

In the name of the people

The Basic Court of Mitrovicë/Mitrovica in the trial panel composed of EULEX judges: Dariusz Sielicki as the presiding trial judge, Vidar Stensland and Iva Niksic as panel members, assisted by EULEX Legal Officer Chiara Tagliani acting as recording clerk in the criminal case No. P 938/2013 against the following accused charged with the indictment No. PPS 88/11 filed with the Court by the prosecutor of the Special Prosecution Office of the Republic of Kosovo on 8 November 2013:

1. **J.D.** , father's name H. , born on _ ____ _,'
2. **S.G.** , father's name S. , born on _ ____ _'
3. **I.H.** , father's name S. , born on _ ____ _,'
4. **S.J.** , father's name H. , born on _ ____ _'
5. **S.L.** , father's name M. , born on _ ____ _'
6. **S.S.** , father's name S. , born on _ ____ _'
7. **A.Z.** , father's name H. , born on _ ____ _';

after the main trial held in public and in the presence of all the accused and their defense counsel, respectively: Haxhi Millaku for **S.G.** ; Thorsten Link until 14 October 2014 and Tahir Rrecaj for **S.J.** ; Mexhid Sylja for **J.D.** , Tomë Gashi, Gregor Guy Smith, and Ibrahim Dobruna for **S.S.** ; Mahmut Halimi for **I.H.** ; Luljeta Ginovci until 24 September 2014, Dr. Ingo Risch until 4 December 2014; Arianit Koci from 24 September 2014 for **S.L.** ; and Gani Rexha for **A.Z.** ;

on the days: 22 and 23 May; 12, 13, 24, and 25 June; 8, 16, 17, 18, 22, 23, and 24 July; 4 and 5 August, 17, 24, and 25 September; 7, 8, 14, and 29 October; 11, 12, 13, 18, 19, and 20 November; 3, 4, 5, and 11 December 2014; and on 15 January; 3 and 13 February; 10, 11, 19, and 24 March; and 22, 24, 28, and 29 April; 12, 19, and 25 May 2015;

after the trial panel's deliberation and voting held on 25 and 26 May 2015, on 27 May 2015, pursuant to the Article 359 Paragraph 1 of the Criminal Procedure Code of the Republic of Kosovo (CPCRK) in the presence of accused, their defense counsel, EULEX Prosecutor of the Special Prosecution Office of Kosovo Charles Hardaway, pronounces in public the following:

V E R D I C T

I. S.L. _____ is guilty of the following criminal act: that acting in a brutal manner __ intentionally took the life of an unidentified _____ speaking _____ around _____ years old in such a way that __ put a TT-type pistol to the _____'s head while the ____ had ____ hands tied and was guarded by ____ unidentified _____, and then fired ____ shots in the _____'s head and thereby caused ____ death, in an undetermined location between the villages of _____ and _____, on an undetermined date in _____ and this action is hereby classified as a murder under Article 30 Paragraph 2 Subparagraph 1 of the Criminal Law of the Socialist Autonomous Province of Kosovo of 28 June 1977 (CLSAPK), and for this crime, pursuant to Article 30 Paragraph 2 Subparagraph 1 of the CLSAPK and Article 38 Paragraph 1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY) in its wording as entered into force on 1 July 1977 whereas all these provisions were retained in force by Paragraph 1.1 (b) of the United Nations Interim Administration Mission in Kosovo Regulation 1999/24 of 12 December 1999,

S.L. _____ is hereby sentenced to 12 (twelve) years of imprisonment;

II. S.S. _____ is guilty of the following criminal act: that, during the internal armed conflict in Kosovo, on several occasions, in _____ and _____, acting as a member of the _____ (____), __ seriously violated Article 3 common to the four Geneva Conventions of 12 August 1949, because __ intentionally perpetrated violence, cruel treatment, and torture against Witness A, a _____ civilian detained in the _____'s _____ facility in _____/_____ (_____/_____ municipality), who took no active part in hostilities, by beating ____ with punches and slaps, (____), inside the detention cell, and this action, pursuant to Article 33 Paragraph 1 of the

Constitution of the Republic of Kosovo is hereby classified as a war crime in continuation under Article 152 Paragraph 1, Paragraph 2 Subparagraph 2.1, and Article 81 Paragraph 1 of the Criminal Code of the Republic of Kosovo that entered into force on 1 January 2013 (CCRK), in violation of Article 4 Paragraph 2 (a) of the Additional Protocol II to the said Conventions, and for this crime, pursuant to Article 152 Paragraph 1 and Article 45 Paragraph 1 of the CCRK modified by Article 33 Paragraph 2 of the Constitution and by Article 38 Paragraph 1 of the CCSFRY in its wording as entered into force on 1 July 1977 that was retained in force by Section 1 Paragraph 1.3 of the UNMIK Regulation 1999/24 of 12 December 1999 **S.S.** is hereby sentenced to 6 (six) years of imprisonment;

III. It is established that during the internal armed conflict in Kosovo, on ___ occasion around ___ **S.G.** acting as a member of the ___ intentionally violated the bodily integrity and the health of Witness B, an ___ civilian detained in the ___'s ___ facility in ___/___ (___/___ municipality), by beating ___ repeatedly with a baton; however this action did not demonstrate characteristic of a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 as it was classified in the indictment and for this reason it did not constitute a criminal offence at the time of perpetration, and therefore, pursuant to Article 364 Paragraph 1 Subparagraph 1.1 of the CPCRK and Article 3 of the CCSFRY, **S.G.** is hereby acquitted of the charge consisting of this action;

IV. It is established that during the internal armed conflict in Kosovo, on ___ occasion between beginning of ___ and end of ___ **J.D.** and **S.S.** acting as members of the ___ and in co-perpetration with each other, intentionally violated the bodily integrity and the health of an unidentified ___ from the ___ area in ___, detained in the ___'s ___ facility in ___/___ (___/___ municipality), by repeatedly beating ___ up, in ___/___ (___/___ municipality); however this action did not demonstrate characteristic of a serious violation of Article 3 common to the four

Geneva Conventions of 12 August 1949 as it was classified in the indictment and for this reason it did not constitute a criminal offence at the time of perpetration, and therefore, pursuant to Article 364 Paragraph 1 Subparagraph 1.1 of the CPCRK and Article 3 of the CCSFRY, **J.D.** and **S.S.** are hereby acquitted of the charge consisting of this action;

V. It is established that during the internal conflict in Kosovo, on ___ occasion in _____ **S.S.** acting as a member of the ___, in co-perpetration with another so far unidentified ___ member, ___ intentionally violated the bodily integrity and the health of an unidentified _____ from _____ village detained in the ___'s _____ facility by beating ___ up while ___ was cleaning the floor of the _____, in ___/_____ (_____/_____ municipality), however this action did not demonstrate characteristic of a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 as it was classified in the indictment and for this reason it did not constitute a criminal offence at the time of perpetration, and therefore, pursuant to Article 364 Paragraph 1 Subparagraph 1.1 of the CPCRK and Article 3 of the CCSFRY, **S.S.** is hereby acquitted of the charge consisting of this action;

VI. Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPCRK **S.G.** and **S.J.** are hereby acquitted of the following count: that acting as the members of the _____ (___) and in co-perpetration with each other and other so far unidentified _____, they killed _____, a _____ by beheading ___ with a chain saw, in ___/_____ (_____/_____ municipality), on an undetermined date around ___-___ which count was classified in the indictment as a war crime against the civilian population provided for and punished by Articles 22 and 142 of the CCSFRY, because it was not proven that they committed the said action;

VII. Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPCRK **S.G.** and **S.J.** are hereby acquitted of the following count: that in their capacity

of members of the ____, in co-perpetration, they violated the bodily integrity and the health of Witness C, a civilian detained in a ____-run _____ center located in ____/____ (____/____ center), by repeatedly striking ____ with a baseball bat while **S. J.** kicked and punched ____, in ____/____ (____/____ municipality), on an undetermined date around the beginning of ____ ____ which count was classified in the indictment as a war crime against the civilian population, provided for and punished by Articles 22 and 142 of CCSFRY, because it was not proven that they committed the said action;

VIII. Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPCRK **I.H.** is hereby acquitted of the following count: that in ____ capacity of member of the ____, ____ violated the bodily integrity and the health of Witness F, a civilian, by firing a pistol in the direction of Witness F's leg the very same shot wounding ____ leg, and then hitting ____ on ____ forehead with the pistol butt, in an undetermined location near _____ village (_____/____ municipality) on an undetermined date in late ____/early ____ ____ which was classified in the indictment as a war crime against the civilian population under Article 142 of the CCSFRY, because it was not proven that he committed the said action;

IX. Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPCRK **S.J.**, **S.L.**, **A.Z.** and **S.S.** are hereby acquitted of the following count: that in their capacity as ____ members and persons exercising control over the ____/____ _____ (conditions, regulations, and the persons to be detained and/or released), in co-perpetration with each other, they violated the bodily integrity and the health (e.g. prisoners chained, premises inappropriate, excessive heat, lack of sanitation, inadequate nutrition, frequent beatings) of an undefined number of _____ civilians, detained in such _____, in ____/____ (_____/____ municipality), from _____ until the first months of ____, which was classified in the indictment as a war crime against the civilian population under Article 142 of the CCSFRY

because it was not proven that they committed the said action;

X. Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPCRK **S.J.** _____ is hereby acquitted of the following count: that in ___ capacity of member of the ___, in co-perpetration with an undetermined number of other persons, ___ repeatedly violated the bodily integrity and the health of _____, a _____ held captive at the hands of the ___; more precisely, the defendant participated in the crime by taking on several occasions _____ to the market square in ___/_____, by announcing publicly that whoever wanted to beat _____ could do so, and by keeping the victim at the disposal of an undetermined number of persons who slapped and hit ___, in ___/_____ (_____/_____ municipality), on several undetermined dates in early _____ which count was classified in the indictment as a war crime against the civilian population, provided for and punished by Articles 22 and 142 of CCSFRY, because it was not proven that they committed the said action;

XI. Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPCRK **S.J.** _____, **S.L.** _____, **A.Z.** _____ are hereby acquitted of the following action: that in their capacity of members of the ___, in co-perpetration with each other and with another identified person now deceased, and three so far unidentified _____, they violated the bodily integrity and the health of Witness F, a civilian detained in the ___/_____ by repeatedly kicking ___, in ___/_____ (_____/_____ municipality), on an undetermined date in early _____ which was classified in the indictment as a war crime against the civilian population under Articles 22 and 142 of the CCSFRY, because it was not proven that **S.J.** _____, **S.L.** _____, **A.Z.** _____ committed the said action;

XII. Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPCRK **S.J.** _____ is hereby acquitted of the following count: that in ___ capacity of member of the ___,)__ repeatedly violated the bodily integrity and the health of Witness E, a civilian detained in an annex

building of the ____/_____, over a period of approximately _____, including by flogging ____ with car chains, in ____/_____ (_____/_____ municipality), on undetermined dates in early _____, which was classified in the indictment as a war crime against the civilian population under Article 142 of the CCSFRY, because it was not proven that **S.J.** committed the said action;

XIII. Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPCRK **S.J.** is hereby acquitted of the following count: that in ____ capacity of member of the ____, in co-perpetration with other so far unidentified _____ violated the bodily integrity and the health of ____ so far unidentified civilians, a _____ and a _____, detained in an annex building of the ____/_____, who were severely beaten up, in ____/_____ (_____/_____ municipality), on undetermined dates in early _____, which was classified in the indictment as a war crime against the civilian population under Article 142 of the CCSFRY, because it was not proven that **S.J.** committed the said action;

XIV. Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPCRK **S.J.** and **S.S.** are hereby acquitted of the following count: that in their capacity of members of the ____, in co-perpetration with each other they violated the bodily integrity and the health of Witness I, a civilian detained in the ____/_____ _____, by repeatedly beating _____, in ____/_____ (_____/_____ municipality), on an undetermined date in late ____/early _____ of _____, which was classified in the indictment as a war crime against the civilian population under Article 142 of the CCSFRY, because it was not proven that **S.J.** and **S.S.** committed the said action;

XV. Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPCRK **A.Z.** is hereby acquitted of the following count: that in ____ capacity of member of the ____, in co-perpetration with ____ so far unidentified _____, violated the bodily integrity and the health of Witness F, a civilian detained in the ____/_____ _____

_____, _____, who was beaten with sticks; more precisely, the defendant participated in the crime by keeping the victim at the direct disposal of the ___ so far unidentified _____, who beat Witness F and by reinforcing their criminal intent with ___ presence in ____/____ (_____/_____ municipality), on an undetermined date in _____ which action was classified in the indictment as a war crime against the civilian population under Articles 22 and 142 of the CCSFRY, because it was not proven that **A.Z.** committed the said action;

XVI. Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPCRK **A.Z.** _____ is hereby acquitted of the following count: that in ___ capacity of member of the ___, in co-perpetration with ___ so far unidentified _____, ___ violated the bodily integrity and the health of Witness F and an unknown prisoner from _____, ___ civilians detained in the ____/____ _____, by repeatedly beating them, in ____/_____ (_____/_____ municipality), on an undetermined date in ____/____ _____ which action was classified in the indictment as a war crime against the civilian population under Articles 22 and 142 of the CCSFRY, because it was not proven that **A.Z.** _____ committed the said action;

XVII. Pursuant to Article 83 Paragraph 1 of the CCRK the period of deprivation of liberty of **S.S.** _____ from 24 May 2013 until 19 December 2014 shall be credited for the punishment of imprisonment imposed on _____;

1. Pursuant to Article 7 and Article 50 Paragraph 1 of the CCSFRY the period of deprivation of liberty of **S.L.** _____ from 23 May 2013 until 19 December 2014 shall be credited for the punishments of imprisonment imposed on _____;

XIX. Pursuant to Article 453 Paragraph 3 of the CPCRK, the cost of the criminal proceedings shall be partially reimbursed by:

- **S.S.** _____ in a scheduled amount of Euro 1200;
- **S.L.** _____ in a scheduled amount of Euro 1200;

while any remaining cost of the criminal proceedings shall be paid from the budgetary resources.

R E A S O N I N G

A. Procedural Background and Actions

I. The indictment

1. On 08 November 2013 the EULEX Prosecutor of the SPRK filed an Indictment no PPS 88/11 dated 6 November 2013. **S.L.** , **S.G.** , **S.J.** , **J.D.** , **S.S.** , **I.H.** , **A.Z.** were charged with various criminal acts. The defendants allegedly acted in their capacity of members of the ___ during the internal armed conflict in Kosovo in ____.

2. Most of the charges consisted of violation of bodily integrity and health of civilian prisoners that were allegedly kept in ___'s _____ in ____/_____. In particular:

2.1. **S.S.** was accused of:

2.1.1 violation of the bodily integrity and the health of Witness A, by beating ___ on an undetermined number of occasions, not fewer than _____, with punches and slaps inside the cell where ___ was detained, on several undetermined dates in _____ (count 13(2) of the indictment);

2.1.2 violation of the bodily integrity and the health of an unidentified person from _____ village, by beating ___ up while ___ was cleaning the floor of the prison, in co-perpetration with another so far unidentified ___ member, on an undetermined date in _____ (count 13(5) of the indictment);

2.2. **S.J.** _____ was accused that:

2.2.1 ___ repeatedly violated the bodily integrity and the health of Witness E, over a period of approximately _____, including by flogging ___ with car chains, on undetermined dates in early _____ (count 11(6) of the indictment);

2.2.2 in co-perpetration with other so far unidentified _____ violated the bodily integrity and the health of ___ so far unidentified civilians, a _____ and a _____, detained in an annex building of the _____/_____, who were severely beaten up, on undetermined dates in early _____ (count 11(7) of the indictment);

2.3. **S.J.** _____ and **S.S.** _____ were accused that in co-perpetration with each other they violated the bodily integrity and the health of Witness I, by repeatedly beating ___, on an undetermined date in late _____/early _____ of _____ (counts 11(8), and 13(7) of the indictment);

2.4. **J.D.** _____ and **S.S.** _____ were accused that in co-perpetration with each other they violated the bodily integrity and the health of an unidentified _____ from the _____ area in _____, on an undetermined date between beginning of _____ and end of _____ (counts 6(3), and 13(6) of the indictment);

2.5. **S.G.** and **S.J.** were accused that in co-perpetration with each other, they violated the bodily integrity and the health of Witness C, by repeatedly striking ___ with a baseball bat while **S.J.** kicked and punched ___, on an undetermined date around the beginning of ___ (counts 9(2), and 11(2) of the indictment);

2.6. **S.J.**, **S.L.**, **A.Z.** were accused that in their capacity of members of the ___, in co-perpetration with each other and with _____ (now deceased), and _____ so far unidentified _____, they violated the bodily integrity and the health of Witness F, by repeatedly kicking ___, on an undetermined date in early _____. More precisely, **S.L.** and **A.Z.** participated in the crime by keeping the victim at the direct disposal of the other perpetrators, who beat Witness F and by reinforcing their criminal intent with ___ presence (counts 11(5), 12(2), and 15(2) of the indictment);

2.7. **S.G.** was accused of violation of the bodily integrity and the health of Witness B, by repeatedly beating ___ with a baton around _____ (count [9(3) of the indictment);

2.8. **A.Z.** was accused that in co-perpetration with two so far unidentified _____:

2.8.1. ___ violated the bodily integrity and the health of Witness F, who was beaten with sticks; more precisely, the defendant participated in the crime by keeping the victim at the direct disposal of the ___ so far unidentified _____, who beat Witness F and by reinforcing their criminal intent with ___ presence on an undetermined date in _____ (count 15(3) of the indictment);

2.8.2. ___ violated the bodily integrity and the health of Witness F and an unknown prisoner from _____ by repeatedly beating them, on an undetermined date in ____/____ (count 15(4) of the indictment).

3. The indictment contained two charges related to violation of bodily integrity of civilians that allegedly took place in location other than _____ in ____/_____:

3.1. **I.H.** was accused that ___ violated the bodily integrity and the health of Witness F, a civilian, by firing a pistol round in ___ leg and then hitting ___ on ___ forehead with the pistol butt, in an undetermined location near _____ village (_____/_____ municipality) on an undetermined date in late ___/early ____ (count 10(1) of the indictment);

3.2. **S.J.** was accused that in co-perpetration with an undetermined number of other persons, ___ repeatedly violated the bodily integrity and the health of I.B. _____, a _____ held captive at the hands of the ___; more precisely, the defendant participated in the crime by taking on several occasions I.B. _____ to the market square in ____/____, by announcing publicly that whoever wanted to beat I.B. _____ could do so, and by keeping the victim at the disposal of an undetermined number of persons who slapped and hit _____, in ____/_____ (_____/_____ municipality), on several undetermined dates in early ____ (count 11(3) of the indictment).

4. Besides charges that consisted of violation of bodily integrity and health of civilians **S.J.** _____, **S.L.** _____, **S.S.** _____ and **A.Z.** _____ and were accused that as persons exercising control over the ____/_____ (conditions, regulations,

and the persons to be detained and/or released), in co-perpetration with each other, violated the bodily integrity and the health (e.g. prisoners chained, premises inappropriate, excessive heat, lack of sanitation, inadequate nutrition, frequent beatings) of an from _____ until the _____ months of _____ (counts 11(1), 12(1), 13(1), and 15(1) of the indictment).

5. There were also charges that consisted of killings:

5.1. **S.G.** and **S.J.** were accused that in co-perpetration with each other and other so far unidentified _____, they killed I. B. , a _____ by beheading _____ with a chain saw, in _____/_____(_____/_____ municipality), on an undetermined date around _____ (counts 9(1), and 11(4) of the indictment);

5.2. **S.L.** was accused of killing an unknown _____ civilian prisoner, by shooting _____ times in the head with a TT pistol, in an undetermined location between the villages of _____ and _____, on an undetermined date in _____ (count 12(3) of the indictment).

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

that were allegedly committed in co-perpetration consisted also of Article 22 of CCSFRY.

7. The same indictment consisted of two more charges that were later on severed with the ruling of the presiding judge dated 14 April 2014, in order to be heard in other proceedings.

7.1. The first of them was described as follows:

A.D. _____, **S.S.** _____, I. T. _____, Z. D. _____, F.D. _____, N.D. _____, S.D. _____, D.D. _____, B.D. _____, and **J.D.** _____ were also accused of: the following act that in co-perpetration with each other and with so far unidentified _____ members, they violated the bodily integrity and the health of Witness A and Witness B, _____ civilians detained in the _____/_____ _____, by:

- beating them with fists and wooden sticks;
- forcing Witness A and Witness B to beat each other;
- pinching Witness A's genitals with an iron tool and subsequently dragging _____ on the floor with it,

on an undetermined date in _____.

7.2. By the second charge that was also subject of the above mentioned Ruling on severance, **J.D.** _____, **S.S.** _____, I.T. _____, and Z.D. _____ were accused of the following act: that in co-perpetration with each other and other so far unidentified _____ members, on an undetermined number of occasions, they violated the bodily integrity and the health of Witness A, a civilian detained in the _____/_____ _____, by beating _____ with fists and wooden sticks on various parts of _____ body, on several undetermined dates in _____ and _____.

II. Objections to the indictment

8. With the ruling of the presiding judge dated 8 February 2014 the objections to the admissibility of the evidence presented in the indictment filed by all defense counsels and **A.Z.** _____self as well as their requests to dismiss the indictment were rejected as ungrounded. This ruling was upheld by the Court of Appeal on 8 April 2014.

III. Competence of the court and panel composition

9. In accordance with Article 11 Paragraph 1 of the Law on Courts, Law No. 03/L-199, basic court has jurisdiction to adjudicate at first instance all criminal offences.

10. The criminal offences, according to the indictment, were committed in the region of _____ which is in the territory of the Basic Court of Mitrovicë/Mitrovica. Therefore, in accordance with Article 29 Paragraph 1 of CPCRK, this court has territorial jurisdiction to adjudicate the case.

11. The case was investigated by the Special Prosecution Office of Kosovo; therefore, according to Article 3.1 of the Law No. 03/L-053 of 13 March 2008 "Law on Jurisdiction Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo"¹, EULEX judges have competence and jurisdiction over this case.

12. According to Article 286 of the CPCRK main trial should be held at the place where the court has its seat, and in the courthouse.

¹ Law is approved by Assembly, date 13.03.2008 and promulgated by the Decree of the President of the Republic of Kosovo No. DL-019-2008, date 15.06.2008.

13. On 15 May 2014, the President of the Basic Court of Mitrovica/a rejected the motions filed by defence counsel Dr. Ingo Risch on 2 May 2014; Haxhi Milaku, Mahmut Halimi, Mexhit Sylja, Tahir Rrecaj and Gani Rexha on 7 May 2014; and Gregor Guy Smith on 8 May 2014. The defence counsel Luljeta Gjinovci also filed a motion requesting a change of venue on 15 May 2014. This motion was rejected with the decision of the President of the Mitrovica Basic Court issued on 20 May 2014. On 23 June 2014, the defence counsel Gregor D. Guy-Smith filed another motion for change of venue, which was also rejected by a decision of the President of the Mitrovica Basic Court dated 26 June 2014.
14. The prosecutor presented his motion for the change of venue during the hearing on 22 May 2014. The panel refused to consider it due to the lack of subject matter competence, pursuant to Article 286 of the CPCRK.
15. It is a notorious fact that since March 2008 until the day the judgment was rendered because of specific security requirements in the north of Mitrovica/Mitrovica there has been firmly established practice that criminal cases in the Basic Court of Mitrovica/Mitrovica are tried by panels composed exclusively of EULEX Judges. This practice has never been contested by courts of any instance. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as Article 31 paragraph 2 of the Constitution of the Republic of Kosovo provide for a right to fair trial by tribunal established by law. The notion of "tribunal established by law" refers also to domestic legislation on territorial and factual jurisdiction. It appeared that exclusive participation of EULEX judges was the only way to observe the right to court.
16. Such practice was also reaffirmed in the Agreement between the Head of the EULEX Kosovo and the Kosovo Judicial Council on relevant aspects of the activity and cooperation of EULEX Judges with the Kosovo Judges working in the local courts (the 'Agreement'), of 18 June

2014, whereby under section 5 (a), the Agreement states that "EULEX Judges will ensure that the Basic Court of Mitrovica remains operational, until the multiethnic court system in the North is implemented and operational."

17. No issue was raised by the parties regarding the composition of the trial-panel. Therefore it is presumed that according to Article 382 Paragraph 4 of the CPCRK they waived the right to challenge the composition.

IV. Main trial

a. Duration of the main trial

18. The main trial commenced on 22 May 2014 and was concluded on 25 May 2015. It was heard on 46 trial days. At the opening session of 22 May 2014 the accused **S.J.**, **I.H.** and **S.L.** did not appear. The proceedings were therefore severed against them in accordance with Article 36 Paragraph 1 of the CPCRK. Since the mentioned accused appeared at the next session on 23 May 2014, the proceedings were then joined again.

19. The sessions scheduled for 09 October 2014, 12, 16 and 17 December 2014 and 05, 06 and 07 March 2015 were cancelled upon request of the parties. The sessions of 16 July 2014, 25 September 2014 and 24 March 2015 had to be adjourned because of health conditions of some defendants. All requests were justly reasoned and, therefore, granted.

20. Due to unusual length of testimonies of witnesses for the prosecution the duration of the main trial exceeded the period of 120 calendar days prescribed in Article 314 Paragraph 1.2 of the CPCRK. However; each subsequent adjournments ordered by the trial panel did not exceed 30

days and were always reasoned by indication of procedural actions to be taken during the next court session.

21. The parties did not raise objection to the duration of the trial. Therefore, pursuant to Article 382 Paragraph 4 of the CPCRK it has been presumed that they waived the right to challenge this matter.

b. The court facilities

22. Due to the significant number of participants and members of the public interested in observing the proceedings special arrangements were made in order to accommodate the trial in a proper way. The courtroom was properly furnished with pieces of furniture commonly used in Kosovo and it was air-conditioned. The size of the courtroom allowed for enough space for the parties, for around 80 seats reserved for the public, and also for room for TV cameras. The members of each defense team, it means defendants, their lawyers, and persons assisting the lawyers were seated together; each defense team sat at a separate bench in order to allow for confidential communication within the team.

c. Measures taken to ensure public access to the courtroom and Public character of the trial

23. The access of the public was facilitated by announcing trial dates during each of the court sessions and additionally on the EULEX Web page. Kosovo Police assisted members of the public in reaching the courtroom. There were no security incidents related to members on the public movements in the North of Mitrovice/Mitrovica reported. No complaints on limitation or hindrance of the access to the courtroom were presented to the trial panel.

24. The trial was held in open court. Besides the exclusion of the possibility for the members of the public to see the face of a witness heard by videoconference (as detailed below), there were following exceptions to the public character of the trial:

24.1. The session was closed for the public because of the issues pertinent to witness' protection in the following instances:

- on 13 June 2014, when the prosecution's motions on protective measures for witnesses was discussed;
- on 5 August 2014 during the testimony of witness F.M. due to a risk that he would reveal Witness A's identity;
- on 12 November 2014 for the part of Witness D's testimony that related to Witness G;

24.2. The needs for protection of the witness' right to privacy were recalled by the trial panel when reasoning closing the session to the public on two occasions:

- on 29 October 2014 when Witness M's health status was discussed;
- on 13 March 2015 for the testimony of ___ G. H. on Witness A's mental status.

d. Security in the courthouse

25. There were normal security measures typical for the high profile cases in Kosovo applied during the whole trial. These involved bans on bringing large objects to the courtroom, and personal checks with metal detector at the entrance to the courthouse. Kosovo Police officers were present in the courtroom. There were no security incidents in the courthouse reported.

e. Medical assistance

26. As already mentioned above, due to the numerous health issues raised by some of the defendants public emergency medical service in Mitrovica/Mitrovica was arranged in advance to facilitate swift assistance.

f. Presence of the parties

27. The EULEX prosecutors of the Special Prosecution Office of Kosovo, the accused and their defence counsel were present on all trial days.

28. The injured parties Witness A, Witness B, Witness C, Witness E, Witness F, Witness G, Witness I, and M. B. were duly informed about the trial and about their respective procedural rights, and that the main trial may be held in their absence but they did not execute their rights of a party during the trial.

g. Language of the proceedings, interpretation and court recording

29. Based on Article 16 of the Law on Jurisdiction and competencies of EULEX Judges and Prosecutors in Kosovo, the language used in the court proceedings was English.

30. In accordance with Article 1 Paragraph 2 of CPCRK, interpreters translated the court proceedings and all court documents relevant to the trial from English into Albanian and vice-versa. During the first two days of the trial translation into Serbian language was provided to the members of the public. On other days the Serbian translation was not requested by the public. Most of the interpretation was performed in a consecutive manner. The speakers were asked by the presiding judge to make

intervals in their utterance, usually every 1 to 3 minutes and as a principle at the end of the complete thought, and then the interpreter rendered what was said into the target language. This method allowed parties to control accuracy of interpretation of all evidence taken in the courtroom.

31. On some occasions the parties raised objections to the quality of translation. All the objections were immediately given consideration by the trial panel and the clarification was put in the record.

32. Closing arguments of the parties and the announcement of the enacting clause of the judgment were translated simultaneously into English, Albanian, and Serbian.

33. On 22 May 2014, according to the decision of the presiding judge taken pursuant to Article 315 Paragraph 2 and 5 of the CPCRK, the record of the proceedings was made verbatim in writing and without audio, video or stenographic recording because the time used for translation allowed the court recorder to accurately capture and write down all words spoken in the courtroom. As a matter of fact, on 15 May 2014, in writing, the defense counsel Gregor Guy Smith requested that audio and video recording of the proceedings was to be made. His motion was supported by Counsel Haxhi Milaku on 22 May 2014 and rejected by the Trial Panel with the 22 May 2014 Ruling. On 13 November 2014, the defense counsel Guy-Smith again requested a verbatim transcript. During the same session, the Trial Panel rejected this motion by affirming in full the ruling given on 22 May 2014.

34. Accuracy of the written record was controlled by the presiding judge in real time. The computer screen displaying the record was placed in front of him. This manner of recording made use of other recording methods redundant as it appeared unlikely to achieve any better accuracy of the semantic content of the record.

h. Protective measures

35. On 24 June 2014 pursuant to Article 222 Paragraph 1 and Article 339 Paragraph 3 of the CPC the Trial Panel ordered the protective measures in relation to the witnesses proposed by the prosecution. It was decided that:

35.1. the _____ of Witness A, the _____ of Witness A, the _____ of Witness B, the _____ of Witness F, and the _____ of Witness F, would be granted the following pseudonyms: K, L, M, N and O;

35.2. witnesses A, B, C, D, E, F, G, I, J and witnesses K, L, M, N and O would be heard by video-link from a remote location without distortion of their face's image;

35.3. the names, addresses, places of work, information on profession or any other data or information that could be used to identify these witnesses, should be expunged from court documents available to the parties;

35.4. any records identifying these witnesses should not be disclosed;

35.5. the defense counsel, defendants and any other person in possession of information on identities of the witnesses were ordered not to disclose any information that might lead to the disclosure of their identity;

35.6.media and the public could remain in the courtroom during testimonies of the said witnesses but without possibilities to see the faces of witnesses;

35.7.no audio or video recording of the testimonies would be allowed.

36.Following the order, personal data of the said witnesses was omitted and expunged from the court documents, and the statements of the protected witnesses were taken by video link with the witnesses being placed in a remote location and without exposing their faces to the public. Namely, the following Witnesses were heard through videoconference due to the security concerns: Witness A, Witness B, Witness D, Witness I, Witness L, Witness N, and Witness O.

37.Witness F and Witness C insisted on giving a statement in the open court in person, so the panel withdrew from the use of videoconference.

38.The identity of all the witnesses that were given pseudonyms was known to the parties, but not the public and parties were placed under an obligation not to reveal it.

39.Witnesses E, G and M did not appear for trial due to their unavailability. Witnesses G and M were diagnosed as not being able to participate in judicial proceedings.² Witness E is currently residing out of Kosovo and ___ stated to be unwilling to travel to Kosovo to testify. No measures could be taken by the Court to ensure ___ presence in the proceedings, due to lack of bilateral agreements between Kosovo and the country witness E has ___ residence on such judicial matters.

² See expert medical report of 08 January 2015.

40. The panel considered ex-officio protective measures for witness N.F. and witness K.H. . However, after preliminary hearings of the witnesses conducted by the presiding judge³ without the presence of the parties, no protective measures were imposed as the witnesses declared that they were not likely to present any facts that might trigger any hostility against them.

V. Principles applied for questioning witnesses

a. Leading, provocative, badgering and other similar questions

41. As a principle, leading questions on direct examination were not allowed by the presiding judge. The only exceptions were permitted when recollection of facts by the witness was obviously exhausted, when there was a need to focus witness's attention on a particular matter, or when the question touched upon a matter being undoubtedly of a common knowledge.

42. The prosecutor objected to the ban on asking leading questions on direct examination arguing that the CPCRK does not contain such a ban.⁴ This objection was rejected with the following clarification presented by the presiding judge:

"Leading question is a question that suggests the particular answer or contains the information the examiner is looking to have confirmed. Leading questions cannot be asked in direct examination because we want the answer to be given by witness spontaneously."⁵

3 See hearing minutes of 17 and 19 February 2015.

4 Minutes of the main trial; 22 July 2014 p. 16.

5 Minutes of the main trial; 22 July 2014 p. 16.

43. Provocative, suggestive, and repetitive questions were also not allowed at this stage.

44. Badgering or insulting a witness, as well as misquotation of previous statements, was not permitted during all examination.

b. Questions on witness protection program

45. The panel decided not to allow any questions related to witness protection, other than questions strictly related to the motivation of the witness to give testimony and that were asked by the panel.⁶ The following reasoning was presented for this decision:

"We will ask the questions that will give a clear understanding if witness motivation was somehow based on the benefits that might come from the witness protection program. First of all we take a notice that all elements of the so called witness protection program are determined by the law on witness protection adapted by assembly of Republic of Kosovo on 29th July 2011. We are well aware of all benefits that the witness may be granted. We are also aware that the list of these benefits is dynamic. Usually the witness is informed what kind of measures may be applied and even if not applied today they might be imposed in the future. One of the benefits that may be granted is financial support determined in Article 12 of the said law. That means when protected person has no financial source to maintain a minimum standard financial support may be granted, but up to this limit: to ensure a minimum living standard. We have also observed Article 30 of the said law. Any detail of any agreement constitutes an official secret. Disclosure of an official secret comprises a criminal

⁶ Minutes of the main trial; 17 July 2014 p. 7.

act. So it is determined by law that details of agreement cannot be revealed in the courtroom. It is not up to the court to decide if this ban can be somehow waived. There is a special procedure; the court may apply to the committee on witness protection for disclosure of such secrets but we take presumption that some benefits may be granted to the witness, presently or in the future. It is a common understanding that when we deal with the witness who may expect some benefits there is always a risk that this is the main motivation to give testimony."

c. Questioning by judges

46. The panel participated actively in questioning of the witnesses at various stages of examination. However, the parties were always given an opportunity to challenge the answers given by the witness in response to a judge's question. The panel based its activity in questioning on the conclusion that Article 7 Paragraph 1 of the CPCRK obliges judges to seek an objective truth. Therefore, a meticulous clarification of all factual matters that appear to the judges to be unclear was necessary. Article 299 Paragraph 1 of the CPCRK entitles the judges to pose questions to any witness but it does not indicate any particular stage of examination. It appears that the code does not impose any limitations with relation to the time of interrogation by judges.

d. Hostile witness

47. The Trial Panel allowed the prosecutor to declare some of the witnesses for the prosecution as hostile and to examine them without limitations that are usually applied during direct examination with relation to asking leading questions and to the use of pre-trial statements. The parties were instructed that witnesses' previous statements would, however, not be used as direct evidence. The following instruction was given on 17

September 2014 with relation to hostile witness concept applied by the court:⁷

"The institution of hostile witness is not provided for by the Kosovo Procedural Code. However, we are bound by European Convention on Human Rights so we must provide for equality of arms for both sides. The Kosovo criminal procedure imposes on the parties quite a far going limitations while examination in chief is taking place.

The lawyers do not need a lecture on it but I will explain for the public. The main limitation is the use of witness' previous statements that are inconsistent with testimony given in the courtroom. On direct examination you can use the previous statement just to refresh the witness's memory, not to look for explanation on discrepancies. This you can do on cross examination; there is the logic of the adversarial system behind it. It is based on assumption that the witness which is sponsored by the party would present the evidence in accordance with the thesis presented by the party. In such situation the criminal procedure gives the sponsoring party opportunity to prove the fact and at the same time the regime of cross examination allows the opposing party to challenge it. In the situation when the witness sponsored by a party is actually contradicting her, the said limitation deprives the party of the opportunity to challenge witness credibility. It appears as a clear violation of the principle of equality of arms. This situation is not regulated by Kosovo procedure therefore we have to use the instruments we know from the theory of criminal procedure. It is like a Defense Counsel bringing in a witness that would suddenly start to accuse his client; of course the Defense Counsel must challenge the credibility of the witness.

There are two ways of dealing with a hostile witness applied in trial practice in the countries that apply the adversarial model of proceedings. The first is that the party that sponsors the witness does not call him to the stand anymore; then the witness is called ex-officio and the party can do cross examination and challenge credibility of his evidence. The other way is just to declare a witness hostile and it is clear that the purpose of examination is to challenge credibility and not to prove facts. This is why I instructed the party that we would apply this institution of hostile witness here to preserve equality of arms. That means that in our situation the Prosecutor may challenge the credibility of the witness by questioning without the usual limitations;

⁷ Minutes of the main trial; 17 September 2014 p. 4.

meaning: leading questions are allowed as well as confronting the witness with his previous statement."

48. The following witnesses sponsored by the prosecution were declared to be hostile: Witness C, Witness I and Witness L. The prosecutor's motion to declare also Witness F as hostile was refused as it came after direct examination was already completed.

49. On 24 July 2014, the defense counsel Tahir Recaj objected to the use of the hostile witness concept for interrogation of witnesses. This objection was rejected by the panel during the same session of 24 July 2014. Defense counsel Guy-Smith, Ingo Risch and Mexhid Syla objected to the use of the hostile witness concept on 05 August 2014. These objections were rejected by the panel during the same session of 05 August 2014. On 17 September 2014, the defense counsel Tahir Rrecaj again objected arguing that this concept is not grounded in law, joined in by the Defense counsel Ibrahim Dobruna. The Trial Panel rejected this objection during the same session. On 19 November 2014, the defense counsel Tahir Rrecaj and Guy-Smith again objected. During the same session, the Trial Panel confirmed and reiterated in full the decisions previously given on this subject matter.

e. Videoconference

i. rationale

50. The use of videoconference was legitimized in a reasoning of the ruling imposing the protective measures:⁸

"The court assessed the values protected by the right to public trial, the right to defense and equality of arms

8 Minutes of the main trial; 24 June 2014 p. 3.

and the right of the witnesses to their personal safety. And it tried to strike a balance. The court assessed that a balance will be reached by the way highlighted in the enacting clause.

In fact, the video-link with the screen giving its back to the public is authorized because, although the court asserted that the witnesses names and personal data are already known to the defense, disclosing such identity to the public and asking for their physical appearance in court would increase the risk of retaliation and would place the witnesses in danger of concrete intimidation.

Due to the sophisticated nature of the video-link equipment, the defense will anyway be able to engage in any cross-examination using demonstrative evidence or to present or add any documents for use with the witnesses at the location of the video-link."

ii. equipment

51. The equipment used for videoconference allowed the panel members and the parties in the courtroom to see the witness sitting in the remote location from the waist upwards. The witness was able to see the person interrogating ___ with the camera zoomed on face and upper part of the body of the person asking questions. Two-way audio communication in real time was maintained between witnesses and persons in the courtroom. The sound was synchronized with the image. There was a 54- inch screen installed in the courtroom for the parties and for the panel. The screen was placed with its back facing the public so the public could not see the interrogated person but could only hear ___.

iii. Assistance in the remote location

52. Each witness testifying in the remote location was assisted by a EULEX legal officer or EULEX judge. Their role was exclusively to confirm the identity of the witness and to present the witness with an exhibit used in evidence if needed. Their presence was also meant as a safeguarding to make sure that the witness testified

without duress or other undue influence. No such occurrence was reported by any of the assisting persons.

53. During the testimony of Witness B there was an interpreter present with ___ in the remote location due to the witness' hearing problems. All other witnesses were questioned with a help of interpreter present in the courtroom.

iv. Objections

54. In its Ruling dated 24 June 2014, the Trial Panel further stated that an individual assessment would have been done before hearing each individual Witness.

55. On 24 June 2014, with regard to Witness A, the defense counsel Gregor Guy Smith objected to taking the witness's statement through videoconference, arguing that, when asked, the witness expressed ___ willingness to appear in the courtroom in person. On 25 June 2014, the Defense Counsel Ingo Risch raised the same objection. On 08 July 2014, defense counsel Ingo Risch and Guy-Smith again sustained this objection defining it as a 'continuing objection'. On 11 November 2014, the defense counsel Guy-Smith again objected due to the lack of sufficient actual basis for the imposition of these measures.

56. These objections were rejected by the Trial Panel after assessing the circumstances for each Witness. The Trial Panel reaffirmed on all occasions its initially given ruling.

f. Parties' objections to procedural actions taken by the trial panel

57. On 02 May 2014, the defense counsel Sylva submitted a motion for joinder of proceedings. On 22 May 2014, the Trial Panel asserted how the severance of proceedings was already decided and substantiated and no appeal was possible against this ruling at that stage of proceedings.

58. On 12 June 2014, the Defence Counsel Ingo Risch objected to the rejection of the Trial Panel to conduct a closed session on health issues of defendants. The Panel reasoned that the medical expert would have provided an independent expert medical report on the health of the Defendants, and there was no need to hold a closed session on it. On 05 August 2014, the Trial panel reinstated the reasoning based on which the requested was rejected and how such decision is not appealable.

59. On 25 June 2014, the Defense Counsel Ingo Risch requested to be present at the remote location where Witness D would have testified from. This motion was supplemented on 27 June 2014. On 22 July 2014, the Defense Counsel Ingo Risch motioned for an expert Witness to be present at the remote location during the interrogation of Witness D through videoconference, in case his motion to be present at such remote location would have been rejected. This motion was followed by another motion/response filed on 06 November 2014 by Guy-Smith, who requested the presence of all defense counsel at the remote location in case Risch's motion would have been approved, and also that a psychological expertise of Witness D be conducted to deem whether __ is competent to testify. The Defense Counsel Tahir Rrecaj also supported Risch's motion. On 11 November 2014, the Trial Panel rejected this motion based on the following reasoning:

"The panel finds that it is the competence of the court to ensure the witness is duly identified and that he testifies without any unlawful influence or duress. It should be stressed that the authorized member of the court staff is present with the witness all the time, either a judge or legal officer. This is a general practice applied in the international mutual assistance when the video conferencing is used". With regard to the assessment of the body language, the trial Panel stated that "Today's technique allows observing the witness' body language. And of course it is up to the panel and not to the Defense Counsel to make any assessment of witness' non-verbal communication. Due to the nature of video link equipment, both parties have the right to have the possibility to question the witness properly". „Concerning the request to have the Defense Counsel _____ to observe the witness during the breaks at remote location, the trial panel see neither legal ground nor common sense justification. There are already measures taken by the Panel to ensure the witness gives testimony freely and without undue influence". With regard to the challenges to the witness' credibility, "The trial panel found that this is an exclusive competence of the trial panel to assess the credibility of the witness. The panel cannot be replaced in this role by any expert witness. The motion does not consist of any concrete and specific challenge to the witness competency. The court practice allows for psychiatric examination of the witness only if there are reasons to believe that ___ mental or physical impairment may affect ___ ability to perceive recollect, explain or correctly relate the facts. The prima facie assessment of the pre-trial statement of the witness D does not give grounds to such a conclusion. This is of course said without any prejudice to the credibility or truthfulness of ___ statement".

60. On 27 June 2014, the Defense Counsel Ingo Risch submitted a motion requesting the continuation of Witness A interrogation in the Courtroom. On 05 August 2014, the Trial panel rejected the motion asserting that the decision had already been taken on 24 June 2014 when the Trial Panel confirmed to hear the Witness via video-link,

and such decision was properly reasoned and was not appealable at this stage of proceedings.

61. On 01 July 2014, the defense Counsel Ingo Risch filed another motion in relation to Witness A, challenging the Witness's credibility by alleging that ___ lied in relation to ___ place of stay. On 05 August 2014, the Trial Panel rejected this motion stating that "the law does not provide any confidential way of communication between the Defense Counsel and the panel unless there are serious security measures not related to the subject of the proceedings. In this motion, the Defense Counsel is challenging Witness A's credibility because the counsel got information about witness's place of stay. I cannot see the subject of the request. There will be time for closing statements and comments on credibility of evidence".

g. Other Evidentiary motions

62. On 28 January 2015, the Prosecution motioned in writing for a new Witness to be summoned and for the public to be excluded. On 03 February 2015, the Trial Panel granted the motion, but rejected the request for exclusion of the public and allowed instead the use of an opaque shield.

63. On 28 January 2015, the Prosecution motioned in writing to have the pre-trial statements of Witnesses M and G read in court and to be adduced as evidence in the case file. On 03 February 2015, the Trial panel rejected this motion based on the following reasoning: "The new procedural code implemented some safeguards to be enjoyed by the defendants. They consist of the ban to use a testimony that could not be challenged by questioning. The distinction between testimony and interview is a new solution that came into force since January 2013 and it was unknown previously. So, we share the opinion presented by the appellate court in so-called "MTPT Case" (MTPT 1, PN 577/2013, of 10 December 2013) that we must apply interpretation imposed by the new code to all procedural actions taken under the regime of the old one".."...under the new code, testimony

is a witness's statement taken in the presence of defence counsels. This is not the case with relation to the Witness G and Witness M and their statements. Therefore, the use of pre-trial statement is not admissible. There was a very challenging remark made by the Prosecutor, that the provision of Article 262 of the new code refers to ban on using statement that were not challenged by questioning, as a sole and decisive. According to the Prosecutor, this may lead to the conclusion that if the evidence is not sole and decisive than it could be used even if it has not been challenged by questioning. Otherwise this provision seems to be redundant. However, the Trial Panel asserts that in case of such inconsistencies in the system, the interpretation in case of doubts should be done in favour of the defendants".

64. On 10 April 2015, the Prosecution filed a motion to adduce new evidence. On 22 April 2015, the Trial Panel rejected the request to introduce as evidence the trial statements given by Witnesses A and B in P 58/14, and it rejected the request to summon the Witness M.B. , since this request came too late in the proceedings and, anyway, it would not be relevant to the elements of the alleged crime. The Trial Panel also rejected the request to introduce the testimony of witness S.P. given before the ICTY chamber, since the information coming from a witness should be presented in front of the court in a form of testimony, as well as the request to adduce as evidence the spotlight report Nr. 27 of the Humanitarian Law Centre dated 05 August 2008 and a printout from the International Committee of the Red Cross Web page in relation to M.B. .

h. Evidence examined in Court

65. The following pieces of evidence were presented to the Trial Panel and adduced into the evidence:

- Exhibit _: medical paper related to Witness A, submitted by Witness L during the hearing session of 23 July 2014
- Exhibit _: envelope containing name of Witnesses written by Witness D, during the session of 11 November 2014;
- Exhibit _: drawing made by Witness D during the session of 12 November 2014 and envelope containing a further name written by the Witness;
- Exhibit _: envelope containing name of Witnesses written by Witness D, during the session of 13 November 2014;
- Exhibit _: pictures submitted by defense counsel Millaku on 24 March 2015 in relation to the treatment that **S.G.** underwent in _____ in _____, and also in _____ and _____;
- Exhibit _: The Application for _____ filed by Witness A, presented in criminal case P 58/14 and introduced into the case file of P 938/13 on 24 March 2015.

66. The following Witnesses were heard by the Trial Panel:

- Witness A on 24 and 25 June 2014, 08, 16, 17 and 18 July 2014;
- Witness K on 22 July 2014;
- Witness L on 23 and 24 July 2014, and on 04 August 2014;
- Witness F.M. on 05 August 2014 and on 17 September 2014;
- Witness F on 24 and 25 September 2014, and on 07 October 2014;
- Witness N on 08 October 2014;
- Witness O on 08 October 2014;
- Witness B on 14 and 29 October 2014;
- Witness D on 11, 12, 13 and 18 November 2014;
- Witness I on 19 and 20 November 2014;
- Witness F.B. on 03 December 2014;
- Witness B.G. on 04 December 2014;

- Witness C on 05 and 11 December 2014;
- Expert Witness C.B. on 15 January 2015;
- Witness C.S. on 03 February 2015;
- Witness A.G. on 13 February 2015;
- Witness H.H. on 13 February 2015 and on 10 March 2015;
- Witness J.L. on 11 March 2015;
- Witness N.F. on 11 March 2015;
- Witness K.H. on 11 March 2015;
- Witness G.H. on 19 and 24 March 2015.

All the defendants used their right to remain silent.

B. Determination of the factual situation

67. The facts relevant to the counts that the defendants were tried for in this case were established by the trial panel as a result of analysis and assessment of all pieces of evidence examined in the courtroom.

I. Repetitive beating of Witness A by S.S.

68. On _____, _____ around _____ came in a jeep like vehicle to Witness A house in a village in the _____ region. They called _____ so _____ went outside. They told _____ that they had an order from _____ **S.S.** that witness A should come to _____/_____ to give a statement. They also informed _____ that _____ would be released after having given the statement. Witness A did not know them. One of them introduced himself as F.G. _____. Both _____ wore _____ that Witness A recognized as _____'s _____ outfits. They carried automatic guns and hand guns. Witness A voluntarily boarded the vehicle together with the _____.⁹

69. The _____ asked Witness A if _____ knew where Witness B's house was. Witness A led them to Witness B's house. They

9 Minutes of the main trial; 24 June 2014 p. 14-15.

stopped the vehicle near Witness B's house and they told Witness A to get out of the car. Following _____' command, Witness A called Witness B to come to them. The _____ informed Witness B that, by **S.S.** order, ___ had to come with them and give a statement. Witness B and Witness A got into the vehicle and the _____ took them to _____.¹⁰

70. Upon arrival to _____, Witness A and Witness B were placed in separate rooms, in the building that was used by the _____. The building was used as a _____ before the war. The roof of the building was burnt.¹¹

71. The room that Witness A was put in was around 4 by 4 meters, and it looked like a detention cell. It had a window with bars and which was located close to the ceiling. There was a wooden bed and some chairs there. There were chains attached to the bed legs.¹² The doors were kept locked with a key from outside.¹³ Outside the room there were ___ armed _____ guarding the door.¹⁴

72. Shortly after the arrival to _____/_____, _____, M.X. _____ and R.S. _____, entered the room and started interrogating Witness A. R. S. _____ was writing down the record. The interrogators asked questions about Witness A's collaboration with _____. M.X. _____ told Witness A that ___ was a _____ of _____ A.B. _____ and a friend of I. B. _____.¹⁵ I.B. _____ was _____ and ___ worked at the _____ in _____, dealing with _____ and _____.¹⁶ Witness A denied any collaboration. R.S. _____ proposed to release Witness A, but M.

10 Minutes of the main trial; 24 June 2014 p. 16.

11 Minutes of the main trial; 24 June 2014 p.17.

12 Minutes of the main trial; 24 June 2014 p. 16.

13 Minutes of the main trial; 8 July 2014 p. 10, and 16.

14 Minutes of the main trial; 8 July 2014 p. 15.

15 Minutes of the main trial; 24 June 2014 p. 18.

16 Minutes of the main trial; 25 June 2014 p. 6.

X. _____ refused saying that further clarification was needed.¹⁷

73. Approximately ____ later, another _____ named S.S.1 _____ entered the room and threw Witness A on the floor. Immediately after, _____ other persons came. _____ of them had their faces painted. They kicked Witness A, who was lying on the floor, and they accused ____ of being _____'s friend. Witness A lost consciousness.¹⁸

74. On the same day, after some time had lapsed, in the evening, **S.S.** _____ came to the room.¹⁹ ____ was wearing civilian clothes.²⁰ Witness A did not know _____. ____ introduced himself to Witness A as "_____". Witness A was still lying on the floor. **S.S.** _____ grabbed ____ by a collar and put ____ on the bed. Then **S.S.** _____ slapped Witness A few times with an open hand, punched ____ few times with a fist, and told ____ that ____ would beat ____ with a stick to bring ____ back to consciousness. While assaulting Witness A, **S.S.** _____ kept saying that Witness A was a _____ of _____. It lasted a few minutes.²¹

75. The next afternoon, **S.S.** _____ came to Witness A alone and repeated the accusation of Witness A being a _____. ____ threatened Witness A that ____ would be killed for this reason.²²

76. Similar actions were repeated by **S.S.** _____ during the next days. Sometimes ____ was coming to Witness A's room twice a day. On some occasions **S.S.** _____ used

17 Minutes of the main trial; 24 June 2014 p. 18.

18 Minutes of the main trial; 25 June 2014 p. 3.

19 Minutes of the main trial; 25 June 2014 p.6.

20 Minutes of the main trial; 25 June 2014 p. 11.

21 Minutes of the main trial; 25 June 2014 p. 6.

22 Minutes of the main trial; 25 June 2014 p. 11.

to call Witness A a _____ and on some occasions _____ was also slapping and beating _____.²³

77. After three nights, another person was placed in the same room with Witness A. _____ name was F.M. _____ and _____ told Witness A that _____ was imprisoned because _____ was a supporter of _____. Some days later, a _____ called H.M. _____ was put in the same room. F. M. _____ told Witness A that _____ was wounded with a gunshot by _____ after having had a quarrel with them, and _____ was imprisoned after this incident.²⁴

78. Five days later H.M. _____ was released from incarceration. Sometime later F.M. _____ was also allowed to leave.²⁵ Five or six days from Witness A's arrival to _____/_____, another _____, a _____ named G.V. _____, was placed in the room with _____. _____ told Witness A that _____ was incarcerated because _____ wanted to marry a girl without her parents' consent and they complained to _____ in _____/_____. G. V. _____ was kept in one room with Witness A until the end of Witness A's stay in _____/_____.

79. Several times **S.S.** _____ came to the room and shouted at Witness A in the presence of other persons kept there. However, _____ never beat Witness A in the presence of H.M. _____ and F.M. _____. Several times _____ came in the afternoon and slapped witness A in _____ face in the presence of G.V. _____.²⁶

23 Minutes of the main trial; 25 June 2014 p. 11.

24 Minutes of the main trial; 25 June 2014 p. 12-13.

25 Minutes of the main trial; 25 June 2014 p. 14.

26 Minutes of the main trial; 25 June 2014 p. 17.

II. Beating of an unknown _____ from _____ (S.S. _____)

80. On one occasion, Witness A and an unidentified _____ from the village of _____ were ordered to clean some other rooms in the building that Witness A was kept in. The _____ was severely beaten by some _____ while doing the cleaning. S.S. _____ was present during the beating but _____ did not actively participate in it. This happened 3-4 days before Witness A's release from _____/_____.²⁷

III. Beating of an unknown _____ from _____, _____ (S.S. _____, J.D. _____)

81. One day _____ brothers from a place called _____ in _____/_____ were put in the room together with Witness A. S.S. _____ came to the room. _____ asked the brothers why they sold _____ to _____ instead of giving them to _____. The next day S.S. _____ came again, this time with J.D. _____ and they beat one of the brothers with punches and kicks. They did it in turns for around _____ minutes. After that they took the brothers away from the room. There was no evidence proving what happened to the brothers later on.²⁸

IV. Beating of Witness B (S.G. _____)

82. Shortly after, Witness B was brought to _____/_____ was placed in the same building as Witness A but in another room.²⁹ Around _____, S.G. _____ came to this room. _____ had difficulties in _____. _____ was heavily wounded in combat at the _____ of _____ and underwent serious surgery.³⁰ From the _____ of _____

27 Minutes of the main trial; 25 June 2014 p. 23.

28 Minutes of the main trial; 25 June 2014 p. 24.

29 Minutes of the main trial; 14 October 2014 p. 14.

30 Minutes of the main trial; 4 December 2014 p. 19.

____, __ was treated in ____/____. __ had a plaster cast applied. The cast immobilized ____ wounded ____.³¹

83. At the __ of _____ ____, **S.G.** 's ability to ____ was limited but __ was able to ____ on ____.³² __ also moved in a ____.³³ But this time __ ____ in the room using a ____ kept under ____ _____. Witness B did not know __ at this time. **S.G.** asked __ why __ was objecting to ____ and beat __ for a few minutes with a baton in various parts of the body including the head and then left the room. As a result of this beating Witness B bled from the ear.³⁴

V. Other facts related to charges referring to events that took place in ____/_____

84. Before Witness A was taken to ____/_____ there were numerous attacks launched by _____ that included heavy artillery shelling of villages in _____ region. Also ____/_____ was already bombed in the beginning of _____.³⁵ ____ were engaged in _____-type actions against _____.³⁶

85. There were refugees from neighboring villages seeking shelter in Witness A's village. __ village was attacked by ____ on ____ _____. Witness A did not participate in hostilities. __ was not a member of ____.³⁷ After the war, __ applied for _____ as a person supporting and helping __ members, by way of sheltering them and providing them with other assistance.

31 Minutes of the main trial; 3 December 2014 p. 6, 10 March 2015 p. 4.

32 Minutes of the main trial; 11 November 2014 p. 23.

33 Minutes of the main trial; 8 July 2014 p. 11.

34 Minutes of the main trial; 14 October 2014 p. 9.

35 Minutes of the main trial; 24 June 2014 p.14, 11 November 2014 p. 14.

36 Minutes of the main trial; 11 November 2014 p. 13.

37 Minutes of the main trial; 24 June 2014 p. 14.

86. Until _____ **S.S.** _____ was a _____ of the _____ in the _____ operational zone. Then, _____ was replaced in this position by **S.L.** _____ and became a _____ of the _____.³⁸ **S.J.** _____ was a _____ of _____.³⁹

87. On several occasions Witness A was taken by _____ from the room that _____ was kept in, to a bigger room. _____ was beaten there by various persons.⁴⁰ On one occasion _____ was maltreated together with Witness B by many _____. This happened around 3 days before Witness A was released from _____/_____.⁴¹ The details of these beatings were subject of the count that was severed and tried in other proceedings.

88. As a consequence of the beatings that Witness A suffered in _____/_____, _____ sustained various injuries: bruises all over the body including the head, 2 broken ribs, a wound in the _____.⁴² There were no grounds to attribute particular injuries to the actions performed solely by **S.S.** _____ that were a subject of the charge against _____ in this case.

89. During the stay in incarceration, Witness A was receiving food once a day and _____ suffered from hunger. For the first three days _____ was given only bread and water. After that _____ was fed with little quantity of pasta once a day. One of the _____ used to secretly give _____ some bread and told _____ that **S.S.** _____ would execute _____ for doing it if _____ knew.⁴³ Witness A was allowed to use the toilet once a day and _____ was not given opportunity to wash. There was excessive heat in the room and the _____ guarding the door did not allow _____ to open the door to get some fresh air inside.⁴⁴ One time a _____

38 Minutes of the main trial; 11 November 2014 p. 10.

39 Minutes of the main trial; 11 November 2014 p. 19.

40 Minutes of the main trial; 25 June 2014 p. 18.

41 Minutes of the main trial; 25 June 2014 p. 20.

42 Minutes of the main trial; 15 January 2015 p. 8.

43 Minutes of the main trial; 8 July 2014 p. 19.

44 Minutes of the main trial; 8 July 2014 p. 20.

named N.G. passed to Witness A clean clothes brought by Witness A's _____.⁴⁵

90. There were no grounds to establish any instances of similar discomfort that other persons kept in _____/_____ might have been exposed to.

91. Neither Witness B, nor the brothers from _____ nor the man from _____ served in the ____, nor did they participate in the hostilities. (presumption adopted by the panel).

92. Witness A was released from _____/_____ on __ or __ _____ when the _____ offensive started. _____ R.S. _____ opened the door and let Witness A and G.V. _____ go. Witness A returned by foot to _____ home village.⁴⁶

93. **S.S.** _____ and **J.D.** _____ used to ask each other on several occasions in Witness A's presence "if they should _____ with a chainsaw like it happened to I.B. _____".⁴⁷

94. Once _____ of the _____ threatened to kill Witness A with a gun. **J.D.** _____ stopped the _____ and told _____ that they were not going to execute Witness A, but only to beat _____. Witness A heard this remark. Another time **J.D.** _____ said to Witness A that they would kill and take _____ and _____. Witness A heard those remarks.⁴⁸

45 Minutes of the main trial; 8 July 2014 p. 11.

46 Minutes of the main trial; 8 July 2014 p. 18.

47 Minutes of the main trial; 25 June 2014 p. 20.

48 Minutes of the main trial; 25 June 2014 p. 18.

95. While staying in ____/____ Witness A never saw **S. L.** , **I.H.** nor **A.Z.** and ____ did not hear anything related to them.⁴⁹

96. Witness B stayed in ____/____ until an undetermined day in _____, however there was no evidence that could allow the panel to establish facts related to ____ stay and ____ release with the exception of one occasion when ____ was maltreated together with Witness A, and one occasion when ____ was beaten by **S.G.** .⁵⁰

97. During ____ stay in ____/____, through the window of ____ room, Witness A saw **S.J.** being present there. However, **S.J.** never mistreated ____ . Witness A never saw **S.J.** mistreating other persons.⁵¹

98. Besides G.V. , who stayed in the same room with Witness A until they were both released, F.M. , and H.M. , there were other persons imprisoned in ____/____ during Witness A's stay there. Those were ____ brothers from _____, a man from a place called _____, and an ____ man from the village of _____, and a _____ from _____.⁵² There were no grounds to establish how long they stayed there and how they were treated.

99. One day between ____ and _____, there was a group of between ____ and ____ persons being imprisoned in ____/____. They were kept in two rooms, ____ to ____ people in one room. The doors were guarded by ____ . One of them was Witness G, a ____ . There was no piece of evidence indicating the nationality of the others and how long they were kept there and if they were abused in any way other way than

49 Minutes of the main trial; 15 July 2014 p. 15.

50 Minutes of the main trial; 25 June 2014 p. 20.

51 Minutes of the main trial; 16 July 2014 p. 3.

52 Minutes of the main trial; 25 June 2014 p. 24.

incarceration. There were also no grounds to establish if they participated in hostilities between the _____ population and _____.⁵³

VI. Killing of an unknown _____ (S.L. _____)

100. Witness D was a _____ of the _____ and the _____ of _____ village.⁵⁴ _____ was reporting about the situation in the neighborhood to **S.L.** _____. _____ was related to **S.L.** _____ by marriage: _____ father in law was a brother of **S.L.** _____'s father.⁵⁵

101. One evening, in the end of _____ or beginning of _____, Witness D came to **S.L.** _____'s _____'s house in the village of _____. _____ stayed there overnight.

102. The next day in the afternoon, **S.L.** _____ told Witness D to accompany _____ in the 4-wheel drive vehicle. **S.L.** _____ drove. Witness D sat in the front passenger's seat. There were no other persons with them. **S.L.** _____ was armed with AK-47 type assault rifle and TT-type pistol and _____ wore a _____ with _____ on it. Witness D was in civilian clothes and _____ also had AK-47 type rifle. They logged approximately a distance of _____ km from _____ in the direction of _____.

103. Between villages _____ and _____, **S.L.** _____ stopped the car. They went outside the vehicle. **S.L.** _____ smoked a cigarette. There was a _____ at the _____ side of the road and in front of them there was a small forest.

53 Minutes of the main trial; 11 November 2014 p. 27, 31.

54 Minutes of the main trial; 11 November 2014 p. 11.

55 Minutes of the main trial; 11 November 2014 p. 14.

104. In a short time _____ dressed in _____
_____ appeared. Both of them were armed. They came out
of the forest.⁵⁶ They were escorting a ___-___ year old
_____.⁵⁷ _____ was a _____.⁵⁸ The _____ had _____ hands
tied in front of _____ with a wire that caused bleeding.⁵⁹

105. The _____ held _____ by the arms from both of _____
sides. In some moments they dragged _____ and in some
others _____ walked on _____ own. _____ wore civilian clothes.
When they approached **S.L.** _____ one of the escorting
_____ said to _____, referring to the escortee: "this is the
person".⁶⁰

106. Witness D stayed close to the vehicle. **S.L.**
_____ moved a few meters in front of _____ and approached the
escortee. The escortee genuflected.⁶¹ At the distance that
was close enough to extend a hand with a pistol and to
touch the escortee's head with it, **S.L.** _____ put a
pistol to _____ head behind the left ear. The escortee
cried and said in _____ dialect "don't kill me,
please." At that moment the _____ that were so far
holding the escortee by _____ arm, stepped a couple of
steps away. **S.L.** _____ fired a shot and after that _____
fired _____ more shots into the escortee's head.⁶² After
that the escortee fell on the ground. The shots deprived
_____ of _____ life (presumption adopted by the panel).

107. The _____ took the body away to the forest.⁶³
S.L. _____ and Witness D boarded the vehicle and **S.**
L. _____ drove it to _____. On the way **S.L.**
_____ told Witness D that _____ killed the victim because this _____
took a gun from **S.L.** _____ 's cousin named A.
L. _____ and murdered _____.⁶⁴ This was not the truth as

56 Minutes of the main trial; November 2014 p. 46-47.

57 Minutes of the main trial; 11 November 2014, p. 47.

58 Minutes of the main trial; 12 November 2014, p. 8.

59 Minutes of the main trial; 12 November 2014, p. 4.

60 Minutes of the main trial; 11 November 2014 p. 49.

61 Minutes of the main trial; 12 November 2014, p. 4.

62 Minutes of the main trial; 12 November 2014, p. 11.

63 Minutes of the main trial; 11 November 2014 p. 41.

64 Minutes of the main trial; 12 November 2014 p. 7.

A.L. died under different circumstances (testimony of J.L.). There was no evidence indicating if S.L. deliberately lied or if ___ was mistaken.

C. Assessment of evidence

I. Evidence used as a basis for reconstruction of facts

a. Evidence fully reliable

108. The trial panel based the majority of its factual findings on the testimonies of Witness A, Witness K, and Witness D.

Witness A

109. Witness A and _____, Witness K, spoke in the way typical of persons not educated in narrating a story. It was clearly noticeable that they were not used to presenting a cogent and sequential account of events. This resulted in omissions and gaps which in the opinion of the trial panel can be attributed to the lack of the witnesses's reporting skills rather than to deliberate lying. The court took into consideration that the testimonies of the said witnesses were clearly consistent in relation to the presented facts despite their rather limited ability to put their report in a clear and structured order. After meticulous reciprocal comparison of testimonies given by Witness A and Witness K, the trial panel came to the conclusion that in relation to essential elements all these pieces of evidence fully corroborated and confirmed each other.

110. The testimony of Witness A was decisive for the reconstruction of events that took place in _____/_____.

111. There were no doubts as to the witness's abilities to perceive, recollect and present facts that he witnessed. The issue of presumed mental disorder, which the Witness might suffer from, was brought to the attention of the panel by the medical certificate dated _____ (exhibit _) and by the testimony of G.H. _____. The panel applied meticulous scrutiny to the content of Witness A's statements in order to exclude the possibility of delusions being presented as facts.

112. Witness A's version of events was found to be believable. It did not contain any elements that would be contradicted by general knowledge or common sense. Moreover, it was internally consistent and, therefore, it was credible. There were no discrepancies in _____ narration although the witness was repetitively asked about the same issues. The witness understood questions and _____ answer corresponded to the matters that _____ was interrogated about.

113. The defense lawyers presented some challenges to Witness A's credibility.

114. Counsel Tahir Recaj argued that the witness described **S.J.** _____'s _____ as _____ although _____ wore a _____ _____. Actually, the black uniform was mentioned in this context by Witness D.

115. Also Counsel Gregor Guy Smith argued for improbability of **S.S.** _____ wearing civilian clothes as described by the witness. Nevertheless, the contested fact seemed to be of marginal significance as the common sense does not exclude a temporary non-adherence to the habit of wearing particular apparel.

116. Counsel Mexhit Sylla referred to the conflict between the witness and D. _____ and the witness's potential jealousy towards the D. _____. He also indicated prospective benefits that might result from the status of protected witness as a possible motivation that lured Witness A to testify falsely. These arguments were taken into consideration by the panel, but they were found to be a kind of speculation and did not deny Witness A's credibility.

117. The story presented by Witness A indicates various degrees of emphasis applied by the witness to the actions of particular perpetrators. There seems to be a natural proportion between the suffering he sustained and the attention ___ paid to individual culprits.

118. Witness A's recollection of dates seemed to be correct. ___ indicated that ___ was taken to ____/_____ on _____, ___ _____ and it is a notorious fact that this date was indeed a _____. All the dates that ___ mentioned reflected the chronological order of the events that ___ described.

119. None of the facts presented by Witness A was denied by any other piece of evidence that was found by the panel as trustworthy: testimony of Witness K, testimony of Witness D and expert opinion of C.B. .

Witness K

120. Witness K confirmed that _____ Witness A was taken from their home by _____, that ___ stayed away from home for almost a month and that ___ came home injured. ___ description of the injuries corroborates Witness A's statement. ___ recollection of ___ recount on what happened to ___ in ____/_____ and that ___ heard from ___ upon ___ return, corresponds with the account of

events that Witness A presented in the court. Witness D confirmed that there were rooms located in the _____ in _____/_____ and that they were used by the _____ as holding cells and they were guarded by _____.

121. Witness K testified in a sincere and spontaneous way. _____ statement contained neither intrinsically unreliable elements nor elements that would explicitly contradict Witness A's testimony.

122. After detailed comparison of the statements of both witnesses, the panel concluded that they concentrated on various facts and circumstances and used different description of the same events. It excluded impression that they concocted their statements in order to compliment or corroborate each other.

123. Witness K did not confirm that the _____ who took Witness A from home mentioned **S.S.** _____'s orders, as Witness A said. The panel took it as an indication that Witness K did not tend to portray **S.S.** _____ as the main perpetrator of _____'s grievance.

124. _____ did not mention **S.S.** _____ spontaneously, but _____ referred to _____ only after being asked questions that directed _____ to focus on the person mentioned by _____ and recalled only the pseudonym "_____" that _____ heard from _____.

125. At the same time it seems natural due to the time lapse that _____ recollection of the circumstances surrounding the moment of _____ being taken away from home, and especially the recollection of references to **S.S.** _____'s order, is not as complete as that presented by Witness A, who communicated with the _____ directly.

126. Judicial experience shows that omissions in detailed narrations presented by an eyewitness after a long time usually differ as various persons attribute different importance to the same details.

127. Witnesses A's and D's statements were mutually corroborated in relation to the fact that the rooms in _____/_____ were used by the _____ as _____ facilities.

128. Witness A's statement stayed in conformity with observations and findings presented by expert witness C. B. _____. According to the expert witness, the scars might result from injuries that were shown or described by Witness A to _____ or that _____ learned from M. G. _____ report and that might be inflicted in the way that, by the opinion of the panel, fully complies with the witness's statement.

129. It is a general observation that forensic expert opinions are often based on hearsay, i.e. on the anamnesis coming from the injured party. The panel noted that in this case the anamnesis had been verified: the description of the scars and their origin given to C.B. _____ by Witness A during examination fully corresponded with Witness A's statement given in court.

130. The panel noticed a discrepancy between statements of Witness A and witness K and the results of x-ray examination performed by C.B. _____ that related to the number of broken ribs that Witness A suffered from. The difference appears not as a result of deliberate misstatement of Witness A and _____, but is rather a consequence of their lack of medical knowledge and diagnostic skills.

131. Another discrepancy was related to the characteristic of the wound in the _____. Witness A referred to the wound as being an "open" one. According to the result of the examination that took place on 21 September 2012, the wound was healed with a visible scar. Again, the discrepancy was attributed by the panel to Witness A's limited linguistic skill that was noticeable as ___ used simple and non-nuanced expressions.

Expert Witness C.B.

132. The panel fully accepted the findings and conclusions presented by the expert witness. The witness's expertise in the field of forensic medicine was firmly established by presentation of ____ academic background and professional experience. ____ based ____ findings on the medical examination that ____ performed personally with the exception of the examination of the wound located in the genital area of Witness A's body. ____ gave a detailed report of this examination. The panel had no doubts as to the credibility of ____ report and accurateness of opinion given in court on 15 January 2015.

133. The examination completed by M.G. _____ was also fully credible. ____ presented a clear, precise and detailed description of ____ findings and there were no doubts as to ____ qualifications as a forensic doctor.

134. The conclusion that only the scar in the _____ could be associated with a single particular action that Witness A was subjected to while in _____/_____, was made by the panel on the basis of B.'s _____ opinion. The expert witness gave a very general indication as to the potential origin of the scars on Witness A's body. This indication was neither specific nor unique for any particular beating that was recalled by the witness, except the only occasion when ____ was pinched in _____.

135. The general assessment that C.B. 's opinion corroborated Witness A's testimony was not impaired by ___ assertion that the said scars might derive from events other than those presented by the witness. The corroboration in this case was neither conclusive nor decisive, but the opinion did not discredit the witness in any way. Therefore it was the logic, the coherency and the absence of non-conformity with other credible evidence that contributed to the positive evaluation of the probative value of Witness A's and Witness K'S testimonies.

Witness D

136. The panel found Witness D's testimony as fully credible. ___ spoke in a logical way. ___ modulated ___ emotions adequately to the degree of traumatizing content in the description of events that ___ witnessed. ___ did not show any tendency to attribute to **S.L.** any action that ___ only conjectured about by having heard from other people, instead of having witnessed it _____. ___ clearly differentiated facts related about **S.L.** by other persons from ___ own observations. This gave ___ statement a value of objectivity.

137. Witness D's statement seemed to the panel to be spontaneous and at the same time consistent. ___ testified in a confident and consequent manner. All facts mentioned in ___ narration matched each other and made a coherent and convincing account of the events.

138. Witness D's credibility was verified through meticulous and detailed cross examination performed not only by the defense counsel but also by the panel members. ___ was asked numerous repetitive questions and was not even slightly confused by them. All ___ answers were coherent and consequent. Veracity of ___ recount was a subject of

testing during four hearing sessions. On no occasion did ___ deflect from the version presented through ___ whole testimony.

139. Witness D showed no tendency to deliberately evade any topic. ___ seemed to be fully responsive as much as ___ memory allowed it. At the same time ___ did not hesitate to admit that ___ did not remember some facts of minor significance, grounding even more ___ objectivity. Furthermore, this appeared to be quite understandable because of the time passed.⁶⁵

140. There were some noticeable disparities between Witness D's pre-trial depositions and ___ in-court statement challenged by defense counsel Gregor Guy Smith and Arianit Koci, in relation to the killing attributed to **S.L.** :

140.1. in the pre-trial stage the witness testified that in the very moment when the first shot was fired the victim was in a standing position⁶⁶, while in the courtroom the witness clearly stated the victim was kneeling at the time;⁶⁷

140.2. in the pre-trial stage the witness said that ___ came to **S.L.** 's house in _____ in the night and then **S.L.** told ___ to go with ___ and they went by a vehicle to the crime scene. In the court ___ stated that ___ stayed in **S.L.** 's _____'s house in _____ overnight and went to the crime scene only the next day.⁶⁸

65 Minutes of the main trial; 11 November 2014 p. 20, 22, 31, 32, 42, and 12 November p. 9.

66 Minutes of the main trial; 13 November 2014 p. 46.

67 Minutes of the main trial; 12 November 2014 p. 4.

68 Minutes of the main trial; 11 November 2014 p. 40.

141. Both challenges were presented in the course of cross - examination and did not baffle the witness. ___ stayed by ___ version presented during examination in chief. In the opinion of the trial panel divergences and disparities resulted from the time lapse and natural imperfection of human perception and memory. In fact they assured the trial panel that the testimony given in front of the panel was fully spontaneous and had not been concocted beforehand by the witness.

142. ___ reaction to the confrontation with the disparities seemed to be natural and spontaneous. ___ explanation with regard to specificity of details asked during the examination in the main trial⁶⁹ was assessed by the panel as a sincere and convincing. In fact the interrogation during investigation was not very specific. The record shows that no questions for clarification were asked at that time. Therefore, the discrepancies did not impeach Witness D's credibility.

143. There was no credible piece of evidence contradicting Witness D's statement. In particular, testimonies of witness N.F. and witness K.H. were not convincing and therefore not reliable. The story presented by witness J.L. did not deny Witness D's truthfulness as it only denied the veracity of the explanation that **S.L.** presented to Witness D at the critical time.

144. In his closing arguments, the defense counsel Arianit Koci presented some other arguments in order to impeach Witness D's credibility, namely that:

144.1. the Witness erroneously stated that **S.L.** was "_____ of the _____ of _____" whereas ___ became _____ of the _____ only sometime in _____. The

69 Minutes of the main trial; 13 November 2014 p. 27.

panel concluded that this error does not prove that the witness lied deliberately. It only showed that ___ had a limited knowledge of the ___ structure which does not affect veracity of ___ recollection of facts that ___ witnessed;

144.2. it was impossible to drive for ___ km without encountering any _____ check point. The panel found that this thesis was not supported by any evidence;

144.3. it was impossible to communicate with _____ in a distance of ___ km by radio and the phones were not working. Witness D actually did not say that **S. L.** communicated in ___ presence with ___ who escorted the victim. Logical reasoning led the panel to the presumption that the ___ observed the road so they were able to appear immediately after they saw **S.L.** smoking a cigarette upon ___ arrival.

Witness A.G.

145. Witness A.G. _____ presented ___ testimony in a logical and coherent way. It fully corresponded with the statements of F.B. _____ and H.H. _____ in relation to the medical treatment that **S.G.** _____ was given in _____. For these reasons the panel assessed ___ testimony as reliable.

146. The Witness indicated that after the surgery that took place in the end of ___ or beginning of _____, **S. G.** _____ had the injured ___ immobilized with plaster cast. However, ___ could move if only the other ___ was operant. The witness admitted that ___ had no knowledge if the injuries of the non-immobilized ___ prevented **S.G.**

from moving on _____.⁷⁰ ___ admitted that **S.G.** could move on _____ on a distance of few meters.⁷¹ This statement complies with testimonies of Witness A and Witness D.

Witness A's application for _____ dated _____

147. The panel concluded that Witness A's application for _____ dated _____ was properly authenticated. It was delivered to the court by the competent authority: _____ for the _____ and _____ of _____, _____ and _____. The content of the application complies with Witness A statement in front of the court, since ___ had supported ___ with shelter and food. It does not indicate that the applicant participated in hostilities before ___ was brought to _____/_____.

Medical certificate issued for Witness A by G. H. on _____

148. The panel assessed the medical certificate issued by G.H. on _____ as authentic. Its origin was confirmed by the doctor.

149. The certificate itself was accepted only as a proof that the doctor issued the diagnosis written in the certificate and not as a proof of the correctness of the diagnosis.

70 Minutes of the main trial; 13 February 2015 p. 14.

71 Minutes of the main trial; 13 February 2015 p. 14.

b. Evidence partially reliable

Witness B

150. The panel came to the conclusion that only the part of Witness B's statement presented by ___ on direct examination and that was related to the beating of the Witness _____ performed by **S.G.** could be used for reconstruction of facts. ___ narration on the beating was consequent and firm.

151. Witness B talked about the grievance that ___ suffered from **S.G.** in a sincere and adamant way. ___ determination to present the disservice that ___ suffered was apparent, despite security concerns that the witness pointed at.

152. During the cross examination, Witness B denied that ___ was ever beaten by **S.G.** . While confronted with ___ different version given in examination in chief, ___ did not explain the reasons of disparity and reacted in a visibly anxious manner, obviously hiding the true reason of changing ___ testimony. Therefore ___ denial was not convincing.

153. Witness B's version in relation to the circumstances of ___ arrest was contradicted by Witness A. According to Witness B, Witness A cooperated with ___ ___ ___ on that occasion and was even armed with a handgun. Witness B obviously evaded answering questions directed to Witness A's participation in ___ arrest.⁷²

72 Minutes of the main trial; 14 October 2014 p. 9.

154. Despite assertion that Witness A cooperated with the ___ and was even allowed to carry a gun, Witness B spontaneously said that ___ did not even see where "they" had taken Witness A.⁷³ These words indicated that Witness B actually assumed that Witness A had been "taken", i.e. deprived of liberty while ___ stayed in ____/____.

155. In the light of facts presented by Witness A and Witness K, the ascertainties on Witness A cooperating with ____ during the arrest were completely unrealistic.

156. Witness B determined that ___ was brought to ____/____ on ___ _____ and then beaten by **S. G.** on _____. The indication of the first date is visibly erroneous as Witness A convincingly stated that they were brought to ____/____ on ___ _____.

157. Witness B's statements on the duration of ___ stay in ____/____ and ___ denial of being involved in the incident when ___ was maltreated together with Witness A are contrary to Witness A's testimony.

158. Witness B's allegation on falsification of ___ pre-trial statement by the prosecutor sounded naïve and unconvincing. On cross examination ___ denied even the facts that ___ already admitted in front of the court.

159. Witness B's behavior during the main trial indicated that ___ was afraid to tell the truth. ___ was agitated, evasive and ___ reactions to some questions manifested this. ___ did not explain the reason of the substantial change of ___ version of events.

73 Minutes of the main trial; 14 October 2014 p. 14.

160. Witness B had concerns about ___ personal security. This finding was made on the basis of the testimony given by the witness C.S. .

Witness H.H.

161. The testimony of H.H. was logical and corresponded with the statement of F.B. and A. G. . The Witness showed willingness to give exhausting answers.

162. However, the panel did not accept the witness's circumscription of time until **S.G.** stayed immobilized after the surgery. The Witness stated that **S.G.** stayed in the recumbent position until the beginning of _____.⁷⁴ The witness showed some degree of uncertainty in placing the events in time.⁷⁵ ___ explained that ___ set out the time according to ___ recollection of weather condition or the savor in the air. ___ explained that ___ used the same method to determine the time when **S.G.** was operated and ___ gave different indications of the time on direct and cross examinations.⁷⁶

163. The testimony of witness H.H. as to the period of **S.G.** 's immobilization was contradicted by Witness A and Witness D. They saw **S.G.** moving on _____ or in a _____. Also Witness B convincingly testified that **S.G.** maltreated ___ in _____, after ___ was brought to _____/_____ with Witness A who testified that it was on _____.

74 Minutes of the main trial; 10 March 2015 p. 6.

75 Minutes of the main trial; 10 March 2015 p. 23.

76 Minutes of the main trial; 10 March 2015 p. 24.

c. Presumptions and notorious facts adopted by the panel

164. The panel accepted the presumption that Witness B, the brothers from _____ and the man from _____ neither served in the _____ nor participated in hostilities. It was based on assessment that no piece of evidence indicated their involvement in combat or other form of hostilities related to the armed conflict. It is a notorious fact that the majority of Kosovo Albanians were exposed to atrocities caused by the conflict. Not all of them actively participated in hostilities although many of them might have supported the _____ in various other forms.

165. It was concluded by the panel that the shots fired by **S.L.** _____ into the unidentified _____'s head deprived the man of his life. This presumption was based on the general knowledge that shots fired in the victim's skull with a muzzle pointing at the place behind an ear would probably result in death of the victim. The degree of probability is in this case so close to certainty that no reasonable doubts as to the demise of the victim are actually left.

166. **S.L.** _____ did not tell Witness D the truth about the reason for killing the unknown _____ in _____ presence. This presumption was a consequence of positive assessment of the testimony of witness J.L. _____ .

167. The weapons that witnesses commonly referred to as "TT pistol" or as "AK-47" were presumed by the panel to be in fact a type of TT pistol or a type of AK-47 assault rifle. It is a notorious fact that instead of original weaponry, fully functional replicas made by various manufacturers were commonly used in armed conflicts in former Yugoslavia. None of the witnesses who mentioned some weapons had the opportunity to examine it nor did they seem to have a specialist knowledge on weaponry.

168. It was accepted as a notorious fact that at the time when Witness A was kept in _____/_____ and when **S. L.** killed an unknown ___ between _____ and _____ there was an armed conflict going on in Kosovo. There were numerous casualties, damage of property, and displacement of civilians. This notoriety was reinforced by the facts presented by Witness A⁷⁷, Witness D⁷⁸, and also by F. _____ B. _____, A.G. _____ and B. G. _____.

d. Evidence reliable but not conclusive

Witness J.L.

169. The panel assessed the testimony given by witness J. L. _____ as credible. There were no elements that would dictate criticism of ___ veracity. Having in mind common respect for forefathers and, generally, respect for family values that is ever present in Kosovo, it seems unlikely that ___ would deliberately provide an alibi for a person who presumably murdered _____ by lying about circumstances of _____'s death.

Witness F.B.

170. There were no reasons to deny the credibility of witness F.B. _____. ___ recollection of facts was adequate to the time lapse. ___ answered questions in a sincere manner and ___ testimony was corroborated by H.H. _____. However, ___ had no direct knowledge about **S.G.** _____'s ability to _____ in the end of _____ nor about the _____'s _____.

77 Minutes of the main trial; 24 June 2014 p. 14.

78 Minutes of the main trial; 11 November 2014 p. 13.

Witness B.G.

171. Witness B.G. presented ___ recollection in a sincere and logical way. There were no grounds to doubt ___ credibility. At the same time it turned out that ___ statement contained almost no elements that could be used for reconstruction of facts related to the charges. The only exception referred to the treatment provided to **S.G.** .

172. The Witness did not know any facts directly related to **S.G.** 's medical condition in the ___ of _____ nor did he know the ___'s commanding structure at the critical time except mentioning **S.L.** and **S.S.** as the _____.

Witness C.S.

173. There were no reasons to criticize the veracity of witness C.S. . ___ testimony consists of no elements that would be unrealistic.

174. Witness C.S. repeated information that ___ received from Witness B about ___ concerns for ___ personal security. This information corresponded with Witness B's behavior during the testimony: ___ was visibly agitated, frightened and felt unsecure.

175. The facts presented by C.S. were useless for the reconstruction of facts. There was no way to verify if Witness B told ___ the truth.

176. The testimony of witness C.S. indicated that Witness B was frightened. However, Witness B's reliability was already denied on numerous other grounds.

Witness N

177. Witness N, the ____ of Witness F, testified in a sincere way. There were no grounds to reject ____ credibility. However, ____ statement consisted mostly of hearsay that was told to ____ by ____ Witness F. There was no basis for verification of this hearsay and for this reason Witness N's testimony could not contribute to the reconstruction of facts.

178. Witness N confirmed that ____ was absent for some time and that ____ told ____ that ____ was taken by the ____ and that ____ came home wounded. The remaining pieces of credible evidence were not sufficient to link these facts to any criminal actions of any of the defendants.

Witness O

179. There were no grounds to disqualify the truthfulness of Witness O. ____ testimony was also entirely based on unverifiable hearsay coming from ____, Witness F. Therefore, it was not useful for fact finding.

Witness G.H.

180. As elaborated above, the panel believed that on ____ G.H. issued a certificate that confirmed that Witness A suffered from acute psychosis and was unable to work. The Witness firmly confirmed the origin of the document.

181. G.H. _____ did not recollect the examination of Witness A. ___ indicated that Witness A and some members of ___ family were ___ patients before the war.

182. G.H. _____'s testimony was coherent and logical. In the light of ___ understanding of acute psychosis, ___ diagnosis appears as quite probable. This conclusion was based by the panel on the common sense analysis of ___ testimony. ___ indicated that traumatic events may induce acute psychosis. The panel noticed that the events that ___ mentioned correspond with Witness A's experience from _____/_____.

183. The witness explained that according to ___ acute psychosis meant what follows:

"Acute psychosis is brief psychotic state which is displayed as a consequence of serious traumatic situations or events, in case of loss of a dear family member, in stressful situations which is manifested with psychiatric disorders which attack many spheres, mainly the area of thinking, the perception aspect, the individual is out of the reality, on whom the delusional ideas would predominate, we would have also cognitive disorders, perception disorders, where present are hallucinations, both auditory or visual and as I mentioned earlier personality disorder with the consequence of losing himself and sense of reality around him."

184. ___ also explained that acute psychosis usually happened for a brief period of time. ___ pointed out at the possibility of repetition. (1 March 2015).

185. The panel found no reason to confront G.H. _____'s understanding of acute psychosis with the commonly applied definition of this kind of mental disorder.

186. The diagnosis itself did not impair the assessment of Witness A's competency to give reliable testimony as it was adopted by the panel. According to the panel's observations during the trial, Witness A showed no single symptom described by G.H. _____ as typical for acute psychosis. There was no indication that _____ perception or recollection of ability to present facts was in any way affected by a mental disorder.

II. Evidence rejected as a basis for reconstruction of facts

Witness F.M.

187. The panel critically assessed the testimony presented by witness F.M. _____. As it was presented on cross examination, this witness deflected completely from _____ pre-trial statement. In the opinion of the panel this discrepancy is so profound that it cannot be attributed simply to the imperfection of the witness's reporting skill. In the pre-trial stage the witness presented the ability to be quite precise and logical. However, after full consideration, the Panel finds that this discrepancy has been purposefully fabricated because _____ version of events obviously contradicts the testimony of Witness A and _____ own statement given in the pre-trial stage.

188. The witness was examined by the prosecutor as a hostile witness. _____ did not give any convincing reasons for changing _____ version of events. _____ allegations that _____ pre-trial interrogation was falsified appeared to be naive and unrealistic, as any falsification would be more than obvious to be revealed to the court. In principle, the criminal procedure does not allow for the use of the record of a pre-trial interview as direct evidence, which makes a falsification consisting of completely fictitious facts useless. The allegations appeared to the panel as frivolous and hollow accusations.

Witness L

189. The panel assessed the testimony of Witness L, the _____ of Witness A, as not credible. There were significant disparities between Witness L's and Witness A's testimonies. According to Witness L _____ was taken to _____/_____ on _____ by _____ and one of them was **J.D.** . Witness A indicated the date of _____ and denied that **J.D.** participated in _____ arrest. Witness K did not mention **J.D.** during _____ arrest. Witness L denied that _____ had contact with **S.S.** in _____/_____ while _____ stayed there.

190. Witness L confirmed that Witness A told _____ that _____ and Witness B were maltreated together and forced to beat each other. Witness L described also that _____ looked as if _____ had been maltreated, after _____ return home. At the same time, Witness L came to trial with an apparent intent to discredit Witness A. _____ pointed out _____'s alleged mental infirmity saying that _____ was retarded, and _____ even brought a medical certificate that _____ indicated as proof of it (exhibit _____). _____ behavior went far beyond a sole correction of alleged mistakes that _____ made in relation to the identification of **S.S.** .

191. Witness L's account of _____ erroneous recognition of **S.S.** was unrealistic. _____ allegedly saw **S.S.** on TV and recognized _____ as a _____ that _____ met in _____/_____. Then, after being interrogated by the prosecutor, Witness L again saw **S.S.** on TV and realized that _____ made a mistake. During examination in front of the panel _____ presented strong arguments to explain _____ alleged mistake. _____ recalled height and face features of the _____ that _____ confused with **S.** **S.** It was unreasonable that _____ performed such recollection only before coming to the trial.

192. Witness L was visibly hostile towards **J.D.** . ___ accused ___ of being a _____ and tended to attribute some actions to ___ which were not confirmed by any credible piece of evidence.

193. The witness tended to avoid giving straight answers. The panel's impression was that ___ hedged to refer to issues that ___ was asked about.

Witness C

194. Witness C's testimony given in the main trial was completely unreliable. From the beginning of ___ appearance in the courtroom ___ showed a hostile attitude towards the justice system. ___ was arrogant and disrespectful. It was obvious that ___ tended to sabotage confronting ___ with ___ pre-trial depositions.

195. ___ totally contradicted ___ allegations presented to the prosecutor in the pre-trial stage. ___ story on falsification of the records of ___ pre-trial interview was naive and unconvincing.

196. Witness C was declared as a hostile witness. Therefore ___ statement in the court could not be used as a direct evidence for the reconstruction of facts.

Witness F

197. The panel critically assessed the probative value of Witness F's testimony. Although ___ presented a coherent version of events during the main trial, it contradicted ___ pre-trial statement so significantly that disparity could not be attributed only to various recollections of facts.

198. The panel concluded that Witness F intentionally changed ___ story and concocted the account of events presented in the courtroom in order to exculpate defendants that ___ previously incriminated. ___ explanation on divergences between ___ statements pointed out at alleged falsification of record. The allegations were unfounded and contradicted common sense.

Witness I

199. Witness I was examined by the prosecutor as a hostile witness. From the very beginning of ___ statement ___ was agitated and presented an hostile attitude towards the proceedings. ___ obstructed the interrogation by falling into narration not related to the questions. ___ behavior indicated a lack of sincerity and for this reason ___ testimony was not credible.

200. Witness I completely denied ___ allegations presented in the pre-trial proceedings. ___ accused the prosecutor, who interrogated ___ during the investigation phase, of falsification of the record, but ___ did not explain why the record was signed by ___ as congruous with ___ statement. ___ reaction to the pre-trial statement being read in the courtroom was marked by extreme emotions.

Witness K.H.

201. The testimony of witness K.H. was assessed by the panel as not credible. The witness contradicted Witness D's statements as to their contacts in ___/___ by denying acquaintance with ___.

202. The reason of the negative assessment was the witness's behavior during cross-examination. ___ was obviously

evasive. On direct examination ___ showed an ability to express _____ precisely and straight to the point.

203. During cross-examination, ___ deliberately avoided answers related to ___ contacts with some of the defendants. Therefore, the panel evaluated ___ testimony as not candid and for this reason not truthful.

Witness N.F.

204. The panel was not convinced by the testimony given by witness N.F. _____. According to Witness D, _____ N. F. _____ brought _____ once to _____/_____ by _____ car.

205. Witness N.F. _____ gave evasive and contradicting answers to the questions related to the possession of a car during the war. Initially, ___ said that in _____ had no car at all because it was burnt by _____ at the beginning of the war. After another question ___ said that the war started with _____ and that it took place in the beginning of _____. As an answer to the next question ___ said that it happened in the _____. It was visible that at the beginning of ___ testimony the witness tried to avoid the fact that ___ was in possession of a vehicle in the _____ of _____.

206. Witness N.F. _____ admitted that ___ knew Witness D, but ___ denied that ___ ever went with _____ to _____/_____. This denial was not reliable because of the witness's insincerity in relation to the possession of a car.

D. The charges that have not been substantiated by evidence

207. The panel found no evidence supporting the following charges:

- beating of Witness C by **S.G.** and **S.J.** (counts 9(2), and 11(2) of the indictment);
- beating of I.B. by **S.J.** (count 11(3) of the indictment);
- killing of I.B. by **S.G.** and **S.J.** (counts 9(1), and 11(4) of the indictment);
- beating of Witness I by **S.S.** and **S.J.** (counts 11(8), and 13 (7) of the indictment);
- wounding of Witness F by **I.H.** (count 10(1) of the indictment);
- beating of Witness F by **S.J.**, **S.L.**, and **A.Z.** (counts 11(5), 12(2), and 15(2) of the indictment);
- beating of Witness F by **A.Z.** (count 15(3) of the indictment)
- beating of an unknown _____ from _____ and Witness F by **A.Z.** (count 15(4) of the indictment);
- beating of Witness E by **S.J.** (count 11(6) of the indictment);
- beating of ___ unidentified civilians, a _____ and a _____ by **S.J.** (count 11(7) of the indictment).

208. The sole pieces of evidence that supported these charges were pretrial interviews of witnesses who did not stand by their inculpatory statements during the main trial (Witness B, Witness C, Witness F, Witness I, Witness L) or did not appear for the trial (Witness E, Witness G). According to Article 123 Paragraph 1 of the CPCRK pre-trial interviews may be used as a basis to substantiate pre-trial investigative orders, orders for detention on remand, and indictments, but must not be used as direct evidence for determination of guilt when the case enters a stage of main trial.

209. The content of threats towards Witness A directed by **S.J.** and **S.S.** and containing reference to the death of I.B. was not sufficient to determine the culprit and to recreate the circumstances of this death.

210. The panel found no evidence supporting the charge consisting in criminal responsibility, as "person exercising control", of **S.J.**, **S.L.**, **A.Z.** and **S.S.** for the operation and conditions in the _____/_____ detention center (counts 11(1), 12(1), 13(1), and 15(1) of the indictment).

211. It was established that there were two rooms in the _____ in _____/_____ that were used by the ___ as holding cells to incarcerate civilians.

212. There were chains in the Witness A's cell, but there was no evidence that any of the prisoners were shackled.

213. There was no evidence that before Witness A's stay in _____/_____ there were any prisoners incarcerated there. The testimony of Witness D does allow for the conclusion that persons that ___ saw in the holding cells were actually kept there for any extended period of time.

214. There was no evidence that any person apart from Witness A was a subject of maltreatment consisting in inadequate nutrition, or exposed to inadequate sanitary conditions and excessive heat due to the lack of ventilation. This maltreatment appeared as an action of the unidentified sentries and there was no evidence that it was ordered or even acknowledged by any of the defendants.

215. According to the charges, the accused violated the bodily integrity of the prisoners. The panel came to the conclusion that each individual instance of a violation of bodily integrity of persons detained in _____/_____ was considered separately.

216. There was no evidence that the accused who did not participate in a particular beating were aware that this beating took place. Therefore, they could only be held responsible for the beating that they committed.

217. Therefore, Pursuant to Article 364 Paragraph 1 Subparagraph 1.3 of the CPRK the panel acquitted **S. J.** _____, **S.L.** _____, **A.Z.** _____ and **S.S.** _____ of exercising control over _____/_____ _____ and of the responsibility for the conditions there, because it was not proven that they committed the said action

E. Legal classification of the actions attributed to the accused

I. Subjective identity of the judgement over indictment

218. Following Article 360 Paragraphs 2 of the CPRK, the panel was not bound by the legal classification of charges that was presented in the indictment. However, due to the requirement of subjective identity of the judgement over the indictment which is stipulated in Article 360 Paragraphs 2 of the CPRK, the crimes that were assigned to the accused could not consist of material elements that were not contained in the counts in the indictment. Therefore, the panel did not relegate any particular injuries sustained by the victims to the deeds committed by the accused while determining the acts that were attributed to the accused and matching the facts in the case with definitions of crimes.

II. International humanitarian law

219. It was established that the actions attributed to the accused happened during the period when armed clashes in Kosovo took place between the regular army of the Federal Republic of Yugoslavia which controlled Kosovo before the war and fighters belonging to the Kosovo Liberation Army.

220. The actions consisted mostly of abuse that included violence against individual civilian persons, and applied with various degree of intensity. In one case it resulted in death.

221. For centuries the savagery of warfare has been the subject of the efforts made by the international community to limit the effects of military operations by protecting persons who were not participating in hostilities. The efforts contributed to the development of a branch of international law called: international humanitarian law. Serious violations of this law became penalized as war crimes.

a. Definition of prohibited acts

222. The first regulation of International humanitarian law that dealt specifically with humanitarian protection in situations of non-international armed conflict was Article 3 common to the four Geneva Conventions adopted on 12 August 1949:

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

"1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse

distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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

(b) Taking of hostages;

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

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

223. The catalogue of acts that should be prohibited was complemented by Article 4 Paragraph 2 of the Additional Protocol II which partially repeated the wording of common Article 3. It recommended penalization of the following acts:

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

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

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

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

(g) pillage;

(h) threats to commit any of the foregoing acts."

224. The Geneva Conventions of August 1949, with their common Article 3, were ratified by the Federal People's Republic of Yugoslavia on 15 September 1950.⁷⁹ On 26 December 1978 the Additional Protocol II to the four Geneva conventions was ratified by the Republic under its new name, i.e. as the Socialist Federal Republic of Yugoslavia.⁸⁰

b. Existence of non-international armed conflict

225. The trial panel decided to follow the functional definition of non-international armed conflict provided by the International Criminal Tribunal for Former Yugoslavia (ICTY) in the Tadic⁸¹ case. This definition has been commonly applied by the ICTY as a formula for the characterization of non-international armed conflict⁸²:

79 Službeni vjesnik Predizijuma Narodne skupštine FNRJ broj 6/1950. od 15. rujna 1950 (The official gazette of the Presidium of the National Assembly of FPRY, no. 6/1950, dated 15 September 1950).

80 Međunarodni ugovori at 1083 (International contracts at 1083).

81 Prosecutor v. Tadic, case No. IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995.

82 Prosecutor v. Delalic, Mucic, Delic and Landzo, Trial Chamber Judgment, 16 November 1998, ICTY Case No. IT-96-21-T, para. 183; Prosecutor v. Furundzija, Trial Chamber Judgment, 10 December 1998, ICTY Case No. IT-95-17/1, para. 59; Prosecutor v. Kordic and Cerkez, Trial Chamber Judgment, 26 February 2001, ICTY Case No. IT-95-14/2-T, para. 24; Prosecutor v. Kordic and Cerkez, Appeals Chamber Judgment, 17 December 2004, ICTY Case No. IT-95-14/2-T, para. 336; Prosecutor v. Kunarac, Kovac and Vukovic, Trial Chamber Judgment, 22 February 2001, ICTY Case No. IT-96-23, para. 402; Prosecutor v. Kunarac, Kovac and Vukovic, Appeals Chamber Judgment, 12 June 2002, ICTY Case No. IT-96-23, para. 56; Prosecutor v. Naletilic and Martinovic, Trial Chamber Judgment, 31 March 2003, ICTY Case No. IT-98-34-T, para. 177; Prosecutor v. Staki, Case No. IT-97-24-T, Judgment, Trial Chamber II, 31 July 2003, para. 568; Prosecutor v. Slobodan Milošević, Third Chamber Decision on Motion for Judgment of Acquittal (Milošević Rule 98bis Decision), ICTY Case No. IT-02-54-T, 16 June 2004, para. 16; Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60-T, Judgment, Trial Chamber I, 17 January 2005, para. 536; Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, Trial Chamber II, 31 January 2005, para. 215; Prosecutor v. Limaj, Bala, and Musliu, Case No. IT-03-66-T, Judgment, 30 November 2005, para. 84; Prosecutor v. Ori, Judgment, Case No. IT-03-68-T, Trial Chamber II, 30 June 2006, para. 254.

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

226. It should be stressed out that the provisions of common Article 3 to the Geneva Conventions should apply also outside the actual theatre of combat operations which means in the whole territory under the control of a party whether or not actual combat takes place.

227. The practice of the ICTY established two fundamental criteria of protracted armed conflict: the organization of the parties and the intensity of the violence.

228. With regard to government forces, it is commonly presumed that they meet that requirement without it being necessary to carry out an evaluation in each case. As for non-governmental armed groups, the indicative elements that need to be taken into account include, for example: the existence of a command structure, the authority to launch operations bringing together different units, the ability to recruit and train new combatants or the existence of internal rules.

229. The trial panel took judicial notice of the findings of the ICTY in the *Prosecutor v. Limaj* case:

"before the end of May 1998 the KLA already sufficiently possessed the characteristics of an organized armed group, able to engage in an internal armed conflict";⁸³

"KLA attacks were carried out against a variety of Serbian military, community and commercial targets over a widespread and expanding area of Kosovo";⁸⁴

83 *Prosecutor v. Limaj , Bala , and Musliu*, Case No. IT-03-66-T, Judgment, 30 November 2005, para 134.

84 *Ibidem*, para 169.

"many combat operations were carried out in the area of Drenica where the KLA developed earlier and was probably best organized."⁸⁵

230. In assessing the intensity of armed violence during a period of actions established through the reconstruction of facts, the trial panel used a similar approach to that applied by the ICTY in Prosecutor v. Milosevic case (Prosecutor v Slobodan Milošević, Case No. IT-02-54-T, Rule 98 bis Decision, 16 June 2004, paras 26-32): the engagement of governmental troops, the use of artillery, the destruction of property, the displacement of local population, which were proven in the main trial and also the existence of casualties which is known as a notorious fact.

231. Therefore, the trial panel assessed that there was a non-international armed conflict going on in the meaning of common Article 3 in the period relevant for the actions attributed to the accused in this case. It triggered a further analysis of the applicability of this provision.

c. Nexus

232. The panel followed the concept observed by the ICTY in relation to the necessity of a nexus between the accused's action and the armed conflict, in order to classify a criminal act committed during the armed conflict as a war crime.

233. In the Tadic case, the ICTY expressed the opinion that:

"There must be an obvious link between the criminal act and the armed conflict . . . It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict." (Prosecutor v Tadic, Case

85 Ibidem, para 170.

No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.)

234. In the same case, the ICTY stressed the fact that a war crime can be perpetrated even if "substantial clashes were not occurring in the region at the time and place" where the crimes were allegedly committed. (ibidem)

235. A more detailed explanation on this issue was presented by the ICTY Appeals Chamber in the Kunarac case:

"What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment - the armed conflict - in which it is committed. It need not have been planned or supported by some form of plan or policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict [. . .]"⁸⁶;

236. The trial panel assessed that the actions that took place in _____/_____ were explicitly linked to the armed conflict going on:

236.1. all the perpetrators were members of an armed group that was well structured and that effectively controlled at least a part

86 Judgment, Prosecutor V. D. Kunarac, R. Kovac e Z. Vukovic, Appeal Chamber, 12 June 2002, par 58 and 59.

of the territory of Kosovo. The control disabled any activity of governmental agendas including state-run law enforcement which instead took a position of an enemy and persecutor of _____ population. Therefore, civilians were deprived of any form of legal protection against arbitrary and offensive acts committed by ___'s _____. The culprits enjoyed a temporary impunity;

236.2. extended deprivation of liberty of Witness A and other persons incarcerated in _____/_____ was possible because of the lack of legal protection that should be provided by the state in peace time. Such a protection would normally provide for a system of competent organs and procedures to review complaints against unlawfulness and conditions of detention;

236.3. the detention lasted long enough to elicit such complaints in a time of peace;

236.4. the apprehension of Witness A took place in the presence of the members of his family. They were deprived of an opportunity to react effectively because of a non-functioning State apparatus;

236.5. additionally, the abuse that Witness A suffered from was motivated by ___ presumed collaboration with _____ _____.

237. The panel rejected the existence of sufficient nexus between the killing attributed to **S.L.** and the armed conflict going on at that time. Although **S.L.** was a member of the ___ and the persons who

escorted the victim were presumably also in the service of the ____, the link with their military activity is not proven. The sole motivation of the perpetrator remains unknown. The killing itself was a short lasting action. It is not known how the victim was apprehended and if ____ was deprived of liberty long enough to cause _____ actions if this would happen in peace time.

238. As a general rule, war crimes are punished more severely than their common equivalents and they also trigger other negative consequences, as for example the non-applicability of the statute of limitations. According to Article 3 Paragraph 1 of the CPCRK, doubts regarding the existence of facts relevant for the case shall be interpreted in favor of the accused. Therefore, the panel concluded that there was no sufficient nexus between **S. L.** 's deed and the armed conflict.

d. Gravity of violations of the international humanitarian law

239. The wording of common Article 3 and Additional Protocol II does not set up any threshold of gravity of violations of the provisions that define these acts against **civilians** that should be prohibited during non-international armed conflicts. The provisions obligate the states to penalize the violations through domestic legislation.

240. It was only in 1977, at the occasion of the adoption of the Protocol Additional to the 1949 Geneva Conventions relating to the protection of victims of international armed conflicts (Additional Protocol I), that the international community agreed to accept an explicit clause according to which 'grave breaches of the instruments of international humanitarian law shall be regarded as war crimes'.⁸⁷

87 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1125 UNTS 3, 8 June 1977, entered into force 7 December 1979, Article 85 (5).

241. All pieces of domestic legislation relevant to crimes committed against civilians did not provide for any threshold of seriousness or gravity for the concrete violation of international humanitarian law. The Criminal Code of Kosovo (CCK) [The code entered into force on 6 April 2004 with the name Provisional Criminal Code of Kosovo (PCCK); according to the Law No. 03/L-002 on supplementation and amendment of the Provisional Criminal Code of Kosovo adopted by the Assembly of the Republic of Kosovo on 6 November 2008, the code was renamed as Criminal Code of Kosovo (CCK)] in its Article 120 Paragraph 2 and the Criminal Code of the Republic of Kosovo (CCRK) in its Article 152 Paragraph 2 stipulated that any breach of the provisions of common Article 3 constitutes a serious violation without reference to particular circumstances of a concrete crime.

242. The concept of 'war crimes' commonly accepted by the international community, i.e. crimes committed in the course of an armed conflict that require criminal punishment of the culprit, refers to serious violations of the laws or customs of international or internal armed conflicts.⁸⁸⁺⁸⁹

243. The ICTY jurisprudence established the following interpretation: violation of international humanitarian law is serious if it constitutes a breach of a "rule protecting important values, and the breach must involve grave consequences for the victim".⁹⁰

244. The panel fully accepted this interpretation and concluded that:

88 See article 8 of the ICC Statute, article 2 of the ICTY Statute, article 4 of the ICTR Statute, article 3 of the SCSL Statute and s 6.1 of Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (in East Timor), Doc No UNTAET/REG/2000/15 of 6 June 2000.

89 "to steal a loaf of bread in an occupied territory does not make a war criminal out of a member of the occupying force": in Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) dated 2 October 1995, Case No IT-94-1-AR/72 [ICTY Appeals Chamber] para 94.

90 Kunarac, Kovac and Vokovic, June 12, 2002, para. 66.

244.1. Beating of Witness B by **S.G.** , beating of a ___ from _____ by **S.S.** and beating of a ___ from _____ by **S.S.** and **S.J.** did not reach the necessary threshold of seriousness. These actions constituted an infringement of important values protected by international humanitarian law: bodily integrity and human dignity. However, it was not proven that any of these actions caused grave consequences for the victims;

244.2. Repetitive beating of Witness A amounted to serious violation of international humanitarian law. It violated the same values as other beating did. However, the scale of infringement of Witness A's bodily integrity and dignity met the threshold required for a war crime. The beatings of Witness B and other ___ appeared as single, short lasting episodes, while Witness A was exposed to beating for long time. Additionally ___ was threatened with death and humiliated with accusations of being a ___. ___ testimony proved grave consequences as ___ still suffers from trauma that ___ experienced.

e. Application of domestic law to the actions meeting criteria of a war crime

245. International humanitarian law does not provide for sanctions for the acts that this law prohibits and recommends for such acts to be penalized by domestic legislation. The action committed by **S.S.** , which consisted of elements of prohibited serious violation of international humanitarian law, had to be classified by the application of domestic law. The same applied to the remaining acts attributed to the accused which were not qualified as war crimes.

246. The legal classification of the actions that were attributed to each of the accused resulted from comparison of their deeds with elements of particular crimes defined by various pieces of domestic legislation.

247. The trial panel took into consideration the change in the substantial law which took place after the time of commission of the relevant acts and before the time of sentencing. The panel collated the legal provisions provided by the law that was in force at the time of commission of the incriminated action attributed to the accused.

i. Protection of individual civilians during non-international armed conflict in domestic law

248. The preliminary analysis of the facts in the case that was performed from the perspective of international humanitarian law, led to the conclusion that actions carried out by **S.S.** could be considered as a war crime as they constituted a serious violation of common Article 3 of the four Geneva conventions and Article 4 Paragraph 2 (a) of the Additional Protocol II to the said Conventions.

249. These actions consisted of violence in the form of repetitive beating of Witness A with punches and slaps, threatening ___ with death and humiliating ___ by accusing ___ of being a _____.

250. International humanitarian law delegates determination of sanctions to domestic law, so the analysis of relevant provisions of the law applicable in Kosovo was necessary.

251. The protection of individual civilians during the internal armed conflict in the domestic law that was in force in Kosovo from the time of the war in Kosovo until the time of sentencing in this case underwent a significant evolution.

252. Initially Article 142 of the CCSFRY, in its wording as introduced on 1 July 1977, criminalized as war crimes only those acts that were directed against a civilian population. The "socially harmful" acts that were directed against individual civilians were criminalized as ordinary crimes.

253. The amendment of Article 142 of the CCSFRY that entered into force on 30 August 1990 widened the scope of criminalization of acts against civilians. Besides numerous crimes against a civilian population, it also criminalized as a war crime an attack against individual civilians or persons unable to fight, which resulted in the death, grave bodily injuries or serious damaging of people's health.⁹¹

254. As a general rule introduced by the Regulation issued by the United Nations Interim Administration Mission on 12 December 1999⁹², which had a retroactive effect from 10 June 1999, the law that entered in force in Kosovo after 22 March 1989 and until 10 of June 1999 was not applicable, under the terms specified in Paragraph 1.2 of the same Regulation.

255. War crimes against individual persons were not a subject matter of any former provisions. Therefore, according to Paragraph 1.2 of the said Regulation the court could exceptionally apply relevant provisions that were introduced after 22 March 1989, as long as they were not discriminatory and in compliance with section 1.3 of the same Regulation.

256. Nevertheless even the amended Article 142 in its wording introduced on 30 August 1990 did not criminalized the acts committed by **S.S.** against Witness A, because they did not result in the death, grave bodily injuries or serious damaging of Witness A's health.

91 Službeni List SFRJ 38/90 (The official gazette of SFRY 38/90).

92 UNMIK/REG/1999/24 of of 12 December 1999.

257. Criminalization of the said actions was introduced into Kosovo's domestic legal order by Article 120 of the CCK. As referenced above, the code had entered into force on 6 April 2004 under the name of Provisional Criminal Code of Kosovo (PCCK). Pursuant to the Law No. 03/L-002 on supplementation and amendment of the Provisional Criminal Code of Kosovo adopted by the Assembly of the Republic of Kosovo on 6 November 2008, the code was renamed as Criminal Code of Kosovo (CCK), without however any changes to the wording of Article 120. Protected persons were defined not only as civilians but as persons not taking parts in hostilities.

258. Article 120 Paragraph 1 of the CCK provided that:

"Whoever commits a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 shall be punished by imprisonment of at least five years to 20 or by long-term imprisonment."

259. Article 120 Paragraph 2 of the CCK stipulated that:

"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:

1) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

2) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

3) Taking of hostages;"

260. The subsequent piece of legislation that replaced the CCK was the Criminal Code of the Republic of Kosovo

(CCRK). It repeated verbatim the definition of the crime given in Article 120 of the CCK, including the definition of protected persons, but it extended the catalogue of prohibited acts. According to Article 152 of the CCRK:

"1. Whoever commits a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 shall be punished by imprisonment of not less than five (5) years to 15 or by life-long imprisonment.

2. A serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 means one or more of the following acts committed in the context of an armed conflict not of an international character against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

2.1. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

2.2. committing outrages upon personal dignity, in particular humiliating and degrading treatment;

2.3. taking of hostages;

2.4. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable."

261. The panel assessed that the actions that **S.S.** performed in relation to Witness A fully correspond with the characteristics of the crime defined in Article 120 Paragraph 2 Subparagraphs 1 and 2 of the CCK, and at the same time in Article 152 Paragraph 2 Subparagraph 2.2 of the CCRK.

ii. Concurrence of criminal act

262. It was concluded by the panel that **S.S.** acted with the same intent to maltreat Witness A. The notion "the same intent" refers literally to the identity of intention. This conclusion was based on identical modus operandi and the same opportunity used every time by the perpetrator.

263. The PCCRK did not define the rules of classification of concurrent criminal acts committed with the same intent. The panel applied the teleological approach and it considered the element of the same intent to be decisive for the classification of all acts performed by **S.S.**, as the execution of ___ intent to maltreat Witness A as one offence is classified under that code.

264. Under the provisions of the CCRK, actions committed by **S.S.** against Witness A should be classified as one crime in continuation. According to Article 81 of the CCRK:

"1. Criminal offense in continuation is constituted of several same or similar offenses committed in a certain time period by the same perpetrator, and that are considered as a whole due to the existence of at least two (2) of the following conditions:

1.1. the same victim of the criminal offense;

1.2. the same object of the offense;

1.3. the taking advantage of the same situation or the same time relationship;

1.4. the same place or space of commission of the criminal offense; or

1.5. the same intent of the perpetrator."

265. The panel assessed that all of these conditions are met.

266. The panel knows ex officio that in another case **S. S.** was convicted of war crimes against Witness A committed in co-perpetration with other persons in _____/_____ in a similar manner and in the same time as the crime in the present case. In principle, Article 1 Paragraph 6 of the CCRK allows for separate adjudication of the criminal offence that was not included in the criminal offense in continuation.

iii. Principle of legality

267. The Constitution of the Republic of Kosovo that entered into force on 15 June 2008 adopted the principle of legality which is considered by civilized nations as a fundamental rule of criminal justice. It stipulates that no one should be punished for any act or omission which did not constitute a criminal offence under the law in force at the time when it was committed.

268. Simultaneously, the Constitution recognizes a substantial exception to this principle. The exception allows for the punishing of perpetrators of acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law. The principle of legality and the exception to the principle of non-retroactivity of substantive criminal law are expressed in Article 33 Paragraph 1 of the Constitution:

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

269. This exception to the principle of legality stays in conformity with Article 7 Paragraphs 1 and 2 of the

European Convention for the Protection of Human Rights and Fundamental Freedoms⁹³:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal 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 criminal offence was committed.

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

270. Pursuant to this exception to the principle of non-retroactivity of substantive criminal law provided for in Article 33 Paragraph 1 of the Constitution, both the CCK and the CCRK might be considered for legal classification of **S.S.** 's acts.

iv. Application of most favorable law

271. There has been a firmly established principle of mandatory application of the most favorable substantive law applicable in Kosovo in the period from the commission of the acts to the sentencing.

93 According to Article 22 Paragraph 2 of the Constitution of the Republic of Kosovo the provisions of European Convention for the Protection of Human Rights and Fundamental Freedoms are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.

272. According to Article 4 of the CCSFRY:

(1) The law that was in power at the time when a criminal act was committed shall be applied to the person who has committed the criminal act.

(2) If the law has been altered one or more times after the criminal act was committed, the law which is less severe in relation to the offender shall be applied.

273. The same principle was repeated in subsequent legislation, i.e. in Article 2 Paragraphs 1 and 2 of the CCK and in Article 3 Paragraphs 1 and 2 of the CCRK.

274. The law does not stipulate any criteria for indication of the most favorable law. The panel followed the interpretation that dictates consideration of the concrete situation of the accused. It made necessary a simulation of sentencing in accordance with both relevant pieces of legislation.

275. The sanction prescribed by Article 120 Paragraph 1 of the CCK was imprisonment of at least five to twenty years or long time imprisonment.

276. According to Article 37 Paragraphs 1 and 2 of the CCK the punishment of long-term imprisonment could be imposed for the most serious criminal offences committed intentionally either under particularly aggravating circumstances or causing especially grave consequences. This punishment could last for a term of twenty-one to forty years.

277. According to Article 44 Paragraph 1 of the CCRK the punishment of life long imprisonment could be imposed for the most serious criminal offenses committed under especially aggravating circumstances or criminal offenses that have caused severe consequences.

278. The panel concluded that the circumstances of the case did not justify imposing against **S.S.** neither long-term imprisonment nor life imprisonment as the crime that ___ committed could not be considered as the most serious criminal offense, neither did it cause sufficiently severe consequences.

279. Because of these premises, the sanctions that could be considered by the panel were *in concreto*: imprisonment of five to twenty years under the CCK or imprisonment of five to fifteen years under the CCRK. For this reason, the concrete punishment imposed under the CCK would be higher. Therefore, the CCRK appeared as the most favorable piece of legislation as it prescribed a milder sanction.

280. The maximum punishment of 15 years of imprisonment stays in conformity with the principle expressed in Article 33 Paragraph 2 of the Constitution:

"No punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed."

281. The panel noted that the phrase "the penalty provided by law" can only refer to the type of punishment and not to the penalty prescribed by law at the time of commission. Following the rule of Article 33 Paragraph 1 of the Constitution some war crimes should be punished even if they were not criminalized at the time of commission and there was no penalty prescribed for them at that time.

f. Application of domestic law to the acts other than war crimes

i. Beatings committed by S.G. _____, S.S. _____ and S.J. _____

282. The beating of Witness B by **S.G.** _____, the beating of an unknown _____ from _____ by **S.S.** _____, _____ and the beating of an unidentified man from _____ by **S.S.** _____ and **S.J.** _____ were not classified as a war crime because they did not constitute serious violations of common Article 3 to the four Geneva conventions of 1949.

283. All these actions consisted of a violation of bodily integrity of various persons, which is commonly referred to as an assault.

284. The principle of subjective identity of the judgement in relation to the indictment excluded attribution of any results to these assaults, in particular any injuries that victims might have sustained.

285. The analysis of the law in force at the time they were committed led to the conclusion that assault was not criminalized. Neither the CCSFRY nor the Criminal Law of the Socialist Autonomous Province of Kosovo of 1978 (CLSAPK) defined an assault that did not cause any injury as a crime.

286. An assault became penalized only under Article 187 of the CCRK.

287. Article 33 Paragraph 1 of the Kosovo Constitution prohibited conviction for an act, which did not constitute a penal offense at the time it was committed, and did not constitute genocide, war crime or crime against humanity according to international law.

288. Therefore, pursuant to Article 364 Paragraph 1 Subparagraph 1.1 of the CPCRK and Article 3 of the CCSFRY:

- **S.G.** was acquitted of beating Witness B;

- **S.S.** and **S.J.** were acquitted of beating a ___ from _____; and

- **S.S.** was acquitted of beating the ___ from _____

289. As these actions did not constitute a crime at the time of their commission.

ii. Killing of an unidentified ___ by S.L.

290. The actions performed by **S.L.** that resulted in the death of an unidentified ___ met the characteristics of murder as defined under Article 30 Paragraph 2 subparagraph 1 of the CLASPK.

291. ___ acted willfully. The way ___ proceeded left no doubts that ___ had a direct intent to deprive the victim of ___ life.

292. ___ action was brutal as it was extremely cruel. The panel discerned the cruelty, because the victim was helpless having the hands tied by ___ persons guarding ___ and ___ was fully aware of ___ fate to come. The victim begged for ___ life, but the culprit showed no mercy.

293. The punishment prescribed by the CLASPK for this kind of murder was at least ten years of imprisonment. Article 38 Paragraph 1 of the CCSFRY determined the maximum length of imprisonment for crimes defined in the Laws of the Yugoslav Federation, republics and autonomous provinces. The maximum term of imprisonment was 15 years.

294. This regulation was retained in force by Section 1 Paragraph 1.2 of the UNMIK Regulation 1999/24 of 12 December 1999. Pursuant to Paragraph 1.6 of this Regulation, the penalty that was originally applicable under the CCSFRY to the murder committed in a cruel way was abolished.

295. Pursuant to the provisions of the CCK, depriving another person of life in a cruel way constituted an aggravated murder under Article 147 Paragraph 3 and it was punishable with imprisonment of at least ten years or long-term imprisonment. The maximum length of imprisonment was determined in Article 38 Paragraph 1 as twenty years of imprisonment and according to Article 37 Paragraph 2 the long-term imprisonment could last from twenty one to forty years.

296. According to the subsequent piece of legislation, i.e. the CCK, the action attributed to **S.L.** constituted an aggravated murder defined in Article 179 Paragraph 1 Subparagraph 1.4. The prescribed punishment was imprisonment of not less than ten years or lifelong imprisonment.

297. The comparison of sanctions shows that the law in force at the time of commission, with modification implemented

by UNMIK Regulation 24/99, was in this case the most favorable for the culprit.

F. Determination of the punishments

298. While determining the punishments for **S.S.** and **S.L.** , the panel kept in mind the purposes listed in Article 41 of the CCRK. The priority was given to the need of expressing the judgement of society for criminal offenses, increasing morality and strengthening the obligation to respect the law. The panel was also directed by the principle of general prevention, having in mind that the judgment should discourage other people from committing criminal offenses.

299. The panel followed its obligation to evaluate all mitigating and aggravating factors, as required by Article 73 Paragraph 1 of the CCRK.

300. In relation to **S.L.** the panel considered the following factors to be aggravating: he acted flagrantly with blatant disregard for the possibility of ___ crime being exposed by the witnesses. It showed that ___ level of respect for the law is low. ___ behavior was ruthless, merciless and it demonstrated gross disregard towards basic values respected by civilized society.

301. As per the aggravating circumstances in relation to **S.S.** , the panel took into consideration the degree of suffering inflicted by ___ on Witness A. ___ carried on ___ criminal intent for extended time and with persistence.

302. In relation to both of the accused, the panel took into consideration as mitigating factors the fact that they both reached prestigious and important public positions in Kosovo society after the war, and that they served the public. The panel also took into account that during the

war in Kosovo, they were fighting for their nation against a regime that is considered by the international community as criminal and for this reason condemned.

G. The costs

303. The trial panel based its decision related to the costs of criminal proceedings on legal provisions quoted in the enacting clause. The extent and proportion between scheduled amounts that **S.L.** and **S.S.** are obligated to reimburse and the total cost of the proceedings has been determined with consideration for the gravity of the charges against them and the number of investigatory and evidentiary actions that were taken in order to prove these charges, as well as the expenses related to expert's opinion on their health status. It was also taken into consideration that **S.G.**, **S.J.**, **J.D.**, **I.H.**, and **A.Z.** were acquitted of all the charges against them.

Dariusz Sielicki
EULEX Presiding Judge

Chiara Tagliani
Recording Clerk

Authorized persons may file an appeal against this judgment to the Court of Appeal through the Basic Court of Mitrovicë/a within fifteen (15) days of the day the copy of the judgment has been served, pursuant to Article 380 Paragraph (1) of the CPC.