COURT OF APPEALS
PRISTINA

Case number: **PAKR 440/13**
Date: **11 August 2015**

Basic Court: **Pristina, P 448/2012**

Original: **English**

The Court of Appeals, in a Panel composed of EULEX Court of Appeals judge Radostin Petrov, as presiding and reporting judge, EULEX Court of Appeals judge Roman Raab and Kosovo Court of Appeals judge Tonka Berishaj as panel members, assisted by Alan Vasak, EULEX legal officer, acting in the capacity of a recording officer,

in the case concerning the defendant:

> **L.G.**, aka Commander "L.", Kosovo Albanian, father's name R., mother's name R. and maiden name S., born on [] in [], Municipality of [], [], currently residing in [], not in detention, ID [];
>
> **N.M.**, aka "D.", Kosovo Albanian, father's name H., mother's name S. and maiden name H., born on [] in [], municipality of [], [], [], currently residing in [], not in detention, ID [];
>
> **R.M.**, aka "R.", Kosovo Albanian, father's name M., mother's name N. and maiden name l., born on [] in [], [], currently residing in [], not in detention, ID [];

charged under the Special Prosecution Office of the Republic of Kosovo's (SPRK) amended indictment Hep. No. 65/2002 dated 30 June 2003, limited to Count 8 and the events alleged at the Llapashtica camp only, with the following criminal offence, prosecuted *ex officio*:

> *War Crime against the Civilian Population*, in particular, inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures 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 October 8, 1976) (CCSFRY), in conjunction with Articles 22, 24 26 and 30 of the CCSFRY, because from October 1998 until late April 1999, L.G., N.M. and R.M., with superior and personal

liability, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians illegally detained in the detention center located at Llapashtica in an attempt to force those detainees to confess to acts of disloyalty to the KLA;

adjudicated in first instance by the Basic Court of Pristina with judgment P 448/2012, dated 7 June 2013,

by which the defendants L.G., N.M. and R.M. were found guilty of 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 (CCSFRY), in conjunction with Articles 22, 24, 26 and 30 of the CCSFRY, because from October of 1998 until late April of 1999, L.G., N.M. and R.M., with superior and personal liability, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians illegally detained in the detention center located in Llapashtica in an attempt to force those detainees to confess to acts of disloyalty to the KLA;
and by which L.G. was sentenced under count 8 to 5 (five) years of imprisonment, N.M. was sentenced under count 8 to 3 (three) years of imprisonment and R.M. was sentenced under count 8 to 4 (four) years of imprisonment. Pursuant to Article 48, paragraph 2 of the CCSFRY and Article 357, paragraph 5 of the LCP, the aggregate punishments were determined as follows: L.G. shall serve an aggregate punishment under Counts 5, 8 and 14 of 6 (six) years of imprisonment; N.M. shall serve an aggregate punishment under Counts 5 and 8 of 3 (three) years of imprisonment; R.M. shall serve an aggregate punishment under Counts 5 and 8 of 4 (four) years of imprisonment;

seised of the appeals filed by defense counsel Mexhid Syla and Bajram Tmava for the defendant L.G., defense counsel Fazli Balaj for the defendant N.M. and defense counsel Aziz Rexha for the defendant R.M.,

having considered the response of the SPRK,

having considered the motion of the appellate state prosecutor,

after having held a public session of the Court of Appeals on 29 July 2015,

having deliberated and voted on 30 July and 11 August 2015,

acting pursuant to Articles 370, 371, 372, 376, 377, 378, 379, 380, 381, 382, 384, 387, 388 and 390 of the Law on Criminal Proceedings (LCP),

renders the following:

JUDGMENT

I. The appeal of defense counsel Fazli Balaj for the defendant N.M. against the judgment of the Basic Court of Pristina P 448/2012 dated 7 June 2013 is dismissed as belated.

II. The appeal of defense counsel Mexhid Syla and Bajram Tmava for the defendant L.G. against the judgment of the Basic Court of Pristina P 448/2012 dated 7 June 2013 is partially granted, in so far as the time spent in detention on remand which shall be credited towards the sentence is to be included in the enacting clause. The remainder of the appeal is rejected as unfounded.

III. The appeal of defense counsel Aziz Rexha for the defendant R.M. against the judgment of the Basic Court of Pristina P 448/2012 dated 7 June 2013 is partially granted, in so far as the time spent in detention on remand which shall be credited towards the sentence is to be included in the enacting clause. The remainder of the appeal is rejected as unfounded.

IV. The judgment of the Basic Court of Pristina P 448/2012 dated 7 June 2013 is modified in its enacting clause. The time the defendants L.G. and R.M. spent in detention on remand which shall be credited towards the sentence shall be included as follows:

> **Pursuant to Article 50 §1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia the time the defendant L.G. spent in detention from 28 January 2002 until 23 July 2005 and from 3 October 2009 until 9 June 2010 shall be credited towards the sentence.**
>
> **Pursuant to Article 50 §1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia the time the defendant R.M. spent in detention from 11 August 2002 until 23 July 2005 shall be credited towards the sentence.**

V. The judgment of the Basic Court of Pristina P 448/2012 dated 7 June 2013 is *ex officio* modified in its enacting clause. The time the defendant N.M. spent in detention on remand which shall be credited towards the sentence shall be included as follows:

Pursuant to Article 50 §1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia the time the defendant N.M. spent in detention from 28 January 2002 until 23 July 2005 shall be credited towards the sentence.

VI. In the remaining parts the judgment is affirmed.

REASONING

I. PROCEDURAL BACKGROUND

The original indictment was filed against the defendants L.G., N.M. and R.M. on 19 November 2002 in the District Court of Pristina, subsequently amended on 4 February and 30 June 2003, alleging a number of counts of War Crimes Against the Civilian population contrary to the Criminal Code of the Socialist Federal Republic of Yugoslavia (hereinafter the 'CCSFRY') Article 142 pursuant to UNMIK Regulation 1999/24 as amended by UNMIK Regulation 2000/59. It is the amended indictment of 30 June 2003, Count 8 that is now placed before this panel; L.G. already being subject to a final guilty verdict on Counts 5 and 14 and N.M. and R.M. both already being subject to a final guilty verdict on Count 5 of the said amended indictment.

The first instance (original) trial was held at Pristina District Court which issued its verdict on 16 July 2003, which dismissed several charges completely and several elements of some charges and convicted all three defendants on the remaining elements for the criminal offence of War Crimes Against the Civilian Population, sentencing them as follows: L.G. 10 years, N.M. 13 years and R.M. to 17 years imprisonment.

After a defence appeal against all convictions and a prosecution appeal against the sentence for L.G. only, the Supreme Court of Kosovo in case Ap Kz 139/2004 issued its decision dated 21 July 2005 in which it 'cancelled in their entirety' Counts 1, 2, 3 and 12, acquitted the defendants for Count 11 and sent the remaining Counts back for re-trial.

The first re-trial panel in 2009 (P526/05) heard the re-trial, fully receiving evidence afresh on Count 5, 9 and 14 of the amended indictment of 30 June 2003 [NOTE: there had been a proposed further amended indictment filed on 14 April 2009, but that was rejected by the re-trial panel and therefore requires no further comment]. On Count 8 the first re-trial panel determined that the evidence had already been properly and lawfully received and thus confined itself to re-consideration of the sentence. During the proceedings, the prosecutor withdrew Count 9.
On 2 October 2009 the first re-trial panel convicted the defendants as follows:

a. L.G. of War Crimes Against the Civilian Population on Count 5 (sentence 2 years imprisonment), Count 8 (sentence 5 years imprisonment) and Count 14 (sentence 2 years imprisonment) - aggregate sentence 6 years imprisonment.
b. N.M. of War Crimes Against the Civilian Population on Count 5 (sentence 1 year 6 months imprisonment) and Count 8 (sentence 3 years imprisonment) - aggregate sentence 3 years imprisonment.
c. R.M. of War Crimes Against the Civilian Population on Count 5 (sentence 2 years imprisonment) and Count 8 (4 years imprisonment) - aggregate sentence 4 years.

On 15, 16, and 18 February 2010, all three defendants appealed the convictions and sentence. The prosecutor did not appeal against the sentences.

On 26 January 2011 (Ap Kz 89/2010) the Supreme Court issued its verdict in which the first instance re-trial decisions on Count 5 and 14 were confirmed. Those convictions and sentences became final. The Supreme Court however quashed the conviction on Count 8 and returned it to the District Court for a second re-trial. The basis of that decision was the failure of the first re-trial panel to hear the witnesses afresh on Count 8. The original 2003 trial panel convicted upon Count 8 of the amended indictment of 30 June 2003 with regards to the events at Llapashtica detention centre only. The panel acquitted the defendants regarding the events within the count relating to Majac and Potok. That verdict was considered by the Supreme Court in its decision 21 July 2005 and it concluded that the evidence had been properly and lawfully received in accordance with the Procedural Code. Yet despite that, the Supreme Court remitted the Count back to the first instance court for re-trial on the grounds that the original verdict 'treated the various counts in the indictment as one singular war crime as to each defendant'. The first re-trial panel with regard to this Count considered its obligation pursuant to the Supreme Court's decision to be limited to the question of sentence, but that consideration of the Count remains limited only to events at Llapashtica because the acquittal relating to events at Majac and Potok remains final. As a result of this stance, the first re-trial panel failed to hear the witnesses afresh, convicted the defendants and re-considered the sentences imposed. The task of the second re-trial panel was to only re-try Count 8, limited to the events at Llapashtica, and to re-examine the relevant witnesses again (subject to any agreement between the parties to read witnesses' records into the record, or to order witnesses' records into the record on grounds such as death or untraceability.) Furthermore, as the prosecution did not appeal the sentence imposed, the second re-trial panel was limited by way of maximum sentence to the sentence imposed on this Count by the first re-trial panel. Having undertaken that task, the second re-trial panel then considered the appropriate aggregate sentence for each defendant.

On 26 February 2013 the second re-trail panel held the pre-trial hearing and main trial hearings open to the public commenced on 25 March 2013 and continued on 26, 27 March, 11 April, 7, 8, 10 and 22 May and 4 and 7 June 2013, as well as a partially closed session on 11 April 2013.

The deliberation and voting was held on 6 June 2013 and the verdict was announced on 7 June 2013 in open court.

The written judgment was served to the defendant L.G. on 24 September 2013 and to his defence counsel Mexhid Syla and Bajram Tmava on 24 September 2013. The defendant, through his defence counsel, appealed the judgment, filed on 8 October 2013.

The written judgment was served to the defendant N.M. on 28 September 2013 and to his defence counsel Fazli Balaj on 9 October 2013. The defendant, through his defence counsel, appealed the judgment, filed on 22 October.

It is unclear from the delivery slip when the written judgment was served to the defendant R.M.. The written judgment was served to his defence counsel Aziz Rexha on 4 October 2013. The defendant, through his defence counsel, appealed the judgment, filed on 16 October 2013.

On 12 November 2013 the SPRK filed a response to the appeal.

The case was transferred to the Court of Appeals for a decision on the appeal on 14 November 2013.

On 29 November 2013 the appellate state prosecutor filed a motion.

The session of the Court of Appeals Panel was held on 29 July 2015 in the presence of the defendants, their defence counsel (Rame Gashi for N.M.) and the appellate state prosecutor Claudio Pala.

The Panel deliberated and voted on 30 July and 11 August 2015.

II. SUBMISSIONS OF THE PARTIES

A. Appeal of the defence on behalf of the defendant L.G.

Defence counsel Mexhid Syla and Bajram Tmava on 8 October 2013 filed an appeal dated 7 October 2013 with the Basic Court on behalf of the defendant L.G. on the grounds of:

- Substantial violation of the provisions of criminal procedure
- Erroneous or incomplete determination of the factual situation
- Violation of the criminal law
- Error in the decision on criminal sanctions

The defence submits that the examination of protected or anonymous witnesses during the pre-trial stage violated the legal provisions regulating this procedure, as the witnesses were examined without the presence of the defense counsel, were blackmailed with different promises, and in many cases were not examined in their mother tongue, but through interpreters who did not speak the Albanian language. This relates in particular to witness 7 R.B. and witness 4 A.A. Furthermore, the material evidence during the pre-trial proceedings was provided in an unlawful manner. The defendant was also denied the guaranteed right by the Constitution and the international conventions for a fair trial within a reasonable time.

Concerning violations of the provisions of criminal procedure, the defence submits that the judgment exceeded the scope of the indictment, in violation of paragraph 1.9 of Article 364 LPC. If one carefully analyzes the enacting clause of the indictment and the enacting clause of the judgment, it is clear that the indictment was exceeded due to the attribution of acts by the defendants in the judgment, which were not foreseen in the indictment.

Furthermore the enacting clause of the judgment is unclear and confusing, due to the following wording: "with superior and personal liability, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians."

The defence further submits that it is unacceptable that after three main trials in the first instance and two main trials in the second instance, the other individuals the defendants allegedly cooperated with, still have not been identified.

The Basic Court in the impugned judgment manipulates the general term regarding the "Albanian civilians" who were subject to the suffering and torture, due to not specifying who those Albanians were and what the level of the committed torture was.

Furthermore, in the reasoning of the judgment nothing is stated regarding the superior and personal liability of the defendant L.G. There are contradictions even among the records of the main trial, the evidence elaborated during those trials and what is stated in the reasoning of the appealed judgment.

The defence contends that the diary of the defendant L.G., which was lost, is the main piece evidence which supports his defence and confirms his alibi.

The defence further submits that the provisions of the criminal procedure code were violated when the other evidence was assessed by the Basic Court, as this was done according to double criteria focusing on incriminating the defendant.

With regard to the erroneous and incomplete determination of the facts, the defence contends that the Basic Court did not evaluate all the evidence administered during trial in a fair manner and as a whole. The evidence does not confirm that the defendant L.G. ordered and participated in the beating and torturing of Kosovo Albanian civilians. On the contrary, the administrated evidence confirms that he had no commanding authority and also had nothing to do with the detained persons. The evidence confirms that he used to be the chief of the information center. He had no commanding authority regarding the supervisors of the detained persons.

The defence further points out that there are discrepancies with regard to many circumstances between the statements of witness R.B. given during the investigation and the statements given during the main trial sessions. Given these discrepancies, the defence argues that the testimonies of witness R.B. have no legal validity and a conviction therefore cannot be based on his statements.
The defence further submits that the Basic Court should have declared the testimony of witness A.A. given to the pre-trial judge on 18 October 2002 as inadmissible evidence, as it was taken contrary to the legal provisions regarding witness' examination.
The defence also considers that from the statements of other witnesses "C, P, I, J, H, D, E, G, F and M" no concrete circumstances have been proven. The defence reiterates its position that the Basic Court should have assessed these statements as circumstantial evidence because all these witnesses in their testimonies gave account of what they were told by other persons, not about what they saw or heard themselves. With regard to to the other group of witnesses: V.J., K.H., G.Z., N.I., K.K. etc., the Basic Court has assessed their testimonies in a biased manner and to the detriment of the defendant L.G.
With regard to violations of the criminal law, the defence contends that the Basic Court erred in law when finding the defendant L.G. guilty for the criminal offense of War Crime under Article 142 CCSFRY in the capacity of co-perpetrator with other accused, while the criminal liability is also connected to Article 26 CCSFRY, which relates to criminal association.
The defense further submits that the defendant L.G. was a KLA member, but that this in no way implies he was a member or founder of a criminal organization or enterprise, as specified in Article 26 CCSFRY.
The Basic Court also holds the defendants criminally liable as co-perpetrators, pursuant to Article 22 CCSFRY). However, since they are also being held liable according to Article 26 CCSFRY, they cannot be held liable according to Article 22 CCSFRY as co-perpetrators as well, because liability according to Article 26 CCSFRY absorbs the liability according to Article 22 CCSFRY.
Furthermore, a violation of the criminal law also occurred when the defendant L.G. was found guilty for three criminal offences of War Crimes against Civilian Population, which should have been treated as one single criminal offence.
The criminal law was also violated due to the calculation of the imposed detention on remand not being specified in a clear manner.
Finally, as to the decision on criminal sanctions, the defence contends the imposed punishment is neither fair nor lawful. In this particular case any punishment is unlawful and a just and lawful verdict would only be a judgment of acquittal.

For all these reasons, the defence requests the Court of Appeals to modify the judgment and to acquit L.G.

B. <u>Appeal of the defence on behalf of the defendant N.M.</u>

Defence counsel Fazli Balaj on 22 October 2013 filed an appeal dated 22 October 2013 with the Basic Court on behalf of the defendant N.M. on the grounds of:

- Substantial violation of the provisions of criminal procedure
- Erroneous or incomplete determination of the factual situation
- Violation of the criminal law
- Decision on criminal sanction

Concerning violations of the provisions of the criminal procedure, the defence submits that the judgment is not comprehensible and that the criminal offence for which the defendant N.M. was found guilty is unclear; as a consequence the impugned judgment should be annulled.
With regard to the erroneous and incomplete determination of the facts, the defence opines that the Basic Court did not evaluate all the evidence administered at the trial in a fair manner. No witness has ever mentioned that the defendant N.M. has ordered or participated in the abuse and torture of the detained civilians.
Regarding the violations of the criminal law, the defence contends that the Basic Court erred when it found the defendant N.M. guilty for the criminal offense he is charged with.
Finally, as to the decision on criminal sanctions, the defence contends that the imposed punishment is neither fair nor lawful.

For all these reasons, the defence requests the Court of Appeals to annul the judgment and return the case for retrial or modify the judgment and to acquit the defendant N.M.

C. Appeal of the defence on behalf of the defendant R.M.

Defence counsel Aziz Rexha on 16 October 2013 filed an appeal dated 14 October 2013 with the Basic Court on behalf of the defendant R.M. on the grounds of:

- Substantial violation of the provisions of criminal procedure
- Erroneous or incomplete determination of the factual situation
- Violation of the criminal law
- Decision on criminal sanction

The defence submits that no statement of any witness implicates that the defendant R.M. was involved in the criminal offense of War Crime against the Civilian Population. The defence reiterates that the trial against him is of a political nature. The defence contends that in the impugned judgment neither evidence nor explanations are presented regarding the intent, actions or omissions of the defendant R.M.
With regard to the violations of the provisions of the criminal procedure, the defence submits that the judgment exceeded the scope of the indictment, in violation of paragraphs 1.9, 1.11 and 2 of Article 364 LPC. If one carefully analyzes the enacting clause of the indictment and the

enacting clause of the judgment, it can be established without doubt that the indictment is exceeded due to attributing to the defendants actions that the prosecutor did not foresee in his indictment. Furthermore, the enacting clause of the judgment is unclear and confusing.
The defence contends that in the impugned judgment the court failed to elaborate on the co-perpetration, pursuant to Article 22 CCSFRY, the assistance, pursuant to Article 24 CCSFRY, as well as other legal provisions which were mentioned in the enacting clause.
The facts presented in the reasoning of the judgment are not correct, because the defendant did not "admit that he was a commander in Lapashtica region". This statement is incorrect and biased because the defendant R.M. was the commander for the entire ZOLL (Operative Zone of Llap), and not only for Lapashtice village. Furthermore, there is not even a single sentence with regard to the supposed incriminating actions the defendant R.M. is charged with. The defendant R.M. cannot be held responsible for anything that happened at the detention center in Lapashtica, because he was not aware and not informed by his subordinates, who, in the chain of command, had the direct authority and responsibility. With regard to the lack of reasoning concerning the command responsibility, the defence refers to the case-law of the ICTY.
Regarding the erroneous and incomplete determination of the facts, the defence opines that the Basic Court did not evaluate all the evidence administered at the trial in a fair manner and as a whole. The factual situation has been determined in an erroneous manner and to the detriment of the defendant R.M. The defendant R.M. was neither aware nor able to know that his subordinates might have committed the criminal offence as stated in the enacting clause and in the reasoning of the impugned judgment.
The defence submits that the judgment does not produce any evidence that would indicate beyond any suspicion that the defendant R.M. was managing an illegal detention regime of beatings and torture.

With regard to violations of the criminal law, the defence contends that the Basic Court erred in law when finding the defendant R.M. guilty for the criminal offense of War Crime under Article 142 CCSFRY in the capacity of co-perpetrator with other accused. Furthermore, the defence claims that Article 26 CCSFRY is applied improperly.

Finally, as to the decision on criminal sanctions, the defence contends the imposed punishment is neither fair nor lawful. In this particular case any punishment is unlawful and a just and lawful verdict would only be a judgment of acquittal.

For all these reasons, the defence requests the Court of Appeals to modify the judgment and to acquit the defendant R.M.

D. Response of the SPRK

The special prosecutor on 12 November 2013 filed a response to the appeals of the defence and requests the Court of Appeals to reject the appeals as unfounded and affirm the judgment of the Basic Court.

The special prosecutor states that each of the appeals fails to substantiate an error in the judgement which would warrant a successful appeal. There are no grounds for overturning the verdict of the Basic Court and to send the case back for retrial. He opines that the appeals exemplify not that the Basic Court has erred either in its handling of the main trial or in the drafting of its judgement, but simply that the defendants disagree with the decision that has brought their impunity for the commission of this criminal offence to an end.

E. Motion of the Appellate Prosecution Office

Appellate Prosecutor on 29 November 2013 filed a motion requesting the Court of Appeals to reject the appeals filed on behalf of the defendants L.G. and R.M. as unfounded and to reject the appeal filed on behalf of the defendant N.M. in accordance with Article 382 LCP as being late. In his detailed motion the EULEX Prosecutor elaborates on the raised issues in the appeals; Substantial violations of the provisions of criminal procedure, Erroneous or incomplete determinations of the factual situation, Violations of the criminal law and the Decision on criminal sanction. The Appellate Prosecutor states that no substantial violations of the provisions of criminal procedure were made by the Basic Court. He further contends that contrary to what the defendants argue, the Basic Court correctly assessed the factual situation and did not violate the criminal law as raised by the appeals. He also opines that the decision on the Criminal Sanction was not wrongful as stated in the appeals. Therefore he motions the Court of Appeals to reject the appeals.

III. FINDINGS OF THE PANEL

A. Applicable Procedural Law in the Case

The indictment in the case was filed with the District Court of Pristina on 19 November 2002 and amended on 4 February 2002 and 30 June 2003, before the entry into force of the Provisional Criminal Procedure Code of Kosovo, which was in force from 6 April 2004 until 31 December 2012.

The Provisional Criminal Procedure Code of Kosovo included a transitional provision in Article 550, pursuant to which all criminal proceedings in which the indictment was filed prior to Provisional Criminal Procedure Code of Kosovo entering into force and were not completed by 6

April 2004 were to be continued according to the provisions of the previously applicable law (Law on Criminal Proceedings, 1986) until the judgment rendered at main trial became final.

On 1 January 2013 a new procedural law entered into force in Kosovo – the Code of Criminal Procedure, criminal law no. 04/L-123. This Code repealed the Provisional Criminal Procedure Code of Kosovo. The new Code applies in all on-going criminal proceedings initiated prior to its entry into force except in the cases where the main trial commenced before 1 January 2013 or where a case was returned for re-trial (See also Legal Opinion of the Supreme Court no. 56/2013 adopted in its General session on 23 January 2013).

In the case at hand the applicable procedural law pursuant to the newly applicable CPC would thus be the Provisional Criminal Procedure Code of Kosovo, because the trial in this case commenced prior to the entry into force of the CPC. The Provisional Criminal Procedure Code of Kosovo via Article 550, as noted, however derogates to the Law on Criminal Proceedings, 1986, therefore pursuant to Article 550 Provisional Criminal Procedure Code of Kosovo the applicable procedural law in this case remains to be the Law on Criminal Proceedings, 1986. The Court of Appeals accordingly conducted the proceedings pursuant to the Law on Criminal Proceedings.

B. Competence

Pursuant to Article 117 LCP the Panel has reviewed its competence and since no formal objections were raised by the parties the Panel will suffice with the following. In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, the Panel concludes that EULEX has jurisdiction over the case and that the Panel is competent to decide the respective case in the composition of one Kosovo judge and two EULEX judges.

C. Admissibility of the appeal

a. The appeal filed on behalf of the defendant N.M.

The Panel notes that the impugned judgment was served on the defendant N.M. on 28 September 2013. The impugned judgment was further served on his defence counsel Fazli Balaj on 9 October 2013. The appeal filed by defence counsel Fazli Balaj on behalf of the defendant N.M. is dated 22 October 2013, as can be seen on the appeal itself.

Pursuant to Article 359 of the Law on Criminal Proceedings, the parties may file an appeal against a judgment within fifteen (15) days of being served with the judgment. Pursuant to

Article 123 of the Law on Criminal Proceedings, when a decision is served both on the defendant and his defence counsel, the prescribed period of time for pursuing a legal remedy shall commence on the date when the document is served on the defendant.

In this case nothing indicates that the defendant or his defence counsel were in any way prevented from being able to effectively use the right to appeal within the time limits. The 15-days deadline for filing an appeal therefore expired on 13 October 2013. The appeal on behalf of the defendant was only filed on 22 October 2013, and is therefore belated.

Accordingly, the Panel of the Court of Appeals finds the appeal of defence counsel Fazli Balaj filed on 22 October 2013 on behalf of the defendant N.M. as belated and therefore will not adjudicate on the merits of his case.

b. The appeals filed on behalf of the defendants L.G. and R.M.

The appeals of defense counsel Mexhid Syla and Bajram Tmava for the defendant L.G. and defense counsel Aziz Rexha for the defendant R.M. are admissible. The appeals were filed within the 15-day deadline pursuant to Article 359 of the Law on Criminal Proceedings. The appeals were filed by authorized persons and contain all other relevant information pursuant to Article 360 and 362 LCP.

D. Determination of the factual situation

The defence submits that the Basic Court did not evaluate all the evidence administered during main trial in a fair manner and as a whole.

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

It is clear from Article 366 LCP that it is not sufficient for the appellant to demonstrate only an alleged error of fact or incomplete determination of fact by the trial panel. Rather, as the criminal procedure code requires that the erroneous or incomplete determination of the factual situation relates to a "material fact", the appellant must also establish that the erroneous or incomplete determination of the factual situation indeed relates to a material fact, i.e. is critical to the verdict reached.[1] Furthermore, it is a general principle of appellate proceedings that the Court of Appeals must give a margin of deference to the finding of fact reached by the trial panel because it is the trial panel which is best placed to assess the evidence. The Supreme Court of Kosovo has frequently held that it must "*defer to the assessment by the trial panel of the credibility of the*

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

trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so." The standard which the Supreme Court applied was "*to not disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous*" (Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, para. 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, para. 30).

The Basic Court in the impugned judgment in detail analyses the evidence administered during the main trial. The Panel examined the thorough analysis of the witness statements which is set out in paragraphs 34 to 101 of the impugned judgment (English version pagination). In the view of the Panel, the Basic Court comes to logical conclusions in its assessment of that evidence and finds no contradiction in the stance of the Basic Court. The Panel furthermore autonomously reviewed all the evidence. After this careful evaluation the Panel is still fully persuaded by the conclusions and reasoning of the Basic Court. The Panel finds that there is sufficient evidence to proof beyond a reasonable doubt that the defendants are guilty of 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 (CCSFRY), in conjunction with Articles 22, 24, 26 and 30 of the CCSFRY, because from October of 1998 until late April of 1999, L.G., N.M. and R.M., with superior and personal liability, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise - as for the joint criminal enterprise it was already established by the Supreme Court (judgment Ap.-Kz. No. 89/2010, 26 January 2011) regarding Count 5 - ordered and participated in the beating and torture of Kosovo Albanian civilians illegally detained in the detention center located in Llapashtica in an attempt to force those detainees to confess to acts of disloyalty to the KLA.
The Panel therefore does not see a need to repeat the complete detailed analysis of the Basic Court. The Panel will however elaborate on the following.

a. Admissibility of the witness statements
The defence argues that the examination of certain protected and anonymous witnesses during the pre-trial stage violated the legal provisions regulating this procedure. The Basic Court in paragraphs 5 to 8 of the impugned judgment (English version pagination) in detail elaborates on the issue of admissibility of the witness statements and also refers to earlier decisions taken by the Basic Court prior to the judgment. As was agreed by all parties, the written evidence of witnesses H, J, D, E, G, F, V.J., M, F.M., K.H., G.Z., K.K. and N.I. was admitted as evidence by the Basic Court. The Basic Court further found that the initial police statements of witnesses R.B., C, D, E, F, G, H and P would not be used for evidence. With regard to the witness statements before the investigating judge, the Basic Court ruled that the statement of R.B. before

the Investigating Judge on 23 August 2002 is admissible, that the statement of A.A. before the Investigating Judge on 14 May 2002 is inadmissible and that the statement of A.A. before the Investigating Judge on 18 October 2002 is admissible. After careful consideration of the witness statements and procedure, the Panel fully concurs with the assessment made by the Basic Court and affirms the decisions. With regard to the statement of R.B. the Panel specifically reiterates the decision of the Basic Court delivered orally on 4 April 2013, namely that what happened during the interview appears to have been a free voluntary account of the witness as to what happened in Lapashtica and that no breaches were made by the investigating judge.[2] As with regard to the statement of A.A. the Panel concurs with the decision of the Basic Court to exclude the statement given on 14 May 2002 as the defence was not present. The Panel furthermore concurs with the decision of the Basic Court that there are no grounds however to exclude the statement given on 18 October 2002, as the witness was heard in the presence of the defence on that occasion.

b. Credibility and reliability of the witnesses

The defence challenges the credibility and reliability of the incriminating statements of the witnesses, in particular witnesses R.B. and A.A. The appeal of the defence elaborates on the inconsistencies and contradictions of the witness statements, predominantly regarding the evidence given by the witnesses concerning the forced detainment at the detention center in Lapashtica and the beatings of the detainees.

As a general remark concerning witness statements the Panel notes that it is well aware of the difficulties associated with identification and/or recognition evidence and that it must carefully evaluate any such evidence, before accepting it as a basis for sustaining a conviction.[3] With this in mind the Panel has carefully analyzed the statements of the witnesses in this criminal proceeding along with the reasoning of the Basic Court in the impugned judgment. The Panel further has carefully reviewed the arguments presented in the appeals, the replies and the motion of the appellate prosecutor.

Although the Basic Court did not explicitly link the evidence of the incriminating, statements of R.B. and A.A. with other specific evidence, the statements find enough support in the evidence presented by the Basic Court in its reasoning throughout paragraphs 34 to 101 of the impugned judgment (English version pagination).

The testimony of Witness 7 R.B.

[2] Minutes of the Main Trial 4 April 2013, page 7-8.

[3] *Prosecutor v. Kupreskic et al. (Appeal Judgment)*, IT-95-16-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 23 October 2001, paragraphs 34-41. *Prosecutor v. Clément Kayishema and Obed Ruzindana (Trial Judgment)*, ICTR-95-1-T, International Criminal Tribunal for Rwanda (ICTR), 21 May 1999, paragraphs 71-72. *Prosecutor v. Haradinaj et al. (Trial Judgment)*, IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008, paragraph 29.

R.B. states that he was held at detention center in Lapashtica and that during his second interrogation (end of November/beginning of December 1998) N.M. and L.G. were the ones interrogating him; L. was interviewing and N. beat him up.[4] R.B. further states he was released on 31 December 1998. Two days before that he was interrogated for the third time. It was L. and N.M. who conducted the interrogation. He was beaten too. Other detainees included H.H., I.S., A.T.M., N.H., M., A.X. and two brothers. R.B. confirms that these detainees were beaten too. Beatings would also sometimes occur within the stable form other KLA soldiers, and the detainees were sometimes made to beat each other.[5]

During the second re-trial on 2013 R.B. denied that there were any beatings in Llapashtica, as he also denied during the trials in 2003 and 2009. The Court of Appeals opines that the Basic Court properly assessed the different and contradictory testimonies of R.B. With the Basic Court, the Panel finds that R.B.'s accounts during the main trial in 2003, 2009 and 2013 in which he denies that any improper treatment, beatings or torture occurred at Llapashtica detention centre, are manifestly false. The evidence that R.B. gave in his original account is corroborated by the accounts of other witnesses which the Panel accepts as truthful. These witnesses are:
Witness I (brother of A.M.) – A.M. (T.) told Witness I about the detention in Llapashtica. A.M. (T.) head been tortured and all had been emotionally and physically maltreated. A. had scars and bruises on his front and back. A. said that L.G. had beaten him.[6]
Witness J (sister of A.M.) – A. told Witness J that he and other defendants had been maltreated by L.G. and A. showed his family his scars.[7]
Witness P – brother of I.S. – The letter from I. read L.G. is maltreating and abusing him.[8]

The testimony of Witness 4 A.A.
A.A. states that he was held at detention center in Lapashtica and that he was immediately beaten by the military police.[9] The other prisoners present included: N.H., H. from B., B. from Pristina, I.S., A.M., M. from Kerpime, M. from Dvrishta and M. from Podujeva.[10] After several days, A. was beaten again by the Military Police with batons and electricity. A. witnessed others being taken for questioning and saw and discussed their injuries form the beatings.[11]A. was released about 23 March and at that time prisoners included V.J., A.K., H., D. and others.[12]

[4] Statement to Investigating Judge 23 August 2002, page 7, 8 and 9.
[5] Statement to Investigating Judge 23 August 2002, page 17 and 19.
[6] Statement to Investigating Judge 20 February 2002, page 7. Minutes of the Main Trial 20 June 2003, page 5 and minutes of the Main Trial 11 April 2013, page 7-8.
[7] Statement to Investigating Judge 19 February 2002, page 7.
[8] Statement to Investigating Judge 7 March 2002, page 4. Minutes of the Main Trial 6 May 2003, pages 4 and 6.
[9] Statement to Investigating Judge 18 October 2002, page 3.
[10] Statement to Investigating Judge 18 October 2002, page 3-4.
[11] Statement to Investigating Judge 18 October 2002, page 5-7 and 9-10.
[12] Statement to Investigating Judge 18 October 2002, page 12-13.

During the second re-trial on 2013 A.A. denied that there were any beatings in Llapashtica, as he also denied during the trials in 2003. The Court of Appeals opines that the Basic Court properly assessed the different and contradictory testimonies of A.A. With the Basic Court, the Panel finds that A.A.'s accounts during the main trial in 2003 and 2013 in which he denies that any improper treatment, beatings or torture occurred at Llapashtica detention centre, are manifestly false. The evidence that A.A. gave in his original account is corroborated by the accounts of other witnesses which the Panel accepts as truthful. These witnesses are:
Witness D (wife of A.K.) – A. told Witness D, in a secret meeting arranged by Commander Y., that he was detained in Llpashtica, the conditions were very bad and that L.G. "is killing him". A. was tired, pale, and had bruises.[13]
Witness E (daughter of A.K.) – Y. arranged a secret meeting between A. and his family. Witness E describes the condition of her father as very bad, all swollen, he was trembling and his hands were covered in blood. He was crying, saying that "they are beating me, they are killing me, L. is beating me and making others beat me."[14]
Witness F (nephew of A.K.) – A.'s hands were black and he looked as if he had been beaten.[15]
Witness G (daughter of A.K.) – Y. arranged a secret meeting between A. and his family. Witness F describes that A. had had wounds. A. was crying.[16]
Witness H (son of D.B.) – G. had a distinctive mole on his cheek. When D. was questioned, witness H was able to see from his room and look through a window. He saw L.G. holding a gun to his mother.[17] Witness H saw another detainee at the detention center called I.S.[18]
Witness V – Witness V went to Llapashtica with his son and his father. Having identified himself to the soldiers he was put in a room with 12-13 other detainees. He was beaten on the first night. He remembers A.A. was detained with him.[19]

c. Diary of L.G.
The defence submits that due to the diary being lost at some stage between the first trial in 2003 and the re-trial in 2009, the defendant L.G. was harmed in his defence.

The Panel concurs with the conclusion of the Basic Court that no substantial prejudice can be caused to the defendant L.G. by the absence of his diary, as set out in paragraph 9 of the impugned judgment (English pagination version). The diary merely contains a personal account of the events that occurred. This is not objective evidence, yet simply another source of the

[13] Statement to Investigating Judge 12 February 2002, page 12-13. Minutes of the Main Trial 7 April 2003, pages 8-9.
[14] Statement to Investigating Judge 12 February 2002, page 5-6. Minutes of the Main Trial 8 April 2003, pages 5-8.
[15] Statement to Investigating Judge 13 February 2002, page 2-4.
[16] Statement to Investigating Judge 14 February 2002, page 8 and 13. Minutes of the Main Trial 8 April 2003, pages 15-17.
[17] Statement to Investigating Judge 5 February 2002, page 10. Minutes of the Main Trial 5 May 2003, page 4.
[18] Statement to Investigating Judge 5 February 2002, page 11.
[19] Statement to Investigating Judge 1 March 2002, page 5.

statement of the defendant L.G. With the Basic Court, the Panel therefore finds that the absence of the diary does not prevent a fair trial for the defendant L.G.

d. Roles of the defendants

The Panel notes that the specific role, and thus the liability, of each defendant has been described specifically in the reasoning of the impugned judgment of the Basic Court. The Panel affirms this assessment.

As specified in paragraph 102 (English pagination version) there is sufficient evidence that the defendant L.G. bears both command and direct personal liability for directing the illegal detentions, beatings and torture of detainees and personally engaging in questioning victims whilst they were beaten, as he was the Chief of Military Intelligence for the Llapi zone and thus was centrally involved in the operation of the detention center in Llapashtica.

With regard to the defendant R.M., paragraph 104 of the impugned judgment (English pagination version) specifies that the defendant R.M. was zone commander of the Llapi zone and responsible for and directed the regime of illegal detention, beatings and torture and was fully aware that such conduct was occurring under his authority.

e. Conclusion

In conclusion, the Panel is satisfied that the Basic Court completely and correctly established the factual situation and that the arguments raised in the appeals do not undermine these findings. This ground of the appeal of the defence is therefore rejected as unfounded.

E. Armed conflict

The Panel concurs with the reasoning of the Basic Court that an ongoing armed conflict existed in Kosovo, including the detention center located at Llapashtica, between October 1998 until late April 1999 when the criminal offence was committed. Moreover, the nexus between the conduct of the defendants and the said armed conflict has also been correctly established by the Basic Court, as well as the status of the victims. Seeing as the defence did not dispute the existence of the armed conflict, nor the elements of the underlying offence, the Panel will refrain from further elaboration on this issue. The Panel affirms the findings of the Basic Court, as set out at paragraphs 24 to 27 of the impugned judgment (English version pagination).

F. Joint criminal enterprise

The defence submits that the defendants cannot have been part of a joint criminal enterprise, seeing as they acted for the KLA and the KLA cannot be qualified as a joint criminal enterprise.

As was explicitly stressed in all the previous decisions so far, the actions of the defendants are subject of review and not the actions of the KLA as a whole. The KLA is therefore not to be

qualified as a joint criminal enterprise; rather the collaboration between the defendants, and other unknown perpetrators, amongst each other is to be regarded as the joint criminal enterprise. The Basic Court in a clear manner elaborated on this in paragraphs 105 to 108 of the impugned judgment (English pagination version) and the Panel adopts this assessment in its entirety.

G. Enacting clause

a. Exceedance of the indictment

The defence asserts that the scope of the indictment was exceeded as the enacting clause of the impugned judgment attributed actions to the defendants they were not charged with, thus violating 364 §9 LCP in conjunction with Article 346 §1 LCP.

The Panel notes that the Basic Court in the impugned judgment on pages 1 and 2 does not include the exact wording of Count 8 of the indictment in its entirety. However, the Panel finds no violation with regard to the exceeding of the indictment in the enacting clause. The enacting clause contains a conviction for:

> "inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror, and torture […], because from October of 1998 until late April of 1999, L.G., N.M. and R.M., with superior and personal liability, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians illegally detained in the detention center located at Llapashtica […]"

Although the order of certain phrases and sentences in the enacting clause differ from Count 8 of the amended indictment Hep. No. 65/2002, dated 30 June 2003, the proven acts and terminology in the enacting clause corresponds exactly with the indictment:

> "From October of 1998 until late April of 1999, L.G., N.M. and R.M., acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians illegally detained in the detention center located at Llapashtica […]
> By ordering and participating in the beating and torture of Kosovo Albanian civilians illegally detained in the detention centers located at Llapashtica […], L.G., N.M. and R.M. incurred personal and superior responsibility for the war crimes of inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror and torture […]"

The Panel therefore finds the enacting clause in accordance with Article 346 §1 LCP, as the enacting clause "pertains solely to the criminal act which is the subject of the charge contained in the indictment filed originally or as amended or expanded during the main trial".

b. Elaboration of acts

The defence further asserts that the acts of 'inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror and torture' are not elaborated on in the impugned judgment, thus violating Article 364 §11 LCP.

The Panel observes that although not explicitly stated in the reasoning of the impugned judgment, it is explicitly stated in the enacting clause that the 'inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror and torture' refers to the ordering and participating in the beating and torture of Kosovo Albanian civilians illegally detained. The Panel finds that the severity of the beatings combined with circumstance of the victims being illegally detained are of sufficient gravity to be qualified as 'inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror and torture'.[20] Given the fact that the judgment needs to be read as a whole, enacting clause and reasoning, the Panel finds no violation of Article 364 §11 LCP.

c. Identification of co-perpetrators

The defence submits that Article 364 §11 LCP has been violated by not identifying the individuals with whom the defendants acted in concert with.

The Panel notes that this submission of the defence has already been discussed by the Supreme Court in its judgment Ap.-Kz. No. 89/2009, 26 January 2011, namely paragraphs 62 to 64 (English pagination version). The Panel fully subscribes to this reasoning and adopts the conclusion of the Supreme Court that the fact that the names of the co-perpetrators are not mentioned in the enacting clause does not render the Basic Court judgment invalid.

d. Identification of the victims

The defence submits that Article 364 §11 LCP has been violated by not specifying the identity of the victims in the enacting clause.

The Panel notes that this submission of the defence has already been discussed by the Supreme Court in its judgment Ap.-Kz. No. 89/2010, 26 January 2011, namely paragraphs 51 to 58 (English pagination version). The Panel fully subscribes to this reasoning and adopts the

[20] *Kordić and Čerkez* Appeal Judgement, paras 106-107; *Blaškić* Appeal Judgement, paras 143, 155 (beatings, physical or psychological abuse, and intimidation can constitute persecution); *Vasiljević* Appeal Judgement, para. 143; *Krnojelac* Appeal Judgement, para. 188. *See also Kvočka et al.* Appeal Judgement, paras 323-325 (harassment, humiliation, and psychological abuse can constitute the material elements of the crime of persecution).

conclusion of the Supreme Court that the fact that the identity of victims such as names, surnames, date and place of birth, etc. has never been required so far. The Panel therefore finds no violation of Article 364 §11 LCP.

e. Superior liability

The defence asserts that the superior liability as included in the enacting clause is not reasoned upon sufficiently, thus violating Article 364 §11 LCP.

The Panel notes that the liability of each defendant has been described specifically in the reasoning of the judgment.

As specified in paragraph 102 (English pagination version) the defendant L.G. has been found guilty for both command and direct personal liability for directing the illegal detentions, beatings and torture of detainees and personally engaging in questioning victims whilst they were beaten, as he was the Chief of Military Intelligence for the Llapi zone and thus was centrally involved in the operation of the detention center in Llapashtica.

With regard to the defendant R.M., paragraph 104 of the impugned judgment (English pagination version) specifies that the defendant R.M. was zone commander of the Llapi zone and responsible for and directed the regime of illegal detention, beatings and torture and was fully aware that such conduct was occurring under his authority.

The ascertainment of the commanding roles of the respective defendants is based primarily on the evidence given by the defendants themselves, as detailed in the judgment in paragraphs 29.c-h, 31.a-b and 33.a-e (English pagination version). The Panel specifically notes that R.M. stated that L.G. was chief of intelligence for the zone and that it was his job to discover potential threats to the army and the people.

Furthermore, the Panel takes into consideration and adopts the decision already taken by the Supreme Court in this case in judgment Ap.-Kz. No. 89/2010, 26 January 2011, namely paragraphs 109 to 113 (English pagination version), regarding the legal framework governing superior liability (i.e. command responsibility).

In the light of the above, the Panel finds that the superior liability of the defendants is sufficiently elaborated on in the impugned judgment and rejects this ground of the appeal.

f. Articles 22 and 26 CCSFRY

The defence argues that since the defendants are being held liable pursuant to Article 26 CCSFRY, they cannot also be held liable pursuant to Article 22 CCSFRY as co-perpetrators as well, because liability according to Article 26 CCSFRY absorbs the liability according to Article 22 CCSFRY.

The Panel notes that this submission of the defence has already been discussed by the Supreme Court in its judgment Ap.-Kz. No. 89/2010, 26 January 2011, namely paragraphs

139 and 140 (English pagination version). The Panel fully subscribes to this reasoning and adopts the conclusion of the Supreme Court that no violation can be established with regard to the defendants being found guilty under Article 142 CCSFRY as read with Articles 22 and 26 CCSFRY.

g. Time spent in detention on remand

The Panel agrees with the submission of the defence that the Basic Court failed to include in the enacting clause the time spent in detention on remand which is to be credited towards the sentence. The Panel shall therefore modify the judgment accordingly and credit the time spent in detention on remand towards the sentence, pursuant to Article 50 §1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia. With regard to the defendant L.G., his time spent in detention from 28 January 2002 until 23 July 2005 and from 3 October 2009 until 9 June 2010 shall be credited towards the sentence. With regard to the defendant R.M., his time spent in detention from 11 August 2002 until 23 July 2005 shall be credited towards the sentence.

Although the appeal of the defendant N.M. is dismissed as belated, the Panel shall nonetheless *ex officio* modify the judgment in his case as well, pursuant to Article 380 LCP. With regard to the defendant N.M., his time spent in detention from 28 January 2002 until 23 July 2005 shall be credited towards the sentence.

H. Criminal acts of War Crimes against the Civilian Population

The defence asserts that the criminal law has been violated due to the defendant L.G. being found guilty for three criminal offences of War Crimes against Civilian Population, which should have been treated as one single criminal offence.

The Panel notes that this submission of the defence has already been discussed by the Supreme Court in its judgment Ap.-Kz. No. 89/2010, 26 January 2011, namely paragraphs 76 to 82 (English pagination version). The Panel fully subscribes to this reasoning and adopts the conclusion of the Supreme Court that the prescribed conditions for extended criminal acts do not exist in cases of War Crimes against the Civilian Population, because the single criminal acts that may constitute a war crime cannot be considered as creating an apparent actual concurrence between them in the present case. The Panel therefore finds no violation.

I. Time period

The defence raises the issue of the relatively long period of time that has passed between the initiation of the criminal proceedings and the verdict to be reached by this Panel. The Supreme Court in its judgment AP.-Kz No. 89/2010 dated 26 January 2011, addressed this issue in detail in paragraphs 148 to 153 (English version pagination). The Supreme Court concluded that

Article 6 §1 of the European Convention on Human Rights and Basic Freedoms (ECHR), which for each trial includes the need for a reasonable duration, was not violated in this case. The Panel adopts this reasoning in its entirety. Furthermore, the Panel also finds no grounds to conclude Article 6 §1 ECHR has been violated from the time when the aforementioned judgment of the Supreme Court was issued until the rendering of this judgment of the Court of Appeals. The delay is also due to the fact that the case was re-assigned to the presiding/reporting judge on 29 September 2014 but he was not able to exercise his judicial functions until the end of March 2015, when he was officially appointed by the President of Kosovo.

J. Decision on the criminal sanction

The defence challenged the determination of punishments, considering it unfair and unlawful.

Pursuant to Article 357 paragraph 8 LCP the Basic Court in paragraphs 105-114 of the impugned judgment (English version pagination) considered all the relevant factors needed to determine an adequate punishment. The Panel fully concurs with this analysis. The Basic Court appropriately assessed and weighed all the mitigating and aggravating circumstances and came to proportional sentences. The defence did not bring forth any new circumstances that have not already been considered by the Basic Court. The Panel therefore rejects the submissions of the defence.

K. Closing remarks

The Court of Appeals – for reasons elaborated above – partially grants the defence appeals in so far as the time spent in detention on remand which shall be credited towards the sentence is to be included in the enacting clause, and modifies the enacting clause accordingly. The other grounds of the appeals are rejected and the impugned judgment is affirmed in the remaining parts.

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Reasoned written judgment completed on 7 October 2015.

Presiding Judge

_____

Radostin Petrov
EULEX Judge

Panel member

Panel member

Tonka Berishaj Kosovo Judge	Roman Raab EULEX Judge

Recording Officer

Alan Vasak
EULEX Legal Officer

Court of Appeals
Pristina

PAKR 440/14

11 August 2015