SUPREME COURT

Prishtinë/Priština

Case number: **PA II 11/2016**
(P No. 938/13 Basic Court of Mitrovicë/Mitrovica)
(PAKR No. 445/15 Court of Appeals)

Date: **3 July 2017**

IN THE NAME OF PEOPLE

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Krassimir Mazgalov (Presiding and Reporting), EULEX Judge Arnout Louter and Supreme Court Judge Emine Mustafa as Panel members, and EULEX Legal Officer Sandra Gudaityte as the Recording Officer, in the criminal case against, among others, defendants

JD;

SL;

SS;

charged under Indictment PPS 88/11 dated 8 November 2013 (hereinafter "Indictment") with a number of counts of War Crimes against the Civilian Population, contrary to Article 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (Official Gazette SFRY No. 44 of 8 October 1976) (hereinafter "CCSFRY") (currently criminalized under Articles 31 and 152 of the Criminal Code of Kosovo (hereinafter "CCK") and in violation of common Articles 3 and 4 of the Additional Protocol II, all rules of international law effective at the time of the internal conflict in Kosovo and at all times relevant to the Indictment;

acting upon the appeals filed by defence counsel on behalf of defendant JD on 29 November 2016, defence counsel on behalf of defendant SS on 30 November 2016, and defence counsel on behalf of defendant SL on 29 November 2016;

having considered the replies to the appeals of the Office of the Chief State Prosecutor (hereinafter "Prosecution") filed on 20, 21, and 22 December 2016;

having held a public session on 20 June 2017

having deliberated and voted on 3 July 2017;

pursuant to Articles 398, 403, and 407 of the Criminal Procedure Code of Kosovo (hereinafter "CPC")

renders the following

JUDGEMENT

I. The appeal filed by defence counsel on behalf of defendant JD on 29 November 2016 is hereby <u>rejected as unfounded</u>.

II. The appeal filed by defence counsel Greg on behalf of defendant SS on 30 November 2016 is hereby <u>partially granted</u>.

III. The appeal filed by defence counsel on behalf of defendant SL on 29 November 2016 is hereby <u>granted</u>.

IV. The Judgment PAKR No. 445/15 of the Court of Appeals rendered on 15 September 2016 is modified only in relation to Count IX as follows:

Pursuant to Article 364(1)(1.3) of the CPC, defendants SL and SS are hereby acquitted of the following count because it was not proven beyond reasonable doubt that defendants SS and SL committed the following criminal offence: that in their capacity as KLA members and persons exercising effective control over the Likoc/Likovac detention centre (conditions, regulations, and the persons to be detained and/or released), in co-perpetration with each other, they violated the bodily integrity and the health (e.g. prisoners chained, premises inappropriate, excessive heat, lack of sanitation, inadequate nutrition, frequent beatings) of an unidentified number of Albanian civilians detained in such detention centre in Likoc/Likovac (Skenderaj/Srbica municipality) from spring 1998 until the first months of 1999 which was qualified as a War Crime against Civilian Population in violation of Article 142 of the CCSFRY (currently criminalized under Articles 31 and 152 of the CCRK), and in violation of common Articles 3 and 4 of the Additional Protocol II, all rules of international law effective at the time of the internal conflict in Kosovo and at all times relevant to the Indictment.

The sentence is modified as follows:

In relation to defendant SS: Pursuant to Articles 80(1), (2)(2.2), and 82(1) of the CCK, taking into consideration that the defendant was sentenced to 5(five) years and 3 (three) months of imprisonment for the criminal offence as it is described in Count IV, and previously sentenced to 7 (seven) years of imprisonment by Judgement PAKR Nr 456/15 of the Court of Appeals dated 14 September 2016, the defendant is hereby imposed the aggregate punishment of 8 (eight) years of imprisonment.

In relation to defendant SL: Pursuant to Article 364(1)(1.3) of the CPC, the defendant is acquitted of the criminal offence as it is detailed in Count IX; therefore, pursuant to Article 403(4) of the CPC, the detention on remand against SL shall be terminated and the defendant shall be released immediately.

V. The remaining parts of the appeal filed by defence counsel on behalf of defendant SS on 30 November 2016 is hereby <u>rejected as unfounded</u>.

<u>REASONING</u>

I. Procedural background

1. On 8 November 2013, the Special Prosecution Office of the Republic of Kosovo (hereinafter "SPRK") filed the Indictment against JD, SL, SS and other defendants charging them with several counts of War Crimes against the Civilian Population, contrary to Article 22 and 142 of the CCSFRY (currently criminalized under Articles 31 and 152 of the CCK) and in violation of common Articles 3 and 4 of the Additional Protocol II, all rules of international law effective at the time of the internal conflict in Kosovo and at all times relevant to the Indictment.

2. The trial commenced on 22 May 2014, and was concluded on 27 May 2015. It consisted of 46 court sessions. On 27 May 2015, the Basic Court of Mitrovicë/Mitrovica rendered its Judgment P 938/13. **JD** was acquitted of the criminal charges as it is detailed in the single charge dealt with in the present case. **SL** was found guilty for the following criminal act: that acting in a brutal manner intentionally took the life of an unidentified Albanian speaking male around 40 (forty) years old by putting a TT type pistol to the male's head while the man had his hands tied and was guarded by two unidentified KLA soldiers, and then fired three shots to the male's head and thereby caused his death, in an undetermined location between the villages of Galica and Dubovc, on an undetermined date in September 1998, and this action is hereby classified as murder under Article 30(2)(1) of the Criminal Law of the Socialist Autonomous Province of Kosovo of 28 June 1977 (hereinafter "CLSAPK") (hereinafter will be referred to as "Count I" based on the paragraph number of the enacting clause of the Basic Court Judgement), and sentenced to 12 (twelve) years of imprisonment. SL was acquitted of the criminal offences as detailed in the remaining 2 (two) counts. **SS** was found guilty for the following criminal act: during the internal armed conflict in Kosovo, on several occasions, in August and September 1998, acting as a member of the Kosovo

Liberation Army (hereinafter "KLA"), seriously violated Article 3 common to the four Geneva Conventions of 12 August 1949, because he intentionally committed violence, cruel treatment, and torture against Witness A, a Kosovo Albanian civilian detained in the KLA's detention facility in Likoc/Likovac (Skenderaj/Srbica municipality) who took no active part in hostilities by beating him with punches and slaps inside the detention cell, and this action, pursuant to Article 33(1) of the Constitution of the Republic of Kosovo is classified as a war crime in continuation under Articles 152(1) and (2)(2.1), and 81(1) of the CCK, in violation of Article 4(2)(a) of the Additional Protocol II to the Geneva Conventions (hereinafter will be referred to as "Count II" based on the paragraph number of the enacting clause of the Basic Court Judgement), and sentenced to 6 (six) years imprisonment. The defendant was acquitted of the criminal offences as detailed in the remaining 4 (four) counts.

3. On 6, 7, and 10 August 2015, the SPRK and the defence counsel on behalf SS and SL filed their appeals against Judgment P 938/13 of the Basic Court of Mitrovicë/Mitrovica.

4. On 15 September 2016, the Court of Appeals rendered Judgement PAKR 455/15. The Court of Appeals granted the appeal filed by defence counsel on behalf of defendant SL and acquitted the defendant of the criminal offence as it is described in Count I as it has not been proven that the accused has committed the act with which he has been charged. The Court of Appeals further granted the appeals of the defence counsel of SS and rejected the charge against the defendant as it is described in Count II as it was a material, factual part of a criminal offence in continuation for which the defendant was previously convicted.

5. The Court of Appeals further partially granted the appeal of the SPRK, and modified Judgment P 938/13 of the Basic Court of Mitrovicë/Mitrovica finding defendants SS and JD guilty for the following criminal act: during the internal armed conflict in Kosovo, on one occasion between the beginning of August and the end of September 1998, acting as member of the KLA and in co-perpetration with each other as it is defined in Article 31 of the CCK, intentionally violated the bodily integrity and the health of an unidentified Albanian male from Shipol area in Mitrovicë/Mitrovica, detained in Likoc/Likovac detention centre by repeatedly beating him up, hereby classified as a war crime under Article 152(1) and (2)(2.1), (2.2) of the CCK and in violation of Article 4(2)(a) of the Additional Protocol II to the

Geneva Conventions, in conjunction with Article 33(2) of the Constitution of the Republic of Kosovo (hereinafter will be referred to as "Count IV" based on the paragraph number of the enacting clause of the Basic Court Judgement). For this criminal offence the Court of Appeals sentenced SS to 5 (five) years and 3 (three) months of imprisonment, and JD to 5 (five) years of imprisonment.

6. The Court of Appeals further modified Judgment P 938/13 of the Basic Court of Mitrovicë/Mitrovica by finding defendants SS and SL guilty, and acquitting defendant SJ of the following criminal act: in their capacity as the KLA members and persons exercising control over the Likoc/Likovac detention centre, in co-perpetration with each other as it is defined in Article 31 of the CCK, they violated the bodily integrity and the health of an unidentified number of Albanian civilians detained in such detention centre by keeping them in inappropriate premises with lack of sanitation, inadequate nutrition, suffering frequent beatings, at least during August and September 1998, hereby classified as a war crime under 152(1) and (2)(2.1), (2.2) of the CCK, and in case of SL, in conjunction with Article 161(1)(1.1) of the CCK, both in violation of Article 4(2)(a) of the Additional Protocol II to the Geneva Conventions, in conjunction with Article 33(2) of the Constitution of the Republic of Kosovo (hereinafter will be referred to as "Count IX" based on the paragraph number of the enacting clause of the Basic Court Judgement). For this criminal offence SS was sentenced to 8 (eight) years of imprisonment, and SL to 7 (seven) years of imprisonment. Pursuant to Articles 80(1) and (2.2), and 82(1) of the CCK and taking into consideration the punishment imposed in the judgement of the Court of Appeals in case PAKR 456/2015 dated 14 September 2016, SS was imposed the aggregate punishment of 10 (ten) years of imprisonment.

7. The Court of Appeals further modified the Basic Court Judgement in relation to the calculation of the time spent in detention as follows: pursuant to Article 83(1) of the CCK, the period of deprivation of liberty of SS, JD, and SL in house detention from 23 May 2013 to 31 May 2013, in detention on remand from 31 May 2013 to 19 December 2014, and in detention on remand from 27 May 2015 until the delivery of the Court of Appeals judgement shall be credited for the punishment of imprisonment imposed on the defendants.

8. On 29 November 2016, the defence counsel on behalf of defendant JD filed the appeal against Judgment PAKR No. 445/15 of the Court of Appeals rendered on 15 September 2016 moving the Supreme Court to amend the impugned judgement by and acquit the defendant of all charges or to annul the impugned judgement and to send the case for retrial, and to terminate the detention on remand.

9. On 29 November 2016, the defence counsel on behalf of defendant SL filed the appeal Judgment PAKR No. 445/15 of the Court of Appeals rendered on 15 September 2016 moving the Supreme Court to annul or modify the impugned judgement and to issue the judgement of acquittal, or pursuant to Article 398(1)(1.3) of the CPC to annul the impugned judgement and send the case for the re-trial.

10. On 30 November 2016, the defence counsel on behalf of defendant SS filed the appeal against Judgment PAKR No. 445/15 of the Court of Appeals rendered on 15 September 2016 moving the Supreme Court to reverse the convictions and reinstate the acquittals.

11. On 20, 21, and 22 December 2016, the Prosecution filed its replies to the appeals moving the Supreme Court to declare the appeals as belated, or, in alternative, reject the appeals as unfounded.

II. Submissions of the parties

Submissions on behalf of JD

12. The defence counsel claims that the judgement of the Court of Appeals contains substantial violations of the provisions of criminal procedure, erroneous and incomplete determination of the factual situation, violation of criminal law and erroneous decision on sentence. Therefore, the defence moves the Supreme Court to amend Judgement of the Court of Appeals PAKR 455/15 by acquitting JD or to annul Judgement of the Court of Appeals PAKR 455/15 and send the case for re-trial, and terminate the detention on remand against the accused.

13. The defence counsel claims that the impugned judgement contains substantial violations of the provisions of criminal procedure, and erroneously established facts and circumstances. The defence claims that the Court of Appeals contains violations of law because JD was found guilty for the criminal offence that he did not commit. The specific allegations raised by the defence counsel will be addressed in the reasoning of the present judgement.

Submissions on behalf of SL

14. The defence claims that Judgment of the Court of Appeals PAKR 455/15 dated 15 September 2016 contains essential violations of the procedural provisions, namely violation of principle *in dubio pro reo*, and erroneous determination of the factual situation. The defence therefore moves the Supreme Court to annul or modify the impugned judgement and to issue the judgement of acquittal, or pursuant to Article 398(1)(1.3) of the CPC to annul the impugned judgement and send the case for re-trial. The specific allegations raised by the defence counsel will be addressed in the reasoning of the present judgement.

Submissions on behalf of SS

15. The defence claims that the Court of Appeals judgement is based on inconsistently applied legal standards, a failure to consider the evidentiary record as a whole, and misinterpretations about the trial evidence, it reflects significant legal and factual errors, and constitutes a failure to provide a reasoned, legal opinion by a neutral and impartial court. The defence therefore moves the Supreme Court to reverse the convictions and reinstate the acquittals. The specific allegations raised by the defence counsel will be addressed in the reasoning of the present judgement.

Replies of the Prosecution

16. The Prosecutor requests the Supreme Court to reject the appeals filed by the defence counsel on behalf of JD, SL and SS as belated or, in alternative, as unfounded. The Prosecutor claims

that all three appeals should be declared as belated because the 10-day deadline set in Article 379 of the CPC was not met.

17. In relation to the composition of the panel, the Prosecutor points out that the defence did not raise its objection on the composition of the panel at the beginning of the trial. Further, this is a general practice within the Basic Court of Mitrovica to ensure that the cases falling under this court's jurisdiction will be adjudicated.

18. According to the Prosecutor, the defence's allegations that the proceedings were not concluded within reasonable time are without merit. The Basic Court judgement was issued within one year from the moment the trial started. The time elapsed between the filing of the SPRK's appeal and issuing the Court of Appeals judgement does not have any prejudice to the defendant as he was not in detention.

19. In relation to the allegations of an incomprehensible enacting clause, the Prosecutor claims that the enacting clause of the Judgement of the Court of Appeals meets the requirements set in Article 370 of the CPC. Additionally, the enacting clause has to be read together with the reasoning of the judgement.

20. The Prosecutor claims that as a general rule, the conviction can be based on the testimony of one witness. This is a generally accepted practice of international tribunals and is allowed by Article 262 of the CPC. The Prosecutor alleges that the requirements set in Article 262 of the CPC are fully met.

21. In relation to the concept of hostile witness, the Prosecutor concurs with the defence counsel that this concept is not expressly foreseen in the CPC. However, this concept derives from the obligation to conduct a fair trial. In case of hostility of a witness, the evidence obtained through the cross-examination of a witness by the party who called the witness is falling under the general discretion of the court to consider the evidence as admissible, relevant and with probative value. Therefore, the Prosecution's cross-examination was not in violation of Articles 333 and 334 of the CPC.

22. In relation to the questioning of the witness by the Presiding Judge of the Basic Court trial panel, the Prosecutor claims that the panel in the proceedings is not a passive observer and is entitled to ask questions in order to fulfil its duties under Article 7 of the CPC.

23. The Prosecution claims that even though the Indictment is not clear about the command responsibility, the defence was put on notice about it during the main trial. According to Article 360(2) of the CPC, the court shall not be bound by the motions of the State Prosecutor regarding the legal classification of the act. In this case certain requirements have to be met – the defence needs to be notified and have a chance to advance their defence in respect of the reformulated charge. In the present case, the defence was both notified and had an opportunity to advance their defence in relation to this mode of liability.

24. In relation to the effective control test related to the command responsibility, the Prosecution claims that this is a matter of evidence and should be considered in the light of the circumstances of the entire case. While it is true that *de jure* control does not automatically prove the effective control, the Court of Appeals effectively established that there was a detention centre that had a number of detainees who were subject to outrageous treatment. The first and the second instance courts established beyond reasonable doubt that SL held [a position] and SS held [a position], and was *de jure* superior of the KLA soldiers running the detention centre. Further, there was no evidence produced during the main trial showing any cracks in the command structures. Witness BG clearly indicated that SL and SS dealt with every issue with the KLA. This testimony is corroborated by Witness D who stated that everybody knew who their commander was.

25. In relation to the mental element, the Prosecution points out that the Court of Appeals rightfully concluded that the detention centre was located in the KLA Drenica Zone Headquarters. SL was often present in the house; he could not have possibly missed the presence of the detainees and their mistreatment. Therefore, the Prosecution claims that the Court of Appeals correctly established that it was proven beyond reasonable doubt that SL knew that some of the detainees were mistreated.

26. The Prosecution indicated that the Court of Appeals rightfully corrected the mistake made by the trial panel in relation to the general mistreatment of the prisoners. Witness A clearly described the brutal treatment he received and showed that other prisoners were severely mistreated. The statement of Witness D corroborates the evidence given by Witness A. Even if the Court of Appeals declared the statement of this witness as not credible, it still has some probative value.

27. The Prosecution disagrees with the defence that it is necessary to prove the injuries in order to consider the bodily injury to be considered as a war crime. The testimony about the beating of an unidentified man from Shipol area in Mitrovica clearly shows the humiliating treatment.

28. Concerning the credibility of the testimony of Witness A, the Prosecutor claims that the Court of Appeals' assessment is the one that a reasonable trier of facts could have made. The Prosecutor points out that minor discrepancies in the witness's testimony could be explained by the fact that the witness testified 16 years after the events, was under pressure by the defence and was heavily cross-examined. The defence's attack on the witness's personal integrity is without merit and has been addressed by the Court of Appeals. Finally, the Prosecutor points out that the courts should give a margin of deference to the finding of facts by the trial panel because the trial panel is best placed to assess the evidence.

III. Composition of the Panel

29. The Panel established that on 27 April 2017 (KJC No. 124/2017), the Kosovo Judicial Counsel (hereinafter "KJC") confirmed that the appeals against the Court of Appeals Judgement in the present case shall be adjudicated by a panel composed of a majority of EULEX judges and presided by an EULEX judge.

IV. Findings of the Panel

- *Applicable criminal procedure law*

30. In relation to the criminal procedure provisions applicable to the present proceedings, the Panel notes that according to Article 540 of the CPC, for any criminal proceedings initiated prior to entry into force of the CPC (1 January 2013), but without any indictment filed, the provisions of the CPC shall be applied *mutatis mutandis*. In the present case, the investigation was initiated on 19 January 2012. The indictment in the present case was filed on 8 November 2013. Therefore, the applicable criminal procedure in this case is the CPC in force from 1 January 2013.

- *Admissibility of the appeals*

31. The Prosecutor claims that all three appeals should be declared as belated because the 10-day deadline set in Article 379 of the CPC was not met.

32. The Majority of the Panel considers that in case of the third instance appeals, the deadline to file the appeal set in Article 380 of the CPC should be applicable. The Majority of the Panel is further mindful that Article 380 of the CPC exclusively indicates that appeal against a judgement rendered by the single trial judge or trial panel of the Basic Court shall be filed within 15 (fifteen) days of the day the copy of the judgement has been served. However, this article is in the chapter entitled "Appeals against Judgements" which also covers the third instance appeals. Further, in accordance to Article 407(2) of the CPC, the provisions regulating the procedure of appeal before the Court of Appeals shall be *mutatis mutandis* applicable to the procedure of appeal before the Supreme Court. Article 380 of the CPC clearly regulates the procedural aspect of the appellate procedures and should be extended to the procedure of appeal before the Supreme Court. Finally, any doubt in relation to the applicable law should be considered to the benefit of the defendant.

33. Therefore, the Majority of the Panel considers that even though expressly not indicated, Article 380 of the CPC should be applicable to the third instance appeal. This is in line with the general practice of the Supreme Court.

34. As such, the Majority of the Panel considers that the appeals filed by defence counsel on behalf of defendant JD on 29 November 2016, defence counsel on behalf of defendant SS on 30 November 2016, and defence counsel on behalf of defendant SL on 29 November 2016 are admissible. They are permitted (Article 407(1) of the CPC), and were filed by an authorised person (Article 381(1) of the CPC), within the prescribed deadline (Article 380(1) of the CPC), and to the competent court (Article 374(1)(1.1) of the CPC).

- *The panel of the Basic Court was composed in violation of law*

35. The defence of JD claims that Basic Court violated Article 384(1.1) of the CPC because the panel was composed in violation of the legal provisions set in Law No 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (hereinafter "Law No 03/L053"). This law does not foresee the possibility for a trial panel to be composed of three EULEX judges, and the agreement between the Head of EULEX Judges and the Kosovo Judicial Council is not valid because it is in contradiction with the existing legal provisions.

36. At the outset, the Panel notes that the issue related to the trial panel being composed of 3 (three) EULEX judges was already raised by the defence and addressed in great detail in the Basic Court judgement (*see* paragraphs 15 and 16 of the Basic Court Judgement P 938/13 and page 24 of the Court of Appeals Judgment PAKR 455/15). Both courts concluded that even though it is not specifically outlined in Law No 03/L053, the composition of the trial panel of three EULEX judges is a result of the specific security requirements and is the only way to ensure the right to fair trial.

37. The Panel notes that the Indictment in the present case was filed on 8 November 2013. At the time, the jurisdiction and competence of EULEX judges in the criminal proceedings was regulated by Law No 03/L-053. In accordance to Article 3.2 of this law, any case investigated or prosecuted by the SPRK is falling within the jurisdiction of EULEX judges. Further, in accordance to Article 3.7 of Law No 03/L-053, Panels in which EULEX judges exercise their jurisdiction in criminal proceedings will be composed of a majority of EULEX judges, and presided by one EULEX judge.

38. The Panel further notes that on 30 May 2014, Law No 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in Kosovo entered into force *inter alia* amending Law 03/L-053 (hereinafter "Law No 04/L-273"). In accordance to Article 2.3 of the Law on Jurisdiction, on 18 June 2014, the Head of EULEX Kosovo and Kosovo Judicial Council signed an Agreement on the Relevant Aspects of the Activity and Cooperation of EULEX Judges with the Kosovo Judges Working in the Local Courts (hereinafter "Agreement"). The Agreement was concluded as it is allowed by Law No 04/L-273 and intends to clarify certain aspects of the activity and cooperation between EULEX Judges and Kosovo judges. Specifically, Article 5(a) of the Agreement indicates that EULEX judges will ensure that the Basic Court of Mitrovica remains operational until multi-ethnic court system in the North is implemented and operational. Therefore, the Agreement shows the continued efforts of EULEX and the KJC to sort out the security concerns in the Basic Court of Mitrovica and ensure that the cases are adjudicated.

39. For the purposes of Article 14 of the International Covenant on Civil and Political Rights (hereinafter "ICCPR") and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), criminal proceedings must be conducted by a "tribunal established by law". This requirement, according to the European Court of Human Rights, embodies the principle of the rule of law inherent in the system of the ECHR and its protocols. A body that has not been set up in accordance with the will of the people, i.e., as expressed through the law, would necessarily lack the legitimacy that is needed in a democratic society for such a body to hear the case of individuals. Even though the expression "established by law" is not defined in the ICCPR or the ECHR, one of its core elements is the requirement of the sufficiently regulated legal framework. The ECHR adds that it is not necessary to regulate every aspect of the judiciary, so long as the legislation "establishes at least the organisational framework for the judicial organization".[1]

[1] *Zand v Austria* [1978] European Commission of Human Rights, paragraphs 69–70.

40. In the present case, the rules on the composition of the panel are sufficiently regulated and cover the basic requirements. However, Law No 04/L-273 does not address the extraordinary situations, e.g. when the trial panel cannot be composed based on the provisions set in Law No 04/L-273 due to the security concerns. The Agreement adopted 18 June 2014 manifests the attempt of the KJC and EULEX to sort out the issue and regulate this specific situation when the Basic Court of Mitrovica would become non-functional if the basic requirements set in Law No 04/L-273 would be followed. This attempt was in line with the doctrine of necessity which means that "*the disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice*".[2]

41. The Panel therefore considers that the security situation in the Basic Court of Mitrovica amounts to the extraordinary circumstance allowing to depart from the requirement set in Article 3.7 of Law No 04/L-273. The Panel considers that there was no other reasonably available solution which could have allowed to adjudicate the present case. If the trial panel would not consist of 3 (three) EULEX judges, the case would have been severely delayed to the detriment of the defendants. Therefore, the Panel concludes that the deviation from the general requirement to conduct the criminal proceedings by a "tribunal established by law" in the present case is based on extraordinary circumstances in order to ensure the defendants' right to fair and expeditious trial, and is in line with the defendants' rights set in Article 14 of the ICCPR, Article 6 of the ECHR, and Article 31(2) of the Constitution of Kosovo. Consequently, the allegation of the defence counsel of JD is rejected as unfounded.

- *The proceedings at the first and second instance courts were not concluded within reasonable time*

42. The defence counsel of JD claims that the impugned judgement violated the requirement to follow the procedural deadlines as it is defined in Articles 5, 314(1) and 384(2) of the CPC. The defendant was in detention and house arrest since 23 May 2013, but the final judgement

[2] Commentary on the Bangalore Principles of Judicial Conduct, https://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf, page 77.

has not been issued yet. Further, the judgement of the Court of Appeals was served on the defendant only 1 year and 5 months after the first instance judgement.

43. The Panel recalls that in accordance to Article 405(2) of the CPC, the Court of Appeals shall send its decision and the files to the Basic Court no later than 3 (three) months from the day it has received the files. The Panel confirms that the Court of Appeals' decision was not concluded within the deadline set in Article 405(2) of the CPC.

44. The Panel notes that the Court of Appeals held sessions on 11, 12 and 13 of May 2016, and deliberated on 21, 26 July and 15 September 2016. The judgement is 57 pages long and contains detailed analysis of the War Crimes against Civilian Population, including complex notion of command responsibility, the exhaustive factual and legal analysis of every allegation raised by the defendants and the Prosecution. There is no indication that the Court of Appeals delayed the judgement without any substantial reason. At the opposite, the judgment was prepared, finalized and served to the parties in a reasonable time considering the scope of the case.

45. In accordance to Article 6 of the ECHR, everyone has the right to a trial within a reasonable time. However, in assessing the reasonableness of the time, it is necessary to assess the circumstances of each individual case. When determining whether the duration of criminal proceedings has been reasonable, the Panel has to take into consideration factors such as the complexity of the case, the applicant's conduct and the conduct of the relevant administrative and judicial authorities.[3] The present case is clearly lengthy and complex. The issues covered by the Court of Appeals requires detailed research on applicable national and international law, and it required three days in deliberations to reach the decision.

46. Therefore, the Panel considers that the standard set in Article 6 of the ECHR is fully met even though the deadline set in Article 405(2) of the CPC is not met. The Panel further recalls that under Article 383(1) of the CPC, it must be established that the judgement of the Court of Appeals contains substantial violation of the provisions of the criminal procedure.

[3] ECHR, König v. Germany, paragraph 99; Neumeister v. Austria, paragraph 21; Ringeisen v. Austria, paragraph 110; Pélissier and Sassi v. France [GC], paragraph 67; Pedersen and Baadsgaard v. Denmark, paragraph 45.

The defence in the present case failed to demonstrate that violation of Article 405(2) of the CPC in relation to set deadlines violated the rights of the defence and possibly influenced the rendering of lawful and fair judgement. Therefore, the allegation of the defence counsel of JD is rejected as unfounded.

- *Incomprehensible and contradictory enacting clause*

47. The defence of JD alleges that the impugned judgement contains violations of Articles 370(3) and 365 of the CPC. The enacting clause of the Court of Appeals judgement is incomprehensible because it does not indicate which acts were undertaken by defendant JD, who was the person against whom the defendant allegedly used violence, what the injuries were and whether those actions constitute serious violation of Articles 3 and 4 common to all Geneva Conventions.

48. The Panel considers that the enacting clauses of the Judgement of the Basic Court is drawn in accordance to the requirements set in Article 370 (3) and (4) in conjunction with Article 365 of the CPC. The enacting clause contains full description of the acts of which the defendants were found guilty or acquitted together with the description of the facts and circumstances indicating their criminal nature and the application of pertinent provisions of the criminal law. The Basic Court Judgement clearly indicates the circumstances of the criminal offence, clear description of each act committed by each defendant, indicates which acts were committed in co-perpetration, and precisely names the injured parties. The enacting clause clearly describes an unidentified Albanian male from Shipol area in Mitrovica. The Panel further notes that the judgement has to be read in its entirety including the enacting clause and the reasoning. The enacting clause and the reasoning are inseparable parts of the judgement and certain part and/or sentences of the judgement cannot be read in isolation.

49. Therefore, the Panel considers that the defence counsel did not provide any concrete violations of Articles 365(1)(1.1), 370(4) and 384(1.10) of the CPC. The allegations of the insufficient and inconsistent enacting clause are rather related to the disagreement with the factual determination. The Panel notes, that possibly erroneously or incompletely established factual situation does not automatically mean that there is a substantial violation of the

criminal procedure. These are two separate grounds of an appeal which do not necessary interrelate. Therefore, the allegations raised by the defence counsel of JD in relation to incomprehensible and contradictory enacting clause are rejected as unfounded.

50. The defence of JD claims that the court exceeded the charges. The witness states that the beating of an unidentified person from Shipol area in Mitrovica occurred only one time. However, it is not clear from the enacting clause whether the beating occurred only on one occasion or whether it occurred continuously from the beginning of August until the end of September 1998.

51. In this regard, the Panel considers that this allegation is rather a misunderstanding of the Judgement. The Court of Appeals Judgement is long and complex document which contains a description of difficult factual and legal aspects. This might require careful reading and a great attention to detail. In this particular situation, the enacting clause clearly states that "on one occasion between the beginning of August and the end of September 1998". In this regard the enacting clause clearly states that the beating occurred on one occasion, but the timing of this on beating took place sometime between the beginning of August and the end of September 1998. Hence, the Panel considers that the enacting clause is not in contradiction with itself and it clearly determines for which acts the defendant was found guilty or acquitted of. The defence's allegation is therefore rejected as unfounded.

- *The Court of Appeals failed to apply the most favourable law*

52. The defence of JD claims that the judgement of the Court of Appeals is unclear and contradictory in relation to the qualification of the criminal offence and the applicable law. In the enacting clause, the Court of Appeals states that the criminal offence was qualified pursuant to Article 152(1) and (2)(2.1), (2.2) of the CCK and Article 33(2) of the Constitution of Kosovo; however, the reasoning of the judgement is not clear and it does not specify which law was applied. The defence counsel on behalf of JD claims that according to the commentary of Article 142 of CCSFRY, the criminal offence of war crime should be

considered as a single criminal offence regardless the number of individual activities committed.

53. In the present case, both courts addressed the issue of the applicability of the most favourable law. The Basic Court analysed the elements of the criminal offences of War Crimes in Serious Violation of Article 3 Common to the Geneva Convention as it is described in Article 120 of the Provisional Criminal Code of Kosovo (hereinafter "PCCK") and Article 152 of the CCK, and War Crimes against Civilian Population as it is described in Article 142 of the CCSFRY, and concluded that the CCK appeared as the most favourable law because it prescribed a milder sanction (*see* paragraphs 248 – 281 of the Basic Court Judgement P 938/13). The Court of Appeals on the other hand concluded that the Basic Court's reasoning on the applicable substantial law is not clear because Basic Court applied the CCSFRY along with the CCK. The Court of Appeals reassessed the application of the most favourable law and concluded that the imposed sanction cannot be the only element the court should assess. Given the fact that the concept of the criminal offence in continuation is not covered by the CCSFRY, but is established in Article 81 of the CCK, the Court of Appeals concluded that CCK is in fact the most favourable applicable law (*see* pages 46-49 of the Court of Appeals Judgment PAKR 455/15).

54. In relation to the applicable criminal law, the Panel is mindful of the principle of legality and its core which is the applicability of the most favourable law as described in Article 2(2) of the CCK and 3(2) of the PCCK. Article 11 of the Universal Declaration of Human Rights (1948) gives a very well structured definition of the principle "*No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed*". The same concept with nearly identical wording is found in several international and regional human rights treaties, including the International Covenant on Civil and Political Rights (1966), the European Convention for the Protection of Human Rights. Originated from the principle of legality, the concept of the most favourable criminal law is a tool that guarantees individual rights, thereby ensuring by its effectiveness, the accessibility

and predictability of the criminal law. Where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are the most favourable to the defendant.[4]

55. The Panel concurs with the Court of Appeals that the provisions of the criminal law cannot be analysed in isolation. The identification of the more favourable criminal law must be done by comparing and applying the law in its entirety. It is generally accepted that, to determine more favourable law, it is necessary to examine and compare the successive laws in terms of conditions of criminality of the act, prosecuting and sanctioning. The courts should consider not only the punishment provided for the offense, but also all rules and institutions related to the case and which influence the criminal liability of the perpetrator: unity and plurality of offenses, aggravation causes and mitigation of punishment, complementary punishments and accessories, provisions on attempt, participation etc. Therefore, the Panel considers that in case of the plurality of the criminal offences, the existence of concept of the criminal offence in continuation would be more favourable to the defendant. For this reason, the Court of Appeals correctly concluded that the CCK is the most favourable law and should be applicable in the present case.

56. Contrary to the arguments of the defence of JD, the Court of Appeals clearly explained the applicable law. The Court of Appeals further explained that the term *civilian population* covers the criminal offences committed against individual civilians because each civilian represents the entirety of the civilian population. The reasoning of the Court of Appeals in this aspect is completely in line with the commentary of Article 142 of the CCSFRY cited by the defence. Therefore, the Panel considers that the allegations of the defence counsel of JD are without merit.

- *The concept of "hostile witness" is not allowed by the CPC*

[4] ECHR, *Scoppola v. Italy (no. 2)* [GC], paragraphs 103-109.

57. The defence of JD claims that the examination of the witnesses was conducted unlawfully. Firstly, the declaration of witnesses as hostile witnesses (in particularly witnesses L, C, I and F) is contrary to the provisions of the CPC. The Prosecutor posed a lot of leading questions and the presiding judge in some cases assisted the Prosecutor. This is not consistent with the requirement of equality of arms and is detrimental to the factual determination.

58. The concept of hostile witness in the present case was introduced by the Basic Court and discussed in great detail in its judgement. The Basic Court concluded that even though this concept is not included in the CPC, the application of this concept is in live with the principle of equality of arms and the overall adversarial model of the criminal proceedings (*see* paragraphs 47-49 of the Basic Court Judgement P 938/13). The Court of Appeals in its judgement concurred with the assessment of Basic Court (*see* pages 25-26 of the Court of Appeals Judgment PAKR 455/15).

59. A hostile witness is a witness at trial whose testimony on direct examination is either openly antagonistic or appears to be contrary to the legal position of the party who called the witness. This concept is largely reflective of the common law system, and has two main components: the possibility for the calling party to cross-examine its witness, and to use the pre-trial statements during this cross-examination. As both courts correctly determined, this concept is not included in the present CPC. Therefore, the Panel turns to examine whether legal concepts not included into the applicable criminal procedure law could be used in the present case, and whether the use of such concepts violates the rights of the defendant.

60. The CPC exclusively states that the party calling the witness can only conduct direct examination (*see* Articles 332(1) and 333 of the CPC). At the same time, the other parties have a right to cross-examine the witness as it is determined in Articles 332(2) and 334 of the CPC. Generally, leading questions should not be used on the direct examination; however, they are permitted on cross-examination. Further, pursuant to Articles 123(2) and 337(5) of the CPC, the witness' prior statements could be used during the cross-examination of that witness. Therefore, the Panel finds that the prior statements could be used in cross-examination to challenge the contradictions of the witness testimony in the main trial. This of

course does not mean that the prior statements of the witnesses are going to be considered as direct evidence during the trial unless the conditions set in Article 337 of the CPC are met.

61. The Panel now turns to the question whether the interest of justice could dictate a certain measure of flexibility and whether the trial panel is in a position to allow the calling party to put prior inconsistent statement to its witness in order to clarify the contradictions. The Panel firstly notes that the continental system generally does not have the concept of the hostile witness because traditionally the witnesses are called and questioned under authority of the court, which has all previous inconsistent statements of the witness. The present criminal procedure of Kosovo manifests the interaction of the adversarial and inquisitorial systems. The present code shifts more responsibilities to the parties to present the case limiting the court's influence on the examination of the evidence. The judges under the present code have a limited role in calling and questioning the witnesses; their main responsibilities are related to the protection of the rights of the parties and the management of the proceedings. However, the present code remains silent how to handle the situation when the witness revokes the statement he or she made in the pre-trial stage.

62. Therefore, in this particular situation the Panel is of the opinion that the Basic Court correctly exercised its obligation to manage the criminal proceedings and to protect the rights of the parties by tackling the issue of the hostile witness. Having left the issue of the witnesses rejecting their pre-trial statement during the main trial would have hampered not only the interest of the parties but also the quest of the courts to meet the ends of justice. The Basic Court, given the role of the judge in the present code, chose to follow the model of the adversarial system, namely introducing the concept of hostile witness.

63. While the trial panel is in no way bound by the rules of the common law, it is important to be cautious in removing general safeguards that belong to the process for reasons of fairness to the parties and for the purpose of ascertaining the truth. The Panel is of the opinion that the Basic Court took all necessary precautions while allowing the calling party cross-examine its own witness. The Basic Court firstly addressed the issue in great detail, had the relevant witnesses declared as hostile and tackled the objections of the defence (*see* page 4, Minutes of the Main Trial, 17 September 2014; Minutes of the Main Trial, 24 July 2014, 5 August

2014, 17 September 2014, and 19 November 2014). The Basic Court used its discretion in limiting the scope of the questioning, and clarified the questions as necessary. Therefore, the Panel considers that the Basic Court carefully maintained the protection of the rights of the parties.

64. Finally, the Panel recalls that the appellate review has a limited scope. In this specific situation, the Panel has to assess not only whether the Basic Court and the Court of Appeals made a legal error, but also whether the concept of hostile witness causes prejudice to the parties. It must be shown that the overall assessment of the Basic Court of the Court of Appeals failed to render justice. In the present case, the Basic Court deflates four Prosecution witnesses (Witnesses C, I, L, and F) as hostile witnesses. Their pre-trial testimonies were used in the cross-examination lead by the Prosecution. The Panel points out that this was used only to determine the credibility of the witnesses. The Basic Court declared the testimonies of the four hostile witnesses as not credible and did not take their testimonies in consideration while determining the guilt of the defendants (*see* paragraphs 189 to 200 of the Basic Court Judgement P 938/13). Therefore, the Panel considers that the defendants failed to show how the use of the concept of hostile witness cause any prejudice towards them, and declares their allegations without merit.

- *The impugned judgements are erroneously based on the testimony of one witness*

65. The defence of JD and DD claims that the impugned judgement violated Article 2 of the CPC because the case was not adjudicated impartially and independently. The entire judgement is based only on the testimony of Witness A and his testimony is not supported by any other evidence.

66. The Court of Appeals addressed in great detail whether the conviction could be based on the testimony of one witness. The Court of Appeals clearly concluded that none of the situations described in Article 262 of the CPC occur; therefore the conviction can be based on the testimony of one witness even though the threshold in assessing the credibility of this witness should be higher (*see* page 31 of the Court of Appeals Judgment PAKR 455/15).

67. The Panel recalls that in accordance to Article 262(3) and (4) of the CPC, the testimony of one witness cannot be used as a basis for the defendant's guilt if the witness' identity is anonymous to the defendant and his defence counsel, and if the sole witness has a status of cooperative witness. As the Court of Appeals correctly determined, none of the limitations described in Article 262 of the CPC is applicable in the present case. This clearly shows that the law does permit a guilty verdict on the testimony of one witness identifying the defendant as the person who committed the charged crime. This practice is in line with the jurisprudence of international tribunals.[5]

68. The defence counsel of JD and SS disagrees with the conclusion of the Court of Appeals that the lawmaker allows to find a defendant guilty based on the testimony of one witness. The provisions of the CPC regulating the situation in which the defendant cannot be found guilty based on the testimony of one witness are clearly regulated; however, they are not applicable in the present case. Therefore, the Panel considers that the defence is rather challenging whether the evidence presented by Witness A was sufficient to determine the guilt of defendant JD and SS.

69. The Panel concurs with the defence that the evidence on the single witness should be assessed in light of the test of sufficiency. In assessing whether the direct evidence of the witness could be sufficient in establishing the guilt of the defendant, the most important aspect is the credibility. The Panel therefore considers that the allegation of the defence that the first and the second instance courts could not base the guilty verdict on the testimony of one witness is rather related to the disagreement with the factual determination. The Panel notes that possibly erroneously or incompletely established factual situation does not automatically mean that there is a substantial violation of the criminal procedure. These are two separate grounds of an appeal which do not necessary interrelate. Therefore, this allegation is hereby rejected as unfounded, and the disagreement of the defence in relation to the testimony of Witness A shall be addressed below.

[5] *See,* Muhimana Appeal Judgement, paragraph 101; Gacumbitsi Appeal Judgement, paragraph. 72; Semanza Appeal Judgement, paragraph 153; Limai et al. Appeal Judgement, para. 203; Kvoika et al. Appeal Judgement, paragraph 5761; Tadic Appeal Judgement, paragraph 65.

- *Erroneously concluded de novo review*

70. The defence of SS claims the Court of Appeals conducted an improper *de novo* review of the facts without explaining why the findings of the Basic Court were unreasonable. It has been accepted in international tribunals that the Court of Appeals may not substitute its own view of the evidence and factual findings for that of the trial court unless no reasonable trier of fact could have reached the original decision. Specifically, the Court of Appeals' conclusion in relation to the conditions of the detention is based on the assumptions.

71. At the outset, the Panel notes that standards of appellate review are drawn from and, to some extent reflect, the limited role of the appellate court in a multi-tiered judicial system. As a general rule, appellate judges are concerned primarily with correcting legal errors made by lower courts, developing the law and setting forth precedent that will guide future cases. The Basic Court judges, in contrast, are entrusted with the role of resolving relevant factual disputes and making credibility determinations regarding the witnesses' testimony because they see and hear the witnesses testify. A trial judge's factual findings are accorded great deference because the judge has presided over the trial, heard the testimony, and has the best understanding of the evidence. Under the clearly erroneous standard, it is not enough to show that the factual determination was questionable. An appellate court will affirm the trial court's factual determinations unless, based on a review of the entire record, it is left with the definite and firm conviction that a mistake has been committed. The wide margin of deference was also affirmed by the Supreme Court in previous cases "*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*".[6]

[6] 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.

72. The standard of the appellate review of the factual determination is set in Article 386 of the CPC. This article affirms that it is not enough to challenge the judgement by merely indicating the alleged error or incomplete determination of the fact by the trial panel. Rather, as the criminal procedure code 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.

73. Therefore, the Panel concurs with the defence of SS that the *de novo* standard cannot be used in questions of fact. However, the Panel further points out that the Court of Appeals did not agree with the Basic Court on the credibility of Witnesses B, and D (*see* pages 35-38 of the Court of Appeals Judgment PAKR 455/15). the Court of Appeals did not conduct *de novo* review, the court rather assessed the statement of the witnesses given in the main trial and contrary to the Basic Court concluded that the contradictions in these statements are too severe to consider them as credible. Therefore, the Panel considers that in reviewing the factual allegations the Court of Appeals correctly applied the erroneous standard.

74. However, the modification of acquittals is done purely based on the interpretation of law. Questions of law are reviewed *de novo*. Because during the appellate review, the courts are primarily concerned with enunciating the law, they give no deference to the trial court's assessment of purely legal questions. In this regard, in determining defendants' guilt in relation to Count IV, the Court of Appeals addressed purely legal questions of the elements of war crimes. Therefore, the Panel considers that the Court of Appeals applied correct standards of review in relation to the factual and legal determination done by the Basic Court. The allegations of the defence counsel of SS are therefore rejected as unfounded.

- *Credibility of Witness A*

75. The defence of JD and SS claim that the Court of Appeals erroneously concluded that statements of Witness A are reliable, credible, and supported by the testimony of Witness K and expert CB. The statements of this witness are contradictory and cannot prove any fact or

relevant circumstance, such as the time when he was brought to the detention, how long he stayed there, the time when he was mistreated, the level of mistreatment, the consequences to his health, the identity of the his family members was never established. The defence claims that the Court of Appeals failed to assess other factors in relation to the testimony of Witness A. Notably, the fact that the witness was diagnosed with acute psychosis, and had strong material reasons to be part of the witness protection program.

76. The Witness A's testimony was contradictory to the one he gave in another case – Drenica II. For example, the defence of JD claims that in that case the witness stated that he has never seen JD in the small room.

77. In relation to the beating of an unidentified person from the Shipol area in Mitrovica (Count IV), Witness A was not sure what time other detainees stayed in his room; he did not know the reasons why they were brought in or who brought them in. The witness further was not able to identify time when the beating took place. Further, the witness was not sure how long the three brothers stayed in his room. The defence of SS adds that at first, Witness A testified that only JD was doing the beating, whereas later due to leading questions, the witness changed his statement and added that SS also participated in the beating.

78. The testimony of Witness D was declared as not credible due to the same type of contradictions as in the testimony of Witness A. Thus, the Courts applied different legal standards.

79. The Basic Court and the Court of Appeals addressed the issue of the credibility of the testimony of Witness A in great detail (*see* paragraphs 109 to 119 of the Basic Court Judgement P 938/13, and pages 31-33 of the Court of Appeals Judgment PAKR 455/15). Both courts concluded that the overall account of Witness A seems to be consistent and coherent, therefore, both courts declared the testimony of Witness A as fully credible. Further, the Court of Appeals addressed each allegation of the defence raised in their appeals, namely alleged mental disease of the witness, his application to get the KLA veteran status, and the inconsistencies in the testimony claimed by the defence, clearly explained every

allegation and why the defence failed to show an error in the factual evaluation done by the Basic Court.

80. The Panel recalls the standard of the appellate review in relation to the factual determination as it is detailed in the previous chapter of the present judgement. The Panel further recalls that the Basic Court has full discretionary power in determining the appropriate weight and credibility to be accorded to the testimony of a witness. This assessment is based on a number of factors, 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, any prior examples of false testimony, any motivation to lie, and the witness's responses during cross-examination. The Panel further recalls that the Basic Court has the main responsibility to resolve any inconsistencies that may arise within or among witnesses' testimonies. It is within the discretion of the Basic Court to evaluate any such inconsistencies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence. It is not a legal error per se to accept and rely on evidence that deviates from a prior statement or other evidence adduced at trial. However, a Trial Chamber is bound to take into account any explanations offered in respect of inconsistencies when weighing the probative value of the evidence.

81. On the other hand, the party challenging a discretionary decision by the trial chamber must demonstrate that the Basic Court has committed a discernible error. The Basic Court's discretionary decision could be overturned only where it is found to be: (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of discretion.[7]

82. In the present case, the Majority of the Panel considers that there is no indication showing that the Basic Court or the Court of Appeals failed to evaluate the statement of Witness A or that the particular inconsistencies raised by the defence could potentially result in the two judgements being reversed or revised. The Majority of the Panel considers that such inconsistencies as the fact that Witness A was not sure whether FM and HP were present

[7] ICTY, POPOVIĆ et al. (IT-05-88-A), Appeal Judgement, 30.01.2015, paragraph 131.

when one of the brothers was beaten, would lead the Basic Court or the Court of Appeals to take a different decision in relation to the credibility of Witness A. Further, it is important to note that separate statements of the testimony of the witness cannot be assessed in isolation. For example, the defence claims that Witness A was contradictory, when stated that the three brothers from Shipol stayed in detention for 3-4 hours while later on he changed his testimony and claimed that the three brothers stayed in the detention over the night. The Majority of Panel considers that this statement is taken out of the context while it is clear that the witness talks about the three brothers staying in the detention over the night (*see* page 24 of Main Trial Minutes, 25 June 2014 and page 20 of Main Trial Minutes, 18 July 2014).

83. The Majority of the Panel considers that Witness A overall presented a detailed account of the events, his testimony was subject to cross-examination of all defendants (*see* Minutes of the Main Trial, 24, 25 June 2014, and 8, 16, 17, 18 July 2014). His accounts were consistent in the most crucial parts of his testimony. The Majority of the Panel is further mindful that there are certain contradictions between the statements of Witness A. Contrary to the submissions of all defence counsel, these contradictions are generally minor and do not call into question the decision of the Basic Court and the Court of Appeals to rely on the accounts of Witness A. Finally, the Majority of the Panel considers that the Court of Appeals correctly took into consideration the alleged mental disease of Witness A and the fact that he attempted to get enlisted at the KLA.

84. The Panel further notes that the statements given by Witness A in other cases have never been part of the present trial. Therefore, the Panel shall not address any allegations in relation to the statements of Witness A given in other cases.

- *The elements of war crimes were not fully established (Count IV)*

85. In relation to Count IV, the defence of SS claims that not all violation of bodily integrity, dignity or health constitutes a war crime. Physical or mental suffering must be proven. The injuries of the unidentified person from Shipol area in Mitrovica were never identified by Witness A. The Court of Appeals' reasoning is based on speculation and subjective opinion, therefore should be reversed.

86. This question whether it is necessary to prove physical suffering in order to determine that an act should be considered as grave violation of the common Article 3 of the Geneva Conventions was addressed by the Basic Court and the Court of Appeals. The Basic Court concluded that it is necessary to prove the grave consequences to the victim. In the present case, the seriousness of beating of the unknown man from the Shipol area did not reach the necessary threshold of seriousness (*see* paragraphs 239-244.2 and 282-289 of the Basic Court Judgement P 938/13). The Court of Appeals expressed its disagreement with the assessment of the Basic Court. In evaluating the grave breach of international humanitarian law, it is necessary to evaluate the overall conditions. The direct bodily harm caused to the victim or permanent damage to the health is not the only thing that should be considered (*see* pages 51-52 of the Court of Appeals Judgment PAKR 455/15). Therefore, the Court of Appeals reversed the acquittal rendered by the Basic Court, and found defendants SS and JD guilty for the criminal offence as described in Count IV.

87. The international tribunal statutes provide that only "serious" violations of the laws and customs of war crime within their jurisdiction may result in individual criminal responsibility pursuant to their statutes. An IHL violation is serious if it constitutes a breach of a "rule protecting important values, and the breach must involve grave consequences for the victim". All grave breaches of the Geneva Conventions are regarded as serious violations of IHL. It is a generally accepted practice of the international tribunals that in order the requirement of gravity to be fulfilled, the offence must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.[8] The Basic Court and the Court of Appeals concurred to this established practice; however, they disagreed as to the degree of the harm caused to the victim and whether it is possible to determine such harm based on the facts established in the present case.

88. In the present case, Article 152(2)(2.1) and (2.2) of the CCK define war crimes in serious violation of common Article 3 of the four Geneva Conventions as follows:

[8] ICTY, TADIĆ Duško (IT-94- 1-AR72), Interlocutory Decision on Jurisdiction - 02.10.1995, paragraphs 94; Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 66; ee also Prosecutor v. Kvocka et al., Case No. IT-98-30/1 (Trial Chamber), November 2, 2001, para. 123.

2. A serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 means one or more of the following acts committed in the context of an armed conflict not of an international character against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
2.1. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
2.2. committing outrages upon personal dignity, in particular humiliating and degrading treatment;

89. In the practice of the international courts inhumane or cruel treatment is defined as an intentional act or omission, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity, and which is committed against protected persons.[9] The degree of physical or mental suffering required to prove inhuman treatment or cruel treatment is lower than that required for torture but at the same level as that for wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions. For example, poor prison camp conditions could be considered as cruel treatment.[10] Humiliating and degrading treatment is broader than torture, inhuman treatment and causing great suffering or serious injury. It is aimed at protecting persons from humiliation and ridicule, rather than harm to the integrity and physical and mental well-being of persons. The crime must meet a certain objective level of seriousness to be considered an outrage upon personal dignity. The humiliation must be so intense that any reasonable person would be outraged.[11] To determine this, factors for consideration include the form, severity and duration of the violence, and the intensity and duration of the physical or mental suffering.

90. The Basic Court and the Court of Appeals concurred on the application of the International Humanitarian Law, and that it is necessary to show the serious consequences to the victim in order to determine whether the acts of the defendants amount to the serious violation of common Article 3 of the four Geneva Conventions. The determination of the seriousness of

[9] ICTY, Naletilid, Trial Judgement, paragraph 246; Čelebidi, Appeals Judgement, paragraph 426.
[10] ICTY, Limaj, Trial Judgement, paragraphs 288 – 289.
[11] ICTY, *Kunarac*, Appeals Judgement, paragraph 162.

the harm in question must be made on a case-by-case basis while assessing the evidence presented during the main trial. In this regard, the Basic Court and the Court of Appeals disagreed on the assessment of the sustained injuries.

91. In the present case, the Court of Appeals concluded that in order to define whether the unidentified person from the Shipol areal in Mitrovica suffered cruel treatment or humiliating and degrading treatment, it is necessary to address the overall circumstances. The Court of Appeals has concluded that there was a detention centre in Likoc/Likovac where there were a number of detainees kept under poor conditions (*see* pages 43-44 of the Court of Appeals Judgment PAKR 455/15). The unidentified person from the Shipol area in Mitrovoca was beaten in front of his brothers and other people (at least Witness A); he was beaten for a considerable period of time using punches and kicks (*see* page 24 of the Minutes of the Main Trial, 25 June 2014).

92. The Majority of the Panel concurs with the Court of Appeals that the overall circumstances clearly show that the unidentified person from the Shipol area in Mitrovica was kept in poor conditions for the considerable time; he was questioned by SS and later beaten by SS and JD. Such treatment clearly amounts to the cruel treatment and humiliating and degrading treatment as it is defined in Article 152(2)(2.1) and (2.2) of the CCK. The unidentified person from the Shipol area in Mitrovica went through a great physical and mental suffering, harm to the integrity of physical and mental well-being. Further, the serious mental harm need not result from acts causing permanent or irremediable mental impairment; it suffices that the harmful conduct cause grave and long-term disadvantage to the ability to conduct a normal life. In the present case, the three brothers from the Shipol areal in Mitrovica were detained because of the alleged cooperation with the Serbs, they were kept in the detention and beaten for a considerable length of time. The Majority of the Panel is of the opinion that this shows that the unidentified man from the Shipol area in Mitrovica was not only suffering physical violence, but also was exposed to the constant threat of violence which would last even after the release from the detention centre. Therefore, the Panel considers that the Court of Appeals correctly assessed the serious consequences to the victim, and correctly concluded that the beating of a man from the Shipol area in Mitrovica corresponds with the serious

violation of Article 3 common to the four Geneva Conventions. For this reason, the allegations of the defence counsel related to Count IV are rejected as unfounded.

- *The indictment did not charge the defendants with command responsibility*

93. The defence of SS claims that the defendant cannot be found guilty for Count IX under the theory of command responsibility because this mode of liability had never been dealt with by the trial panel. The Indictment has never charged SS with command responsibility. The defence alleges that SS was charged as a co-perpetrator for this crime; therefore the defendant did not have a chance to challenge the concept of command responsibility.

94. The Panel notes that the Indictment in relation to defendants SL and SS reads as follows "*the defendant, in his capacity as a KLA member and as a person exercising control over the Likoc/Likovac detention centre*" (*see* pages 12 and 13 of Indictment PPS 88/11). In this regard the Panel disagrees with the defence of SS that the defendant was not charged with the command responsibility. The ability to exercise the control over the Likoc/Likovac detention centre is the core element of this mode of liability. While the Panel acknowledges that the Indictment could have been more precise in using the exact terms defining each mode of liability, the Panel is of the opinion that the Indictment includes the description of the command responsibility. Therefore, the Panel rejects this allegation as unfounded.

- *The elements of command responsibility were not established*

95. The defence of SL and SS claim that the Court of Appeals failed to establish the elements of command responsibility in relation to Count IX. Commander's responsibility has certain strict conditions. The following elements have to be proven beyond reasonable doubt: (1) criminal act or omission committed by somebody else than the defendant; (2) superior-subordinate relationship; (3) superior knew or had a reason to know that his subordinate was about to commit or already committed the criminal offence; (4) the defendant failed to take necessary actions to prevent or punish his/her subordinates for the criminal offence.

96. It is also necessary to prove effective control. It is not enough to prove *de jure* authority. The defence claims that in the present case, the Courts merely concluded that SL and SS [held positions]. The Court of Appeals further considered that the testimony of witness BG was sufficient to show that both defendants had the effective power to make decisions in the KLA Headquarters. However, the statement of witness BG who admitted that he had never seen SL giving orders to others was not taken into consideration. There were a lot of witnesses during the main trial who gave the evidence showing that SL did not have the command responsibility or effective control. The defence argues that BG's statement that "*whenever he had any issue with the KLA, he was ready to meet with SS and SL*" is not enough to show that SL exercised effective control. This sentence is taken out of the context and is in contradiction with other parts of the witness's statement. BG was in Likoc/Likovac only twice, and he has never met SL there or been present when military orders were given; therefore, according to the defence, he could not know the superior-subordinate relationship, or the ability of the superiors to take decisions. Further, the defence claims that the Court of Appeals did not consider the statement of Dr. FB who saw SL only as a patient. The defence of SS adds that he cannot be found guilty for command responsibility if he was actively involved in the commission of a crime.

97. The defence of SL adds that the Court of Appeals failed to prove beyond reasonable doubt that SL knew or had a reason to know what was happening in the detention centre. Firstly, there is no evidence in the case showing that SL was involved in the beating of the detainees, their cruel, humiliating and degrading treatment. Secondly, limited space of the headquarters cannot be considered as the only element proving the mental element.

98. The defence claims that the Court of Appeals erroneously concluded that SL failed to exercise his authority to terminate the actions that were committed there. S was mostly absent from the prison in Likoc/Likovac, therefore, the mental element cannot be considered as established beyond reasonable doubt.

99. The Basic Court concluded that there was no evidence that apart from Witness A there were other people maltreated in the detention centre, and that it has not been proven that the defendants exercised the effective control over the detention centre (*see* paragraphs 210-2017

of the Basic Court Judgement P 938/13). The Court of Appeals on the other hand disagreed with the Basic Court in relation to both aspects. The Court of Appeals concurred with the Basic Court that the testimony of Witness A is reliable and credible. This witness clearly testified about multiple individuals in the detention centre who were maltreated. Beating is considered as a part of cruel, humiliating and degrading treatment. Further, the Court of Appeals indicated that in the present case, the concept of command responsibility should be considered. There is enough evidence to prove that all defendants were holding high positions within the KLA structure. The Court of Appeals concluded that there is enough evidence (notably the statement of BG) showing that SS and SL had effective control over the camp. In relation to the knowledge, the Court of Appeals established that SS was an active perpetrator of the beating of the detainees, and that proves his knowledge. In relation to SL, his direct participation is not proven. However, due to his high position and effective control over the camp, the knowledge is established (*see* pages 43-46 of the Court of Appeals Judgment PAKR 455/15).

100. At the outset, the Majority of the Panel fully adopts the conclusions of the Court of Appeals in relation to the fact that there was a detention centre established in Likoc/Likovac at least at the time of the captivity of Witness A. The Majority of the Panel recalls that Witness A was declared as credible witness and he described in great detail the detention of a number of people and the condition he and the other people were held in.

101. The Panel now turns to the analysis of the command responsibility. Article 161(1) of the CCK defines the command responsibility of the military commander as follows:

> 1. A military commander or person effectively acting as a military commander shall be criminally liable for the criminal offenses referred to in Articles 148-156 of this Code committed by forces under his or her effective command and control, or effective authority and control, as a result of his or her failure to exercise control properly over such forces, where:
>
> > 1.1. that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such criminal offenses; and
> > 1.2. that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

102. This Article is in line with the practice of the international tribunals. It has been widely established that there are three main elements of the command responsibility: (i) the existence of a superior-subordinate relationship of effective control between the accused and the perpetrator of the crime; and, (ii) the knowledge, or constructive knowledge, of the accused that the crime was about to be, was being, or had been committed; and, (iii) the failure of the accused to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator.[12] The Panel notes that the Court of Appeals correctly established the main elements of the command responsibility.

103. The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. Therefore, it is of essential importance to show the superior-subordinate relationship between the commander and his/her subordinates. The first step in determining such relationship is the assessment of the official position of the commander. A formal position of authority may be determined by reference to official appointment or formal grant of authority.[13] In the present case, the Court of Appeals correctly concluded that SL and SS had clear appointments within the structure of the KLA. SS [held a position], and SL [held a position], later promoted to [the position] (*see* page 45 of the Court of Appeals Judgment PAKR 455/15).

104. The Panel further notes that even though there is enough evidence to establish the official positions of the defendants, there is no evidence to show the tasks and duties of [positions]. There is no evidence of any instruction issued to subordinates, or any evidence showing the defendants' responsibility to handle disciplinary matters. The only connection between the Headquarters of Drenica Operational Zone and the detention facility seems to be that they were in the same building (*see* page 45 of the Court of Appeals Judgment PAKR 455/15). There is no evidence regarding the establishment of the detention centre, the command and control structures that might have been in place in that detention centre, or any official appointments.

[12] ICTR, *Bagilishema,* (Trial Chamber), June 7, 2001, para. 38
[13] ICTY, *Kordic and Cerkez*, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 419.

105. Therefore, the Panel considers that it is of utmost importance in the present case to assess whether defendants SL and SS exercised the effective control over their subordinates. The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only de facto, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment.[14]

106. The principle of command responsibility must only apply to those superiors who exercise effective control over their subordinates. The concept of effective control over a subordinate – in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised – is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 161(1) of the CCK. Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders. This requirement is not fulfilled by a simple showing of an accused individual's general influence. That said, indications for the existence of effective control are 'more a matter of evidence than of substantive law', depending on the circumstances of each case, and that those indications are confined to showing that the suspect had the power to prevent, repress and/or submit the matter to the competent authorities for investigation. For example, in the *Kordić and Čerkez* Judgement, the ICTY Trial Chamber held that "*the capacity to sign orders will be indicative of some authority. The authority to issue orders, however, may be assumed de facto. Therefore in order to make a proper determination of the status and actual powers of control of a superior, it will be necessary to look to the substance of the documents signed and whether there is evidence of them being acted upon*".[15] Further, in another case,

[14] ICTY, Mucic et al. ("Celebici"), AC, Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, para. 193.
[15] ICTY, Kordic and Cerkez, TC, Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 421 confirming ICTY, Mucic et al. ("Celebici"), TC, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 672. Also ICTY, Naletilic and Martinovic, TC, Judgement, Case No. IT-98-34-T, 31 March 2003, para. 67.

the ICTR noted that while proof that an accused is not only able to issue orders but that his orders are actually followed provides an example of effective control.[16]

107. In the present case, the Court of Appeals concluded that the defendants [held positions] which was in the same building as the detention facility. Further, the Court of Appeals relied on the testimony of witness BG who claimed that whenever he had an issue with the KLA, he was willing to meet SS and SL (*see* page 45 of the Court of Appeals Judgment PAKR 455/15). The Panel notes that this evidence is insufficient to prove that SL and SS were effectively acting as military commanders over the Likoc/Likovac detention centre. The evidence presented in the case proves beyond reasonable doubt their position in the KLA chain of command rather than their ability to exercise effective control over the detention facility. Therefore, the Panel finds that no reasonable trier of fact could have found that the appointment as [position] or the mere presence at the detention facility demonstrated the effective control over the defendants' subordinates, which, in turn, imposed a duty on that authority to prevent the soldiers from committing crimes or to punish them for the crimes committed. Consequently, the Panel concludes that it has not been proven beyond reasonable doubt that SS and SL exercised effective control over the detention centre.

108. The Panel further notes that the degree of the superior's effective control guides the assessment of whether the individual took reasonable measures to prevent, stop, or punish a subordinates' crime. In this regard, the Court of Appeals did not address the issue whether defendants SL and SS took any measures to stop the unlawful acts. In this regard, the Panel notes that this issue was not discussed during the main trial either. Therefore, the Panel cannot make a conclusive analysis of this element of the command responsibility. Pursuant to Article 3(2) of the CPC, doubts regarding the existence of facts relevant to the case shall be interpreted in favour of the defendants. As such, the Panel is of the opinion that the defendants SL and SS cannot be held accountable for the command responsibility.

109. As the last element of the command responsibility, it is necessary to establish that he commander/superior knew, or had reason to know that his subordinates committed or are

[16] ICTR, NYIRAMASUHUKO et al. (Butare), (ICTR-98-42-A), Appeal Judgement - 14.12.2015m paragraph 2568.

about to commit a criminal offence. The superior's knowledge cannot be presumed, but it may be established through the circumstantial evidence. Factors to consider in determining this knowledge include: number, type and scope of illegal acts, time during which they occurred, the number of subordinates involved, geographical location; whether the acts were widespread, the location of the accused at the time and other factors. It should be noted that more physically distant the superior was from the scene, the more evidence may be necessary to prove his knowledge. Conversely, the commission of a crime in the immediate proximity of the place where the superior ordinarily carried out his duties would suffice to establish a significant indication that he had knowledge of the crime, a fortiori if the crimes were repeatedly committed. The Panel notes that in the present case, defendant SS was a direct perpetrator while SL was present at time at the Headquarters (*see* page 45 of the Court of Appeals Judgment PAKR 455/15). Even though it might be enough circumstantial evidence in the present case to establish the knowledge of the defendants, the Panel considers that the command responsibility is a mode of liability that is based on omission. Having concluded that the effective superior-subordinate relationship and the failure to act were not proven beyond reasonable doubt, the possible knowledge of the criminal offence in the present case is not enough to consider the defendants criminally liable as commanders.

110. **Having concluded that the elements of the command responsibility are not established beyond reasonable doubt, the Panel therefore acquits defendants SS and SL of the criminal offence as it is detailed in Count IX.**

- *The decision on punishment*

111. Pursuant to article 64(1) PCCK, the court shall determine the punishment within the limits provided for by the law for such criminal offence, taking into consideration the purpose of the punishment, mitigating and aggravating circumstances and, in particular, the degree of criminal liability, motives, intensity of danger to the protected juridical value, circumstances in which the act was committed, the past conduct of the perpetrator, the entering of a guilty plea or plea-agreement, the personal circumstances of the perpetrator and

his or her behaviour after committing the criminal offence. Additionally, the punishment has to be proportionate.

112. The Basic Court considered the aggravating and mitigating circumstances in relation to SS and SL. Notably, the Basic Court concluded that SL acted flagrantly with blatant disregard for the possibility of his crime being exposed by the witness. In relation to SS, the Basic Court took into consideration the degree of suffering inflicted on Witness A. as mitigating circumstances, in relation to both defendants, the Basic Court took into consideration the fact that they both held important and prestigious positions which served the public, and that they were fighting for their nation (*see* paragraphs 298-302 of the Basic Court Judgement P 938/13). The Court of Appeals considered the facts that defendants SS, SL and JD are living an honest life after the war as mitigating circumstance. However, the Court of Appeals rejected the fight as the KLA members as a mitigating circumstance. In relation to the aggravating circumstances, the Court of Appeals took into consideration the fact that SS was [held a position], and in most of situations had more authority than SL (*see* page 55 of the Court of Appeals Judgment PAKR 455/15).

113. In relation to defendant JD, the Majority of the Panel considers that the Court of Appeals correctly assessed the mitigating circumstances. The Majority of the Panel further notes that the Court of Appeals did not identify any aggravating circumstances in relation to JD. Therefore, the Majority of the Panel considers that the Court of Appeals correctly considered the overall circumstances and fully subscribes with the findings of the Court of Appeals in relation to the determination of the sentence for defendant JD.

114. The Panel takes into consideration that in the present judgement defendants SL and SS were acquitted of the criminal offence as it is described in Count IX. Therefore, the Majority of the Panel considers that the punishment imposed to defendants SL and SS shall be modified.

115. In relation to defendant SL, the Panel takes into account that the defendant was acquitted of two criminal offences by the Basic Court and later by the Court of Appeals, and notes that he was acquitted of the criminal offence as it is described in Count IX by the present

judgement. As such, the defendant was acquitted of all charges. Therefore, pursuant to Article 403(3) of the CPC, the Panel terminates the detention on remand against SL and orders his immediate release.

116. In relation to defendant SS, the Majority of the Panel firstly considers that the punishment shall be modified because the defendant was acquitted of the criminal offence as it is described in Count IX by the present judgement. In reconsidering the punishment, the Majority of the Panel fully subscribes to the mitigating and aggravating circumstances analysed by the Court of Appeals. Namely, as the mitigating circumstance, the Majority of the Panel considers that defendant SS lives an honourable life after the war, and held an important position to serve the public interest. As an aggravating circumstance, the Majority of the Panel takes into consideration the fact that SS [held a position], and an as such had an important role within the KLA. The Majority of the Panel further notes that defendant SS was sentenced by the Court of Appeals to 5 (five) years and 3 (three) months of imprisonment for the criminal offence as it is described in Count IV. Finally, the Majority of the Panel considers that the Court of Appeals correctly applied Article 82 of the CCK and took into consideration the punishment imposed on SS by the Court of Appeals in case PAKR 456/2016 (namely 7 (seven) years of imprisonment). Therefore, pursuant to Articles 80(1) and (2)(2.2) and 82(1) of the CCK, taking into consideration all the above-mentioned circumstances and principle *reformation in peius*, the Majority of Panel imposes to defendant SS the sentence of 8 (eight) years of imprisonment.

For the above it has been decided as in the enacting clause.

Presiding Judge **Recording Officer**

Krassimir Mazgalov
EULEX Judge

Sandra Gudaityte
EULEX Legal Officer

Panel members

_____

Arnout Louter
EULEX Judge

_____

Emine Mustafa
Supreme Court Judge