COURT OF APPEALS

Case number: **PAKR 55/14**

Date: **29 October 2014**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Hajnalka Veronika Karpati as Presiding and Reporting Judge, and EULEX Judge Elka Filcheva-Ermenkova and Kosovo Appellate Judge Abdullah Ahmeti as Panel Members, with the participation of Beti Hohler, EULEX Legal Officer, as the Recording Officer,

in the criminal proceedings against

S.G., son of xxx., born in xxx. village (hereafter: xxx.), xxx.(hereafter: xxx.) municipality, date of birth xxx, resident at xxx educated to xxx level and employee of xxx, in detention on remand since xxx,

RR.G, son of xxx., born in xxx village, xxx. municipality, date of birth xxx, resident at xxx., xxx holds a diploma in xxx and is an xxx, in detention on remand since xxx,

H.G, son of S.G, born in xxx village, xxx municipality, date of birth xxx, resident in xxx village (xxx. municipality), educated to xxx level and is a xxx in the xxx, in detention on remand since xxx,

B.SH., son of xxx, born in xxxvillage, xxx date of birth xxx. Resident in xxx. municipality, xxxby profession;

charged under the special prosecutor's Indictment no. PP. 81/2012 filed on 12 December 2012 and amended on 17 January 2013 as follows: **S.G., H.G and RR.G** with two counts of criminal offence *War Crime against the Civilian Population* pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) 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.** with one count of criminal offence *Providing Assistance to Perpetrators after the Commission of Criminal Offences* under Articles 305(1) and (2) of the Criminal Code of Kosovo (CCK, in force from 6.4.2004 until 31.12.2012), currently criminalized under Article 388 (1) and (2) of the CCRK;

and adjudicated in first instance by the Basic Court of Mitrovica with Judgment no. P 14/2013, dated 12 September 2013 as follows:

- **S.G., RR.G** and **H.G** were found guilty and convicted under Count 1 of the Indictment for the death of G.B. of the criminal offence *War Crime against the Civilian Population* committed in co-perpetration, under Articles 22 and 142 of the CC SFRY, 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 Conventions. The defendants were each sentenced to an imprisonment term of 12 years. The defendants were acquitted under the same count for the death of V.B.
- **S.G., RR.G** and **H.G** were found not guilty and acquitted under Count 2 of the Indictment for the death of I. and M.V. of the criminal offence *War crime against the civilian population* committed in co-perpetration, under Articles 22 and 142 of the CC SFRY, currently criminalized 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.
- **B.SH.** was found not guilty and acquitted under Count 3 of the Indictment of the criminal offence *Providing assistance to perpetrators after the commission of criminal offences,* under Article 305 Paragraphs (1) and (2) CCK.

deciding upon the following appeals, filed against the Judgment of BC Mitrovica no. P 14/2013 dated 12 September 2013:

- **appeal of the special prosecutor, filed on 20 December 2013,**
- **appeal of defendant RR.G filed on 21 December 2013,**
- **appeal of defence counsel Tahir Rrecaj for defendant S.G. filed on 20 December 2013,**
- **appeal of defence counsel Mahmit Halimi for defendant RR.G, filed on 26 December 2013,**
- **appeal of defence counsel Fatbardh Makolli for defendant H.G, filed on 20 December 2013;**

having reviewed the motion of the appellate state prosecutor filed pursuant to Article 412 CPC on 6 February 2014;

after having held a public session of the appellate panel on 30 September 2014 and on 28 October 2014;

having deliberated and voted on 29 October 2014;

pursuant to Articles 389, 390, 394, 398 and 401 of the Criminal Procedure Code - Law no. 04/L-123 (CPC);

renders the following

JUDGMENT

I. The appeal of the special prosecutor against the Judgment of BC Mitrovica no. P 14/2013 dated 12 September 2013, challenging the acquittal of defendant B. SH, is hereby rejected as unfounded.

II. The appeal of defendant RR.G, defence counsel Tahir Rrecaj for defendant S.G., appeal of defence counsel Mahmut Halimi for defendant RR.G, and the appeal of defence counsel Fatbardh Makolli for defendant H.G, are partially accepted insofar they challenge the imposed sentence against defendants S.G., RR.G and H.G.

III. The Judgment of BC Mitrovica no. P 14/2013 dated 12 September 2013 is hereby modified in its sentencing part. The sentences imposed on defendants S.G., RR.G and H.G for the criminal offence of *War Crime against Civilian Population*, committed in co-perpetration, pursuant to Articles 22, 142 of CC SFRY read in conjunction with UNMIK Regulation 1999/24 are modified as follows:

- **Defendant S.G., born xxx, is sentenced to 8 (eight) years of imprisonment. The time spent in detention on remand since xxx shall be credited towards the sentence.**

- **Defendant RR.G, born xxx, is sentenced to 8 (eight) years of imprisonment. The time spent in detention on remand since xxx shall be credited towards the sentence.**

- **Defendant H.G, born xxx, is sentenced to 8 (eight) years of imprisonment. The time spent in detention on remand since xxx shall be credited towards the sentence.**

IV. In the remaining parts, the appeals of the defence are rejected as unfounded and the impugned judgment is affirmed.

REASONING

I. RELEVANT PROCEDURAL BACKGROUND

The criminal investigation in the case was initiated against **S.G., RR.G** and **H.G** on 14 August 2012 by the EULEX prosecutor of the Special Prosecution Office of the Republic of Kosovo

(SPRK) for one count of the criminal offence of *War Crime against Civilian Population*. By a ruling dated 7 December 2012 the investigation was expanded to include xxx **B.SH**. for the offence of *Providing Assistance to Perpetrators after the Commission of Criminal Offences*. A separate Ruling dated 10 December 2012 expanded the investigation against **S.G**., **RR.G** and **H.G** to include a second count of *War Crime against the Civilian Population*.

On 12 December 2012 the special prosecutor filed the indictment PP.no 81/2012 dated 11 December 2012. The Indictment was amended on 17 January 2013.

On 12 April 2014 the presiding trial judge issued the Ruling on Indictment. The ruling was partially affirmed and partially modified upon appeal by the Court of Appeals through Ruling no. Kp 490/13 dated 6 May 2014.

Defendants **S.G., RR.G and H.G** have been held in detention on remand since xxx.

The main trial in the case 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. The trial panel also extended detention on remand against defendants **S.G., RR.G and H.G** until the judgment became final.

The written judgment was served to the parties in early December 2013. Defendants **S.G., RR.G** and **H.G** all appealed the judgment in the part convicting them of the criminal offence. The special prosecutor appealed the judgment with regard to the acquittal of B.SH.

None of the parties appealed the acquittal of defendant **S.G., RR.G and H.G** under count 2 of the Indictment nor the part of Indictment under Count 1 relating to the death of V.B. These sections of the impugned judgment became final on 26 December 2013.

The case was transferred to the Court of Appeals for a decision on the appeal on 29 January 2014. On 6 February 2014 the appellate state prosecutor filed a motion pursuant to Article 412 CPC.

The first session of the Appellate Panel was held on 30 September 2014 in the presence of all defendants and their defence counsel and the appellate state prosecutor Judit Eva Tatrai. During that session the defence filed a request for disqualification of the Appellate Panel. The session was adjourned and the request transferred to the President of the Court of Appeals for a decision.

The President of the Court of Appeals rendered his decision on 9 October 2014. He rejected the request for disqualification of the Appellate Panel as unfounded.

The session thereafter continued before the Appellate Panel on 28 October 2014 in the presence of all defendants, defence counsel Tahir Rrecaj and Mahmut Halimi and appellate state

prosecutor Claudio Pala. Defence counsel Fatbardh Makolli (for defendant **H. G.)** and defence counsel Gani Rexha (for defendant **B. Sh.)** were duly invited to the session as demonstrated by the delivery slips in the case file but did not attend.

The Appellate Panel deliberated and voted on 29 October 2014.

II. FINDINGS OF THE APPELLATE PANEL

1. Competence of the Panel

Pursuant to Article 472(1) CPC the Panel must first review its competence to decide the criminal case before it.

The defence during the session of the Appellate Panel on 30 September 2014 objected to the composition of the Panel. The defence submitted that the Panel should be composed of one Eulex Judge and two Kosovo Court of Appeals judges. The Appellate Panel rejects the defence challenge as unfounded.

The Court of Appeals is the competent court to decide on the appeals pursuant to Articles 17 and 18 of the Law on Courts - Law no. 03/L-199.

The Panel of the Court of Appeals is constituted in accordance with Article 19 (1) of the Law on Courts and Article 3 of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273,[1] and clarified through the Agreement between the Head of Eulex Kosovo and the Kosovo Judicial Council dated 18 June 2014.

The amending Law no. 04/L-273 (also known to the public as the Eulex Omnibus Law) in Article 1.A defines what cases constitute ongoing cases which fall within Eulex jurisdiction. The present case clearly constitutes an on-going case pursuant to Article 1A (1) of the said law. The investigation in the case was initiated in 2012, the first instance judgment issued in September 2013 and the case has been pending before the Court of Appeals since January 2014.

Having affirmed Eulex jurisdiction over the case, the next issue that arises is the panel composition of an ongoing Eulex case.

Pursuant to Article 3.3 of the Law no. 04/L-273 the panels of cases under Eulex jurisdiction should be composed of majority of Kosovo judges unless the Kosovo Judicial Council (KJC) decides that the panel should be composed with the majority of Eulex Judges.

[1] Law no. 04/L-273 on amending and supplementing the laws related to the mandate of the European Union Rule of Law Mission in the Republic of Kosovo.

This provision and the requirement for a decision from the KJC gave rise to Section 2 of the Agreement between Eulex and the Kosovo Judicial Council of 18 June 2014. The KJC through this Agreement decided that in all ongoing cases the trial panels will consist of majority of Eulex judges and "will continue with a majority of Eulex judges on the panel for the continuation of all phases of the trial and the remainder of the proceedings." The term "remainder of the proceedings" must be read as a clear reference to the proceedings with legal remedies. The provision therefore extends also to the appellate proceedings in such ongoing cases.

Pursuant to the above legal basis, the Appellate Panel in the case at hand is therefore correctly composed of two Eulex judges and one Kosovo CoA Judge.

Insofar defence counsel Rrecaj on 30 September 2014 also argued that a general agreement between Eulex and KJC does not fulfill the requirements of Article 3.3 of Law no. 04/L-273, such argument is rejected. The defence counsel opined that a general agreement is not sufficient but a specific agreement for each case in question must be reached.[2] The Appellate Panel considers such reading of Article 3.3 unfounded. There is nothing in the law that would prevent the competent authority – the KJC – to enter into an agreement that includes a category of cases. Article 3.3. does not speak of an individual request for a specific case, but merely requests that a decision be made by the KJC. The agreement between Eulex and KJC of 18 June 2014 fulfills that requirement. The agreement defines the category of cases for which the decision has been reached and the cases are clearly identifiable. There is accordingly no violation in this regard.

In accordance with the above findings the Panel unanimously concludes that it is competent to decide the respective case in the composition of one Kosovo judge and two Eulex judges.

2. Admissibility of the appeals

All five appeals are admissible.

The defendants were all served with the reasoned judgment on 13 December 2013. The special prosecutor was served with the impugned judgment on 11 December 2013.

All appeals were filed within the 15-day deadline pursuant to Article 380(1) CPC. The appeals were filed by the authorized persons and contain all other information pursuant to Article 376 *et seq* CPC.

3. Findings on the merits

The appeal of the special prosecutor is rejected. The appels of **S.G., RR.G** and **H.G** are partially accepted; insofar they challenge the imposed criminal sanction.

[2] Record of appellate session, PAKR 55/14, 30 September 2014, p. 2 (English version).

The Appellate Panel will discuss all grounds of appeal raised under relevant headings below. Firstly, the Panel will address the appeal of the special prosecutor as it deals with a narrow issue of interpretation of Article 305 CCK, in relation to the criminal case against **B.SH**. Secondly, the Panel will discuss the challenges raised by the appeals of the defence. The defence challenges the guilty verdict for **S.G., RR.G** and **H.G** on all grounds pursuant to Article 383(1) CPC – substantial violation of provisions of criminal procedure, violation of criminal law, erroneous or incomplete determination of factual situation and the decision on the criminal sanction. The appellants raise largely the same challenges, therefore they will be addressed jointly.

3.1. Appeal of the special prosecutor on the interpretation of criminal law concerning the acquittal of B.SH. (Article 305 CCK)

The special prosecutor charged defendant **B.SH.** with the criminal offence of *Providing Assistance to Perpetrators after the Commission of Criminal Offences* pursuant to Article 305 (1) and (2) of the CCK. The underlying action of the criminal offence was the pre-trial statement given by **B.SH**. to the special prosecutor on 19 November 2012 in which **B.SH**. stated that he was not present and knew nothing about the killing of G.G. in the S. health centre on 18 June 1999.

The Appellate Panel observes that the criminal charge was initially rejected by the presiding trial judge during the indictment and plea stage of the proceedings. Following an appeal from the special prosecutor, the charge was however reinstated by the Court of Appeals in its Ruling no. Kp 490/13 dated 6 May 2014.

The basic court in the impugned judgment found defendant **B.SH**. not guilty and acquitted him of the indicted criminal offence.

Whilst the basic court explicitly noted that it "didn't believe Defendant xxx **Sh.** that he was not in the room where the criminal offence was committed […]"[3], the basic court concluded that the elements of the criminal offence under Article 305(1) and (2) CCK were not established.

The Appellate Panel notes that the basic court in the reasoning made reference to Article 364(1.3) CPC. This, noting the elaborate reasoning, is in the view of the Appellate Panel a mere typing error. The defendant was acquitted because the act he was charged with does not constitute a criminal offence and not because it was not proven he did committed the act. The correct reference is therefore that to Article 364(1.1) CPC.

The basic court engaged in a literal and systematic interpretation of the relevant CCK provision and concluded that Article 305 CCK does not criminalize every kind of assistance but only behaviour specifically mentioned in the provision. The basic court also rejected the prosecutor's

[3] Impugned judgment, p. 34 (English version).

and the Court of Appeals' interpretation of the term 'discovery' adopted in the Court of Appeals' ruling of 6 May 2014.

The special prosecutor appeals the acquittal of **B.SH**. and reiterates its interpretation of Article 305 CCK. The prosecutor focuses on the interpretation of the term 'discovery' and argues that "a defendant does not technically become a perpetrator until a court's judgment establishes his/her criminal responsibility as a perpetrator given that there is a presumption of innocence until proven guilt."[4]

The Appellate Panel rejects the interpretation of the special prosecutor and affirms the interpretation of the law as adopted by the basic court.

Article 305(1) CCK reads as follows:

> *"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 towards frustrating the execution of a punishment or an order for mandatory treatment shall be punished by imprisonment of up to one year."*

The core issue before the Appellate Panel is the conflicting interpretation (between the prosecutor and the basic court) of the term '*aids him or her to elude discovery… in any other way*'.

The Panel notes that the prohibited act criminalized by Article 305(1) CCK is one of 'aiding the perpetrator' with the intention to help the perpetrator elude discovery. The first question that arises therefore is what does "aiding the perpetrator to elude discovery" mean.

The crime of "providing assistance to a perpetrator after the commission of criminal offences" to "elude discovery" is qualified under Article 305(1) CCK. As a point of departure, the Appellate Panel must employ the literal interpretation of the law.

It must be accepted that the legislator chose the term 'discovery' with good reason as opposed to another term.

The usual meaning of the word discovery is the act of finding or learning something for the first time. Thus, the literal interpretation of '*aiding the perpetrator to elude discovery'* would generally relate to concealing the identity of the perpetrator from the authorities so that the identity of the perpetrator could not be established. The literal interpretation in the view of the

[4] Appeal of the special prosecutor p.2 (English version).

Appellate Panel would also extend to situations when the given assistance would be directed at aiding a perpetrator, whose identity is known, not to be captured.

The interpretation of the special prosecutor that 'discovery' should be understood as 'finding guilty by a final judgment' has no support in the literal interpretation of the provision. Reading the provision in the manner advocated by the special prosecutor would mean going far beyond its scope.

Moreover, the Panel observes that also a systematic comparison with other provisions of the CCK using the same term, as demonstrated by the basic court in the impugned judgment, leads to the rejection of the prosecutor's interpretation. The Appellate Panel endorses the basic court's interpretation and conclusions in this regard on pages 41-43 of the impugned judgment (English pagination).

The Panel further notes that the interpretation of Article 305 CCK was recently clarified also by the Supreme Court of Kosovo. The Supreme Court in the *Kabashi Judgment*[5] of 7 August 2014 adopted effectively the same interpretation as advocated by the basic court in this case and the current Appellate Panel. The Appellate Panel observes that previously the majority of a different Court of Appeals panel had adopted a different interpretation of Article 305 CCK which was then overturned by the Supreme Court.

In conclusion, the Appellate Panel rejects the appeal of the special prosecutor as unfounded and affirms the acquittal of **B.SH**. rendered by the first instance court. Giving a false statement during the pre-trial stage of the proceeding and after the perpetrator of the criminal offence under investigation has been identified and even remanded is not criminalized under Article 305 CCK.

The Appellate Panel notes that giving false testimony is penalized under Article 307 CCK, however, that provision is restricted to giving false testimony *in court proceedings*. Therefore, as correctly pointed out by the basic court, the actions of defendant **B.SH**. could not be qualified under Article 307 CCK.

"The trial panel pointed to an apparent gap in the law. However, the gap is only seemingly there if we apply the following *ratio legis*: It is clear that the law is not meant to tolerate giving false testimony in the pre-trial phase of proceedings (see the adequate warning given to the witness in the pre-trial phase), however, the interest to find the truth during main trial is the prevailing interest. This means that the witness, even when it is established that he or she had given a false statement to the prosecutor, should be called and given the opportunity to correct his/her

[5] Judgment PA II 3/2014 of the Supreme Court of Kosovo, 7 August 2014.

previous statement during main trial. If he does so, he/she cannot be prosecuted for giving false testimony during the pre-trial phase. In case he adheres to the false testimony then - and only then - he can be indicted in a separate procedure under Article 307 CCK."

3.2. Alleged substantial violations of the provisions of criminal procedure

(a) Alleged violation of Article 369(1) CPC in conjunction with Article 384(2) CPC that defence rights were violated because of delay in drawing up the reasoned judgment

The defence alleges the violation of defence rights, because the reasoned judgment was only served to the defence three months after the verdict was announced. Pursuant to Article 369(1) CPC the reasoned judgment in detention cases should be drawn up within 15 days, and in other matters within 30 days from the announcement of the verdict. When a case is complex, this deadline may be extended by up to 60 additional days.

The Panel confirms that the reasoned judgment was not drawn up in the deadline set by Article 369(1) CPC. However the impugned judgment amounts to 45 pages and contains detailed analysis of a plethora of complex factual and legal issues in the case. There is no indication that the trial panel delayed the drafting. The opposite, the judgment was prepared, finalized and served to the parties in a reasonable time considering the scope of the case.

The Panel also notes that not every violation of CPC will amount to a substantial violation of criminal procedure. Under Article 384(2) CPC the defence must demonstrate that a right of the defence has been violated by the alleged violation of a procedural provision. The appellants in this case had not demonstrated this. The Appellate Panel finds that the delay in the serving of reasoned judgment had no impact on the defence rights in the proceeding as a whole.

Insofar the appellants refer to the right to trial in reasonable time, under article 6 ECHR, the Panel reiterates that the reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of each individual case. This has been continuously emphasized in the ECtHR jurisprudence.[6] In the case at hand the two-month delay in issuing the reasoned judgment is not excessive considering the volume and complexity of the case. Moreover, the proceeding as a whole has not taken an unreasonable amount of time.

The Panel therefore concludes there has been no violation of Article 384(2) CPC or of Article 6 ECHR.

(b) Alleged violation under Article 384(1.12) CPC that the judgment was not drawn up in accordance with article 370 CPC

[6] See for an overview of relevant jurisprudence McBride: Human Rights and Criminal Procedure: The case law of the European Court of Human Rights, COE Publishing 2009, at p. 359 et seq.

The defence submits that the enacting clause is incomprehensible and in contradiction with itself as well as with the evidence in the case file. The defence submits that the impugned judgment is not drafted in accordance with Article 370 CPC.

This ground of appeal is rejected as unfounded.

The enacting clause is clear, logical and does not contradict itself or the reasoning. The enacting clause provides a coherent and comprehensive description of the decisive facts and contains all the necessary data prescribed by Article 370(3) and (4) CPC in conjunction with Article 365 CPC.

The enacting clause is fully coherent with the reasoning of the impugned judgment and reflects the findings elaborated therein. The basic court presented grounds for each individual point of its decision, as required by Article 370(6) CPC.

The enacting clause read together with the detailed reasoning of the impugned judgment provides a comprehensive assessment of the evidence and of the facts the basic court considered proven and not proven. In accordance with Article 370(7) CPC the basic court also made a detailed assessment of the credibility of conflicting evidence and the reasons guiding the basic court in settling points of fact and law.

(c) Alleged violation of Article 262 CPC in conjunction with Article 384(2) CPC – that the impugned judgment is based solely or decisively on evidence in violation of Article 262 CPC

The defence of **RR.G** submits that the conviction is based solely on the statement of one witness in violation of Article 262 CPC.

The Panel acknowledges that witness J.B. is the key witness in the case against the defendants. The witness however was never a cooperative witness or an anonymous witness, therefore the limitations set out in Article 262(3) and (4) CPC do not apply to his evidence.

This ground of appeal is accordingly rejected, and the Appellate Panel need not discuss to what level the conviction is based on the testimony of this witness.

(d) Alleged violations of Article 7(2) CPC and Article 253 CPC and of the principle of presumption of innocence

The defence claims Articles 7(2) and 253 CPC have been violated. Similarly, the defence alleges that the basic court failed to evaluate the evidence separately and jointly and has failed to respect the principle of presumption of innocence. Implicitly, the defence thus argues there has been a substantial violation of criminal procedure pursuant to Article 384(2) CPC.

Article 7(2) CPC stipulates that *"subject to the provisions contained in the [CPC], the court, the state prosecutor and the police participating in the criminal proceedings have a duty to examine carefully and with maximum professional devotion and to establish with equal attention the facts*

against the defendant as well as those in his or her favor, and to make available to the defense all the facts and pieces of evidence, which are in favor of the defendant, before the beginning of and during the proceedings."

Article 253 CPC sets out grounds for dismissal of indictment during the indictment and plea stage of the proceedings.

Article 3 CPC codifies the principles of presumption of innocence and in *dubio pro reo*.

The Panel finds no violation of these provisions in this case.

Insofar Article 7(2) CPC is concerned; it is clear from the elaborate analysis contained in the reasoning of the impugned judgment, that the basic court has performed a careful and meticulous analysis of the evidence in the case. The basic court was fully aware of the contradictions in evidence and has addressed them.

Whilst the defence may disagree with the conclusions the basic court drew after completing its analysis of the evidence, that amounts to a separate challenge. The defence however cannot reasonably claim that the basic court did not fulfil its duty to carefully examine the evidence with maximum professional devotion.

Moreover, the analysis of the record of the main trial reveals that the trial panel throughout the proceedings was dedicated to establishing the truth in the proceedings. The trial panel engaged in lengthy questioning of witnesses both on the prosecution and defence side in order to determine the facts and to assess the credibility of individual witnesses. The basic court gave due consideration to the evidence of the defence and also reasoned in detail why it was not convinced by the alibi witnesses. The basic court did not simply ignore the exculpatory evidence administered during the trial, but transparently and in a detailed manner discussed the conflicting nature of evidence and reasoned why it chose to believe the prosecution's version of events.

There has therefore been no violation of Article 7(2) CPC.

Insofar the defence alleges a violation of Article 253 CPC; such argument is unclear and also unfounded.

Article 253 CPC sets out grounds for dismissal of indictment prior to main trial. This provision serves no purpose after the main trial has commenced.

After the start of main trial the court can reject a charge against a defendant only in very limited circumstances by issuing a rejection judgment (Article 363 CPC). Conditions for such rejection judgment are all of procedural nature as follows: the prosecution withdraws the charges; the defendant has already been acquitted or convicted of the same act by a final judgment or the proceedings against him were terminated in a final form or circumstances exist which bar

prosecutions such as expiry of statutory limitation period or the passing of amnesty law. None of these procedural situations existed or exist in the case at hand.

Insofar the presumption of innocence is concerned, the Panel finds no violation of the principle. The presumption of innocence does not mean that a defendant cannot be convicted. The principle protects against the defendant being considered and treated as guilty before a final judgment is rendered. There is no indication in the case file that the basic court would have acted in this manner. The trial panel conducted the trial impartially and gave careful consideration to motions for evidence from the defence and prosecution alike and has carefully weighed the evidence and arguments of both parties. This is clear from the impugned judgment and the reasoning given by the trial panel therein.

Insofar the principle of *in dubio pro reo* is concerned, the Panel reiterates that the principle is relevant only when the court is faced with doubts regarding the existence of facts relevant for the case or implementation of a criminal law provision. In the case at hand the basic court was not faced with any such doubt in relation to the death of G.B. The Appellate Panel therefore did not have any obligation to apply Article 3(2) CPC because it found the relevant facts proven on the basis of the evidence administered during the trial. There has accordingly been no violation of procedural law in this regard.

Again, the Appellate Panel reiterates that whether the conclusions of the basic court on determination of facts were correct and complete is a separate issue and this will be assessed in the next section of this judgment.

3.3. The allegation of erroneous and/or incomplete determination of the factual situation

(a) Standard of Review

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

Article 386 CPC defines the terms “erroneous determination of the factual situation” and “incomplete determination of the factual situation”. It is clear from these definitions that it is not sufficient for the appellant to demonstrate only an alleged error of fact or incomplete determination of fact by the trial panel. Rather, as the criminal procedure code requires that the erroneous or incomplete determination of the factual situation relates to a “material fact”, the appellant must also establish that the erroneous or incomplete determination of the factual situation indeed relates to a material fact, i.e. is critical to the verdict reached.[7] Furthermore, it is a general principle of appellate proceedings that the Court of Appeals must give a margin of

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

deference to the finding of fact reached by the trial panel because it is the trial panel which is best placed to assess the evidence. The Supreme Court of Kosovo has frequently held that it must "*defer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so.*" The standard which the Supreme Court applied was "*to not disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous*" (*Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, para. 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, para. 30*). The approach taken by the Supreme Court reflects a principle of appellate proceedings which is applied – although with some variance – both in common law and civil law jurisdictions alike as well as in international criminal law proceedings (*see e.g. Supreme Court of Ireland, Hay v. O'Grady, [1992] IR 210; Federal Court of Justice Germany, BGHSt10, 208 (210); International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. xxx et al., IT-95-16-A, Appeals Judgment, para. 28 et seq.).*[8]

The Appellate Panel will first address the relevance of the submission made by defendant S.G. in the session before the Appellate Panel on 28 October 2014, when the defendant stated that he was the only one involved in the killing of G. B on 18 June 1999. Thereafter the Panel will address other arguments made by the defence with regard to incomplete or erroneous determination of factual situation, including the issue of credibility of evidence of J. B. and whether there was an armed conflict on-going in Kosovo on 18 June 1999.

(b) Statement made by defendant S.G. before the Appellate Panel on 28 October 2014

In the session before the Appellate Panel on 28 October 2014 defendant **S.G.** made the following statement:

> *"First of all I would like to apologize to the court, the Defence Counsel, because I didn't tell the truth in the first trial because the three of us were not together when this happened because I was at the crime scene. I was working at home until the evening and in the evening around 6 I was on my way to the hospital.*
>
> *I would like to state that I took part in the killing in front of the hospital. I entered hospital because I was injured in my abdomen and wanted to treat that injury and at the entrance of the hospital I saw a person holding a pistol in his hand and this happened in the presence of French KFOR. And I asked him to put away the gun because he was*

[8] The same approach taken by various different panels of the court of Appeals. See e.g. Judgment np. PaKr 1122/12 dated 25.04.2013, paras. 39-40; Judgment PaKr 1121/12 dated 25.09.2013, paras 47-48; Judgment PaKr 1282/12 dated 28.05.2014, p. 31.

shooting in the air. I shot once at his direction after he shot at my direction. This was at the entrance of the hospital. The KFOR intervened, took my gun and told me to leave. I didn't know if he was a Serb or Albanian and only later did I realize who the person was. I am really sorry for my cousins because they were not there. I was wearing a black uniform and the witness J. said that I was wearing a camouflaged uniform but I had black uniform because I was a military police at that time and our uniform was black. This is the truth. I am really sorry it took so much time but the witnesses were not accurate in telling how the events developed."

Defendant **S.G**. was instructed prior to making any submission, that the Appellate Panel is not conducting a hearing and is not taking evidence but is holding a session in accordance with Article 390 CPC. The Appellate Panel reminded the defendant again about the scope of the session after the opening sentences of his submission.[9] The Appellate Panel also clarified that no questions will be asked to the defendant during the session,[10] but his statement is in the record and will be considered by the Appellate Panel during the deliberation.[11]

The Appellate Panel carefully considered and discussed the statement defendant **S.G.** made in the session of 28 October 2014. The question the Appellate Panel must answer is whether this submission creates doubt about the factual findings of the basic court.[12]

The Appellate Panel concludes that the submission of **S.G**. on 28 October 2014 does not in itself undermine the factual findings of the basic court about the actions and responsibility of all three defendants.

Having carefully analyzed the submission of **S.G**. and his defence counsel Tahir Rrecaj, it is the conclusion of this Appellate Panel that the sole purpose of **S.G.'s** statement was to exonerate the remaining two defendants **RR.G** and **H.G** and not to give a truthful account of events.

The Appellate Panel will not discuss in detail the content of **S.G.**'s submission and the description of the events there; the relevant issue before the Panel is the credibility of the statement as such.

The Panel observes that **S.G.** gave statements in this proceeding both in pre-trial phase and in the main trial, in all of which he denied any involvement in the killing of G.B..

The defendant stated that it is remorse that has prompted him to make a different statement now. He said he could no longer bear that also **H.G** and **RR.G** are in detention on remand.

[9] Record of session of the Court of Appeals, PAKR 55/14, 28 October 2014, at p. 6 (English version).
[10] The reason being that evidence can only be taken in a hearing, whilst the Panel was conducting a session.
[11] Ibid.
[12] If the Appellate Panel concluded that the factual situation was established incorrectly or incompletely it would then have to either (a) conduct a hearing at the appellate level in order to take and/or repeat evidence or (ii) return the case for re-trial to the basic court

The Appellate Panel does not find the defendant's submission credible. All three defendants have been in detention on remand since 15 November 2012. The Appellate Panel opines that if **S.G.** was telling the truth on 28 October 2014, he would have done so before and not at the very last stage of the proceeding before a judgment becomes final. Surely he would have stated so at least after the rendering of first instance judgment, when all three defendants were convicted or in the appeal.

Moreover, the Appellate Panel also carefully observed **S.G.'s** demeanor and reactions when he was making his submission, both being relevant for assessing the credibility of his submission. The Appellate Panel did not find defendant **S.G.** convincing in his statement.

The Appellate Panel does not believe **S.G.** that he was the only person involved in the killing of G.B. It is the considered view of this Appellate Panel that defendant **S.G.** made the submission on 28 October 2014 either under pressure, out of fear or for another unknown reason, in order to secure the release of **RR.G** and **H.G**. The defendant's defence counsel in his remarks made reference to the presence of blood feud and revenge in the Kosovo society.[13] This strengthens the impression of the Appellate Panel that the submission of **S.G.** on 28 October 2014 is not in fact the truth but is meant to serve a different objective.

In conclusion, the Appellate Panel finds that the submission of **S.G**. that **RR.G** and **H.G** were not responsible for the criminal offence at hand is not reliable. In the view of the Panel this statement does not undermine the factual findings of the basic court in this case.

The Appellate Court has an obligation to ensure that the facts which are important to rendering a lawful decision are established truthfully and completely. The Panel cannot blindly follow a statement of one defendant just because the latter effectively admitted to taking part in incriminating actions; the obligation of the court is to verify whether the account given by the defendant is supported by other information and evidence. The obligation of the Appellate Panel is to carefully weigh any such statement against the findings in the case, the evidence in the case and other circumstances. After doing all of the above the Court of Appeals is not persuaded by the submission of the defendant. It is on the other hand persuaded by the analysis of facts and evidence made by the basic court in the impugned judgment.

In conclusion, the Appellate Panel rejects the submission of defendant **S.G.** that he was the only one involved in the killing of G.B.. Independently of this finding, the Appellate Panel will review other challenges raised by the defence on the factual situation as established by the basic court.

[13] Record of session of the Court of Appeals, PAKR 55/14, 28 October 2014, at p. 6 (English version).

(c) Credibility of witness J.B.

The defence challenges the credibility of witness J.B. and alleges that his account of events was a fabrication and the defendants are innocent. The appeals elaborate on the conflicting evidence in the case, namely on the evidence given by witness J.B.on one hand and the evidence of the defence witnesses on the other hand.

The Appellate Panel accepts that the guilty verdict in this case rests largely on the testimony of witness J. B.[14] The Appellate Panel has therefore carefully analyzed the statements of witness B. in this criminal proceeding along with the reasoning of the basic court in the impugned judgment.

The defence alleges that the motivation of witness B. for accusing the defendants was him being accepted into the witness protection programme. Defendant **RR.G** in the session before the Appellate Panel on 28 October 2014 stated that *"J.B. lost his job in 2012 [and] in order to gain the status of protected witness and go abroad so that he and his family can obtain benefits, he went to the court to give false testimony."*[15]

This is a very serious allegation, but not an accurate one.

The Appellate Panel notes that whilst witness J.B.is currently in the witness protection programme,[16] he only entered into the programme shortly before the start of the main trial in the case at hand, therefore after he had already made a number of statements in the pre-trial proceeding and after the indictment against the defendants was filed.[17] The reason the witness was placed in the witness protection programme was that the level of risk for him increased at the time and posters with threatening messages appeared in the S. area.[18]

The witness, when giving his statements, did not know and could not anticipate that he would be admitted into the witness protection programme and relocated outside Kosovo. This therefore could not have been the motive or incentive for any kind of statement given by the witness. Moreover, the Appellate Panel also notes the strict conditions and evaluations for being admitted into the programme, meaning that even when the risk analysis merits such placement, there are no guarantees the defendant would be admitted into the programme. This is an additional reason the Appellate Panel finds that the motives attributed by the defence to the witness are ill-founded.

[14] The basic court itself has observed that "it was mindful that the conviction of the three G. defendants is in essential parts solely based on his statement". See impugned jdugemnt at p. 21 (English version).
[15] Record of session of the Court of Appeals, PAKR 55/14, 28 October 2014, at p. 8 (English version).
[16] This is also clearly stated in the impugned judgment, see at p. 11 (English judgment).
[17] See the Official Note of 28.10.2014 on correspondence between the Court of Appeals Legal Officer and the Presiding trial Judge of the case with the Basic Court on this issue in the case file.
[18] Ibid.

The Appellate Panel, after having carefully reviewed the arguments presented in the appeals, the reasoning of the basic court and the case file as a whole is not persuaded by the appellants when they claim that witness B. fabricated the events he testified to.

The Appellate Panel is satisfied that witness J.B**.** described the events on 18 June 1999 accurately and that defendants **S.G., RR.G** and **H.G** are responsible for the killing of G.B. in the xxx health center. The Panel does not believe the defendants were in their village when the victim was shot.

The basic court in the impugned judgment in detail analyses the evidence administered during the main trial and comes to logical conclusions in its assessment of that evidence.

The Appellate Panel with specific attention reviewed the analysis of the basic court with regard to the conflicting evidence. The Panel is fully persuaded by the conclusions and reasoning of the basic court and finds no contradiction in the stance of the basic court.

The Appellate Panel concurs with the assessment of the basic court who did not find the alibi witnesses proposed by the defence credible. The basic court has addressed this in detail. The Appellate Panel too finds that the eagerness to convince the court about the whereabouts of the defendants was not persuasive but indeed gave the impression that the witnesses were not telling the truth.

The Appellate Panel concurs with the impugned judgment that J.B. told the truth when he described his way to xxx and what he witnessed in the xxx. health center. He provided several details which endorsed his credibility.

Insofar the defence refers to discrepancies between the statements of witness B. in the pre-trial phase and his evidence given during main trial, the Appellate Panel notes that the basic court specifically addressed this issue in the impugned judgment at pages 27-28 (English version pagination). The Appellate Panel concurs with this reasoning.

The Court of Appeals analyzed the thorough analysis of the factual findings which is set out at pages 15 to 34 of the impugned judgment (English version pagination), and adopts this analysis in its entirety. The Appellate Panel does not see a need to repeat the detailed analysis of the basic court. It is sufficient to say that the Panel fully endorses the findings and reasoning of the basic court with regard to the credibility of witness J.B. and his evidence.

In conclusion, the Appellate Panel is satisfied that the basic court completely and correctly established the factual situation and that the arguments raised in the appeals do not undermine these findings.

(d) Whether an armed conflict existed in S. on 18 June 1999

The defence submits that the elements of criminal offence of *War crime against civilian population* are not established in the case, because no armed conflict existed in xxx. on 18 June 1999 when G.B. was killed.

The defence raises this ground as a violation of criminal law. The Appellate Panel however clarifies that the allegation is one of fact and is dealt with accordingly by the Panel.

The basic court held it was irrelevant that on 18 June 1999 parts of the FRY and Serbian forces already withdrew from Kosovo, after the so-called Kumanovo agreement was signed on 9 June 1999. According to this agreement, the withdrawal of Yugoslav forces had to be finalized within 11 days after its entry into force, i.e. by 20 June 1999.

The appellants submit that the war in Kosovo ended on 9 June 1999. By 18 June 1999 the Serbian forces had left xxx. and there was therefore no armed conflict ongoing at the time.

The Appellate Panel rejects the challenge of the defence and concurs with the reasoning of the basic court that an ongoing armed conflict existed in Kosovo, including S, on 18 June 1999 when G.B. was killed. Moreover, the nexus between the killing of G.B. and the said armed conflict has also been correctly established by the basic court.

Whilst the ICTY and the Supreme Court of Kosovo have on multiple occasions affirmed an ongoing non-international armed conflict in Kosovo at least since early spring 1998 onwards between the (governmental) Serbian armed forces and the KLA, continuing into 1999,[19] the available jurisprudence does not address events occurring as late as mid-June 1999.

The ICTY Trial Chamber in *xxx* and *xxx* explicitly held that the armed conflict continued until June 1999,[20] but again without specifying the end date of the armed conflict as that was unnecessary given the factual situation in those cases.

The Supreme Court of Kosovo has confirmed the existence of an internal armed conflict between the KLA and the Serbian forces for example in the *xxx* Decision of 5 August 2004 and in the *xxx* Decision of 21 July 2005,[21] and more recently also by affirming the Court of Appeals' *xxx* decision on 8 July 2014.[22]

Both the prosecution and the defence accept that the Kumanovo agreement was signed on 9 June 1999 and that the agreement foresaw a period of 11 days for withdrawal of Serbian armed forces from Kosovo. During those 11 days the Serbian forces were therefore in the process of

[19] See e.g. *Prosecutor* v. *xxx*, ICTY, Trial Judgment, 26 February.2009, Volume 1 of Judgment, paragraphs 840-841; *Prosecutor* v. *xxx*, ICTY, Trial Judgment, 23 February 2011 para. 1579.
[20] *Ibid*.
[21] Decision of Supreme Court of Kosovo (xxx), AP-KZ 139/2003, 05.08.2004, p. 14 et seq; Decision of Supreme Court of Kosovo (xxx), AP-KZ 139/2004, 21.07.2005, p. 9 et seq.
[22] Supreme Court of Kosovo Judgment, PML 125/14 (xxx) dated 8 July 2014.

withdrawal, remained present in parts of Kosovo and for this reason the armed conflict cannot be considered as concluded. The retreat implied a military operation; therefore, the armed conflict may be considered nonexistent only *after* the determined period for withdrawal had expired.

This interpretation is supported by the UN legislation passed in Kosovo immediately after the war. UNMIK regulation 2006/50 in Section 3.1 explicitly defined the temporal aspects of the armed conflict in Kosovo as lasting from 27 February 1998 until 20 June 1999.[23]

Moreover, the Supreme Court of Kosovo has recently discussed the issue in the *G. Judgment* dated 2 October 2014, and came to the same conclusion – the armed conflict in Kosovo ended only with the full withdrawal of the Serbian forces on 20 June 1999.[24]

That the armed conflict was concluded only on 20 June 1999 is further supported by comparative jurisprudence from the Supreme Court in Serbia in the *xxx* case. The said case is reported as follows:

> *"In the Lekaj case […] [t]he accused argued on appeal that the criminal offences took place while a Military and Technical Agreement was in force, and therefore the armed conflict had ended. The Supreme Court rejected this argument, and concluded that the Military and Technical Agreement contained a provision setting a period of 11 days for demilitarization and retreat of Yugoslav armed forces from the territory of Kosovo and Metohija. This was completed on 20 June 1999, which was taken as the date of the end of the conflict.*[25]

In conclusion, the Appellate Panel rejects this appellate ground as unfounded and affirms the finding of the basic court that an armed conflict existed in S. on 18 June 1999.

3.4. Alleged erroneous application of criminal law

All defence appeals submit that the basic court incorrectly applied the criminal law by applying Articles 142 and 22 CC SFRY and the UNMIK Regulation 2000/59 dated 27 October 2000 to the acts committed by defendants **S.G., RR.G** and **H.G**.

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[23] The provision of Section 3.1 in full reads as follows: 3.1 The Kosovo Property Agency shall, through the Executive Secretariat, have the competence to receive and register and, through the Property Claims Commission, have the competence to resolve, subject to the right of appeal to the Supreme Court of Kosovo, the following categories of conflict-related claims involving circumstances directly related to or resulting from the armed conflict that occurred between 27 February 1998 and 20 June 1999 […].

[24] Supreme Court of Kosovo judgment no. PML KZZ 157/2014 (xxx), dated 2 October 2014.

[25] See the case reported in the International Criminal Law Services Series, Module 8: War Crimes, *Part of the OSCE-ODIHR/ICTY/UNICRI Project "Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions". See at* p. 126, available at: http://wcjp.unicri.it/deliverables/docs/Module_8_War_crimes.pdf (last accessed: 12 November 2014).

This argument is well founded.

The Appellate Panel finds that whilst the basic court correctly relied on the CC SFRY and UNMIK Regulation 1999/24, UNMIK Regulation 2000/59 is not applicable to this criminal proceeding.

The applicable law at the time the criminal offence was committed was the CC SFRY. UNMIK Regulation 1999/24 defined the applicable law to be the law in force in Kosovo on 22 March 1999. The regulation also stated in Section 3 that it shall have deemed to enter into force as of 10 June 1999. In Section 1.5. the Regulation 1999/24 abolished the capital punishment.

On 27 October 2000 the Special Representative of Secretary General promulgated UNMIK Regulation 2000/59, which included the following provision as its section 1.6.:

> *"For each offence punishable by the death penalty under the law in force in Kosovo on 22 March 1989, the penalty will be a term of imprisonment between the minimum as provided for by the law for that offence and a maximum of forty (40) years."*

The same regulation however also included an explicit provision that this new section 1.6 shall only apply to crimes committed after 27 October 2000.

Due to the general principle of non-retroactivity of criminal law and the explicit provision contained in the UNMIK Regulation 2000/59 itself, it is clear that this regulation does not apply to the criminal offence committed on 18 June 1999.

Pursuant to Article 3 of the current Criminal Code the law in effect at the time the criminal offence was committed shall be applied to the perpetrator and in the event of change of applicable law prior to a final decision, the law most favorable for the perpetrator shall apply. The same provision was included in the Criminal Code in force from 6.4.2004 until 31.12.2012 under Article 2 and in the CC SFRY under Article 4.

The Panel notes the general rule of criminal law theory that the courts must take into account all laws that could have been applied to the perpetrator in the time period from the commission of the criminal offence until the rendering of a final decision, even though they may not be in force anymore.

The Panel finds that the law most favorable for the accused is the CC SFRY as amended by UNMIK Regulation 1999/24 abolishing the death penalty. The subsequent laws (the CCK and the current CCRK) are not more favorable as they carry longer punishments for the committed criminal offences.

Pursuant to Article 142 CC SFRY the punishment for the criminal offence of *War crime against civilian population* was at least five years of imprisonment or the death penalty. As noted, the death penalty was abolished by UNMIK Regulation 1999/24. The general maximum term of imprisonment prescribed by the CC SFRY was 15 years pursuant to Article 38(1) CC SFRY.

The sentence prescribed for the criminal offence under Article 142 CC SFRY is imprisonment from 5 years to 15 years. The basic court by deciding that the applicable law for the punishment prescribes imprisonment from 5 years to 40 years therefore committed an error in law, which must be rectified.

With the exception of the above, the Appellate Panel finds no errors in the application of criminal law by the basic court. The basic court correctly established the elements of the criminal offence and found the defendants responsible for the criminal offence of *War Crime against Civilian Population* pursuant to Articles 22 and 142CC SFRY.

3.5. Decision on the criminal sanction

The Panel, as has been discussed above, notes that the prescribed punishment for the criminal offence under Article 142 CC SFRY read in conjunction with UNMIK regulation 1999/24 is imprisonment from 5 to 15 years.

Further, the Panel also carefully reviewed the aggravating and mitigating circumstances established by the basic court and the challenges raised by the appeals in this regard.

The Panel accepts the argument of the defence that the basic court failed to consider the family situations of the defendants as a mitigating circumstance.

The Appellate Panel clarified the family situation of all three accused in the session of 28 October 2014 and has established as follows: **S.G.** is married with three children aged 20, 9 and 7 years. **RR.G** is married with three children aged 18, 15 and 13 years. **H.G** is married with four children aged 13, 12, 10 and 6 years.

The Appellate Panel therefore considered as an additional mitigating circumstance for all three defendants that they are married and each of them has at least two underage children.

Insofar the defence submits that the place of the commission of the criminal offence – the health centre – does not constitute an aggravating circumstance, the Appellate Panel disagrees. The place of commission of the criminal offence typically falls within what the law (Article 41(1) CC SFRY) describes as "circumstances in which the act was committed". The health centre should be considered a safe heaven and its occupants especially vulnerable (sick or wounded). The defendants did not hesitate to commit the criminal offence in such an environment. The Appellate Panel finds that the basic court correctly considered this as an aggravating circumstance.

In light of the mitigating and aggravating circumstances correctly established by the basic court and giving due regard to the additional mitigating circumstance of family status of the defendants and considering the maximum punishment prescribed for the criminal offence is 15 years of imprisonment, the Panel decides that the sentence of 8 (eight) years of imprisonment is the appropriate punishment for each of the defendants for having committed the established criminal offence. The Appellate Panel in accordance with article 41 CC SFRY imposes the punishment within the limits provided by the law and taking into account all the relevant circumstances as well as the purposes of the punishment set out in Article 33 CC SFRY.

The time spent in detention on remand since 15 November 2012 shall be accredited towards the defendants' sentence.

3.6. Other issues raised by the appeals

Motion for new evidence by defence of RR.G

Defence counsel Mahmut Halimi, representing defendant **RR.G**, filed a motion to hear new witnesses, namely H.B, I.B, and F. B. The defence repeated the motion in the session of the Appellate Panel on 28 October 2014.

Pursuant to Article 382(3) CPC new evidence and facts may be presented in the appeal but the appellant making the motion must give reasons for failing to present them before. Moreover, the appellant must indicate what facts he intends to prove through the newly proposed evidence.

Whilst the appeal did not provide any meaningful information about what these three witnesses may testify on, the defence counsel during the session clarified these witnesses would testify to the alibi of defendant **RR.G**.

The Appellate Panel rejects the motion for new evidence as unsubstantiated and also unnecessary. The Panel notes that a number of witnesses have already been heard with regard to the alibi of **RR.G.** The defence did not provide any indication that these three witnesses would provide any new information not heard before from other witnesses. Moreover, the defence also failed to show that it was unable to propose these witnesses earlier in the proceedings.

The Appellate Panel accordingly rejects the motion to hear new evidence.

The Panel also rejects the motion to hold a hearing at the appellate level. The Panel, as elaborated above, finds that the factual situation was established completely and correctly.

III. CONCLUSION

The Court of Appeals has for reasons elaborated above rejects the special prosecutor's appeal and partially accepts the defence appeals insofar they challenge the application of criminal law with regard to the imposed criminal sanction and the length of sentence imposed. The Appellate Panel modifies the impugned judgment so as to impose a sentence of 8 (eight) years of imprisonment against the defendants for the committed criminal offence under Articles 22 and 142 CC SFRY. In the remaining parts the impugned judgment is affirmed.

Done in English, an authorized language. Reasoned Judgment completed on 17 November 2014.

Presiding Judge

_____

Hajnalka Veronika Karpati
EULEX Judge

Panel member

_____

Elka Filcheva-Ermenkova
EULEX Judge

Panel member

_____

Abdullah Ahmeti
Judge

Recording Officer

_____

Beti Hohler
EULEX Legal Officer

COURT OF APPEALS OF KOSOVO
Pakr 55/14
29.10.2014