SUPREME COURT

Case number: **Pml.Kzz 1/2014**
(P. Nr. 45/2010 District Court of Mitrovica)
(PAKR 966/2012 Court of Appeals)

Date: **7 May 2014**

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Timo Vuojolahti (Presiding and Reporting), and EULEX Judge Willem Brouwer and Supreme Court Judge Valdete Daka as Panel members, and EULEX Legal Officer Kerry Kirsten Moyes as the Recording Officer, in the criminal case number P. Nr. 45/2010 of the (then) District Court of Mitrovica against:

S. G., nicknamed "X", son of X and X, born X in X Village, X Municipality, Kosovo Albanian, currently residing at X in X, married with four children, previously convicted of Attempted Extortion, Endangering Security and Causing General Danger, in detention on remand since 6 May 2010. S. G. was charged with six counts of **War Crimes Against the Civilian Population** in violation of Art 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), also foreseen in Articles 23 and 120 of the Criminal Code of Kosovo (CCK), and in violation of Common Article 3 of the Geneva Conventions (GC) and Articles 4 and 5(1) of Additional Protocol II to the Geneva Conventions (AP II). He was convicted of 4 counts of **War Crimes** by the District Court of Mitrovica. This Judgment was modified by the Court of Appeals to 1 count of **War Crimes**. He was also convicted of **Unauthorized Ownership, Control, Possession or Use of Weapon** in violation of Article 328(2) of the CCK;

R. A., nicknamed "X", son of X and X, born X in XVillage, X Municipality, Kosovo Albanian, currently residing in X Village, X, married with four children, no known previous convictions, in detention on remand since 23 June 2010. R. A. was charged with three counts of **War Crimes Against the Civilian Population** in violation of Articles 22 and 142 CCSFRY, also foreseen in Articles 23 and 120 CCK, and in violation of Common Article 3 GC and Articles 4 and 5(1) of AP II. He was convicted of 2 counts of **War Crimes** by the District Court of Mitrovica. This Judgment was modified by the Court of Appeals to 1 count of **War Crimes**;

S. R., son of X and X, born X in X Village, X Municipality, currently residing in X, married with four children, no known previous convictions. S. R. was charged with three counts of the criminal offence of **War Crimes Against the Civilian Population** in violation of Articles 22 and 142 CCSFRY, also foreseen in Articles 23 and 120 CCK, and in violation of Common Article 3 GC and Articles 4 and 5(1) of AP II. He was convicted of 1 count of **War Crimes** by the District Court of Mitrovica.

et al

acting upon **the Requests for Protection of Legality** filed by Defense Counsel M. H. on 17 January 2014 on behalf of the defendant **S. G.**, filed by Defense Counsel G. K. on 24 December 2013 on behalf of the defendant **R. A.**, and filed by Defense Counsel Q. Q. on 14 January 2014 on behalf of the defendant **S. R.** against the Judgments of the (then) District Court of Mitrovica in this case dated 29 July 2011 (for S. G. and R. A.) and 13 October 2011 (for S. R.), and the Judgment of the Court of Appeals dated 11 September 2013;

having considered the Responses to the Requests filed by the State Prosecutor KMLP. II. – ZZZK. II. No. 1/14 filed on 15 January 2014 for R. A., and filed on 14 February 2014 for S. G. and S. R.;

having deliberated and voted on 7 May 2014;

pursuant to Articles 418 and Articles 432-441 of the Criminal Procedure Code (CPC)

renders the following

JUDGMENT

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1. **The Requests for Protection of Legality filed by Defense Counsel G. K. on behalf of the defendant R. A., and by Defense Counsel Q. Q. on behalf of the defendant S. R., against the Judgments of the (then) District Court of Mitrovica dated 29 July 2011 (for R. A.) and 13 October 2011 (for S. R.), and against the Judgment of the Court of Appeals dated 11 September 2013, are rejected as ungrounded. The above Judgments are not amended based on these requests.**

2. **The Request for Protection of Legality filed by Defense Counsel M. H. on behalf of the defendant S. G. against the Judgment of the (then) District Court of Mitrovica dated 29 July 2011, and the Judgment of the Court of Appeals, dated 11 September 2013, is partially granted. The Judgment of the (then) District Court of Mitrovica dated 29 July 2011, and the Judgment of the Court of Appeals dated 11 September 2013, are amended for S. G. part as follows:**

   - **The charge of the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapon (District Court Judgment, Count 7), against the defendant S. G., in violation of Article 328(2) of the CCK, is rejected pursuant to Article 363 (1.1.3) of the CPC and Law No. 04/L-209 on Amnesty (the Law on Amnesty).**

- **The defendant S. G. is released from the punishment of fine. The aggregate punishment of imprisonment (15 years) remains. The weapon to remain confiscated.**

The remainder of the Request is rejected as unfounded.

REASONING

1. **Procedural background**

A. The Indictment

1.1. On 6 August 2010, the SPRK Prosecutor filed Indictment PPS No. 08/2009 against the defendants S. G. and R. A., charging them with the criminal offences of War Crimes against the Civilian Population pursuant to Articles 22 and 142 of the CCSFRY, currently criminalized under Articles 23 and 120 (2) of the CCK. The alleged criminal acts took place in two KLA-run camps in X and Xin the Republic of X, in 1999. S. G.was also indicted for unauthorized possession of a weapon. The Indictment was confirmed with Ruling KA No. 64/2010 on 24 November 2010.

1.2. On 29 December 2010, the SPRK Prosecutor filed Indictment PPS No. 117/2010 against S. R. and a co-accused, H. H., charging them with War Crimes against the Civilian Population. The alleged criminal acts took place in a KLA-run camp in X in the Republic of X, in 1999.

1.3. On 16 February 2011, the Prosecutor filed a Ruling on expansion of the criminal investigation of case PPS No. 117/2010 to include a fifth co-accused, Sh. H., as a suspect. Subsequently, on 25 February 2011, the Prosecutor filed a separate Indictment under PPS No. 117/2010 (registered by the Court under KA No. 09/2011) against Sh. H. charging him with two counts of War Crimes with regard to the detainees at the KLA camp in X.

1.4. At the request of the SPRK Prosecutor, on 2 March 2011 the Confirmation Judge issued an Order to join criminal case KA No. 09/2011 against Sh. H. to criminal case KA No. 208/2010 against H. H. and S. R., as the alleged criminal offences were interconnected and relied upon common evidence. On 25 March 2011, the Confirmation Judge issued Ruling KA No. 208/2010 confirming both Indictments and declaring all the evidence contained in the case file as admissible.

B. The Trial

1.5. The trial against S. G. and R. A. opened on 14 March 2011 before a Panel composed of two EULEX Judges and one Kosovo Judge at the District Court of Mitrovica. On 14

April 2011, the Prosecutor moved for the case against H. H., S. R. and Sh. H. to be joined to the ongoing trial against S. G. and R. A.. On 4 May 2011, the trial against H. H., S. R. and Sh. H. in case P No. 13/2011 was opened, also in the presence of defendants S. G. and R. A. and their Defence Counsels. All of the parties agreed to the joinder of the cases, and thus, the main trial continued against all five defendants.
1.6. On 16 June 2011, Defence Counsel Q. Q. applied for permission from the Court for the defendant S. R. to travel to X for urgently needed heart surgery. On 20 June 2011, the Trial Panel severed the case against S. R. pursuant to Article 34 of the KCCP, and the trial continued against the four other defendants.

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

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

C. The Verdicts

1.9. The defendant S. G. was found guilty of 4 counts of War Crimes against the Civilian Population pursuant to Articles 22 and 142 CCSFRY and in conjunction with Common Art 3 GC and Articles 4 and 5(1) AP II (inhumane treatment of civilian prisoners, torture of civilian prisoners, violation of bodily integrity of civilian prisoners by means of ill-treatment and beatings). He was also found guilty of Unauthorised Possession of Weapons (Count 7) pursuant to Article 328 (2) CCK. He was sentenced respectively to 8, 12, 9 and 8 years of imprisonment for each count of War Crimes against the Civilian Population. For the Unauthorized Ownership, Control, Possession or Use of Weapon he was punished with a fine of 4,000.00 Euro. The aggregate punishment was determined in 15 years of imprisonment and a fine of 4,000.00 Euro. The time spent in detention on remand was credited. He was acquitted of two counts of War Crimes against Civilian Population (murder, giving orders to the violation of bodily integrity of civilian prisoners).

1.10. The defendant R. A. was found guilty of two counts of War Crimes against the Civilian Population pursuant to Articles 22 and 142 of the CCSFRY and in conjunction with Common Art 3 GC and Articles 4 and 5(1) of AP II (violation of bodily integrity of detained civilians). He was sentenced respectively to 8 and 9 years of imprisonment for each count of War Crimes against the Civilian Population. The aggregate punishment was determined in 12 years of imprisonment and the time spent in detention on remand was credited. He was acquitted of one count of War Crimes against the Civilian Population (inhumane treatment of civilian detainees).

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

was acquitted for two counts of War Crimes against the Civilian Population. He was sentenced to 5 years of imprisonment.

1.12. For completeness, regarding the two co-accused who have not filed Requests for Protection of Legality, the Supreme Court notes the following. The defendant H. H. was found guilty of one count of War Crimes against the Civilian Population (torture of a detained civilian), was acquitted of one count of War Crimes against the Civilian Population, and was sentenced to 6 years of imprisonment. The defendant Sh. H. was found guilty of one count of War Crimes against the Civilian Population (torture of a detained civilian), was acquitted of one count of War Crimes against the Civilian Population, and was sentenced to 7 years of imprisonment.

D. The Appeals Procedure

1.13. Defence Counsels M. H. and H. M. filed a Joint Appeal on behalf of S. G. on 14 February 2012. Defence Counsel G. K. filed an Appeal on behalf of R. A. on 15 February 2012. Defence Counsel Q. Q. filed an Appeal on behalf of S. R. on 4 April 2012. (Appeals were also filed on behalf of H. H. and Sh. H.). All Appeals were submitted timely. On 25 January 2013 the EULEX Appellate Prosecutor Judit Eva Tatrai filed an Opinion and Motion in response to the Appeals.

1.14. On the 13 January 2013 the case was transferred from the District Court of Mitrovica to the Court of Appeals pursuant to Art 39 (1) of the Law on Courts, Law No. 03/L-199. The session of the Court of Appeals took place on 10 September 2013, when the Panel joined the criminal proceedings in the severed case against the defendant S. R. to the case against the other four defendants.

1.15. The Court of Appeals disagreed with the arguments that the District Court had substantially violated the norms of procedural law, had wrongfully and incompletely established the factual situation, and that as a result the substantive law had been wrongfully applied to the detriment of the defendants. First, the Court of Appeals could not find any contradictions or inconsistencies within the enacting clause. Second, the Court of Appeals could not find the enacting clause as inconsistent with the Reasoning in the Judgment. Third, the Court of Appeals found that there were no contradictions with the evidence and conclusions made by the District Court, as alleged.

1.16. The Court of Appeals, however, re-qualified the acts of S. G. and of R. A. Their Appeals raised the issue of the qualification for the repeated commission of the same criminal offence. The District Court had convicted both Defendants for several counts of War Crimes against Civilian Population and imposed a separate sentence on them for each individual count, although all their respective acts were in contradiction of one Article of substantive law – Article 142 CCSFRY. The Court of Appeals considered the question of whether repeated commission of the criminal offence of War Crimes against Civilian Population as foreseen by Article 142 CCSFRY should be qualified as separate

counts that result in separate punishments, i.e. one punishment for each individual count, or should only one punishment be rendered for all such acts taken together. The Court of Appeals considered Article 48(1) CCSFRY and the Supreme Court (acting as the Second Instance Court) Judgment in the criminal case against L. G.[1]. It concluded that it is more appropriate to apply the principle of ideal concurrence. This approach has been widely accepted in the legal literature and in the civil tradition of court practice across Continental Europe. The acts of the Defendant S. G., therefore, were re-qualified to constitute one criminal offence of War Crimes against Civilian Population in violation of Article 142 of the CCSFRY, also foreseen in Articles 120 and 121 of the CCK, and in violation of Common Article 3 GC and Articles 4 and 5(1) of AP II, with the conduct supporting the conviction detailed in 4 sub paragraphs. Similarly, the Court of Appeals also re-qualified the acts of R. A. to constitute one criminal offence of War Crimes against Civilian Population in violation of Article 142 of the CCSFRY, also foreseen in Articles 120 and 121 of the CCK, and in violation of Common Article 3 GC and Articles 4 and 5(1) of AP II, with the conduct supporting the conviction detailed in 2 sub paragraphs.

1.17. The Appeals of the Defense Counsels for S. G. and R. A. , therefore, were partially granted to modify the Judgment of the District Court of Mitrovica dated 29 July 2011 No. 45/2010 to re-qualify the acts of S. G. and R. A.. S. G. was sentenced to 15 years of imprisonment and R. A. to 12 years of imprisonment (the same sentences as imposed by the District Court). Because the appeals of Defense Counsels for H. H. and Sh. H. were rejected, the remaining part of the Judgment (29 July 2012) was confirmed.

1.18. The Appeal of the Defense Counsel for S. R. was rejected as unfounded. Thus, the Judgment of the District Court of Mitrovica dated 13 October 2011 No. 45/2010 was confirmed.

2. **Submissions by the Parties**

A. Defense Counsel M. H. for **S. G.**.

2.1. The Request states that it is based on two grounds; Substantial Violation of the provisions of Criminal Procedure and Violations of the Criminal Law.

a. Substantial Violations of the provisions of criminal procedure code (Article 384, paragraph 1, item 12 in conjunction with Article 370 of the KCCP).

- The First Instance Judgment dismisses as 'minor discrepancies' significant controversies of decisive facts. Witness 'B' said in the investigation stage that G. was

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

motivated by revenge from conflicts between them in Dubrava prison, and later denied this. There were other controversies between the testimonies given during the investigation and those during the Court hearing.
- There were also significant controversies in the statements of Witness 'H' given during the investigation and given in the Court hearing.
- Witness 'A' stated in the trial that G. did not use violence nor did he have a commanding position in X.
- I. I.'s evidence is not consistent with the evidence of Witness 'K', the former saying that he was slapped by G. twice and then hit with his crutch, whereas the latter states that he only witnessed one time when S. pushed him with crutches.
- The First Instance Judgment neglected the statements of five defense witnesses.

- The Second Instance Judgment does not meet the requirements of Article 389 in that it does not give Reasoning in relation to the findings of the Judgment of First Instance, only restating the paragraphs regarding Common Article 3 of the Geneva Conventions and repeating the same Reasoning.

- International humanitarian law is not applicable. The reach of Common Article 3 of the Geneva Convention of 'at any time and any place' does not mean territory outside of the territory of one of the parties to the conflict. 'Territory' does not mean political or national state borders. This infringes the doctrine of state sovereignty. X was not a party to the conflict nor a member of NATO. The application of the Conventions shall cease at the close of military operations, and so does not apply now. Finally, any doubts as to facts or the applicability of criminal law should be interpreted in the defendant's favour.

b. Violation of the criminal law

- There has been unlawful application of the Geneva conventions.
- The witnesses' statements were inconsistent within themselves and with other testimonies.
- The testimony of I. I. was not corroborated.
- No reasons were given for finding as proven that the Defendant was liable for the manner of the 'inhumane treatment' at X, and only Witness B gives evidence of G.'s command position.
- The sentence is too severe for a single offence, and was made without consideration of his general circumstances (he is in a very serious health condition, he has 4 children, he was very well behaved throughout the trial). Further, a more lenient sentence would also achieve the purpose of criminal sanctions as per Article 41 of the CCK as similar circumstances will not occur in future now that Kosovo is at peace.

2.2. The Defense Counsel requests that the defendant S. G. is acquitted of the charges, or that both the Judgment of the District Court dated 29 July 2011and the Judgment of the Court of Appeals are 'quashed' and the case returned to the District Court for a

retrial, or otherwise that the most lenient sentence possible is imposed. Moreover, the Defense Counsel calls for acquittal of the criminal offence of Unauthorised Ownership, Control, Possession or use of Weapon (Count 7) because of the amnesty provided by the Law on Amnesty.

B. Defense Counsel G. K. for **R. A.**

2.3. The Request states that it is based on three grounds; Violation of the Criminal Law, Essential violations of the Criminal Procedure Code, Other violations of the Criminal Procedure Provisions.

- in relation to sentence for the two criminal offences, only one criminal offence has been committed.
- both the First and Second Instance Judgments are based on inadmissible evidence.
- There is no evidence that A. mistreated witness 'O' and he was not heard during the trial, which means his statement should not be taken into account.
- both the First and Second Instance Judgments did not clearly and fully describe what facts, and why, they found to be true.
- Violation of Article 11, paragraph 1 and Articles 14 and 15 of the 'CCP'. If the evidence had been assessed correctly A. would not have been convicted.
- both did not accurately assess the inconsistent evidence. Specifically, regarding I. I., the enacting clause said that he was 'severely and repeatedly beaten up' and in count 3 it states 'an indefinite number of occasions…between April 12th and middle of June 1999'. Item 249 of the Judgment says 'two different occasions'. Item 165 states after the two severe beatings there were other less severe beatings by other KLA soldiers. - There is insufficient evidence that any beatings of I. I. were on the order of A.
- Regarding witnesses 'K' and 'M' they themselves state that there were 'only' hit by A. once, on the day that they arrived at X.
- There is no evidence that A. beat witness 'N'. He himself only mentions other KLA soldiers.

2.4. The Defense Counsel proposes that the Judgment of the District Court dated 29 July 2011 and the Judgment of the Court of Appeals are annulled and the case referred back to the Basic Court of Mitrovica for retrial, or to change the sentence to a more lenient one.

C. Defense Counsel Q. Q, on behalf of **S, R,**

2.5. The Request is based on two grounds; Substantial violations of Article 403, paragraphs 1 and 12 of the Criminal Procedure Provisions and violation of the criminal law.

- the enacting clause of the First Instance Judgment is incomprehensible and contradictory with its Reasoning.

- the Appeals Judgment did not answer the Appeal or individualize R.'s role.
- to pronounce a person guilty, the intent of the accused must be grounded on evidence and undisputed facts.
- All incriminating actions rely exclusively on Witness 'N' who, along with Witnesses 'K', 'L' and 'M' all state that R. was once of the best in the camp.
- he cannot be guilty of acting in co-perpetration under Article 22 (of the CCSFRY) and also responsible under Article 26 of the 'LAP' because the responsibility under Article 26 absorbs the responsibility under Article 22.
- to find co-perpetration under Article 22 there must be a verbal or written plan for the criminal offence.
- Common Article 3 to the Geneva Conventions of 1949 is not applicable in this case. The Convention states that where one of the parties to a conflict has reasonable grounds to assess that a person is involved in a damaging activity that person does not enjoy the rights and privileges of the Convention. Also, there was a grounded suspicion that these persons had been, and would be, conducting harmful activities against the KLA, and all have a right to self-defense.
- any doubts as to facts should be interpreted in the defendant's favour.
- his intent was not analysed clearly.

2.6. The Defense Counsel proposes that the Judgment of the District Court dated 13 October 2011 and the Judgment of the Court of Appeals are annulled and the case returned to the Basic Court for re-trial.

D. The Prosecutor

2.7. In his response the State Prosecutor proposes that the Requests for Protection of Legality are rejected and both District Court Judgments and the Judgment of the Court of Appeal are affirmed, except as concerns the proposal from Defense Counsel for S. G. regarding the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons, in which the Supreme Court should consider to apply the Law on Amnesty (04/L-209) according to current legal praxis (the weapon to stay confiscated). The State Prosecutor states that all the Requests for Protection of Legality are without merit, and all arguments have been previously presented, considered and adjudicated upon by the District Court and the Court of Appeals. Issues regarding the evaluation of evidence cannot be grounds for a Request for Protection of Legality, in accordance with Article 432 paragraph 2 of the CPC. The medical condition of S. G. has already been considered by the Court of Appeals.

3. **Findings of the Panel**

A. General findings

3.1. The Requests for Protection of Legality by the Defense Counsels and the Response by the State Prosecutor are admissible and timely filed.

3.2. The Supreme Court notes that all Defense Counsels raise issues with the evaluation of the evidence by the District Court. Defense Counsel are reminded that Requests for Protection of Legality may be filed on the ground of a violation of the criminal law, on the ground of certain substantial violations of the provisions of the criminal procedure, or if there is any other violation of the provisions of the criminal procedure that has affected the lawfulness of the judicial decision. A Request may not be filed on the ground of erroneous or incomplete determination of the factual situation (Article 432 of the CPC). The Supreme Court concurs with the State Prosecutor that the contents of the Requests are largely a repetition of their Appeals against the First Instance Judgment, which have been completely answered by the Court of Appeals. It is a widely spread and unfortunate tendency among many Defense Counsels to try to use the Request for Protection of Legality as a second Appeal, which it is not supposed to be.

3.3. Generally, all Defense Counsels claim that both Judgments did not clearly and fully indicate what facts and for what reasons were found to be true, or that they are incomprehensible or contradictory. The Supreme Court completely disagrees with these submissions. The First Instance Judgement is very thorough and clear as to what exactly has been found as proven – again, this is detailed in a completely comprehensible manner in paragraphs 54 to 214. The Court of Appeals Judgment is equally articulate in its Reasoning and entirely clear as to its Findings. Nor can the Supreme Court identify any contradictions between the enacting clause and the Reasoning in either Judgment. Thus, the Panel, referring to the reasoning of the factual situation in the District Court's Judgment and without any further reason to analyse in a more detailed way, does not find any violations of the rules in Article 403 paragraph 1 item 12 of the CPCK / Article 384 paragraph 1 item12 of the CPC as alleged in the Requests.

B. Common Article 3 of the GC

3.4. Defense Counsels for S. G. and S. R. claim that Common Article 3 of the Geneva Conventions does not apply in this case for a variety of reasons: a) the Convention cannot be applied to acts which took place in a territory of a State that was not a party to the conflict, and Albania was not a party to the conflict nor a member of NATO, b) the application of the Convention shall cease at the close of military operations, and so does not apply now, c) a person involved in a damaging activity does not enjoy the rights and privileges of the Convention.

3.5. First, the Supreme Court notes that the question is not about the jurisdiction and competence of the Kosovo Courts to adjudicate on the indicted crimes against the defendants. In this sense the Supreme Court only refers to what the District Court and Court of Appeals have reasoned regarding these issues.

3.6. The Supreme Court points out that the question raised in the Requests deals with the elements of the criminal offence of War Crimes against the Civilian Population: are the

elements of this criminal offence in this case fulfilled due to the fact that the alleged criminal acts took place in Albania, which was not a party to the conflict. The defense refers to Common Article 3 GC which states: *'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties….'*

The Supreme Court notes that the indictment is based on the Art 142 of the CCSFRY which states: *'Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders …. or who commits one of the foregoing acts…*' In the Indictment the Prosecutor has specified, that in this case the violated rules of international law are the rules of Common Article 3 GC and Articles 4 and 5(1) AP II. This means that the question to be answered reads: does the Common Article 3 GC set a prerequisite for the scene of the crime; do the criminal acts have to take place in the territory of the party to the conflict?

3.7. The District Court has explained in paragraph 42.3 what the Court thinks is needed for the application of Common Article 3 GC. One requirement that they detail is that the alleged conduct occurred on the territory under the control of one of the parties to the conflict. The Court states reasons for their finding that the alleged conduct took place in a territory under the control of KLA, which was a party to the conflict. Later on in paragraph 43 the Court concludes that the Court has jurisdiction despite the alleged criminal activity taking place in X, and that if proved the offences can be classified as war crimes despite the fact that the crimes occurred within the territory of a third party nation (X).

3.8. The Supreme Court disagrees with the District Court's (and Court of Appeals) assumption that Common Article 3 GC includes a requirement that the alleged conduct must have occurred on the territory under the control of one of the parties to the conflict. What Article 3 states is that when the conflict occurs (and not when the offences occur) in the territory of a High Contracting Party to the Conventions, then the *parties to the conflict* are bound by the Conventions. It is noted that X became a High Contracting Party to the Geneva Conventions on 15 December 1950 and to the Additional Protocols on 28 December 1978. It is also noted that Article 1 of Additional Protocol II is similarly worded (…*conflicts which take place in the territory of a High Contracting Party*).

3.9. After stating the protection guaranteed to persons who are not taking active part in the hostilities, the first paragraph in Common Article 3 GC states the following: '*To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons…'*

The Supreme Court points out, first, that in the wording of the Common Article 3 GC there is no requirement that the criminal offence/s occur in the territorial area of the ongoing conflict or in an area under the control of one of the parties to the conflict.

Second, the quoted wording in Common Article 3 GC clearly states that the acts are prohibited *'at any time and in any place whatsoever'*. Third, the whole purpose of the GC supports a wide interpretation in the question of its application. Thus, the conclusion is that the obligations to the parties of the conflict are not restricted to any specific territorial area, but rather apply to all the activities related to the conflict, wherever these take place. What is now relevant is the nexus between the alleged acts of the accused and the armed conflict. If the nexus is not proven, the elements of war Crimes against the Civilian Population (Art 142 CCSFRY) are not all fulfilled.

The District Court has given reasons to establish the existence of the nexus (see paragraph 42.3 and 45). The Supreme Court notes that the presented arguments (the perpetrators as being KLA members, the victims were assumed as having had sympathies for the opposing party or collaborated with them, the conducted acts were committed because of these assumed sympathies, the existence and purpose of the KLA camps in X and X) are relevant and the existence of the nexus can be based on these facts. There is no doubt that the offences occurred in connection with the armed conflict.

As the District Court has stated, the victims were not taking an active part in the hostilities. It cannot be accepted that the protections of the Geneva Conventions against inhumane treatment and the violation of bodily integrity by beatings do not apply to civilians suspected of being enemy sympathisers.

3.10. Therefore, the Supreme Court rejects all arguments that the offences are not within the reach of the Common Article 3 GC and Articles 4 and 5(1) AP II. There is no violation of the Criminal Law as alleged in the requests.

C. S. G.

3.11. Defense Counsel for S. G. states that the application of the Conventions cease at the close of military hostilities. As established by District Court, the criminal acts were committed during the armed conflict, and the Convention was effective at that time. The Panel considers that this argument stems from Defense Counsel's misunderstanding of the law, which is clear on this point.

3.12. Defense Counsel also claims that the District Court Judgment neglected the examination of defense witness statements of O. K., S. D., H. A., Xh. H. and R. Q. The Panel disagrees. The District Court's Judgment beginning from paragraph 54 entitled 'Evaluation of the Evidence: Factual Findings' states that it considers the facts which are detailed in this section as proven. The Panel notes that O. K. is specifically mentioned, and the other defense witnesses were not present at the place and time of the commission of the criminal offences, and the point of their evidence seems to have been to support S. G.'s assertion that there was a grudge between him and Witness B. The Supreme Court refers again to the detailed evaluation of the evidence in the District Court's Judgment between paragraphs 54 and 214. The Panel finds no relevant violation as alleged.

3.13. Regarding S. G.'s conviction for the criminal offence of Unauthorised Ownership, Control, Possession or Use of Weapons pursuant to Article 328 (2) of the CCK, the Panel notes the effect of the Law No. 04/L-209 on Amnesty (Amnesty Law) to the present case. The law came into force on 4 October 2013. Pursuant to Article 2 (1) of the Amnesty Law all perpetrators of offenses, listed in Article 3 of this law, that were committed before 20 June 2013 shall be granted a complete exemption from criminal prosecution or from the execution of punishment for such offenses, in accordance with the terms and conditions of Article 3 of this law. According to Article 3 (1.2.5.), the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 (2) of the CCK falls under the scope of amnesty. As S. G. committed this criminal offence before the relevant date in Article 2 (1) of the Amnesty Law, he must be exempted from criminal prosecution for this crime, and the Supreme Court therefore rejects this charge against S. G., and the defendant S. G. is released from the punishment of fine.

3.14. Otherwise, and despite the requalification of the War Crimes offences to a single offence by the Court of Appeals, the Supreme Court finds no reason to disturb S. G.'s sentence. The poor state of his health was specifically mentioned by the First Instance Court at paragraph 268 of its Judgment, and the Court was also aware of his wider personal circumstances. Finally, good behaviour during a trial is something which is expected by the Court as a matter of basic courtesy, and is not something which should be rewarded by a reduction in sentence.

D. R. A.

3.15. Defense Counsel for R. A. claims that both Judgments were based on inadmissible evidence, but provides no further details, making it impossible for the Supreme Court to determine this claim. Thus, there is no violation as alleged.

3.16. The Defense Counsel also claims that he was convicted of two (2) criminal offences and sentenced to different terms of imprisonment in different parts of the First Instance Judgment. The Supreme Court notes that the Judgment is very clear that his aggregate punishment was determined in twelve (12) years of imprisonment. The Court of Appeals sentenced him, after re-qualifying the acts as establishing one criminal offence of War Crimes against Civilian Population, to 12 years of imprisonment. The sentence is clear and there is no violation of criminal law as alleged. The Supreme Court sees no reason to disturb this defendant's sentence.

E. S. R.

3.17. Defense Counsel for S. R. submits that to pronounce a person guilty, the intent of the accused must be grounded on evidence and undisputed facts, any doubts as to facts should be interpreted in the Defendant's favour, that the Defendant cannot be guilty of

acting in co-perpetration under Article 22 (of the CCSFRY) and also responsible under Article 26 of the 'LAP' because the responsibility under Article 26 absorbs the responsibility under Article 22, and that to find co-perpetration under Article 22 there must be a verbal or written plan for the criminal offence. This Panel considers that these allegations are misunderstandings of the law. First, intent and guilt do not have to be based on undisputed facts. Rather, it is the Court's function to determine which facts are proved. Second, neither is there a tension between Articles 22 and 26 of the CCSFRY as Article 26 is not mentioned in the enacting clause of either Judgment. Further, as was pointed out in the Court of Appeals Judgment in answering this submission, Article 22 does not state a requirement for a previous agreement, verbally or in writing, to find joint criminal enterprise.

3.18. Taking into consideration that the allegations are manifestly without merits, there is no need for further reasoning. There is no violation as alleged in the Request.

F. Conclusion

3.19. The Supreme Court could not establish any violations as alleged in the Requests.

Presiding Judge	**Recording Officer**
Timo Vuojolahti	Kerry Kirsten Moyes
EULEX Judge	EULEX Legal Officer

Panel members

Willem Brouwer	Valdete Daka
EULEX Judge	Supreme Court Judge