he is charged *"... in his capacity as ... commander, and as a person holding a position of responsibility over the Klecke /Klecke detention centre ..."*.

In Count 1 against **F.L.**, he is charged *"as KLA ... commander and as a person exercising overall control over the Kleçkë/Klečka detention centre ...´ Count 2 and Count 3 charge **F.L.** also in his capacity as ´KLA commander..."*.

In Count 1 against **N.S.** he is charged *"... in his capacity as KLA member holding a positon of responsibility within the Kleçkë/Klečka detention centre....."*.[69]

The Court of Appeals entirely concurs with the Basic Court and remarks that the Indictment does not specifically allege the 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 superior 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 the question open".[70]

The Court of Appeals finds that the defendants **N.K.**, **F.L.** and **N.S.** are correctly accused and indicted for superior responsibility. By dint of Article 386 paragraph 2 of the KCCP, the Court shall not be bound by the motions of the Prosecutor regarding the legal qualification of the act. Therefore, the Court was free to assess whether or not the criminal liability of the defendants is one based on command responsibility, as long as it is properly addressed in the Indictment. In the view of the Court it is sufficient that the historical events are properly described in the Indictment, and that they can be understood by the Court as well as by the defendant with which criminal act he is charged. The Panel did not object to the Indictment as it was clear for the defendants **N.K.**, **F.L.** and **N.S.** that they are charged with command responsibility.

[69] SPRK, Indictment, pp. 3, 9, 11.
[70] Supreme Court of Kosovo, Ruling, 20 November 2012, p. 33.

The Court of Appeals will first address general remarks on the conditions for command responsibility, and then the Panel will assess each defendant separately.

(1) ICTY Statute.

Article 7 (3) of the ICTY Statute provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning. The responsibility of Article 7 (3) of the ICTY Statute reads as follows:

> *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.*

(2) Legal Elements for Superior Responsibility.

According to the established jurisprudence, three elements must be proved before a person may incur superior responsibility for the crimes committed by subordinates. For a conviction under Article 7 (3) of the Statute, proof is required that: (i) there existed a superior-subordinate relationship between the commander (the accused) and the perpetrator of the crime; (ii) the accused knew or had reason to know that the crime was about to be or had been committed; and (iii) the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.[71]

(2.1) Superior-Subordinate Relationship, Position of Command.

Not only military personnel but also civilians can be liable for war crimes on the basis of command responsibility. The International Criminal Tribunal for Rwanda, in the *Akayesu case* in 1998 and in the *Kayishema and Ruzindana case* in 1999, and the International Criminal Tribunal for the former Yugoslavia in the *Delalić case* in 1998, has adopted this principle. It is also contained in the Statute of the International Criminal Court. The Statutes of the International

[71] ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, 3 March 2000, 3 March 2000, para. 294; ICTY, *Prosecutor v. Zlatko Aleksovski*, Judgment, 25 June 1999, paras. 68, 72, 81, 118.

Criminal Tribunals for the former Yugoslavia and for Rwanda, and of the Special Court for Sierra Leone, refer in general terms to a "superior, as do many military manuals and national legislation".

This principle is recognized in various Judgments of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.[72] The Tribunals identified the actual possession of control over the actions of subordinates, in the sense of material ability to prevent and punish the commission of crimes, as the crucial criterion.[73] The same idea is reflected in Article 28 of the Statute of the International Criminal Court.[74]

It is necessary to consider first the notion of command or superior authority within the meaning of Article 7 (3) of the Statute before examining the specific issue of *de facto* authority. Article 87 (3) of Additional Protocol I to the 1949 Geneva Conventions provides:

> *The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of his Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.*[75]

he *Blaskić* Judgment, referring to the Trial Judgment and to Additional Protocol I, construed control in terms of the material ability of a commander to punish:

> *What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.*[76]

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*:

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[72] ICTR, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment, 1 June 2001, paras. 212, 217, 218; ICTY, *Prosecutor v. Zejnil Delalić et al.*, Appeal Judgment, 20 February 2001, paras. 182-214; ICTY, *Prosecutor v. Zlatko Aleksovski*, Judgment, 25 June 1999, paras. 30, 76, 78, ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, 3 March 2000, paras. 205, 296, 300; ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Judgment, 22 February 2001, para. 396; ICTY, *Prosecutor v. Miroslav Kvočka et. al.*, Judgment, 2 November 2001, para. 315.

[73] See, e.g., ICTY, *Prosecutor v. Zejnil Delalić et al.*, Judgment, 16 November 2001, para. 354; ICTY, *Prosecutor v. Zlatko Aleksovski*, Judgment, 25 June 1999, paras. 77, 91; ICTY, *Prosecutor v. Miroslav Kvočka et al.*, Judgment, 2 November 2001, para. 240 (3), 313.

[74] Rome Statute of the International Criminal Court, Article 28.

[75] ICTY, *Prosecutor v. Zejnil Delalić et al.*, Appeal Judgment, 20 February 2001, para. 189.

[76] ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, 3 March 2000, para. 302; ICTY, *Prosecutor v. Zejnil Delalić et al.*, Appeal Judgment, 20 February 2001, para. 190.

> *Article 7 (3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable 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.*[77]

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, organized 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.[78]

The Court of Appeals recalls, as a general principle, that the relationship between the commander and the subordinate does not necessarily need to be a direct *de jure* one. *De facto* command responsibility is sufficient to occasion liability of the commander.

It is settled jurisprudence that a superior must have effective control over the persons committing the underlying violations of international humanitarian law. 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. 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.[79]

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[77] ICTY, *Prosecutor v. Zlatko Aleksovski*, Appeal Judgment, 25 June 1999, para. 76; ICTY, *Prosecutor v. Zejnil Delalić et al.*, Appeal Judgment, 20 February 2001, para. 191.
[78] ICTY, *Prosecutor v. Zejnil Delalić et al.*, Appeal Judgment, 20 February 2001, paras. 192-193.
[79] ICTY, *Prosecutor v. Zejnil Delalić et al. (Čelebići-Case)*, Appeal Judgment, 20 February 2001, para. 256.

(2.2) The Commander/Superior knew, or had Reason to know.

The jurisprudence also confirms that command responsibility is not limited to situations where the commander/superior has actual knowledge of the crimes committed or about to be committed by his or her subordinates, but that constructive knowledge is sufficient. The latter idea is expressed in various sources with slightly different formulations: "had reason to know",[80] "had information which should have enabled [the commander/superior] to conclude in the circumstances at the time",[81] the commander/superior "(owing to the circumstances at the time,) should have known",[82] the commander/superior was "at fault in having failed to acquire such knowledge",[83] and the commander/superior was "criminally negligent in failing to know".[84] These formulations essentially cover the concept of constructive knowledge.

In determining whether or not this standard is reached must be considered in light of the accused's position of command, if established. Indeed, as was held by the *Aleksovski* Trial Chamber, an individual's command position *per se* is a significant indication that he knew about the crimes committed by his subordinates.[85] Other indications are; "the number, type and scope of the illegal acts, the time during which the illegal acts occurred, the number and type of troops involved, the logistics involved, if any, the geographical location of the acts, the widespread occurrence of the acts, the speed of the operations, the *modus operandi* of similar illegal acts, the officers and staff involved, and the location of the commander at the time.[86]

The Appeals Panel reiterates that the *Ćelebići* 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

[80] See e.g., ICTY Statute, Article 7 (3); ICTR Statute, Article 6 (3); Statute of the Special Court for Sierra Leone, Article 6 (3); UNTAET Regulation No. 2000/15, Section 16; Canada, *LOAC Manual*; Cambodia, *Law on the Khmer Rouge Trial*; UN Secretary-General, Report on the draft ICTY Statute.
[81] See e.g., Additional Protocol I, Article 86 (2) (adopted by consensus); the Military Manuals of Canada, Netherlands, New Zealand, Sweden, United Kingdom and United States; Indonesia, Ad Hoc Tribunal on Human Rights for East Timor, *Abilio Soares case*, Indictment and Judgment.
[82] See, e.g., ICC Statute, Article 28 (a) (i); the Military Manuals of Australia, Belgium, Canada and New Zealand; United States, Federal Court of Florida, *Ford v. García case*, Judgment.
[83] See e.g., IMT (Tokyo), *Case of the Major War Criminals*.
[84] See e.g., Canada, *Crimes against Humanity and War Crimes Act*.
[85] ICTY, *Prosecutor v. Zlatko Aleksovski*, Judgment, 25 June 1999, para. 80.
[86] ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, 3 March 2000, para. 307.

reason for the Appeals Chamber to depart from that position. The Trial Judgment's interpretation of the standard is not consistent with the jurisprudence of the Appeals Chamber in this regard and must be corrected accordingly.[87]

(2.3) The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

In the *Delalić case* in 1998, the ICTY interpreted the term "necessary and reasonable measures" to be limited to such measures as are within someone's power, as no one can be obliged to perform the impossible.[88] With respect to necessary and reasonable measures to ensure the punishment of suspected war criminals, the Tribunal held in the *Kvočka case* in 2001 that the superior does not necessarily have to dispense the punishment but "must take an important step in the disciplinary process".[89] In its Judgment in the *Blaškić case* in 2000, the Tribunal held that "under some circumstances, a commander may discharge his obligation to prevent or punish an offence by reporting the matter to the competent authorities".[90]

In its Judgment in the *Blaškić case* in 2000, the ICTY specified, however, that a commander must give priority, where he or she knows or has reason to know that his or her subordinates are about to commit crimes, to prevent these crimes from being committed and that "he cannot make up for the failure to act by punishing the subordinates afterwards".[91]

What constitutes [necessary and reasonable] measures is not a matter of substantive law but of evidence; 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". Under Article 86 of the Additional Protocol I, superiors have a duty to take "all feasible measures within their power" to prevent or punish a breach of laws of war and under Article 87 of the Additional Protocol, such "feasible measures" may take the form of both "disciplinary or penal" measures. A failure to punish subordinates who commit war crimes can result from a failure to investigate possible crimes and/or a failure to report allegations of war crimes to higher authorities.

In the *Krnojelac* Judgment the Trial Chamber stated that the measures required of the superior are limited to those which are feasible in all the circumstances and are 'within his power.' A

[87] ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, 3 March 2000, para. 62.
[88] ICTY, *Prosecutor v. Zejnil Delalić et al.,* Judgment, 16 November 1998, paras. 341-342.
[89] ICTY, *Prosecutor v. Miroslav Kvočka*, Judgment, 2 November 2001, para. 316.
[90] ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, 3 March 2000, para. 335.
[91] ICTY, *Prosecutor v. Tihomir Blaškić*, Judgment, 3 March 2000, para. 336.

superior is not obliged to perform the impossible. However, the superior has a duty to exercise the powers he has within the confines of those limitations.[92]

(2.4) Pleading Superior Responsibility.

The Court of Appeals notes 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. 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. 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. An Indictment which fails to duly set forth the specific material facts underpinning the charges against the accused is defective.

However, 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 who 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. 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. An Indictment may be defective when the material facts are without sufficient specificity.[93]

[92] ICTY, *Prosecutor v. Milorad Krnojelac*, Judgment, 15 March 2002, para. 95.
[93] ICTR, *Prosecutor v. Mikaeli Muhimana*, Appeal Judgment, 21 May 2007, paras. 76, 167. 195; ICTR, *Prosecutor v. André Ntagerura et al.*, Appeal Judgment, 7 July 2006, para. 27.

(3) N.K. (Charged as Commander in the Indictment).

Count 1 against the accused **N.K.**, **F.L.** and **N.S.** alleges the superior responsibility of the accused *as KLA commanders and/or KLA members holding a position of responsibility within the Kleçkë/Klečka detention center*, 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 Kleçkë/Klečka prison.

The First Instance Court noted that it has not been proven that **N.K.** exercised superior responsibility. The evidence does not enable the Trial Panel to conclude so that it is sure that the defendant knew or had reason to know that specific individuals, such as anonymous witness H, his brother or **S.A.** would be subjected to cruel treatment or had been subjected to cruel treatment; and that **N.K.** failed to take the necessary and reasonable measures to prevent the crimes or punish the perpetrator thereof.

The Court of Appeals notes that the accused gave evidence that his nickname was "**F.**". Several witnesses confirmed he was a member of the Brigade 121 under the accused **F.L.** Witness C testified he was amongst the three KLA soldiers that drove him to Trpeza. The accused was present when he was beaten. He actively took part in beating and finally took him to Kleçkë/Klečka. In any event, the Court of Appeals stresses that **N.K.** is not charged with events in Trpeza, although these events are taken as contextual evidence and prove that the defendant generally had the readiness to participate in beatings of prisoners and to commit war crimes.

Witness C said he was in detention with **A.A.**, **S.**, **I.** and a Serb **M.** He gave evidence that he did not see "**F.**" in Kleçkë/Klečka. The Court of Appeals observes that when he gave his statement to SPRK on 21 September 2010 he was never shown pictures of "**F.**". Therefore, the identification procedure is erroneous and insufficient. Witness C also declared that after the war he came to find out that "**F.**" was **N.S. B.Z.** said he saw "**F.**" in Kleçkë/Klečka but did not give further details. **S.D.** also knew "**F.**" as a military police officer and saw him in Kleçkë/Klečka. He was able to identify him.

Witness H mentions "**B.**" firing at him at the time of his capture. However, witness H was never asked to identity **N.K.** on a board. **U.K.** (former witness I) testified that "**B.F.**" took charge of four Serbian officers brought to Kleçkë/Klečka in April 1999 and that he was a "zone police officer". He confirmed that "**B.F.**" was **N.K.** and identified him. The cooperative witness **A.Z.** confirms that witness C was detained in Kleçkë/Klečka from 20 March 1999 to 2 April 1999 (see also diary /012, pages 1, 2). **A.Z.**'s diary /012 last page (5) mentions witness H and his brother and the date of 28 February 1999. **S.D.** acknowledged that he saw witness H and his brother

subject to cruel treatment, and testified that he saw **S.A.** in Kleçkë/Klečka, but did not know what happened to him.

S.D. was not asked if he knew who had beaten witness H and his brother. Also, in Court during his testimony dated 23 April 2013 again, concerning the two Serbian brothers, he was never asked who had carried out the beating/killings.

The Court of Appeals concurs with the Basic Court and finds that the evidence neither demonstrates that the defendant exercised command over the detention center nor that he had a superior position. The Appeals Panel finds that there is some limited corroboration involving the defendant in committing the beatings, notably of witness H. However, there are gaps in the evidence as to the identification of **N.K.** In conclusion, the Court of Appeals finds that, due to the lack of reliable identification evidence, the evidence is insufficient to establish beyond reasonable doubt that **N.K.** held a superior position at Kleçkë/Klečka and that he failed to act.

(4) F.L. (Charged as Commander in the Indictment)

Count 1 against the accused, **N.K.**, **F.L.** and **N.S.** averred **F.L.** is charged … as KLA … commander and as a person exercising overall control over the Kleçkë/Klečka detention center 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 Kleçkë/Klečka detention center by keeping them in inhumane conditions from early 1999 until mid-June 1999.

Under Count 2 **F.L.** is charged as a commander in the crime of torture of a Serbian military prisoner, detained in the Kleçkë/Klečka detention center.[94]

The First Instance Court concluded that the Indictment failed to plead and demonstrate material facts on the existence of a superior-subordinate relationship, or that the accused knew or had reason to know that the criminal act was about to be or had been committed, or that the accused failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator.

The Court of Appeals finds that it is proven that in 1998 the accused was the commander of the 121st Brigade. In November 1998, **F.L.** was appointed as a member of General Headquarters and Haxhi Shala took over the command over 121st Brigade. In this new position he was a superior with a clear superior-subordinate relationship.

[94] SPRK, Indictment, p. 9.

F.L. gave evidence that he was a member of General Headquarters until around 30th March and was then appointed to Deputy Minister of Defence. **A.K.** gave evidence, when questioned, that **F.L.** was a member of the command chain of the KLA Headquarters. **N.K.** testified that **L.** was director of the Military Police of the KLA HQ until the end of March and then went to Albania in order to become Minister. **N.S.** testified that **F.L.** was a member of General Headquarters in Novo Selo. Witness **B.Z.** gave evidence that from January to April 1999 **F.L.** was the head of the entire KLA military police, and that **N.** was a member of the 121st Brigade under the direct command of the military police directorate headed by **F.L. S.D.** testified in a first statement that **L.** was the only one who had such power as he was the head of the military police. However, he changed his statement and stated that he did not have such power. Witness M noted that the camp was under the responsibility of **L.** and that the units were under his control. **U.K.** said that **L.** had a higher position and he saw **L.** in Kleçkë/Klečka in 1999, notably when four Serbian officers were brought there, but he did not know if **L.** dealt with them. Witness **N.M.** gave evidence that **L.** was appointed as the head of the whole military police of the KLA.

The Appellate Panel notes that beatings were committed by members of the military police. **B.Z.** testified that the commander in Kleçkë/Klečka was **H.S.** of the 121st Brigade [which is a military police unit]. **S.D.** gave evidence that the prisoners were under the physical control of the military police. Witness M testified that the camp was under the responsibility of **L. U.K.** noted that the military police used to stay on the top floor. **B.Z.** gave evidence that the commander in Kleçkë/Klečka was **H.S.** of the 121st Brigade (Military Police).

Moreover, the First Instance Court has well elaborated and proven beyond reasonable doubt that beatings happened in the Kleçkë/Klečka detention center, and the Court of Appeals fully concurs with its findings. Witness D gave evidence that the prisoner known as "**S.**" was subjected to a beating in front of the other prisoners. He was taken upstairs and witness D could subsequently hear him screaming. Witness V gave evidence about his treatment while detained in Kleçkë/Klečka. He said that during that period **M.S.** threatened to kill him. He testified: "he dragged me out of the cell with a sack over my head and he threatened my life. When I was in prison, **M.S.**, together with his cousin and three other persons came three times in my cell. On one occasion they threatened me and on another occasion they kicked me." In the same statement he said: *Personally, I was never physically maltreated in Kleçkë/Klečka. I only received two kicks with the knee in my stomach.*

Witness V did describe having seen marks on **B.K.**`s hands and shoulders, but said **B.K.** had stated that he had hurt himself. He gave evidence about a young man of 17 years of age, from the Village of Obri with whom he had been detained for two days. KLA soldiers, including **B.H.**,

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. 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 that they had been beaten. Anonymous witness L gave evidence that during his detention at Kleçkë/Klečka he saw an imprisoned KLA soldier in his cell whom he said had been badly beaten. **N.R.** was arrested in October 1998. He said two Serbian prisoners were detained in the room next to his. He described how he heard screams as they were beaten.

The Appellate Panel is not persuaded that it has been established beyond a reasonable doubt that **F.L.**, despite his superior position as the director of military police in the headquarters and overall commander of the military police, had the material ability to act or that he knew or had reasons to know that his subordinates had committed crimes, and that he failed to prevent those crimes or to punish the perpetrators. Careful analysis all of the pieces of evidence cannot lead the Appeal Panel to establish that **F.L.** had even some general information in his possession which would put him on notice of possible unlawful acts by his subordinates, which in turn would be sufficient to prove that he "had reason to know." Although he was seen in Kleçkë/Klečka quite often there is no proof that he had general information about the mistreatment of prisoners when he was in command, and the number and dates of the beatings remain undefined. The Appeal Panel concludes that there are insufficient circumstances to establish that **F.L.** had good reasons to know.

(5) N.S. (Charged as Commander in the Indictment).

Count 1 alleges the superior responsibility of the accused **N.S.** as KLA commander and/or KLA member holding a position of responsibility within the Kleçkë/Klečka detention center, in the crime of violation of the bodily integrity and health of an undefined number of Serbian and Albanian civilians and Serbian military, detained in the Kleçkë/Klečka detention center by keeping them in inhumane conditions.

The First Instance Court found that the Indictment for counts 1 fails 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. The Trial Panel referred to the existing jurisprudence taking into account that when the accused are charged with both 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.[95]

The Supreme Court of Kosovo in its ruling of 20 November 2012 made no determination on this issue but instead decided to … *leave the question open whether or not the Indictment has particularly charged the defendants ... for War Crimes commission under command responsibility.*[96] For its part, the Prosecution averred reference to certain defendants holding positions of authority was simply to highlight their respective role, which should be considered by the court as an aggravating factor when determining any sentence.

The Court of Appeals notes that it could not be proven beyond reasonable doubts that the defendant **N.S.** had a superior position. **S.D.** gave evidence that he knew the nickname "**F.**" but not his real name. He often saw him in Kleçkë/Klečka. **U.K.** also saw him in Kleçkë/Klečka. He testified that in April 1999 "**F.**" took charge of the four Serbian officers brought to Kleçkë/Klečka. However, no testimony could bring evidence that the defendant had a position which was beyond or above that of a regular soldier. Thus, the Panel concluded that the defendant cannot be charged with superior responsibility.

F. CONCLUSION.

The Court of Appeals notes the following as conclusion: From the presented and thoroughly evaluated evidence it has been proven without any reasonable doubt that war crimes took place in the detention center in Kleçkë/Klečka. In particular *War Crimes against the Civilian Population*, criminalized under Articles 22, 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, currently criminalized under Articles 31, 152 of the Criminal Code of the Republic of Kosovo, in violation of Common Article 3 of the four Geneva Conventions of 12 August 1949 and Articles 4, 5 (1) of Additional Protocol II and *War Crimes against Prisoners of War*, under Articles 22, 144 CCSFRY, currently criminalized under Articles 31, 152 CCRK, in violation of Common Article 3 of the four Geneva Conventions of 12 August 1949 and Articles 4, 5 (1) of Additional Protocol II have been committed. Although the conditions of the detention center in Kleçkë/Klečka did not *per se* amount to cruel treatment the Panel observes that in particular the beatings of prisoners had reached a worrying proportion which could also be considered as systematic with regard to specific prisoners.

[95] ICTR, *Prosecutor v. Joseph Kanyabashi*, Trial Chamber Decision on Defence Preliminary Motion for Defects in the Form of the Indictment, 31 May 2000, paras. 5.8-5.11.
[96] Supreme Court of Kosovo, Ruling, 20 November 2012, p. 33.

The Court of Appeals clearly stresses that, similar to the findings of the First Instance Court, the cooperative witness **A.Z.** was not a fully credible and trustworthy witness and his statements and testimony cannot be the sole basis for the conviction of any of the defendants. Contradictions, gaps in memory, many different versions of the same event or events – these factors determine that **A.Z.** cannot be considered as a reliable source of evidence. Even if on some points he can be considered to have told the truth, the above mentioned factors reasoned by the Appeal Panel ruin his credibility. The Panel wants to strongly point out that the presented evidence was not strong enough for the defendants to be convicted and therefore the decision must be in favor of the defendants, according to the general legal principle *in dubio pro reo*. The decision is in accordance with international jurisprudence when defendants are acquitted due to a lack of evidence.[97]

In conclusion the Panel finds the Special Prosecutor's appeal as admissible but rejects it as unfounded, affirms the Impugned Judgment of acquittal for all ten defendants. It has therefore been decided as in the enacting clause.

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Reasoned written Judgment completed on 29 April 2016.

Presiding Judge

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Piotr Bojarczuk
EULEX Judge

Panel Member *Panel Member*

_____ _____

[97] ICTY, *Prosecutor v. Ramush Haradinaj et al.*, Judgment, 29 November 2012; ICTY, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Appeal Judgment, 19 May 2010; ICTY, *Prosecutor v. Ante Gotovina et al.*, Judgment, 15 April 2011; ICTR, *Prosecutor v. Ignace Bagilishema, Appeal Judgment*, 3 July 2002; ICTR, *Prosecutor v. Protais Zigiranyirazo*, Appeal Judgment, 16 November 2009.

Roman Raab
EULEX Judge

Vahid Halili
Kosovo Court of Appeals Judge

Recording Officer

_____

Dr. Bernd Franke
EULEX Legal Officer

COURT OF APPEALS OF KOSOVO
PAKR 266/14
26.01.2016