

District Court of Pristina

P no. 425/11

21.03.2012

The Main Trial Panel composed of EULEX Judge Jonathan Welford-Carroll, presiding, Judge Shqipe Qerimi, and EULEX Judge Dean Pineles, Panel Members, in the criminal case against:

AK *et al*

UPON motion of the Defence to declare inadmissible **AZ**'s statements and diaries, filed with the Court by the Prosecution and which include statements and diaries found admissible pursuant to the Ruling of the Confirmation Judge, dated 26 August 2011,¹ and forwarded to the Presiding Judge for the Main Trial together with the Indictment and other evidence;

AFTER hearing the arguments of the Defence at the main trial sessions on 28 and 29 February 2012, 01, 06 and 07 March 2012, and having reviewed the written arguments of Defence Counsel Ramiz Krasniqi, filed with the Court on 12 March 2012;

HAVING reviewed the Prosecution response to the Defence arguments, filed with the Court in writing on 12 March 2012, and the Defence rejoinder filed with the Court in writing by Defence Counsel Bajram Tmava and Mexhid Sylja on 13 March 2012, Florin Vertopi and Xhafer Maliqi on 13 March 2012, Defence Counsel Fehmije Gashi-Bytyqi on 14 March 2012, Defence Counsel Karim A.A. Khan QC on 14 March 2012, Defence Counsel Qerim Zogaj on 14 March 2012, and the Prosecution further response to the rejoinder of Defence Counsel Karim A.A. Khan QC, filed with the Court on 15 March 2012;

AFTER deliberation and voting held on 13 and 15 March 2012;

PURSUANT to Art.154 of the Kosovo Code of Criminal Procedure (KCCP);

issues the following

**RULING ON ADMISSIBILITY
OF **AZ**'S STATEMENTS AND DIARIES**

- I. **AZ**'s statements and diaries, filed with the Court by the Prosecution and which include statements and diaries found admissible pursuant to the Ruling of the**

¹ Ruling of the EULEX Confirmation Judge Ingo Risch, dated 26.08.2011, para.VII, pg.10, Court Trial Binder 2

Confirmation Judge, dated 26 August 2011, are hereby declared INADMISSIBLE evidence.

II. The following AZ's statements and diaries shall be excluded from the file and sealed, and be kept separated from the other records and evidence:

- 1) EULEX Police Record of Witness Statement of AZ on 20.11.2009, SPRK Binder M, PPS 07/10, Attachment 1 to the Police Report, dated 11.12.2009.
- 2) EULEX Police Record of Witness Statement of AZ on 30.11.2009 and 3.12.2009, SPRK Binder M, PPS 07/10, Attachment 2 to the Police Report, dated 11.12.2009.
- 3) SPRK Record of the Suspect Hearing in an Investigation, PPS 07/2010, dated 04.02.2010, SPRK Binder A.
- 4) SPRK Record of the Suspect Hearing in an Investigation, PPS 07/2010, dated 09.02.2010, SPRK Binder A.
- 5) SPRK Record of the Suspect Hearing in an Investigation, PPS 07/2010, dated 11.02.2010, SPRK Binder A.
- 6) SPRK Record of the Suspect Hearing in an Investigation, PPS 07/2010, dated 16.02.2010, SPRK Binder A.
- 7) SPRK Record of the Suspect Hearing in an Investigation, PPS 07/2010, dated 17.02.2010, SPRK Binder A.
- 8) SPRK Record of the Suspect Hearing in an Investigation, PPS 07/2010, dated 10.03.2010, SPRK Binder A.
- 9) SPRK Record of the Suspect Hearing in an Investigation, PPS 07/2010, dated 16.03.2010, SPRK Binder A.
- 10) SPRK Record of the Suspect Hearing in an Investigation, PPS 07/2010, dated 25.03.2010, SPRK Binder A.
- 11) SPRK Record of the Suspect Hearing in an Investigation, PPS 07/2010, dated 09.06.2010, SPRK Binder A.
- 12) SPRK Record of the Suspect Hearing in an Investigation, PPS 07/2010, dated 20.08.2010, SPRK Binder A.
- 13) SPRK Record of the Witness Hearing in an Investigation, PPS 07/2010, dated 05.10.2010, SPRK Binder A.
- 14) EULEX/WCIU Photo Board Identification Procedure Report, dated 07.10.2010, SPRK Binder A.
- 15) SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05.07.2011, SPRK Binder A/bis.
- 16) SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 06.07.2011, SPRK Binder A/bis.
- 17) SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 07.07.2011, SPRK Binder A/bis.

- 18) SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 09.07.2011, SPRK Binder A/bis.
- 19) Evidence comprising so-called 'war diaries', marked as: 0096-09-EWC2/008, 0096-09-EWC2/009, 0096-09-EWC2/010, 0096-09-EWC2/011, 0096-09-EWC2/012, 0096-09-EWC2/013, 0096-09-EWC2/014, 0096-09-EWC2/015, 0096-09-EWC2/016.²
- 20) Evidence comprising so-called 'post-war diaries', marked as: 0096-09-EWC2/001, 0096-09-EWC2/002, 0096-09-EWC2/003, 0096-09-EWC2/004, 0096-09-EWC2/005, 0096-09-EWC2/006, 0096-09-EWC2/017, 0096-09-EWC2/018.
- 21) Evidence comprising so-called 'German Diary', filed by the SPRK in trial session on 11.11.2011, marked by the Court as Exhibit P1(b).

REASONING

A. PRELIMINARY CONSIDERATIONS

1. In this case, each Defence team has objected to the admissibility of the statements of AZ (witness X) and his associated diaries on multiple grounds.³ The Prosecution maintains that such materials are properly admissible and ought to be retained at the Main Trial against AK and others (known as the Klecka case).
2. From the outset, the Panel notes and records that the circumstances of this case, and the decision that the Panel must now make on admissibility, are highly unusual, exceptional and possibly even unique. The entirety of the Prosecution case rests upon one witness, AZ who was a co-offender with the indicted defendants in the alleged conduct. The Indictment PPS no.07/2010 of the EULEX Special Prosecutor states: 'In the instant case, the well-grounded suspicion against all the defendants arises mainly from the declarations of cooperative witness X, formerly a suspect within the same investigation.'⁴ Further, at the session on 30 January 2012 the Special Prosecutor in the context of AZ

² It must be noted that some parts or whole of documents marked 0096-09-EWC2/009, 0096-09-EWC2/010, 0096-09-EWC2/015 and 0096-09-EWC2/016 include no date *per se* as to when they were allegedly written (e.g. at the top of the page as in some other instances) but some of them do refer to dates and/or events in 1998, 1999 and are essentially in the same format as so called 'war diaries' (i.e. individual pieces of paper with various names written). For this reason, the Court has considered them as part of so called 'war diaries'.

³ Presentation of the arguments on admissibility of AZ's statements and diaries began on 28 February 2012. In the Main Trial sessions from 28 February 2012 until 07 March 2012 the Defence was presenting their arguments. Objections to the admissibility of AZ's statements and diaries had already been raised by the Defence in previous written submissions and also previous sessions, including the sessions on 30 January 2012 and 07 February 2012.

⁴ Indictment PPS no.07/2010, pg.16 (in the English version), Court Trial Binder 1

); evidence noted: 'The admissibility issue is preliminary to that, otherwise there is no trial.'⁵

- 3.. AZ has had the various statuses of witness, accused, and cooperative witness in the case, and has died before the Main Trial and therefore is no longer available for examination before the Trial Panel. Most, if not all, of these difficulties would not exist if AZ were alive to give evidence at the Main Trial. It is tragic for him, his family and for this case that he is not.
4. The difficulties created by this peculiar set of circumstances are rendered even greater by the fact that the entirety of the Panel's ultimate determination of the case rests upon a detailed assessment of AZ's reliability and credibility (assuming that his statements and diaries are in fact admitted), bearing in mind also the effect of KCCP Art. 157(4) that 'the court shall not find any person guilty solely on the evidence of testimony given by the cooperative witness'. Though the case file reveals material to corroborate AZ's account of what happened at Klecka, there is no material to corroborate AZ's assertions as to the identity of who did it. A detailed review of decided cases in Kosovo and of international tribunals including the European Court of Human Rights (ECtHR) reveals the circumstances of this case to be almost unique.
5. The challenged materials are set out above in paragraph II of the enacting clause of this ruling and are not repeated.

B. FACTUAL AND PROCEDURAL BACKGROUND

a) Factual circumstances of the case

6. It is necessary to set out with detailed particularity the factual circumstances of this case. AZ was a member of the KLA joining in about April 1998 (war nickname of MTZ). He soon came to meet and know the defendants in this case, including FL. According to AZ FL was the commander of the area including Klecka. In Klecka, a house had been made into a KLA facility, variously described as an HQ, a military police station and a detention camp.
7. AZ states that FL made him a guardian of the prisoners in Klecka. Though he does not accept having overall command of the detention centre, over time, AZ appears to have acquired the responsibility of the day to day running of it. In

⁵ Record of the Main Trial, 30 January 2012, paras.76, 101, 103, 105, Court Trial Binder 6

many statements. AZ gives an account of events in Klecka that he has witnessed and taken part. These events, if true, are undoubtedly capable of amounting to War Crimes.

8. Throughout the period of his KLA service, AZ asserts that he maintained a diary. The entries in that diary are said to have been made broadly contemporaneously with the events described by AZ himself. He denies that others were responsible for any entries. His diary keeping habit was maintained after the war as evidenced by the post war diaries. AZ asserts that he preserved and hid his war diaries from the end of the war, until he handed them over to the police.
9. After the war, it appears that the relationship between AZ and FL and his associates broke down, especially after it became apparent that AZ had become a witness in the ICTY investigation into FL. AZ gave statements to the ICTY investigators in 2004. In the event AZ did not give evidence before the ICTY.

b) AZ in the status of a witness

10. Sometime in July 2009 AZ voluntarily approached the EULEX War Crimes Investigation Unit.⁶ On 20 and 30 November and 03 December 2009, AZ gave statements to the EULEX War Crimes Investigation Unit investigators. On those occasions he had the status of a witness.
11. KCCP Art.164(2) and Art.162 require the following warnings to be given to a witness before taking his/her statement: it is a witness's duty to speak the truth; and that he or she may not withhold anything; that false testimony constitutes a criminal offence; but that he need not answer individual questions which would expose himself or herself or a close relative to serious disgrace, considerable material damage or criminal prosecution. Those warnings were given by the EULEX investigators.

c) AZ in the status of a defendant

12. The Prosecutor issued a ruling on initiation of an investigation into AZ and his allegations on 02 February 2010 pursuant to KCCP Art.221.
13. On 04, 09, 11, 16, 17 February 2010, 10, 16, 25 March 2010, and 09 June 2010, and 20 August 2010, AZ was interviewed by the EULEX Special Prosecutor about his

⁶ SPRK Record of the Suspect Hearing in an Investigation, dated 16 March 2010, pg.4 (in the English version), SPRK Binder A

allegations.⁷ The transcripts are headed 'record of the suspect hearing in an investigation'. KCCP Art.151(1) defines the 'suspect' as 'a person whom the police or the authorities of the criminal prosecution have a reasonable suspicion of having committed a criminal offence, but against whom criminal proceedings **have not** been initiated'. As proceedings against AZ had been initiated with the ruling on initiation of investigation, issued by the EULEX Special Prosecutor on 02 February 2010, during the said interviews in February, March, June and August 2010, AZ had the status of a defendant, as per KCCP Art.151(2).

14. KCCP Art.231(2) states that before any examination the defendant shall be informed of the following rights: the charges against him/her; the right to remain silent; the right to an interpreter; the right to a defence counsel; the fact that his statements might be used as evidence before the court; and the fact that he may request evidence to be taken in his/her defence. KCCP Art.231(2) is worded in terms 'shall' and therefore contains mandatory instructions which must be given to the defendant before any examination. Furthermore, KCCP Art.235 explicitly prescribes that if examination of the defendant was conducted in violation of this provision, the statement of the defendant shall be inadmissible.
15. The transcripts of each of the above dated interviews in February, March, June and August 2010 state that AZ was informed of his rights according to KCCP 'Art.23(2)'. The Trial Panel assumes that this is a mistake and that the transcript was intended to refer to KCCP Art.231(2). Pursuant to that Article, the Special Prosecutor informed AZ of: the charges against him; that he had the right to remain silent; that he had the right to an interpreter; and that he had the right to a defence counsel. The transcripts record that AZ at every hearing waived his right to a defence counsel. Though the transcripts of 04 and 11 February 2010 available to the Trial Panel do not record AZ's signature with his waiver. (See more on this at paras. 83-86 below.)
16. In the above dated interviews in February, March, June and August 2010, the Prosecutor **did not** inform AZ, that his statements might be used as evidence before the court and that he had the right to request evidence be taken in his defence. This constitutes a breach of the mandatory requirements of KCCP Art.231(2)5) and 6). (See below para. 87.)
17. The first three of the interviews on 04, 09 and 11 February 2010 essentially consisted of quoting his original statements given to the EULEX investigators. AZ confirmed

⁷ The records are contained in the SPRK Binder A

what he had previously said, and made some additions and corrections and the confession of an additional crime (murder of two Serbian prisoners).

18. From the interviews of 16 February 2010 onwards, AZ began to discuss the history of his relationship with FL, also setting out his beliefs that FL was determined to silence AZ, by whatever means necessary.

d) AZ in the status of a cooperative witness

19. After hearing from AZ in person, on 25 August 2010, the EULEX Pre-Trial Judge declared AZ a cooperative witness.
20. The Special Prosecutor interviewed AZ in his new capacity on 05 and 07 October 2010. It should be noted that AZ was not asked to confirm the statements that he had previously given in the status of the defendant (see paras 65-72 below). The October 2010 interviews related to the examination of some documents and identifications.

C. QUESTIONING OF AZ PURSUANT TO KCCP ART.156(2) BETWEEN 05 AND 09 JULY 2011 - 'OPPORTUNITY TO CHALLENGE'

a) Unavailability of AZ

21. According to the authorities of the Federal Republic of Germany, AZ was found dead. The date of his death is recorded as 28 September 2011 and cause of his death as suicide by hanging.
22. AZ is therefore not an available witness for the Main Trial.
23. The Defence challenged admissibility of his statements to the investigators and the Special Prosecutor and also the admissibility of his diaries.

b) Defence Right to Challenge a Witness

24. KCCP Art.156(2) states that 'a statement of a witness given to the police or the public prosecutor may be admissible evidence in court only when the defendant or defence counsel has been given an opportunity to challenge it by questioning that witness during some stage of the criminal proceedings'.

25. The Defence right to confront a witness/accuser is well-established in both common law and civil law legal systems. An accused must be afforded an opportunity to test by questioning adverse witness evidence. Cross-examination has been recognized as a fundamental right. The right is recognized in Art.31(4) of the Kosovo Constitution, by providing that everyone charged with a criminal offence has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence. If a defendant is denied that right, whether deliberately or wholly innocently, in most criminal justice systems such evidence is highly unlikely to go before a trial panel in the absence of a detailed procedural protections to ensure the fairness of the trial as a whole, and, within the KCCP is subject to the absolute bar of KCCP Art.156(2).
26. The defence right to challenge a witness is also guaranteed by Art.6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It is a fundamental right and a cornerstone of a fair trial. The ECtHR has confirmed that 'all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument'.⁸ In this regard, KCCP Art.156(2) creates an **exception** that evidence taken out-of-court may be introduced in the specified circumstances.
27. Art.22 of the Kosovo Constitution makes the ECHR directly applicable to the Kosovo domestic legal system. Furthermore, Art.53 of the Kosovo Constitution requires that 'human rights and fundamental freedoms guaranteed by the Constitution are interpreted consistent with the court decisions of the European Court of Human Rights' (ECtHR). Therefore, the Trial Panel must interpret the KCCP Art.156(2) 'opportunity to challenge' in line with the ECtHR's findings.
28. The ECtHR has observed that the opportunity to challenge and question a witness must be given to an accused 'either at the time the witness is making his statement or at some later stage of the proceedings'. However, a crucial part of the ECtHR's determination is that such an opportunity must be '**adequate and proper**'.⁹

⁸ Birutis and others v. Lithuania, Judgment of 28 March 2002, ECtHR, para.28, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Birutis&sessionid=88607244&skin=hudoc-en>; Visser v. the Netherlands, Judgment of 14 February 2002, ECtHR, para.51, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Visser&sessionid=88603649&skin=hudoc-en>

⁹ Kostovski v. the Netherlands, Judgment of 20 November 1989, ECtHR, para.42, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Kostovski&sessionid=88606816&skin=hudoc-en>; Birutis and others v. Lithuania, Judgment of 28 March 2002, ECtHR, para.28, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Birutis&sessionid=88607244&skin=hudoc-en>; Visser v. the Netherlands, Judgment of 14 February 2002, ECtHR, para.51,

29. If, in view of all the circumstances, the opportunity to challenge *AZ* given to the Defence is not 'adequate and proper' then it is not an opportunity at all and the mandatory condition precedent of KCCP Art.156(2) is not met.

30. Against this background, the Trial Panel has considered the circumstances in which the Defence was given an opportunity to challenge *AZ*'s accusations, and whether that opportunity was 'adequate and proper'.

c) **Circumstances of Opportunity to Challenge** *AZ*

31. On 05, 06, 07 and 09 July 2011, a series of interviews of *AZ*; occurred at the instigation of the Prosecutor at which the Defence Counsel for all defendants and some of the defendants in person attended. The Defence had been invited to attend these hearings pursuant to a document headed 'Summons for Pre-Trial Investigation', dated 27 June 2011, eight days before the hearings commenced. The stated purpose of these hearings was to give the Defence 'the opportunity to challenge the statements of the witness *AZ* by questioning him'.¹⁰ The document therefore adopted the wording of KCCP Art.156(2).

32. Even though the Defence attended and to varying degrees took part in the process, at the same time the Trial Panel observes that numerous objections and criticisms were put on record. These include, but are not limited to:

- 1) Insufficient disclosure by the Prosecution to the Defence prior to the interviews taking place.¹¹
- 2) That the purpose of the hearings was not made clear to the Defence¹² and if the intended purpose was to meet the requirements of KCCP Art.156(2) the Defence were not ready.¹³

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Visser&sessionid=88603649&skin=hudoc-en>

¹⁰ SPRK Summons for Pre-Trial Investigation, PPS 07/10, dated 27 June 2011, attached to the record of the main trial, 07 March 2012, Court Trial Binder 8, tab 26

¹¹ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pgs.2, 5, SPRK Binder A/bis

¹² SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pg.3, SPRK Binder A/bis. In relation to request for disclosure the Special Prosecutor responds: '...we do not know if we will have a main trial. Should we have a trial we will meet the deadline.'

¹³ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pg.3, SPRK Binder A/bis. Defence Counsel Bajram Tmava states: 'If we want to meet the requirements of Art.156 KCCP I am not ready today to discharge my function as a defence counsel.' Also, SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 06 July 2011, pg.13, SPRK Binder A/bis

- 3) That the proposed questioning pursuant to KCCP Art.156(2) was not lawful and therefore one Defence Counsel declined to take part.¹⁴
 - 4) That the proposed hearings ought not to be conducted according to KCCP Art.156 in front of the Prosecutor but according to KCCP Art.238 in front of the Pre-Trial Judge.¹⁵
 - 5) That the Prosecution was obliged to re-hear *AZ* as a cooperative witness because the previous statements had been taken from him in the capacity of defendant.¹⁶
 - 6) That the Prosecution should question *AZ* first in the presence of the Defence Counsel and questions from Defence Counsel should follow thereafter.¹⁷
 - 7) That the Defence understand the purpose of the proposed session is to assist the Prosecution to fulfill its statutory obligation to find the truth and Defence questioning would be limited to that function, that a full trial cross-examination would take three weeks not three days offered by the Prosecution in its summons, thus questioning is 'focused to that end' and on 'few focused items'.¹⁸
33. As indicated above, in certain circumstances, pursuant to KCCP Art.156(2), questioning at 'some stage of the criminal proceedings' may be sufficient to render an out-of-court witness's statement admissible at the Main Trial.
34. While the ECtHR, as to admissibility of evidence, on various occasions has reiterated that 'the admissibility of evidence is primarily governed by the rules of domestic law, and that, as a rule, it is for the national courts to assess the evidence before them', it has emphasised that the rights of defence must be respected and 'defendant must be given an adequate and proper opportunity to challenge and question a witness against him'.¹⁹

¹⁴ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 06 July 2011, pg.13, SPRK Binder A/bis

¹⁵ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pgs.3, 4, SPRK Binder A/bis

¹⁶ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pg.4, SPRK Binder A/bis

¹⁷ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pg. 5, SPRK Binder A/bis

¹⁸ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 07 July 2011, pg. 2, SPRK Binder A/bis. SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 07 July 2011, pg. 2, SPRK Binder A/bis. Defence Counsel Karim A.A. Khan QC notes: 'So today it is an opportunity for me to ask questions which hopefully will help the Prosecution discharge their statutory obligation to find the truth. So the questions I ask are focused to that end.' Further, Defence Counsel Karim A.A. Khan QC notes: '...if it does go to trial maybe I will need perhaps three weeks with you, and not three days of today. That's why I am going to focus on a few focused items.'

¹⁹ *Doorson v. the Netherlands*, Judgment of 26 March 1996, ECtHR, para.67, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Doorson&sessionId=88607244&skin=hudoc-en>; *Al-Khawaja and Tahery v. the United Kingdom*, Judgment of 15 December 2011, ECtHR,

35. Therefore the 'opportunity to challenge' in KCCP Art.156(2) must be 'adequate and proper'. In other words, it must be real, enabling the defence to engage substantively with the witness's evidence. It is not sufficient to merely follow the letter of the law. One must have regard to the spirit and intention of the law which is to safeguard the fairness of the trial by protecting the non-negotiable right of a defendant to challenge his/her accuser.
36. The Court must have regard to all of the circumstances, including but not limited to: the amount of advance notice given to permit appropriate preparation time; the stage of the proceedings; the complexity of the case; the relative importance of the witness; the degree of disclosure given to the Defence or relevant material which at the least must include any material which undermines the Prosecution case or might reasonably assist the Defence case; the status of the witness. With regard to status of the witness, a witness who either is or has been accused of the same offences must require more caution than a witness who is not implicated in the offending, thereby escalating the duty upon the Prosecution to ensure that fair and adequate disclosure has occurred.

d) State of Disclosure by the Prosecution

37. As to disclosure by the Special Prosecutor, from Prosecutor's response to the Defence arguments on admissibility of *AZ*, dated 12 March 2012, it follows that prior to 05 July 2011 the following had been disclosed to the Defence.
38. **SPRK Binder A**, which contains:
- 1) *AZ*'s statement to the Special Prosecutor on 04 February 2010, no attachments.
 - 2) *AZ*'s statement to the Special Prosecutor on 09 February 2010, with attachments:
 - Sketch plan of Klecka prison;
 - Single page, dated 15.03.99, from 0096-09-EWC2/012.
 - 3) *AZ*'s statement to the Special Prosecutor on 11 February 2010, with attachments:
 - Single page, dated 21.03.99, from 0096-09-EWC2/012;
 - Single page, dated 03.04.99, from 0096-09-EWC2/012;
 - Single page, dated 03.04.00, from 0096-09-EWC2/012;
 - Single page, n/d, from 0096-09-EWC2/011.
 - 4) *AZ*'s statement to the Special Prosecutor on 16 February 2010, no attachments.

- 5) AZ 's statement to the Special Prosecutor on 17 February 2010, no attachments.
- 6) AZ 's statement to the Special Prosecutor on 10 March 2010, no attachments.
- 7) AZ 's statement to the Special Prosecutor on 16 March 2010, with attachments:
 - Annex 7, (photographs of exhumation site and Klecka);
 - Annex 8, photograph of AZ in a KLA uniform.
- 8) AZ 's statement to the Special Prosecutor on 25 March 2010, with attachment:
 - Annex 9, statement to Kosovo Police, dated 16.07.2007.
- 9) AZ 's statement to the Special Prosecutor on 09 June 2010, with attachments:
 - Various attachments relating to identifications of persons that AZ knows.
- 10) AZ 's statement to the Special Prosecutor on 20 August 2010, with attachments:
 - Various attachments relating to identifications of persons that AZ knows.
- 11) AZ 's statement to the Special Prosecutor on 05 October 2010, with attachments:
 - Attachment 1, single page, dated 06.05.99, from 0096-09-EWC2/024 (report showing prisoners brought in/out during 20.02.99 - 06.05.99);
 - Attachment 2, single page, dated 15.05.99, from 0096-09-EWC2/032 (request for additional prison staff);
 - Attachment 3, single page, dated 15.05.99, from 0096-09-EWC2/031 (request for written statement of rights and duties of prison personnel);
 - Attachment 4, single page, dated 14.06.99, from 0096-09-EWC2/028 (duty report for 06.05.99 - 14.06.99 referring to three prisoners in detention);
 - Attachment 5, single page, dated 15.06.99, from 0096-09-EWC2/035 (request for additional prison guard staff);
 - Attachment 6, single page, dated 20.06.99, from 0096-09-EWC2/029 (duty report, dated 14.06.99 - 20.06.99, referring to three prisoners);
 - Attachment 7, single page, dated 22.06.99, from 0096-09-EWC2/027 (duty report, dated 20.06.99 - 22.06.99, stating that upon transfer of the prison to Malisheve AZ was obliged to release two prisoners);
 - Attachment 8, single page, dated 02.02.99, from 0096-09-EWC2/034 (order from military judge to receive two prisoners);
 - Attachment 9, single page, dated 14.02.99, from 0096-09-EWC2/023 (order from military judge to receive one prisoner);
 - Attachment 10, single page, dated 02.03.99, from 0096-09-EWC2/022 (manual on procedure implementation towards the detainees);

Attachment 11, single page, dated 26.04.99, from 0096-09-EWC2/030 (decision of military judge to sentence BSC to custody);

Attachment 12, single page, dated 05.05.1999, from 0096-09-EWC2/026 (judgment for IHC);

Attachment 13, single page, dated 17.05.1999, from 0096-09-EWC2/025 (judgment for anonymous witness B);

Attachment 14, single page, dated 30.05.1999, from 0096-09-EWC2/033 (decision on disciplinary custody for ADU „

Attachment 15, single page, n/d, from 0096-09-EWC2/019 (discharge list for AZ under medical treatment from 30.11.2006 until 19.01.2007);

Attachment 16, single page, dated 24.08.2009, from 0096-09-EWC2/036 (Police Inspectorate of Kosovo notification to AZ about his complaint);

Attachment 17, single page, dated 11.05.2004, from 0096-09-EWC2/020 (certification that AZ was a member of KLA);

Attachment 18, single page, dated 02.06.2008, from 0096-09-EWC2/021 (certificate to AZ for service in the KLA);

Attachment 19 (various photograph identifications).

- 12) AZ ; statement to the Special Prosecutor on 07 October 2010, with attachments:

Various photograph identifications.

39. **SPRK Binder B**, which contains:

- 1) SPRK Record of the Witness Hearing of Witness Y, PPS 09/10, dated 20 April 2010;
- 2) SPRK Record of the Witness Hearing of Anonymous Witness C, PPS 07/10, dated 21 September 2010, with attachments:
Attachment 1 (photograph identifications).
- 3) EULEX Police Interrogation Statement of Anonymous Witness I, PPS 07/10, dated 22 November 2010, with attachments:
Various photograph identifications.
- 4) SPRK Record of the Witness Hearing of Witness A, PPS 07/10, dated 23 September 2010, with attachments:

Attachment 1, single page, dated 02.03.99, from 0096-09-EWC2/022 (manual on procedure implementation towards the detainees);

Attachment 2, single page, sketch of Klecka prison;

Attachment 3, cover letter from WCIU, dated 09.06.2010, with photograph identifications;

Attachment 5, single page, dated 15.05.99, from 0096-09-EWC2/031 (request for written statement of rights and duties of prison personnel);

Attachment 6, single page, dated 17.05.1999, from 0096-09-EWC2/025 (judgment for anonymous witness B);

- Attachment 7, single page, dated 14.02.99, from 0096-09-EWC2/023 (order from military judge to receive one prisoner);
- Attachment 8, single page, dated 02.02.99, from 0096-09-EWC2/034 (order from military judge to receive two prisoners).
- 5) EULEX Police Interrogation Statement of Witness F, PPS 07/10, dated 02 January 2011, with attachments:
Various photograph identifications.
- 6) SPRK Record of the Witness Hearing of BKU PPS 07/10, dated 04 October 2010.
- 7) SPRK Record of the Witness Hearing of Witness E, PPS 07/10, dated 28 October 2010, with attachments:
Attachment 1, single page, dated 02.03.99, from 0096-09-EWC2/022 (manual on procedure implementation towards the detainees);
Attachment 2, single page, dated 17.05.1999, from 0096-09-EWC2/025 (judgment for anonymous witness B);
Attachment 3, single page, dated 14.02.99, from 0096-09-EWC2/023 (order from military judge to receive one prisoner);
Attachment 4, single page, dated 02.02.99, from 0096-09-EWC2/034 (order from military judge to receive two prisoners).
- 8) EULEX Police Interrogation Statement of Anonymous Witness B, dated 04 December 2010, with attachments:
Various photograph identifications.
- 9) EULEX Police Interrogation Statement of Witness G, dated 11 January 2011, with attachments:
Various photograph identifications.
- 10) EULEX Police Interrogation Statement of Witness H, dated 24 August 2010, with attachments:
Various photograph identifications.
40. Further, the Special Prosecutor in his response, dated 12 March 2012, states that exhumation reports, contained in the Binder I and Binder L, were disclosed to the Defence between 11 May 2011 and 07 July 2011. It should be noted that the hearings for questioning of AZ began on 05 July 2011. From the response of the Special Prosecutor it is not clear whether exhumation reports had been provided prior 05 July 2011. Therefore, the Trial Panel is not in a position to make any particular conclusions in this regard.
41. On 13 May 2011 the Prosecution disclosed to the Defence of FL documents recovered from the search of FL's residence in April 2010. During the course of

argument before the Main Trial Panel, the Prosecution conceded that its case does not rely on any of these documents.

42. On 09 July 2011, which was the fourth day of the July 2011 examinations of **AZ** by the Defence, the Prosecution disclosed copies of **AZ**'s diaries 0096-09-EWC2/001,002, 011, 013 and 014. The Panel observes that these materials do not represent the entirety of the so-called 'war diaries' on which **AZ** extensively relies in his statements regarding the events during the 1998-1999 conflict.²⁰ In this regard, it should be noted that these were disclosed **after** Lead Defence Counsel for **FL** had finished his questions and left Kosovo. Furthermore, the Defence assert and the Prosecution does not deny that the English translation of the diary was not in fact disclosed to the Defence until January 2012.
43. The Prosecution in addition make the following observations:
- 1) At all material times, the Defence could have come to the office of the Special Prosecutor to inspect the case files, and that some but not all Defence Counsel did so.
 - 2) At the time of the July 2011 examinations of **AZ** by the Defence the Prosecutor was not obliged according to the KCCP to disclose the materials in its possession to the Defence.
 - 3) That it is not a legal requirement of KCCP Art.156(2) that the Defence be in possession of all investigative material in the case file at the time of the opportunity to question.
44. Noting the disclosure issues discussed above, the following is a list of materials that were seemingly not disclosed to the Defence prior to 05 July 2011. The following list is compiled on the basis of the Court file as of 21 March 2012. Materials for which the Court was unable to make a definite determination whether they were in the possession of the Prosecutor prior to 05 July 2011 are included in the list but are appropriately marked with a footnote.²¹
- 1) Record of Witness **QK** Statement, 14.06.2011, PPS 07/2010, SPRK Binder C;

²⁰ Materials referred to as 'war diaries' include the following documents: 0096-09-EWC2/008, 009, 010, 011, 012, 013, 014, 015, 016. As noted above, some parts of documents marked 0096-09-EWC2/009, 0096-09-EWC2/010, 0096-09-EWC2/015 and 0096-09-EWC2/016 include no date per se as to when they were allegedly written (e.g. at the top of the page as in some other instances) but some of them do refer to dates and/or events in 1998, 1999 and are essentially in the same format as so called 'war diaries' (i.e. individual pieces of paper with various names written). For this reason the Court has considered them as part of so called 'war diaries'.

²¹ The Court notes that with regard to some of the Police Reports with various attachments there are no stamps or delivery slips included that would certify when the documents were delivered to the Prosecutor. In these instances, however, the Court relies on the dates on the accompanying letters addressed to the Prosecution under the assumption that they were delivered to the addressed Prosecutor on the said date or soon thereafter.

- 2) Record of Witness *AQ* Statement, 07.06.2011, PPS 07/2010, SPRK Binder C;
- 3) Record of Witness T Statement, 03.05.2011, PPS 07/2010, SPRK Binder C;
- 4) Record of Witness S Statement, 14.06.2011, PPS 07/2010, SPRK Binder C;
- 5) Record of Witness V Statement, 18.04.2011, PPS 07/2010, SPRK Binder C;
- 6) Record of Witness : *HBV* Statement, 08.04.2011, PPS 07/2010, SPRK Binder C;
- 7) Record of Witness *IA* Statement, 07.04.2011, PPS 07/2010, SPRK Binder C;
- 8) Record of Witness *NAM* , 06.04.2011, PPS 07/2010, SPRK Binder C;
- 9) Record of Witness *NM* Hearing, 05.04.2011, PPS 07/2010, SPRK Binder C;
- 10) Record of Witness *BZ* Hearing, 04.04.2011, PPS 07/2010, SPRK Binder C;
- 11) Record of Witness *DD* Statement, 04.04.2011, PPS 07/2010, SPRK Binder C;
- 12) Record of Witness *ZK* Statement, 04.04.2011, PPS 07/2010, SPRK Binder C;
- 13) Record of Witness *BEK* Statement, 08.01.2011, PPS 07/2010, SPRK Binder C;
- 14) Record of Witness N Statement, 04.01.2011, PPS 07/2010, SPRK Binder C;
- 15) Record of Witness D Statement, 18.01.2011, PPS 07/2010, SPRK Binder C;
- 16) Record of Witness R Statement, 22.12.2010, PPS 07/2010, SPRK Binder C;
- 17) Record of Witness *NH* Statement, 02.12.2010, PPS 07/2010, SPRK Binder C;
- 18) Record of Witness *AO* Statement, 30.11.2010, PPS 07/2010, SPRK Binder C;
- 19) Record of Witness *HK* Hearing, 20.10.2010, PPS 07/2010, SPRK Binder C;
- 20) Record of Witness *BT* Statement, 08.10.2010, PPS 07/2010, SPRK Binder C;
- 21) Record of Witness *JU* Statement, 24.08.2010, PPS 07/2010, SPRK Binder C;
- 22) Record of Witness *GB* Statement, 14.06.2011, PPS 07/2010, SPRK Binder C;
- 23) Record of Witness L Statement, 12.04.2011, PPS/07, SPRK Binder D;
- 24) Record of Witness M Statement, 30.03.2011, PPS/07, SPRK Binder D;
- 25) Record of Witness M Statement, 20.05.2011, PPS/07, SPRK Binder D;
- 26) Record of *AH* Statement, 14.12.2010, PPS/07, SPRK Binder D;
- 27) Record of *AH* Statement, 27.05.2011, PPS/07, SPRK Binder D;
- 28) Record of *SB* Statement, 27.05.2011, PPS/07, SPRK Binder D;
- 29) Record of Witness U Statement, 26.06.2011, PPS/07, SPRK Binder D;
- 30) Record of Witness W Statement, 16.06.2011, PPS/07, SPRK Binder D;
- 31) Record of *IZ* Statement, 19.05.2011, PPS/07, SPRK Binder D;
- 32) Record of *BAZ* Statement, 23.05.2011, PPS/07, SPRK Binder D;
- 33) Record of *ST* Statement, 25.05.2011, PPS/07, SPRK Binder D;

- 34) Record of *RI* Statement, 24.05.2011, PPS/07, SPRK Binder D;
- 35) Record of *FK* Statement, 13.05.2011, PPS/07, SPRK Binder D;
- 36) Record of *ZS* Statement, 18.05.2011, PPS/07, SPRK Binder D;
- 37) Record of *VS* Statement, 17.05.2011, PPS/07, SPRK Binder D;
- 38) Record of *LS* Statement, 18.05.2011, PPS/07, SPRK Binder D;
- 39) Record of Witness O Statement, 24.05.2011, PPS/07, SPRK Binder D;
- 40) Record of Witness Q Statement, 26.05.2011, PPS/07, SPRK Binder D;
- 41) Record of Witness P Statement, 25.05.2011, PPS/07, SPRK Binder D;
- 42) Record of *BET* Statement, 05.04.2011, PPS/07, SPRK Binder D;
- 43) Documents marked 0096-09-EWC/003, PPS/07, SPRK Binder F;
- 44) Documents marked 0096-09-EWC/004, PPS/07, SPRK Binder F;
- 45) Documents marked 0096-09-EWC/005, PPS/07, SPRK Binder F;
- 46) Documents marked 0096-09-EWC/006, PPS/07, SPRK Binder F;
- 47) Documents marked 0096-09-EWC/007, PPS/07, SPRK Binder F;
- 48) Documents marked 0096-09-EWC/008, PPS/07, SPRK Binder F;
- 49) Documents marked 0096-09-EWC/009, PPS/07, SPRK Binder F;
- 50) Documents marked 0096-09-EWC/010, PPS/07, SPRK Binder F;
- 51) Parts of Documents marked 0096-09-EWC/012 (i.e. pages marked 4, 5), PPS/07, SPRK Binder F;
- 52) Documents marked 0096-09-EWC/015, PPS/07, SPRK Binder F;
- 53) Documents marked 0096-09-EWC/016, PPS/07, SPRK Binder F;
- 54) Documents marked 0096-09-EWC/017, PPS/07, SPRK Binder F;
- 55) Documents marked 0096-09-EWC/018, PPS/07, SPRK Binder F;
- 56) Summary and Investigation Diary (pp. H2-H5), PPS/07, SPRK Binder H;²²
- 57) Ante Mortem Investigations (pp. H6-H20), PPS/07, SPRK Binder H;²³
- 58) Post Mortem Investigations (pp. H21-H40), PPS/07, SPRK Binder H;²⁴
- 59) Prosecutor Involvement (pp. H41-H46), PPS/07, SPRK Binder H;²⁵
- 60) Evidence (pp. H112-H134), PPS/07, SPRK Binder H;²⁶
- 61) CD on Exhumation Grave Site KER, PPS/07, SPRK Binder H;²⁷

²² It cannot be determined from the documents contained in Binder H when the Prosecutor came into possession of these documents.

²³ It cannot be determined from the documents contained in Binder H when the Prosecutor came into possession of these documents.

²⁴ It cannot be determined from the documents contained in Binder H when the Prosecutor came into possession of these documents.

²⁵ It cannot be determined from the documents contained in Binder H when the Prosecutor came into possession of these documents.

²⁶ It cannot be determined from the documents contained in Binder H when the Prosecutor came into possession of these documents.

²⁷ It cannot be determined from the documents contained in Binder H when the Prosecutor came into possession of these documents.

- 62) Preliminary Police Report with Attachments, including **AZ**'s Statements to EULEX Police of 20.11.2009, 30.11.2009 and 3.12.2009, PPS/07, SPRK Binder M;
- 63) Police Report on Expert Examination of Items seized at **NK**'s Residence, dated 20.6.2011, PPS/07, SPRK Binder M;
- 64) Police Report on Expert Examination of Items seized at **NK**'s Residence, dated 17.06.2011, PPS/07, SPRK Binder M;
- 65) Police Report on searched conducted against **NS** with attachments, dated 18.3.2011, PPS/07, SPRK Binder M;
- 66) Police Report on Expert Examination of Items seized at **NK**'s and **NS**'s residences and attached CD, dated 06.05.2011, PPS/07, SPRK Binder M;
- 67) Final Forensic Report on Expert Examination of Items Seized at **NK** and attachments, no date, PPS/07, SPRK Binder M;²⁸
- 68) Police Report on Search Conducted at Pristina Hospital and Seizure of Original Medical Files of Co-operative Witness x with attached file, dated 02.02.2011, PPS/07, SPRK Binder M;
- 69) Handover of items seized at **NS**'s House, dated 07.06.2011, SPRK Binder M;
- 70) Record of **AZ**'s Statement to the ICTY (CD), KA nr. 505/11, KA Binder 1;²⁹
- 71) Minutes of Expert Interview with Photo Album, dated 20.01.2010, KA nr. 505/11, KA Binder 1;
- 72) Autopsy Reports and other attachments, various dates prior to 2011, KA nr. 505/11, KA Binder 1;³⁰
- 73) UNMIK Autopsy Reports, dated 29.10.2009, KA nr. 505/11, KA Binder 1;³¹
- 74) Ante Morte – Post Mortem Comparison Tables, dated 2/4/2010, 2/5/2010, 12/7/2009, 12/9/2010, 12/7/2009, Exhibits P28b to P28f, GjPP 425/2011 Prosecution Exhibits Binder 1;³²
- 75) Department of Forensic Medicine Reports DFM KEQ 01 and DFM KEQ 02, both dated 10 and 11 August 2010, Exhibits P29a and P29b, GjPP 425/2011 Prosecution Exhibits Binder 1.³³

e) Analysis of the Circumstances of Opportunity to Challenge **AZ**

44. The Panel observes that during course of the Main Trial the Defence claimed that certain actions should have been carried out by the Special Prosecutor as to questioning of **AZ**. The Special Prosecutor has responded, however, that no explicit procedure is foreseen in the KCCP, and, therefore, the Special Prosecutor has been under no

²⁸ It has not been determined when the Prosecutor came into possession of these documents.

²⁹ It is unclear when the Prosecutor came into possession of the CD.

³⁰ It has not been determined when the Prosecutor came into possession of these documents.

³¹ It has not been determined when the Prosecutor came into possession of these documents.

³² It has not been determined when the Prosecutor came into possession of these documents.

³³ It has not been determined when the Prosecutor came into possession of these documents.

obligation. A similar approach is adopted by the Special Prosecutor in his response, dated 12 March 2012. For example, in paragraph C, the Special Prosecutor asserts that the KCCP does not foresee a procedure to revoke secrecy declared by the Pre-Trial Judge for the attachments B1 to B9 (attached to the Prosecution request to declare ^{AZ} a cooperative witness, dated 05 July 2010). Therefore, there is no procedure to follow.

45. Following this line of argument, if the KCCP constitutes a road map in terms that procedures explicitly foreseen may be followed and only, then besides the Prosecution, also the Defence must be entitled to the same level of legal certainty and procedural clarity. It is indeed that KCCP Art.1(1) lays down a general principle that the Code 'determines the rules of criminal procedure **mandatory** for the proceedings of the regular courts, the prosecutor and other participants in criminal proceedings'.
46. In the Trial Panel's judgment KCCP Art.156(2) is not in itself a procedure. In other words, the KCCP does not foresee a procedure to be available to the Prosecution during the investigation stage to hold a witness examinations according to KCCP Art.156(2). KCCP Art.156(2) is a safety net. In other words, where there has been in fact an opportunity to question a witness at some stage during the proceedings and thereafter the witness becomes unavailable KCCP Art.156(2) may save the evidence. The KCCP does envisage circumstances where witnesses may be examined by the defendant or defence counsel during the investigative stage, for example KCCP Art. 237(4). This does not elevate KCCP Art.156(2) to a procedure sanctioned under the KCCP to allow the Prosecutor to create an opportunity for the Defence to examine a witness that the Prosecutor fears may not in the event be available for examination before the Main Trial.
47. Furthermore, insofar as KCCP Art.156(2) is a safety net, the requirements are flexible to meet the circumstances of the case. In a simple street robbery where there may be only one or two witnesses, the investigation is simple and an opportunity to question a witness very near the start of the investigation is frankly as full and complete as at the end of the investigation. An adequate and proper opportunity may be fulfilled easily. In a complex case where the witness is also factually a co-perpetrator, is the only witness as to the key facts (with some corroboration) and the only witness as to the identity of the alleged co-perpetrators (with no corroboration) and, in the event has subsequently died, the requirements to meet the 'adequate and proper' test are considerably greater, and may require almost as much as a full cross examination as would occur at the main trial.
48. What is clear on any view, on the facts of this case, what occurred in the examination of July 2011 fell far short of such a standard. The Defence was not provided with all of the materials necessary to adequately and properly prepare to question the one and only incriminating witness in the case. This would require all of the statements given by the

witness on the subject matter, including the ICTY statements, the EULEX Police statements (not quotations in another document but the original), AZ's psychiatric records, and an accurate assessment by the Prosecution of the other material in its hands which either undermined its case or assisted the Defence case. Importantly, the entirety of the diaries should have been disclosed. During his examinations AZ repeatedly said that he had no independent recollection of matters other than by consulting his diary.

AZ at the 07 July 2011 hearing was asked by the Defence: 'If for instance the diary was lost, what would be the truth?' AZ replied: 'In that situation I would not have been able to tell the story.'³⁴ Furthermore, the Prosecution was in possession at the time of the July 2011 hearings of 41 additional statements of other witnesses but declined to make those available to the Defence so that any questioning of AZ could be set into a proper context of what other witnesses said.

49. One must also put into the context what the Prosecutor was saying about the purpose of the July 2011 hearings to the Defence. On 05 July 2011 hearing, which was the first hearing of AZ by the Defence, the Special Prosecutor stated: 'this hearing was specifically scheduled to give you the opportunity to challenge the statements of the cooperative witness, AZ. If you deem it necessary, you may ask him any questions regarding the current investigation against your clients.'³⁵ From these opening remarks of the Special Prosecutor the Defence was given an impression that it is with respect to **investigation** into defendants that Defence could ask questions if they deemed necessary. Further, during the 05 July 2011 hearing the Special Prosecutor in response to the request of Defence Counsel Karim A.A.Khan QC for disclosure noted that Prosecution was under no obligation to disclose and '**do not know if we will have a main trial**' and '**should we have a trial we will meet the deadline**'.³⁶ In this context, the Panel also notes the content of KCCP Art.7(2), which requires the Prosecution 'to make available to the defence all the facts and pieces of evidence, which are in favor of the defendant before the beginning of and during the proceedings'.
50. The Prosecutor therefore took an essentially passive role repeatedly stating that he was simply giving the Defence an opportunity to question AZ 'regarding the current investigation'. Furthermore, the Special Prosecutor stated: 'It is an opportunity for you today that I am giving you. If you want to take it, fine, if not, it is up to you.'³⁷

³⁴ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 07 July 2011, pg.38, question no.511), SPRK Binder A/bis

³⁵ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pg.2, SPRK Binder A/bis

³⁶ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pg.3, SPRK Binder A/bis

³⁷ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pg.3, SPRK Binder A/bis

Furthermore, the passive approach taken by the Prosecutor together with the approach taken by the Prosecutor to Defence disclosure questions suggests that the Prosecutor gave no consideration at all of the materials in his possession and whether any such materials might properly be needed by the Defence to assist in the proper preparation and conduct of the questioning of AZ particularly given his stance set out in paragraph 50 above that he was under no obligation to disclose.

51. It is the context of the July 2011 hearings that Defence could reasonably expect that this was not the only and the last opportunity to question AZ. The Special Prosecutor in response to Defence Counsel Bajram Tmava as to availability of AZ at the Main Trial responded: 'If there will be the main trial, we will follow the procedural rules.'³⁸ Moreover, the Special Prosecutor invited the Defence to ask questions to AZ in relation to the 'current investigation'.³⁹ As such, the Defence was given a direction that scope of the questioning did not extend beyond investigation.
52. As noted above, the Prosecution case rests upon AZ. With the understanding that the requirements of KCCP Art.156(2) are flexible to meet the need of the complexity of the case and importance of the witness, it may be that to properly meet the needs of this case, the opportunity to question AZ would need to meet almost the same level of significance as a Main Trial cross-examination. In other words, that the Defence would need to have clearly understood that there was a possibility that this could be the only opportunity to question AZ and that therefore it was necessary to put the Defence case to its fullest extent to him as if it were the Main Trial cross-examination. In this regard, the Panel observes that in certain circumstances the ECtHR has accepted limitations for defence to cross-examine a prosecution witness. Such limitations have included a refusal to call a witness at the main trial, with an opportunity being given to a defence during pre-trial investigation to ask questions to a witness through a police officer. This frequently is where such a witness was a recognized category of vulnerable witness such as a child victim or sex offence victim where the national legislation provided for an out-of-court opportunity for the defence to question. In such circumstances, the Defence are fully aware that it could well be the only opportunity to question the witness and therefore are required to approach their task on that basis. A failure to do so would not then allow the Defence to object to that evidence at the main trial.⁴⁰

³⁸ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pg.3, SPRK Binder A/bis

³⁹ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pg.2, SPRK Binder A/bis

⁴⁰ See for example *S.N. v. Sweden*, Judgment of 2 July 2002, ECtHR, paras.47, 48, 49, 50, 52, 53, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=S.N.&sessionId=88782809&skin=hudoc-en>. The ECtHR when faced with a statement of a key witness, also co-accused, taken during investigation, would make an observation **if the pre-trial confrontation procedure was an appropriate substitute**

53. Against this background, the circumstances of the present case did not give to the Defence an unequivocal understanding that it may well be the only opportunity to engage in a full cross-examination of **AZ**. On the contrary, the Special Prosecutor noted that questions may be asked regarding 'current investigation' and that Special Prosecutor was not sure if there would be the Main Trial and if there is the Main Trial the procedural rules would be followed.⁴¹ Moreover, on two occasions the Special Prosecutor stated in clear terms to the Defence: 'Do not show me your cards.'⁴² 'I am happy because you are laying down all the objections that you may raise at a main trial. But this is not the purpose of this hearing. Do you really want to lay down your cards?'⁴³
54. Consequently, there was a positive indication from the Prosecution that a further opportunity to challenge the main witness would follow. The Trial Panel accepts that there is no requirement in the KCCP for the Prosecution to inform the Defence that it might be their only opportunity to question a witness. However, the Panel cannot consider that there was any other reason to justify the July 2011 hearings other than that the Prosecutor was concerned to preserve the evidence against the risk that **AZ** would not be available at the Main Trial. The Prosecutor was in a wholly advantageous position compared to the Defence to make such an assessment, and if that was his assessment, basic concepts of fairness require that the Defence should have been notified thereof. This is especially the case where the Defence were putting on a record the limited approach they would take as to asking questions in the July 2011 hearings (see para. 32 above). The fact that the KCCP does not provide for a disclosure to the Defence at that stage in the proceedings does not assist the Prosecution, because the Code did not envisage such a procedure as the Prosecution purported to carry out. In effect, the Prosecution invented a procedure which was not provided for in the Code.
55. The most compelling evidence in support of the Trial Panel's view above is derived from KCCP Art.238 which provides for Extraordinary Investigative Opportunity. KCCP Art.238 makes it absolutely clear that the lawmakers in drafting the KCCP did foresee exceptional circumstances 'for the purpose of preserving evidence where there is ... a significant danger that such evidence may not be subsequently available at the main trial'.

for the examination of the co-accused in open court. See *Melnikov v. Russia*, Judgment of 14 January 2010, ECtHR, paras.75, 76, 78, 80, 81, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Melnikov&sessionId=89045413&skin=hudoc-en>

⁴¹ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pgs.2, 3, SPRK Binder A/bis

⁴² SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pg.4, SPRK Binder A/bis

⁴³ SPRK Record of the Cooperative Witness Hearing in an Investigation, PPS 07/10, dated 05 July 2011, pg.5, SPRK Binder A/bis

56. One must consider the motive of the Prosecution in seeking to hold an examination of AZ in July 2011. As noted above, it must be that the Prosecution at least entertained the notion that there was a significant risk that AZ would not be available at the Main Trial and was therefore seeking to preserve his evidence under the KCCP Art.156(2) safety net.
57. The Panel concludes that the Prosecution had that notion since otherwise there is no explicable reason for seeking to hold the July 2011 examinations. This is particularly so since AZ, at the time of the examinations was under Witness Protection, had been so previously but came out of the Programme and his willingness to testify and/or cooperate with the Prosecution had been variable. Furthermore, the Special Prosecutor in his request for the issuance of an arrest order, dated 28 February 2011, provided: 'With particular reference to cooperative witness X, there is ample evidence ... that at least since 2003 he was subjected to all forms of pressure, intimidation, threat and physical assault, including at least two murder attempts ...' The Special Prosecutor also asserted: '... it is highly probable that the defendants, personally or through their emissaries, will try and eliminate cooperative witness X, as he constitutes the primary source of the information and evidence against them.'⁴⁴ Also, the Pre-Trial Judge in the ruling ordering pre-trial measures, dated 17 March 2011, accepted considerations of the Special Prosecutor and noted: '... there can be little doubt as to the capability of the defendants to commit crimes of extreme violence and also, more specifically, as to their violent attitude towards witness X. It is highly likely that after the current criminal investigation becomes known to them, this attitude will be reinforced.'⁴⁵
58. In such circumstances, it is perfectly reasonable that the Prosecution would seek to preserve his testimony against future risk of AZ's withdrawal of cooperation and lack of availability at the Main Trial. KCCP Art.238 precisely deals with that scenario. But it contains key protections that elevate KCCP Art.238 to the status of a KCCP sanctioned procedure rather than KCCP Art.156(2) safety net. KCCP Art.238(2) requires that the process occurs in front of a pre-trial judge who is obliged to 'take such measures may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, **to protect the rights of the defendant**'. And, the taking of the testimony shall be conducted in accordance with Chapters XX, XXI, and XXII of the Code. In other words, this procedure would have approximated to something very alike the Main Trial process. The Defence would have had an opportunity to assert what disclosure they needed. The Pre-Trial Judge would have had an opportunity to ensure adequate disclosure was made in good time and that proper preparation time was afforded to the Defence (not the eight days in fact

⁴⁴ SPRK Request for the Issuance of an Order for Arrest, PPS 07/2010, dated 28 February 2011, Court GJPP Binder 2

⁴⁵ Ruling Ordering Pre-Trial Measures, PPS 07/2010, GJPP 25/2010, dated 17 March 2011, Court GJPP Binder 2

given) and the Defence would have fully appreciated that this may have been the one and only chance to question the witness. The Prosecution would have questioned the witness first. The Defence would have responded. The Pre-Trial Judge would be able to assess the demeanor, reliability and credibility of the witness and the consequential evidence would be of a much higher and safer standard than what has in fact been created.

59. In the written submissions, the Prosecutor argues that the existence of an alternative mechanism to secure *AZ*'s evidence has no validity on the procedure followed. For the reasons already given, KCCP Art.156(2) does not amount to a procedure and is not an alternative mechanism in itself. So this Prosecution argument fails. The Prosecutor also argues that the legal requirements triggering KCCP Art.238 were not met. This is plainly wrong as there is no other possible explanation for the Prosecutor proceeding as he did but for a real and substantial fear that *AZ* might not be available at the Main Trial, or that he might be available but have renounced his previous testimony.
60. In addition, the Prosecution interpretation of KCCP Art.156(2) that it constitutes an alternative procedure to that of KCCP Art.238 would run counter the general principles of the Kosovo criminal procedure. KCCP Art.8(2) sets out that 'the court renders its decision on the basis of the **evidence examined and verified in the main trial**'. As such, the KCCP emphasizes the principle of immediacy. This entails that hearing of all the evidence relevant to the charge are to be led immediately before the trial panel in such a way as to enable the trial panel to hear the live testimony of the accused and witnesses rather than to experience them through a reading of written records. Consequently, derogations from this principle should be taken with very great caution.
61. By way of comparison, as it appears, some national legal systems do not place strong emphasis on oral testimony. However, the respective codes provide for procedures to be followed in taking a witness statement. In Dutch criminal proceedings it is rare for witnesses to appear in court. Instead they take part (in serious cases, at least) in pre-trial confrontations, generally in the presence of the investigating judge and the defence, and their evidence is recorded and delivered to the court in the form of a written file. In some Swiss Cantons, including Zurich, a type of District Attorney (*Bezirksanwalt*) is responsible for organising the pre-trial confrontations between the accused and the witnesses. These are then recorded in a file and submitted to the court.⁴⁶
62. While KCCP Art.8 envisages that evidence, as a general rule, be heard in the Main Trial, it is by way of KCCP Art.238 that derogation from this general rule is foreseen. It should also be recalled that KCCP Art.238(2) specifically requires the Pre-Trial Judge to take such

⁴⁶ Referred to in S.Summers, *Fair Trials* (Hart Publishing, Oxford and Portland, Oregon, 2007), pgs.135, 136

measures as may be necessary to 'protect the rights of the defence'. It is in this light that the safety net in KCCP Art.156(2) should be taken with extreme care in assessing if measures taken can be reconciled with an adequate and effective exercise of the rights of the defence.

63. The Trial Panel holds that, in view of the circumstances of the particular case, the questioning under KCCP Art.156(2) ought not to have occurred at all, but that an extraordinary investigative opportunity under KCCP Art.238 ought to have been held under the supervision of the Pre-Trial Judge. Insofar as the examination did occur under article KCCP 156(2) in the wholly exceptional circumstances of this case, the Trial Panel does not consider what occurred to amount to an 'adequate and proper opportunity' to challenge *AZ*. Therefore the condition precedent of KCCP Art.156(2) is not met.
64. As a consequence, KCCP Art.156(2) acts as a complete bar to the evidence of *AZ* which therefore is inadmissible in its entirety including all his statements and his diaries.

D. COOPERATIVE WITNESS STATUS VERSUS DEFENDANT STATUS REGARDING CONTENT OF THE STATEMENTS

65. As a result of the interview sessions from 04 February 2010 to 20 August 2010, the Special Prosecutor made a decision to apply to the Pre-Trial Judge to declare *AZ* a cooperative witness. In his written response to the admissibility arguments, dated 12 March 2012, in paragraph E ('Defence argument 2') the Prosecutor explains that a request to declare a person as a cooperative witness cannot be filed without 'making him into a suspect/defendant ... by starting an investigation against him'.
66. The Trial Panel does not accept that proposition. KCCP Art.298 defines who may become a cooperative witness. KCCP Art.298 provides that 'the term 'cooperative witness' means a suspect or a defendant with respect to whom the indictment has not yet been read at the main trial and who is expected to give evidence in court', which fulfills any of the requirements of sub-paragraphs 1) to 5). KCCP Art.151(1) defines a 'suspect' as 'a person whom the police or the authorities of the criminal prosecution have a reasonable suspicion of having committed a criminal offence, but against whom criminal proceedings have not been initiated'. Whereas the same Article defines 'defendant' as 'a person against whom criminal proceedings are conducted'.
67. KCCP Art.298 makes it clear that either a 'suspect' or a 'defendant' may be declared a cooperative witness. Therefore, it was not a necessary precondition to initiate investigation against *AZ* before applying to declare him a cooperative witness, as

there was already sufficient information available to the Prosecutor to render AZ 'a suspect' as defined by KCCP Art.151(1). Though it may indeed have been prudent for the Prosecutor to interview AZ first to make an assessment of his credibility/reliability. This could have been done as a witness/suspect in much the same way as the police had spoken to him.

68. The Trial Panel also notes that irrespective of the merits of the decision to initiate investigation against AZ having done so, the Prosecutor considered it necessary to interview him 'in order to check whether he confirms in his new capacity as a defendant his previous statements'.⁴⁷ However, after the second change of status from defendant to cooperative witness, the Prosecutor did not consider it necessary at that stage to check whether AZ confirms in his new capacity as a cooperative witness his previous statements. This is potentially important as the warnings given to a defendant before his statement is taken are materially and significantly different from the warnings given to a witness (including a cooperative witness) before his statement is taken.
69. The Special Prosecutor observes, as regards the change of status from defendant to cooperative witness, that there is no provision in the KCCP that requires the Prosecutor to repeat the examination of a suspect/defendant after he was afforded the new status. The Trial Panel observes that equally there is no provision in the KCCP that requires the Prosecutor to repeat/confirm previous statements as a result of a change of status from witness to defendant. However, the Prosecutor clearly thought it necessary and/or prudent to do so in this case.
70. Given the material difference in the warnings given to a suspect/defendant and to a witnesses, at the very least it would have been prudent after the change of status from the defendant to cooperative witness to re-interview AZ to ask him: firstly, to re-read his previous statements; secondly, to confirm in the light of the witness's warnings and obligations that the statements he made as the defendant were true; and, lastly, whether he had any amendments or corrections to make. In doing so, AZ would have been given a clear opportunity to adopt what he had previously said as the defendant in his new capacity as the witness.
71. The Prosecutor asserts that 'it goes without saying that all the previous statements rendered by the person become those of the cooperative witness'. The Trial Panel does not agree. On the contrary, the warning as to the **obligation of truthfulness** given to a

⁴⁷ See Prosecution written submissions heading (e) response to Defence Argument 2 page 4 of 11

witness is mandatory and non-negotiable.⁴⁸ That warning was not given during any interview of AZ when he had the status of a defendant and by failing to invite AZ, to adopt those previous statements under his capacity of a witness means that an essential verification step has not been taken. That cannot now be retrospectively achieved after AZ's death. The Prosecutor seeks to remedy this deficiency by asserting that during the cooperative witness session, AZ was warned by the Pre-Trial Judge that he must say the truth and that, when he was then asked whether he confirmed all his previous statements as true, he did so.⁴⁹ The Panel is unable to accept this point as remedying the deficiency. With regard to cooperative witness session KCCP Art.300(1) provides that 'statements made to the judge during this examination cannot be used in criminal proceedings against ... any other person as evidence to support a finding of guilt'. The Prosecution argument relying on what AZ said at the hearing to determine his cooperative witness status runs entirely contrary to the prohibition of KCCP Art.300(1). The Prosecution is prohibited from relying on what was said by AZ to the Pre-Trial Judge in seeking to establish the veracity of his earlier statements given as the defendant in order to directly use those statements to support a finding of guilt against the defendants. The KCCP clearly prohibits that course.

72. For these reasons, and in addition to the reasons given under Heading C above in this ruling, the statements of AZ from 04 February to 20 August 2010 which were given as defendant and not witness and therefore without the mandatory witness warnings are inadmissible.

E. B1 to B9 Statements

73. The Defence also attacks the admissibility of the statements of AZ from 04 February to 09 June 2010 on different grounds. Those statements were attached to the Special Prosecutor's application to declare AZ a cooperative witness, dated 05 July 2010, marked B1 to B9. On 19 August 2010, the Prosecutor issued a request to the Pre-Trial Judge pursuant to KCCP Art.299(2) for an order of secrecy of the factual allegations made in the request to declare AZ a cooperative witness, namely attachments B1 to B9. On 25 August 2010 the Pre-Trial Judge issued his order declaring AZ a cooperative witness and in addition ordered that 'the factual allegations attached to the request to declare AZ a cooperative witness (attachments B1 to

⁴⁸ KCCP Art.164(2) prescribes: 'A witness shall first be told that it is his or her duty to speak the truth and that he or she may not withhold anything, whereupon he or she shall be warned that false testimony constitutes a criminal offence.'

⁴⁹ Prosecution Response to the Defence Arguments on the Admissibility of AZ's Statements, dated 12 March 2012, pg.4, Court Trial Binder 8

B9 of the request of the Prosecutor to declare a cooperative witness) shall be sealed and shall remain secret from other parties and their legal counsel'.

74. The Defence argued *inter alia* that the effect of KCCP Art.300(1) is to thereby exclude the B1 to B9 statements from the case as they amount to 'statements made to the judge during this examination' (i.e. the cooperative witness hearing). The Panel rejects that proposition as too expansive interpretation. B1 to B9 cannot be seen as statements made to the judge during that examination.
75. However, that does not address the Prosecutor's actions as regards the secrecy order. The clear purpose of the order was to protect the integrity of the ongoing investigation. However, the order was neither time limited nor function limited. The Prosecutor opines that KCCP Art.299(3) 'patently refers to a mere procedural step by which the factual allegations ... are to be kept secret for the limited purpose of the cooperative witness procedure', in other words, limited to that purpose only. The Prosecutor's request and the Judge's order could have been so limited, and nothing stopped the Prosecutor from seeking an order for secrecy limited to a specific function or a specific time. But he did not do so, and the consequential Pre-Trial Judge's order was on its face an absolute imposition of secrecy.
76. The Special Prosecutor opines that there is no procedure in the KCCP for revoking secrecy. The cooperative witness procedure under the KCCP is clearly within competence of the Pre-Trial Judge and not the Prosecutor. It is simply not open to the Prosecutor to choose how to interpret the Pre-Trial Judge's order and when to unilaterally bring the order's effect to an end. Nothing in the KCCP prevented the Prosecutor going back to the Pre-Trial Judge at the appropriate stage, for instance, with an application for arrest orders with application seeking to lift the secrecy order which by then would have fulfilled its function.
77. Though by itself, this feature would not justify rendering the statements inadmissible, what begins to emerge is a series of errors by the Prosecution which have cumulative effect such that the integrity of the investigation and trial process cannot be protected. That cumulative effect renders the statements inadmissible.

F. SIGNING AND TRANSLATION OF *AZ* S STATEMENTS

78. The Trial Panel makes the same point with regard to the Defence complaint that the statements of *AZ* were never properly signed. KCCP Art.89(2) states: 'The record of an examination shall be signed by the person who is being examined. If the record

consists of more than one page, the person examined shall sign each page.' This is not a negotiable invitation in the Code. It is a mandatory instruction. Its purpose is clear. It is to ensure the ownership by the person examined of the contents of the record. It ensures that it is not at some later stage interfered with, altered or in any other way compromised. The Panel does not suggest at all that Prosecution has altered AZ's statements, because there is no such evidence. However, when examining the statements to both EULEX Police and to the Prosecutor, it is apparent that they have not been signed by AZ on each page but only at the end.

79. With respect to the statements of AZ given in a capacity of the defendant, on 04, 09, 11, 16, 17 February 2010, 10, 16, 25 March 2010, 20 August 2010, they have not been signed on each page by AZ. As confirmed by the Special Prosecutor during course of the Main Trial and Prosecutor's written response, dated 12 March 2012, the Prosecutor himself had put his initials on each page of some of the AZ's statements. As observed previously KCCP Art.89(2) requires that 'the person examined shall sign each page'. The Special Prosecutor in his written response, dated 12 March 2012, asserts: 'The lack of his (AZ's) signature on each page is not expressly sanctioned with inadmissibility.' The Trial Panel rejects this argument. On the contrary, KCCP Art.231(4) with regards to examination of the defendant explicitly requires that a written record be made in accordance with *inter alia* KCCP Art.89 (if video or audio recording of the examination is not possible). Further, KCCP Art.156(1) lays down: 'A statement by the defendant given to ... the public prosecutor may be admissible evidence in court **only** when taken in accordance with the provisions of Art.229 through 236' and KCCP Art.231(4) includes requirement under KCCP Art.89 for the witness to sign each page.
80. Next, the Panel also notes the concession from the Prosecutor during argument in Court that AZ was at no stage ever given a copy of his statements in Albanian to read for himself and to verify. Instead, the Prosecutor asserts that the interpreter went through the contents of the statement until AZ understood it. With respect, that is a value judgment made by the Prosecutor to determine whether somebody else properly understood what was being translated and read to AZ. The only person who can and should have done that would be AZ himself by being presented with a copy of his statements in Albanian for him to read, understand and correct as necessary, and signing each page and at the end to confirm his ownership of the contents. Consequently non-compliance with the KCCP Art.89 makes the statements inadmissible in Court, especially when considered together with the cumulative effect of the other breaches of the Code already identified in this ruling.
81. The Defence also argued that two of the statements signed by AZ, namely 09 June 2010 and 20 August 2010 should be inadmissible because at that stage he was a

defendant yet he signed as a witness. The Panel rejects that argument. The warnings that were given to him at the commencement of the hearing were clearly those appropriate to a defendant. Therefore neither AZ, nor any defendant or Defence Counsel at Trial could have been in any way misled by what amounts to no more than a trivial error.

G. ADMISSIBILITY OF STATEMENTS GIVEN TO POLICE BEFORE RULING OF INITIATION OF INVESTIGATION

82. The Defence argued that the statements given by AZ to the EULEX Police before the ruling of initiation of investigation should be declared inadmissible simply because they were taken before that ruling. That argument is rejected by the Panel. No ruling on initiation of investigation can be issued unless and until the police have carried out a preliminary investigation to determine whether or not there are reasonable grounds to believe that an offence has been committed and who the offender is. KCCP Art. 200 and 201 empower the police to act as they did, and KCCP Art.156(1) expressly states that statements given to the police may be admissible evidence in court (subject to compliance with other rules). Though this Defence argument is rejected, it is clear that for reasons stated above, the disputed evidence remains inadmissible.

H. ABSENCE OF DEFENCE COUNSEL

83. The Defence contends that at all times when AZ was a suspect, it was mandatory that he be represented by a defence counsel. This argument is based on two elements. Firstly, KCCP Art.73(1)5) requires defence counsel to be present when an accused admits guilt. Second, KCCP Art.73(1)1) requires defence counsel where an accused displays signs of mental disorder.
84. Dealing with the admitting guilt point first. It is clear that KCCP Art.73(1)5) makes defence counsel mandatory where a defendant seeks to enter into an agreement to **plead guilty**. This is the foundation of the guilty plea procedure. AZ entered into no such agreement. Therefore defence counsel was not mandatory. The Defence complains that the Prosecution somehow erred in informing AZ that he could waive the right to defence counsel because the KCCP does not provide for the defendant to be notified of such a right. This is a nonsense point and no possible harm is caused by notifying a defendant that he may dispense with defence counsel if he wishes.
85. As to the mental health point, the Trial Panel acknowledges that on the facts of the case, AZ was known to have a psychiatric history. It may be that the Prosecution would

have been more prudent to obtain a fresh psychiatric assessment before commencing the series of interviews of . AZ in 2010, not least to neutralise a potential defence point. However, KCCP Art.73(1)1) only makes the presence of defence counsel mandatory if 'from the first examination, when the defendant ... **displays signs of mental disorder or disability** and is therefore incapable of effectively defending himself'. There is no evidence that AZ was displaying any such signs at the time of the 2010 interviews whatever the state may have been in the years before. On the contrary, he appeared to be clear and rational in the accounts that he was giving. The Defence refers to the presence of the Witness Protection Unit Psychologist as evidence of psychiatric illness. That is inaccurate. A Psychologist is a clearly different expert to a psychiatrist, and the Witness Protection Unit Psychologists role is limited to ensuring the fitness of a person to be in the Witness Protection Programme. However, it may equally be asserted that it is unlikely that the Psychologist would remain inactive if AZ had displayed any signs of mental disorder.

86. The Trial Panel finds that there is no merit to this Defence argument.

I. FAILURE TO NOTIFY AZ THAT HIS EVIDENCE MIGHT BE USED IN COURT

87. As noted in paragraph 16 above, the Prosecution did not notify AZ at the commencement of his interviews in 2010 that what he said could be used as evidence before court. This undoubtedly is a breach of the mandatory provision of KCCP Art.231(2)5). However, it is clear that the intended purpose of this provision is to protect the defendant from his own words being used against himself in the trial, or at least, to ensure that he is aware that they may be used. In other words, the function of this provision is to protect the declarant and not others. It is equally clear on the facts of this case that AZ was fully aware that his words would be used in court. Indeed it was his hope that they would be. So, though a breach of the Code exists, it is not one that would justify rendering the consequential statements inadmissible. This determination being irrespective of the Trial Panel's findings above as to inadmissibility of the 2010 statements on separate grounds.

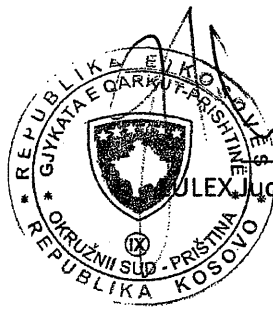
J. MISCELLANEOUS OTHER MATTERS

88. The Defence raises two additional arguments and/or principles. They complain that the Prosecution failed to obtain graphology evidence despite repeated requests to obtain it, and they rely on the principle of *in dubio pro reo*. In view of the findings above, it is not

necessary for the Panel to address either of these issues in order to make its ruling on admissibility.

89. For the avoidance of doubt, the Trial Panel finds inadmissible all of the statements made by AZ, in this case, for varying reasons as set out above. As to the status of the diaries, though they may fall to be considered as documentary evidence, the reality is that they have no existence independent of AZ. He is said to be the sole author of them, though the Defence dispute that. The diaries represent now unsworn and untested testimony from the grave. As the Defence has had no adequate and proper opportunity to question AZ, as required *de minimis* to render his evidence admissible, it follows that the diaries too are inadmissible.

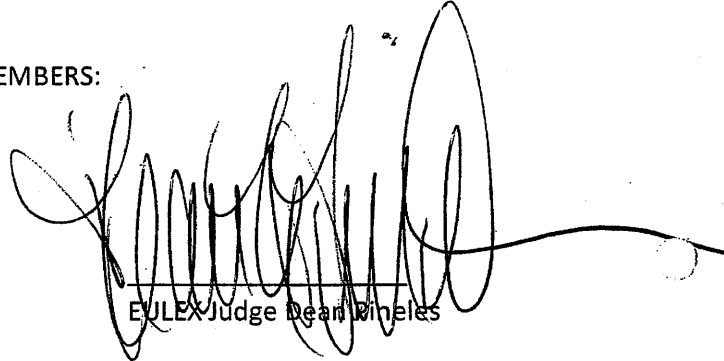
PRESIDING JUDGE:




EULEX Judge Jonathan Welford-Carroll

PANEL MEMBERS:


Judge Shqipe Qerimi


EULEX Judge Dean Rineles