BASIC COURT OF MITROVICË/MITROVICA

P.nr. 12/2012

8 March 2013

IN THE NAME OF THE PEOPLE

THE BASIC COURT OF MITROVICË/MITROVICA, in the trial panel composed of EULEX Judge Nuno de Madureira as Presiding Judge, EULEX Judge Roxana Comsa and EULEX Judge Katja Dominik, with EULEX Legal Officer John Gayer as the Recording Officer in the criminal case against:

MK , **BK** **and EK** , charged under the Public Prosecutor's amended Indictment PP. 102/2011 dated 31 January 2012 and amended on 27 November 2012 and 3 January 2013 and filed with the Registry of the Basic Court of Mitrovicë/Mitrovica and confirmed by the Ruling on Confirmation of Indictment dated 5 March 2012 with co-perpetration in aggravated murder under Article 147(1), (5) and (11) of the Criminal Code of Kosovo (CCK); and co-perpetration in attempted aggravated murder under Article 147(1) and (5) of the CCK. **MK** and **EK** are also charged with unauthorised ownership, control or possession of weapons under Article 328(2) of the CCK

After having held the main trial hearing, open to the public, on 27 and 30 November, 3 and 5 December 2012, 15, 18 and 21 January 2013 all in the presence of the Accused **MK** , **BK** and **EK** , the Defence Counsel Xhelal Hasani, Rexhap Kacaniku, and Agim Lushta; Injured Party **FK** , Authorized Representative of the Injured Party Vahide Badivuku until 15 January and Hali Derguti from 15 January; and EULEX Public Prosecutor Maarten Groothuizen,

Following the trial panel's deliberation and voting held between 18 and 21 January 2013,

Pursuant to Article 392(1) of the Criminal Procedure Code of Kosovo (KCCP), pronounced in public and in the presence of the Accused, his Defence Counsel, the Injured Party, the Authorized Representative of the Injured Party and the EULEX Public Prosecutor,

Renders the following:

VERDICT

I. Count 1

The Defendants:

MK , son of

Arrested on 6 August 2011 and in detention since 8 August 2011.

BK , son of

He was arrested on 6 August 2011 and has been on remand detention since 8 August 2011,

EK , (also known as " ") son of

He was arrested on 7 August 2011 and has been on remand detention since 8 August 2011,

Are

FOUND GUILTY

Because it is proven beyond reasonable doubt that on 6 August 2011 **IK** travelled to village in the municipality of Vushtrri/Vučitrn with his daughter **AK** , aged years old, and his son **AK2** , aged years old.

IK had been ostracised from Village due to a dispute with the Defendants' family. An agreement had been reached in the community that **IK** would leave Village in order to resolve the dispute. On 5 August 2011 **IK** and **MK** were involved in a verbal altercation over **IK's** presence in the village. **IK** threatened **MK** during the altercation.

On 6 August 2011 **BK** saw **IK, AK, AK2** enter the village on a "motor-cultivator" tractor and trailer at around 11h00. He contacted his father, **MK** . **MK** knew **IK** regularly visited a location near Llap River. **MK** and **BK** decided to ambush **IK** . **BK** contacted his brother **EK** to arrange for **EK** to transport all three of the Accused to near the Llap River.

MK and **BK** were at **MK's** house when **EK** arrived in his car, a white Audi 80 (registration no. 02-560-AJ). **EK** Emin was informed of their intentions and agreed to transport them. **MK** , armed with a Crvena Zastava automatic rifle (serial no. 0-81383), sat in the rear seat beside **BK** while **EK** drove the car. **BK** and **EK** knew and accepted that their father was armed.

EK drove his father (**MK**) and brother (**BK**) to the road leading to Llap River. At this point **MK** and **BK** left the car and walked towards the Llap River. **EK** waited for a while in the car and after some time joined them.

MK , **BK** and **EK** ambushed **IK** at approximately 14h00 as he drove along the road returning from the Llap River. **IK's** daughter **AK** and son **AK2** sat on the trailer directly behind him with one on either side. **MK** opened fire indiscriminately without warning. Under the sustained fire **MK** shot and killed **IK** and **AK** . He also wounded **AK2** on the neck.

EK intervened after **IK** had been killed to take the weapon from **MK** who was still firing.

By doing so **MK** has intentionally killed **IK** at the same time as shooting and killing **AK** aged years old. He knew by firing on **IK**

there was a substantial risk he could hit and kill the daughter and the son but took no steps to avoid this. He carried out the shootings.

BK and **EK** voluntarily acted together with their father and in full knowledge of the plan to ambush and kill .

MK , **BK** and **EK** were fully mentally competent.

Therefore,

The Defendant MK **is CONVICTED** of committing the criminal charge of aggravated murder of **IK** under Articles 23 and 147(11) of the Criminal Code of Kosovo – UNMIK/REG/2003/25 (CCK), in accordance with Article 2(1), of the CCK;

The Defendant MK **is CONVICTED** of committing the criminal charge of aggravated murder of **AK** under Article 147(1) and (11) CCK, in accordance with Article 2(1), of the CCK.

The Defendant BK **is CONVICTED** of committing the criminal charge of murder of **IK** under Articles 23 and 146 of the CCK, in accordance with Article 2(1), of the CCK;

The Defendant EK **is CONVICTED** of committing the criminal charge of murder of **IK** under Articles 23 and 146 of the CCK, in accordance with Article 2(1), of the CCK; pursuant to Article 388(1) of the KCCP.

II. The Defendants BK **and EK** **are**

FOUND NOT GUILTY

Because it is not proven beyond a reasonable doubt that, although **BK** knew **AK** was with **IK** , she was an intended target and **BK** foresaw and accepted that the actions of **MK** would result in her death.

Also, it is not proven beyond a reasonable doubt that **EK** was aware of the presence of **AK** with her father before he drove the Accused to the crime scene and he accepted her as an intended target or it was foreseeable the actions of **MK** would result in her death.

Therefore, the Defendants BK and EK are ACQUITTED of committing the criminal offence of Aggravated Murder of **AK** (Article 147(1), (5) and (11), in conjunction with article 23 of the CCK), pursuant to Article 390(3) KCCP.

III. Count 2

The Defendant MK is also

FOUND GUILTY

Because of the proven facts stated under Count 1.

In addition **MK** continued to fire at **AK2** as he fled the scene.

By doing so **MK** intentionally shot and wounded **AK2** with the intention to kill him.

Therefore,

The Defendant MK **is CONVICTED** of committing of the criminal charge of Attempted Aggravated Murder under Articles 20 and 147(1) of CCK, in accordance with Article 2(1), of the CCK; pursuant to Article 388(1) of the KCCP.

IV. The Defendants BK **and EK** are

FOUND NOT GUILTY

Because it is not proven beyond a reasonable doubt that, although **BK** knew **AK2** accompanied his father, he agreed or accepted to target **AK2** or sufficiently foresaw and accepted the actions of **MK** could result in the shooting of **AK2** .

Also, it is not proven beyond a reasonable doubt that **EK** knew **AK2** accompanied his father before he drove the Accused to the crime scene or that he agreed or accepted to target **AK2** or foresaw and accepted the actions of **MK** could result in the shooting of **AK2** .

Therefore, the Defendants BK and EK are ACQUITTED of committing the criminal offence of Attempted Aggravated Murder of **AK2** (Articles 147(1), (5) and (11), in conjunction with article 20 and 23 of the CCK), pursuant to Article 390(3), KCCP.

V. Count 3

The Defendants MK and EK are

FOUND GUILTY

Because MK until 6 August 2011, in his house in Village, Vushtrri/Vučitrn, was in possession of a Crvena Zastava automatic rifle (serial no. 0-81383) of calibre 7.62. On 6 August 2011 he brought the weapon to the crime scene and used it.

At the crime scene **EK** took the weapon from his father. He proceeded to hide the weapon near the Llap River. He later led the police to where he had hidden the weapon.

Neither **MK** nor **EK** have the required licences for the ownership, control or possession of this weapon.

By doing so **MK** was in unauthorised control and possession of a weapon. **EK** was in unauthorised possession of a weapon while he concealed it.

Therefore,

The Defendants MK and EK are each one of them CONVICTED of committing the criminal charge of unauthorised ownership, control or possession of weapons under Article 374(1) of the Criminal Code of the Republic of Kosovo (Code no. 04/L-082) in accordance with Article 2(2) of the CCK; pursuant to Article 388(1) of the KCCP.

VI. In accordance with Article 388(1) of the KCCP the Accused are

SENTENCED

To the following punishment:

Count 1

- Under Articles 2(1) and 147(11) of the CCK and in accordance with Article 38 of the CCK:

MK is sentenced to imprisonment of 15 (fifteen) years for **IK's** death;

- Under Articles 2(1) and 147(1) and (11) of the CCK and in accordance with Article 38 of the CCK:

MK is sentenced to imprisonment of 17 (seventeen) years for **AK's** death;

- Under Articles 2(1) and 146 of the CCK and in accordance with Article 38 of the CCK:

BK is sentenced to imprisonment of 9 (nine) years;

EK is sentenced to imprisonment of 7 (seven) years.

Count 2:

- Under Articles 2(1) and 147(1) of the CCK and in accordance with Articles 20(3), 38 and 65(2) of the CCK:

MK is sentenced to imprisonment of 12 (twelve) years.

Count 3:

- Under Article 2(2) of the CCK and Article 374(1) of the CCRK and in accordance with Article 45(1) and (2) of the CCRK:

MK is sentenced to imprisonment of 3 (three) years.

EK is sentenced to imprisonment of 2 (two) months.

VII. Aggregate sentence

In accordance with Article 71(2)(2) CCK, the following aggregate sentence is passed:

- **MK** is sentenced to imprisonment of 20 (twenty) years;

- **EK** is sentenced to imprisonment of 7 (seven) years and 1 (one) month.

Time spent in detention by the Defendants shall be taken into account in accordance with Articles 73(1) of the CCK and 83(1) of the CCRK; as well as Article 71(2)(1) of the CCK.

VIII. In accordance with Article 374 (3) of the CCRK the Crvena Zastava automatic rifle (serial no. 0-81383) and ammunition seized is confiscated.

IX. In accordance with Article 60(1) of the CCK the Audi vehicle registration no. 02-560-AJ is confiscated.

X. The Accused **MK** , **BK** and **EK** shall pay 400 (four hundred) Euros each as part of the costs of criminal proceeding, but are relieved of the duty to reimburse the remaining costs in accordance with Article 102 paragraphs (1) and (4) KCCP. The Accused must reimburse the ordered sum no later than 30 days from the day this Judgment is final.

XI. The Injured Party are instructed that they may pursue their property claim in civil litigation pursuant to Article 112 (2) of the KCCP.

REASONING

1. Procedural history

1. The District Public Prosecutor of Mitrovicë/Mitrovica filed an indictment PP.no 102/2011 dated 31 January 2012, which charged all the Accused with co-perpetration of aggravated murder under Articles 23 and 147(9) and (11) of the CCK and co-perpetration of attempted aggravated murder under Articles 20, 23 and 147(1) of the CCK. **MK** and **EK** were further charged with unauthorised ownership, control or possession of weapons under Article 328(2) of the CCK.

2. On 27 November 2012 and 2 January 2013 the indictment was amended as follows. The revenge element was removed from the indictment and replaced with the aggravating feature of ruthless and violent. The hours of the offence were specified in the indictment as between 10.00 and 14.00 on the 6 August 2011. Count one was changed to a charge under Articles 23 and 147(1), (5) and (11) of the CCK. Count two was amended to Articles 147(1) and (5) of the CCK. In addition to reflect the entry into force of a new criminal code – the Criminal Code of the Republic of Kosovo (CCRK) - the new references under the CCRK were added. This was Articles 31 and 179(1.1), (1.5) and (1.11) of the CCRK for count one and Articles 28, 31 and 179(1.1) and (1.5) of the CCRK for count two.

3. On 30 August 2012 the President of the Assembly of EULEX Judges assigned EULEX Judges to the case in accordance with Article 3.3 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law No. 03/L-053).

4. A main trial held on 27 and 30 November, 3 and 5 December 2012, 15, 18 and 21 January 2013.The Judgment was announced on 21 January 2013 in conformity with the above enacting clause.

2. Procedural Code

5. On 1 January 2013 a new Criminal Procedure Code came into force in Kosovo. The Criminal Procedure Code (Criminal No. 04/L-123) (CPC) replaced the Provisional Criminal Procedure Code of Kosovo (as amended) (UNMIK Regulation 2003/26) (KCCP) (Articles 545(2) and 547 of the CPC). Transitional and saving provisions apply which determine the application of the procedure under the CPC and the continued application of the KCCP in specific circumstances. As the indictment was confirmed by a final decision before 1 January 2013, Article 541(2) of the CPC determines the use of the CPC or the KCCP. The Panel considered the scope of Article 541(2) was not meant to include ongoing main trials that had started before 1 January 2013 and the KCCP should continue to apply until the end of the main trial at least.

6. This has since been confirmed by the legal opinion no. 56/2013 of the Supreme Court of Kosovo dated 23 January 2013 amending legal opinion no. 93/2013 of the Supreme Court of Kosovo dated 7 January 2013. These legal opinions only discuss on-going main trials.

7. These proceedings have moved from the main trial stage into the legal remedies stage as defined under Article 68 of the CPC. As such this stage of proceedings is regulated by the CPC and not the KCCP in accordance with Article 541(2) of the CPC as the indictment has been confirmed. Under Article 541(2) of the CPC the proceedings shall be concluded under the CPC, although the Panel considers the legality of any procedure would be assessed in light of the KCCP where it applied at the time. The Panel notes the fundamental rights of the defence have maintained the same constitutional protection irrespective of whether the KCCP or the CPC is applied.

3. Competence

8. The Law of Courts, Law no. 03/L-199 (LC) also entered fully into force on 1 January 2013 (Article 43). This regulates the territorial and substantive jurisdiction of the Court.

9. The offences falls within the Basic Court of Mitrovicë/Mitrovica's (prior to 1 January 2013 the District Court of Mitrovica) substantive and territorial jurisdiction. The offences of aggravated murder and attempted aggravated murder has a minimum sentence of at least 10 years and falls under the subject matter jurisdiction of the Basic Court in the first instance (see Article 23(1)(i) of the KCCP and Article 15(1.11) and (1.21) of the LC). As the offence was committed in Vushtrri/Vučitrn Municipality, it falls within the territorial jurisdiction of the Basic Court of Mitrovica under Article 27(1) of the KCCP and Article 9(2.7) of the LC.

4. Change in trial panel composition

10. At the start of the trial on 27 November 2012 EULEX Judge Hajnalka Karpati was a panel member. She was replaced by EUELX Judge Katja Dominik from 30 November 2012 onwards until the end of the main trial. Judge Karpati was only available until 13 December 2012 after which point she would be leaving the District Court of Mitrovica at the end of the year. On 27 November 2012 a medical assessment for **MK** was considered necessary to assess his mental competence. The report would not be ready by the end of 2012 and was only ready on 11 January 2013.

11. In accordance with Article 345(1) of the KCCP the proceedings of the 27 November 2012 were considered as read for the Panel in its changed composition.

5. Mental competence of MK

12. Based on the medical evaluation of **MK** dated 11 January 2013 the Panel considered he was mentally competent at the time of the offence and fit to stand trial. This was announced on 18 January 2013.

6. Evidence at trial

13. The following evidence was considered admissible at the main trial:
14. The following police reports:
    - Criminal reports dated 6 and 7 August 2011,
    - KP Officer Sevet Sadiku's (#5377) report dated 6 August 2011,
    - KP Officer Abdylaziz Hoxha's (#0249) report dated 6 August 2011, and
    - KP Officer Fadil Gashi's memos dated 7 August 2011.

15. The following records of witness interviews:
    - Record of **AK2's** witness interview dated 6 August 2011,
    - Record of **FK's** witness interview dated 6 August 2011,
    - Record of **LH's** witness interview dated 6 August 2011,
    - Record of **RM's** witness interview dated 6 August 2011,
    - Record of **NH's** witness interview dated 6 August 2011,
    - Record of **KM's** witness interview dated 6 August 2011,
    - Record of **AK2's** witness interview dated 7 August 2011, and
    - Record of **MA's** witness interview dated 8 September 2011.

16. The following suspect and defendant interview minutes:
    - Minutes of **MK's** suspect interview dated 7 August 2011,
    - Minutes of **BK's** suspect interview dated 7 August 2011,
    - Minutes of **EK's** suspect interview dated 7 August 2011,
    - Minutes of **EK's** defendant interview dated 2 September 2011,
    - Minutes of **BK's** defendant interview dated 6 September 2011,

- Minutes of **MK's** defendant interview dated 29 September 2011, and Minutes of **MK's** defendant interview dated 26 October 2011.

17. The following miscellaneous reports and orders:
    - Order of the District Court of Mitrovica to VALA for the disclosure of phone records dated 9 August 2011,
    - Memorandum from KP Officer Fadil Gashi dated 10 August 2011
    - Order of the Public Prosecutor to VALA dated 10 August 2011,
    - Report from PTK dated 15 August 2011,
    - PTK phone report for no. 44384 (outgoing) dated 15 August 2011,
    - PTK phone report for no. 44384 (incoming) dated 15 August 2011,
    - PTK phone report for no. 44586 (outgoing) dated 15 August 2011,
    - PTK phone report for no. 44586 (incoming) dated 15 August 2011,
    - PTK phone report for no. 45268 (outgoing) dated 15 August 2011,
    - PTK phone report for no. 45268 (incoming) dated 15 August 2011,
    - PTK phone report for no. 44469 (outgoing) dated 15 August 2011,
    - PTK phone report for no. 44469 (incoming) dated 15 August 2011,
    - PTK phone report for no. 44967 (outgoing) dated 15 August 2011,
    - PTK phone report for no. 44967 (incoming) dated 15 August 2011,
    - Order of the District Court of Mitrovica dated 8 August 2011,
    - Order of the District Court of Mitrovica dated 10 August 2011,
    - Order of the District Court of Mitrovica dated 20 January 2012,
    - Request of the Public Prosecutor dated 10 August 2011,
    - Request of the Public Prosecutor dated 10 August 2011,
    - Request of the Public Prosecutor dated 17 January 2012,
    - List of returned items dated 17 January 2012,
    - Record of house search of **MK** dated 6 August 2011,
    - Vehicle tow-in report dated 6 August 2011,
    - List of seized items from **EK** dated 7 August 2011,
    - Receipt of confiscated items from **NH** undated,
    - Unidentified sketch if the crime scene dated 8 August 2011,
    - Sketch of crime scene by **AK2** dated 30 November 2012,
    - Death certificate of **MA** ,
    - Criminal background check of **MK** dated 23 November 2012,

- Criminal background check of **BK** dated 23 November 2012,
- Criminal background check of **EK** dated 23 November 2012,
- Criminal record check of **MK** by the Municipal Court in Vushtrri/Vučitrn dated 15 November 2012,
- Criminal record check of **BK** by the Municipal Court in Vushtrri/Vučitrn dated 15 November 2012, and
- Criminal record check of **EK** by the Municipal Court in Vushtrri/Vučitrn dated 15 November 2012.

18. The following forensic and expert reports:
    - Forensic Laboratory forms A and B dated 6 August 2011,
    - Forensic Science Centre, Croatia report dated 8 March 2012,
    - Report on the crime scene investigation by KP Officers Arta Ferati (#1782) and Sgt. Petrit Fejza dated 8 August 2011,
    - List of evidences by KP Officer Besim Osmani (#0761) dated 10 August 2011,
    - List of evidences by KP Officer Arta Ferati (#1782) dated 8 August 2011,
    - Forensic Laboratory Centre forms A dated 6 August 2011, C dated 10 and 12 August 2011 and 12 January 2012, and D undated,
    - Record of the entrance to the crime scene undated,
    - Firearms Expertise Unit, expertise reports dated 22 and 23 August 2011,
    - Sector for tracing and dactyloscopy, expertise report dated 16 august 2011,
    - Autopsy summary report of **IK** and **AK** by KP Officer Besim Osmani (#0761) dated 9 August 2011,
    - Legend of sketch dated 6 August 2011,
    - Measurements,
    - Sketch of crime scene,
    - Photographs from autopsy of **IK** and **AK** ,
    - Photographs of the crime scene by KP Forensic Unit PK Sead Azemi (#0192) dated 6 August 2011,
    - Photographs of the crime scene by KP Forensic Unit KP Officer Arta Ferati (#1782) dated 7 August 2011,
    - Medical report on **MK** by UCCK Psychiatric Clinic dated 11 January 2013,
    - Autopsy of **IK** dated 8 August 2011,
    - Autopsy report of **AK** dated 8 August 2011, and

- Medical report on **AK2** dated 6 August 2011.

19. During the trial the following witnesses gave statements:
    - **FK** on 30 November 2012,
    - **AK2** on 30 November 2012,
    - **RM** on 3 December 2012,
    - **KM** on 3 December 2012,
    - **NH** on 3 December 2012,
    - **LH** on 3 December 2012,
    - **AK3** on 5 December 2012, and
    - **BA** on 15 January 2012.

20. **MK** and **BK** testified on 15 January 2013. **EK** exercised his right not to answer questions but confirmed his pre-trial statements to the police and prosecutor.

21. During the trial the following motions for evidence were made by the parties and rejected by the Panel:
    - On 27 November 2012 the Authorized Representative of the Injured Party submitted the names of three witnesses the Injured Party wanted called. The Panel rejected the motion on 30 November 2012 as unnecessary under Article 152(3) (1) of the KCCP. The revenge element of the prosecution had been dropped which made the proposed witnesses irrelevant.

    - On 27 November 2012 the Defence Counsel for **EK** applied for a ballistic and forensic report and a site reconstruction. The Panel rejected the motions on 30 November 2012 as unnecessary under Article 152(3) (1) of the KCCP. In relation to the ballistic and forensic reports as the current evidence was clear and for the site reconstruction because it was unclear what it would achieve.

    - On 27 November 2012 the Defence Counsel for **BK** applied for two named witnesses and an unidentified witness to be called, and for the PTK records of **BK's** phone. The Panel partially rejected these motions on 30 November 2012 as impossible under Article 152(3)(3) of the KCCP for the unidentified witness and unnecessary under Article 152(3)(2) of the KCCP for the

collection of the PTK records as they would not prove **BK** was the one who purchased the phone credit.

- On 15 January 2013 the Defence Counsel for **BK** applied for an expert to determine the definition of "ruthless and violently". The Panel rejected this motion as it is a legal term and within the Panel's competence. No expert is required.

22. NB: any reference is to the English version of statements, reports, trial minutes or other documents unless expressly stated.

7. Factual findings of the Court

7.1 Summary of the proven and unproven facts

7.1. 1. The flowing facts are proven:

I. **IK** had been ostracised from Village due to a dispute with the Defendants' family. An agreement had been reached in the community that **IK** would leave Village in order to resolve the dispute. On 5 August 2011 **IK** and **MK** were involved in a verbal altercation over **IK's** presence in the village. **IK** threatened **MK** during the altercation.

II. On 6 August 2011 **IK** travelled to village in the municipality of Vushtrri/Vučitrn with his daughter **AK** , aged years old, and his son **AK2** , aged years old.

III. On 6 August 2011 **BK** saw **IK, AK** and **AK2** enter the village on a "motor-cultivator" tractor with trailer at around 11h00. He contacted his father, **MK** . **MK** knew **IK** regularly visited a location near Llap River. **MK** and **BK** agreed to ambush **IK** . **BK** contacted his brother **EK** to arrange for **EK** to transport all three of the Accused to near the Llap River.

IV. **MK** was in possession and control of a Crvena Zastava automatic rifle (serial no. 0-81383) of calibre 7.62 and 7.62 x 39mm ammunition at his house in Village, Vushtrri/Vučitrn.

V. **MK** and **BK** were at **MK's** house when **EK** arrived in his car, a white Audi 80 (registration no. 02-560-AJ). **EK** Emin was informed of their intentions and agreed to transport them. **MK**, armed with a Crvena Zastava automatic rifle (serial no. 0-81383), sat in the rear seat beside **BK** while **EK** drove the car. **BK** and **EK** knew and accepted their father was armed.

VI. **EK** drove his father (**MK**) and brother (**BK**) to the road leading to Llap River. At this point **MK** and **BK** left the car and walked towards the Llap River. **EK** waited for a while in the car and then joined them.

VII. **MK**, **BK** and **EK** ambushed **IK** at approximately 14h00 as he drove along the road returning from the Llap River. **IK's** daughter **AK** and son **AK2** sat on the trailer directly behind him, on either side of their father. **MK** opened fire indiscriminately without warning. Under the sustained fire **MK** shot and killed **IK** and **AK**. He also wounded **AK2** in the neck. He reloaded the weapon during the attack.

VIII. **MK** continued to fire at **AK2** as he fled the scene.

IX. **MK** intentionally shot and wounded **AK2** with the intention to kill him.

X. **MK** intentionally killed **IK** at the same time as shooting and killing **AK**. He knew by firing on **IK** there was a substantial risk he could hit and kill the daughter and the son but took no steps to avoid this. He carried out the shootings.

XI. **EK** intervened after **IK** and **AK** had been killed to take the weapon from **MK** as he continued to fire.

XII. **EK** proceeded to hide the weapon near the Llap River. He later led the police to where he had hidden the weapon.

XIII. **BK** and **EK** voluntarily acted together with their father and in full knowledge of the plan to ambush and kill **IK**.

XIV. **MK** , **BK** and **EK** were fully mentally competent.

XV. Neither **MK** nor **EK** have the required licences for the ownership, control or possession of this weapon.

7.1.2. The following is unproven, whether:

- Although **BK** knew **AK** was with **IK** , she was an intended target and **BK** foresaw and accepted that the actions of **MK** would result in her death;

- **EK** was aware of the presence of **AK** with her father before he drove the Accused to the crime scene and he accepted her as an intended target or it was foreseeable the actions of **MK** would result in her death;

- Although **BK** knew **AK2** accompanied his father, he agreed or accepted to target **AK2** or sufficiently foresaw and accepted the actions of **MK** could result in the shooting of **AK2** ;

- **EK** knew **AK2** accompanied his father before he drove the Accused to the crime scene or that he agreed or accepted to target **AK2** or foresaw and accepted the actions of **MK** could result in the shooting of **AK2** .

7.1.3. Uncontested facts

23. A number of facts are uncontested and so proven.

24. **IK** had been tried and acquitted of the murder **GK** (son of **MK** and brother of **BK** and **EK**). On his release from remand detention **IK** was ostracised from village by the community after a process which involved both the Defendants" and the Victims' families. **IK** and **MK** had a confrontation at which verbal threats were exchanged on 5 August 2011 (**MK's** trial testimony dated 15 January 2013 (MK trial) at para. 316). The Panel does not consider **MK's** conflicting account of where this confrontation happened –

either in the village or at the Llap river – undermines his account of the confrontation (see **MK's** Defendant interview dated 26 October 2011 (MK defendant)).

25. **IK, AK,** and **AK2** travelled together from to near the Llap River on 6 August 2011 at approximately 11.00 (**AK2's** trial testimony (AK trial) and **FK's** trial testimony (FK trial) both dated 30 November 2012, at paras. 275 to 292 and paras. 48 to 59 respectively; and **FK's** witness interview dated 6 August 2011 (FK witness)). **BK** was in on 6 August 2011 (AK trial, at paras 298 to 350; and **AK3's** trial testimony dated 5 December 2012 (AvK trial) at paras. 60 to 65). **BK** confirms he was in in the morning (**BK's** trial testimony dated 15 January 2013 (BK trial), at paras 515 and 516).

26. **EK** drove to the crime scene in a white Audi car, registration no. 02-560-AJ (EK defendant, at p.2).

27. Further **MK** ambushed and intentionally killed **IK** with an automatic rifle (MK trial, at paras. 233 to 242; AK trial, at para 374; **EK's** suspect interview dated 7 August 2011 (EK suspect), at p.2 and **EK's** defendant interview dated 2 September 2011 (EK defendant), at p.3). At least 15 shots were fired from the weapon based on casings found at the scene which were similar to test firings of the weapon (Firearms Expertise Unit report dated 22 August 2011). The same weapon which killed **IK** also killed **AK** and injured **AK2** (Forensic Science Centre report dated 8 March 2012; Firearms Expertise Unit reports dated 22 and 23 August 2011; **AK2** Medical report dated 6 August 2011; Autopsy report of **IK** dated 8 August 2011; and Autopsy report of **AK** dated 8 August 2011).

28. **MK** admits to taking two ammunition clips, although it is unlikely these were full ammunition clips (MK defendant, at p.2). In any case one ammunition clip was found to be empty meaning during the ambush **MK** stopped and reloaded the weapon (List of Evidences dated 8 August 2011, per exhibits B1.1 and B1.2; and EK defendant, at p.3).

29. Upon his arrest **EK** led the police to the weapon and ammunition (EK suspect, at p.2 and List of Seized items from **EK** dated 7 August 2011, nos. 2 to 4).The murder weapon is a Crvena Zastava M70 AB2 automatic rifle calibre 7.62 x 39mm (serial numbers 81383 and 72394) recovered with 9 rounds of 7.62 ammunition with metal cores and full metal jackets (See Firearms Expertise Unit's Expertise Reports dated 22 and 23 August 2011, List of Evidences dated 8 August 2011, per exhibits B1 to B1.2, and Photo Album dated 6 August 2011, per photos 7, 8 and 10).

30. The ambush occurred between 13.38 when **FK** and **IK** last spoke and 14.30 when the police secured the crime scene (PTK phone report for no. 44469 (outgoing) dated 15 August 2011; PTK phone report for no. 45268 (outgoing) dated 15 August 2011; and Record of the entrance to the crime scene undated).

31. **IK** was killed by gunshot wounds he sustained (Autopsy report of **IK** dated 8 August 2011, at pp. 16 to 19). **AK** was killed by gunshot wounds sustained to her head (Autopsy report of **AK** dated 8 August 2011, at p.4). **AK2** sustained a gunshot wound to his neck (medical report on **AK2** dated 6 August 2011).

32. The fact **AK** and **AK2** were children at the time is uncontested and proven.

7.1.4. Facts in dispute

33. The Panel considered a number of facts which were either implicitly or explicitly disputed.

*Did **BK** see the victims enter ?*

34. This is denied by the Defendant **BK** (BK trial, at paras. 449 and 450) but is contradicted by the account of **FK** and **AK2** (FK trial, at paras. 147 and 148; and AK trial, at paras. 299-306). The Panel considers **BK** did see the victims. **FK's** testimony is hearsay based on what **IK** told her in phone conversations, but **AK2's** account is a clear first-hand account. The Court found **AK2** was overall a credible witness as he provided a clear and detailed account. Some inconsistencies can be explained by the shock and short time period in which the ambush occurred some of which are discussed below.

35. Further this accounts for why **MK** went to confront **IK** at the Llap River on 6 August 2011. The Panel does not believe **MK's** account of how he came to ambush **IK** (MK trial, at paras. 271 to 312). The coincidences of **MK** going armed to the Llap River at a time and place which coincided with **IK** are too remote. The Panel believes something triggered **MK's** immediate reaction and considers this to be the information relayed by his

son **BK** that **IK** had returned. The lack of direct phone contact between **BK** and his father and the presence of **BK** at his father's house (see below) strongly suggests this information was relayed in person.

36. **MK's** understandable motivation to lie about both his sons' involvement in the offence undermines the credibility of his account in this respect.

*Was **BK** in Vushtrri/Vučitrn at the time of the offences?*

37. The Panel find no credibility in **BK's** alibi. **BK's** alibi is based on him travelling to Vushtrri/Vučitrn to collect his social security payment (**BK's** defendant interview dated 6 September 2011 (BK defendant), at pages 2 and 3; and BK trial, at paras. 513 to 544 and 564 to 602). His account is evasive and uncorroborated. The Panel does not accept he spent the relevant period of time in Vushtrri/Vučitrn. It cannot believe he spent an extended period of time carrying out a regular activity and socialising without any third party corroboration. **BK's** own witnesses called to support his alibi fail to confirm his account (AvK trial, at paras. 82 to 93; and **BA's** trial testimony dated 15 January 2013, at para. 56).

38. The Panel places little weight on the fact two mobile phone accounts used by **BK** were credited during this time in Vushtrri/Vučitrn. These accounts can be credited by third parties as the phone user's presence is not required.

39. Against this the Panel sets the clear account of **AK3** who places **BK** in (AvK trial, at para. 93) and the accounts of **AK2** and Co-Defendant **EK** which combine to place him in before the shootings, at his father house, being transported to the crime scene and at the crime scene (EK suspect, at p.2; EK defendant, at p.2; and AK trial, at paras. 374 and 384).

40. The Panel considered **EK's** pre-trial testimony as credible on these points. No reasonable justification could be established as to why he would incriminate himself or maliciously incriminate his brother to such an extent nevertheless the poor relationship between them.

*Was there a plan to kill **IK, AK** and **AK2** ?*

41. The Panel notes the testimony of **EK** who stated **BK** with **MK** often talked about revenge (EK suspect, at p.4). The Panel also notes **FK's**

claim **MK** and **BK** had been seen by her children and possibly by her, driving in the vicinity of their new home before the killings (FK trial, at paras. 128 to 142).

42. There was animosity between the two families over the death of **GK** . In such circumstances the Panel do not consider it unusual that emotions would run high and revenge would be discussed. However, talking of revenge does not, in itself, indicate an intention to kill or evidence of premeditated planning. **EK** does not testify his father and brother took any active steps to kill **IK** before 6 August 2011. **FK's** identification is weak and her testimony is largely based on hearsay. The Court places little weight on it and considers its relevance to the killings at the Llap river – away from the new home - is limited.

43. No evidence suggests an extended period of planning and specific targeting of all three victims. On the contrary the Panel considers the plan to have been a spontaneous reaction triggered by the appearance of **IK** . There is no evidence **IK's** movements were being monitored by any of the Accused as preparation for an ambush.

44. The Panel does not consider it proven **BK** had an intention or knew of a plan to kill **IK** or his children when he relayed the information to **MK** . It is also not proven the presence of **AK** and **AK2** was disclosed by **BK** to **MK** while at **MK's** house.

45. The Panel considers it proven **BK** knew about a plan to kill **IK** before they all travelled to the crime scene. **BK's** continued presence at and from **MK's** house to the crime scene and the preparations **MK** made to access and prepare the murder weapon; all suggests a level of knowledge and agreement or acquiescence on the part of **BK** .

46. There is insufficient evidence to prove **EK** knew of a plan or intention to kill **IK** before he arrived at **MK's** house. There is also insufficient evidence to suggest he knew of the presence of **AK** or **AK2** . In the case of the children the Panel accepts he intervened to stop his father shooting after **IK** had been shot and killed (EK suspect, at p.3; and EK defendant, at p.3). In terms of what he knew before driving his father and brother, he claims he did not see his father with the murder weapon, his father did not speak and **BK** refused to explain what was happening (EK defendant, at p.2).

47. **MK's** account is motivated to protect his son and hide his involvement. **MK** claims he told his son he needed to be taken to the doctor and his son dropped him on the road near the Llap River and drove away (MK trial at para. 202). This account is not considered credible, it is illogical to accept **EK** would drive his father to

the road side a distance from the surgery shortly after **MK** claimed to feel ill, rather than directly there.

48. The Panel considers it highly unlikely **EK** was not told about the planned ambush of **IK** before he drove to the crime scene. Take into account the phone contact between **EK** and **BK**, the history of animosity between the two brothers and the difficulty in concealing a long-barrelled weapon. A common purpose must have brought the two bothers together to co-operate. The Panel does not accept as credible the possibility **EK** would have accepted and carried out his brother's request without good reason or justification. No plausible alternative has been offered by the Defence to raise a reasonable doubt to the scenario put forward by the Prosecutor.

49. There is insufficient evidence to suggest any prior discussion to kill **AK** and **AK2** or this was the subject of agreement or acquiescence between any or all of the Defendants. There is no evidence to suggest this was considered at any level. To **EK's** credit his actions in taking the weapon from his father suggests there was no common plan to kill the children.

*Did **BK** call **EK** to arrange transport?*

50. The phone records presented as evidence clearly show a number of calls between the two brothers before the shootings (PTK phone reports for no. 044 586 821 (outgoing) dated 15 August 2011, at 12.11, 12.18 and 13.44 on 6 August 2011). **BK** confirms he owned the phone number 044 867 409 but denies making these calls (BK trial, at paras. 475 to 482). **EK's** testimony verifies he was called to his father's house in order to provide transport for **MK** and **BK** although disputes this was by direct communication with **BK** (EK suspect, at p.2; and EK defendant, at p.2). According to **EK**, **BK** was waited for him at **MK's** house (EK defendant, at p.2).

51. The Panel notes the relationship between **BK** and **EK** had been very poor (BK defendant, at p.2). Regular communication and contact between the two was not normal and the level of contact is not replicated in the previous days. The presence of **IK** and their father's wishes led to the brothers setting their differences aside.

52. The Panel does not accept **BK's** claim he did not call **EK**. Irrespective of whether **EK** received the request directly or indirectly from **BK**, his intention for **EK** to provide at least transport is clear.

*Did **BK** travel by **EK's** car to the crime scene?*

53. **EK** is clear his brother was a passenger with **MK** in the car **EK** drove to the crime scene (EK suspect, at p.2 and EK defendant, at p.2). **MK** confirms **EK** drove him to the crime scene but denies **BK** was there (MK trial, at paras. 161 to 202). **AK2** places **BK** at the crime scene as already mentioned (AK trial, at 374).

54. Taking this into account the Panel rejects **MK's** assertion **BK** was not present as an example of a father trying to protect his son from criminal liability. The communication between **EK** and **BK** , **EK's** testimony to **BK's** presence at the house, **BK's** purpose of being at **MK's** house, **BK's** presence at the crime scene and the lack of alternative transport for **BK** all point to **BK** travelling with his father and brother.

*Did **BK** and **EK** know **MK** was armed?*

55. **EK** testified he did not know **MK** was armed when he entered his car and only discovered this later at the crime scene (EK suspect, at p.2 and EK defendant at p.2). **MK** claims to have concealed the weapon under an overcoat during a summer day (MK trial at paras. 185 to 192). **EK's** accounts conflict. When interviewed on 7 August 2011 he clearly stated his father wore a "short... [leather] jacket" (EK suspect, at p.2). While on 2 September 2011 he corroborates **MK's** account of wearing a "long blue colored [sic] jacket" **MK** normally wore during the winter (EK defendant, at p.2).

56. **EK** testifies his father and **BK** sat in the back of the car, with **BK** sitting on the driver's side (EK suspect, at p.2). The Panel considers the weapon would have been very cumbersome to conceal. **BK** was with his father as they prepared to leave and sat in the rear of the car with him. Irrespective of whether or not his father had expressly discussed his intentions, the Panel considers **BK** knew his father was armed and the intention behind this.

57. It is plausible a weapon can be concealed from the driver. However, considering the family relationship, the likelihood of seeing the weapon and the circumstances of **EK** providing transport; the Panel considers it is proven he knew **MK** was armed and the intention behind this. **EK** claims only to have known about the intention

to kill Imer after the group arrived at the Llap River (EK suspect, at p.4). The Panel rejects this part of his testimony for the above reasons.

58. The Panel does not rule out **MK** wore a long coat on the day in question to hide the weapon. As the crime scene was a public place it is more likely he wore a coat to conceal the weapon from third parties and not his sons. Whilst sitting in the car a long coat would not have assisted **MK** concealing it from those who he was travelling with as the weapon was too long.

*Did **BK** and **EK** accompany **MK** to the ambush?*

59. **MK's** claim that **BK** was not present and **EK** drove off after dropping him near the Llap River are considered to be lies to protect his sons (MK trial, at paras. 167, 168 and 202). **EK** places his brother at the scene and accompanying **MK** from the car (EK suspect, at p.2; and EK defendant, at pp.2 and 3). In addition he admits to following afterwards (Ibid). **AK2** testimony places all three Defendants at the crime scene at the time of the shooting (AK trial, at para.374). The Panel notes his version of events have changed since his first police interview (**AK2's** witness interview dated 6 August 2011 (AK witness), at p.2). However, his testimony corroborates **EK's** version of key events to a highly significant degree.

60. The Panel notes **EK's** admits to seeing his father produce the murder weapon and commence firing (EK suspect, at p.2; and EK defendant, at p.2). Although he does not confirm **BK** was there at the time. The Panel has considered the type of weapon, rate of fire, apparent indiscriminate fire, the lack of a warning and number of shots fired. The timeframe for the attack is limited. The Panel considers it proven **EK** was there or in the near vicinity when the ambush began. The Panel considers it proven that **BK** accompanied his father to the ambush site and was in the vicinity. Although it is not proven he was beside **MK** when the ambush began.

61. The Panel considers by accompanying their father **BK** and **EK** showed a degree of support and knowledge. Ultimately though the Panel is convinced the brothers had the requisite knowledge before each made their contribution to the commission of the offence. Accompanying their father to the ambush adds to the evidence the Panel can infer knowledge, but presence is not the key indication of knowledge and hence potential criminal liability.

62. At trial a drawing was included by the Prosecution whose authorship and origin were unknown. **AK2** denied knowledge of the drawing or who had made it. The Panel places no weight on this evidence. Instead as part of his testimony at trial **AK2** produced a drawing which showed three assailants.

Who was armed?

63. It is proven **MK** was armed with an automatic long barrelled weapon (Crvena Zastava automatic rifle, serial no. 0-81383) during the ambush. Firearm residue tests show only **MK** had recently fired a firearm (Forensic Science Centre, Croatia report dated 8 March 2012). **BK** tested negative for firing a weapon. Only bullet casings from **MK's** weapon were found at the scene (Report of crime scene examination dated 6 August 2011; List of evidences dated 6 August 2011 and Criminal report dated 7 August 2011) and no second or third weapon were found.

64. The Panel considers **AK2's** account of all three being armed to be incorrect but this does not undermine his credibility as a witness. The Panel accepts the ambush was a relatively short and intense experience in which his father and sister were killed and his own life was threatened. **AK2's** account on this fact is mistaken and uncorroborated by other evidence.

*Did **MK** know the children were present?*

65. **MK** claims not to have seen the children (MK trial, at paras 354 and 355).

66. The Panel considers he must have known the children were with their father before he started shooting. The 6 August was a bright and clear summer day and the ambush occurred on a straight stretch of road which is bordered by areas of low to medium height vegetation (see Photo album dated 6 August 2011, pictures 1 to 3, 6, 27, 47 and 102). His visibility would have been excellent. The children were riding in an open top trailer and were seated either side of their father (see Photo album dated 6 August 2011, picture 14; and AK trial, at paras. 408 to 412 and 436 to 439). **MK** admits to seeing **IK** coming and opening fire at a short distance of no more than 5 meters (MK defendant, at p.2; and MK trial, at paras. 396 and 397).

67. The children were sitting in a prominent and exposed position and **MK** would have had a clear line of sight from a relatively short distance. The Panel considers it improbably he could see **IK** but not the children.

68. **MK** saw **AK2** but carried on firing and intentionally targeted him. The Panel has considered a number of factors. The position of **MK** moving from left to right as he faced towards **IK** meant he would have seen **AK2** on the trailer and escaping in the direction the tractor had come from; the position of **IK's** body compared to the tractor shows **MK** would have seen him fall (and his main objective completed); and **AK2** testified he saw his father fall to the ground before he fled and was injured as he escaped (Photo album dated 6 August 2011, at pictures 13, 27 and 28; Sketch of crime scene and legend for sketch dated 6 August 2011; MK trial, at paras. 402 to 413; AK trial, at paras. 374 and 445 to 449). **EK** states he only intervened because **MK** targeted **AK2**, reloading to do so (EK suspect, at p.3). And the testimony of **MA** indicates shots were still being fired in **AK2's** direction when he reached her house (**MA** witness statement dated 8 August 2011, at p.2).

69. For the above reasons the Panel considers it proven **MK** saw the children with their father before he opened fire and continued to target **AK2** as he escaped.

*Did **EK** have possession or control of the murder weapon?*

70. **MK** claims **EK** was not with him and he does not know what happened to the murder weapon and ammunition after the shooting (MK trial, at paras. 212, 257 and 258). The Panel find little credibility in this account and considers it another example of **MK** trying to protect his son.

71. The Panel believes **EK's** account of taking the weapon and ammunition from his father during the shooting and hiding the weapon (List of items seized from **EK** dated 7 August 2011). His full co-operation with the police from the start and surrender of the murder weapon suggest he has no motive to lie about weapons' possession. There is no evidence he knew the children were present or he wanted the children to be killed or accepted this fact.

8. THE LAW

72. The Panel is not bound to the provisions set out by the Prosecutor (Article 386(2) of the KCCP). In addition under the new Criminal Code of the Republic of Kosovo (CCRK) the presumption is the provision in force at the time of the offence will continue to apply except if a new provision is more favourable to the Defendant (Article 3(1) and (2)). The Panel interpreted this as primarily looking at the substantive elements of the offence but also the level and calculation of any associated punishment.

73. The Panel concluded the CCK provisions for the murder offences should still be applied as the CCRK was not more favourable. The relevant elements of the offence remain the same under the CCRK as under the CCK. The only difference is the removal of the aggravating feature "ruthlessly and violently" under Article 147(5) of the CCK which is considered irrelevant for the reasons below. However, in relation to the firearms offence against **MK** and **EK** the substantive elements of the offence were the same but the punishment and sentencing provisions under the CCRK were more favourable. For the firearms offence the CCRK should be applied.

8.1. Criminal liability

74. Article 11(1) of the CCK or Article 17(1) of the CCRK clearly set out a person is only criminally liable when mentally competent and commits a criminal offence "intentionally or negligently."

75. For co-perpetrators their criminal liability and punishment is limited within the degree of their intent (Article 27(1) of the CCK and Article 36(1) of the CCRK).

8.2. Murder

76. Article 146 of the CCK defines murder as:

"Whoever deprives another person of his or her life..."

77. The mental element of this offence requires intention as specified under Article 15 of the CCK. The Panel considers negligence under Article 16 is restricted as a mental element to negligent murder under Article 149 of the CCK.

8.3. Aggravated murder

78. Murder and aggravated murder are to be considered in a relation of basic and qualified norm. The latter is an aggravated form and not a separate offence, as it is shown by the reference in article 147 to a person who is a murderer (who has deprived under certain circumstances another person of his or her live). As such, linked with article 146, aggravated murder is committed if an aggravating factor listed under article 147 is present in the offence.

79. This can take the form of a mental element or a purely factual position. In this case the Panel considered paragraphs 1, 5 and 11:

> "(1) Deprives a child of... life;
> ...
> (5) Deprives another person of...life while acting ruthlessly and violently;
> ...
> (11) Intentionally commits two or more murders... [except those committed in mental distress or murder during child birth]."

80. A "child" is defined as under 18 years old (Article 107(21) of the CCK.

81. The aggravating feature of "ruthlessly and violently" has to be distinguished from murder under Article 146 of the CCK. The circumstances of the case must indicate a level of ruthlessness combined with a level of violence. While acting in a ruthless and violent manner the agent uses a method to cause death that goes far beyond, in a substantial way, the necessary measure needed to cause death.

82. The Panel considers the active and mental element of the offence stem from Articles 15 and 146. Article 147 is ancillary and is engaged when an aggravating feature is present and the agent's intention, on the cognitive side, covers all the elements of the offence, including criteria that increases the punishment. For this reason, in considering liability for co-perpetration it is possible to attribute an aggravating feature for sentencing purposes to one co-perpetrator in the case of murder while still maintaining co-perpetration and murder under Article 146 (see discussion below on the liability of co-perpetrators).

8.4. Required intention for murder

83. Only Article 15 of the CCK should be considered in relation to murder under Articles 146 and 147. Article 16 of the CCK should only be used to determine whether negligent murder has occurred under Article 149 of the CCK.

84. Article 15 defines intent as being present either directly or indirectly ("eventual intent"):

(2) A person acts with direct intent when... aware of [their]... act and desires its commission.
(3) A person acts with eventual intent when... aware that a prohibited consequence can occur as a result of [their]... act or omission and he... accedes to its occurrence."

85. The law requires intent as the form of mens rea before criminal liability can be established, as negligence is the exception (article 11 (3) of the CCK).

86. The Panel consider the definition of direct intent is clear: a person must know he or she is doing something and want to do so. In other terms, the author must know the elements of the offence (cognitive element) and have the will to bring about its completion (volitional element).

87. However, eventual intent is based on whether a consequence "can" occur: the agent must be aware of the fact that his actions may lead to an offence being committed (cognitive element) and accepts or approves it nevertheless (volitional element).

88. The Panel considers the level of risk needs to be at a significantly higher level then applied in the circumstances of "conscious negligence" and "unconscious negligence" which use the same wording (see Article 16(2) and (3) of the CCK).

89. A standard of reasonably foreseeable or very likely risk would be too low if applied to Article 15(3) of the CCK. The Panel believes this would bring eventual intent too close or in the same category as negligence. The foreseeable risk possibility should be at least highly likely but cannot be as high as a certainty as this would be indirect intent. This reflects the definitions of direct, indirect and eventual intent discussed in other jurisdictions as well as international ad hoc tribunals and at the International Criminal Court.

90. The test is whether the Defendant knew of the risk and accepted or acquiesced to it.

8.5. Co-perpetration in murder

91. Co-perpetration is defined in the CCK as:

"When two or more persons jointly commit a criminal offence by participating in the commission of a criminal offence or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offence." (Article 23)

92. The definition covers persons who actively participate in the commission of the offence. This covers the situation where persons act as co-principals in the commission of the offence either adopting the same roles or different roles which meet the active element of the offence (actus reus).

93. The second part of the definition covers persons who have done preparatory or supportive acts which are not active elements or the adoption of active elements of the offence but are substantial contributions that have an impact on the execution of the common plan.

94. In both cases the persons must act with a common purpose and goal in mind. They must all have the required intention to commit the offence being committed. Although, this does not extend to them all sharing the same level of intention (for example direct or eventual). This common mental element to commit the offence differentiates co-perpetrators from those who merely assist a third party but whose intention is limited to the assistance and not the commission of the offence.

95. In murder cases the Panel considers offenders may be guilty of different degrees of murder from the same criminal acts. To a degree where aggravating features may apply to one offender but not all. This considers the limits on criminal liability set out in the law. The co-perpetration can be maintained even though offenders are convicted of different offences as long as the essential elements of the offence are shared. For example, the essential elements of murder under Article 146 are shared with aggravated murder under Article 147. Additional aggravating factors only effect the punishment imposed under Article 147. This allows different levels of criminal liability to be drawn from the same acts and permits co-perpetrators being convicted and sentenced for different offences which share common active and mental elements.

96. In such cases to insist the same level of offence is applied to all co-perpetrators could have the undesirable effect to: limit an offender's criminal liability, despite their actions, going beyond the minimum intended liability of the group (i.e. the convictions could only be for the lowest denominator of criminal intent); or raise the group liability to be the highest denominator of liability (i.e. all convictions at the highest denominator) which may act to impose intent on a co-perpetrator where he or she has insufficient intent for the greater liability; or prevent a conviction for co-perpetration where the foreseen act does not exactly match the resulting actions.

97. The Panel would stress this is a different situation to where a charge for assisting or other inchoate offence; or for an offence with a different character would be more appropriate. This also does not cover a case where the requisite level of intent is not displayed by all the co-perpetrators.

8.6. Attempt

98. Article 20(1) of the CCK defines it as:

"Whoever intentionally takes an immediate action towards the commission of an offence and the action is not completed or the elements of the intended offence are not fulfilled..."

99. An attempt means the lack of full completion of the offence.

100. It is clear the elements of the offence referred to are the active elements of the offence and not the mental elements. Mens rea required for the full offence must always be fulfilled in order for there to be an attempt: on the cognitive side, the person's intention must cover all the elements of the offence, again including criteria that increases the punishment; on the volitive side, the person must have the requisite degree of intent demanded by the offence in question.

8.7. Unauthorised ownership, control or possession of weapons

101. This is regulated by Article 374(1) of the CCRK:

"Whoever owns, controls or possesses a weapon in violation of the applicable law relating to such a weapon shall be punished..."

102. The Panel considers control to include storage or the ability to access a weapon, and possession to include personal possession of the weapon in so far as having the weapon.

103. The Crvena Zastava automatic rifle (M70 AB2 serial nos. 0-81383 and 72394) of calibre 7.62 x 39mm is defined as a weapon under Article 38(1) of the CCRK being a firearm. Article 38 also defines ammunition for a firearm as a weapon.

104. In addition the rifle and ammunition are prohibited weapons under Article 4(1.1.2) and (1.1.4) of the Law on Weapons (Law no. 03/L-143) for which no permit can be obtained by a natural person:

"Category A – prohibited weapons are:

...

(1.1.2) Automatic firearms (A2);

...

(1.1.4) Ammunition with high penetrating level, ...(A4)"

105. Automatic weapons are defined as:

"... a firearm which reloads automatically each time a round is fired and can fire more than one round with one pull of the trigger;" (Article 2(1.10) of the Law on Weapons)
High penetration ammunition is defined and in this case includes 7.76 x 39mm rounds with metallic cores or full metal jackets:
"...any... rifle bullet or... ammunition with... projectile cores constructed entirely (excluding the presence of traces of other substances) from tungsten alloys, steel, iron,

brass, bronze, beryllium copper..., or fully jacketed bullets larger than .5.6 mm designed and intended for use in... rifles and whose jacket has a weight of more than 25% of the total weight of the projectile..." (Article 2(1.39) of the Law on Weapons).

106. Additionally under the Law on Weapons there is an obligation to surrender or report any weapon which belongs to a deceased adult family member within 30 days of death; and a duty to immediately report all found weapons and ammunition to the police (Articles 46 and 48 Law on Weapons).

8.8. Mental element regarding unauthorised ownership, control or possession of weapons

107. Only intent is sufficient to commit the offence as negligence is not expressly provided for under Article 374 of the CCRK as required under Article 17(2) of the CCRK.

108. The provisions on intent are the same under the CCK as the CCRK except the reference is now Article 21 of the CCRK. The definitions of direct and eventual intent are the same and are discussed above.

109. Eventual intent can be an act of omission but this will only count where there is " ...an obligation to undertake an act but fail to do so." (Article 8(2) of the CCRK). The Panel considers a failure to perform an obligation under the Law of Weapons would qualify as an omission.

8.9. Necessary defence

110. This is defined under Article 12(2) of the CCRK as:

"An act is committed in necessary defence when a person commits the act to avert unlawful, real and imminent attack against himself, herself or another person and the nature of the act is proportionate to the degree of danger posed by the attack."

111. An act committed in necessary defence is not a criminal offence (Article 12(1) of the CCK). However, if the action is disproportionate criminal liability will still apply but the punishment can be reduced or waived in extenuating circumstances in relation to the person's mental state (Article 12(3) and (4) of the CCRK)

112. The Panel notes the threat can be to a third party and the threat must be cumulative in being an unlawful, real and imminent attack.

9. Count 1

*The shooting and killing of **IK***

A) **MK**

113. The Defendant has admitted the active and mental elements of the offence. The proven facts show he intended and desired to ambush and kill **IK** . Acting jointly with his sons **BK** and **EK** , he took the weapon to the crime scene and ambushed **IK** . He fired an automatic weapon without warning specifically targeting **IK** . His rate of fire was sustained and he reloaded the weapon. He shot and killed **IK** .

114. **MK** acted with direct intent in shooting and taking the life of **IK** . This was aggravated by the additional killing of **AK** in the same instance (see below).

115. The Panel dismisses the Prosecutor's argument Article 147(5) of the CCK is engaged as the level of violence is insufficient. Only the necessary degree of brutality one would expect from the use of a lethal fire weapon was used to cause **IK'S** death.

116. His criminal liability for co-perpetration of aggravated murder under Articles 23 and 147 (11) of the CCK of **IK** is proven beyond a reasonable doubt. He is guilty in accordance with Article 388(1) of the KCCP.

B) **BK**

117. Although he did not directly participate in the offence **BK** acted as a co-perpetrator with his father and brother in the murder of **IK** .

118. The Panel considers he acted with direct intent and shared a common purpose with **MK** and **EK** . From the proven facts it is considered beyond a reasonable doubt he knew and acted with his father to ambush and kill **IK** when he contacted his brother to arrange transport to the crime scene. He acted with his father and brother. By organising the transport to the crime scene he made a substantial contribution to the commission of the offence. Without it the offence is unlikely to have occurred. Transport was required to reach the ambush site, provided a means to conceal the weapon from public view and a way to escape the scene.

119. The Panel considers he is not guilty for the murder of **AK** (see below) and as such does not have the required intention to aggravate the offence under Article 147(11) of the CCK.

120. The Panel dismisses the Prosecutor's argument Article 147(5) of the CCK is engaged as the level of violence is insufficient.

121. His criminal liability for the co-perpetration of murder under Articles 23 and 146 of the CCK is proven beyond a reasonable doubt. He is guilty in accordance with Article 388(1) of the KCCP.

C) **EK**

122. Although he did not directly participate in the offence **EK** acted as a co-perpetrator with his father and brother in the murder of **IK** .

123. The Panel considers he acted with direct intent and shared the common purpose with **MK** and **BK** . From the proven facts it is considered beyond a reasonable doubt he knew about his father's intention to ambush and kill **IK** at least before he transported his brother and father from **MK's** house. He accepted it was highly likely **IK** would be killed if ambushed with an automatic weapon. By driving them to the crime scene he made a substantial contribution to the commission of the offence. Without it the offence is unlikely to have occurred.

124. The Panel considers he is not guilty for the murder of **AK** (see below) and as such does not have the required intention to aggravate the offence under Article 147(11) of the CCK.

125. The Panel dismisses the Prosecutor's argument Article 147(5) of the CCK is engaged as the level of violence is insufficient.

126. His criminal liability for the co-perpetration of murder under Articles 23 and 146 of the CCK is proven beyond a reasonable doubt. He is guilty in accordance with Article 388(1) of the KCCP.

*The shooting and killing of **AK***

A) **MK**

127. Further to the killing of **IK** , the Panel considers the Accused had eventual intention in firing on and killing **AK** . He could not have failed to see

AK with her father as they approached. The Accused would have had a clear and straight view of **IK** approaching. It was early afternoon on a clear summer's day. He could clearly evaluate the close proximity of the children to their father. Yet still he chose to ambush **IK** without any warning and to fire indiscriminately a weapon with a high rate of fire when it was highly likely **AK** could also be shot and killed. The result of his actions was the shooting and killing of **AK** .

128. **MK** could see **AK** on the trailer as visibility was good and he had clear sight of the tractor and trailer as it approached. He must have recognised her as until recently they had been neighbours. The aggravating factor under Article 147(1) of the CCK is engaged as **AK** was aged years old and was a child as defined under the law.

129. The Panel considers the requisite intention can be formed just before the active elements of the offence are committed and spontaneous action is sufficient. In this case **MK** formed the necessary intention before he started firing.

130. The killing of **AK** clearly engages Article 147(1) of the CCK as an aggravating factor. She was years old at the time of the killing, as **MK** was aware.

131. The killing of her father at the same time introduces the second aggravating factor of the death of at least two persons in the same instance (Article 147(11) of the CCK).

132. Once more, the Panel dismisses the Prosecutor's argument Article 147(5) of the CCK is engaged as the level of violence is insufficient.

133. His criminal liability for the offence of aggravated murder under Article 147(1) and (11) of the CCK is proven beyond a reasonable doubt. He is guilty in accordance with Article 388(1) of the KCCP.

B) **BK** and **EK**

134. Although **BK** must have seen **AK** with her father entering village it is not proven beyond a reasonable doubt he had the requisite intention (direct or eventual) to kill her. Also, it is not proven that **EK** knew of **AK's** presence before he transported his father and brother and there is no proof to show his intention to kill her.

135. As stated above it is not proven **AK** was a planned and accepted target of the ambush. Or the presence of **AK** was discussed and considered in any planning. The Panel considers the perceived risk was not high enough to satisfy the requirements under Article 15(3) of the CCK. **BK** and **EK** lacked the knowledge that by ambushing **IK** , **AK** was highly likely to be shot and killed.

136. Despite their substantial contributions to the offence neither brother had the required direct intention to the target of **AK** ; or accept or acquiesce to the required level of risk to satisfy eventual intent.

137. Furthermore, no facts were collected to satisfy negligence under article 16 of the CCK, conscious or unconscious. In truth, no proven facts show that either brother ever foresaw the risk of **AK** becoming collateral damage. The killing and wounding of the two children is solely the result of **MK's** actions, namely his indiscriminate shooting immediately after having spotted the tractor. No circumstances reveal that the brothers could have anticipated this outcome.

138. The criminal liability of **BK** and **EK** for the offence of co-perpetration of aggravated murder under Articles 23 and 147(1) of the CCK is not proven beyond a reasonable doubt. They are acquitted in accordance with Article 390(3) of the KCCP.

10. Count 2

*The shooting and injuring of **AK2***

A) **MK**

139. The Panel considers the factors relevant in relation to **AK** apply equally to **AK2** . It is clear **MK** had eventual intent to kill **AK2** once he started opened fire on **IK** and the group. This in itself is sufficient to satisfy the offence.

140. **MK's** intent then graduated to direct intent as he targeted **AK2** as **AK2** fled the scene. By continuing to target **AK2** he showed a desire to kill him. It was only the intervention of **EK** which stopped the shooting.

141. In opening fire **MK** had taken the immediate steps towards the commission of the offence. It was only the actions of **AK2** , luck and the eventual intervention of **EK** which prevented the completion of the active elements of the offence.

142. **AK2** was only years old at the time of the shootings, as **MK** knew.

143. **MK's** criminal liability for attempted aggravated murder under Articles 20 and 147(1) of the CCK is proven beyond a reasonable doubt. He is guilty in accordance with Article 388(1) of the KCCP.

B) **BK** and **EK**

144. Although **BK** must have seen **AK2** with his father entering village it is not proven beyond a reasonable doubt he had the requisite intention (direct or eventual) to kill him. Equally it is not proven **EK** knew about **AK2** and so had formed the requisite intent.

145. It is not proven **AK2** was a planned and accepted target of the ambush. Or the presence of **AK2** was discussed and considered in any planning. The Panel considers the perceived risk was not high enough to satisfy the requirements under Article 15(3) of the CCK. **BK** and **EK** lacked the knowledge that by ambushing **IK** , **AK2** was highly likely to be shot and potentially killed.

146. Despite their substantial contribution in the offence neither brother had the required direct intention to the target of **AK2** ; or accepted or acquiesced to the required level of risk to satisfy eventual intent.

147. The Panel notes **EK's** intervention to stop the shooting after **IK** had been shot and killed. Without this intervention **AK2** may not have survived.

148. The criminal liability of **BK** and **EK** for the offence of co-perpetration of aggravated murder under Articles 23 and 147(1) of the CCK is not proven beyond a reasonable doubt. They are acquitted in accordance with Article 390(3) of the KCCP.

11. Count 3

Unauthorised ownership, control or possession of weapons

A)**MK**

149. **MK** admits to possession and control of the murder weapon. The automatic rifle is a weapon as defined under Article 38(120) of the CCRK as is the ammunition. He does not have any authorisation for the weapons and in any case these are prohibited under the Law of Weapons. The automatic rifle is a category A2 prohibited weapon and the nine 7.62 x 39mm rounds are category A4 prohibited weapons as they clearly have full metal jackets (see the Law on Weapons).

150. **MK** had the required direct intent. He kept his son's weapon and on 6 August 2011 took it with him to the crime scene.

151. They originally belonged to his deceased son and he kept the automatic rifle and ammunition for a number of years. He failed to hand the weapons to the responsible authorities.

152. His criminal liability for the offence of Unauthorised ownership, control or possession of weapons under Article 374(1) of the CCRK is proven beyond a reasonable doubt. He is guilty in accordance with Article 388(1) of the KCCP.

B) **EK**

153. **EK** admits to possession and control of the murder weapon. The automatic rifle is a weapon as defined under Article 38(120) of the CCRK as is the ammunition. He does not have any authorisation for the weapon and in any case these are prohibited under the Law of Weapons. The automatic rifle is a category A2 prohibited weapon and the nine 7.62 x 39mm rounds are category A4 prohibited weapons as they clearly have full metal jackets (see the Law on Weapons).

154. **EK** had the required direct intent to commit the offence. It is accepted he initially acted in necessary defence of **AK2** who was under a real and on-going threat from **MK** . If his possession of the weapon had been limited to stopping that threat he would not face criminal liability e.g. waiting for the threat to pass and leaving the weapon at the crime scene. However, he continued to possess and took further control of the weapon and ammunition by hiding them. He did not abandon the weapon or report it to the police. Reliance on necessary defence is limited to the time while the threat exists. In this case his intent to possess and control the weapon exceeded this timeframe. There is no minimum time before the requisite intent is formed. **EK** actions do not suggest his secondary intention was to surrender the weapon to the authorities. This only transpired later after his arrest.

155. They originally belonged to his deceased brother. He took it off his father **MK** after the shootings with the aim of disposing of the weapon.

156. His criminal liability for the offence of Unauthorised ownership, control or possession of weapons under Article 374(1) of the CCRK is proven beyond a reasonable doubt. He is guilty in accordance with Article 388(1) of the KCCP.

12. SENTENCING

12.1. The law

157. In order to consider the most favourable law the sentencing sanctions, levels and regime under both the CCK and the CCRK have to be considered and applied. Initially, the relevant parts of the two Codes are set out and discussed. Then the two Codes are applied to each count where a Defendant has been found guilty and convicted of an offence.

Criminal Code of Kosovo (CCK) (2003)

158. The sentence range for aggravated murder is imprisonment of at least 10 years or long-term imprisonment which is 21 years to 40 years imprisonment (Articles 37(2) and 147 of the CCK). Murder carries a minimum sentence of imprisonment of at least five years and a maximum of 20 years to differentiate it from long-term imprisonment (Articles 38(1) and 146 of the CCK). Where an offender acted in co-perpetration the sentence shall be the same range as for the substantive offence, but the sentence should reflect the co-perpetrator's level of intent (Articles 23 and 27(1) of the CCK).

159. The sanctions for the control, possession or ownership of an unauthorised weapon is either a fine from 50 euro up to a maximum of 7,500 euro or imprisonment of between one to eight years (Articles 39(1) and 328(2) of the CCK).

160. Where an offender is guilty of an attempted offence the maximum punishment must be capped at 75% of the range (Articles 20(3) and 65(2) of the CCK).

161. The Court must consider the: sanctions under the offence, purpose of punishment, and aggravating and mitigating circumstances. The Court must consider seven factors which relate to aggravating and mitigating circumstances but are not limited to these. Any punishment must be proportionate to the offence. (Article 65(1) of the CCK).

162. The CCK does not expressly restrict what can be considered an aggravating or mitigating factor.

163. The CCK sets out how sentences for concurrent offences are aggregated (Article 71 of the CCK). If long-term imprisonment is sentenced for one of the offences only this sanction shall be executed (Article 71(1) of the CCK). If imprisonment is sentenced the aggregate must be higher than the highest individual sanction; but lower than the combined period from each individual sanction capped at 20 years imprisonment (Article 71(2) of the CCK). Where the

individual sanctions for imprisonment imposed are all up to three years the maximum aggregate is capped at eight years imprisonment (Article 71(3) of the CCK). If each individual sanction is a fine, the aggregate fine cannot exceed 25,000 euro; or if at least one offence was committed to obtain a material benefit the aggregate fine is capped at 50,000 euro (Article 71(4) of the CCK). Finally, where the sanctions imposed are a mix of imprisonment and fines the preceding provisions shall apply (Article 71(5) of the CCK).

164. An offender's time spent in pre-trial detention (remand or house detention) must also be taken into consideration and counts for the same period (Article 73 of the CCK). One day's detention is the equivalent of 20 euro in calculating any fine (Article 73(4) of the CCK).

Criminal Code of the Republic of Kosovo (CCRK) (2012)

165. The minimum terms of imprisonment applied to murder and aggravated murder are the same as under the CCK – five years and 10 years respectively (Articles 178 and 179(1) of the CCRK).

166. For murder, the maximum term of imprisonment has been raised to 25 years (Article 45(1) of the CCRK). Equally, a new sentence of "life long imprisonment" has replaced long-term imprisonment. Under the CCRK there is no maximum period for which lifelong imprisonment can be imposed and the minimum term is raised to above 25 years to differentiate it from imprisonment (Article 45(1) of the CCRK).

167. For the control, possession or ownership of an unauthorised weapon the sanctions are the same as under the CCK, except the minimum fine is raised to 100 euro and the sentencing range of imprisonment is lowered to between 30 days and up to five years (Articles 45, 46(1) and 374(2) of the CCRK).

168. For attempted offences the punishment may be reduced to reflect the incomplete circumstances. However, there is no mandatory cap on the punishment range under the substantive offence. The 25% reduction to the range under the CCK has been removed. (Article 28(3) of the CCRK).

169. The general rules for calculating a sanction are the same as under the CCK (Article 73(1) to (3) of the CCRK). In addition the CCRK expressly sets out non-exhaustive aggravating and mitigating circumstances which shall be considered (Article 74(2) and (3) of the CCRK). This is a change from the CCK and codifies some of the most common factors.

170. The CCRK largely replicates the previous CCK provisions under Article 80 of the CCRK on the aggregation of sentenced sanctions with some minor changes. Firstly, reference to

long-term imprisonment is replaced by life long imprisonment. Secondly, the aggregate sentence for imprisonment is capped at 25 years (raised from 20 years under the CCK). Finally, the cap for a fine where at least one offence is for a material benefit is now 500,000 euro (raised from 50,000 euro under the CCK). (Article 80(2)(2.1) to (2)(2.5) of the CCRK.)

171. An offender's time spent in pre-trial detention (remand or house detention) must also be taken into consideration and counts for the same period (Article 83 of the CCRK). One day's detention is the equivalent of 20 euro in calculating any fine (Article 83(4) of the CCRK).

12.2. Count 1

A) ***MK***

Killing of ***IK***

172. The aggravating factors are clear: revenge for the death of his son **GK** , his primary role as instigator of the plan to kill **IK** , supplier of the weapon and attacker. In mitigation his advanced age, personal circumstances, lack of any previous convictions, his consistent acceptance of responsibility from arrest to main trial have been taken into consideration.

173. The Panel recognises his motive for killing **IK** was based in the loss of his son. However, the Court cannot condone his actions where the victim has been acquitted by a court of law.

Application of CCK

174. The sentencing range is 10 to 20 years or long-term imprisonment as detailed above. Despite the nature of the offences the Panel did not consider the circumstances were aggravated to a degree or the consequences were so grave to justify long-term imprisonment.

175. In this case public protection and deterrence are the main purposes of punishment considered. The above aggravating and mitigating circumstances have been taken into account and considered in line with Article 65 of the CCK.

176. For the death of **IK** the Panel would sentence **MK** to 15 years imprisonment under the CCK.

Application of CCRK

177. The sentencing range is 10 to 25 years of imprisonment or life long imprisonment as detailed above. Despite the nature of the offences the Panel did not consider the circumstances were aggravated to a degree or the consequences were so grave to justify life long imprisonment.

178. The above aggravating and mitigating circumstances have been taken into account and considered in line with Articles 73 and 74(2.1) to (2.3), (2.6) and (2.8), (3.2) to (3.3), (3.6), (3.10) and (3.11) of the CCRK.

179. For the death of **IK** the Panel would sentence **MK** to 17 years imprisonment under the CCRK.

Conclusion

180. The CCRK is no more favourable than the law in force at the time of the offence. The CCK should be applied in accordance with Article 3(1) of the CCRK. **MK** is sentenced to 15 years imprisonment in accordance with Article 38(2) of the CCK.

*Killing of **AK***

181. The aggravating and mitigating circumstances applicable to **IK's** death also apply to the death of **AK** . In addition **MK** did show remorse for the death of the child and there is no evidence of a premeditated plan to kill **AK** . The Panel considered the indifference to the presence of **AK** shown by **MK** and lack of any motive means the sentence should be higher than applied to the killing of **IK** .

Application of the CCK

182. The sentencing range is 10 to 20 years or long-term imprisonment as detailed above. Despite the nature of the offences the Panel did not consider the circumstances were aggravated to a degree or the consequences were so grave to justify long-term imprisonment.

183. In this case public protection and deterrence are the main purposes of punishment considered. The above aggravating and mitigating circumstances have been taken into account and considered in line with Article 65 of the CCK.

184. For the death of **AK** the Panel would sentence **MK** to 17 years imprisonment under the CCK.

Application of the CCRK

185. The sentencing range is 10 to 25 years of imprisonment or life long imprisonment as detailed above. Despite the nature of the offences the Panel did not consider the circumstances were aggravated to a degree or the consequences were so grave to justify life long imprisonment.

186. The above aggravating and mitigating circumstances have been taken into account and considered in line with Articles 73 and 74(2.1), (2.3), (2.6) to (2.8), (3.3), (3.6), (3.10) and (3.11) of the CCRK.

187. For the death of **AK** the Panel would sentence **MK** to 21 years imprisonment under the CCRK.

Conclusion

188. The CCRK is no more favourable than the law in force at the time of the offence. The CCK should be applied in accordance with Article 3(1) of the CCRK. **MK** is sentenced to 17 years imprisonment in accordance with Article 38(2) of the CCK.

*B) **BK***

*Killing of **IK***

189. **BK** is convicted of the co-perpetration of **IK's** murder.

190. The Panel considered the following aggravating and mitigating factors applied to **BK** .

191. Aggravating factors are the motivation for revenge for the death of **GK** , his central role in facilitating the offence and the manner in which **IK** was killed. **BK** is considered to have taken a more active role than **EK** . In mitigation the Panel recognises **BK** has no previous convictions.

192. The Panel takes into consideration the extent of **BK's** criminal liability as a co-perpetrator. Without his involvement the Panel considers it unlikely the offence would have been committed.

Application of the CCK

193. The sentencing range is 10 to 20 years or long-term imprisonment as detailed above. Despite the nature of the offences the Panel did not consider the circumstances were aggravated to a degree or the consequences were so grave to justify long-term imprisonment.

194. In this case public protection and deterrence are the main purposes of punishment considered. The above aggravating and mitigating circumstances have been taken into account and considered in line with Article 65 of the CCK.

195. For the death of **IK** the Panel would sentence **BK** to 9 years imprisonment under the CCK.

Application of the CCRK

196. The sentencing range is 10 to 25 years of imprisonment or life long imprisonment as detailed above. Despite the nature of the offences the Panel did not consider the circumstances were aggravated to a degree or the consequences were so grave to justify life long imprisonment.

197. The above aggravating and mitigating circumstances have been taken into account and considered in line with Articles 73 and 74(2.2), (2.3), (2.6), (2.8) and (3.3) of the CCRK.

198. For the death of **IK** the Panel would sentence **BK** to 11 years imprisonment under the CCRK.

Conclusion

199. The CCRK is no more favourable than the law in force at the time of the offence. The CCK should be applied in accordance with Article 3(1) of the CCRK. **BK** is sentenced to 9 years imprisonment in accordance with Article 38(2) of the CCK.

*C)**EK***

*Killing of **IK***

200. **EK** is convicted of the co-perpetration of **IK's** murder.

201. The Panel considered the following aggravating and mitigating factors applied to **EK** .

202. **EK's** conduct is aggravated by the motivation for revenge, he played a key role in transporting his father to the crime scene without this transport the offence is unlikely to have occurred. **EK's** age is taken as mitigation for his part in the offence as well as his remorse and early co-operation with the police and prosecutor. It is also noted he played a less active role than his brother, **BK** .

Application of the CCK

203. The sentencing range is 10 to 20 years or long-term imprisonment as detailed above. Despite the nature of the offences the Panel did not consider the circumstances were aggravated to a degree or the consequences were so grave to justify long-term imprisonment.

204. In this case public protection and deterrence are the main purposes of punishment considered. The above aggravating and mitigating circumstances have been taken into account and considered in line with Article 65 of the CCK.

205. For the death of **IK** the Panel would sentence **EK** to 7 years imprisonment under the CCK.

Application of the CCRK

206. The sentencing range is 10 to 25 years of imprisonment or life long imprisonment as detailed above. Despite the nature of the offences the Panel did not consider the circumstances were aggravated to a degree or the consequences were so grave to justify life long imprisonment.

207. The above aggravating and mitigating circumstances have been taken into account and considered in line with Articles 73 and 74(2.3), (2.6), (2.8), (3.6), (3.8), (3.9) and (3.11) of the CCRK.

208. For the death of **IK** the Panel would sentence **EK** to 9 years imprisonment under the CCRK.

Conclusion

209. The CCRK is no more favourable than the law in force at the time of the offence. The CCK should be applied in accordance with Article 3(1) of the CCRK. **EK** is sentenced to 7 years imprisonment in accordance with Article 38(2) of the CCK.

12.3. Count 2

MK

*Attempted killing of **AK2***

210. He is convicted of the attempted murder of **AK2** .

211. The Panel considered the aggravating and mitigating factors applicable to **MK** . His primary role as instigator of the plan to kill **IK** , supplier of the weapon and attacker meant he was the main participant in the attack on **AK2** . **AK2** was defenceless and vulnerable, and has suffered mental trauma since the attack. In mitigation his advanced age, personal circumstances, lack of any previous convictions, his remorse in relation to **AK2** and his consistent acceptance of responsibility from arrest to main trial have been taken into consideration.

Application of CCK

212. The maximum sentence for an attempt is punishable at 75% of the maximum sentence prescribed by the CCK – in this case up to but not including 21 years for imprisonment and 40 years under long-term imprisonment (article 65(2) if the CCK). The Panel considers the reduction is made to the maximum sentence prescribed and not applied to a sentence after aggravating and mitigating factors have been considered in an individual case.

213. Taking this into account, the sentencing range for attempted aggravated murder is 10 to 15 years or 21 to 30 years.

214. Despite the nature of the offences the Panel did not consider the circumstances were aggravated to a degree or the consequences were so grave to justify long-term imprisonment.

215. In this case public protection and deterrence are the main purposes of punishment considered. The above aggravating and mitigating circumstances have been taken into account and considered in line with Article 65 of the CCK.

216. For the attempted aggravated murder of **AK2** the Panel would sentence **MK** to 12 years imprisonment under the CCK.

Application of CCRK

217. As this was an attempt and as such has to be taken into account. However, there is no mandatory reduction in the maximum sentencing range from 10 years to 25 years or life long imprisonment as detailed above. Despite the nature of the offences the Panel did not consider the circumstances were aggravated to a degree or the consequences were so grave to justify life long imprisonment.

218. On the other hand, the Panel did not find any reasons to reduce the punishment pursuant to articles 28 (3) and 75 (1) 1.1 of the CCRK.

219. The above aggravating and mitigating circumstances have been taken into account and considered in line with Articles 73 and 74(2.1), (2.3), (2.6), (2.8), (3.3), (3.6), (3.10) and (3.11) of the CCRK.

220. For the attempted aggravated murder of **AK2** the Panel would sentence **MK** to 15 years imprisonment under the CCRK.

Conclusion

221. The CCRK is no more favourable than the law in force at the time of the offence. The CCK should be applied in accordance with Article 3(1) of the CCRK. **MK** is sentenced to 12 years imprisonment in accordance with Article 38(2) of the CCK.

12.4. Count 3

*A)**MK***

222. He is convicted of unauthorised ownership, control or possession of weapons.

223. The Panel considers the following are aggravating circumstances: his high degree of participation in the offence. He had known about the weapons for a number of years and made no attempt to hand them to the authorities. The offence is further aggravated by the weapons being prohibited. The continued retention of prohibited and unauthorised weapons only facilitate serious criminal offences often with tragic results.

224. In mitigation the Panel considered his age and his co-operation with the police over his criminal responsibility.

Application of CCK

225. The sanctions of a maximum fine of 7,500 euro or one up to eight years imprisonment apply in this case (Article 328(2) of the CCK).

226. In this case deterrence is the main purposes of punishment considered. The above aggravating and mitigating circumstances have been taken into account and considered in line with Article 65 of the CCK.

227. For the unauthorised ownership, control or possession of weapons the Panel would sentence **MK** to 5 year and 6 months imprisonment under the CCK.

Application of CCRK

228. The sanctions of a maximum fine of 7,500 euro or up to five years imprisonment apply in this case (Article 374(1) of the CCRK).

229. The above aggravating and mitigating circumstances have been taken into account and considered in line with Articles 73 and 74(2.1), (2.2), (3.3), (3.6), and (3.10) of the CCRK.

230. For the unauthorised ownership, control or possession of weapons the Panel would sentence **MK** to 3years imprisonment under the CCRK.

Conclusion

231. The CCRK is more favourable than the law in force at the time of the offence. The CCRK should be applied in accordance with Article 3(2) of the CCRK. **MK** is sentenced to 3 years imprisonment in accordance with Article 45 of the CCRK.

*B)**EK***

232. He is convicted of unauthorised ownership, control or possession of weapons.

233. The Panel considered no aggravating circumstances applied to **EK** for this offence. A number if mitigating circumstances were found by the Panel which included his voluntary co-operation with the police investigation by surrendering the weapons, and the short period he was in control and possession of the weapons.

234. In mitigation the Panel considered his age and his co-operation with the police over his criminal responsibility.

Application of CCK

235. The sanctions of a maximum fine of 7,500 euro or one up to eight years imprisonment apply in this case (Article 328(2) of the CCK).

236. In this case deterrence is the main purposes of punishment considered. The above mitigating circumstances have been taken into account and considered in line with Article 65 of the CCK.

237. For the unauthorised ownership, control or possession of weapons the Panel would sentence **EK** to 1 year 3 months imprisonment under the CCK.

Application of CCRK

238. The sanctions of a maximum fine of 7,500 euro or thirty days up to five years imprisonment apply in this case (Article 374(1) of the CCRK).

239. The above mitigating circumstances have been taken into account and considered in line with Articles 73 and 74 (3.6) and (3.10) of the CCRK.

240. For the unauthorised ownership, control or possession of weapons the Panel would sentence **EK** to 2 months imprisonment under the CCRK.

Conclusion

241. The CCRK is more favourable and the law in force at the time of the offence. The CCRK should be applied in accordance with Article 3(2) of the CCRK. **EK** is sentenced to 2 months imprisonment in accordance with Article 45 of the CCRK.

12.5 Aggregate sentence

242. Both **MK** and **EK** have committed concurrent offences.

243. Taking into account Articles 3(1) and (2) of the CCRK the CCK remains the most favourable law placing a maximum 20 years imprisonment limit under Article 71(2)(2) of the CCK. The CCRK, on the other hand, prescribes a limit of 25 years of punishment of concurrent offenses (article 80(2)(2.2)). The Panel considers the law on sentencing to be discrete from the substantive offences. The sentencing provisions of either the CCK or CCRK can be applied under Article 3 of the CCRK even where sentences under the CCK and the CCRK have to be aggregated together.

244. Therefore, and according to article 71(2)(2) of the CCK, the range of the aggregate punishment for **MK** is 17 to 20 years imprisonment and, according to article 80(2)(2.2) of the CCRK 17 to 25 years.

245. For **EK** the sentencing range is the same under both codes: 7 years to 7 years 2 months.

246. The aggregate sentences for the offenders are, taking into account the global image provide but the conjoint offences:

- **MK** is sentenced to an aggregate of 20 years imprisonment.
- **EK** is sentenced to an aggregate of seven (7) years and one (1) month imprisonment.

12.6. House detention

247. The Panel notes any time on remand or house detention shall count towards any sentence of imprisonment or fine (Article 73(1) of the CCK and Article 83(1) if the CCRK).

13. OTHER MATTERS

13.1. Confiscation

248. The prohibited weapons shall be confiscated and destroyed in accordance with Article 274(3) of the CCRK and Article 38(1) and (2) of the Law on Weapons. The confiscation shall occur within 15 days from when the judgment becomes final (Article 38(1) of the Law of Weapons).

249. The Court uses its discretion to confiscate the Audi vehicle registration no 02-560-AJ. This vehicle was used in the commission of the offences of aggravated murder and murder (Article 60(1) of the CCK).

13.2. Costs

250. Costs must be ordered against convicted offenders (Article 102(1) of the KCCP). The Panel is unable to proportion the costs based in relation to each charge on the indictment. The Defendants are jointly and severely liable for the costs of the proceedings but are required to pay a minimum of 400 euros each (Article 102(3) of the KCCP).

13.3 Property claim

251. A property claim by the Injured Parties was incorrectly filed with the Court. Due to the misrepresentation by the Injured Parties' Authorized Representative the submission was not considered by the Panel during its deliberations. The submission was provided in Albanian at the hearing on 18 January 2013. The Authorised Representative stated it was his closing speech and had provided an oral summary. He confirmed to the Court the submission did not add anything further. For this reason the submission was not read out in open court and so translated. At no point did the Authorised Representative draw the Court's attention to the property claim. This was only discovered after the Court's deliberations.

252. In addition no evidence was attached to or referred to in the property claim submission.

253. At no time did he expressly state the document contained the property claim and so breached his duty to his client Article 81(3) of the KCCP. The lawyer is obliged to properly file any submission and the Court is under no duty to adopt this obligation when filing is deficient and is unaware of this.

254. The Panel considers a lack of adherence to Article 109(1) to (3) of the KCCP and the misleading of the Court means no property claim was properly filed and so the Court's obligation under Article 111(2) of the KCCP to consider it is not triggered.

255. For the above reason the issue of a property claim is not considered in the enacting clause (Article 396(4) of the KCCP).

Nuno Madureira

Presiding Judge

EULEX Judge

Roxana Comsa

Panel Member

EULEX Judge

Katja Dominik

Panel Member

EULEX Judge

John Gayer

Recording Officer

EULEX International Legal Officer

LEGAL REMEDY: A Defendant, their legal counsel, the Prosecutor, an Injured Party or their Authorised Representative have 15 days from service of this judgment to appeal in accordance with Articles 380(1) and 381(1) of the CPC. Any appeal must be filed with the Court of first instance under Article 388(1) of the CPC.