SUPREME COURT

Case number: **Plm. Kzz. 18/2016**
(P. no 448/2012 Basic Court of Prishtinë/Priština)
(PAKR 440/13 Court of Appeals)

Date: **13 May 2016**

IN THE NAME OF PEOPLE

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Dariusz Sielicki (Presiding and Reporting), EULEX Judge Anna Adamska-Gallant and Supreme Court Judge Nebojsa Boricic as Panel members, and EULEX Legal Officer Sandra Gudaityte as the Recording Officer, in the criminal case against defendants:

L.G., citizen of…, ID No…., son of…, date of birth…, place of birth…, current residence…, academic degree…, currently not in detention;

N.M., citizen of…, ID No…., son of…, date of birth…, place of birth…, current residence…, academic degree…, currently not in detention;

RR.M., citizen of…, ID No…., son of…, date of birth…, place of birth…, current residence…, academic degree…, currently not in detention;

charged under the Special Prosecution Office of the Republic of Kosovo's (hereinafter "SPRK") amended indictment Hep. No. 65/2002 dated 30 June 2003, limited to Count 8, and the alleged events at the Llapashtica camp only, with the following criminal offence: *War Crime against the Civilian Population,* in particular, inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror, and torture, in violation of

Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (Official Gazette SFRY No. 44 of 8 October 1976) (hereinafter "CCSFRY"), in conjunction to Articles 22, 24, 26, and 30 of the CCSFRY, because from October 1998 until late April 1999, L.G., N.M., and RR.M., with superior and personal liability, acting in concert with other unidentified individuals and pursuant to joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians, illegally detained in the detention centre located at Llapashtica in attempt to force those detained to confess to acts of disloyalty to the Kosovo Liberation Army (hereinafter "KLA");

acting upon the requests of protection of legality filed by defence counsels B.I. and L. S. on behalf of defendant RR.M. on 17 December 2015, defence counsels M.S. and B.T. on behalf of defendant L.G. on 6 January 2016, defence counsel R.G. on behalf of defendant N.M. on 8 January 2016, and defendant N.M. on 5 February 2016;

having considered responses of the Office of the State Prosecutor (hereinafter "Prosecution") filed on 5 February 2016 regarding the request filed by defence counsels on behalf of defendant RR.M., on 16 February 2016 regarding requests filed by defence counsels of defendants L.G. and N.M., and on 22 March 2016 regarding the request filed by defendant N.M.;

having deliberated and voted on 13 May 2016;

pursuant to Articles 432, 433 and 435 of the Criminal Procedure Code of Kosovo (hereinafter "CPC")

renders the following

JUDGMENT

The request for protection of legality filed by defendant N.M. on 5 February 2016 is hereby dismissed as belated.

The requests for protection of legality filed by defence counsels B.I. and L.S. on behalf of defendant RR.M. on 17 December 2015, defence counsels M.S. and B.T. on behalf of defendant L.G. on 6 January 2016, defense counsel R.G. on behalf of defendant N.M. on 8 January 2016, are hereby rejected as unfounded.

REASONING

I. Procedural background

1. On 19 November 2002, the indictment was filed against L.G., N.M., RR.M., and now diseased N.K. before the District Court of Prishtinë/Priština. The indictment was subsequently amended on 4 February, and on 30 June 2003. The defendants were charged with 14 counts of criminal offence of war crimes against civilians, in violation of Article 142 of the CCSFRY.

2. The original trial was held before the District Court of Prishtinë/Priština which rendered its Judgment C Nr. 425/2003 on 16 July 2003. The judgment dismissed counts 4, 6, 7, 10, and 13, and charges of inhumane treatment, beatings and torture of civilians allegedly committed in detention centres of Majac and Potok of counts 5 and 8 in relation to all defendants. The Judgment further dismissed counts 1 and 11 in relation to L.G., counts 12 and 14 in relation to N.M., and count 14 in relation to RR.M.. The defendants were found guilty for the criminal offence of War Crimes against Civilians in relation to the remaining counts. The defendants were sentenced as follows: L.G. to 10 years, N.M. to 13 years, and RR.M. to 17 years of imprisonment.

3. Defence counsels filed their appeals against Judgment C Nr. 425/2003 on 29, 30, and 31 December 2003, and the SPRK appealed the Judgment in relation to the sentence of L.G. on 13 January 2004.

4. The Supreme Court in its Judgment AP-KZ 139/2004 of 21 July 2005 dismissed counts 1, 2, 3, and 12 in relation to all defendants, and acquitted all defendants on count 11 because the factual allegations were not proved beyond reasonable doubt. Counts 5, 8, 9, and 14 were

sent back for the re-trial pursuant to Article 381 of Law on Criminal Proceedings (Official Gazette No. 26/86) (hereinafter "LCP").

5. On 14 April 2009, the SPRK filed an amended indictment in which a single count of War Crimes against Civilians was divided into three sub-counts encompassing counts 4, 5, 6, 7, 8, 9, 11, 13, and 14 of the original indictment. On 8 July 2009, the District Court of Prishtinë/Priština rejected the amended indictment.

6. During the re-trial, the panel heard evidence in relation to counts 5, 9, and 14. However, the panel concluded that the evidence related to count 8 has already been properly assessed and confirmed by the Supreme Court in its Judgment AP-KZ 139/2004 of 21 July 2005, and that only the sentence had to be re-assessed in the re-trial. During the re-trial, the SPRK withdrew the charge of count 9. On 2 October 2009, the District Court of Prishtinë/Priština issued Judgment P 526/05 in which L.G. was found guilty of the criminal offence of War Crimes against Civilians pursuant to Article 142 as read with Articles 22, 24, 26, and 30 of the CCSFRY as described in counts 5, 8, and 14; N.M. and RR.M. were found guilty of the criminal offence of War Crimes against Civilians pursuant to Article 142 as read with Articles 22, 24, 26, and 30 of the CCSFRY as described in counts 5, and 8. Consequently, L.G. was sentenced to 6 years of imprisonment, and was ordered to compensate the injured party M.S. the damages (a total of five thousand Euros). Further, N.M. was sentenced to 3 years, and RR.M. to 4 years of imprisonment.

7. Defence counsels of all three defendants filed their appeals against Judgment P 526/05 of 2 October 2009 on 15, 16, and 18 February 2010.

8. On 26 January 2011, the Supreme Court issued Judgment AP-KZ No. 89/2010 in which the Judgment of the District Court of Prishtinë/Priština No. P 526/05 of 2 October 2009 was affirmed in relation to counts 5 and 14. The conviction on count 8 was quashed and returned to the District Court of Prishtinë/Priština for a second re-trial. The Supreme Court concluded that the evidence was not properly assessed as the re-trial panel failed to hear the witnesses afresh on count 8. The Supreme Court concluded that even though the evidence related to count 8 has already been properly assessed by trial panel in Judgment C Nr. 425/2003 on 16

July 2003 and confirmed by the Supreme Court in its Judgment AP-KZ 139/2004 of 21 July 2005, the Judgment of 16 July 2003 was quashed **in its entirety** because "*various counts in the indictment were treated as one singular was crime as to each defendant*". For this reason, the Supreme Court considered that the re-trial panel could not limit its assessment only to the sentence, and had to re-examine the evidence related to count 8 afresh.

9. On 7 June 2013, the Basic Court of Prishtinë/Priština issued Judgment P. no. 448/2012 in which defendants L.G., N.M., and RR.M. were found guilty of War Crime against Civilian Population, in particular, inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror, and torture in violation of Article 142 of CCSFRY, in conjunction with Articles 22, 24, 26, and 30 of CCSFRY, because from October 1998 until late April 1999, L.G., N.M., and RR.M., with superior and personal liability, acting in concert with other unidentified individuals and pursuant to joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians, illegally detained in the detention centre located at Llapashtica in attempt to force those detained to confess to acts of disloyalty to the KLA.

10. The defendants were sentenced under count 8 as follows: L.G. to 5 years, N.M. to 3 years, and RR.M. to 4 years of imprisonment. Pursuant to Article 48(2) of the CCSFRY and Article 357(5) of the LCP, the aggregate punishments were determined as follows: L.G. was sentenced under counts 5, 8, and 14 to an aggregate punishment of 6 years; N.M. was sentenced under counts 5 and 8 to an aggregate punishment of 3 years; and RR.M. was sentenced under counts 5 and 8 to an aggregate punishment of 4 years of imprisonment.

11. Defence counsels filed an appeal on behalf of L.G. on 8 October 2013, on behalf of RR.M. on 16 October 2013, and on behalf of N.M. on 22 October 2013.

12. On 11 August 2015, the Court of Appeals rendered Judgment PAKR 440/13. The Court of Appeals dismissed the appeal of defence counsel F.B. filed on behalf of N.M. as belated. The appeals of defence counsels M.S. and B.T. filed on behalf of L.G., and defence counsel A.R. filed on behalf of RR.M. were rejected as unfounded. The Court of Appeals modified the challenged judgment in its enacting clause as follows: the time the defendant L.G. spent in

detention from 28 January 2002 until 23 July 2003 and from 3 October 2009 until 9 June 2010, and the time the defendant RR.M. spent in detention from 11 August 2002 until 23 July 2005 was credited towards the sentence. Further, the Court of Appeals *ex officio* modified the challenged judgment in its enacting clause as follows: the time the defendant N.M. spent in detention from 28 January 2002 until 23 July 2003 was credited towards the sentence.

13. Requests for protection of legality against the Judgments rendered in the first and the second instance were filed by defence counsels B.I. and L.S. on behalf of defendant RR.M. on 17 December 2015, defence counsels M.S. and B.T. on behalf of defendant L.G. on 6 January 2016, defence counsel R.G. on behalf of defendant N.M. on 8 January 2016, and defendant N.M. on 5 February 2016.

14. The Prosecution filed its responses on 5 February 2016 regarding the request filed by defence counsels on behalf of defendant RR.M., on 16 February 2016 regarding the requests filed by defence counsels of defendants L.G. and N.M., and on 22 March 2016 regarding the request filed by defendant N.M. The Prosecution moves the Supreme Court to reject the requests as unfounded.

II. Submissions of the parties

Submissions of N.M. and defence counsels L.G.

15. N.M. and defence counsels of L.G. in their requests for protection of legality request the Supreme Court to annul Judgment of the Basic Court of Prishtinë/Priština P no. 448/2012 dated 7 June 2013 and Judgment of the Court of Appeals PAKR 440/2013 dated 11 August 2015, and send the case back to the first instance court for re-trial and reconsideration.

16. N.M. and defence counsels of L.G. claim that the judgments contain serious violation of criminal procedure law, specifically, the violation of Article 364(1)(8), (9), and (11) of the LCP. N.M. and defence counsels of L.G. further argue that both judgments contain violations of criminal law. Each allegation will be addressed in detail in the reasoning of the present judgment.

Submissions of defence counsel of N.M.

17. The defence moves the Supreme Court to modify Judgment of the Basic Court of Prishtinë/Priština P no. 448/2012 dated 7 June 2013 and Judgment of the Court of Appeals PAKR 440/2013 dated 11 August 2015, and to acquit N.M. of all charges in absence of facts that he committed the criminal offences, or to send the case back to the first instance court for reconsideration. The defence counsel claims that both challenged judgments are in violation of the law and essential violations of the rules of the criminal procedure. Each allegation will be addressed in detail in the reasoning of the present judgment.

Submissions by defence counsels of RR.M.

18. Defence counsels in their request for protection of legality moves the Supreme Court to acquit RR.M. regarding count 8 of the indictment because the acts for which he is charged, even if proven beyond reasonable doubt, do not constitute the necessary elements of the criminal offence under Article 142 of CCSFRY. The courts failed to prove that there were attacks committed against civilian population, namely Kosovo Albanians, and that those attacks were widespread and systematic. Alternatively, the defence counsels move the Supreme Court to annul Judgment of the Basic Court of Prishtinë/Priština P no. 448/2012 dated 7 June 2013 and Judgment of the Court of Appeals PAKR 440/2013 dated 11 August 2015, and order a re-trial.

19. Defence counsels argue that both judgments contain essential violations of provisions of the criminal procedure code, and the provisions of the criminal law. Each allegation will be addressed in detail in the reasoning of the present judgment.

Prosecutor's replies

20. The Prosecution in its replies moves the Supreme Court to reject all requests submitted by defence counsels on behalf of L.G., N.M. and RR.M., and by defendant N.M. as ungrounded.

Additionally, the Prosecution moves to dismiss the request of defendant N.M. as belated pursuant to Article 435(2) of the CPC.

21. The detailed arguments submitted by the Prosecution in its replies, will be addressed in the reasoning of the present judgment.

III. Applicable Law

22. Transitional provisions related to the applicable law are included in Chapter XXXVIII of the CPC which entered into force on 1 January 2013. According to Article 545(1) of the CPC "*the determination of whether to use the present code of criminal procedure shall be based upon the date of the filing of indictment".* This provision shall be read together with Legal Opinion of the Supreme Court No. 56/2013 of 23 January 2013 which states that "*in criminal proceedings initiated prior to entering into force of the present Code, for which the main trial has already commenced, but has not been completed or completed but sent back for the re-trial by means of ordinary or extraordinary legal remedy, provisions of the old Code shall apply mutatis mutandis until the decision <u>becomes final</u>*" (emphasis added). As such, the previous criminal procedure codes can be applicable only in cases where the indictment was filed and confirmed prior to the entry into force of the present CPC, and until the decision in the case becomes final.

23. The Panel notes that even though the amended indictment in the present case was filed on 30 June 2003, and the case was sent for re-trial in 2005 and in 2011, the Court of Appeals Judgment PAKR 440/13 issued on 11 August 2015 shall be considered as the final judgment in this case. The requests filed by the defence on behalf of the defendants, and by the defendant initiated a new criminal proceeding of Extraordinary Legal Remedy. According to Article 539 of the CPC, "*any criminal proceedings initiated after the present code entered into force shall be fully compliant with the terms of the present code*". The requests for protection of legality were filed on 17 December 2015, 6, 8 January 2016, and 5 February 2016; therefore, the applicable law in the present criminal proceeding is the new CPC.

24. The Panel finds that the Court of Appeals correctly applied the LCP in their proceedings. In accordance to Article 544 of the CPC and Article 500 of the Provisional Criminal Procedure Code of Kosovo, the LCP is the applicable law in the second instance proceedings.

IV. Composition of the Panel

25. The jurisdiction of EULEX judges is regulated by Law 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in Kosovo (hereinafter "Omnibus Law"), approved on 23 April 2014 and entered into force on 30 May 2014 *inter alia* amending Law 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (hereinafter "Law on Jurisdiction"). In accordance to Article 2.3 of the Law on Jurisdiction, on 18 June 2014, the Head of EULEX Kosovo and Kosovo Judicial Council signed an agreement on the relevant aspects of the activity and cooperation of EULEX Judges with the Kosovo Judges working in the local courts (hereinafter "Agreement").

26. According to Article 3.1 of the Law on Jurisdiction, EULEX judges assigned to criminal proceedings will have jurisdiction and competence over "ongoing cases". The term of "ongoing case" is explained in Article 1.A of the Omnibus Law. In the present case, the Panel unanimously agreed that this case was assigned to EULEX judges prior to 15 April 2014, and thus shall be considered as an "ongoing case".

27. The general rule on the composition of a panel in the criminal proceedings is regulated by Article 3.3 of the Law on Jurisdiction which states that "*panels in which EULEX judges exercise their jurisdiction in criminal proceedings will be composed of a majority of local judges and presided by a local judge"*. However, this provision should be read together with the provisions set out in the Agreement which specifies the applicable rules in the "ongoing cases". According to Point 2 of the Agreement, "*in all ongoing cases the trial panels consisting of a majority of EULEX judges and will continue with a majority of EULEX judges in the panel for the continuation of all phases of the trial and the remainder of the proceedings".* Therefore, the Panel concludes that Article 3 of the Law on Jurisdiction has to

be interpreted in the light of the clarifications set out in the Agreement. In cases where the panels were composed of a majority of EULEX judges with a EULEX judge presiding prior to 15 April 2014, all the following stages of the proceedings shall be continued with the majority of EULEX judges and presided by EULEX judge.

V. Findings of the Supreme Court

Admissibility of the requests of protections of legality

28. According to Articles 418(3) and 433(2) of the CPC, the defendant may file a request for protection of legality within three (3) months of the service of the final judicial decision on the defendant. The judgment of the Court of Appeals PAKR 440/13 of 11 August 2015 was served to defendant N.M. on 3 November 2015. The request for protection of legality was filed by N.M. on 5 February 2016. Therefore, pursuant to Article 435(2) of the CPC, the Panel finds that the request for protection of legality filed by defendant N.M. is belated and is hereby dismissed.

29. The Panel finds that the requests for protection of legality filed by defence counsels B.I. and L.S. on behalf of defendant RR.M., defence counsels M.S. and B.T. on behalf of defendant L.G., and defence counsel R.G. on behalf of defendant N.M. are admissible. They were filed by an authorised person (Article 433(1) of the CPC), within the prescribed deadline (Article 433(2) of the CPC), and to the competent court (Article 434(1) of the CPC).

Merits of the case

- *Composition of the panel of the Court of Appeals*

30. The defence of N.M. claims that the composition of the panel of the Court of Appeals was done in violation of criminal procedure because the panel was composed in accordance to the CPC while applicable law is the LCP. The defence further claims that the panel of the Court of Appeals was composed of majority EULEX judges in violation of Articles 3.1 and 3.3 of the Law on Jurisdiction. The Prosecution asserts that there is no violation of Articles 3.1 and 3.3 of the Law on Jurisdiction because the panel of the Court of Appeals was composed in

accordance with the clarifications set out in Point 2 of the Agreement. The Prosecution submits that this allegation should be deemed as inadmissible as all the parties, including defence counsels of N.M., waived their right to contest the composition of the panel at the beginning of the proceedings.

31. In this regard, the Panel notes that the parties had an opportunity to challenge the composition of the panel during the first and the second instance trials; however there were no objections raised (*see* Record of the main trial, 25 March 2013, pages 1-2, and Minutes of the session of the Court of Appeals, 29 July 2015).

32. Further, the Panel notes that according to Article 23(2) of the LCP, the courts trying the cases in the second instance shall sit in panels consisting of five judges for the criminal acts for which, according to the law, a sentence of 15 years of imprisonment or a more severe penalty might be pronounced. The Panel considers that the old criminal procedure rules cannot be applicable without any reference to the current legal system. The lawmaker took into consideration that in certain circumstances the old criminal procedure rules would be impossible to apply, and in Article 544 of the CPC indicated that the previous criminal procedure code shall be applicable *mutatis mutandis.* In this regard, the Panel notes that the structure of the court system of Kosovo was reformed by Law on Courts (Law No. 03/L-199). Articles 17 to 19 of the Law on Courts regulate the establishment and the composition of the Court of Appeals. Specifically, Article 19(1) of the Law on Courts indicates that the Court of Appeals reviews and adjudicates cases in panel of three (3) professional judges. This means that the composition of the courts as it is envisaged in Article 23 of the LCP does not exist anymore in the Kosovo law. Therefore, the Panel finds that the panel of the Court of Appeals was composed in accordance to the legal requirements, legal principles and without any prejudice to the defendants or the trial itself. The argument of the defence counsel of RR.M. that the composition of the panel of the Court of Appeal was illegal is rejected as unfounded.

33. Further, the composition of EULEX judges is regulated by the Omnibus Law and the Agreement (as specified in paragraphs 25-27 of the present judgment). The Panel finds that the panel was formed in accordance to these requirements.

- *Appeal dismissed in violation of Article 382 of the LCP*

34. The defence counsel of N.M. argues that the appeal against judgment of the Basic Court was dismissed as belated in violation to Article 382 of the LCP as it was dismissed by a judgment, and not by a ruling. The Prosecution, on the other hand, argues that the Court of Appeals can decide on all appeals against the same judgment by a single decision pursuant to Article 398(3) of the CPC, and Article 381(2) of the LCP.

35. The Panel notes that according to Article 381(2) of the LCP, in case there are multiple appeals against the same verdict, the court in the second instance shall rule with one decision on all the appeals against the same verdict. Therefore, the Panel finds no violation of Article 382 of the LCP.

- *Allegations related to counts 5 and 14*

36. The defence of L.G. addresses a number of violations of the criminal law and criminal procedure law in Judgment P 526/05 of the District Court of Prishtinë/Priština dated 2 October 2009, and Judgment AP-KZ No. 89/2010 of the Supreme Court dated 26 January 2011 related to counts 5 and 14. The Prosecution indicates that the challenges related to counts 5 and 14 should be dismissed as belated.

37. L.G. was found guilty for the criminal offences described in counts 5 and 14 by Judgment P 526/05 of the District Court of Prishtinë/Priština dated in 2 October 2009. The part of judgment related to counts 5 and 14 was affirmed by the Supreme Court in its Judgment AP-KZ No. 89/2010 of 26 January 2011. This part of the case became final as there was no request for protection of legality filed in relation to these counts. The case was sent for the re-trial only in relation to count 8; hence the scope of the present request of legality is limited only to the judicial review of the criminal charges in count 8. Therefore, the allegations related to counts 5 and 14 are dismissed as exceeding the scope of the present trial.

- *Evaluation of evidence*

38. The Panel notes that the requests filed by defence counsels on behalf of defendants L.G. and RR.M. include a large number of arguments related to the evaluation of evidence by the first and the second instance courts. In particular, the defence counsel of L.G. argues that the loss of the L.G.'s journal was not properly evaluated as an important piece of evidence in the case. Further, the defence counsels of RR.M. argue that both judgments erroneously or incompletely established the facts. Defence counsels argue that the court did not establish the facts regarding the creation, organisation, structure and discipline of the KLA. The requests analyse in detail the statements given by witnesses R.B., A.A., Witnesses H, I, J, P, D, E, F, G, C, and V. In this regard the Prosecution alleges that the request for protection of legality cannot be filed on the grounds of erroneous determination of factual situation and moves the Supreme Court to dismiss these arguments as inadmissible.

39. The Panel notes that pursuant to Article 432 (1) of the CPC, the request for protection of legality can be filed only on the grounds of a violation of the criminal law, a substantial violation of the provisions of criminal procedure, or another violation of the provisions of criminal procedure if such violations affected the lawfulness of a judicial decision. Article 432 (2) of the CPC strictly and clearly indicates that a request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation. A mere disagreement with the factual evaluation made by the first and the second instance courts does not amount to the requirements for the request for protection of legality as it is set in Article 432(1) of the CPC. Therefore, the Panel finds that all allegations related to the ground of erroneous or incomplete determination of the factual situation shall be dismissed as inadmissible.

- *Admissibility of the evidence*

40. The Panel further notes that defence counsels of L.G. argue that during the investigative stage the protected or anonymous witnesses were questioned in the police stations without presence of authorised persons; they were questioned in a foreign language with an interpreter who did not speak Albanian; they were tempted to give false testimony by

promising them migration to the western countries and offering financial help. In this regard, defence counsels of L.G. are challenging the admissibility of evidence presented by two witnesses – R.B. and A.A.. The evidence given by R.B. should have been declared inadmissible given the manifested contradictions between the statements given to the investigative judge and in all main trials. Further, it is argued that the statement of A.A. given to the investigative judge on 18 October 2002 was admitted into evidence in violation of Article 232 of the LCP. Finally, the defence counsel of L.G. alleges that the Basic Court declared the number of defence witnesses (V.L., F.M., G.Z., K.H., S.G., N.I., K.K.) as not credible without any adequate reasoning.

41. The admissibility of the statements of witnesses R.B. and A.A. given during the pre-trial stage to the investigative judge was analysed in great detail both by the Basic Court and the Court of Appeals (paragraphs 6-8 of Judgment P. no. 448/2012, and page 15 of Judgment PAKR 440/13). The Panel concludes that the assessment of the admissibility of the statements of the two witnesses was made in accordance to the requirements to the set in Articles 168(4), 168(8), 225 to 237, and 328 of the LCP.

42. The issues raised by the defence of defendant L.G. in objection to the admissibility of the statements of the two witnesses are related to the credibility of the witnesses and the weight of their accounts rather than to the question of the admissibility. Similarly, the defence counsel of L.G. challenges the credibility assessment of the defence witnesses done by the Basic Court (paragraphs 81 – 101 of Judgment P. no. 448/2012). The Panel notes that the Supreme Court in many occasions indicated that the assessment of the credibility of the evidence cannot be subject of the request of the protection of legality. Specifically, the Supreme Court has previously stated that "*the CPC is clear in that a request for Protection of Legality cannot be used as a mechanism to invite the Supreme court to review and assess, at a distance, the credibility of the evidence given in the Main Trial"* (Supreme Court of Kosovo, Pml.Kzz 72/2015, 13 October 2015, paragraph 3.2). Therefore, the allegations related to the admissibility of the witness statements of R.B. and A.A., and the credibility assessment of the statements of V.L., F.M., G.Z., K.H., S.G., N.I., K.K. are rejected as unfounded.

- *Witness statements admitted during the investigative stage and the violation of right of confrontation*

43. The defence counsels of L.G. further state that the Basic Court erroneously based it's judgment mainly on evidence obtained during the investigative stage which is in violation of the requirements of Article 347(1) of the LCP. Further, defence counsels of RR.M. adds that inability to confront witnesses about their statements given to the investigative judge violates defendant's right to confrontation as it is established in Article 6 of European Convention on Human Rights (hereinafter "ECHR").

44. The Panel notes that Article 347(1) of the LCP ensures the principles of fairness, immediacy, and that the parties have the opportunity to challenge every piece of evidence presented by the opposing party. The same principle is also enshrined in Article 6(3)(d) of the ECHR. However, the European Court of Human Rights in its practice established that the exceptions to this principle are possible but must not infringe the rights of the defence.[1] As a rule, the main requirement is that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.[2] Such exceptions are also set in the LCP. Articles 330 to 333 of the LCP establish a number of justified exceptions to this rule.[3] Specifically, Article 333(1) allows the panel to read into the record the testimony of the witness in cases indicated in subparagraphs (1) and (2). Article 333(2) of the LCP indicates that with the consent of the parties, the panel may decide that the record of the prior hearing of a witness be read even though the witness is not present, regardless of whether the witness was summoned to the main trial or not.

45. In the present case, the Basic Court addressed in great detail the admissibility of the evidence presented during the investigative stage and whether the defendants had adequate opportunity to question the witness statements. On 10 April 2013, the Basic Court issued a ruling in relation to the evidence presented by Witness V. On 7 May 2013, and on 26 August 2013, the

[1] European Court of Human Rights, Al-Khawaja and Tahery v. the United Kingdom [GC], paragraph 118.
[2] European Court of Human Rights, Hümmer v. Germany, paragraph 38; Lucà v. Italy, paragprah 39; Solakov v. the former Yugoslav Republic of Macedonia, paragraph 57.
[3] *See* Commentaries of the Articles of the Yugoslav law on Criminal Procedure, Book III, page 81.

parties signed agreements to admit written evidence of witnesses H, J, D, E, G,F, V.J., M, F.M., K.H., G.Z., S.G., K.K., and N.I. Further, the Basic Court in detailed analysed the initial police statement of witnesses R.B., C, D, E, F, G, H, and P. Finally, on 4 April 2013 and 8 May 2013, the Basic court issued rulings related to statements of witnesses R.B. and A.A. The parties signed written agreements accepting the witness statement without cross-examinations and were allowed to raise objections. Therefore, the Panel considers that the Basic Court properly evaluated the conditions set in Article 333(1) and (2) of the LCP; and the evidence presented during the investigative state should be considered as a part of the trial record. The evidence was admitted without any infringement to the rights of the defence, fair trial, and did not cause any prejudice. Therefore, the allegation of the violation of Article 347(1) of the LCP is rejected as unfounded.

- *The allegation that the Basic Court judgment exceeded the scope of the indictment*

46. The defence of L.G. claims that the Basic Court exceeded the scope of the indictment which is in violation of Article 364(1)(9) of the LCP. The enacting clause of the judgment of the Basic Court is not in compliance with the enacting clause of the indictment. In this regards, that the following actions were attributed to L.G. by the Basic Court, but were not included in the indictment: "*inhumane treatment, immense suffering, application of measures of intimidation and terror*". The Prosecution indicates that this issue has already been addressed by the Court of Appeals in its Judgment PAKR 440/13.

47. The Panel notes that these allegations were raised by the defence in the appeals against the judgment of the Basic Court and were addressed by the Court of Appeals in its judgments (pages 19-20 of Judgment PAKR 440/13). The Court of Appeals indicated that even though the wording of the indictment and the enacting clause of the judgment of the Basic Court differs, the two documents contain absolutely the same elements of the criminal offence. The Panel fully concurs with the findings of the Court of Appeals and refers to its findings in full in regards to this matter. Therefore, the allegations that the Basic Court exceeded the scope of the indictment are rejected as unfounded.

- *Absence of the reference to the provisions of international law in the enacting clause*

48. Defence counsels argue that Article 142 of the CCSFRY has to be read together with provisions laid out in international law. The enacting clause of the judgment of the Basic Court does not contain any provisions laid out in international law. The Prosecution alleges that the fact that the enacting clause does not specify which international law rules is not a violation of Articles 384(1)(12), 370(4), and 365(1)(2) of the CPC. The Prosecution argues that the Basic Court judgment cannot be considered as an arbitrary decision, because the defence failed to demonstrate that the alleged omission constitutes the substantial violation of criminal procedure law or adversely affects the "lawfulness of the decision" as determined by Article 432(1)(2) and (1)(3) of the CPC.

49. The Panel finds that the reference to the provisions laid out in international law in Article 142 of the CCSFRY shall be considered as one of the elements of the criminal offence, and not as a legal basis of the criminal offence within the meaning of Article 351(1)(2) of the LCP. The application of the provisions laid out in international law is essential part of the determination of the elements of War Crimes against Civilians. Certain elements are not regulated in the national law and are interconnected with the rules and regulations of the international humanitarian law (both customary and statutory law), such as the existence of armed conflict, the nexus, the status of the protected individuals and other aspects. The Basic Court referred to the provisions of the four Geneva Conventions regulating the definition of armed conflict, nexus, and status of victims (*see* paragraphs 25-27 of Judgment P. no. 448/2012). The Panel finds that the reference to the provisions laid out in international law as set in Article 142 of the CCSFRY has been correctly applied by the Basic Court and the Court of Appeals. Therefore, the allegation that the criminal law was violated is rejected as unfounded.

- *The enacting clause does not indicate concrete victims of the alleged criminal acts*

50. Defence counsels of L.G. and RR.M. argue that the enacting clause of the judgment of the first instance court is internally incomprehensible. Firstly, the defence of L.G. and RR.M.

claim that the enacting clause does not contain a description of the number of Kosovo Albanians beaten, extent of beating or inflicted injuries.

51. In this regard, the Panel concurs with the findings made by the Supreme Court in its Judgment AP-KZ No. 89/2010 (*see* paragraphs 51 to 58) and the Judgment of the Court of Appeals (*see* page 21). The victim in the sense of Article 142 of the CCSFRY is the civilian population as whole and there is no requirement to prove the identity of specific victims. The main element necessary to prove is that the attacks were directed against the civilian population as such. In this regard, the notion of the civilian population is defined in Article 50 of Additional Protocol I, "*a civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of Additional Protocol I*." For the purpose of the protection of victims of armed conflict, the term "civilian" is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict. It is a matter of evidence in each particular case to determine whether an individual has the status of civilian.[4]

52. In the present case, the Panel fully subscribes to the analysis of the status of the victims and the witness's statements done by the Basic Court in its Judgment (*see* paragraphs 27 and 34-101). As a result of the assessment of the witness statements, evidence given by the defendants and the documentary material, it appears that the victims detained in the Llapashtica detention centre were not taking any active part in the hostilities. Contrary, those placed in the detention were often victims of little more than gossip and rumour. There is enough evidence to show that the victims subject to inhumane treatment, immense suffering, application of measures of intimidation and terror were part of the civilian population and most of them were Kosovo Albanians. Therefore, the Panel finds that the first and the second instance courts correctly assessed the status of the victims in the present case; therefore the Panel finds no violation of Article 364(1)(11) of the LCP.

- *Lack of the established nexus*

[4] ICTY, *Galić* Indictment, 26 March 1999, paragraph 47.

53. Defence counsels of RR.M. claim that there are internal inconsistencies in the judgment constituting the violation of Article 364(1)(11) of the LCP. The Basic Court concluded that there is a nexus between the individual criminal acts and the war objectives, and that the crimes were committed as part of a joint criminal enterprise. However, at the same time the Basic Court stated that "*what is put forward as evidence of collaboration is in every case nothing more than gossip, rumour and innuendo, often motivated it seems by petty jealousies*". The defence argues that acts of petty jealousy do not prove the nexus and cannot be considered neither as acts committed as part of and in furtherance of the war objectives, nor as a prove of a joint criminal enterprise.

54. The Prosecution asserts that this was not what the Basic Court had in mind. The court concluded that the most of the arrests were based on "*gossip, rumour and petty jealousies*". The act of unreasonably denunciating victims because of their previous or current contact with the Serbs is in fact a proof of the nexus. The Prosecution further stresses that RR.M. himself admitted that the "*alleged collaborators could be arrested by the KLA before they had in fact committed any act of collaboration*".

55. The Panel notes that the nexus between individual criminal acts and the armed conflict was in details discussed by the Court of Appeals (paragraph 26 of Judgment PAKR 440/13). The Panel fully subscribes to the reasoning of the Court of Appeals that there is a nexus because the civilians were arrested based on the suspicion of collaboration with the Serbs, or that their conduct was not amounting to the public good/interests of Kosovo Albanians at the time of war. The Panel finds that the defence is mixing the element of nexus with the elements proving that the deprivation of liberty of the protected persons was arbitrary. In the present case, the first and the second instance court clearly concluded that the arrests and detention based on "*gossip, rumour and innuendo, often motivated it seems by petty jealousies"* are arbitrary. These arrests and detention were not based on evidence or even on a likelihood that the Kosovo Albanian civilians committed a crime against the existing legal norms, nor they were performed respecting due process of law. Therefore, the allegations that the Basic Court did not establish nexus are rejected as unfounded.

- *Lack of specification of the illegal detention, inhumane treatment, immense suffering, application of measures of intimidation and terror*

56. The defence of L.G. indicate that even though the enacting clause refers to terms of inhumane treatment, immense suffering, application of measures of intimidation and terror, the judgment itself does not present any clear reasoning about the level of inhumane treatment, immense suffering, application of measures of intimidation and terror. Further, defence counsels of L.G. state that both judgments fail to prove that the treatment of detainees and their detention is in contradiction with the international conventions, that the detention and mistreatment took place systematically and continuously, that mistreatments took place based on race, religion or gender, and that mistreatment took place in a large scale. The Prosecution indicates that this issue has already been addressed by the Court of Appeals in its Judgment PAKR 440/13.

57. The Panel notes that this issue has already been addressed by the Court of Appeal (*see* pages 20-21 of Judgment PAKR 440/13). The international humanitarian law and human rights law strictly prevents detention unless there are clearly established needs, in particular security needs, and provides certain conditions and procedures to prevent disappearance and to supervise the continued need for detention. In addition to the valid grounds, certain conditions have to be followed. The detained persons shall be informed promptly, in a language he understands, of the reasons why these measures have been taken, and must have an opportunity to seek for a review of the detention decision.[5] Imprisonment without any judicial review, and followed by a procedure that fails to meet the basic standards of international norms, is both arbitrary and illegal, and cannot be defended on the basis that it was inevitably necessary for the security or other reasons. The fact that in the present case, the detainees were not merely deprived of liberty, they were also exposed to beatings and torture, demonstrates a clear lack of the guarantees established in the international legal norms. Therefore, the Panel finds that the Basic Court and the Court of Appeals fully explained that the detention in the Llapashtica detention centre was illegal.

[5] *See*, Fourth Geneva Convention, Articles 43 and 78; Additional Protocol I, Article 75(3).

58. During the armed conflict, the civilians shall be treated humanely, whereas arbitrary deprivation of liberty and beating is not compatible with this requirement. The term "inhuman treatment" is defined in the Elements of Crimes for the International Criminal Court (hereinafter "ICC") as the infliction of "*severe physical or mental pain or suffering*".[6] It was further expanded by the International Criminal Tribunal for Former Yugoslavia (hereinafter "ICTY") that inhuman treatment is that which "*causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity*".[7] The only element distinguishing the inhuman treatment and torture is the absence of the requirement that the treatment be inflicted for a specific purpose. For this purpose, the Basic Court established that there is enough evidence to show that the detained in the Llapashtica detention centre were beaten and tortured in order to extract confessions from them about collaborating with the Serbs.

59. Therefore, the Panel concurs with the findings of the Court of Appeals that "inhumane treatment, immense suffering, application of measures of intimidation and terror" refers to arbitrary detention and beating of Kosovo Albanian civilians. There is enough evidence to show that the detention in the Llapashtica detention centre was against international customary and treaty norms. There is no particular number of incidents that are necessary to prove. Mere existence of arbitrary detention and beatings of persons held in detention is enough to prove the elements set in Article 142 of the CCSFRY. For this reason, the Panel find that there was no violation of Article 364(1)(11) of the LCP.

- *Lack of determination of widespread and systematic attacks*

60. The defence counsels further argue that the facts established by the court do not amount to War Crimes against Civilians under Article 142 of CCSFRY. The defence argues that there were no attacks against civilian population, and even if there is evidence to establish the existence of the attacks, they were neither widespread nor systematic. The scale or frequency that is presented in the indictment does not allow concluding that there was an attack against civilian population, namely Kosovo Albanians.

[6] Elements of Crimes for the ICC, Definition of inhuman treatment as a war crime (ICC Statute, Article 8(2)(a)(ii)).
[7] See ICTY, Delalić case, Judgment (cited in Vol. II, Ch. 32, paragraph 1328) and Kordić and Čerkez case, Judgment (ibid., paragraph 1330).

61. In this regard, the Panel notes that the term "war crimes" as indicated in Article 142 of the CCSFRY refers to serious breaches of international humanitarian law committed against civilians or enemy combatants during an international or domestic armed conflict, for which the perpetrators may be held criminally liable on an individual basis. The war crimes require the proof of a number of elements: the crime was committed against one or more person; such person was protected person under the Geneva Conventions; the conduct took place in the context of the armed conflict; the perpetrator was aware of the existence of the armed conflict.[8]

62. The Panel notes that in the context of war crimes there is no need to prove neither the widespread or systematic nature of the attacks nor scale or frequency of the attacks. These are the elements that are necessary to prove in the context of crimes against humanity, and not the war crimes. The defendants in the present case were charged with a criminal offence indicated in Article 142 of the CCSFRY which has very strictly determined elements of crime and which cannot be exceeded by adding an additional element. Therefore, the Panel finds that the Basic Court and the Court of Appeals correctly determined the elements of crime set in Article 142 of the CCSFRY. The allegation that the courts did not establish widespread and systematic nature of the attacks is rejected as unfounded.

- *Lack of indication of the mode of liability*

63. The defence of L.G. submits that the enacting clause is in contradiction with the reasoning. In the enacting clause it is stated that the criminal acts were committed "*acting in complicity with other unidentified individuals and implementing a joint criminal enterprise*" while the judgment itself denies the existence of joint criminal enterprise. The Basic Court and the Court of Appeals failed to indicate which criminal organization the defendants belonged to. The Defence of RR.M. further adds that the enacting clause does not indicate whether RR.M. ordered or participated in illicit treatments mentioned in the enacting clause, and whether he was found guilty and held accountable for superior (command) or personal (direct) liability,

[8] *See* Elements of Crimes for the ICC.

or participation in a joint criminal enterprise. The Prosecution indicates that this issue has already been addressed by the Court of Appeals in its Judgment PAKR 440/13.

64. The Panel concurs with the reasoning of the Supreme Court in its Judgment AP-KZ No. 89/2010 (paragraphs 109-113) establishing the applicable law in the present case in relation to the command responsibility. It is well established that the military commander or person effectively acting as such shall be criminally liable for the commission of crimes enlisted in Article 142 of the CCSFRY, as committed under his/her effective command and control, even if he/she only should have known that the forces were committing or planning them or in case he/she has failed to take all necessary and reasonable measures within his/her power to prevent or stop their commission. In this regard, the Supreme Court in its Judgment AP-KZ No. 89/2010 determined the main elements of the command responsibility as established in the jurisprudence of the international criminal tribunals determining.[9]

65. These elements cover both *actus reus* and *mens rea* requirements of the command responsibility. The objective element is the ability to exercise sufficient control over the subordinates so as to prevent them from committing the crimes. This requirement is inherently linked with the factual situation in each case. The *mens rea* requirement can be divided into two subjective thresholds: either the superior must have actual knowledge with regard to the crimes; or he must possess information putting him on notice of the risk of such crimes, which indicates a need for additional investigation to determine whether crimes were committed or were about to be committed. The Supreme Court in its Judgment AP-KZ No. 89/2010 also applied wider standard of the superior's knowledge – "should have known" – established in the Rome Statute of the ICC and widely applied in practice.[10] This means that the superior was negligent in failing to acquire knowledge of his subordinates' illegal conduct.

[9] *See*, e.g. ICTY Judgment, Furundzija (IT-95-17/1), Appeals Chamber, 21 July 2000, paragraph 117 et seq.; Krnojelac Appeals Judgment, supra note 4, paragraph 29 et seq.; Vasiljevic Appeals Judgment, supra note 4, paragraph 95 et seq.; Stakic Appeals Judgment, supra note 5, paragraphs 64 and 65. For the ICTR *see* Ntakirutimana Appeals Judgment, supra note 5, paragraph 462 et seq.; Judgment and Sentence, Simba (ICTR-01-76), Trial Chamber, 13 December 2005, paragraphs 386-388; Krajisnik Trial Judgment, supra note 3, paragraph 878 et seq.
[10] *See* Rome Statute, Article 28; Jean-Pierre Bemba, Case No. ICC-01/05-01/08, Confirmation of Charges Decision, Pre-Trial Chambers, 12 Jan. 2009, paragraphs 427-434.

66. A superior-subordinate relationship is characterised by a hierarchical relationship between the superior and subordinate. Besides the superior-subordinate relationship, it is necessary to prove that the superior has actual powers to control his or her subordinates. In other words, the control (command, authority) has to be "effective". In determining whether the "effective control" test was satisfied, it is necessary to address certain aspects, such as the position of authority, capacity to issue orders, the procedure of appointment, and actual tasks the accused has performed. In this regard, based on the evidence presented in during the trial, the Basic Court clearly established that RR.M. was Llapi zone commander. He was superior of L.G. whom RR.M. selected and appointed as the Chief of Military Intelligence for the Llap zone and *de facto* directing the Military Police. In this capacity, L.G. was the superior of N.M. who was the Chief of Military Police. Number of witnesses confirmed that N.M. was their supervisor (*see* for example, paragraphs 87-89 of the Judgment P. no. 448/2012). N.M. was supervising the Detention Centre guards and reporting directly to L.G. While RR.M. was responsible for and directed the regime of illegal detention, beatings and torture, and was fully aware that such conduct is occurring under his authority (*see* paragraphs 29(d), (e), (h); 31(b), (c); 33(a), (c); 102(f), 103(b), 104(c) of the Judgment P. no. 448/2012). Therefore, the Panel is satisfied that the Basic Court fully established the superior-subordinate relationship.

67. The superior's knowledge cannot be presumed, it may be established through the circumstantial evidence. Factors to consider in determining the knowledge include: number, type and scope of illegal acts, time during which they occurred, the number of subordinates involved, geographical location; whether the acts were widespread, the location of the accused at the time and other factors. It should be noted that more physically distant the superior was from the scene, the more evidence may be necessary to prove his knowledge. In the present case, the Panel finds that the Basic Court concluded that L.G. and N.M. often were present in the Detention Centre, giving orders related to the detention or release of the detainees, were responsible for the maintenance of the Detention Centre, had knowledge about certain detainees, and even personally participated in questioning and beating (*see* paragraphs 29(h), (i); 31(c), (f), (h); 35(c) – (f); 39(e); 40; 51(e); 61(b); 73(c) of Judgment P. no. 448/2012). In relation to RR.M., even though none of the witnesses indicated that he participated in beatings and torture, the Panel finds that the Basic Court correctly applied the

standard of the superior knowledge. There are enough factors to show that RR.M. had knowledge of the detention, beatings and torture in the Detention Centre. Additionally, RR.M. in his statement indicated that he kept himself informed about the detainees, and that he issued three amnesties (*see* paragraph 33(c) and (g) of Judgment P. no. 448/2012). Therefore, the Panel is satisfied that the subjective element of the command responsibility is established.

68. The Panel finds that the elements of command responsibility are established in relation to all three defendants. Even though the Basic Court and the Court of Appeals did not specifically address each element of the command responsibility in the enacting clause, the Panel finds that these elements are nevertheless addressed in the reasoning. For this purpose, the Panel notes that the judgments have to be read in its entirety.

69. Turning to the Joint Criminal Enterprise (hereinafter "JCE") as another mode of liability, the Panel fully concurs with the theoretical aspects of this mode of liability addressed by the Supreme Court in its Judgment AP-KZ No. 89/2010 (paragraphs 114-117). The Supreme Court examined the thorough and accurate analysis of the law including jurisprudence of the ICTY and adopts this analysis in its entirety. The Supreme Court concluded that the JCE is considered as an additional form of liability and as such is taken into account in the present case to better identify the responsibilities of the three defendants.

70. The Panel concurs that the JCE is a different mode of liability than the command responsibility. The JCE is a mode of personal liability and serves to impute certain criminal acts or results to persons for their participation in a collective ('joint') criminal enterprise. The 'criminal enterprise' is defined by a common - explicit or tacit - agreement or understanding to commit certain criminal acts for an ultimate criminal objective or goal. In other words, it is necessary to prove the common purpose. As opposed to merely knowing about the commission of the criminal offence (as it is in case of command responsibility), the co-perpetrator in the JCE shares the intent of the principal perpetrator. It is not a liability for mere membership or conspiracy to commit a crime; it is a mode of participation in a criminal offence that consists of understanding or arrangement amounting to an agreement between

two or more persons that they will commit a crime.[11] The participants in JCE may be individually liable for the acts of the other members.

71. There are three forms of the JCE. The basic form of the JCE concerns the cases where all participants possess the same intention to commit a crime. The second category of the JCE refers to so-called "concentration camp" scenarios when the crimes are committed due to the existence of an organised system of ill-treatment. The *mens rea* in this category requires prove of the knowledge of the criminal concerted system, the awareness of its nature, and voluntarily and active participation in its enforcement. Finally, the third category comprises the cases involving the commission of an act which, even falling outside the common plan or purpose, was nevertheless a natural foreseeable consequence of the execution of the criminal purpose.

72. The Panel notes that neither Basic Court nor the Court of Appeals specifically addresses the category of the JCE applicable in the present case. However, the Panel finds that the courts did address each element in the context of the witness analysis and the analysis of the criminal liability of each defendant. In this regard, the Panel concurs with the finding of the Supreme Court in its Judgment AP-KZ No. 89/2010 that L.G., N.M. and RR.M. acted together to reach a common purpose of arresting civilians in order to extract confessions from them about collaborating with the Serbs (*see* paragraphs 116 and 117 of the Judgment AP-KZ No. 89/2010). The Basic Court in its Judgment P. no. 448/2012 clearly determines that there was a system of ill-treatment established in the detention centre. Each defendant had a clearly established role, actively participated in the establishment and supervision of the detention centre, and was aware of each other's acts. In this regard, it has been established that L.G. and RR.M. participated in decision making process in the KLA HQ ordering the arrests and detention of certain individuals (*see* paragraphs 29(f) and 33(a) of Judgment P. no. 448/2012). N.M. on the other hand was responsible for keeping the detainees in the detention and presenting them for interrogation (*see* paragraph 103(c) of Judgment P. no. 448/2012). The Basic Court analysed in great detail the existence of the

[11] *See*, ICTY, *Prosecutor v. Mulitinovic et al.* (IT-99-37-AR72), Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, paragraph 26; *Prosecutor v. Krnojelac* (IT-97-25-T), Judgement, 15 March 2002, paragraph 80.

common plan to establish, and maintain the detention centre (*see* paragraphs 29(f),(h), 31 (c),(e), 33 (a),(c) of Judgment P. no. 448/2012).

73. Concerning the subjective element of the JCE, the Panel notes that the Basic Court in its Judgment in great extent addressed the issues related to the knowledge of L.G., N.M. and RR.M. about the illegal detention, beatings and torture of the members of the civilian population; their participation in the common plan by giving and taking the orders; voluntary and active participation in the common plan, as it is explained in paragraph 67 of the present judgment.

74. Therefore, the Panel finds that the objective and subjective elements of the command responsibility and the JCE were fully evaluated in the Basic Court judgment and upheld by the judgment of the Court of Appeals. Even though both judgments do not address each element of different modes of liability separately, the judgments have to be read in its entirety, including the enacting clause and the reasoning. Therefore, the Panel finds that there is no violation of Article 364(1)(11) of the LCP.

- *Evaluation of the criminal offence of War crimes against Civilians*

75. Defence counsels of L.G. further argue that the both judgments contain violations of criminal law. The defence counsels argue that L.G. was found guilty for three criminal offences of War Crimes against Civilians in contradiction to Article 142 of the CCSFRY. The defence of L.G. claims that this evaluation of criminal offence is wrong as the criminal offence of War Crimes against Civilians as defined by Article 142 of the CCSFRY is a unique criminal offence and no one can be accused or sentenced for a separate criminal offence for each unlawful suspected action which falls within this criminal offence.

76. In this regard, the Panel notes that this issue was already addressed by the Court of Appeals (page 23 of Judgment PAKR 440/13), and the Supreme Court (paragraphs 76-82 Judgment AP-KZ No. 89/2010). The Panel notes that the conditions for "extended criminal acts" generally are not applicable to the War Crimes against the Civilian Population. 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. Therefore, the Panel finds that there is no violation of criminal law.

VI. CONCLUSION

Having considered the above, the Supreme Court of Kosovo decided as in the enacting clause of this Judgment.

THE SUPREME COURT OF KOSOVO
PRISHTINË/PRIŠTINA
Plm. Kzz. 18/2016

Presiding judge:

_____

Dariusz Sielicki
EULEX Judge

Members of the panel:

_____ _____

Anna Adamska-Gallant
EULEX Judge

Nebojsa Boricic,
Supreme Court of Kosovo

_____	_____
Mentor Abdullahu	Sandra Gudaityte,
EULEX Interpreter	EULEX Legal Officer