

**BASIC COURT OF MITROVICË/A**

**P. nr. 14/2013**

**12 September 2013**

**IN THE NAME OF THE PEOPLE**

**THE BASIC COURT OF MITROVICË/A**, in the trial panel composed of EULEX Judge Katja Dominik as Presiding Judge and EULEX Judges Dariusz Sielicki and Anna Adamska-Gallant as panel members, with the participation of EULEX Legal Officer John Gayer as Recording Officer in the criminal case against:

**S.G.** , son of T.G. , born in village (hereafter: ), (hereafter: ) municipality, date of birth . Resident at , floor. Educated to High School level and employee of .

**Rr. G.** , son of S. G. , born in village, municipality, date of birth . Resident at , Entrance floor, Apt. n. . Holds a diploma in economics and is an officer in the .

**H. G.** , son of S. G. , born in village, municipality, date of birth . Resident in village ( municipality). Educated to High School level and is a in the .

*All charged* under the Public Prosecutor's Indictment PP. 81/2012 dated 11 December 2012 and amended on 17 January 2013 and filed with the Registry of the District Court of Mitrovicë/a on 12 December 2012 with two counts of **war crime against the civilian population** under Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY) reflected in Articles 31 and 152 of the Criminal Code of the Republic of Kosovo (CCRK), in violation of Article 3 common to the four Geneva Conventions of 12 August 1949 and of Article 4 and 5 (1) of Protocol II of 8th June 1977, additional to the Geneva Conventions,

*And B. Sh.* , son of M. Sh. , born in village, , date of birth . Resident in municipality. He is a .

*Charged* under the Public Prosecutor's above mentioned amended Indictment PP. 81/2012 with one count of **Providing assistance to perpetrators after the commission of criminal offences** under Articles 305 Paragraphs (1) and (2) of the Criminal Code of Kosovo (CCK), currently criminalized under Article 388 Paragraphs (1) and (2) of the Criminal Code of the Republic of Kosovo (CCRK).

After having held the main trial hearing, partly open to the public, on 11 and 14 June; 1, 2, 5, 12 and 19 July; 12, 13, 14, 15 August; and 4, 6, 9 and with the verdict announced on 12 September 2013; all in the presence of the Defendants **S.G.** , **Rr. G.** , **H. G.** and **Dr B. Sh.** ; their respective Defence Counsel Tahir Rrecaj, Mahmut Halimi, Fatbardh Makolli, and Gani Rexha or their

substitute; the Injured Parties I. V. , M. V. were present on 14 June 2013, and EULEX Public Prosecutors Maurizio Salustro or his substitute, after the trial panel's deliberation and voting held on 11 September 2013, pursuant to Article 359 of the Criminal Procedure Code of Kosovo (CPC), pronounced in public and in the presence of the Defendants, their Defence Counsel, and the EULEX Public Prosecutor Maurizio Salustro issues the following:

## VERDICT

I. The Accused **S.G.** , **Rr. G.** and **H.G.** personal data as above, are each for Count No. 1 of the Indictment found

### **GUILTY**

In the case of G. B. and

Each of them are found

### **NOT GUILTY**

In the case of V. B.

Because it was proven beyond reasonable doubt that on when there was still an ongoing armed conflict between regular and irregular armed forces of the former Yugoslav and the Serbian army on the one hand side and the Kosovo Liberation Army ("KLA") on the other hand side within the territory of Kosovo, the three Defendants **S.** , **Rr.** and **H. G.** in their capacity as KLA shot G. B. in . He was a civilian.

On the , forces of the former Yugoslav and Serbian army were withdrawing out of region and KFOR and KLA took over control of . In the city center of the Albanian population in a huge crowd celebrated this event with so called "happy shooting". In the late afternoon of this day, after o'clock, the victims G. and V. B. were also in the city center of at the crossroad close to the health center and the court building. An unknown person shot with a firearm and hit both the B. brothers. V. was killed, and G. was wounded. It was not proven the three **G.** Defendants singularly, jointly or in view of a common plan between themselves fired the shots. However, they stood close to the victims when they were shot.

Shortly after the shooting at the crossroad described above, the wounded G. B. arrived at the health center which was located m from the spot where the B.s were hit. The health center served as a hospital at that time. G. was placed on a bed in the room. Unknown persons also transported his dead brother V. to the health center where he was placed next to G. because there was no morgue.

**S.** , **Rr.** and **H. G.** realized that G. B. was only wounded. They decided to follow him into the health center and to kill him in a joint action. Their motivation being the allegation, adopted by the KLA, that both B. brothers collaborated with Serb state authorities one of the parties of the armed conflict, the Serbs, and so should be killed for doing so. In execution of this joint plan, they entered the room where G. was and one of them shot him with a firearm to death which all of them intended. In this room there was also the Defendant **Dr Sh. . S.** , **Rr.** and **H. G.** then left the health center.

The Defendants acted in violation of the applicable international and national law at that time.

Hence, the Defendants **S.G.** , **Rr. G.** and **H. G.** committed and are each criminally liable in the case of G. B. , but not in the case of V. B. for the criminal offence of

*War crime against the civilian population committed in co-perpetration, under Articles 22 and 142 of the CCSFRY, currently under Articles 31 and 152(2.1) of the CCRK, in violation of Article 3 common to the four Geneva Conventions of 12 August 1949 and of Article 4 of Protocol II of 8th June 1977, additional to the Geneva Convention.*

II. The Accused **S.G.** , **Rr. G.** and **H. G.** are each found for Count No. 2 of the Indictment

### NOT GUILTY

Because it was not proven beyond reasonable doubt that during a time of internal armed conflict in Kosovo, the Defendants in their capacity as KLA members alone or in co-perpetration with each other, intentionally or by negligence, wounded with firearm shots in the late afternoon of in the city center of the Injured Parties I. V. and M. V. who were inactive KLA members at that time.

I. V. and M. V. were on in the city center of at the crossroads close to G. and V. B. when they – the V.s - were hit by stray bullets at the same time as G. and V. . I. V. was seriously wounded in his abdomen and M. V. received a wound on his right lower leg.

Adopting the arguments under Count 1 in relation to the shooting of the B. brothers in the street, it was not proven that it was one of the **G.** Defendants, either singularly, jointly or as part of a common plan between themselves were responsible directly or indirectly for the shooting of the V. brothers in the street. The injuries which the V. brothers received cannot be linked beyond a reasonable doubt to any activity of **S.** , **Rr.** or **H. G.** .

Therefore, the Defendants **S.G.** , **Rr. G.** and **H. G.** each did not commit and are not criminally liable for the criminal offence of

*War crime against the civilian population committed in co-perpetration, under Articles 22 and 142 of the CCSFRY, currently under Articles 31 and 152 Paragraphs (1) and (2.1.) of the CCRK, in violation of Article 3 common to the four Geneva Conventions of 12 August 1949 and of Article 4 of Protocol II of 8th June 1977, additional to the Geneva Conventions.*

III. The Accused **Dr B. Sh.** , personal data as above,  
is

### **FOUND NOT GUILTY**

Because it was proven beyond reasonable doubt that on the KLA members **S.G.** , **Rr. G.** and **H. G.** during an internal armed conflict in Kosovo killed the alleged collaborator G. B. in the health center in the presence of the Defendant **Dr Sh.** , and it was proven that **Dr Sh.** knowingly gave an untruthful statement to the Public Prosecutor on in saying that he wasn't present in the room where the killing happened. However, his action did not consist of the necessary characteristics of the crime he was charged with, namely under Article 305 CCK, or any other crime because he did not aid to elude discovery of the above mentioned perpetrators of the killing.

Therefore, the Defendant **Dr B. Sh.** did not commit and is not criminally liable for the criminal offence of

*Providing assistance to perpetrators after the commission of criminal offences, under Article 305 Paragraphs (1) and (2) CCK.*

IV. The Defendant **S.G.** is

### **SENTENCED**

to twelve (12 ) years of imprisonment for Count 1 - war crime against the civilian population - in regard with G. B. ,

and for Count 1 in regard with V. B. and for Count 2 - war crime against the civilian population - he is

### **ACQUITTED.**

V. The Defendant **Rr. G.** is

### **SENTENCED**

to twelve (12 ) years of imprisonment for Count 1 - war crime against the civilian population - in regard with G. B. ,

and for Count 1 in regard with V. B. and for Count 2 - war crime against the civilian population - he is

### **ACQUITTED.**

VI. The Defendant **H. G.** is

**SENTENCED**

to twelve (12) years of imprisonment for Count 1 - war crime against the civilian population - in regard with G. B. ,

and for Count 1 in regard with V. B. and for Count 2 - war crime against the civilian population - he is

**ACQUITTED.**

VII. The Defendant **Dr B. Sh.** is

**ACQUITTED**

From the charge of *Providing assistance to perpetrators after the commission of criminal offences* under Article 305 Paragraphs (1) and (2) of the CCK.

VIII.

The Defendants **S. G.** , **Rr. G.** and **H. G.** shall each reimburse hundred and fifty (150) Euros as part of the costs of criminal proceedings, while being relieved of the duty to reimburse the rest of the costs pursuant to Article 453 Paragraphs (1) and (4) of the CPC. Pursuant to Article 454 of the CPC, the costs of criminal proceedings in relation to the Defendant **Dr Sh.** shall be paid from budgetary resources.

IX.

The time the Defendants **S.G.** , **Rr. G.** and **H. G.** spent in house detention and in detention on remand since is to be credited in the amount of the punishment, pursuant to Article 50 Paragraph (1) of the CCSFRY.

**REASONING**

**A. PROCEDURAL BACKGROUND**

*I. Procedural history*

On the EULEX Prosecutor of the Special Prosecution Office of the Republic of Kosovo initiated the investigation into **S.G.** , **Rr. G.** and **H. G.** filed with the then District

Court of Mitrovicë/a on . By a ruling dated the investigation was expanded to include **Dr B. Sh.** for the indicted offence. A separate Ruling dated expanded the investigation against **S.G.** , **Rr. G.** and **H. G.** to include a second count of war crime against the civilian population. Both Rulings on expansion of the investigation were filed on .

On 12 December 2012 the Special Prosecutor filed an indictment PP.no 81/2012 dated 11 December 2012 and amended on 17 January 2013 which charged the Defendants as set out in the enacting clause of this judgment.

A main trial was held on 11 and 14 June; 1, 2, 12 and 19 July; 12 to 15 August; and 4, 6 and 9 September 2013 with the verdict announced on 12 September 2013.

## *II. Competence of the Court*

The offences fall within the Basic Court of Mitrovica's substantive and territorial jurisdiction and under EULEX judges' competency.

The offence of war crime against the civilian population amounts to a serious violation of the laws and customs applicable in times of a non-international armed conflict and are Serious Crimes as defined under Article 22(1.29) of the CPC and Article 15 (1.2) of the Law of the Courts (Law No. 2010/03-L199 (LC)) which places it within the sole jurisdiction of the Serious Crime department. This applies also in the case of the Defendant **B. Sh.** who is accused of being an accomplice to the perpetrators of serious crimes. Article 35.4 of the CPC allows his case to be joined with other proceedings and him to be tried by the same Court.

As the offence was committed in Municipality, it falls within the territorial jurisdiction of the Basic Court of Mitrovica under Article 9(2.9) of the LC.

The case was assigned to EULEX Judges in accordance with Article 3.1 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law No. 03/L-053) because it was investigated and prosecuted by Special Prosecution Office of the Republic of Kosovo.

## **B. Evidence**

The judgement is based on all admissible evidence after the course of the main trial:

I. During the trial the following witnesses and the expert witness gave statements (in the order of their appearance at the trial):

1. I. V. on ,
2. M. V. on ,
3. J. B. on and ,
4. Dr B. M. on ,
5. E. B. on ,

6. B.Z. on ,
7. N. B. on ,
8. A. B. on ,
9. Z. A. on ,
10. H. M. on ,
11. H. B. on ,
12. F. G. on ,
13. H. G. on ,
14. A. G. on ,
15. Dr C. B. on ,
16. J. R. on ,
17. B. B. on ,
18. F. O. on ,
19. Xh. J. on ,
20. Q. A. on ,
21. H. K. on ,
22. S. I. on ,
23. L. G. on ,
24. K. Xh. B. on ,
25. B. B. on ,
26. B. B. on ,
27. F. H. on , and
28. H. R. on .

II. With the consent of the parties and in accordance with Article 338(1.3) of the CPC the following witness statements are considered as read into the record as admissible evidence:

**Group a): Witnesses heard during the trial (alphabetical)**

1. A. B. statement dated ,
2. A. G. statement dated ,
3. Dr B. M. statement dated ,
4. B. B. statement ,
5. B. B. statement dated ,
6. B. B. statement ,
7. B. Z. statement dated ,
8. E. B. statement dated ,
9. F. O. statement dated ,
10. F. H. statement dated ,
11. F. G. statement dated ,
12. H. G. statements dated and ,
13. H. B. statement dated ,
14. H. M. statement dated ,
15. H. R. statement dated ,
16. I. V. statement dated ,
17. J. B. statements dated , , , and ,
18. J. R. statement dated ,
19. L. G. statement dated ,
20. K. X. B. statement dated ,
21. M. V. statement dated ,

22. N. B. statement dated ,
23. Q. A. statement dated ,
24. S. I. statement dated ,
25. Xh. J. statement dated ,
26. M. H. statement dated ; and
27. S. R. B. statement dated ;

**Group b): Witnesses not heard during the trial (alphabetical)**

1. A. B. H. statement dated ,
2. A. L. statement dated ,
3. A. G. (born: ) statement dated ,
4. Dr B. G. statement dated ,
5. G. G. statement dated ,
6. H. G. statement dated ,
7. M. G. statement dated ,
8. N. R. statement dated ,
9. S. G. statement dated ,
10. Sh. B. G. statement dated ,
11. Z. D. statement dated ,
12. Z. T. statement dated ;

**Group c): Defendants' statements (in the order of the indictment)**

1. **S.G.** 's statement dated ,
2. **Rr. G.** 's statement dated ,
3. **H. G.** 's statements dated and ,
4. **Dr B. Sh.** 's statements dated and .

III. During the course of the main trial the following documents were read into the record:

1. DFM Medical Examiner Office report (Dr C. B. ) on examination of Injured Party M.V. with attachments,
2. DFM Medical Examiner Office report (Dr C. B. ) on examination of Injured Party I.V. with attachments,
3. EULEX WCIU photos of the Defendants **S.** , **Rr.** and **H. G.** attached to the police report of ,
4. Death certificates of G. and V. B. ,
5. health centre worksheets for to and on call records for and submitted by Defendant **Dr Sh.** ,
6. KFOR map of the region of and (exhibited to the records *ex officio*),
7. Sheet of sunset times in in and ,
8. Google printout map - , and
9. EXPRESS Newspaper dated (Article about J. B. ).

IV. The Court with its rulings dated and ordered protection measures in the cases of witnesses J. , B. and B. B. . The Court is referring to these rulings.

V. During the course of the main trial the following motions were made:

1. On , the Prosecutor proposed B. and B.B. as rebuttal witnesses to defence witness H. B. who had testified about being in on . This was

opposed by the Defence on the basis that the proposed witnesses were in on and were not witnesses to the events in either or . The Court granted the application as the witnesses claimed the defence witness was in on . The Court is referring to the ruling as set out in the minutes of .

2. The Defence made a motion to call H. K. as a witness. He had been in on . The Prosecution opposed the witness as being unnecessary considering the number of witnesses linked with who had already testified or were due to testify. The Court granted the motion as H. K. had been mentioned by a number of other witnesses heard by the Court.

3. On , the Defence requested discovery of any KFOR report from the troops in on . They were not aware if such a KFOR report exists. They haven't done any researches at KFOR by themselves, neither in pre-trial nor in main trial phase. The motion was unopposed by the Prosecution who were not in control or possession of any KFOR report. The Court rejected the motion as *ex officio*. Enquiries had been made and a search of the KFOR archive in Kosovo and the archive of the Ministry of Justice in had returned a negative result. The Court herewith refers to the explanation of the Presiding Judge in main trial session of 4 September 2013.

4. On 6 September 2013 the Prosecution sought to admit the following documentary evidence: a copy of the EXPRESS newspaper dated ; a print out from Google Maps showing the distance between and in a straight line; the sunset times for the region from and ; and the police statements of M. H. dated and S.

R. B. dated . The Defence did not oppose the inclusion of the latter statements and of the sunset times or the statements which were agreed to be read. They argued the EXPRESS newspaper was unnecessary. The Prosecution argued it contained an article attacking J. B.'s involvement in the proceedings. The Court considered it was admissible. The Defence also pointed out the Google Map print out did not reflect the distance of any pedestrian or vehicular route. Also, the print out did not show an accurate distance between different parts of and . The Prosecution motion was granted. The Court took note and agreed with the caveats placed on the Google maps print out.

5. *Ex officio* the Court introduced a KFOR map of the region showing the topography and distance between and . No objections were raised by any party.

6. Defendant **Dr Sh.** filed a motion to include the worksheets for to and on call records for and from health center. They showed the staff who had worked and been on call during this period including the . No objections were raised and the documents were admitted.

### ***C. Factual findings and Analysis of the Evidence***

I. After the evidentiary phase of the main trial, the Court could establish the following facts:

In the years 1998/99 the Kosovo Liberation Army (UCK/KLA) fought against armed forces of the then Federal Republic of Yugoslavia and the Republic of Serbia to gain control over the territory of Kosovo which was at that time an Autonomous Province in the Federal Republic of Yugoslavia and under the

de-facto control of the Republic of Serbia. The KLA started effectively as an underground organization and gained during the course of the conflict a significant organizational structure. KLA members were wearing different types of uniforms, including camouflage uniforms. According to the so-called Kumanovo Agreement (Military Technical Agreement between the International Security Force ["KFOR"] and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia) signed on 09 June 1999 the Yugoslav and Serbian army forces started their withdrawal from Kosovo. This agreement foresaw their phased withdrawal within 11 days after the signing of the agreement. The withdrawal was completed on 21 June 1999 when the last Yugoslav and Serbian troops left the territory of Kosovo.

On [redacted] Yugoslav and Serbian forces left the [redacted] region; KFOR and KLA troops took over control. KFOR entered [redacted] municipality and also crossed the village of [redacted]. The village of [redacted] is located around [redacted] km linear distance away in northern direction from [redacted]; the municipality of [redacted] can be reached either on an approximately [redacted] km long road or by a pedestrian shortcut. The village of [redacted] is located in western direction of [redacted]; its eastern parts are located in a distance of about [redacted] km from [redacted], while its western parts reach out to a distance of not less than [redacted] km away from [redacted].

After Yugoslav and Serbian forces left [redacted] in the morning of [redacted], the Kosovo Albanian population got enthusiastic about this event which they considered as liberation, while Kosovo Serbian citizens had left the city. People were celebrating with happy shooting on the streets, and citizens from nearby villages, like [redacted], came into town walking or riding on tractors to celebrate the end of the war. The villagers from [redacted], including the B. [redacted] family, also learned about the end of the war when they spotted KFOR helicopters and KFOR vehicles passing by. Witness J. B. [redacted] and his late brother Xh. B. [redacted] decided to leave the village and to go to [redacted], too.

J. [redacted] and Xh. B. [redacted] took the pedestrian shortcut and firstly stopped at a place where the brothers hoped to find a tractor which has been previously stolen from Xh. [redacted]. When they didn't find the tractor, they continued on their way. Close to a place called [redacted] they met a tractor with people on a trailer who had decided to go to [redacted], too. The B. [redacted] brothers were invited to join the ride, but Xh. [redacted] refused and both carried on walking.

It took them at least [redacted] hours to arrive in [redacted]. When they arrived, they walked through the streets. J. [redacted] was interested in occupying a flat which has been abandoned by a Serb who had left. When he arrived there, he met Witness Z. A. [redacted] who also intended to occupy it. J. [redacted] realized that he was too late and went back on the streets where the celebrations were still ongoing in the afternoon.

The Defendants **S.** [redacted], **Rr.** [redacted] and **H. G.** [redacted] have been in their village of [redacted] in the morning of [redacted]. **S.** [redacted] was repairing a room of his house in lower [redacted] for family members who he expected to return after the war. **Rr. G.** [redacted] was staying in a house in [redacted] in the morning. It was not clear where **H. G.** [redacted] was in the morning of that day. At a certain point of the day all three **G.** Defendants decided to go to [redacted]. It could not be established in the evidentiary phase of the main trial, when they decided to do so and if they went there jointly or separately. However, it was clear that at one point after [redacted] o' clock in the afternoon all the three of

them were present at the crossroads in the city center of . They were armed with Kalashnikov rifles and wore KLA uniforms. All three G. defendants were members of KLA brigade at that time.

After hrs. but before it was getting dark, victims V. and G. B. and the Injured Parties I. and M. V. arrived at the crossroads in city center. G. and V. B. – also known as ‘ ’ according to the village where they came from - were civilians and they were not wearing uniforms. All four victims were shot at the crossroads. V. B. was dead; G. B. was wounded. I. and M. V. were about m away from the B.s . M. was wounded in his right lower foot and I. was hit in the abdomen region. I. received first aid by by-standing KFOR soldiers and by Witness Dr M. . It could not be established beyond reasonable doubt that it was one or more of the Defendants who shot at V. and G. B. and killed V. or that there was a plan to do so, or it was one or more of the Defendants who fired the bullets which actually injured the V. brothers I. and M. .

Victims V. and G. B. then arrived at the nearby health center of , first G. and then V. . It could not be established if G. walked to the health centre or if he and V. were transported there and if so by which means and by whom. However, the main trial proved that he was alive when he got there, and he had a medical infusion. Within the health center, the B. brothers were put into beds next to each other into the room on the ground floor. V. was put next to G. because there was a space and the health center didn't have a morgue.

**S.** , **H.** and **Rr. G.** had realized that G. B. was not dead. They decided to go to the health center and to kill G. B. . They wanted him to die because of his alleged collaboration with the Serbs. All three Defendants entered the room, and at least one of them fired a Kalashnikov ( ) at G. . G. B. died what all Defendants wished to happen. They then left the room and the health centre. Defendant **Dr Sh.** who was inside the room saw the killing of G. B. . He was in a state of shock and fear.

The late G. and V. were later moved from inside the health center to the pediatric hospital opposite the health center where their corpses were stored. Witness K.Xh.B. , the widow of the late V. , identified them there and brought them home to bury. There was neither a medical examination conducted nor an autopsy. None of the B. family members nor other citizens of came forward to give a statement about what they saw. The incident was not investigated until , when EULEX investigating authorities found out about the case.

This happened when on witness J. B. gave a statement to the Special Prosecutor in investigations in another war crime case. During this interview the Prosecutor asked him if he knew about other war crimes committed in Kosovo. Witness J. came forward with his observations in regard with the killings of G. and V. B. and EULEX SPRK office initiated the investigation against the Defendants **S.** , **Rr.** and **H. G.** . Witness J. B. and his sons B. and B. B. are presently in EULEX witness protection program. Witness N. B. , a nephew of the deceased G. and V. , was interviewed in and has a refugee status in . Injured Party K. Xh. B. gave statement in . The Special Prosecutor filed an application to put the **G.** Defendants **G.** under detention on remand which the Pre-trial Juge granted by a ruling dated . Defendant **Dr Sh.** was interviewed firstly as a witness on by the Prosecutor. He gave statement that he

has been in the health center on [redacted] but he was in a different room, the ward. He stated that he didn't see any killing committed on that day which was not the truth. **Dr Sh.** knew that his statement was incorrect and he wished it to be so in order not to get involved into the case and to protect himself from possible threats.

II. These factual findings are based on the evaluation of all admissible evidence.

1. *General facts*

The Court took judicial notice of the historical events in regard with the Kosovo war, the withdrawal of the Yugoslav and Serbian army troops and the general structure of KLA as described; the historical dates are set out in common sources. The general description of the location of [redacted], [redacted] and [redacted] is based on common sources and witness statements. In regard with the distance between [redacted] and [redacted] - the airline distance and the way on the nowadays asphalted road – the correct distance has been measured according to the KFOR map and Google maps. It is about [redacted] km between the two places on the now asphalted road according to the KFOR map with no significant altitude differences. The accuracy of these pieces of evidence has not been challenged during the course of the evidentiary phase.

It was uncontested and confirmed by numerous witnesses that on [redacted] the Yugoslav and Serbian forces withdrew from [redacted], and that as a consequence, KFOR and KLA troops entered. There were several people armed and in uniform and there was also happy shooting on-going in the city centre. Most witnesses said that the celebrations started in the late morning or around midday; Witness Dr B. G. [redacted] precisely said that it was about [redacted] a.m. Witness A. G. [redacted] (born [redacted]) stated to the Prosecutor on [redacted] that he understood that [redacted] was liberated in the morning of that day at around [redacted] hrs or [redacted] hrs. He thought that it happened even earlier but he was still afraid to go out. Witness S.I. [redacted] described these events as 'euphoria' and stated that neighbour villages were liberated one by one, starting with the village of [redacted], then [redacted]. Several witnesses stated that refugees were starting to go back to their home.

All witnesses heard to this question credibly stated that the Defendants **S.** [redacted], **Rr.** [redacted] and **H. G.** [redacted] were KLA members at brigade No. [redacted] until the end of the war as usual soldiers. A photo shows them in camouflage uniforms. They themselves said so when being interviewed in pre-trial stage.

Numerous witnesses, including witnesses N. B. [redacted] and K. Xh. B. [redacted], confirmed that G. [redacted] and V. B. [redacted] as the whole B. [redacted] family were alleged to be collaborators with the Serbs. They allegedly had close contacts to Serbian police and provided for money favours to Kosovo Albanians who were in trouble with the police. It was not established that the rumours were true. The Court was convinced that this was the reason and the motive why the **G.** [redacted] Defendants killed them (see below).

In regard with the time when G. [redacted] and V. [redacted] were killed the Court was convinced that the killing happened in the late afternoon, after [redacted] pm but before dark according to witnesses statements of J. B. [redacted], F. O. [redacted], Dr B. M. [redacted], N. B. [redacted], I. [redacted] and M. V. [redacted]. The sun set down in [redacted] region on [redacted] shortly after [redacted] pm (see sunset sheets). It could not be established nor was it necessary to do so at which exact time G. [redacted] and V. B. [redacted] were shot at and when exactly they died. Their death certificates were issued much later and didn't establish the

exact time of death. However, the time frame between pm and pm was exact enough to identify the crime as such. It was undisputed that G. and V. B. died on in the later afternoon.

## 2. Killing of V. B. (Count 1 of the indictment)

The Panel did not find it proven beyond reasonable doubt after the evidentiary phase of the main trial that the Defendants **S.**, **Rr.** and **H. G.** shot at and killed V. B. on after . in the city center at the crossroads of near to the health center and the municipality building, as the Indictment alleges.

Witnesses J. B. gave account to the Court that on he was in city center at the crossroads. He heard shots he identified as being from a Kalashnikov rifle and because of that he turned around; the shooting was too short to establish where the shots came from. The witness described that he saw **S.**, **Rr.** and **H. G.** in KLA uniforms meters away from where the victims V. and G. B. were hit and fell on the ground. He didn't see one or more of the G. Defendants open fire. He only concluded that they have done so because he saw them standing very close by the victims and because of what happened later in the health center (see below).

Witness B. Z. – relative of G. and V. B. – testified to the Court that on he has seen V. B. 's body lying at the crossroads in the city center, but he didn't see the Defendants **S.**, **Rr.** and **H. G.** on that day. This contradicted his statement he has given to the Prosecutor on . He then said that he has seen **S.G.** – armed and in a KLA uniform - together with the two witnesses L. G. and S. I. on the critical day. They were about away from the place where he saw V. 's body lying. Being confronted with this discrepancy, the witness claimed that his witness statement to the Prosecutor was not recorded accurately. He didn't know what he was signing. The content of the records was all the Prosecutor's fabrications. The witness stated that there was an interpreter for the Albanian language present at that time, but he just told him to sign a document to confirm that he was present.

Witness N. B. – nephew of the deceased G. and V. B. – stated to the Court that he was in on . In the late afternoon before dark he was looking for his uncles G. and V. . In the city center he arrived at the crossroads where he saw his uncle V. lying dead on the ground. He didn't see G. . He stated that he shortly later saw the Defendant **S.G.** who was the driver of a vehicle that was parked nearby the health center. **S.G.** also entered the health centre. However, he didn't see who shot G. and V. .

Other witnesses like Witness Z. A. , Dr B. M. , Q. A. , S. I. ,L.G. , G. G. and S. G. stated that they in general have been present in on in the afternoon. However, none of them could provide the Court with any information in regard with the question who has shot the bullets that hit G. and V. B. on the streets.

The Court didn't conclude from the abovementioned statements and was not convinced beyond reasonable doubt after the evidentiary phase of the trial that the **G.** Defendants – either one or more of them – have shot at and killed V. B. . It was uncontested and confirmed by all witnesses that there was happy shooting on-going while G. and V. were hit; it cannot be

excluded to the necessary extent that the victims had been hit by stray bullets. The later events in the health centre indicate, but not sufficiently prove beyond reasonable doubt that it was one or more of the **G.** Defendants who shot the victims. The same applies for the fact that **S.** , **Rr** and **H. G.** were present at the spot. The Court notes the fact that the **B. s** felt comfortable celebrating the liberation of which suggests no sufficiently precise threats had been made against them and they did not fear for their life. Even if there was a general - underlying and articulated - threat against collaborators which was expressed by KLA, as Witness **J.** has told the Court, it was apparently not concrete enough and in a way directed against the **B. s** that they would have stayed away from public places. It could not be established that the **G.** Defendants knew or only hoped to find **G.** and **V. B.** in the crowd in the city center in order to kill them. It is most probable that the **G.s** came from to for the same reasons like everybody else, namely to celebrate the withdrawal of the Yugoslav and Serb forces.

But even if the hypothesis of the Prosecution was right and it was one of the **G.** Defendants who had shot at **V.** and **G.** , there would be no sufficient ground to convict each of them for the count they have been charged with. Since it was not clear who shot and how, the shooter could have decided to do so without the knowledge of the respective others. The Court would then be obliged to apply the principle of *in dubio pro reo* for each of the three **G.** Defendants for legal reasons, unless there had been a common plan to kill. There was no sufficient evidence to establish such a common plan of the **G.** Defendants to kill **G.** and **V. B.** (already) in the streets, because, as said above, they couldn't be sure that the **B.'s** would be there. Therefore, for this first shooting, the Court couldn't find sufficient elements to link any possible action of one or more **G.** Defendants to the killing of **V. B.** .

This result given, the Court did not need to further evaluate the credibility of the witness' statements at this stage. It only notes that witness **B. Z.** was obviously not telling the truth when he gave his account at Court. He signed a statement of pages in total with his signature on each page which clearly undermines his – not credible – allegation that the Prosecutor has put something in the minutes that he, the Witness, hasn't said and he was only told to sign a confirmation that he was present.

The facts set out in count 1 of the Indictment in regard with **V. B.** have therefore not been proven.

### *3. Wounding of the Injured Parties I. and M. V. (Count 2 of the Indictment)*

According to the argumentation above under 1. the Court didn't find it proven beyond reasonable doubt that the Injured Parties **I.** and **M. V.** have been hit by bullets fired by the **G.** Defendants at **G.** and **V. B.** , as the Indictment alleges.

Injured Party and Witness **I. V.** stated to the Court that on he went out with his brother to the city center of . In the city center there was happy shooting on-going. He was hit in the lower right abdomen area and fell to ground; he however got up again and went in the direction to the municipality building where he fell down again. There he received first aid from KFOR soldiers and by witness **Dr M.** . He lost consciousness. The Witness couldn't say if somebody has intentionally shot at him or if he was hit by stray bullets. He didn't see the **G.** Defendants on that day.

Injured Party and Witness M. V. gave testimony that he arrived on in in the afternoon at an uncertain time but before dark. He was hit by a bullet in his right lower leg and realized that his brother, Witness I. V. , was severely wounded in his abdomen area. Witness M. then went to the health centre where he couldn't find doctors and nurses to help. Back on the street again, he met Witness Dr M. and brought him to his wounded brother when I. already received first aid from KFOR. He couldn't say who fired the bullets that hit him and why. He didn't see the Defendants on that day.

Both brothers were not clear when it came to the exact location where they were shot. While I. said it was in a distance of about - from the health centre, M. V. claimed that it was - away.

As said above, witnesses Z. A. , Dr B. M. , Q. A. , S. I. , L. G. , B. Z. , N. B. , G. G. and S. G. couldn't provide any further information in regard with the shooting on the streets; it was not proven that they were present at that exact time when it happened.

Expert witness Dr C. B. who has examined both Injured Parties during the main trial stated that it was impossible to say from a medical standpoint from which direction and in which angle the bullets which caused I.'s and M.'s injuries were shot, in particular if they were caused by an aimed shot or stray bullets, because they have passed soft tissue and could also have been distracted by a hard object. Therefore, she was not able to provide the Court any more information about the nature of the injuries and her expertise was not helpful to establish the identity of the possible perpetrator(s), either.

In evaluating the abovementioned pieces of evidence, the only fact that the court could establish is that I. and M. V. were hit when they were standing in proximity to G. and V. B. and that they were wounded at the same time. Even though S. , Rr. and H. G. were directly on the spot, according to witness J. B. , and one or more of them could theoretically been the one(s) who fired the shots which wounded I. and M. V. , insufficient evidence was collected to link one of their possible, but not proven actions to the injuries that the V.s received. Neither can it be fully excluded that I. and M. V. were hit by stray or ricochet bullets that have been fired on G. and V. B. or were hit by any other stray bullets, nor could it be established who – if any – of the G. Defendants shot. Therefore, the principle *in dubio pro reo* would apply in favor of each of the Defendants in this case, too (see argumentation above).

The facts set out in count 2 of the Indictment have therefore not been proven.

#### 4. Killing of G. B. (Count 1 of the Indictment)

The Court found it proven beyond reasonable doubt that the Defendants S. , Rr. and H. G. have killed G. B. in a joint action in health center. It was convinced that Witness J. B. has described the events which he had seen accurately and that he was not in any more in the afternoon of . G. B. was shot by the G. Defendants in the health center of . The G. Defendants were not in their village of when G. (and V. ) B. were shot.

The Court heard 28 witnesses before court and analysed their and several further statements given to the police and/or the Prosecutor in pre-trial phase.

In assessing all witness' statements the Court was aware that in general it is an indication – not a proof – for a credible statement if it is given with certainty, while an incredible statement contains uncertainty. This is based on the common psychological knowledge that it is easier to tell the truth than to tell and recapitulate a lie, because the honest person only has to activate already memorized pictures of the event instead of inventing things which is significantly more difficult. It is however psychological standard and part of the professional knowledge of the Panel that the human recollection fades after time has elapsed and that the human brain – intentionally or without conscience – also often shows the tendency to modify and to fill gaps to make things more plausible. It is also normal that the human brain firstly forgets about details which it deemed not to be important, and witnesses correct themselves in further statements. In general a statement is more accurate if it is given shortly after the critical events than a statement which is given after years. In this case, however, this rule didn't apply. All witnesses gave account to the Prosecutor/police and to the Court or years after the . Therefore, it is logical than a statement given to the Prosecutor in or could be, but is not necessarily more accurate that a statement given some months later to the court in main trial hearing. Bearing all this in mind, the Court found it essential to pay attention on the way the witnesses performed at Court in testifying and to get a firm personal impression of them.

#### 4.1. Events in

In his testimony J. B. described the day of . He was member of the KLA at that time, but in a different brigade than S. , Rr. and H. G. . He was in possession of a sniper rifle and three hand grenades. During the war he was staying in his brother E.'s large house because he was burnt out of his house during the war. Parts of his family, including his wife and his then young children, witnesses B. and B.B. , were in because it was safer for them to stay there. Plenty of family members and other refugees were also finding shelter at E.'s house at that time. On at one point around midday he heard NATO helicopters flying over . People in the village greeted them and there was some happy shooting. Different from what other witnesses say, he didn't throw a hand grenade on out of joy; he however confirmed that he threw a hand grenade a couple of weeks before the war ended, but only in order to scare Serbs away. When they learned that the Serbs were withdrawing, he and his late brother Xh. decided to go to . They partly took a pedestrian shortcut. On their way they passed by a village called . Nearby, a tractor driver with people on a trailer asked them to join them on their way to . He didn't remember the name of the tractor driver or other persons on the tractor. They refused to take the offer because Xh. preferred to walk on the street which they couldn't do during the war. The next place they reached was the village of . At one place, a tractor storage place, they checked if they could find a tractor that has been stolen from Xh. before. When they didn't succeed they continued to go to where they arrived around ; the witness however was not sure about the exact arrival. He and Xh. were strolling around the celebrating city of . The witness remembered that he saw witness G. G. at his shops but he was not sure if G. had seen him, too. J. also decided to check a flat in city center which had been abandoned by a Serb and which he hoped to occupy. Within the flat he met witness Z. A. who he was lying

on a bed in the flat's bed room in his athletic gear. J. realized after a short discussion with witness A. that he came too late to occupy the flat and went back on the streets.

The Court was convinced that J.'s description of these events was accurate, even though many witnesses claimed that J. was not in at all, but was the whole day in his village in . The witnesses set as a marker a moment when J. was allegedly throwing a hand grenade to celebrate and out of joy; the witnesses claimed that this happened at some time in the (late) afternoon which would make it practically impossible that J. was at the same time at the crime scene in , even though the exact time of the killings could not be established. It was some time after o'clock pm, and in any case before sunset.

Witness E. B. brother of J. and the late Xh. B. - testified to the Court that the family gathered in front of the house in a field area. Some people said that Kosovo would be liberated, some were skeptical about this fact. It was already late in the afternoon when they saw two vehicles passing by the village and a helicopter. He got frightened because he thought it was the Serbs and they prepared themselves to go into the woods in order to survive a potential attack. Then he learned that it was actually KFOR. He didn't see his brother J. B. throwing a hand grenade, but he heard an explosion and somebody told him that it was J. who has done so. He was absolutely sure that his brothers J. and Xh. were at his house for the rest of the day and the night because firstly they would have informed him as the eldest brother if they had intended to go. They didn't do so. Secondly, everybody stayed in for the rest of the day, because no one was absolutely sure that it was safe enough to leave . His brother J. should consult a psychiatrist if he still claimed to be an eye witness of the murders that happened in on . J. has never told him as his older brother about these events and what he has seen.

Witness A. B. – son of E. B. - was on the critical day in in his father E.'s house. He hasn't seen the explosion since he was inside in the yard of the house. He stated that he has only heard it and his uncle J. himself has told him that he has thrown a hand grenade when he was together with witness H. M. . This happened in the late afternoon, after KFOR has arrived in the village. J. was then for sure in E.'s house or around the whole day.

Witness H.K. – son in law of E. B. - testified to the Court that on in the afternoon he was at the gate of E.'s house when he heard shooting coming from around . J. B. and H. M. went into the direction of the field, and J. threw a hand grenade without any previous warning. It was a standard type hand grenade - green and round with a safety pin - and incisions on the surface. J. had thrown the hand grenade outside E.'s house downhill in a distance of - from the point where he, the witness, stood. There were more persons in a distance of around, including A.B. . E. B. came and started to shout and curse his brother. J. explained to him that he threw the hand grenade because was liberated. He, the witness, could guarantee that J. was the whole day in and actually nobody left the village until the following day of .

Witness H. M. didn't confirm this version of witnesses H. K. and A. B. . He didn't remember that J. B. has thrown a hand grenade and stated that if there was such an explosion, a grenade could have been thrown by anybody. If J. had done so, it must

have been far away from the house. He didn't say that he went into the fields together with J. B. when the latter threw the hand grenade, as many witnesses wanted the Court to believe.

Witness H.B. – nephew of J. and son of the late Xh.B. - stated that many family members were in , but his mother and his sister and some children were in for safety reasons. When they heard people in the village shooting, they thought that the Serbs would attack; he and others got scared and gathered close to the forest, ready to run away. Then they realized that people were shooting to celebrate the liberation. He then heard a blast - away and he was later on told that J. has thrown a hand grenade out of joy. All this happened later in the afternoon. He, H. , stayed with both his paternal uncles, E. and J. , all day long at home. He couldn't remember exactly what J. did all the time. Asked about what happened to his father Xh. B. and his brother B.B. , he stated that they were killed in an ambush in . They and also his other family members F. and J. B. were – legally – cutting wood in . They were shot from a distance. F. B. was wounded, and so was Witness J. B. . These events haven't been investigated so far.

Witness H. B.'s statement is contradicted by the statements given by witnesses B. and B.B. – both sons of witness J. B. . While H.B. said to the Court that he was in the whole time during the end of the war, both witnesses credibly stated that H. was with them and other parts of the family in because it was less dangerous for them. The Panel believed B. and B.B. and was convinced that H.B. didn't tell the truth and that he has been with the other children in . On H. was years old. From the beginning of their first statement to the Prosecutor on B. and B.B. were very clear and firm as to whom they have seen in and whom they don't have seen, even though both have been young at that time ( years and years). However, age as such doesn't prevent an accurate recollection. As both witnesses and J. B. said, one part of the family has been in and had only been brought home to on a tractor when the situation was safe. J. B. picked them up on from . Even if the (young) witnesses didn't know exactly what H. has done on the very day, they would have noticed if the then year old H. had gone alone and one day earlier than the rest of the family back to , because this would have been an exceptional situation. The Court excluded the possibility that B. and B. didn't tell the truth to the Court because they wanted to confirm their father J. 's version of the events on . Both witnesses have given exactly the same statement already to the Prosecutor in , and at this point they couldn't know which witness would be important for that case and what H. B. exactly has said to the Prosecutor on . There was no reason for them to lie because H. B. was only one of numerous witnesses from and not a key witness in this case. This situation differs from the situation the witnesses were in, when they (all) stated against J. B. as the decisive witness in this case. The Court found B. and B.'s statements credible.

Witness J. R. – brother in law of the late Xh. B. - gave different statements to the Prosecutor on and to the Court on . In the first statement he said that there was a hand grenade thrown and he placed this event between  and a.m. right after he has seen the KFOR vehicles (see statement to Prosecutor, question No. ). Then he left with his son for his village of . To the Court however he said that the hand grenade event happened in the late afternoon and that the he and his son thereafter left . He didn't

say the truth to the Prosecutor; he realized his mistake already on the very interview day on [redacted] after he had talked to his son H. who reminded him of the correct time. He, J. [redacted], didn't feel the need to go back to the Prosecutor and to correct the mistake he made.

Witness J. R.'s [redacted] son and nephew of the late Xh.B. [redacted], witness H.R., told the police in his pre-trial statement on [redacted] that he stayed at E.'s [redacted] house only until early afternoon and he then headed to [redacted] with his father; they split on their way when J. [redacted] went to their village of [redacted]. To the Court witness H.R. [redacted] gave [redacted] account that it was already in the evening, when it was getting dark, when both of them left [redacted]. KFOR also arrived in the late afternoon. He saw J. [redacted] throwing something and then there was the explosion. He was in this moment about [redacted] away from J. [redacted] and he had to lie down on the ground. When the witness was confronted with his pre-trial interview and the discrepancies in regard with the time of the hand grenade explosion, he claimed that the records of his statement to the Prosecutor were wrong. He however confirmed, as it is set out in the minutes, that they have been re-translated to the Albanian language to him and that he signed them thereafter.

Witness F. H. [redacted] testified on [redacted] that on [redacted] when KFOR [redacted] entered [redacted], J. B. [redacted] threw a hand grenade. He was about [redacted] away. The hand grenade was green, egg shaped and had incisions. The witness was very sure that he has seen it. He didn't see the explosion as such because J. [redacted] threw the hand grenade over a little hill. He had to lie down. Later on, after lunch he went to [redacted] to see his fiancé who he hasn't seen for a longer period of time during the war. He said that he had lunch at around [redacted] - [redacted], then he saw KFOR [redacted] and then he left [redacted] at about [redacted] - [redacted]. He went on foot which took him about [redacted] - [redacted] hours.

Witness M. H. stated to the Prosecutor on [redacted] that KFOR [redacted] arrived [redacted] at [redacted] around noon in [redacted].

Witness A.B.H. [redacted] stated to the prosecutor on [redacted] that she saw [redacted] J. B. [redacted] only when KFOR entered but after that not any more. She couldn't testify due to her health problems.

Witness S. B. R. – sister in law of J. B. [redacted] - stated to the Prosecutor on [redacted] that she didn't see J. B. [redacted] on [redacted]. She was only told that he has done so. Right before dark she saw KFOR tanks passing by, this was after the hand grenade exploded. She didn't hear the explosion herself because her hearing was impaired.

Witness Z. A. [redacted] stated to the Court that on [redacted] he was in the afternoon for about [redacted] hours in a flat that used to belong to a Serb who fled. Being asked if he has seen Witness J. B. [redacted], he stated that he was "100 % sure" that J. [redacted] on that day was not in this flat, but he met him there [redacted] - days later. Only then the encounter that J. [redacted] has described happened.

Witnesses G.G. [redacted] and S.G. [redacted] stated in their statements dated [redacted] and [redacted] respectively that they were around in [redacted] but haven't seen J. [redacted] on [redacted]. No other witness who has been heard at Court or whose statement has been considered as read has seen J. B. [redacted] on that day in [redacted].

The Court was convinced beyond reasonable doubt that the witnesses who said that J. [redacted] was still in [redacted] in the (late) afternoon and he threw a hand grenade at this time were not telling the

truth. In their examination, almost all of the witnesses gave the strong impression that they came to Court only to confirm this particular fact in order to discredit J. B. , instead of trying to recall carefully what exactly happened on . Applying the abovementioned standards of evaluation of witness' statements, the Court didn't put the stress on minor discrepancies within the witnesses' statements given to the Prosecutor and the Court, and the witness' statements in comparison to each other. Some minor discrepancies can easily explained with a loss of recollection after years if the witness didn't remember exactly who was when inside the house or in the court yard, or if it was - when KFOR arrived or maybe even or , around lunch time. The Court was however convinced that one would remember if it was in the middle of the day when people learned that the Kosovo war was over in their region or if it was more at the late afternoon, in particular when, as it turned out, it was essential for many people in the region to return to their homes as soon as possible.

The Court, as stated above, was depart from the content of the statements mainly assessing the personal impression which it got from the witnesses, their way of answering, mimic and gestures, which were not convincing in the parts when they were deviating from the Court's factual findings. Witness H.M. e.g. who was confused – probably because of his advanced age –, said with certainty that J. B. was all day long in , while he hardly could remember anything else that happened on that day. The Court took this as a proof that he decided or was told to confirm J. 's presence.

In this regard the testimony of E.B. was remarkable who tried to explain why J. could not have gone to . He said that neither were the family members sure if was liberated; nor would have J. and Xh. moved away without informing him as the eldest brother. Both reasons were not convincing. It derived clearly from the witness' statements of F. H. , J.R. and H.R. that people actually went away from , and, so the Court was convinced, as soon as possible after they have learned that the ways were free, in particular in the case of the witnesses who needed - hours to walk to . Since it was proven that persons dared to leave , E.B.'s statement that people were afraid to leave simply didn't make sense and it contradicted also what he has said to the Prosecutor, namely that people were joking around in the afternoon because of the liberation of the region (answer to question No. of the Prosecutor). The Court also didn't believe that J. and Xh. would need E.'s 'permission' to leave.

The same eagerness to convince the Court that J. couldn't have been in on the critical day was obvious when it came to the distance between and . It is clear that the bigger the distance between the two destinations is, the more time J. would have needed to arrive there and the less credible it would be that he has seen the murders that happened after in the city center of . J. B. said that he took a pedestrian short cut and it took him over to arrive in but he was not able to say exactly how much time he needed. This made sense, because at the time they started to walk to he couldn't have foreseen what he would see later on in and therefore there was no incentive for him to memorize the concrete time in minutes. E. B. said to the Court that the way on the road would be about , while Witness H. B. estimated the distance to be long. According to the KFOR map, the distance on the now asphalted main road between and is about with no significant difference in topography. The Court found that the only

reason why the witnesses would estimate the distance between [redacted] and [redacted] so significantly different than it was in reality – which E. and H. B. knew since they have been living in [redacted] for their whole life – was that they had planned not to tell the truth to the Court.

The Court found it also remarkable that the longer the main trial was on-going, the more the witnesses have seen. Witness H. K. [redacted], F.H. [redacted] and H.R. [redacted] who have been heard on [redacted] and [redacted] claimed to the Court that they have all seen with their own eyes the hand grenade event happen and two of them even described the hand grenade, while the witnesses who have been heard in the early stage of the trial were more careful and said that they only heard an explosion and then were told by others or J. [redacted] himself that he allegedly had thrown it. The Court believed that these witnesses did so because the Court who has extended the detention on remand against the **G**. Defendants on many occasions was apparently not convinced to drop the grounded suspicion against them; therefore a much colorful version of the story seemed to be necessary. The Court was sure that the witnesses only described any common hand grenade type – green, with a lemon shape, and the incisions - and that they haven't seen anything else because it did not happen on that day. Since it was war time, it was not difficult for the witnesses to describe any explosion of a hand grenade.

It was also noticeable how many witnesses claimed that their statements to the Prosecutor were not accurate and for what reasons. Witnesses B. Z. [redacted], J. R. [redacted] and H. R. [redacted] claimed that the minutes of their statements to the Prosecutor were false; B.Z. [redacted] even alleged the Prosecutor that he has fabricated the records. There was not a single proof for this version, and the explanation that J. R. [redacted] gave, namely that he has just made a mistake, was not credible, because even though it's normal not to remember the exact time of the KFOR arrival, one remembers clearly if this was in the in the morning or in the late afternoon. It is only normal that J. [redacted] and H.R. [redacted] didn't wait until the (late) afternoon to leave [redacted] when H. [redacted] intended to walk the long way to [redacted]. The Court was convinced that they tried to adapt their statement in order to make the Court believe that J. [redacted] was in [redacted] the whole day and they have seen him.

The Court believed J. B. [redacted] has told the truth when he described his way to and what happened in [redacted]. The Court had to assess carefully J. 's [redacted] credibility and the value of his statement in the light of all other collected pieces of evidence. It was mindful that the conviction of the three **G**. Defendants is in essential parts solely based on his statement. The witness was however neither a cooperative witness, nor was his identity anonymous. Therefore, the restrictions set in Article 262.2.and 3. CPC did not apply.

J. B. [redacted] provided many details like the event with the tractor which were not necessary to tell in order to give evidence for the murder case of G. [redacted] and V. B. [redacted]. It was a detour in the description of the course of the events, which actually endorsed his credibility. The Court found it also proven that J. [redacted] met witness Z. A. [redacted] in the flat that the Serb has abandoned in the centre of [redacted] on [redacted], and not days later as witness Z.A. [redacted] wanted the Court to believe. A. [redacted] admitted himself that there were many Kosovo Albanians right after the withdrawal of the Serbs who were looking for a flat to occupy, since many of their houses have been destroyed on one hand side and there were flats which were left by fleeing Serbs on the other hand

side. Everybody who came late risked getting no flat any more. Bearing this in mind, it made sense that J. B. , as he said, tried to have a look on the flat as soon as possible, namely the first day when he arrived in , and not several days later. As it was already said above, the version of J. is also more credible because the encounter with witness Z. A. was not necessary to describe the events linked to the killings of G. and V. B. . If he had fabricated that he was in , he wouldn't have invented a meeting with witness Z. A. unless he could have been sure that A. confirmed his account. A fabricated story would have been easily revealed as a lie, if A. had said that he was the whole day e.g. in . Witness A. didn't go so far. He didn't deny that he has met J. , but tried to make the Court believe that this happened later, so that he didn't have to tell a completely untruthful story. It is remarkable that witness A. didn't tell the truth to the Court, because he is a what in general provides a certain credibility, and he should know best about his obligations in Court. However, from his performance before Court it was clear that his account was not accurate. This came out very clearly, when he said that he has seen Defendant **H. G.** in on that day. When the Defendant **H. G.** instead of asking the witness made a statement in front of the witness and said that he was in that day, the witness without even thinking a second if and why he could have erred, corrected himself and confirmed what H. has told him, namely that he has seen H. in . From the way he acted it was visible that he realized having made a 'mistake' to the disadvantage of the Defendant **H. G.** and he was eager to correct it. The Court didn't believe the witness.

The fact that other witnesses like G.G. , L.G. , S.I. , M. and I.V. , Dr B. M. and Dr B. G. haven't seen J. B. on that day doesn't mean that he wasn't there. J. himself said that he was not sure that G. has seen him, too, and he was not sure if he has actually seen Dr B. G. . He however confirmed that he has seen L. G. who was obviously a well-known person in with his very long beard. L. G. has confirmed that he was in on that day. It is normal that within a big crowd in the city center of people didn't see or didn't remember having seen J. , in particular because he didn't do anything special which would make people remember and at this time it was not evident that among the number of numerous witnesses in who must have made any kind of observations pertaining to the deaths of G. and V. B. , J. would be the key witness in this case years after. Therefore, there was no incentive for any of these witnesses to remember J. if they were able to see him at all within the crowd.

The Court was convinced that the witnesses, in particular the members of the broader B. family, harmonized their statements to the advantage of the **G.** Defendants. They might have done so in order to protect themselves and their families. All of them were interviewed for the first time only after the **G.** Defendants have been already put into detention on remand. The whole B. family was well aware that J. 's , his sons' and their grandmother's life - who are all in witness protection program now - has significantly changed and their life was not like it was before J. has decided to testify. This is why, so the Court deems, E. B. said his brother was insane and he should see a doctor. This comment of E. was unfounded and didn't reflect at all the impression the witness has made before Court. There was no doubt that J. 's state of mind was perfectly clear. The Court didn't see slightest indications that the cognitive capacity of the J. B. who is an educated person could have been handicapped in any way and at any time. In the

case of E. B. it was more than visible that he was upset about the absence of his mother who has gone abroad with his younger J. and he blamed J. for that.

The Court was sure that there was a high pressure on all witnesses in the case not to testify against the **G.** Defendants as former KLA members. It was in all Kosovo media and also confirmed by witness J. B. himself, that there were posters of his hung up in municipality. The posters said that J. was betraying the holy KLA war. This shows what could have happened to anybody who dared to give statement to the disadvantage of former KLA members. He or she would be at least in danger to be exposed to the public in a most degrading way. In any way, the social pressure not to testify against KLA members is enormously high. The Court is herewith referring to the previous assessments of the Court of Appeals in their rulings on detention on remand (see e.g. Ruling on 22 February 2013, Kp 117/13).

#### *4.2. Events in the streets of and the health center*

The Court was further convinced beyond reasonable doubt that the Defendants **S.**, **Rr.** and **H. G.** killed G. B. in the health center; it was proven that G. was not already killed on the street.

4.2.1. Witness J. B. described the events after the shots on the street when V. was hit as follows: After the first shooting he didn't stay at the spot but walked away. He neither saw the victims any more on the street nor did he see how they arrived at the health center. He and his brother then went into the hospital to see what finally happened because they were curious; many people had done so. He didn't know exactly how much time passed after the shots which hit G. and V. until he decided to enter the health center. It might have been around - minutes but he was not sure. Once he arrived in the health center, there were already many people gathering in the corridor. He thought that he might have seen Dr B. G. around there but he didn't recall exactly and he couldn't tell if he has seen the **G.** Defendants at that very moment when he arrived in the corridor. Then suddenly he heard a short burst of shots coming out of the room which was located close to the entrance on the ground floor of the premises; he was only a couple of meters away from this room. He didn't see what happened inside. He just saw immediately the three Defendants **S.**, **Rr.** and **H. G.** exiting the room. They were all armed and they left via the health center's exit door. As the door of the room was open, he and other people approached and had a look inside. In the room he saw two people lying on two beds next to each other. They were covered with blood. Inside the room there was also the Defendant **Dr Sh.** who was totally petrified and was holding his head with his hands. The witness didn't remember exactly if he spoke to the doctor at this very moment or not. He didn't stay longer and left the health center with his brother Xh. ; then they went back home to . When they arrived there it was already dark.

He didn't speak with family members about what he has seen in regard with the murders because, as he stated, it was too dangerous. The only conversations he had were very general ones with friends about who was killed and why. Years later he also had a very short conversation with Defendant **Dr Sh.** who used to be a friend of his. **Dr Sh.** then said that he tried to stop the Defendants from killing the one victim who was not dead, but only wounded, but he was not able to do so. The Defendant **Dr Sh.** didn't want to get deeper into this topic.

Injured Party and Witness M. V. told the Court that when he was hit, he also saw G. and V. B. lying on the ground approximately - m away from him. It took him around minutes to find help for his brother I. . He saw the two bodies lying on the ground when he left to go to the health centre and also when he came back to the spot when they were still there. When the ambulance car came, they needed another minutes to leave the scene. He again saw the two bodies who were still lying on the ground with nobody standing next to them.

Injured Party and Witness I. V. couldn't give exact information about who was for how long near to him, because he moved away from the place he got shot and later on fell unconscious.

Witness Dr B. M. – doctor at health center in – heard on that the town was liberated and he also went out of the health center to celebrate. He then met at the health center's gate M. V. who asked him for help for his severely injured brother I. . When he followed M. he saw two bodies lying on the ground. He thought they were dead; he then continued to opposite the building. When he was asked why he didn't stop to verify the death of the persons he said he has seen no reason to do so as they were dead and there was no need to check dead persons. Then he and KFOR provided first aid to I. V. and prepared an infusion for him. He said that they would have stayed quite a long time on the spot. It was almost one hour until the ambulance car with witness Q. A. as driver arrived. He remembered that one of the infusions they gave to him was almost finished by then. When he left the spot with the ambulance he still saw the bodies of the two persons who he assumed to be dead on the ground.

Witness Q. A. – ambulance driver at health center - gave account that he stayed inside the health center where he was working and also temporarily living during the war. At some time in the afternoon somebody called him to pick up an injured person in front of the Courthouse. He immediately went there, he didn't recall if he went alone or together with witness Dr M. . The place where they found the injured person was about m away from the health center. He loaded the injured persons into the ambulance car and drove them to hospital via a place called . When arriving at it was already dark. He didn't spend much time at the scene where he found the injured victims, but only the time needed to lift them into the ambulance; then they left. When it came to the bodies of G. and V. B. the witness was not clear. Asked several times if he could remember how many persons he has seen on the ground not far away from I. and M. he changed; firstly he said that his statement to the Prosecutor was correct, he saw one person. When he was asked by Defence Counsel Rrecaj if he could draw a sketch and indicate where two persons (G. and V. ) were lying, he said that the two of them were lying at a certain point that he marked on the sketch. When he was asked by Defence Counsel Mahmut Halimi if he still saw two bodies when they left , the witness said that it seemed to him that they were still there. When he was reminded by the Presiding Judge that his statement differs about the number of people he has seen, he corrected himself and said that since a lot of people were gathering at the spot, he actually couldn't exactly see what was going on. In general he confirmed that the health center didn't have a morgue and in case it happened that a person died, the person would be placed wherever there was space.

Witness N. B. – nephew of the late G. and V. B. - stated to the Court that on after he has seen his uncle V. lying dead on the street at point A (see statement

above), he went down the street to a point marked E. On his way he spotted two persons in black clothes entering the health centre; they were armed with Kalashnikov rifles which they were holding. One of those N. identified as **S.G.** who drove a which he owned. The was parked near the crossroads before he, N. , arrived at point A. He recognized **S.G.** because he had known him a long time before . **S.G.** 's was the only vehicle in during the war. **S.G.** wore black clothes like for military or police. There was a badge on his arm with the inscription " ". With him he saw another person with short greyish or blond hair in his mid-thirties about - m tall. Then he heard shooting from the health center but he couldn't provide more details about that. He hasn't seen **S.G.** or the other Defendants leaving the health centre on that day. Shortly after the shots the drove by at high speed and made a right turn to a point F. **S.G.** was driving; the witness was not sure if there were more persons inside. He was not sure if he had seen the Defendants **H.** and **Rr. G.** on that day, but he spotted witnesses S. I. and L. G. .

Witness K.Xh.B. - injured party and widow of the late V. B. – testified about what happened after G. and V. were killed. She stated that late on but before dawn, her neighbor I.T. came to her house and told her that G. and V. were murdered. Witness K. went immediately to the health center to find out what happened but she had to turn back because it got dark. The next morning she woke up at . . and couldn't sleep. She went again to the health center. Opposite to the building she met an old man named N. who she believed has deceased by now. N. told her that one of the two men who had been murdered the day before, died on the spot and the other one walked to the health centre. When she arrived in the health center, she met on the floor where the ward was witness F. O. . F. initially thought that she was asking for the V. brothers [I. and M. ] who were wounded. When she told him who she was, F. said that both were dead and they had been murdered. He also told her that the bodies were taken into another place outside the health center, and he then showed her the place where they were taken. It was opposite the health center within the ward. The door of the room where the bodies were stored was locked and they didn't have a key. Therefore, witness K. had to go home again. When she came later on that day she met in the premises of the health center Dr R.M. together with the Defendant **Dr.B.Sh.** . The doctors were reluctant to provide K. with any information about what happened. She understood that, as she expressed it, things were not okay, and she presumed that either the doctors were threatened or under pressure. She saw that Defendant **Dr Sh.** felt uncomfortable.

Then they went back to the pediatric ward; Dr M. told the witness neither to cry out loudly nor to scream. He then opened the door and the witness went in. The doctor stayed at the doorstep and asked her to rush. She remembered seeing G. and V. as a "catastrophe". Both were lying on the floor. G. was full of blood, had plasters on the left arm and a catheter for an infusion bottle. In regard with V. she remembered only one shot in the back of his head because he had a lot of blood in this area. She was not sure if he was hit in his body. Later on the family took the bodies and buried them. The witness didn't go to the police to let the events investigate because she was afraid to do so.

Witnesses F.O. , Z. D. , Dr. B. G. and A. L. couldn't provide relevant information about the killings as such and all claimed that they haven't been at the spot when the shootings happened. Witnesses D. and Dr.G. stated that they were not on duty

on that day (in the ) which matches the working schedule of the health center provided by Defendant **Dr Sh.** . F.O. and A.L. said that they have been in the health center but didn't notice anything. F. O. gave account to the police that people in said one victim was killed in the health center and they were asking him if he had more information. When he was asked again in Court what people were talking about, he said that no one would have asked him and he doesn't know anything. Defendant **Dr Sh.** gave account on when he was still in the role of a witness that he hasn't seen anything (see detailed below under 6.).

4.2.2. Evaluation: The Court concluded directly from witness J. B. 's and K.Xh. B. 's statement and indirectly from the statements of the medical staff of health center that G. B. was not killed when he was shot in the streets but was executed in the health centre by the **G.** Defendants.

It was not decisive that it couldn't be found out in the evidentiary phase of the main trial in which way and during which time frame V. and G. arrived in the room of health center. The Court didn't find it relevant that witness J. B. couldn't precisely describe how much time passed between the first shooting on the streets until he entered the health centre. It is normal that a witness memory fails when it comes to exact time frames in minutes after the elapse of - years. This is in particular the case since J. couldn't know after what he has seen on the streets what is going to happen in the health centre and therefore he didn't have an incentive to memorize the exact time between the first and the second event. Therefore the time could have been longer or shorter. It is important what the witness saw in the health center.

The fact that G. and V. arrived in the health center at one point was uncontested. Even though there must have been numerous eye witnesses within the crowd who saw how G. and V. arrived or were transported from the streets, no one could be found or volunteered to give statement which is remarkable. Usually, in cases where a killing happens in public, numerous witnesses show up and deliver more and less useful information to the police. This was not the case in at the end of the war when two alleged collaborators with the Serbs have been killed. The Court tried under its competency under Article 329.4 CPC to find out if there was a report written by KFOR in order to get any further piece of evidence in this regard. The outcome was that there was no KFOR report (see minutes of main trial session of 4 September 2013). Since some witnesses have seen only V. , but not G. lying on the streets any more, the Court believed that G. must have arrived (shortly) before V. was brought into the health center, too. This could have been within - minutes, like witness J. B. said, or less or more because J. was not sure about the time frame.

The Court found J. B. 's statement credible. It was detailed and coherent as well. In the evaluation of his credibility the Panel put weight on his examination before Court when he gave statement over one and a half days. The Court and all parties had a chance to observe his face, his mimic and gestures and the way in which the witness answered to the questions. It was visible that at the beginning of the first main trial session he was nervous and was afraid that his statement would be broadcasted by media. Only after he was told that media was not present in the court room he slowly calmed down. The Court found that the Witness gave his statement in a fluent, constant and very convincing way. He answered to questions e.g. connected to issues which were not directly related to the murder but to personal issues in the same fluent and direct way as he

answered to questions in regard with the details of the case. He was attentive and thoughtful, and he didn't hesitate to say when he was not sure about certain details or he simply didn't remember any more. When he was making breaks, then he gave the impression that he concentrated to remember details. The witness also told the Court about things that could be evaluated to his disadvantage like that he wanted to take over illegally the flat of the Serb. The Panel found this a significant indicator for the credibility of his statement. It concluded that the witness was telling the truth.

The motive why witness J. went into the health center – curiosity – seemed to be surprising in the first moment, but the explanation of the witness, that there were also other people and they were also following, was convincing. For all people present it was apparently clear why the B. brothers were shot at, namely because they were collaborators, and this is why people didn't have to fear to be shot themselves. It only indicates that the G. Defendants were not afraid of eye witnesses in that time because they knew that nobody would come forward to testify against them which people indeed didn't do for years.

It was also irrelevant that J. didn't mention in his statement that he has seen Injured Parties I. and M. V. at that day which was for the Defence a sign among others that J. couldn't have been in at all. M. and I. were moving away from the spot where they were hit and I. fell down a couple of meters away while M. was trying to get help. The witnesses themselves were not clear about the exact spot where they got hit and differed within their statements. There was also a huge crowd in which hindered the sight on what happened to M. and I. In this regard it is worth to mention that the Injured Parties and witness Q. A. have hardly paid attention on G. and V. and A. stated that there was a big crowd which hindered the sight. Ultimately, J. didn't remain at the spot where he has witnessed the shooting on the streets but went immediately away for a while. Therefore, it is not a mandatory conclusion that he must have seen I. and M. being hit and receiving first aid, in particular if J. was already in the health centre and spotted the events in regard with G. B.

In order to verify the credibility of J., the Court also carefully assessed all statements that he gave to the Prosecutor in pre-trial phase. It took notice that within his first statement to the Prosecutor on the witness gave a shortened version of the events:

*"I and several other people followed the dead and the wounded while they were carried by some passers-by to the media center, which was away. The three G.'s also followed them with their weapons. Once there, they wanted to enter the medical center. The medical staff, including Doctor B.SH., tried to prevent them from entering, but the three pushed them away. They entered the building and shortly thereafter I heard shots being fired. Immediately afterwards, I saw the three getting out of the medical center, still carrying their weapons. Immediately afterwards, I learnt that the wounded had been killed inside the medical center and in front of the medical staff".*

The Panel didn't find that the version of the events undermined the credibility of the witness. He openly and without any hesitation corrected the impression that could derive from his statement, namely that he has seen the Defendants entering, and clarified that he actually hasn't seen in which way G. and V. have arrived at the health centre. He gave the credible explanation that his previous statements, in particular the first one, was just a general one. He admitted that within this

short overview he summed up things that he has heard from others and mixed things that he has concluded and that he has seen with his own eyes.

This explanation was convincing because J. [redacted] on [redacted] was summoned for and gave statement in a different case. He was only spontaneously reporting about the killings of G. [redacted] and V. B. [redacted]. Neither was he asked about more details nor was the statement in general very long. The pre-trial interview started at [redacted] hrs. and ended at [redacted] hrs and lasted therefore [redacted] hrs and minutes. The records contain [redacted] pages in total. The events in regard with the **G.** Defendants were covered by only about half a page out of the total [redacted]. Therefore the explanation of the witness that he has only given a summary of the events as such made sense. It is also clear that the records were not taken verbatim. The fact that J. [redacted] in previous statements has mixed observations and conclusions can also be considered as not an atypical witness' behavior, in particular with the long time elapsed. Since J. [redacted] has seen the **G.** Defendants inside the health center, they logically must have entered it at one point.

Bearing major principles of witness' recollection in mind, the Court also didn't interpret other minor discrepancies to the disadvantage of the witness. It is irrelevant if the witness entered the emergency room with placing one foot into the entrance or if he completely entered or only peeked in. The same applies for the fact if he addressed the doctor with a question or not. From the witness' perspective these details were of minor importance. It is again normal after the elapse of a long time that the witness' memory saved only the picture of the victims lying on their bed and the terrified doctor holding his head and that he didn't have accurate memory about further details which, from his point of view, might not have been important. When examined before the Court he clearly indicated in which parts from his previous statements he was not exactly sure any more, like if he has seen Dr B. G. [redacted] or if he actually has seen the **G.** defendants entering the room where G. [redacted] and V. [redacted] were. It is also normal that in this statement he said that he learned that the wounded one (G. [redacted]) was killed inside the medical centre, because he was not in the room and couldn't know when he heard the shooting in which state G. [redacted] was, and if the shooting resulted in a (successful) killing or not.

The Court excluded the possibility that J. [redacted] was not present at all in the health center and has only told a story which is based on rumours in [redacted]. It is clear that if J. [redacted] hasn't been in the health center, it wouldn't have made sense to tell the Prosecutor or the Court that he has seen the Defendant **Dr B. Sh.** [redacted]. If J. had fabricated a story and **Dr B. Sh.** [redacted] would have simply not been in the health center, e.g., because it wasn't a working day for him, the story would collapse. Telling a lie in this regard would have created another unnecessary risk for a fabricated story to be revealed. There was also no motive visible why J. B. [redacted] would involve Defendant **Dr Sh.** [redacted] in a fabricated story, if **Dr Sh.** [redacted] hasn't been there.

The Court was convinced that **H.** [redacted] and **Rr. G.** [redacted] were with **S.G.** [redacted] when the killing in the health center happened, even though witness N.B. [redacted] saw only S. [redacted] and an unknown person entering. As witness N. B. [redacted] himself said he only shortly had a look what was going on in front of the health centre. Since there was a crowd on the streets in [redacted], **H.** [redacted] and **Rr.** [redacted] must have been already in or came slightly later than S. [redacted]. Witness J. B. [redacted], as he admitted, hasn't seen them entering. The Court found it decisive that he saw all the three Defendants immediately after the shooting.

There is no doubt that J. recognized S. , Rr. and H. G. who he knew for a very long time before and identified them correctly.

Ultimately, there was no doubt that G. B. was killed within the health center which endorses J. B. 's statement. The entire behavior of the doctors and the medical staff in the health centre wouldn't be explainable, if both B. brothers had been brought to the health center already dead. In this case, Dr Sh. , F. O. or others who have been working on that shift on that day could have easily said so without being compromised in any way. The same would have been the case if G. B. had been brought severely wounded to the health centre and he had simply died there because of any heavy injuries. The medical staff however didn't do so. Defendant Dr Sh. and Dr R. M. avoided talking to witness K. Xh. B. . Dr M. made her to have just a quick look on the victims and then urged her to take the bodies with her because they wanted to get rid of the bodies; nobody wanted to get involved into the case. The reason why they did so was perfectly explained by K. : All medical staff including the Defendant Dr Sh. knew what happened and were terribly afraid to tell the truth.

The Court concluded that none of the aforementioned statements of the medical staff undermined the Court's finding that G. was still alive when he arrived in the health centre. Dr M.'s and M. V. 's statement in this regard were doubtful when they emphasized a very long time that two persons were lying on the ground; the Panel was convinced that either they erred in seeing two persons on the ground because their attention was focused on the severely wounded I. V. , or they were intentionally not telling the truth to the Court. The witness Dr M. gave the strong impression to the Court in his examination that he didn't say all he knew and he avoided in any way to help the Court to find out the truth. His statement that KFOR and he were providing first aid for a long time and the infusion bottle was almost empty which usually takes about an hour, is not credible. The ambulance was in the health center and from there it is impossible that it needed one hour to arrive at the spot from a distance of - m and it is also not credible that it was only called after such a long time. Since Dr M. knew that his professional colleague Dr Sh. whom he saw on the Defendant's bench was indicted, Dr M. had good reasons to protect himself in saying that both persons were killed on the streets. Only in stating this he could avoid being suspected of having given a false statement, too, or, in having failed to comply with medical ethical standards. If he as a medical doctor had seen a wounded person and he didn't initiate any medical help, he potentially would have violated his professional obligations and his medical oath.

#### 4.3. Events in (Alibis)

The Defence in a joint motion proposed to hear several witnesses as alibi witnesses for the Defendants S.G. and Rr. G. in order to prove that these Defendants have been the whole day in , a village near to , on and not in city center where the killings happened.

##### 4.3.1. Defendant S.G.

Witness H. G. – uncle of the Defendant S.G. – gave testimony that on he learnt first that was liberated and the day later he was told by cousins that was free, too. He was coming back on a date that he didn't exactly remember to look after their house which was burned down. They intended to repair it. He worked together with the Defendant S.

**G.** Villagers and KLA soldiers told them in the morning that the Serbian forces have withdrawn from the village, so they could walk there without danger. When they went to the house they didn't have any equipment with them. He wanted to see what was left in the house and whether they would make any repairs. They started repairing the roof. He and **S.G.** stayed in the house and didn't leave it the whole day. On that day a lot of work was going on because people heard what happened and returned to their houses and were speaking to each other. He emphasized that **S.** was like a son to him.

Witness **Xh. J.** – far relative of **S.**, **Rr.** and **H. G.** – testified before the Court that he learnt from people coming from that the town was liberated on the day of . He deemed that this happened in the early afternoon, after hrs. He confirmed that **S.G.**'s house was destroyed during the war. He met him in the afternoon of outside his house, after he had learned that was liberated. They talked about an hour about the whereabouts of their children, but not about that was liberated. They stayed together until late afternoon. This differs from the statement he has given to the Prosecutor on , when in answering questions No. and he said that on he left for his own village at around - to meet his family. The distance between and is about .

Defendant **S.G.** gave statement in his own case and referred to his testimony in pre-trial phase on . He refused to answer further questions before Court.

He then said that he was in region during the entire period of war. He joined brigade of KLA in and remained its member together with **H.** and **Rr.** . Their houses were close to his. On he was the entire day in where he tried to fix at least one room of his burned down house for family members to return home. This took him about - days of work. His paternal uncle ( **H.G.** ) and neighbors were helping him. His house is approximately km away from . He didn't realize that the war was over on the day of but only later on. He has heard the names of **G.** and **V. B.** but he didn't know them, even by sight.

The Court didn't believe the alibi witnesses and the Defendant **S.G.** and deemed that their statements didn't undermine the credibility of **J. B.**'s statement who has seen the Defendant **S.G.** at the crime scene acting in the way which is described above. The Panel didn't exclude the possibility that **S.G.** and **H.G.** , with or without other neighbors, have been working at **S.**'s house in the morning and even in the early afternoon. However, the Court was convinced beyond reasonable doubt that **S.** left later on to go to where he killed **G. B.** with his co-defendants **Rr.** and **H. G.** . It was obvious that witness **J.** was lying to the Court when he claimed having been until late afternoon together with **S. G.** . It is not credible that both had an hour of conversation and none of them was mentioning the fact that the most important thing for Kosovo Albanian population since years, namely the withdrawal of the Yugoslav and Serbian forces from region. Since he was leaving for which was km away from , his statement to the Prosecutor made perfectly sense that he was leaving at around - . The Court is convinced that he changed his statement in order to provide **S.G.** who is a family member with a false alibi. The same applies to witness **H.G.** . The Court was convinced that with his statement he tried to protect the Defendant **S.G.** who was almost a son to him which is a strong motive to testify falsely to **S.G.**'s favor. He

clearly said that he learnt about the liberation of \_\_\_\_\_ on \_\_\_\_\_ and this was the reason why people, including **S.G.** \_\_\_\_\_, actually went to their houses to repair them. It is again not credible that they didn't get aware that \_\_\_\_\_ which is the next biggest town close by was not liberated, too.

#### 4.3.2. Defendant **Rr. G.**

The Court rejected the alibi that Defendant **Rr. G.** \_\_\_\_\_ presented to the Court for the afternoon of \_\_\_\_\_.

Witness F. G. - neighbor of **Rr. G.** \_\_\_\_\_ and living in \_\_\_\_\_ since his birth - stated to the Court that he lived in a distance of \_\_\_\_\_ away from **Rr. G.**'s \_\_\_\_\_ house. On \_\_\_\_\_ he stayed at home. He only learned that the war was over the day after from people who told him so, on \_\_\_\_\_. On \_\_\_\_\_ he went from time to time out into his garden to have a rest in the shade. He saw **Rr. G.** \_\_\_\_\_ who wore his camouflage uniform working in his yard each time when he went out. He didn't talk to him. He emphasized that during the war he for sure saw **Rr.** \_\_\_\_\_ every single day. He, the witness, was KLA fighter in the same brigade No. \_\_\_\_\_ together with **S.** \_\_\_\_\_, **Rr.** \_\_\_\_\_ and **H. G.** \_\_\_\_\_.

Witness A. G. - good friend and neighbor of **Rr. G.** \_\_\_\_\_ and living in \_\_\_\_\_ since he was born - stated to the Court that he served in the same brigade as the defendants **S.** \_\_\_\_\_, **Rr.** \_\_\_\_\_ and **H. G.** \_\_\_\_\_ during the war. He learnt only one day after the war ended – on \_\_\_\_\_ – about what happened when he saw refugees passing by the village of \_\_\_\_\_ on their way from \_\_\_\_\_ to \_\_\_\_\_. His house is about \_\_\_\_\_ away from **Rr. G.**'s \_\_\_\_\_ house and the distance to \_\_\_\_\_ is about \_\_\_\_\_ - \_\_\_\_\_. The distance from his house to the health centre and \_\_\_\_\_ would be \_\_\_\_\_. He has exactly measured this because he was a taxi driver who drove from time to time to earn some extra money. On \_\_\_\_\_ he stayed all day until dark with **Rr.** \_\_\_\_\_. He went there because their houses were nearby; he heard that one child was sick. **Rr.**'s \_\_\_\_\_ wife took this sick child and went alone from \_\_\_\_\_ to \_\_\_\_\_. When the wife came back from \_\_\_\_\_ it was already dark; she reported that she has seen forces in \_\_\_\_\_ but didn't know whose troops it was. Witness A. \_\_\_\_\_ further stated that he wanted to support **Rr.** \_\_\_\_\_ who was a friend. They were among others sitting together and repairing the door of his house, at the gate. His brother in law **B. B.** \_\_\_\_\_ was also there. He also saw F. G. \_\_\_\_\_, but how often this was the case he couldn't tell. He went 2-3 times back to his own house as well. Each time he went back he saw F. \_\_\_\_\_. He didn't see **S.** \_\_\_\_\_ or **H.** \_\_\_\_\_ on that day who live in the lower part of \_\_\_\_\_, closer to \_\_\_\_\_, and about \_\_\_\_\_ - \_\_\_\_\_ away from his house.

Witness **B.B.** – brother in law of the Defendant **Rr. G.** \_\_\_\_\_ - stated to the Court that on \_\_\_\_\_ he was with **Rr. G.** \_\_\_\_\_, his sister and their children in \_\_\_\_\_. His sister dared to walk from \_\_\_\_\_ to \_\_\_\_\_ because her child was ill. He and **Rr.** \_\_\_\_\_ were in the house and did some repairs because the house was inhabitable. He couldn't remember what they did. His sister left in the middle of the day and only came back in the afternoon. She then mentioned that she saw large forces in \_\_\_\_\_, but couldn't tell exactly what she has seen. The witness believed that an attack of the Serbian forces would be expected. He also mentioned to the Prosecutor in his statement of \_\_\_\_\_ that A. \_\_\_\_\_ came from time to time until the evening to help (answer to question No. ). They all found out that \_\_\_\_\_ was liberated the day after, on the \_\_\_\_\_, from people passing by.

Witness Sh.B. G. – wife of the Defendant **Rr.** and sister of Witness B. – stated to the Prosecutor on that she walked on the day of liberation with her sick and she left her old with her husband **Rr.** at home. When she came back home after sunset she met her husband, her brother B. , A. G. and her at home. She told them that she has seen lots of Serbian forces and that she thought that they have come to fight against them. She was afraid in that moment. Her husband and the others didn't say anything in reply. The witness thought that they saw she was scared and didn't want to worry her any more.

Witness M. G. stated to the Prosecutor on that he was a neighbor of **Rr. G.** in . Their houses were only separated by a small river. Neither his nor **Rr.**'s house were destroyed during the war. He knew that **Rr.** had children, but he didn't know how many and he didn't know that **Rr.**'s wife was pregnant at that time. The day was liberated he was at his house. He saw **Rr.** from there; it was already in the evening and it was dark.

The Defendant **Rr. G.** did not give statement to the Court but referred to his pre-trial statement that he has given to the Prosecutor on . He then said that his house was burned during the war and in this period of time he lived at a place in the neighborhood of B. , a suburb of , where he lived in an abandoned house. This house is about - away from . He had two rifles with him and was in possession of an authorization card for both.

The Court found the witnesses who were providing the Defendant **Rr. G.** with an alibi for the later afternoon of not credible in this regard. The Court had doubts if A. G. has been present the whole day at **Rr.**'s house, which B. couldn't confirm. The Court didn't believe that people in upper got notice of the fact the Yugoslav and Serbian forces had withdrawn from . Several witnesses reported people moving from all directions on the streets. It is not credible that in the village of the news didn't arrive, bearing also in mind that the Kumanovo-Agreement has already been signed on 9 June 1999 and the partial withdrawal of the Yugoslav and Serbian troops from other regions of Kosovo has already begun. Even if the village of is divided into two parts, upper and lower , they are not so distant that such important news would have been delayed. In this regard it is interesting that Witness A. G. estimated the distance between **Rr.**'s house and to be - , while **Rr.** himself said in his pre-trial interview that actually is - away.

All witnesses had a strong motive to exculpate the defendant, as they were close relative members or some of them KLA fighters and neighbors. The Panel also didn't believe the story that **Rr.**'s wife was on in and didn't realize all happy shooting going on. The Court found it more likely that she was on another day before in , when Yugoslav and Serbian troops were still there and her fear seemed to be justified. But even if she was in that day and didn't notice at all the joy and happiness of all other people around her, she wasn't then in the late in and she couldn't confirm, where her husband was.

### 4.3.3. Defendant H. G.

**H. G.** didn't give statement to the Court and referred to his statement given to the Prosecutor on . He then said that he wasn't in on . As elaborated above, the Court believed witness J. B. . It refers to all the argumentation above.

### 5. Final evaluation:

In an overall evaluation it must be said that the main trial was held in an unique situation in which only a very few witnesses came forward and told the full truth to the Court. Even though both killings happened during the day and in the middle of where numerous persons either must have seen the defendants or the victims or might have at least given other useful pieces of evidence, it remained a cold case, it was never investigated by the local police authorities and there seemed to be a mutual understanding that collaborators may have received what they deserved or at least, that this was a case in which nobody wanted to get involved in. As witness J. himself said, the B. s were people nobody including himself would like to deal with and depart from the B. family itself, no one showed interest in bringing the murderers of G. B. to justice.

It was obvious that witness J. B. disliked the Defendant **Rr. G.** whom he alleged to be involved in the ambush and the killing of his brother Xh. and nephew B. in and he didn't hide these feelings to the court. At the very beginning of his statement on he addressed the **G.** Defendants and asked the (rhetorical) question if they knew how many mothers would cry for their sons (minutes , page ). He then reported an incident at a tractor auction where **Rr.** threatened him in saying that he should remember what happened in the year to his brother; this was the moment when his family members were killed.

The Court believed that if J. had fabricated the whole story against the **G.** Defendants he wouldn't have expressed these feelings and would have hidden them in order not to jeopardize his made-up story. The witness is an educated person and was without any doubt able to understand these consequences. It is also worth to mention that the witness didn't add any further inculpatory elements. If he wanted to put blame e.g. particular on **Rr. G.** , he could have said that it was him who has opened the fire on the B.s in the streets in the first shooting event. He could have also fabricated that he has seen **Rr. G.** or the other Defendants in that ambush in ,but he didn't do so. This endorsed his credibility.

The witness himself provided a credible explanation why he hasn't come forward with his observations in before . He said that he was in fear like everybody else to tell the truth and nobody would testify in favor of the family of the deceased who the whole town considered to be collaborators. This was also the understandable reason why he didn't talk to family members about this case.

The Court also evaluated the possibility that the witness fabricated a story because his life would be threatened by testifying against former KLA members and because he wanted to get and, later on, to remain in witness protection program. However, the Court excluded this possibility in regard to the overall credible impression the witness gave before Court.

In regard with the motives of the **G.** Defendants to kill G. B. the court was convinced that they decided to act as an execution committee for the alleged collaborators and felt safe to do so at

the end of the war, when the Serbs were fleeing and couldn't protect any collaborators any more. In this regard, it was apparently not necessary to have an order from a higher ranking KLA officer. It was obvious that nobody who killed collaborators at that time had to fear any consequences, not even from the family of the victims themselves. Witness and Injured K. Xh. B. , widow of the late V. , was not the one who came forward, even though she knew, as she stated to the Court, on the very day that the **G.** Defendants were suspected to be the perpetrators.

6. *Defendant **Dr B. Sh.** (count 3 of the Indictment)*

Defendant **Dr Sh.** was charged in the amended Indictment with the criminal offence of Providing Assistance after the commission of a criminal offense (Article 305 CCK). The Prosecutor alleged him having given a false statement to him on and, in doing so, in having assisted the **G.** Defendants to elude their discovery as perpetrators.

The Court indeed was convinced that the Defendant **Dr Sh.** on has given an incorrect statement to the Prosecutor and didn't tell the truth.

**Dr B. Sh.** hasn't given statement to the Court, but was occasionally giving comments. He was referring to his pre-trial statements that he has given on in the role of a witness and on in the role of a Defendant. He refused to answer questions to the Court.

In his first pre-trial statement he basically said that on in the afternoon he was on shift in the health centre in . Also on duty were Dr B. M. , F. O. and others. Starting from until there was a team of people who were staying in the health centre all the time. He only learned that the B. brothers who he knew by sight were killed on . He didn't witness anything but heard different versions about what happened to the victims. Some people were saying that the victims have been shot outside the health centre, and one of the bodies had remained there. Others said that one had been brought inside the health centre. He – the witness - didn't know in which condition this one was in and if he has been shot inside the health centre. He emphasized that he didn't see the B.s neither dead nor alive and only saw the bodies the next day. He confirmed that G. was brought into the health centre in the late hours of . Asked if he knew witness J. B. on that day, he stated that he was from and a member of the municipal assembly. He denied having had closer contact to him.

In his second pre-trial statement to the Prosecutor when he was already in the role of a suspect he emphasized his high degree of education and repeated what he said on ; he added that he was all time in the ward of the health centre. He didn't know **S.** , **Rr.** and **H. G.** before he was interviewed by the Prosecutor. He had never heard who killed the victims. He did never talk with J. B. about the case and he never socialized with him.

The Court didn't believe Defendant **Dr Sh.** that he was not in the room where the criminal offence was committed and believed witness J. B. who has seen the Defendant within the room when the **G.** Defendants killed G. B. . In this regard **Dr Sh.** has given an inaccurate statement to the Prosecutor. It could not established to which extent the Defendant could have provided information about the identity of the perpetrators, e.g. in describing their

physical appearance, since he was, as witness J. B. \_\_\_\_\_ credibly stated, in a state of fear and shock.

When the Defendant **Dr Sh.** gave his statement on \_\_\_\_\_, the investigation against **S.** \_\_\_\_\_, **Rr.** \_\_\_\_\_ and **H. G.** \_\_\_\_\_ was already initiated and all were already put in detention on remand (see under A I.). Until \_\_\_\_\_ the witness statements of J. B. \_\_\_\_\_ (excluding the statement of \_\_\_\_\_), N. B. \_\_\_\_\_, K. Xh. B. \_\_\_\_\_ and H. G. \_\_\_\_\_ have already been collected; witnesses B. Z. \_\_\_\_\_, Q. A. \_\_\_\_\_, R. B. \_\_\_\_\_, A. L. \_\_\_\_\_, Z.D. \_\_\_\_\_ and Z. T. \_\_\_\_\_ were interviewed on the same day as **Dr Sh.** \_\_\_\_\_ or shortly after.

The Court didn't conclude that the behaviour of **Dr Sh.** \_\_\_\_\_ in the circumstances given falls under the scope of any prosecutable criminal offence, in particular because he didn't aid in eluding discovery of **S.** \_\_\_\_\_, **Rr.** \_\_\_\_\_ and **H. G.** \_\_\_\_\_. The criminal offence of the murder of G. B. \_\_\_\_\_ as such and their contribution to it have been discovered in the meaning of the law when J. B. \_\_\_\_\_ gave his statement to the Prosecutor on \_\_\_\_\_ (see in detail below, D IV.).

## D. Legal Reasoning

### I. Article 142 CCSFRY in regard with the killing of G. B. \_\_\_\_\_ (count 1 of the Indictment)

1. The defendants **S.** \_\_\_\_\_, **Rr.** \_\_\_\_\_ and **H. G.** \_\_\_\_\_ have committed the criminal offense of War crime against the civilian population pursuant to Article 142 CCSFRY which was the law in effect at the time of the commitment of the criminal offense on 18 June 1999 according to Article 3.1 of the CC.

Article 142 CCSFRY stipulates:

*“Whoever in violation of the rules of international law effective at the time of war, armed conflict or occupation, orders that the civilian population be subjected to killings [...], or who commits one of the foregoing acts, shall be punished by imprisonment of not less than five years or by the death penalty”.*

Common Article 3 of the Geneva Conventions and Additional Protocol II (GC II) as the relevant international law that Article 142 CCSFRY is referring to<sup>1</sup> states:

*“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:*

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<sup>1</sup>Supreme Court Decision of \_\_\_\_\_ in *L. G. et al.*, p6.; the Geneva Conventions of 1949 were ratified by the Socialist Federal Republic of Yugoslavia in 1950 and the Fourth 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War came into force on 21 October 1950. The Protocols to the Geneva Conventions were ratified in 1979 and Additional Protocol II of the Geneva Conventions came into force on 7 December 1978. In any case Common Article 3 of the Geneva Conventions is widely accepted to have become customary international law and so binding on non-signatories as well.

(1) *Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, 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;*

*[...].*

All elements of the aforementioned provisions were met.

2. The existence of an armed conflict between the Yugoslav and Serbian forces and the KLA within the Kosovo war has been established by the Supreme Court of Kosovo in the K. case Decision of . This finding was confirmed in the Supreme Court Decision of in L. G. et al., p. - . This latter Decision also found that the organizational structure of the KLA satisfied the requirements under Common Article 3 of the Geneva conventions and Additional Protocol II. The Court is referring to these decisions and only points out that an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state. This was here the case between the FRY and Serbian forces on one and KLA on the other hand side. There was an internal armed conflict ongoing in Kosovo.

It is irrelevant that on parts of the FRY and Serbian forces had already withdrawn from parts of Kosovo, after on the so-called Kumanovo-Agreement was signed. The international jurisprudence is settled, common Article 3 GC II has the status of customary international law and its application is not limited to a temporal or when fighting is actually occurring, and geographically only to where it occurs. The protection and scope extends to all areas of the territory under the control of a party to the conflict (ICTY, T. , Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction dated 2 October 1995, at paras. 69 to 70 and 102). Within one state, it is not necessary to prove that an armed conflict existed in every single municipality, it is sufficient that it existed within the larger region where the municipalities existed, in other words the entirety of the territorial entity.

According to the Kumanovo-Agreement the withdrawal of the Yugoslav forces had to be finalized within 11 days after its entry into force which was the . According to all witnesses heard, Yugoslav and Serbian forces had just left and the withdrawal from the whole Kosovo territory was not completed yet. In this situation when both parties of the conflict still face each other within one territory, the conflict is not finalized and peace is not secured. It is therefore irrelevant that on the Yugoslav and Serbian forces had withdrawn from where the criminal offence happened.

The Court was also convinced beyond reasonable doubt that the conflict played a substantial part in the perpetrators' ability, decision, manner or purpose for the offence which are another requirements for the commitment of war crime (K. (IT-96-23 & IT-96-23/1-A) Appeal Judgment

dated 12 June 2002, at para. 58). There is no doubt that on just came under the control of a party to the conflict, namely the KLA, while the other party, the irregular and regular Yugoslav and Serbian forces just withdrew. The Court found it proven that the Defendants acted because of their membership of KLA, that the victims who were civilians at that time were selected for the killing because of their assumed collaboration for the Serbs in relation to the armed conflict which was then taking place. The precise nature of the role and the rank that the Defendants possessed is not clear, nor does it need to be. A clear nexus between the defendants, victims, conduct, treatment and territorial control is proven.

3. The objective elements of Article 142 CCSFRY read with the respective provisions of the Geneva Convention are fulfilled because G. B. was killed. Wilful killing is considered a grave breach of the law and it equals with murder (see M. et al, IT-96-21-T, Judgment dated at paras. 422 to 423; and Articles 146 and 146 of the Fourth Geneva Convention). Article 142 CCSFRY doesn't differentiate between specific types of killings and between murder and aggravated murder.

4. The subjective elements of the crime are also set. **S.**, **Rr.** and **H. G.** knew that in firing several shots on G. B. he would lose his life and they intended this to happen. Their joint intent to do so was to punish G. for his alleged collaboration with the Serbs during the armed conflict in Kosovo. They knew that they didn't have any right to punish and in particular to kill the victim.

5. **S.**, **Rr.** and **H. G.** acted in co-perpetration according to Article 22 CCSFRY which stipulates:

*If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act.*

Co-perpetration under Article 22 CCSFRY requires an act of committing by participating in the act of commission, but it can also be done in "some other way". The law therefore doesn't require a physical contribution. It is not mandatory that all perpetrators pull the trigger of the weapon, or only the person who actually shoots can be considered as perpetrator while others can be only assistants. In this constellation only the existence of an agreement or a joint plan between two or more persons that, if implemented, will result in the commission of a crime, is essential.

The Court was convinced beyond reasonable doubt that the three Defendants **S.**, **Rr.** and **H. G.** acted according to a joint plan which they agreed on latest when they entered the health centre. They followed the victim into these premises and entered the room while everybody else was staying in the corridor. The saw that G. B. was lying on a bed with no chance to defend himself or to escape, hence being helpless, and they executed him. The course of the events proves that none of the Defendants only wanted to aid or to support the person who actually shot, but all intended to commit the criminal offense as a joint action. Different from the situation on the street they knew whom they were following and why, namely to kill him.

6. There are no circumstances visible or proven which would exclude the criminal liability of the Defendants **S.**, **Rr.** or **H. G.** according to Articles 16 and 17 CCSFRY (mistake of fact or law).

7. After having established the criminal offence which the Defendants **S.** , **Rr.** and **H. G.** have committed, the Court had to decide if there was more favorable law to apply.

All Defendants committed the criminal offences in \_\_\_\_\_ when the applicable law was the Criminal Code of the Socialist Federative Republic of Yugoslavia (SFRY). The CCSFRY was adopted by the SFRY Assembly on September 28, 1976 and took effect on July 1, 1977. This Code remained in force until 06 April 2004 when UNMIK Regulation 2003/25 entered into force under the name of Provisional Criminal Code of Kosovo. The Law Applicable in Kosovo UNMIK Regulation No. 1999/24 (as amended by UNMIK Regulation 2000/53) set out any law in force before 22 March 1989 continued to apply after \_\_\_\_\_ although the death penalty was abolished and replaced with a maximum term of imprisonment of 40 years (Sections 1.1(b) and 1.5, and 2 to 4; and Sections 1.6 and 3 of UNMIK Regulation No. 2000/53). The Provisional Criminal Code was merely amended on 06 November 2008 by changing its name to Criminal Code of Kosovo. The new Criminal Code of the Republic of Kosovo (Law No. 4/L-082) entered into force on 01 January 2013 which is prior to the final decision in the case.

Article 3 of the new Criminal Code (2013) states that in these cases the more favorable law has to be applied.

The Panel did not find that the new provisions under Article 152 read with Article 31 of the CC are more favorable for the Defendants. Article 152 CC also refers to Article 3 of the Geneva Convention of 12 August 1949. The only relevant difference is that this provision foresees a punishment of imprisonment of not less than five (5) years or by life long imprisonment. Life long imprisonment is according to the law not limited to a particular amount of years and could theoretically be imposed for more than 40 years. Therefore, Article 142 CCSFRY is the most favorable and in this case the applicable law.

#### II. Article 142 CCSFRY in regard with the killing of V. B. \_\_\_\_\_ (count 1 of the Indictment)

The Court didn't find **S.** , **Rr.** or **H. G.** guilty and criminally liable for committing the criminal offence of War crime against the civilian population (Article 142 CCSFRY) in the case of V. B. as the Indictment alleged in Count 1.

According to the argumentation above, it could not be established if V. B. \_\_\_\_\_ was hit by an intentional shot and if so, who if any of the **G.** Defendants had actually shot V. B. \_\_\_\_\_, nor that the three Defendants **S.** , **Rr.** and **H. G.** already at this point acted according to a plan to kill him. The Court couldn't establish that the **G.** Defendants went to the crime scene in the city centre of \_\_\_\_\_ with the intent to kill nor that all of them knew that one or more of them would meet and shoot at G. \_\_\_\_\_ and V. B. \_\_\_\_\_. Therefore, the Court found that **S.** , **Rr.** and **H. G.** had not committed the criminal offence they were charged with in regard with V. B. \_\_\_\_\_ and had to be acquitted from this charge.

#### III. Article 142 CCSFRY in regard with the Injured Parties I. and M. V. \_\_\_\_\_ (count 2 of the Indictment)

The Court didn't find the Defendants **S.** , **Rr.** and **H. G.** guilty and criminally liable for injuring I. and M. V. \_\_\_\_\_ on \_\_\_\_\_ in \_\_\_\_\_ and in committing the criminal offense

of War Crime against the civilian population (Article 142 CCSFRY) as set out under Count 2 of the Indictment.

The objective elements of the criminal offence are not met. Referring to the argumentation above, it was not proven that it was the shots on G. and V. B. that hit I. and M. V., and even if so, any shooting at this point couldn't be linked in a sufficiently clear way to any action of the G. Defendants.

Therefore, the Court found that S., Rr. and H. G. had not committed the criminal offence they were charged with in regard with I. and M. V. and had to be acquitted from this charge.

#### IV. Article 305 CCK (count 3 of the Indictment)

The Court found that in giving an incorrect statement to the Prosecutor on the Defendant **Dr Sh.** didn't commit the criminal offence he was charged with – Article 305.1 and 2 CCK - because of legal reasons; it is referring to the argumentation of the Presiding Judge in her Ruling on the admission of the Indictment and is herewith deviating from the legal assessment the Kosovo Court of Appeals has provided in its Ruling No. KA 490/2013 dated 6 May 2013 in this case.

Article 305.1 and 2 CCK stipulates:

*“Whoever harbors the perpetrator of a criminal offence prosecuted ex officio or aids him or her to elude discovery by concealing instruments, evidence or in any other way or whoever harbors a convicted person or takes steps forward frustration the execution of a punishment or an order for mandatory treatment shall be punished by imprisonment of up to one year.*

*Whoever assists the perpetrator of a criminal offence punishable by imprisonment of more than five years shall be punished by imprisonment of six months to five years.”*

1. The Kosovo Court of Appeals found it essential to focus on the question when a perpetrator of a criminal offence can be considered as ‘discovered’ in the sense of Article 305 CCK and argued in this case as follows:

*“Possible options are the decision of the Prosecutor to initiate an investigation against an unidentified suspect for a criminal offence (Article 104 CPC) based on a reasonable suspicion, the filing of the indictment based on a well-grounded suspicion (Article 240 et seq. CPC), or as the Special Prosecutor submits, the final conviction of the defendant.*

*The Panel finds that a criminal offence can be considered as discovered for the meaning of Article 305 (1) CCK from the time of the filing of the indictment. The standard of a well-grounded suspicion (Article 19 (1.12) CPC) requires more than a substantial likelihood that a criminal offence was committed by the perpetrator. The factual allegations are sufficiently determined at that stage and with the filing of the indictment the Prosecutor has specifically defined the criminal act and the accusations against a concrete suspect (now accused). For the initiation of an investigation, a perpetrator must be identified only and the person concerned may or may not have committed the criminal offence. This is a substantial lower standard and during an on-going investigation the*

*factual circumstances are not as firm as with the filing of the indictment and might therefore be subject of fundamental changes.*

*The finding of the Panel is also supported by a systematic interpretation of the CCK mandated in order to draw a clear legal distinction between the scope of application of the criminal provisions of Article 305 and 307 of the CCK. Article 307 of the CCK criminalizes a false statement given by witnesses during court proceedings. Court proceedings start with the filing of the indictment. Thus, there is no need to extend the applicable scope of Article 306 of the CCK to cover also the phase of criminal proceedings as the Special Prosecutor suggests. Article 306 of the CCK, on the other hand, also covers the investigative stage but applies to qualified situations which require more than giving a false statement to a prosecutor or investigator”.*

The Panel does not concur with this interpretation of the Article 305 CCK, neither when it comes to the general interpretation of the wording of the Article and the systematic approach, nor in applying the provision in the concrete case of Defendant **Dr Sh.** .

2. It is clear that not any kind of assistance shall be punished, but (only) the cases mentioned in Article 305 CCK itself. The Panel finds that the typical case of ‘harboring’ is e.g. providing shelter for a robber fleeing out of a bank. The one who is giving shelter in this very moment doesn’t need to have a clear assessment of the nature of the criminal offence that has been committed, nor has he to know about the identity of the perpetrators. The general, not very precise knowledge about a criminal offence committed would be sufficient.

Article 305 CCK doesn’t mention that “aiding” in any general way would constitute a criminal offence but “aiding to elude discovery”. Therefore, ‘discovery’ is an essential element. Interpreting the wording of the law, the synonym for the word ‘to discover’ is ‘to reveal’ or ‘to detect’. In ‘discovering’, there is an inherent moment of spontaneous revealing of a fact which was unknown before. A typical acting would be e.g. to provide the fleeing robber in the example above with a vehicle to escape from the police right after the offence. Also in this case it would not be necessary that the helping one knows exactly about the nature of the criminal offence committed or about the identity of the perpetrator.

In the interpretation of the Panel, ‘discovery’ is pertaining to a rather spontaneous moment at a very early stage and closely related to the criminal offence, and not to different levels of suspicion nor to the assessment if factual circumstances are already firm (enough) or not. If this was the case it could be assumed that the legislator had chosen the words “conviction’ or ‘filing an indictment’ instead of ‘discovery’. Facts at each stage of the criminal proceedings can be subject to fundamental changes, e.g. when after the filing of the Indictment within the initial or second hearing the Defense is raising objections or the Defendants are providing an alibi. Therefore it is not clear why the filing of the indictment should be the turning point between a ‘discovered’ or an ‘undiscovered’ perpetrator.

The interpretation of the law that equals ‘discovered’ with ‘indicted’ or even ‘convicted’ and is in this way referring to a later stage of a criminal investigation or even the end of the main trial would go beyond the wording of the law itself and would violate the legal principle of ‘nulla poena sine lege stricta’. It is only accepted in the very rare cases that the wording obviously contradicts the intent of the legislator which is not the case, even to the contrary. The legislator has just recently reviewed the criminal code and adopted a new version which went into force on 1.1.2013.

The respective new Article 388 CC stipulates in its relevant parts:

*“Whoever harbors the perpetrator [...] or aids him or her to elude discovery or arrest ... shall be punished.”[highlights set by the Court].*

From this wording it derives clearly that the criminal offence of providing assistance can be committed at a very early stage even when an investigation hasn't even begun, namely to elude the arrest of a person. There is only a grounded suspicion needed for an arrest and not a well-grounded one or even a conviction (Article 164.1.1. CPC). It therefore can be concluded that also the 'discovery' of a perpetrator – which is placed in order before the arrest within the enumeration of Article 388 CC - is not related to the point when the suspicion has turned into a well-grounded one and an indictment is filed. It is irrelevant that the word 'arrest' is not mentioned in the old code. The fact that the legislator has amended Article 305 CCK in the aforementioned way indicates that Article 305 CCK must be read and interpreted in a way that concurs with Article 388 CC in the new code.

3. The Panel's interpretation of the law is endorsed by a systematic comparison within the legal systems of Article 303 – 315 of the old Criminal Code, respectively Articles 384 – 408 of the new Criminal Code.

The Criminal Code mentions the terms 'discovery' and 'perpetrator' not only in Article 305 CCK (388 CC), but also in Article 304 CCK (386 CC). Article 304 CCK stipulates:

*(1) Whoever, having knowledge of the identity of the perpetrator of a criminal offence punishable by long-term imprisonment or of the commission of such a criminal offence, fails to report such fact even though the discovery of the perpetrator or of the criminal offence depends upon such a report shall be punished by imprisonment of up to three years.*

*(2) An official person or a responsible person who fails to report a criminal offence he or she has discovered in the exercise of his or her duties shall be punished as provided for in paragraph 1 of the present article, if such offence is punishable by imprisonment of at least three years and is prosecuted ex officio[ highlights set by the Court] .*

This Article in general wouldn't make sense if a 'discovered perpetrator' is only a person who has been indicted or convicted yet. The term 'discovered' is clearly related to the moment when the person got knowledge of the perpetrator's identity and who got aware of (namely: discovered) that a potential criminal offence has been committed. The Code penalizes this omission to report and that due to the fact that the identity of the perpetrators remains unknown, a proper investigation cannot start. There is also no sign that the legislator wished to use the term of discovery in a different way in two subsequent articles. Therefore, a systematic analysis endorses the legal opinion of the Panel.

The Court only notes that in other Articles in the Criminal Code, like Article 142 CCK, the word 'discovered' is also used in the way the Panel interprets the law. The law says:

*'Article 142*

*Concealment or failure to report terrorists and terrorist groups*

*1. Whoever conceals the existence of a terrorist group or its participants or obstructs the discovery or apprehension of a terrorist group or its participants shall be punished by*

*imprisonment of three (3) to ten (10) years’.*

Discovery is clearly related to a very early stage and put in the enumeration even before the apprehension of the perpetrator.

Another example is Article 316.3 CC when the Court can waive the punishment if the perpetrator reports that he has committed a criminal offense before it was discovered or before he or she got aware that it was discovered. It wouldn't make sense to report a criminal offence for which the perpetrator has already been indicted or even convicted. Again there is no indication that the legislator wished to use the term of discovery in a different way than in other provisions in the Code.

4. The Court's interpretation of the law doesn't lead to an unjustified gap within the law and even if so, it would not be up to the Court to fill a gap in the law and to extend the scope of any Article within the system of Articles 304 – 308 CCK to the detriment of the Defendant.

The Court doesn't ignore that each judicial system has a vital and legitimate interest in having functioning investigation authorities which are not hampered by lying witnesses. Within criminal procedures a witness is most often the most important mean of evidence, as is was also here the case.

However, the Panel notes the legislator has decided in Article 307 CCK that giving a false statement is only punishable within court proceedings, not in pre-trial phase. If the legislator had wished to punish giving a false statement to the Prosecutor in the pre-trial phase, it would have mentioned the Prosecutor in Article 307 CCK, latest when the Criminal Code was under review and a new Code got into force as of 1.1.2013. The legislator didn't do so. It is not up to the Panel to fill a potential gap in the law. There is also no hint that Article 305 CCK shall serve as a general provision for all cases that Article 307 CCK doesn't cover. If so, the legislator wouldn't have used the enumeration in Article 305 CCK, referring to particular cases of assisting.

In this regard the Panel notices that according to Article 125 CPC a witness is given the warning that he might be prosecuted (only) under Article 390 (false report) or 391 (false statement under oath). The warning doesn't contain Article 388 CC (Providing assistance after the commission of a crime).

The mentioned legal interest of a functioning judicial system is protected in Article 306 CCK, but refers to qualified situations, as the Court of Appeals in the aforementioned ruling emphasizes. Reporting the wrong person and providing false evidence, thus directing the investigation into another direction and/or delaying it for a certain period of time, constitutes a criminal offence. The lying witness in these circumstances plays a very active role. A witness who denies that he has been at the crime scene at all, like the Defendant **Dr Sh.** did, is acting in a significantly different way.

From the viewpoint of the investigating authorities and a legal system as such, it would be wishful to make sure that lying to a Prosecutor in pre-trial phase constitutes a criminal offence. But again, it is not up to the court to interpret the law or to create analogies to the detriment of the Defendant or to fill legal gaps.

5. Applying this legal opinion on the case of Defendant **Dr B. Sh.** , the moment of discovery of the perpetrators happened when the key witness J. B. on gave

statement to the Prosecutor. This was after about years of silence in a cold case the first time that authorities who were willing to act took notice of the crime as such and the names of the alleged perpetrators; this set the turning point in this case and the moment of discovery. As the Court has elaborated above, the conviction of the **G.** Defendants mainly based on J. B. who has given statements in pre-trial phase in , and before the indictment was filed in December 2012. The evidentiary situation for the prosecution case has not significantly changed and there was no higher level of suspicion in the moment the indictment was filed. None of the witnesses who have been heard after the Defendant **Dr Sh.** actually helped the prosecution case in order to reach a higher level of certainty when it came to the facts that inculpate the **G.** Defendants as perpetrators.

In addition to that, the fact that **Dr Sh.** hasn't said the truth on , did neither delay or distract the investigation in any way. It made it in the end more difficult for the prosecution case to be proven, but the Defendants have presented alibis, and numerous witnesses from had to be heard. The partial acquittal of the **G.** Defendants was related to events that happened on the streets of in regard with the killing of V. B. where Defendant **Dr Sh.** was not present.

The Court emphasizes again that there is a legal provision that makes a witness not to get away with a lie. In the present case, the Prosecution could have called **Dr B. Sh.** as witness before court and have confronted him with J. B. 's statement in order to get a statement. It may or may have not happened that Defendant **Dr Sh.** in the role of a witness instead of a Defendant might have said the truth, e.g. under oath before the Court. He would then have to face criminal prosecution under Article 392.1 CC.

For all abovementioned reasons, the Defendant **Dr Sh.** had to be acquitted from the charge against him.

## **E. DETERMINATION OF THE PUNISHMENT**

The Court had to determine the punishment for the convicted Defendants **S.** ,**Rr.** and **H. G.** .

According to Article 33 CCSFRY the purpose of punishment in the framework of the general purpose of criminal sanctions (art 5, para 2) is 1) preventing the offender from committing criminal acts and his rehabilitation; 2) rehabilitative influence on others not to commit criminal acts; 3) strengthening the moral fibre of a socialist self-managing society and influence on the development of citizens' social responsibility and discipline. For to reach the purposes of punishment the court shall pursuant to Article 41 of the CCSFRY fix the punishment for a criminal act within the limits provided by statute for such an act, taking into account all the circumstances bearing on the magnitude of punishment (extenuating and aggravating circumstances), and, in particular, the degree of criminal responsibility, the motives from which the act was committed, the degree of danger or injury to the protected object, the circumstances in which the act was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal act, as well as other

circumstances relating to the personality of the offender. The purpose mentioned in para 3 of the Article 33 CCSFRY apparently disappeared with the decline of the SFRY.

**S.** , **Rr.** and **H. G.** are convicted of one count of War Crime against the civilian Population pursuant to Article 142 of the CCSFRY read with the Geneva Convention. The CCSFRY foresees a minimum punishment of five years of imprisonment and a maximum punishment of the death penalty for this criminal offence. The death penalty was later abolished in Kosovo and replaced with imprisonment of forty years.<sup>2</sup>

In the case of the Defendant **S.G.** the Panel found as significant mitigating circumstance the long time that has elapsed after . **S.G.** didn't have previous convictions and was a good citizen before the commitment of the criminal offence and after it. As aggravating circumstances the Panel found that G. B. was a wounded and therefore vulnerable person. The medical centre was a safe haven which was violated.

In carefully weighing all abovementioned circumstances the Court imposed the following sentence:

For War Crime against the civilian population in the case of G. B. , in violation of Article 142 CCSFRY read with the Geneva Convention within a range foreseen by the law between five (5) years and 40 years of imprisonment a sentence of:

**Twelve (12) years of imprisonment.**

In the case of the Defendant **Rr. G.** the Panel found as significant mitigating circumstance the long time that has elapsed after . **Rr. G.** didn't have previous convictions and was a good citizen before the commitment of the criminal offence and after it. As aggravating circumstance the Panel found that G. B. was a wounded and therefore vulnerable person. The medical centre was a safe haven which was violated.

In carefully weighing all abovementioned circumstances the Court imposed the following sentence:

For War Crime against the civilian population, in violation of Article 142 and 22 CCSFRY read with the Geneva Convention in the case of G. B. within a range foreseen by the law between five (5) years and 40 years of imprisonment a sentence of:

**Twelve (12) years of imprisonment.**

In the case of the Defendant **H. G.** the Panel found as significant mitigating circumstance the long time that has elapsed after . **H. G.** didn't have previous convictions and was a good citizen before the commitment of the criminal offence and after it. As aggravating circumstance the Panel found that G. B. was a wounded and therefore vulnerable person. The medical centre was a safe haven which was violated.

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<sup>2</sup>UNMIK Regulation 1999/24, 12 December 1999; UNMIK Regulation 2000/59 amending UNMIK Regulation 1999/24, 27 October 2000.

In carefully weighing all abovementioned circumstances the Court imposed the following sentence:

For War Crime against the civilian population, in violation of Article 142 and 22 CCSFRY read with the Geneva Conventions in the case of G. B. within a range foreseen by the law between five (5) years and 40 years of imprisonment a sentence of:

**Twelve (12) years of imprisonment.**

For the charges of War Crime against the civilian population, in violation of Article 142 and 22 CCSFRY read with the Geneva Conventions in regard with V. B. , I. and M. V. , the Defendants S. , Rr. and H. G. all had to be according to Article 364.1.3 CPC

**Acquitted.**

Defendant **Dr B. Sh.** had to be acquitted from the charge against him according to Article 364.1.3. CPC.

The time the Defendants **S.G.** , **Rr. G.** and **H. G.** spent in house detention and in detention on remand since is to be credited in the amount of the punishment, pursuant to Article 50 Paragraph (1) of the CCSFRY.

**F. COSTS**

The Defendants **S. G.** , **Rr. G.** and **H. G.** shall each reimburse hundred and fifty (150) Euros as part of the costs of criminal proceedings, while being relieved of the duty to reimburse the rest of the costs pursuant to Article 453 Paragraphs (1) and (4) of the CPC. Pursuant to Article 454 of the CPC, the costs of criminal proceedings in relation to the Defendant **Dr Sh.** shall be paid from budgetary resources.

Katja Dominik

Dariusz Sielicki

Anna Adamska-Gallant

Presiding Judge

Panel Member

Panel Member

John Gayer  
Recording Officer

***Legal remedy:***

*Authorized persons may file an appeal through the Basic Court of Mitrovica/e against this judgment within fifteen (15) days of the day the copy of the Judgment has been served on them, pursuant to Article 380 of the CPC.*