COURT OF APPEALS

Case number: **PAKR 966/2012**

Date: **11 September 2013**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Tore Thomassen as Presiding and Reporting Judge, EULEX Judge Bertil Ahnborg and Kosovo Court of Appeals Judge Fellanza Kadiu as members of the Panel, with the participation of Andres Parmas, EULEX Legal Officer, acting as Recording Officer, in the criminal proceedings against

S.G., in detention on remand since 6 May 2010. **S.G.**.. is charged with six counts of **War Crimes Against the Civilian Population** in violation of Art 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), also foreseen in Art-s 23 and 120 of the Criminal Code of Kosovo (CCK), and in violation of Common Art 3 of the Geneva Conventions (GC) and Art-s 4 and 5(1) of Additional Protocol II to the Geneva Conventions (AP II); and **Unauthorized Ownership, Control, Possession or Use of Weapon** in violation of Art 328(2) of the CCK;

R.A., in detention on remand since 23 June 2010. **R.A.** is charged with three counts of **War Crimes Against the Civilian Population** in violation of Art-s 22 and 142 CCSFRY, also foreseen in Art-s 23 and 120 CCK, and in violation of Common Art 3 GC and Art-s 4 and 5(1) of AP II;

H.H. is charged with two counts of **War Crimes Against the Civilian Population** in violation of Art-s 22 and 142 CCSFRY, also foreseen in Art-s 23 and 120 CCK, and in violation of Common Art 3 GC and Art-s 4 and 5(1) of AP II;

S.H. is charged with two counts of **War Crimes Against the Civilian Population** in violation of Art-s 22 and 142 CCSFRY, also foreseen in Art-s 23 and 120 CCK, and in violation of Common Art 3 GC and Art-s 4 and 5(1) of AP II; and

S.R., is charged with three counts of the criminal offence of **War Crimes Against the Civilian Population** in violation of Art-s 22 and 142 CCSFRY, also foreseen in Art-s 23 and 120 CCK, and in violation of Common Art 3 GC and Art-s 4 and 5(1) of AP II

Acting upon the following Appeals against the Judgment P 45/10 filed with the District Court of Mitrovica:

Appeal of Defence Counsels Mahmut Halimi and Haxhi Millaku on behalf of the Defendant **S.G.**.;

Appeal of Defence Counsel Gezim Kollcaku on behalf of the Defendant **R.A**;

Appeal of Defence Counsel Gani Rexha on behalf of the Defendant **H.H.**;

Appeal of Defence Counsel Agim Lushta on behalf of the Defendant **S.H.**;

Appeal of Defence Counsel Qasim Qerimi on behalf of the Defendant **S.R.**

Having considered the Opinion and Motion of the Appellate State Prosecutor of Kosovo Judit Eva Tatrai no PPA 153/12 dated 25 January 2013;

After having held a public session on 10 September 2013 in the presence of the Appellate State Prosecutor Judit Eva Tatrai, the Defendants **S.G.**., **R.A.**, **H.H.**, **S.H.** and **S.R.** and their respective Defence Counsels Mahmut Halimi, Gezim Kollcaku, Gani Rexha, Agim Lushta and Qasim Qerimi;

Having deliberated and voted on 11 September 2013,

Pursuant to Art-s 420 (1.4) and 426 (1) of the Provisional Criminal Procedure Code of Kosovo (KCCP)

Renders the following

JUDGMENT

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1. The Judgment of the District Court of Mitrovica dated 29 July 2011 in the criminal case no. 45/10 is modified in the following:

1.1. S.G.. is found guilty of War Crimes against Civilian Population in violation of Art 142 of the CCSFRY, also foreseen in Art-s 120 and 121 of the CCK, and in violation of Common Article 3 GC and Art-s 4 and 5(1) of AP II, because he:

1) **from on or about 18 May until 03 June 1999, during a time of internal armed conflict in Kosovo, the accused in his capacity as a member of the Kosovo**

Liberation Army ("KLA") holding a command position in the improvised prison within a KLA military compound in the town of Kukes in the Republic of Albania, jointly together with other KLA members treated inhumanely (e.g. the filthy living conditions, lack of adequate sanitation, food and water) an undefined number of civilian prisoners, including Witness A, Witness B, Witness C, Witness D, Witness E, Witness F, Witness H and Anton Bisaku;

2) **on or about 19 May 1999, during a time of internal armed conflict in Kosovo, the accused in his capacity as a member of the KLA holding a command position in the prison in the KLA camp in Kukes, in co-perpetration with other KLA members, tortured civilian prisoners Witness A, Witness B, Witness C, Witness D, Witness E, Witness F, Witness H and Anton Bisaku by attempting to obtain information and confessions from the victims while repeatedly using violence against them and ordering other KLA members to do the same;**
3) **on several occasions from on or about 18 May until 03 June 1999, during a time of internal armed conflict in Kosovo, the accused in his capacity as a member of the Kosovo Liberation Army ("KLA") holding a command position in the prison in the KLA camp in Kukes, the accused violated the bodily integrity of an undefined number of civilian prisoners including Witness A, Witness B, Witness C, Witness D, Witness E, Witness F, Witness H and Anton Bisaku by means of severe ill-treatment and beatings which occurred inside the makeshift cells where such prisoners were detained;**
4) **on or about 12 April 1999, during a time of internal armed conflict in Kosovo, the accused in his capacity as a member of the KLA, in co-perpetration with R.A., violated the bodily integrity of I.R., a civilian detained in an improvised prison in the KLA camp located in Cahan, Republic of Albania, by repeatedly and severely beating him with a crutch and a wooden stick.**

1.2. R.A. is found guilty of War Crimes against Civilian Population in violation of Art 142 of the CCSFRY, also foreseen in Art-s 120 and 121 of the CCK, and in violation of Common Article 3 GC and Art-s 4 and 5(1) of AP II, because he:

1) **on or about 12 April 1999, during a time of internal armed conflict in Kosovo, the accused in his capacity as a member of the KLA, in co-perpetration with S.G.., violated the bodily integrity of I.R., a civilian detained in an improvised prison in the KLA camp located in Cahan, Republic of Albania, by repeatedly and severely beating him with a crutch and a wooden stick;**
2) **during a time of internal armed conflict in Kosovo, the accused in his capacity as a member of the KLA, violated the bodily integrity of the following civilians detained in the prison in the KLA camp in Cahan:**

- I.R., by beating him in a number of ways including by striking him with a heavy-duty shoe on or about 14 April 1999, and by ordering other unidentified KLA soldiers to punch and kick I.R. on an undefined number of occasions (especially when I.R. was on his way from the cell where he was detained to the toilet) on unspecified dates between 12 April and mid-June 1999;

- Witness M, by repeatedly striking him on his back with an iron bar on or about 17 April 1999;

- Witness K, Witness M, Witness N, and Witness O by beating them in a number of ways, including by striking them with a wooden stick and by ordering other unidentified KLA soldiers to beat them, on unspecified dates between 12 April and mid-June 1999.

1.3. S.G.. is sentenced to 15 years of imprisonment for War Crimes against the Civilian Population.

1.4. R.A. is sentenced to 12 years of imprisonment for War Crimes against the Civilian Population.

2. In The remaining part the Judgment of the District Court of Mitrovica dated 29 July 2011 is confirmed.

3. The Judgment of the District Court of Mitrovica dated 13 October 2011 in the criminal case no. 45/10 is confirmed.

4. The Appeals of the Defence Counsels for S.G.. and R.A. are partially granted as outlined above.

5. The Appeals of the Defence Counsels for H.H., S.H. and S.R. are rejected as unfounded.

REASONING

I. Procedural History

A. Charges against the Defendants

1. On 6 August 2010, The SPRK Prosecutor filed the indictment PPS no 08/2009 against the defendants **S.G.**. and **R.A.** and charged them with the criminal offences War Crime against the civilian population pursuant to Art-s 22 and 142 of the CCSFRY currently criminalized

under Art-s 23 and 120 (2) CCK because of the acts they committed against civilian detainees held in two KLA-run camps in Kukes and Cahan in the Republic of Albania during 1999. **S.G.** was also indicted for unauthorized possession of a weapon. The indictment was confirmed with Ruling KA no. 64/2010 on 24 November 2010.

2. On 29 December 2010, SPRK Prosecutor filed Indictment PPS nr. 117/2010 against **H.H.** and **S.R.** charging them with War Crimes against the Civilian Population by maltreatment of civilian detainees at a KLA-run detention camp located in Cahan, Albania during 1999. On 16 February 2011, the Prosecutor filed a Ruling on expansion of the criminal investigation of case PPS no. 117/2010 to include **S.H.** as a suspect. Subsequently, on 25 February 2011, the Prosecutor filed a separate indictment under PPS nr. 117/2010 (registered by the Court under KA nr. 09/2011) against **S.H.** charging two counts of War Crimes with regard to the detainees at the KLA camp in Cahan. Upon request of the SPRK Prosecutor, on 2 March 2011 Confirmation Judge issued an Order to join criminal case KA no. 09/2011 against **S.H.** to criminal case KA no. 208/2010 against **H.H.** and **S.R.** since the alleged criminal offences were interconnected and relied upon common evidence. On 25 March 2011, Confirmation Judge issued Ruling KA nr. 208/2010 confirming both indictments and declaring all the evidence contained in the case file as admissible.

B. The Trial

3. The trial against **S.G.**. and **R.A.** opened on 14 March 2011 before panel of the District Court of Mitrovica composed of 2 EULEX judges and 1 Kosovar judge. On 14 April 2011, Prosecutor moved for the case against **H.H.**, **S.R.** and **S.H.** to be joined to the ongoing trial against **S.G.**. and **R.A.**. On 4 May, the trial against **H.H.**, **S.R.** and **S.H.** in case P no. 13/2011 was opened, also in the presence of defendants **S.G.**. and **R.A.** and their Defence Counsels. All of the parties agreed to the joinder of the cases because although eleven hearings had been held in the **G/A** trial, all of the evidence heard thus far concerned acts which had allegedly occurred in the KLA camp in Kukes, for which only **S.G.**. and **R.A.** were charged. The charges against **H.H.**, **S.R.** and **S.H.** concerned incidents which allegedly occurred at the KLA camp in Cahan. Therefore, there was no prejudice to the new defendants in the joinder of these cases. The main trial thus continued against all five defendants.

4. On 16 June 2011, Defence Counsel Qasim Qerimi applied for permission from the Court for Defendant **S.R.** to travel to Turkey for urgently needed heart surgery. On 20 June, the Trial Panel severed the case against **S.R.** pursuant to Art 34 KCCP and the trial continued against the four other defendants.

5. The closing arguments were heard on 21 and 25 July 2011, and the verdict in regard of the Accused **S.G.**., **R.A.**, **H.H.** and **S.H.** was pronounced on 29 July 2011.

6. On 12 October 2011 the trial in the severed case against **S.R.** continued and on 13 October 2011 the verdict was pronounced.

C. The Verdicts

7. The Defendant **S.G.**. was found guilty of 4 counts of War Crimes against the Civilian Population pursuant to Art-s 22 and 142 CCSFRY in conjunction with Common Art 3 GC and Art-s 4 and 5(1) AP II (inhumane treatment of civilian prisoners; torture of civilian prisoners; violation of bodily integrity of civilian prisoners by means of ill-treatment and beatings). **S.G.**. was also found guilty for Unauthorised Ownership, Control, Possession or Use of Weapons pursuant to Art 328 (2) CCK.

8. **S.G.**. was sentenced respectively to 8, 12, 9 and 8 years of imprisonment for each count of War Crimes against the Civilian Population. For the Unauthorized Ownership, Control, Possession or Use of Weapon he was punished with a fine of 4,000.00 Euro. The aggregate punishment was determined in 15 years of imprisonment and a fine of 4,000.00 Euro. The time spent in detention on remand was credited.

9. **S.G.**. was acquitted of two counts of War Crimes against Civilian Population (murder; giving orders to the violation of bodily integrity of civilian prisoners).

10. The Defendant **R.A.** was found guilty of two counts of War Crimes against the Civilian Population pursuant to Art-s 22 and 142 of the CCSFRY and in conjunction with Common Art 3 GC and Art-s 4 and 5(1) of AP II (violation of bodily integrity of detained civilians).

11. **R.A.** was sentenced respectively to 8 and 9 years of imprisonment for each count of War Crimes against the Civilian Population. The aggregate punishment was determined in 12 years of imprisonment and the time spent in detention on remand was credited.

12. **R.A.** was acquitted of one count of War Crimes against the Civilian Population (inhumane treatment of civilian detainees).

13. The Defendant **H.H.** was found guilty of one count of War Crimes against the Civilian Population pursuant to Art-s 22 and 142 of the CCSFRY and in conjunction with Common Art 3 GC and Art-s 4 and 5(1) of AP II (torture of a detained civilian).

14. He was sentenced to 6 years of imprisonment.

15. **H.H.** was acquitted of one count of War Crimes against the Civilian Population.

16. The Defendant **S.H.** was found guilty of one count of War Crimes against the Civilian Population pursuant to Art-s 22 and 142 of the CCSFRY and in conjunction with Common Art 3 GC and Art-s 4 and 5(1) of AP II (torture of a detained civilian).

17. He was sentenced to 7 years of imprisonment.

18. **S.H.** was acquitted of one count of War Crimes against the Civilian Population.

19. **S.R.** was found guilty of one count of War Crimes against the Civilian Population pursuant to Art-s 22 and 142 of the CCSFRY and in conjunction with Common Art 3 GC and Art-s 4 and 5(1) AP II (torture of a detained civilian).

20. He was sentenced to 5 years of imprisonment.

21. **S.R.** was acquitted for two counts of War Crimes against the Civilian Population.

D. The Appeals Procedure

22. Defence Counsels Mahmut Halimi and Haxhi Millaku filed a Joint Appeal on behalf of **S.G.**. on 14 February 2012; Defence Counsel Gezim Kollcaku filed an Appeal on behalf of **R.A.** on 15 February 2012; Defence Counsel Gani Rexha filed an Appeal on behalf of **H.H.** on 15 February 2012; Defence Counsel Agim Lushta filed an Appeal on behalf of **S.H.** on 13 February 2012; and Defence Counsel Qasim Qerimi filed an Appeal on behalf of **S.R.** on 4 April 2012. All Appeals were submitted timely. On 25 January 2013 the EULEX Appellate Prosecutor Judit Eva Tatrai filed an Opinion and Motion in response to the Appeals.

23. On the 13 January 2013 the case was transferred from the Basic Court of Mitrovica to the Court of Appeals pursuant to Art 39 (1) of the Law on Courts, Law no. 03/L-199.

24. The session of the Court of Appeals took place on 10 September 2013.

25. On the session of the Court of Appeals the Panel joined the criminal proceedings in the severed case against the Defendant **S.R.** and in the case against the Defendants **S.G.**., **R.A.**, **H.H.** and **S.H.**.

II. Submissions of the Parties

A. The Appeal on behalf of S.G..

26. The Defence Counsels of **S.G.**. propose either to acquit **S.G.**. for all war crimes, return the case for a retrial or at least re-qualify the criminal offence as one single count of war crime and sentence him more leniently.

27. The Appellants argue that the court of first instance has substantially violated the procedural law because the enacting clause is incomprehensible and in contradiction with the reasoning of the judgment. According to them the conclusions of the trial chamber that the alleged crimes were committed in a territory of the party to the conflict is not based on the established facts. The alleged crimes were not committed in a territory of a party to the armed conflict and therefore norms of international humanitarian law are not applicable. Albania was not a party to the conflict between KLA and Serbia and the fact that some KLA soldiers were present in Albania does not change that situation. District Court has failed to establish the opposite. The judgment is also lacking reasoning, because contradictions between different witness statements have not been eliminated and there is no evidence supporting the conclusion of the trial court that **S.G.**. had any position in the military hierarchy in Kukes camp. By arguing that having KLA military bases in Albania, the respective areas became attached to the conflict and the norms of international humanitarian law became applicable there, the District Court exceeded its competence, because such claims could only have been made by one of the parties and not by a court.

28. As a violation of substantive law to the detriment of the Defendant the Appellants see the fact that the acts of **S.G.**. have wrongfully been qualified as in real concurrence, when in fact they should have been viewed as in ideal concurrence, because all accusations fall under one and the same criminal norm. Therefore he should have been sentenced with one single punishment for all instances of war crimes he was found guilty of. The conclusion of the District Court, that **S.G.**. had any commanding authority in Kukes or Cahan camps is unsubstantiated and at least raises hesitations which must be interpreted in his favour.

29. The Defence Counsels of **S.G.**. argue also that the facts have been determined erroneously and incompletely, because the conclusions of the District Court has ignored major discrepancies between witness statements and has wrongfully based the judgment on witness statements which included contradictions on essential aspects concerning the presence and role of **S.G.**. in the Kukes camp (witnesses A and H), whereas leaving aside as incredible the consistent testimonies of witnesses D and E. The statements of the witness I.R. are also unreliable, because of contradictions within them. The Appellants note that based on the evidence and the corroborating fact that his presence in the Kukes camp was sporadic only the conclusion that **S.G.** had no position of authority in either Kukes or Cahan camps can be drawn.

30. The Defence Counsels find that in any way the punishment for **S.G.**.'s actions is too severe and mitigating factors have not been taken into due consideration. The sentence of **S.G.**. should be lightened already because of the fact that his acts (concerning war crimes) should be considered as one single criminal offence.

B. The Appeal on behalf of R.A.

31. The Defence Counsel for **R.A.** proposes to return the case for retrial, to acquit **R.A.** or at least impose a less severe punishment on him.

32. He finds that the District Court has violated the provisions of the criminal proceedings because the enacting clause of the Contested Judgment is incomprehensible and in contradiction with itself and the reasoning of the Judgment. **R.A.** was convicted of beating witnesses K, M, N, O and I.R. on an unspecified number of occasions. At the same time the District Court has established that I.R. was beaten by **R.A.** on only two occasions and witnesses K and M were hit by him only once. It has not been established in the reasoning of the judgment that witnesses N and O would have been ever hit by **R.A.**. He should not have been convicted of any crime against Witness O, because this witness was never heard during the proceedings.

33. The violations of procedural law have resulted in violation of the substantive law to the detriment of the Defendant, because his acts do not constitute the criminal offence he was found guilty of. The court has wrongfully considered **R.A.**'s acts in real concurrence, although being qualified under one and the same norm of the substantive criminal law these acts should have been considered in ideal concurrence.

34. The factual situation in regard of the Defendant **R.A.** has been established erroneously and incompletely. The statements on witness I.R. should have been found incredible, because these statements were not supported by any other evidence. I.R. was lying because of hatred against the defendants. In the first photo line-up he could not recognise **R.A.** (picture from 1999), but recognised him couple of days later (a fresh picture from 2010), stating that he has seen the Defendant in media. The statements of witnesses K and M do not corroborate at all the statements of I.R.. The Defence Counsel also stresses that **R.A.** was only hitting witnesses K and M when they were originally transported to Cahan camp and that happened purely because of the tense overall situation, it was an unintentional ill-considered gesture for which the defendant apologised to the victims shortly afterwards and therefore his acts should not be qualified as war crimes.

35. The Defence Counsel finds that **R.A.** has been sentenced too harshly. The court has wrongly seen as an aggravating circumstance the period during which the victims were kept in Cahan camp, because **R.A.** had no influence on that. Also the big number of victims has been

wrongly attributed to **R.A.**. He was only convicted for the maltreatment of three persons. Concerning the effect of beating on the physical and mental health of the victims, it could not stand as aggravating circumstance, because the victims were beaten only in the beginning of their stay in the Cahan camp and later on they were treated according the same standards as the soldiers. No victim has provided evidence on any bodily injuries. On the other hand the DC wrongfully did not take into consideration mitigating circumstances with the exception of the current state of health of **R.A.**. Other mitigating circumstances to be taken into account are: the harsh period when the crimes were committed; **R.A.** had never before nor has he after the incidents accused for had any criminal proceedings against him; during the trial the Defendant was behaving properly; by punishing **R.A.** his sick wife would be left without care.

C. The Appeal on behalf of H.H.

36. The Defence Counsel of the Defendant **H.H.** proposes either to return the case for retrial or impose a more lenient sentence on him.

37. The Appellant finds that the judgment of the District Court contains violations of the provisions of the criminal proceedings. The reasoning is lacking in the judgment as there are considerable controversies between the judgment and the content of the minutes of the hearings. The Court has wrongfully established as if there was a repeated beating of the witness N. There was even according to the statements of this witness only one beating that lasted for about an hour. The court has not given reasons, why preponderance to some evidence over the other is given. Accordingly the District Court has not given reasons why the statements of witnesses K, M and I.R. as to the denial of the Defendant **H.H.** to have beaten witness N are not trusted. The statement of witness N is confusing, adverse and not credible for these reasons.

38. The Appellant finds that because of these violations the factual situation has been established erroneously and incompletely by the District Court and substantive law has been wrongly applied to the detriment of the Defendant **H.H.**.

39. Even if Court of Appeals should be satisfied with the reasoning of the District Court, the sentence imposed on the Defendant **H.H.** is too severe. The Court has wrongfully considered the object by which the crime was allegedly committed as an aggravating circumstance. The Court has not put adequate weight to the mitigating circumstances in regard of **H.H.**.

D. The Appeal on behalf of S.H.

40. The Defence Counsel of the Defendant **S.H.** proposes his client to be acquitted. The Appellants main arguments are the following.

41. At first the Defence Counsel claims that the District Court has substantially violated the provisions of criminal procedure as the judgment does not contain adequate reasoning and there are considerable contradictions between the enacting clause and the reasoning of the Judgment.

42. The facts have been established wrongly (especially concerning the witness N) in the Contested Judgment, because there are inconsistencies in the statements of N as to the fact when he was brought to Cahan camp. It was wrong to have a partial approach to the evidence – so that in some respect the statements of witness N were considered credible and for other respect not. Hence, it is not clear beyond reasonable doubt from the evidence, that **S.H.** committed the crime he has been convicted for.

43. These violations have led to wrongful application of substantive criminal law to the detriment of the Defendant.

44. The Appellant contends that even if Court of Appeals should agree with the findings of the District Court, the sentence of **S.H.** is too severe.

E. The Appeal on behalf of S.R.

45. The Defence Counsel of the Defendant **S.R.** proposes to acquit **S.R.** or to return the case for retrial.

46. The Appellant argues that the District Court has substantially violated the provisions of the criminal procedure, as there are controversies between the enacting clause of the judgment and its reasoning. The reasoning of the judgment is also self-contradictory. Accordingly in the enacting clause **S.R.** is proclaimed guilty for (count 2) war crimes against the civilian population, however in the judgment it is précised only the term War Crimes from Art 142 CCSFRY, Art 3 GC and Art-s 4 and 5 (1) AP II. There was no armed conflict going on in the place where the crimes were allegedly committed and therefore the norms of international humanitarian law did not apply there at the time of the commission of the alleged crimes. Big part of the evidence was administered by the District Court already before the joinder ruling only after which the trial started against **S.R.**.

47. The factual situation has been established wrongly and incompletely. The statements of witness N are unreliable, because they are contradictory. N also had a big grudge against anybody detaining him. Therefore his statements should not been considered credible. It is not clear from witness N statements that **S.R.** would have interrogated him. The statements are not concrete. The guilt of **S.R.** has not been proven beyond reasonable doubt. The District Court has not evaluated every piece of evidence in conjunction with other evidence.

The Court has also failed to analyse the commanding hierarchy in Cahan camp and has not evaluated actions of every defendant based on that hierarchy.

48. The violations above have led to wrongful application of the substantive criminal law to the detriment of the Defendant. Co-perpetration should absorb the responsibility sanctioned by Art 26 CCSFRY. Therefore the judgment, finding the defendant guilty on both accounts, is wrong. Findings on alleged co-perpetration have not been in any way been grounded in the Judgment. The Defence Counsel finds that the responsibility of **S.R.** in the form of co-perpetration is excluded because there is no evidence of him having beforehand orally or in the writing drafted a plan to commit the crimes he was convicted of.

49. The Defence Counsel argues that even if found guilty, the sentence for **S.R.** is too severe, because aggravated circumstances have been established wrongly and there is a contradiction with the testimonies that **S.R.** was more humane toward the detainees than the other KLA soldiers.

F. The Opinion of the Appellate State Prosecutor

50. On 25 January 2013 The Appellate Prosecutor Judit Eva Tatrai submitted an opinion in response to the Appeals. She moved the Court of Appeals to reject the Appeals and affirm both Contested Judgments. Concerning each Appeal her arguments were as follows.

51. The Appellate Prosecutor finds that the allegation of the Defence Counsels of **S.G.**. as to the violation of provisions of criminal procedure under Art 403 (1.12) KCCP is not substantiated and the appealed judgment is free from these violations. She also finds wrong the Defence Counsels' assumption that due to the fact that the acts were committed outside the geographical territory of Kosovo, in a country which is not party to the armed conflict and which in 1999 was not a member state of the NATO, the courts in Kosovo do not have jurisdiction over the case at hand. The Appellate Prosecutor disagrees with the allegations of the defence counsels that the District Court did not address the issue of contradicting evidence. Contrary to the appeal, the Appellate Prosecutor finds that the Court simply fulfilled its legal obligation under Art 7 (1) KCCP to truthfully establish the facts of the case, and did not exceed its competence. The Prosecutor disagrees with the Defence Counsels of **S.G.**. in regard of the question of the concurrence of several Counts of War Crimes against the Civilian Population and finds that the acts giving rise to these charges were correctly considered by the District Court as separate criminal acts and not as one extended criminal act. For this reason the Appellate Prosecutor finds erroneous the Defence Counsels' claim that the imposed punishment is too severe, and that one single punishment should have been imposed instead of aggregating the separate punishments for the four counts of war crimes. In disagreement with the Appeal she also noted that **S.G.**.'s presence in Kukës and Cahan, and the question whether due to his poor health condition he fulfilled

command position or not, is a matter of evaluation of evidence and not that of violation of the criminal law. The Appellate Prosecutor disagrees with the Defence Counsels' claim that the District Court failed to analyse contradicting witness statements and finds that defence counsels refer to the statements of relevant witness statements out of their context, and demonstrate their testimonies distortedly. She opines that the District Court conducted a thorough evidence-taking procedure and fulfilled its legal obligations in the Judgment as prescribed by Art 387 (2) and Art 396 (7) KCCP with regards to each conviction of **S.G.**.. The first instance Court correctly and completely ascertained the factual situation, did not deviate from the content of the evidence but gave a faithful description of it.

52. The Appellate Prosecutor finds that the allegation of the Defence Counsel of **R.A.** concerning the inconsistencies between the grounds and the enacting clause of the contested judgment is without merit. She notes that The appealed Judgment under para-s 151, 163-164, 167-168 172-173, 174 clearly establishes the violation of bodily integrity of I.R., Witnesses K, M, N and O, and in para-s 205-208 the position and authority of **R.A.** in Cahan. These determinations are based on evidence in the Judgment. The Appellate Prosecutor argues in contrast to the Defence Counsel that the District Court determined the factual situation in the case correctly. Regarding the concurrence of the criminal acts of War Crimes against the Civilian Population, the Appellate Prosecutor refers to her arguments explained at the Appeal of **S.G.**.. Different from the Defence Counsel of **R.A.** the Appellate Prosecutor finds that the imposed punishment is in line with the criminal law, and the factors aggravating and mitigating the sentence were correctly taken into consideration by the District Court.

53. The Appellate Prosecutor finds wrong the allegation of the Defence Counsel of **H.H.** as if the contested judgment lacks reasoning and there was a considerable discrepancy between the statement of grounds relating to the content of documents or records of testimony. According to her, there exists no discrepancy between the witnesses statements referred to by the Appellant. The assessment of the statements and of their weight has been in accordance with the provisions of the criminal procedure and as a result the District Court drew correct conclusions on the factual situation. Contrary to the claims of the Defence Counsel that the punishment is excessive, the aggravating factors not correctly assessed and mitigating factors wrongly not taken into consideration, the Appellate Prosecutor notes that in fact the Court assessed the attempt of the accused to alleviate the discomfort of the witnesses in captivity as a mitigating factor to his sentence. Even if clear criminal record and economic situation of **H.H.** are not appreciated by the Court, the Appellate Prosecutor is of the opinion that his sentence is still proportionate and in accordance with the law.

54. The Appellate Prosecutor does not agree with the Defence Counsel of **S.H.** as if the Contested Judgment suffers from substantial violation of the criminal procedure in the form

of Art 403 (1.12) KCCP, because of a contradiction between para-s 159 and 258 of the reasoning of the Judgment. She draws attention to the fact that the defence counsel claims substantial violation of the provisions of criminal procedure in relation to a Count which **S.H.** was acquitted of. As a matter of fact, para-s 159 and 258 of the reasoning of the Judgment are attached to Count 2 of the Consolidated Charges, Torture of Witness N on 9 May 1999 in Cahan. This argument is not in favour of the accused. The Appellate Prosecutor finds that the Appeal does not claim substantial violation of the provisions of criminal procedure in relation to Count 1 of the Consolidated Charges, Torture of Witness N on 3 May 1999 in Cahan. The Appellate Prosecutor finds that the Defence Counsels claim in regard of false and incomplete determination of the factual situation in the case is unmeritorious and without support even in the arguments of the Defence Counsels own Appeal. Also the arguments as to excessive punishment are ungrounded.

55. In disagreement with the Defence Counsel of **S.R.** the Appellate Prosecutor finds that the judgment of the District Court in regard of **S.R.** is not based on the evidence administered in trial without the participation of **S.R.** and his defence. The Appellate Prosecutor submits that the Judgment is free from the alleged violation also on the ground that the co-perpetrators could not be identified yet. According to Art 22 CCSFRY complicity exists "[i]f several persons jointly commit a criminal act by participating in the act of commission or in some other way […]." It is sufficient to prove that apart from **S.R.** other persons participated jointly in the commission of the act. And in fact it is substantiated by the evidence. Even if at his personal criminal responsibility the Judgment does not mention the unidentified KLA soldiers acting in complicity with **S.R.**, complicity still stands by having **H.H.** and **S.H.** acting in concert with him. The factual situation is determined correctly also in regard of **S.R.** and the arguments of the Appeal opposing this view are ungrounded. According to the defence counsel, the Court violated the criminal law because it convicted **S.R.** for complicity despite that its legal prerequisites, such as a written or oral plan of actions individualized to each accomplice, were not substantiated. The Appellate Prosecutor submits that what the defence claims is not required by the law. The Appellate Prosecutor does not share the argumentation of the defence counsel as to the sentence and submits that the punishment imposed on **S.R.** is proportionate and in accordance with the law.

III. Findings of the Panel

56. The Court of Appeals notes at the outset that in parts, where the Appeals of the Defence Counsels overlap, the Panel will not discuss each Appeal separately, but handles identical arguments of the Appellants together.

A. Alleged Violation of the Procedural Law

57. The Court of Appeals disagrees with the argument that the District Court has substantially violated the norms of procedural law, put forward by all Appellants.

58. The Defence Counsels for **S.G.**. and **R.A.** contest the District Court's Judgment because of the contradictions within the enacting clause. However, neither of the Appellants specifies in what respect the enacting clause contradicts itself. The Panel notes that as such a contradiction only a situation could be seen, where there are logical inconsistencies between different decisions articulated by the Court in the enacting clause. None of such inconsistencies are referred to in the Appeals, nor can they be identified in the District Court's judgment by this Panel.

59. In the Appeals by the Defence Counsels for **S.G.**., **R.A.**, **S.H.** and **S.R.** it is stated that there are contradictions between the enacting clause and the reasoning. The Defence Counsel for **S.R.** also sees contradictions within the reasoning. Just like in regard of the argument of contradictions within the enacting clause, the Court of Appeals fails to see the violation. The conclusions of the District Court are based on the assessment of the facts and the law and there are no logical contradictions between what has been established by the Court and concluded on the ground of it. Merely the fact that the Appellants do not agree with what has been concluded by the Court, does not constitute the violation asserted in the Appeals.

60. The Defence Counsel for **H.H.** sees a contradiction between reasoning of the Judgment and the minutes of the hearing in the fact that **H.H.** was convicted of repeated beating of witness N, although during the trial even this witness himself spoke only about one beating. The Court of Appeals does not concur with the criticism of the Appellant. According to the enacting clause of the Contested Judgment **H.H.** was convicted of torturing witness N (together with **S.H.** and unidentified KLA members) on 3 May 1999 by attempting to obtain information and confessions from him while repeatedly beating him with wooden sticks. It is obvious for this formulation, that **H.H.** has been convicted for only one incident, which lasted for a prolonged period. During this period **H.H.**, together with other persons, hit the victim with wooden sticks for several times. Hence the usage of the word repeatedly is appropriate. This does not however refer in any way as if **H.H.** would have been found guilty of violating the bodily integrity of witness on more than one occasion.

61. In similar vein the Defence Counsel for **R.A.** finds that his client has been falsely convicted of having beaten witness I.R. on an unspecified number of occasions, when actually this witness has only stated that this Defendant beat him twice. The Court of Appeals notes that what is asserted by the Defence Counsel is wrong and does not stand in the enacting clause of the District Court's Judgment. **R.A.** has in fact been convicted of having violated the bodily integrity of I.R. twice. He has, however, also been found guilty of having given orders to unidentified KLA soldiers punch and kick I.R. and this indeed for an unidentified

number of occasions. Such a conclusion is in no way in contradiction with the statement of witness I.R. or any other evidence assessed by the District Court. On the contrary, at the hearing on 4 May 2011, I.R. has stated that **R.A.** had instructed a female to beat him with a stick on 25 or 26 May 1999.

62. The Defence Counsels for **S.G.**. and **S.R.** contest the conclusion of the District Court as to the applicability of Common Art 3 GC and respectively also CCSFRY Art 142 in the case at hand and find that such a conclusion is in contradiction with what was actually established by the District Court. The Court of Appeals does not agree with this argument. In para-s 34-36 the District Court writes the following:

> 34. […] Under Article 23(1)(i) KCCP, district courts are competent to hear criminal cases involving charges for which the law allows the imposition of a penal sentence of at least five years. This includes the matters for which the defendants are charged on this indictment.
> 35. Article 22 combined with Article 142 CCSFRY, reflected in articles 23 and 120 of the CCK gives jurisdiction to try War Crimes against the Civilian Population to the District Court level.
> 36. Article 106 CCSFRY, reflected in Article 101(2) CCK, extends that competence to include offences which were committed by citizens of SFRY abroad (which necessarily includes the territory of Albania) and therefore grants to Mitrovica DC the competence/jurisdiction to try the war crimes alleged to have been committed by **S.G.**., **R.A.** and the other co-defendants.

63. Further in para-s 42-46 the District Court adds:

> "42. The essential principles that can be derived from these cases are as follows:
> 1. An armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state. There is no real challenge by the defence to the proposition that at the relevant time there was an internal armed conflict in Kosovo.
>
> 2. Common Article 3, in particular where it applies to civilians (GC4) should be given the widest possible interpretations in both temporal and geographical terms, since to do otherwise is to defeat the purpose of these provisions. Thus within one state, it is not necessary to prove that armed conflict existed in every single municipality, it is sufficient that it existed within the larger region where the municipalities existed, in other words the entirety of the state. It should be noted that the ICTY in none of these cases was expressly required to determine the situation where the alleged conduct occurred across an international boundary in a 3rd country. As the ICTY was not expressly considering such a situation, nothing in the quoted judgments can be considered to be excluding such a situation.
>
> 3. What is required is a nexus/link between the defendant, the victim, the alleged criminal conduct and the armed conflict and that the alleged conduct occurred on territory under the control of one of the Parties to the conflict. On the alleged facts of this case, it is said that the Defendants behaved in the way alleged because of their membership of KLA, that the victims were selected for the alleged treatment because of their assumed beliefs or sympathies in relation to armed conflict which was then taking place and that the alleged conduct was inflicted because of those sympathies. In every case, the alleged conduct occurred within KLA Camps at Kukes

and Cahan. There is no doubt at all that these amounted to territory under the clear control of a party to the conflict, namely the KLA. In other words, a clear nexus between the defendants, victims, conduct, treatment and territorial control is alleged. Nothing in any of the quoted cases prevents this from amounting to a war crime just because the geographical location of the events was in Albania. Nothing in the alleged conduct deprives this Court of jurisdiction just because the geographical location of the events was in Albania.

43. Thus, it is clear to the Panel that it has jurisdiction and is competent to try cases involving persons previously of Yugoslav citizenship and currently of Kosovo citizenship for offences which occurred outside the territory of Kosovo where the offences alleged constitutes criminalized conduct within Kosovo and that the particular offences alleged in the instant indictment are capable, if the acts are in fact proved, of being classified as war crimes, regardless of the fact that such crimes occurred within the territory of a third party nation (Albania) which was not itself a party to the conflict. Any other conclusion would defeat the clear purposes of the Geneva Conventions and Additional Protocols an would run counter to the prevailing criminal code of the Socialist Federal Republic of Yugoslavia, the current criminal code of Kosovo, the strict letter and the spirit of the Geneva Conventions and Additional Protocols and against all common sense.

44. At the material time, there was both an internal and international armed conflict in which the KLA were engaged in a war of liberation against Serb forces both regular and irregular, such as engaged the provisions of Common Article 3 of the Geneva Conventions 1949, & Art 4 & 5(1) of APII 1977.

45. The KLA had established and maintained camps within Albania at Kukes and Cahan. Those camps were used for a variety of purposes including logistics, transit accommodation for soldiers en route to the fighting, training, administration, headquarters & a detention facility in which ethnic Kosovo Albanians who were suspected of collaboration with the Serb forces were detained, questioned and ill-treated.

46. Despite the physical location of these camps within the territory of Albania, there existed a clear nexus between the KLA, the victims of the detentions and the armed conflict within Kosovo sufficient to qualify such criminal acts as are found to be proved as war crimes within the meaning of International Humanitarian Law."

64. It is clear from the passages referred to above that the District Court has indeed established first the existence of an armed conflict between the KLA and Serbian forces, and second that in the course of this on-going conflict KLA was using and effectively controlling two bases on the territory of Albania. Only on the basis of these established facts, has the District Court drawn the conclusion that Common Art 3 GC and Art 142 CCSFRY are applicable in this case. Again – the criticism raised by the Appellants would only be relevant, if there would be a logical contradiction between the reasoning and the conclusion of the Court. Such a contradiction is not present in the case at hand.

65. The Court of Appeals agrees on the evaluation of the District Court as concerning the applicability of Common Art 3 GC and respectively Art 142 CCSFRY also in substantive.

66. The Defence Counsels of **S.G.**. argues that it would be the only the right of one of the parties to make the claim as to the applicability and not by the District Court *ex officio*. This understanding of the Appellants is wrong. The evaluation, whether a norm applies to facts presented to the Court in an on-going case, lies entirely by the Court – *iura novit curia*. In fact the reason to have a Court to decide over facts is to have an independent body that will consider the facts and arguments presented by disputing parties and to tell the parties in a binding manner, what the law in regard of the facts presented is.

67. The Judgment of the District Court has also been appealed by the Defence Counsels for **S.G.**., **H.H.** and **S.H.** because of alleged lack of reasoning within it. The Panel does not agree to these arguments, finding them to be ill-founded and contradiction with the letter of the Contested Judgment. This Panel is on the viewpoint that the District Court has put considerable effort in reasoning its conclusions and comparing different evidence. This is amongst others clearly witnessed by the fact that the District Court has acquitted several Defendants on some counts they were indicted for, but also by a careful analysis as to the reliability of witness evidence and comparison to various pieces of evidence to each other in the Judgment.

68. The Defence Counsel for **R.A.** argues that his client should not have been convicted of any crime against Witness O, because this witness was never heard during the proceedings. The Court of Appeals disagrees with the Appellant. For finding the Defendant guilty of a crime against an injured party, it is not absolutely obligatory that the injured party should have been interrogated. It should be noted that the prosecution is free to choose, which evidence it wants use in support of its case and based on the evidence presented the trial court is free to take the decision whether the prosecution has been able to prove his case. Based on the evidence assessed by the District Court, it is proven beyond reasonable doubt that **R.A.** in fact beat this person. Witness I.R. has stated in the hearing on 4 May 2011 that he heard Witness O screaming before he was brought into the detention room. When he was brought in, Witness O had injuries from being beaten and his legs were heavily bruised. Witness O told I.R. that **R.A.** and others had beaten him after accusing him of joining FARK.[1]

B. Establishment of Facts

69. According to all Appellants the District Court has established the factual situation wrongfully and incompletely.

[1] **I.I.**, Minutes of Main Trial, 04 May 2011, Q 183, 203-206.

70. One of the main criticisms concerning the establishment of facts by the District Court has been the reproach that the Trial Panel has only inadequately assessed the contradictions between different witness statements and of discrepancies within the statements of certain witnesses. The Court of Appeals does not agree with such criticism and finds that the Appellants are targeting the Judgment on the assessment of the evidence without any reasonable arguments. It is the privilege of the trial panels to evaluate the evidence which they learnt first-hand during the main trial, and recalls the principle established by the Supreme Court of Kosovo in the case of Runjeva, Axgami and Dema :

> "[…] appellate proceedings in the PCPCK rest on the principle that it is for the trial court to hear, assess and weigh the evidence at the trial. The trial court, as the primary trier of fact, in hearing live witnesses, has the advantage of observing their demeanor. It therefore is best positioned to determine their credibility and reliability. Therefore, the appellate court is required to give the trial court a margin of the deference in reaching its factual findings. It should not disturb the trial court's findings to substitute its own, unless the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of fact, or where it's evaluation has been 'wholly erroneous'.
>
> In accordance with this approach the Supreme Court has not purported primarily to reconsider the factual findings made by the first instance court, but rather focused on examining whether the trial court evaluated evidence in accordance with logic and human experience and whether in doing it acted within the limits of discretion allowed to it under the law."

71. Indeed the District Court has put considerable effort in assessing the credibility of witnesses and also in comparing witness statements with each other and documentary evidence, leaving aside statements which were either not corroborated or inconsistent. The findings made by the Court are logical, in accordance with human experience and remain within the limits of its legal discretion.

72. According to the argument put forth by the Defence Counsel for **R.A.**, the apology to the witnesses K and M by **R.A.**, which was offered the very next day after the Defendant had punched these victims, shows that **R.A.** is a decent man and that the acts of violence were only not well thought gestures due to emotions and should not therefore be qualified as war crimes. The Court of Appeals finds that the remorse of **R.A.** does not turn the criminal offence committed by him into non-existent.

73. The Defence Counsel for **S.G.**. contests the conclusion of the Judgment of the District Court that **S.G.**. had commanding authority in Kukes and Cahan camps. According to the Appellant **S.G.**. was a sick man, who was not even able to perform any command duties and he in fact had no position in the military hierarchy of either Kukes or Cahan camps. His presence in both camps was only sporadic and connected to personal reasons. The Court of Appeals finds the assertions of the Defence Counsel misleading and not based on the evidence assessed by the District Court. The District Court has, based on a careful

assessment of witness evidence concluded that although the precise rank held by **S.G.**. is not clear from the evidence, what is clear, is that **S.G.**. was a senior member of KLA, holding authority over soldiers below him and he was in a position to give orders. The Court of Appeals is satisfied with this conclusion and notes that it the ability of a person to exercise authority over the others is a matter of fact. To be responsible for giving orders of crimes to be committed, it is hence not necessary that the person giving such orders holds a formal command position. It has been established to the satisfaction of this Panel by the District Court, that **S.G.**. in fact had such authority that other KLA members followed his orders in committing crimes against the injured parties in the case at hand. Consequently also the fact of how long did **S.G.**. stay in Kukes or Cahan camps does not bear any importance.

74. The Panel concurs with the evaluation of the Appellate Prosecutor, that the Judgment is free from the alleged violation also on the ground that the co-perpetrators could not be identified yet. According to Art 22 CCSFRY complicity exists "[i]f several persons jointly commit a criminal act by participating in the act of commission or in some other way […]." It is sufficient to prove that apart from **S.R.** other persons participated jointly in the commission of the act. And in fact it is substantiated by the evidence. Even if at his personal criminal responsibility the Judgment does not mention the unidentified KLA soldiers acting in complicity with **S.R.**, complicity still stands by having **H.H.** and **S.H.** acting in concert with him. Therefore the criticism of **S.R.**'s Defence Counsel in regard of wrongful establishment of co-perpetration is meaningless. The Defence Counsel has also argued that the responsibility of **S.R.** in the form of co-perpetration is excluded because there is no evidence of him having beforehand orally or in the writing drafted a plan to commit the crimes he was convicted of. The Panel notes that nothing like that is required by the law. Art 22 CCSFRY reads: "If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act." Art 31 CCK corresponds to that. It is not necessary for the responsibility as the co-perpetrator to have a previous agreement on the commission of the offence. It suffices, when the actions of the co-perpetrators are concerted in the course of perpetration of the offence.

C. Application of Substantive law

75. All Appellants find that because of the procedural violations and wrong establishment of facts the substantive law has been wrongfully applied to the detriment of the Defendants. Since the Court of Appeals has not found any of such violations to be present, this argument of the Appellants is without merit.

76. In the Appeals on behalf of the Defendant **S.G.**. and **R.A.** the issue of qualification repeated commission of the criminal offence has been brought up. The District Court has convicted both of these Defendants for several counts of War Crimes against Civilian Population and imposed a separate sentence on them for each individual count, although all their respective

acts infringe one and the same norm of substantive law – Art 142 CCSFRY. The Defence Counsels of both of these Defendants argue that their clients have in fact only committed one crime and should be punished only with one sentence. Hence the question before the Court of Appeals is, should repeated commission of the criminal offence of War Crimes against Civilian Population as foreseen by Art 142 CCSFRY be qualified as different separate counts that result in several separate punishments, *i.e.* one punishment for each individual count or should only one punishment be rendered for all such acts taken together. Art 48 (1) CCSFRY reads that if an offender by one deed or several deeds **has committed several criminal acts**, and if he is tried for all of the acts at the same time (none of which has yet been adjudicated), the court shall first **assess the punishment for each of the acts**, and then proceed with the determination of the integrated punishment (compounded sentence) for all the acts taken together. (The same is provided in Art 80 (1) CCK). There is no clear cut norm for the situation where the offender by several deeds commits only one criminal offence. However it is only logical from the norm above, that in such a case the formula given in Art 48 (1) CCSFRY does not apply and if a person by several deeds commits repeatedly only the same criminal offence, his acts should be qualified as one criminal offence and he should be punished with only one sentence for all individual episodes.

77. The Panel acknowledges that the Supreme of Kosovo has previously taken a different view on an analogous issue. This view has also been supported by the Appellate State Prosecutor, in the present case. The Supreme Court (acting as an appeals court, as according to criminal procedure norms in force before 1 January 2013) has in the criminal case against Latif Gashi *et alia*[2] stated the following:

> "[…] treating a number of acts of War Crimes Against the Civilian Population as only one "extended criminal act" pursuant to Article 142 of the CC SFRY would privilege the perpetrators and thus give a wrong signal in the way that the more relevant acts are committed, the better it would be for the perpetrators, when at trial once. The latter cannot be the intention of the Law, which aims to protect the civilian population in a most efficient manner. Additionally, handling war crimes as "extended criminal acts" would result in preventing prosecution from holding alleged perpetrators responsible for similar crimes, which also would amount to the level of war crimes, when these crimes are newly discovered after the respective perpetrators already have been found guilty for war crimes before (ne bis in idem)."

78. This Court, however, would see it more appropriate to treat only an act the perpetration of which stretches over a period of time and which simultaneously is also covered by a common intent, ~~can be qualified~~ as an extended criminal act, whereas a simple repetition of a crime in itself cannot be mistaken for an extended act. In cases, where the same criminal

[2] Ap.-Kž. No. 89/2010, dated 26 January 2011

law norm is infringed repeatedly but with a separate intent on each occasion, all the underlying acts have to be qualified as one and the same criminal offence and punished with only one sentence. In criminal law theory this situation is known as a variant of ideal concurrence. One of the typical situations, where the issue of ideal concurrence becomes relevant, is breach of criminal law norms, entailing an alternative list of acts all falling under the same norm (such as the criminal offence foreseen in Art 142 CCSFRY). The approach supported by the Supreme Court and the Appellate State Prosecutor would apply, however, only to real concurrence of offences, *i.e* the situation described in Art 48 (1) CCSFRY or 80 (1) CCK.

79. This approach has been widely accepted in the legal literature and court practice across Continental Europe. The Court of Appeals refers to the commentary to Art 142 CCSFRY by L. Lazarevic:

> "The incriminated activities have been alternatively put in the law, so that the act can be performed by each of the activities. However, if one person performs several identical activities or several different activities incriminated in this Article, this will be only one criminal act of war crime against civilian population, since in this case, it ensues from the very legal description of the criminal act that this is a unique criminal act, regardless of the number of the performed individual activities. According to the verdict of the Supreme Court of Serbia Kz-2539/56, there is one criminal act of war crime against the civilian population, in spite of the perpetrator performing particular acts in different places, against different persons, in longer time periods and in a different manner."[3]

80. The concern raised by the Supreme Court in the referred case and supported Appellate State Prosecutor, that when treating different episodes of war crimes as only one offence, it would result in preventing prosecution from holding alleged perpetrators responsible for similar crimes, which also would amount to the level of war crimes, when these crimes are newly discovered after the respective perpetrators already have been found guilty for war crimes before (*ne bis in idem*), is not valid either. The *ne bis in idem* rule precludes the possibility to adjudicate a person repeatedly for the same facts, but it in no way prevents the possibility to qualify newly discovered facts under the same norm of substantive criminal law.

81. For the reason above the Court of Appeals re-qualifies the acts of **S.G.**.. The Defendant **S.G.**. is found guilty of War Crimes against Civilian Population in violation of Art 142 of the CCSFRY, also foreseen in Art-s 120 and 121 of the CCK, and in violation of Common Article 3 GC and Art-s 4 and 5(1) of AP II, because he:

[3] Ljubisha Lazarevic, Commentary of the Criminal Code of FRY, 1995, 5th Edition, "Savremena Administracija", Belgrade.

5) from on or about 18 May until 03 June 1999, during a time of internal armed conflict in Kosovo, the accused in his capacity as a member of the Kosovo Liberation Army ("KLA") holding a command position in the improvised prison within a KLA military compound in the town of Kukes in the Republic of Albania, jointly together with other KLA members treated inhumanely (e.g. the filthy living conditions, lack of adequate sanitation, food and water) an undefined number of civilian prisoners, including Witness A, Witness B, Witness C, Witness D, Witness E, Witness F, Witness H and Anton Bisaku;
6) on or about 19 May 1999, during a time of internal armed conflict in Kosovo, the accused in his capacity as a member of the KLA holding a command position in the prison in the KLA camp in Kukes, in co-perpetration with other KLA members, tortured civilian prisoners Witness A, Witness B, Witness C, Witness D, Witness E, Witness F, Witness H and Anton Bisaku by attempting to obtain information and confessions from the victims while repeatedly using violence against them and ordering other KLA members to do the same;
7) on several occasions from on or about 18 May until 03 June 1999, during a time of internal armed conflict in Kosovo, the accused in his capacity as a member of the Kosovo Liberation Army ("KLA") holding a command position in the prison in the KLA camp in Kukes, the accused violated the bodily integrity of an undefined number of civilian prisoners including Witness A, Witness B, Witness C, Witness D, Witness E, Witness F, Witness H and Anton Bisaku by means of severe ill-treatment and beatings which occurred inside the makeshift cells where such prisoners were detained;
8) on or about 12 April 1999, during a time of internal armed conflict in Kosovo, the accused in his capacity as a member of the KLA, in co-perpetration with **R.A.**, violated the bodily integrity of I.R., a civilian detained in an improvised prison in the KLA camp located in Cahan, Republic of Albania, by repeatedly and severely beating him with a crutch and a wooden stick.

82. The Court of Appeals also re-qualifies the acts of **R.A.**. The Defenedant **R.A.** is found guilty of War Crimes against Civilian Population in violation of Art 142 of the CCSFRY, also foreseen in Art-s 120 and 121 of the CCK, and in violation of Common Article 3 GC and Art-s 4 and 5(1) of AP II, because he:
3) on or about 12 April 1999, during a time of internal armed conflict in Kosovo, the accused in his capacity as a member of the KLA, in co-perpetration with **S.G.**., violated the bodily integrity of I.R., a civilian detained in an improvised prison in the KLA camp located in Cahan, Republic of Albania, by repeatedly and severely beating him with a crutch and a wooden stick;
4) during a time of internal armed conflict in Kosovo, the accused in his capacity as a member of the KLA, violated the bodily integrity of the following civilians detained in the prison in the KLA camp in Cahan:

- I.R., by beating him in a number of ways including by striking him with a heavy-duty shoe on or about 14 April 1999, and by ordering other unidentified KLA soldiers to punch and kick I.R. on an undefined number of occasions (especially when I.R. was on his way from the cell where he was detained to the toilet) on unspecified dates between 12 April and mid-June 1999;

- Witness M, by repeatedly striking him on his back with an iron bar on or about 17 April 1999;

- Witness K, Witness M, Witness N, and Witness O by beating them in a number of ways, including by striking them with a wooden stick and by ordering other unidentified KLA soldiers to beat them, on unspecified dates between 12 April and mid-June 1999.

83. The Defence Counsel for **S.R.** argues in his Appeal that his client has unlawfully been convicted of the war crime both in the form of co-perpetration according to Art 22 CCSFRY and according to the form of responsibility sanctioned by Art 26 CCSFRY (organisation of criminal association), although the latter form of responsibility should be absorbed in co-perpetration. The Court of Appeals notes that **S.R.** has not been convicted of organisation of criminal association and consequently the argument of the Appellant is meaningless.

D. Sentencing

84. Analogously as in regard of the Appellants arguments concerning the wrongful and incomplete establishment of the factual situation, the Court of Appeals notes that also the issue of determining the sentences lies primarily with the trial court and the appellate court, when reviewing the verdict of the court of first instance, should concentrate only on procedural or substantive mistakes made by imposition of the sentences. It should be noted that sentences for **H.H.**, **S.H.** and **S.R.** remain well below the median of the sentence applicable for the criminal offence they were convicted of. The sentence (aggregate sentence) for **S.G.**. and **R.A.** is indeed harsher, but they were both convicted for having committed the same offence on more than one occasion. Therefore the arguments put forth in all of the Appeals, as if the sentences imposed on the Defendants have been too severe, are without merit. The Court of Appeals does not concur with any of the Appellants arguing that either aggravating factors have been wrongly or mitigating circumstances have been unlawfully been left without due consideration by the District Court (Defence Counsels for **S.G.**., **R.A.**, **H.H.** and **S.R.**). The District Court has correctly evaluated the existence or absence of aggravating and mitigating circumstances.

85. Since the Court of Appeals re-qualifies the acts, for which **S.G.**. and **R.A.** were indicted under Art 142 CCSFRY, as only one count, their sentences for these crimes have to be reassessed.

86. **S.G.**. was sentenced respectively to 8, 12, 9 and 8 years of imprisonment for each count of War Crimes against the Civilian Population. The Court of Appeals sentences **S.G.**. with 15 years of imprisonment for the War Crimes against the Civilian Population. In imposing this punishment the Panel takes into account as aggravating circumstances the factors mentioned in para 267 of the Contested Judgment and as a mitigating factor the current state of health of **S.G.**.. However, although the Court of Appeals acknowledges that **S.G.**. needs medical treatment and suffers from various injuries and diseases, the Panel finds that in the face of the charges against him and the big number of aggravating factors merely his bad state of health shall not bring to any deduction from the sentence. For the Unauthorized Ownership, Control, Possession or Use of Weapon **S.G.**. was punished with a fine of 4,000.00 Euro. The aggregate punishment was determined in 15 years of imprisonment and a fine of 4,000.00 Euro. The time spent in detention on remand was credited. The Court of Appeals leaves the aggregate punishment for **S.G.**. unchanged.

87. **R.A.** was sentenced respectively 8 and 9 years of imprisonment for each count of War Crimes against the Civilian Population. The Court of Appeals sentences **R.A.** with 12 years of imprisonment for the War Crimes against the Civilian Population. In imposing this punishment the Panel takes into account as aggravating circumstances the factors referred to in para 269 of the Contested Judgment and as a mitigating factor the current state of health of **R.A.**. However, although the Court of Appeals acknowledges that **R.A.** needs medical treatment and suffers from various injuries and diseases, the Panel finds that in the face of the charges against him and the big number of aggravating factors merely his bad state of health shall not bring to any deduction from the sentence.

E. Other issues

88. For the sake of correct interpretation of law a specific issue that needs to be addressed in regard of the Contested Judgments is the question of the criminal offence of torture as a discrete crime under international law *vs*. torture as a war crime. The Court of Appeals notes that in that respect the reference made to Art 1 of the 1984 UN Torture-convention in the reasoning of both Contested Judgments is incorrect because each of these crimes has different constitutive elements. According to the Torture Convention Art 1 the crime requires: a) any act by which severe pain or suffering is intentionally inflicted on a person; b) for purposes of obtaining from him or a third person information or a confession, punishing him, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind; c) instigation, consent or acquiescence of a public official or other person acting in an official capacity. The war crime of torture does not require the last of these elements. It suffices when severe pain or suffering is intentionally inflicted to a person in order to achieve certain goals (obtaining information or confession, punishment, intimidation, coercion). This is obvious from both the documents defining war crimes – see

e.g the Elements of Crimes adopted by the Assembly of States Parties to the International Criminal Court – art 8(II)(a)(ii) and 8(II)(c)(i) or; as well as from the jurisprudence – see *e.g.* ICTY Judgment of 22 February 2001, Prosecutor *vs*. Kunarac *et al*, para 496. Hence, in the present case it would not be of any relevance whether **S.G.**. or **S.R.**, when being convicted for torture, had any position of authority.

89. Notwithstanding however what has been said above, the Panel finds that the conclusions of the District Court are appropriate in finding the Defendants to be guilty of the war crime against civilians *inter alia* in the form of torture. The evidence assessed by the District Court in this regard is compelling for such a conclusion.

90. The Panel also deems it necessary to draw attention to the reasoning of the District Court's 13 October 2011 Judgment. Namely, when making reference to assessed witness evidence and documents read into the record both contested judgments: the one in regard of the Defendants **S.G.**., **R.A.**, **H.H.** and **S.H.** dated 29 July 2011 and the one in regard of the Defendant **S.R.** dated 13 October 2011 are in most part identical (there are only a couple of extra documents referred to in the latter judgment). However, it must be noted that concerning the Defendant **S.R.** the criminal case was joined to already on-going trial against the Defendants **S.G.**. and **R.A.**, it was later severed again and a separate judgment was rendered concerning him. He was only indicted for his activities in Cahan camp. Hence all the evidence relevant to only acts committed in Kukes camp (concerning the Defendants **S.G.**. and **R.A.**) are completely irrelevant as to reaching in conclusion of his guilt or innocence. Therefore reference made to such evidence in 13 October 2011 Judgment of the District Court is superfluous. Only evidence, based on which the verdict against the Defendant in a case is taken, should be included into the judgment. Everything else is only confusing and might raise false understandings in regard of the conclusions reached by the Court.

91. For the reasons above the Court of Appeals decides as in the enacting clause.

Prepared in English, an authorized language.

Presiding Judge

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Tore Thomassen
EULEX Judge

Panel member	Panel member	Recording Officer
_____	_____	_____
Bertil Ahnborg EULEX Judge	Fellanza Kadiu Judge	Andres Parmas EULEX Legal Officer

COURT OF APPEALS OF KOSOVO
Pakr 966/2012
2 October 2013