COURT OF APPEALS
PRISTINA

Case number: **PAKR 158/17**

Date: **7 December 2017**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Jorge Martins Ribeiro as Presiding and Reporting Judge, and EULEX Judge Krassimir Mazgalov and Kosovo Court of Appeals Judge Hava Haliti as Panel Members, with the participation of EULEX Legal Officer Timo Torkko as Recording Officer, in the case P. nr. 61/2016 before the Basic Court of Mitrovica against:

R.R;

M.V.;

charged under the Indictment of the EULEX Prosecutor within the State Prosecution Office in Mitrovica, dated 7 May 2014 (filed with the court on 8 May 2014), and under the modified indictment dated 7 September 2016 with the criminal offences of:

I. Aggravated Murder, described and punishable under Articles 146 and 147(4), (6), (8) and (10) of the Criminal Code of Kosovo (hereinafter "CCK"), UNMIK/REG/2003/25 (hereinafter CCK) as read in conjunction with Article 23 of the CCK *pari materia* Articles 178 and 179 (1.5), (1.7), (1.9) and (1.10) of the Criminal Code of the Republic of Kosovo, Code no. 04/L082 (hereinafter "CCRK") as read in conjunction with the Article 31 of the CCRK;

II. Attempted Aggravated Murder, described and punishable under Articles 146 and 147(4), (6), (8) and (10) of the CCK as read in conjunction with Articles 20 and 23 of the CCK *pari materia* Articles 178 and 179 (1.5), (1.7), (1.9) and (1.10) of the CCRK as read in conjunction with Articles 28 and 31 of the CCRK;

III. Unauthorized Ownership, control, possession or use of a weapon, described and punishable under Article 328(1) and (2) of the CCK as read in

conjunction with Article 23 of the CCK *pari materia* with Article 374 of the CCRK as read in conjunction with Article 31 of the CCRK;

IV. Obstructing official persons in performing official duties described and punishable under Article 316(1) and (3) of the CCK as read in conjunction with Article 23 of the CCK *pari materia* Article 409(1) and (2) of the CCRK as read in conjunction with Article 31 of the CCRK;

V. Endangering public traffic by dangerous act or means, described and punishable under Article 299(1) of the CCK as read in conjunction with Article 23 of the CCK *pari materia* Article 380(1) of the CCRK as read in conjunction with Article 31 of the CCRK;

VI. Causing general danger, described and punishable in Article 291(1), (3) and (5) of the CCK as read in conjunction with Article 23 of the CCK *pari materia* Article 365 of the CCRK as read in conjunction with Article 31 of the CCRK;

VII. Participating in a crowd committing a criminal offence described and punishable under Article 320(1) of the CCK as read in conjunction with Article 23 of the CCK *pari materia* Article 412 of the CCRK as read in conjunction with Article 31 of the CCRK.

deciding upon the appeals filed by the EULEX Prosecutor on 27 February 2017, by defence counsel A.L on behalf of the defendant M.V. on 24 February 2017 and by defence counsel Z.J. on behalf of the defendant R.R. on 1 March 2017 against the Judgment of the Basic Court of Mitrovica P. no. 61/2016 dated 21 November 2016;

having reviewed the response filed by the EULEX Prosecutor on 6 March 2017;

having reviewed the supplement to the appeal filed by defence counsel Z.J. on behalf of the defendant R.R. on 11 April 2017;

and the motion of the Appellate Prosecutor filed on 13 April 2017;

after having held a public session of the Appellate Panel on 26 October 2017;

having deliberated and voted on 10 November 2017;

pursuant to Articles 389. 390, 394, 398 and 401 of the Criminal Procedure Code of Kosovo (hereinafter "CPC");

renders the following:

JUDGMENT

A) The Court of Appeals *ex officio* declares the absolute bar on criminal prosecution considering both defendants with regards to the criminal offence in count V, pursuant to Article 299 (1) CCK, read together with Articles 90 (1.5) CCK, 91 (1 and 6) CCK. Pursuant to Articles 362(1) and 363(1.3) CPC, as the absolute period of statutory limitation has expired on 26 July 2017, the court rejects the charge in relation to the criminal offense in count V of the Indictment.

B) The appeal filed by the EULEX Prosecutor on 27 February 2017 against the Judgment of the Basic Court of Mitrovica P. no. 61/2016 dated 21 November 2016 is hereby partially granted as to consider the existence of (successive) co-perpetration in Count IV, pursuant to Article 23 CCK.

The remainder of the appeal is rejected as ungrounded

C) The appeal filed by defence counsel Z.J. on behalf of the defendant R.R. dated 27 February 2017 against the Judgment of the Basic Court of Mitrovica P. no. 61/2016 dated 21 November 2016, not containing the reasoning – submitted by a subsequent motion dated 8 March 2017 –, is hereby dismissed and not considered, for not complying with the legal requirements as set in the law, pursuant to Articles 376 (1.1.4 and 1.1.7) and (4) CPC, 379 CPC, 382 (1.2) and Article 398 (1.1) and paragraph 3 (joint determination of all appeals of the same judgment).

D) The appeal filed by defence counsel A.L. on behalf of the defendant M.V. on 24 February 2017 against the Judgment of the Basic Court of Mitrovica P. no. 61/2016 dated 21 November 2016 is hereby, as per Article 398(1.4) CPC, partially granted as to the reduction of the punishment. The punishment of the defendant M.V. is modified and set in 1 year and 3 months of imprisonment; the verification period remains unchanged (3 years).

The remainder of the appeal is rejected as ungrounded.

E) Considering the reduction of punishment of the co-defendant M.V., for reasons that are not or purely personal nature, pursuant to Articles 387 (1), 394 (1.4) and 397 (*beneficium cohaesionis*) CPC, the punishment of the defendant R.R. is modified and set in 1 year and 9 months of imprisonment; the verification period remains unchanged (4

years). As in the impugned judgment, pursuant to Article 73(1) CCK, the time in detention on remand and deprivation of liberty from 11 April 2014 until 22 April 2015 shall be included (discounted) in the punishment in the event the suspended sentence is revoked.

F) Pursuant to Article 398 (1.4), read together with Article 370 (1 and 2) and 403 CPC, corrects the date of the original judgment to 7 February 2017 as it matches the date it was sent for translation and determines that when the case file is returned to the Basic Court of Mitrovica the recording officer, who is still a EULEX staff member, shall sign the original judgment and date it as per the date it does take place, following the determination by this Court of Appeals.

G) Pursuant to article 370 (1 and 2) in the first instance judgment where it is written Article "318 (2)" CCK it is a typo that should be read Article "318 (1) CCK" – in accordance with the last paragraph of page 39 of the English version of the impugned judgment.

H) In the enacting clause and statement of grounds where defendants are found guilty of the criminal offence of Participation in a Group Obstructing Official Persons in Performing Official Duties as per Article 318 (1) CCK, reference to Article 23 CCK, co-perpetration, is now being made.

I) As to the rest, the Judgment of the Basic Court of Mitrovica P. no. 61/2016 dated 21 November 2016 is hereby upheld.

REASONING

I. RELEVANT PROCEDURAL BACKGROUND

1 - On 08 May 2014, the Prosecution of the EULEX Prosecution Office of Mitrovica filed the Indictment PP.nr. 103/2011 dated 07 May 2014 against the Defendants R.R. and M.V., thereby charging them both with the criminal offences of "Aggravated Murder", described

and punishable under Articles 146 and 147 Paragraphs (4), (6), (8) and (10) of the CCK as read in conjunction with Article 23 of the CCK, "Attempted Aggravated Murder", described and punishable under Articles 146 and 147 Paragraphs (4), (6), (8) and (10) of the CCK as read in conjunction with Articles 20 and 23 of the CCK, "Unauthorized Ownership, Control, Possession or Use of Weapons", described and punishable under Article 328 Paragraphs (1) and (2) of the CCK as read in conjunction with Article 23 of the CCK, "Obstructing Official Persons in Performing Official Duties" described and punishable under Article 316(1) and (3) of the CCK as read in conjunction with Article 23 of the CCK, "Endangering Public Traffic by Dangerous Acts or Means" described and punishable under Article 299(1) of the CCK as-read in conjunction with Article 23 of the CCK, "Causing General Danger", described and punishable under Article 291(1), (3) and (5) of the CCK as read in conjunction with Article 23 of the CCK and "Participating in a Crowd Committing a Criminal Offence", described and punishable under Article 320(1) of the CCK as-read in conjunction with Article 23 of the CCK.

2 - The first Main Trial Proceedings in criminal case 59/2014 were opened on 19 January 2015 and concluded on 20 April 2015, with the acquittal of both Defendants for all charges when the verdict was announced. Based on that verdict, both the Accused, R.R. and M.V. were found not guilty of all charges.

3 - On 08 June 2015, the Prosecutor filed an Appeal against the mentioned First Instance Court Judgment.

4 - Following the Appeal of the EULEX Prosecutor Filed against that Judgment, on 29 April 2016, the Court of Appeals of Kosovo, by its Ruling PAKR 355/2015, granted the appeal, annulled the Judgment and the case returned to Basic Court of Mitrovica for retrial.

5 - On 7 September 2016 the EULEX Prosecutor filed the modified Indictment with the following criminal offences in relation to both of the defendants:

I. Aggravated Murder, described and punishable under Articles 146 and 147(4), (6), (8) and (10) of the Criminal Code of Kosovo, UNMIK/REG/2003/25 (hereinafter CCK) as read in conjunction with Article 23 of the CCK *pari materia* Articles 178 and 179 (1.5), (1.7), (1.9) and (1.10) of the Criminal Code of the Republic of Kosovo, Code no. 04/L082 (hereinafter ”CCRK”) as read in conjunction with the Article 31 of the CCRK;

II. Attempted Aggravated Murder, described and punishable under Articles 146 and 147(4), (6), (8) and (10) of the CCK as read in conjunction with Articles 20 and 23 of the CCK *pari materia* Articles 178 and 179 (1.5), (1.7), (1.9) and (1.10) of the CCRK as read in conjunction with Articles 28 and 31 of the CCRK;

III. Unauthorized Ownership, control, possession or use of a weapon, described and punishable under Article 328(1) and (2) of the CCK as read in conjunction with Article 23 of the CCK *pari materia* with Article 374 of the CCRK as read in conjunction with Article 31 of the CCRK;

IV. Obstructing official persons in performing official duties described and punishable under Article 316(1) and (3) of the CCK as read in conjunction with Article 23 of the CCK *pari materia* Article 409(1) and (2) of the CCRK as read in conjunction with Article 31 of the CCRK;

V. Endangering public traffic by dangerous act or means, described and punishable under Article 299(1) of the CCK as read in conjunction with Article 23 of the CCK *pari materia* Article 380(1) of the CCRK as read in conjunction with Article 31 of the CCRK;

VI. Causing general danger, described and punishable in Article 291(1), (3) and (5) of the CCK as read in conjunction with Article 23 of the CCK *pari materia* Article 365 of the CCRK as read in conjunction with Article 31 of the CCRK;

VII. Participating in a crowd committing a criminal offence described and punishable under Article 320(1) of the CCK as read in conjunction with Article 23 of the CCK *pari materia* Article 412 of the CCRK as read in conjunction with Article 31 of the CCRK.

6 - The main trial on retrial commenced on 7 September 2016 and was concluded on 18 November 2016. It was heard on 11 trial days, held on 07, 14, 15, 19, 20 and 26 September 2016, 07, 10 and 17 October 2016, 16 and 18 November 2016 in the presence of the Prosecutor, the Injured Parties D.Z. and M.Z., the Injured Parties Representatives B.M. and

E.P., Defendant R.R., his Defence Counsel Z.J. and N.V., and Defendant M.V. and his Defence Counsel A.L..

7 - On 21 November 2016 the Basic Court announced the Judgment in the case P. No 61/2016, making public the enacting clause.

8 - As per the said Judgment, the defendants were acquitted of the charges in counts 1, 2, 3, 5, 6 and 7 of the Indictment. The defendants were convicted in count 4 for the criminal offence of Participation in a Group Obstructing Official Persons in Performing Official Duties described and punishable under Article 318, paragraph 2, of the CCK.

9 - Defendant R.R. was sentenced to 2 years of imprisonment, but in accordance with article 43, paragraph 1, and article 44, paragraph 2, of the (CCK), the punishment shall not be executed if the convicted does not commit another criminal offence for a verification period of four (4) years. In relation to defendant R.R., pursuant to article 73 paragraph 1 of the CCK, the time of being in detention on remand and during the deprivation of liberty, from 11 April 2014 to 22 April 2015, was ordered to be included in the punishment of imprisonment in the case of revocation of the suspended sentence and execution of the punishment.

10 - Defendant M.V. was sentenced to 1 year and 6 months of imprisonment, but in accordance with article 43 paragraph 1 and article 44 paragraph 2 of the (CCK), the punishment shall not be executed if the convicted does not commit another criminal offence for a verification period of three (3) years.

11 - The Judgment was served to the defendant R.R. on 14 February 2017 and to his defence counsel Z.J. on 15 February 2017. The motion titled “appeal” was filed on 1 March 2017 by the defence counsel on behalf of the defendant. The defence counsel filed later on 11 April 2017 a supplement to the previous motion titled “appeal”.

12 - The Judgment was served to the defendant M.V. on 11 February 2017 and to his defence counsel A.L. on 14 February 2017. The appeal was filed on 24 February 2017 by the defence counsel on behalf of the defendant.

13 - The judgment was served to the EULEX Prosecutor 14 February 2017 and the EULEX Prosecutor timely filed her appeal on 27 February 2017.

14 - The Appeal of M.V. was served on the EULEX Prosecutor on 1 March 2017 and the EULEX Prosecutor filed a response on 6 March 2017 (388(2) CPC).

15 - The motion “appeal” of R.R. was served on the EULEX Prosecutor on 6 March 2017 and the EULEX Prosecutor filed a response on 7 March 2017 (388(2) CPC).

16 - The Appeal of the EULEX Prosecutor was served on R.R. on 2 March 2017 and on his defence counsel Z.J. on 3 March 2017. On behalf of R.R. no response was filed.

17 - The Appeal of the EULEX Prosecutor was served on M.V. on 3 March 2017 and on his defence counsel A.L. on 1 March 2017. On behalf of M.V. no response was filed.

18 - The Appellate Prosecutor filed her response on 13 April 2017.

19 - On 26 October 2017 the Court of Appeals held a public session. The Appellate Panel deliberated and voted on 10 November 2017.

II. SUBMISSIONS OF THE PARTIES

A. The appeal of the EULEX Prosecutor

20 - The Prosecution moves the Court of Appeals to find defendants guilty in counts 1-3 and 5-7 of the indictment. In addition, in count 4 the Prosecution moves the Court of Appeals to find the defendants guilty of the criminal offense of obstructing official persons in performing official duties as per the indictment. The Appeal is based on the grounds of erroneous or incomplete determination of the factual situation, substantial violation of the provisions of criminal procedure and on the ground of an erroneous or incomplete determination of the factual situation pursuant to article 383 (1.1), (1.2) and (1.3) of the CPC.

21 - The Prosecution asserts the following: The Presiding Judge made a request to extend the deadline for drawing up the judgment on 19 December 2016. The request was granted by the Acting President of the Basic Court Mitrovica on the same day. To fully comply with the provisions of Article 369(1) and (2) and 370(2) CPC, the date of the judgment should have been after 19 December 2016 being this date the request was granted by the Acting President of the Basic Court. In addition, contrary to the provisions of Article 369 (2) of the CPC, the judgment was not signed by the recording clerk.

22 - The defendants have been charged with co-perpetration in relation to the commission of the crimes for which they have been charged in Counts I, II, III. Therefore, and according to

the applicable criminal law, the participation of the defendants in the commission of these criminal offences does not require them to be in possession of weapons but to have substantially contributed to the commission of these criminal offences.

23- The Prosecution also moves the court to determine that the actions mentioned in Count IV were in co-perpetration, as per Article 23 CCK.

24 - In count IV of the Indictment, according to the Prosecution, the Basic Court erred in its reasoning of the provisions of co-perpetration stipulated in Article 23 of the CCK *pari materia* with Article 31 of the CC 2013. The said articles require that the perpetrator *"participates in a group of persons which by common action...".* It is not necessary to apply co-perpetration according to Article 23 of the CCK or 31 of the CCRK. The Basic Court failed to take into account that the defendants were acting in collaboration in the furtherance of the criminal acts in the commission of the criminal offences. The applicability of *co-perpetration* is necessary given the roles and participation of the defendants in the group. The provisions of Participation in a Group Obstructing Official Persons in Performing Official Duties contrary to Article (2) of the CCK don't imply that in all circumstances, where this charge is laid against 2 or more defendants, there is a presumption that the defendants would be acting in co-perpetration.

25 - In Counts V and VI, the Basic Court erred in its reasoning that the provisions of Endangering Public Traffic by Dangerous Acts or Means contain significant characteristics of Causing General Danger. The two offences, as can be seen in the elements set out in their respective provisions, are distinct and separate. The concept of *real concurrence* of offences alluded to by the Basic Court is an attempt to create a concept which is unnecessary and not envisaged in the provisions of the CCK or CCRK as well as in the CPC. The Basic Courts reasoning in respect of the principles of *Apparent real concurrence, ideal concurrence* and *subsidiarity* is *ultra vires* as the Basic Court has erroneously departed from its competence and jurisdiction in its interpretation of the law in its attempt to substitute provisions of the law namely the CCK and CPC with theoretical legal principles which are utterly irrelevant and not applicable.

26 - Regarding Count VII of the indictment, Basic Court found in its judgment that it was the general opinion that the crowd should be bigger than seven (7) or at least ten (10) persons. The Prosecution notes that the opinion of the Supreme Court on 21 October 2010 which states that in respect of Article 320 (1) of the CCK an Assembled crowd meant 8 or more

persons. The provisions of Article 412 of CCRK cited in the preceding paragraph states explicitly that an assembled crowd consists of eight or more persons.

27 - Based on the aforesaid the Prosecution moves the Court of Appeals to modify the challenged ruling by convicting and sentencing the defendants in all counts according to the Indictment. Alternatively the Prosecutor moves the Court of Appeals to remit the case back to the Basic Court for retrial.

B) The Appeal of defence counsel Z.J. on behalf of R.R.:

28 - The defence counsel of R.R., Z.J. moves the Court of Appeals to modify the impugned judgment, acquit the defendant R. from charges or to quash, annul and return the case to the Basic Court for retrial and re-adjudication. The Appeal is based on substantive violation of the provisions of criminal procedure (Article 384 CPC), violation of criminal law (Article 385 CPC) and on erroneous and incomplete determination of the state of facts (Article 386 CPC). The Appeal is also based on the decision on criminal sanction (Article 387 CPC).
The defence counsel terminates the motion stating "I will provide the appeal reasoning in a separate submission".

29 - The submission containing the reason was dated 15 March and then filed with the court on 11 April 2017 and the defence counsel named it ***supplement to the appeal*** (emphasis added) stating the following:

With regards the alleged Substantial Violation of Criminal Procedure:

30 - The judgment is in violation of criminal procedure as the Basic Court based its judgment exclusively on the testimony of one witness whose credibility is more than disputable. Witness F.U. told his colleagues that he recognized 3 to 4 or 4 to 5 people at the second barricade. Witness F.U. is the only witness who saw 10 to 15 people at the barricade, while all other witnesses did not mention more than 8 people, starting from 4 to 5 or 7 to 8 people. Witness F.U. referred to the Defendant R. as the blond one, which he is not, and he initially mentioned a wrong surname, wrong father's name, referring to a person (man) who has two sons of the similar age as the Defendant R.. Witness F.U. mentioned some kind of traffic control when R. had not had any identification documents with him. He said that the late E.Z.

was in the patrol with him on that occasion, but he cannot confirm it, unfortunately. There is no other evidence.

31 - Also the way Witness F.U. acted during the hearings did not increase his credibility as he was afraid of his safety, refused to testify and asked for a postponement.

32 - Witness F.U. was sitting in the armoured vehicle behind the driver and the co-driver, where there were not horizontal (meaning, facing forward) seats, but there were inseparable side seats on the left and the right sides, which leaned on the vehicle sides and blocked the sight between the driver and the co-driver. Also, the windshield was divided in the middle by a metal hedge, and the entire surface was protected by a metal grid, which gravely reduced the visibility.

33 - Taking into consideration that the judgment was based solely on Witness F.U.'s testimonies and the above described discrepancies of these testimonies, the judgment is based on unreliable evidence. There is a huge discrepancy between the enacting clause and reasoning, while the reasoning does not state the reasons for the decisive facts. As a consequence the Basic Court violated Article 384(1.12) CPC in conjunction with Article 370(7) CPC, since the first instance court has conducted an erroneous assessment of the administrated evidence.

With regards the alleged Violation of the Criminal Law:

34 - The Basic Court did not establish that the Defendant committed any act that could be qualified as an offence, especially not a criminal offense for which he was found guilty and sentenced. The judgment was wrongfully based on the testimony of a single and unreliable witness.

With regards the alleged Erroneous and Incomplete Determination of the Factual Situation:

35 - The Basic Court conducted an erroneous and incomplete determination of the factual situation as it based its judgment solely on the testimony of one witness, F.U.. This testimony is not reliable and also devoid of any grounds. Witness F.U. was bias and tried to stubbornly prove that defendant R.R. was at the crime scene.

36 - The Defendant R.R. was neither physically present at the critical place nor was he involved in the action or actions. According to the statement by a protected witness (Witness B.), R., at that time, was located 200 - 300 meters away, at an exact place, *i.e.* at the warehouse of construction material, next to which there was the restaurant "Jelena Anzujska", in front of which R. parked his car, a red Skoda. This was confirmed by numerous witnesses and the Basic Court established that the distance was not 200-300 meters, but rather 674 meters, and that the crime scene could not be seen from that location due to the configuration of the terrain. According to the testimony of the witnesses B and other witnesses, R. was seen at the site when the first shots were heard, but these shots occurred at the time when the driver of the armoured vehicle tried to remove by pushing the vehicles forming the barricades. This was the moment when people at the barricade left their location and walked away along the road towards Zubin Potok or into the woods. There is no theoretical possibility that R. was at the barricade when the convoy was stopped.

37 - The judgment is not consistent as the Basic Court found the testimony of Witness B. credible, which was supported by the testimonies of defence witnesses, but at the same testimonies of the defence witnesses (statements which were consistent with the testimony of the witness B.) were not found credible. Such reasoning, unknown to logics, is unsustainable at all levels.

<u>With regards the alleged Decision on the Criminal Sanction:</u>

38 - The defence states that the judgment is unsustainable also in relation to the decision on criminal sanction, without a reference to the type or length of the sentence.

C) The Appeal of the defence counsel A.L. on behalf of M.V.:

39 - The defence counsel of M.V., A.L. moves the Court of Appeals to annul the first instance verdict and return the case for retrial. The appeal is based on substantial violation of provisions of criminal procedure, erroneous and incomplete determination of the factual situation, violation of the criminal code and decision on criminal sanction.

40 - He states that the Prosecution did not provide any evidence which would confirm the guilt of the defendant V. regarding the criminal offenses for which he was charged. The appealed judgment does not present clearly and exhaustively reasoning as to which facts and for what reasons they are considered proven or not proven. The reasons over the crucial facts are completely vague and there is a significant contradiction between what appears in the enacting clause and the reasoning of the judgment or statements given in the minutes. The deficiencies in the judgment violate essential provisions of criminal procedure under article 384(1.12) CPC in conjunction with article 370(7) CPC.

With regards the alleged Substantial Violation of Criminal Procedure:

41 - Firstly, the Trial Panel at the Basic Court found in the Judgment (page 33) that the defendant V. was in the barricade with a group of people partially based on statement of Witness B.. However, according to Witness B. statements and the identification at the main trial, Witness B. stated that defendant V. was not at the crime scene. This contradiction is in violation of Articles 384(1.12) in conjunction with Article 370(7) CPC.

42 - Secondly, Witness F.U. stated, in the statement dated 26.07.2011 at the regional police station in Mitrovica, that he identified four (4) persons while he did not mention or describe at all the person from the photo album number 4, photo number 1. Witness F.U., in his statement dated 29.07.2011, mentioned the same people as in the statement dated 26.07.2011. Witness F.U. didn't mention nor did he give a description of the person from the photo album number 4, photo number 1 (a). Pursuant to the police report from D.E. dated 30.07.2011, who received information from an unknown source who wished to remain anonymous, the defendant V. was in the Opel Corsa car with unknown colour at the scene (page 347 according to police reports cd). Based on the abovementioned, statement of witness F.U. should not be given credibility, because nonexistence of material evidence and corroborative facts shows he has prejudices.

43 - The Judgment cannot be based on assumptions but must be based on material evidence, reliable and uncontested facts. As in this case the Basic Court did not manage to establish a basis for obtaining proper conclusion, the judgment is in substantial violation of the provisions of criminal procedure Article 384(1.12) CPC in conjunction with Article 370(7)

CPC and in violation of the provisions of criminal procedure Article 384(2.1) CPC read together with Articles 3 and 7 CPC.

44 - Regarding the identification, Witness F.U. stated in the statement dated 05 August 2011 that "there were others, and that more than five (5) others, all together ten". He described these other people and their distinctive features by stating "I remember two boys, they were tall and young, younger than the others in that group of five who were making gestures while raising three fingers and the middle finger…, I am able to identify them because I paid lot of attention to this boy and another young guy, because I did not know them from before... ". Witness F.U. did not give any description of these persons or distinctive features thereof, but upon the request of the investigative officers for the identification of six photo albums, he identified the person in the photo under number 1 album number 4, the accused M.V.. This identification was not in line with Article 255 PCCK (applicable at the time) governing the identification procedure. The defence objected the evidence of Witness F.U. and proposed that it would be declared as inadmissible. The Basic Court did not give any explanation on this part and therefore the judgment is in violation of criminal procedure under Article 384(1.12) CPC in conjunction with Article 370(7) CPC.

With regards the alleged Erroneous and incomplete factual evaluation:

45 - The Basic Courts' determination of the factual situation is erroneous and incomplete as the reasoning of the judgment is only a transfer of witness statements and statements given to the police and in the main trial and partial statements from the closing arguments of the defence counsels. The Basic Court established only partially which facts were found credible and which were not. Further, the Basic Court did not provide assessment as to the accuracy of conflicting evidence – listed above in the point Substantial Violation of Criminal Procedure - under Article 370 (7) CPC in violation of Articles 386 (2) and (3) CPC.

With regards the alleged Violation of the Criminal Code:

46 - The Basic Court failed to apply the principles of presumption of innocence and *in dubio pro reo* as it found that the actions of the defendant meet the criminal offence defined in Article 318 CCK.

With regards the alleged Decision on Criminal Sanction:

47 - The Basic Court failed to determine the punishment correctly taking in consideration all the relevant factors.

D) Responses to the appeals:

48 - The EULEX Prosecutor of the EULEX Prosecution Office in Mitrovica filed a response in relation to the Appeals of Defence. The EULEX Prosecutor proposes to reject the appeals against the judgment of the basic court based on the following:

49 - In relation to the Appeal of R.R., initially the Prosecution stated that it would provide a response when the defendant delivers the reasoning for his Appeal.

50 - In relation to the Appeal of M.V., the Prosecution asserts that the grounds set forth in the Appeal (at the 3rd paragraph in page 2) are misleading because Witness B. did not expressly state that defendant M.V. was not present, that the *locus in quo* was as it is being suggested in the appeal.

51 - Witness F.U. identified the persons who he was able to recognise being present at the *locus in quo.* It is not disputed in the facts that the Witness F.U. identified the defendant M.V. (see record of his witness statement on 5 August 2011 pages 1838 – 1849, at page 1841 of the case file). Rules of identification procedure were applied during the interviews conducted, including the interview with Witness F.U.. The identification was conducted in accordance with Article 255 of the Provisional Criminal Code of Kosovo (PCCK) and Article 16 of the Law on Police Law Nr 03/L - 035 which were applicable at the time of the commission of the criminal offences. For the lawful purpose of conducting an identification procedure the use of photographs fulfil the conditions as envisaged in the provisions of Article 255 PCCK and Article 16 of the Law on Police Nr 03/L - 035.

52 - There is no contradiction in the statements of witnesses because the evidence provided by each witness relates to the circumstances pertaining to what each individual witness or observed at the *locus in quo.*

E) The motion of Appellate Prosecutor of Kosovo

53 - The Appellate Prosecutor moves the Court of Appeals to:

- Convict the defendants R.R. and M.V. for the criminal offences of Assistance to Negligent murder or Assistance to Grievous bodily harm and Obstructing official persons in performing official duties and imposing them a significantly higher punishment and

- Dismiss the Appeal of R.R. as inadmissible in accordance with Article 376, 379, 382 (1) and 398 (1.1) of the CPC and

- Dismiss the Appeal of M.V. as ungrounded.

54 - In regard to the admissibility of the appeal of R.R., once the "supplement" was joined to the case file, on 11 April 2017, the Appellate Prosecutor notes that the Appeal does not comply with Article 376 CPC. Nor does it allow the Prosecution or the Court of Appeals to clearly understand and address the grounds for appeal. The Court of Appeals must indeed observe strict impartiality between the parties in accordance with Article 9 of the CPC. Therefore, the request should be rejected as inadmissible. Should R.R. or his defense counsel supplement his appeal at a later stage, this supplement would circumvent the deadline to file an appeal under Article 380(1) CPC and would prevent the prosecution from effectively exercising its right to response under Article 388 (2) of the CPC. It should therefore be dismissed.

55 - With regard to count 1 of the Indictment, the Appellate Prosecutor opines that even if it is not proven beyond reasonable doubt that the defendants had knowledge of that other people in the group should use their weapons and start to shoot against the Police officers in the convoy, it is proven beyond reasonable doubt that they indeed had knowledge of the fact that other people in the group had loaded weapons in their possessions and therefore the possibility that the weapons could be used in the situation. It is also quite clear that the possible use of loaded weapons in a situation like this would most likely lead to grievous bodily harm or in the worst scenario case the death of a person travelling in the Police convoy. Therefore it is the Appellate Prosecutor's opinion that the defendants have acted

negligently and committed the criminal act Assistance/complicity to Negligent murder of E.Z. or Assistance to causing grievous bodily harm of E.Z. by negligence/carelessness.

56 - Concerning the count 4 of the Indictment, the second barricade cannot be seen in isolation from the first barricade and the subsequent shooting. The set of events must be seen in its entirety. Clearly, the attackers obstructed the Kosovo Police Officers by forcing them to stop with two barricades and then by shooting at them. Consequently, it does not make sense to consider that the second barricade was a mere "passive resistance" without use of force. The second barricade itself was just one of the many elements used by the attackers to obstruct, by force, the police officers. The use of force is evidenced by the use of two barricades, the unconcealed hostility showed by the group to the police officers and the immediate subsequent shooting. It is clear that both defendants belonged to the armed group that obstructed by force the Kosovo Police officers. Although their role cannot be clearly distinguished from that of the others, their role is inseparable from that of the group of attackers. By their mere participation to the group, they substantially contribute to the commission of the offense of Obstructing official persons in performing official duties. Therefore, the requirements under Article 23 of the CCK are met.

57 - In relation to the Appeal of M.V., the Appellate Prosecutor avers that the Basic Court properly evaluated and reasoned the credibility and statements of Witness B. and Witness F.U.. According to the general principle of appellate proceedings, the Court of Appeals must give a margin of deference to the findings of facts reached by the trial panel because it is the trial panel which is best placed to assess the evidence (Court of Appeals, PAKR 1122/ 2012, Judgement of 25 April 2013). The standard, which the Supreme Court generally applies, is "to not disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous (Supreme Court, AP-KZi 84/2009, 3 December 2009, para. 35; Supreme Court, AP-KZi 2/2012, 24 September 2012, para. 30). In the case at hand, the defence counsel does not demonstrate that the trial panel reached a blatantly incorrect conclusion of fact concerning Witness B. or Witness F.U.'s testimonies so unfair or unreasonable as to constitute an abuse of discretional powers.

58 - The decision on the criminal sanction shall be modified to be in line with penalties foreseen by the CCK for the offenses of Assistance to Negligent murder or Assistance to Grievous bodily harm and Obstructing official persons in performing official duties. The

sentences imposed against the defendants for the sole criminal offence they have been convicted and sentenced for are unduly lenient and not in accordance with the provisions of Articles 64 and 65 of the CCK *pari materia* Articles 73 and 74 of the CC 2013.

59 - The Appeals of the Defence don't address the issue at all even though the appeals are filed also on the grounds related to the decision on criminal sanction.

III. Findings of the Appellate Panel

A. Composition of the Panel

60 - The Panel establishes that this case is defined as "ongoing" in accordance with the definition set out in article 1 A of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo no. 03/L-053, as amended by laws no. 04/L-273 and 05/L-103 (hereafter: the Law on Jurisdiction). By the decision dated 30 June 2017 (KJC no. 229/2017), the KJC has decided that the Panel shall be composed of two EULEX judges and one local judge and that a EULEX judge will be the presiding judge. The Panel is therefore correctly composed.

B. Applicable procedural law

61 - The Panel establishes that the course of proceedings in this case is governed by the CPC as the indictment was filed 8 May 2014, in other words after the CPC entered into force 1 January 2013 (Article 545(1) CPC).

C. Admissibility of the appeals and responses

62 - Pursuant to Article 380 (1) of the CPC, authorized persons may file an appeal against a Judgment within fifteen (15) days of the day the copy of the Judgment has been served.

63 - The Judgment was served to the EULEX Prosecutor 14 February 2017. The EULEX Prosecutor filed her appeal on 27 February 2017. The EULEX Prosecutors appeal was filed within the 15 days permitted by the CPC and by an authorized person. The appeal of the EULEX Prosecutor is therefore admissible.

64 - The Judgment was served to the defendant M.V. on 11 February 2017 and to his defence counsel A.L. on 14 February 2017. The Appeal was filed on 24 February 2017 by the defence counsel on behalf of the defendant. The Appeal of M.V. was filed within the 15 days permitted by the CPC and by an authorized person. The appeal of M.V. is therefore admissible.

65 - The Judgment was served to the defendant R.R. on 14 February 2017 and to his defence counsel Z.J. on 15 February 2017. The motion titled Appeal was filed on 1 March 2017, within the deadline, and the defence counsel terminates such motion stating "I will provide the appeal reasoning in a separate submission". This last submission, however, containing the reason, was dated 15 March and then filed with the court on 11 April 2017 and the defence counsel named it ***supplement to the appeal*** (emphasis added), providing the reasoning to the Appeal. The Panel is of the opinion that the Appeal filed on 1 March 2017 does not comply with the requisites set for objections and requests for legal remedies by the Article 376 CPC as it lacks the reasoning.

66 - The appeal was timely filed and by an authorised person, but the Court dismisses it, by not considering it, as it does not comply with the legal requirements as set in the law, pursuant to Articles 376 (1.1.4 and 1.1.7) and (4) CPC, 379 CPC, 382 (1.2) and Article 398 (1.1) and (3 - joint determination of all appeals of the same judgment).
A decision of "rejection" would imply that the merits of the appeal filed on 1 March 2017 had been adjudicated, despite its reasoning did not exist at that time. This would be a way (would it be admitted by the Court) of circumventing the deadlines.
As said, the reasoning was absent (the defence counsel himself stated that would submit it later, which would be possible but if still during the deadline, until close of business). In the appeal itself, there was no reasoning pertaining the description of the relevant facts and of the legal basis for the remedy, as per Article 376 (1.1.4 and 1.1.7) CPC. According to par. 4 of this Article "no objection or request shall be considered which does not comply with this Article" (emphasised by Articles 379 and 382 CPC).

67 - The appeal includes merely a list of the legal grounds without any elaboration on them. Therefore, as explained, and according to Article 376(4) CPC, the Panel shall not consider this request for legal remedy. Moreover, the supplement to the appeal –including the reasoning for the Appeal – although dated 8 March, was filed on 11 April 2017 and it would

be, by itself, belated pursuant to Article 380(1) CPC. For these reasons, this Panel dismisses the appeal and does not consider it.

68 - The Panel wishes to add that the time limit set for the Appeal against Judgment by Article 380(1) CPC cannot be circumvented by filing "a blanco Appeal" and providing a supplement to the appeal with the description of facts and legal basis later on. This kind of procedure is not line with Articles of the CPC concerning appellate procedure and cannot therefore be accepted.

69 - The Appeal of M.V. was served on the EULEX Prosecutor on 1 March 2017 and the EULEX Prosecutor timely filed a response on 6 March 2017 (388(2) CPC). The Appeal of R.R. was served on the EULEX Prosecutor on 6 March 2017 and the EULEX Prosecutor timely filed a response on 7 March 2017 (388(2) CPC). The responses of the EULEX Prosecutor are therefore admissible.

E. Findings on the merits

E1. Statutory limitation and the absolute bar on prosecution

70 - The undisputable fact is that the events described in the Indictment took place on 26 July 2011 and that the police investigation was launched right after the incident.

The Court of Appeals ***ex officio*** declares the absolute bar on criminal prosecution considering both defendants with regards to the criminal offences in count V [Endangering public traffic by dangerous act or means, described and punishable under Article 299(1) of the CCK as read in conjunction with Article 23 of the CCK *pari materia* Article 380(1) of the CCRK as read in conjunction with Article 31 of the CCRK], Article 299 (1), read together with Articles 90 (1.5) CCK, 91 (1 and 6) CCK, and rejects the charge in relation to this criminal offense, pursuant to Articles 362(1) and 363(1.3) CPC, as the period of statutory limitation has expired on 26 July 2017.

71 - Indeed, the said plain criminal offence is punishable by imprisonment of up to 3 years, which leads to the term of 3 years set in Article 90(1.1.5) "Unless otherwise provided for by the present Code, criminal prosecution may not be commenced after the following periods have elapsed: Three years from the commission of a criminal offence punishable by

imprisonment of more than one year" and to Article 91(6) CCK, that provides that criminal prosecution shall be prohibited in every case (emphasis added) when twice the period of statutory limitation has elapsed (absolute bar on criminal prosecution).

72 - In the case at hand, considering the punishments in the code in force at the time and in the enacted current code, there is no ground to elaborate on the most favourable law, as the result would be the same if Articles 106 and 107(8) of the CCRK were to be applied.

The actions took place on 26.7.2011 and accordingly the absolute bar on prosecution occurred on 26.7.2017, leading to the rejection of this charge, contained in count V.

73 - The other criminal offences the defendants are charged with, following the same logics as just explained above, relevant punishments and applicable provisions, have not reached the statutory limitation.

E2. *De Minimus* errors in Judgment (Article 371 CPC)

74 - The EULEX Prosecutor argues that the Judgment of the Basic Court was not drawn up according to Article 369(2) CPC as the recording clerk did not sign the judgment. According to the Article 371(1) CPC, parties have the possibility to request a separate ruling to correct any inaccuracies that may have occurred. Also the Court of Appeals may correct these errors in case they are subject of an appeal pursuant to the Article 371(2) CPC. This Panel is of the opinion that the lack of the recording clerk's signature in the Basic Court Judgment is merely a minor formal error without any effect on the actual content of the Judgment, to which may contribute the fact that in different legal European systems there are no recording officers at all, only the judge draws and signs the judgment.

75 - Therefore, this Panel determines that when the case file is returned to the Basic Court of Mitrovica, the recording officer (who is still a EULEX staff member) shall sign the original judgment and date it, as per the date it does take place, following the determination by this Court.

76 - Considering the date of the Judgment, EULEX Prosecutor asserts that it is dated incorrectly and against the Article 369(1, 2) and the Article 370(2) CPC. The Panel agrees with the Prosecution in that regards: the written judgment is indeed dated 21 November 2016 but the Judgment lacks the information when the written Judgment was drawn up. This deficiency however does not mount to the annulment of the Judgment or to a decision to send

the case for a re-trial. Rather, it is again a *de minimus* error that can be amended, as it falls within the scope of Article 371 "deficiencies regarding the form of the written judgment", which, pursuant paragraph 2 of the same Article can be corrected by the Court of Appeals.

77 - It was possible to establish a date when it was finalized (as it was announced in the public session held), because the judgment had to be translated. According to the information (that will be inserted in the case file) provided by the Basic Court of Mitrovica, following a request by this Court, the judgment was sent for translation on 7 February 2017 and this is the date to be considered and the original should be corrected (dated) accordingly.

E 3. Erroneously and incompletely determined factual situation - The Scope of the Appellate review

78 - The Panel notes that both the EULEX Prosecutor and the defence counsel A.L., the latter as defence counsel of M.V., are challenging the impugned Judgment with regard to the alleged erroneous and incomplete determination of the factual situation.

79 - This Panel is mindful that the standards of appellate review are drawn from and, to some extent reflect, the limited role of the appellate court in a multi-tiered judicial system. As a general rule, appellate judges are concerned primarily with correcting legal errors made by lower courts, developing the law and setting forth precedent that will guide future cases. The Basic Court judges, in contrast, are entrusted with the role of resolving relevant factual disputes and making credibility determinations regarding the witnesses' testimony because they see and hear the witnesses testify. A trial judge's factual findings are accorded great deference because the judge has presided over the trial, heard the testimony, and have the best understanding of the evidence as a whole.

80 - Thus, regardless the limits or cases where it is necessary to take new evidence or to repeat evidence already taken, due to an erroneous or incomplete determination of the factual situation [see Article 392(1) CPC – and in the case of the incomplete determination it also depends on the kind of facts and the kind of evidence required to establish them, or not], the Court of Appeals should depart from the factual situation as per the first instance judgment and assess its reasoning in the light of the evidence presented in the main trial and relevant records contained in the case file.

81 - The standard of the appellate review of the factual determination is set in Article 386 CPC. This article affirms that it is not enough to show the alleged error or incomplete

determination of the fact by the trial panel. Rather, as the criminal procedure code requires that the erroneous or incomplete determination of the factual situation relates to a "material fact", the appellant must also establish that the erroneous or incomplete determination of the factual situation indeed relates to a material fact, i.e. is critical to the verdict reached.

82 - Only when there are relevant (or not *de minimus*) errors in the established or not established facts, contradictions between the facts, relevant insufficiency of the factual situation [or, as per the wording of Article 403(1) CPC, "erroneous or incomplete determination of the factual situation"], or the reasoning with regards relevant facts is absent, contradictory or questionable, the Higher Court should either take new evidence or repeat evidence already taken.

83 - Following the above said, we now quote Article 386 (1 and 2) CPC, "there is an erroneous determination of the factual situation when the court determines a material fact incorrectly or when the contents of documents, records on evidence examined or technical recordings ***seriously*** (emphasis added) undermine the correctness or reliability of the determination of a material fact. (…) There is an incomplete determination of the factual situation if the court fails to establish a material fact".

84 - These rules explain the Jurisprudence quoted, as an example, by the Appellate Prosecution Office.

Indeed, apart from disagreeing with the conclusion pertaining the classification of the second barricade, as being a "mere passive resistance", the Appellate Prosecution itself avers "it is a general principle of appellate proceedings that the Court of Appeals must give a margin of defence to the finding of fact reached by the trial panel because it is the trail panel which is best placed to assess the evidence (Court of Appeals, PAKR 1122/2012, Judgment of 25 April 2013). The standard, which the Supreme Court generally applies, is «not to disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous» (Supreme Court, AP-Kzi 84/2009, 3 December 2009, par. 35; Supreme Court AP-KZi 2/2012, 24 September 2012, par. 30)" - The wide margin of deference was also affirmed by the Supreme Court in previous cases *"defer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the*

trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so".

85 - This Panel found the facts established by the first instance court correct and properly established and reasoned, enabling an objective observer to follow the logics underlying such factual decision. However, some additional references to the reasoning of the factual situation will be added.

86 - The defence counsel A.L. on behalf of the defendant M.V. is arguing in his Appeal that the testimony of Witness F.U. was not reliable and that the Basic Court Judgment was erroneous since it was based on this evidence. Moreover, the whole identification procedure conducted at the police investigations after the incident was flawed and therefore the identification of the defendant M.V. conducted by the Witness F.U. was not conducted in accordance with the Article 255 PCCK and therefore his testimony should not have been considered admissible at all.

87 - This Panel agrees with analysis conducted by the Trial Panel at the Basic Court, as the Basic Court noted that Witness F.U. saw, observed and later on identified in the photo album a picture of M.V. as one of the persons at the barricade set out to stop the Kosovo Police convoy.

88 - The procedures were followed, as we see from the different minutes kept (see minutes dated 5 of August 2011 and 26 January 2012), he was asked to give a description first, was informed of the nature of the act, that he did not have to identify anyone and the court finds no violation of the legal requirements. Also the matches between the descriptions and photos chosen are clear.

89 - With regards being photo number 1, nothing prevents that the witness chooses any of the photos, would be the photo number 6, then the argument would be that it was the last photo on each album? No need to say that the argument is without merits… would be there any doubt then this Court points out that in phot album 2 there was also a photo number 1 and the witness did not identify that person.

90 - Both defendants were identified by the witness although assigning them different names, would he be lying to incriminate them then he could have changed the way he was referring

to them… On the contrary, the witness explained in a detailed manner how he recognised them from the past, for knowing them from the surroundings, from having stopped R**.** days before and "S." (V.) from the petrol station, adding further details as in the minutes – and during the trial he clarified he learnt the name of the defendant V. from the media.

91 - Also during the trial he many times gave a honest and simple answer by simply stating "I don't know", repeating that was not good with names and stood by his previous statements, that people at the barricade had no masks and also had no weapons.

92 - Finally, and with regards his behaviour during the trial, the court does not see a problem that a witness complaints about the treatment, not feeling well and the session has to be interrupted. It is often heard, from different people, that those who are summoned (injured parties, witnesses, etc.) to be at court feel defendants are the ones best treated. If it is envisaged that defendants are well treated during a trial, and their rights respected, it is also true that the same concern with other participants sometimes is not so visible. The witness felt bad and uncomfortable and the session could not proceed, that's all.

93 - The Panel also notes that Witness F.U. has participated in police investigations on 26 and 29 July and on 5 August 2011 and on 26 January 2012. Witness U. has identified the Defendant M.V. in his statement given to the Police on 5 August 2011. Later on, in his trial testimony on 20 January 2015 W.U. confirmed his previous statements given at the investigations also considering the identification. Finally, Witness F.U. was heard on 20 September and on 10 October 2016 by the Trial Panel at the Basic Court and Witness U. confirmed in his testimony the prior identification of defendant M.V..

94 - Indeed the witness is credible and there are no major discrepancies between his different statements. If he were lying to incriminate the defendants, why these 2 particular individuals and not others? – The court might ask… And why saying then that they did not have weapons or that they did not flee to the woods when shooting started? With regards the number of people he saw at the barricade, again it is not crucial the difference in the way the statements were given in this regards, able to identify 4 people out of those present, saw more than 5 people, more than 5 altogether 10 and there could be between 10 and 15 people (the statements on different dates are not contradictory).

95 - With regards the positive identification of defendant V., both times (interview on 5 July 2012 and along the main trial) the witness said the same, he was very active in making gestures and knew him from the petrol station.

96 - In addition, the Panel refers to the Basic Courts analysis on the reliability of the testimony of witness F.U. and the identification procedure [1]. Further this Panel agrees with the conclusion of the Basic Court finding that the testimony of Witness F.U. is relevant and honest.

97 – This panel also draws the attention to the fact that the Basic Court analysed thoroughly the "discrepancies" in the Witness F.U.'s statements and took them into account when reaching a conclusion with regards to the evidentiary value of his testimony.

98 - As a conclusion this Panel is of the opinion that no grounds are provided in the Appeal of M.V. which would lead this Panel to evaluate the reliability of the testimony of Witness F.U. otherwise than the Trial Panel at the Basic Court did. In other words, the defence fails to provide this Panel arguments to sustain the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or that the evaluation would have been wholly erroneous in regard to the credibility of Witness F.U..

99 - The Panel is of the opinion that the defence allegations with regard to the alleged misconduct concerning the identification of the defendant M.V. during the police investigations after the incident in 2011 are devoid of merit, as already explained earlier. This Panel notes that the Presiding Judge at the Basic Court of Mitrovica has issued a ruling on 18 July 2014 rejecting the Defendant M.V.'s objections to evidence including also the objections concerning the admissibility of the testimony of Witness F.U., which, at the time, was not appealed by the defendants. Finally, according to the minutes of the Main Trial, at the beginning of the re-trial, the Presiding Judge and the parties agreed on which witnesses need to be heard on re-trial. Additionally, it was agreed which statements from the first main trial could be only read without having the witnesses re-examined during the re-trial.

100 - According to the procedural law, following Article 249(1) of the Criminal Procedure Code, the Defendant has the possibility to file objections towards evidence listed in the Indictment before the Main Trial. Article 249(5 and 6) stipulates that (5) all evidence where

[1] The Basic Court Judgment of page 37 of the English version of the impugned Judgment.

no objection has been filed shall be admissible at the main trial, unless the court *ex officio* determines that the admission of the evidence would violate rights guaranteed to the defendant under the Constitution of the Republic of Kosovo and (6) either party may appeal a decision under paragraph 3 of the present Article. The appeal must be made within five (5) days of the receipt of the written decision.

101 - Panel notes that no objections to evidence have been filed before the main trial on re-trial and that the Basic Court has not therefore issued a separate ruling permitting or excluding any evidence in the case. Rather, at the outset of the main trial on re-trial, it was agreed which evidence and what witnesses the parties demanded present at the main trial. The Panel further considers that the allegations made by the defence regarding the flawed identification procedure are devoid of merit and do not therefore lead the Panel to determine that the admission of this piece of evidence would violate rights guaranteed to the defendant under the Constitution of the Republic of Kosovo.

102 - For these above reasons, the Panel finds rejects the defence allegations concerning the reliability of the Witness F.U. and the allegations in relation to the identification procedure concerning the photo array and the alleged violation of Article 255 PCPC without merits, as explained.

103 - In addition, it is worth mentioning that the essence of F.U.'s testimony was corroborated by the other witnesses present, Police officers – not friends or acquaintances (as defence witnesses) remembering thorough details even if the contents of the statement regarding the movements of defendant R. do not match the technical data provided by the antennas – as very well pointed out by the first instance. And the same assessment applies to the visibility from inside the vehicle: as the first instance court well notes, the vehicle is licensed to be driven on public roads.

104 - In relation to W.B. (in the session held on 15 September 2016 it was agreed to have read the prior statement, dated 27 February 2015), the Court has got no relevant arguments to add as the first instance addressed it properly. W. B. and F.U. were not at the same place and at the same time, they witnessed different moments of the overall event.

105 - Also the attempts to create impossibilities or contradictions in the judgment – be it the visibility from inside the vehicle, be it the distance a young man can walk or run and how long it takes…, as if a distance of 674 meters were kilometres, be it the data provided by the

alibi *vs.* the technical data provided by the antennas – are without merits. On this, see pages 33-36 of the English version of the impugned judgment, to be read together with the stated above.
Also the Prosecution (pp. 15/16 of the English version) agrees with the reasoning of the established facts.

E4. Analysis of the counts departing from the established

106 - The Defence Counsel of M.V. claims that there was not reliable evidence to show that defendant V. would have participated in the criminal actions described in Count 4 of the Indictment.

107 - Both the EULEX Prosecutor and the Appellate Prosecutor move the Court of Appeals to find Defendants R. and V. guilty of Obstructing Official Persons in performing official duties as punishable under the Article 316(1) and (3) of CCK and the Article 409(1) and (2) of the CCRK.

108 - This Panel notes that the Trial Panel at the Basic Court concluded that the proven actions of the Defendants did not include use of force, threats of use or serious threats as required by the Articles 316(1) and (3) of CCK and the Article 409(1) and (2) of the CCRK. However, the Trial Panel at the Basic Court found that the proven actions of the defendants included forcing the Kosovo Police stop at the barricade, refusing to obey the orders given by the Kosovo Police to free the road, showing hand signs in offensive and vulgar manner and shouting at the Kosovo Police. Thus the Basic Court found the Defendants guilty to Participation to in a group of Obstructing Official Persons in Performing Official Duties described punishable by the Article 318(1) CCK [2].

109 - Considering the factual evaluation of the Basic Court, this Panel is mindful of the standard of the appellate review. The Panel, after having gone through the court records,

[2] In the impugned judgment the same typo happens sometimes when this provision is mentioned, by making reference to "paragraph 2" - when it is apparent from the judgment that reference is being made to paragraph 1, as paragraph 2 is the aggravating circumstance of "the leader of the group which commits the offence provided for in paragraph 1 of the present article shall be punished by imprisonment of one to five years" and none of the defendants was convicted for being a leader, as such was not established in the judgment. This is to be considered as a mistake in "number", pursuant to Article 371 (1 and 2) CPC.

cannot establish that the proven actions of the defendants would include anything more or less what the Basic Court found them having committed. The Panel therefore fully concurs with the factual evaluation conducted by the Trial Panel at the Basic Court.

110 - The Panel further notes that the appeal of defendant **V.** is based on the allegation that there was not sufficient evidence to show his participation to these actions and that the testimony of Witness F.U. was not reliable. With regard to this allegation and the standard of appellate review described above, this Panel finds that the evaluation conducted by the basic Court considering the reliability of the testimony of Witness F.U. is sufficient. Moreover, the defence of M.V. is unable to point out a relevant reasoning for the Appellate Panel to consider otherwise. Therefore, the appeal of M.V. is rejected considering count 4 of the Indictment.

111 - With regard to the appeal of the EULEX Prosecutor and the motion of the Appellate prosecutor considering the legal qualification of the criminal offence in Count 4, this Panel rejects these motions based on following.

112 - The Article 316(1 and 3) of the CCK, applicable at the time of the incident, requires that (1) Whoever, by force or threat of immediate use of force, obstructs an official person in performing official duties falling within the scope of his or her authorisations or, using the same means, compels him or her to perform official duties shall be punished by imprisonment of three months to three years and (3) When the offence provided for in paragraph 1 or 2 of the present article is committed against an official person performing his or her duties of maintaining public security, the security of Kosovo or public order or apprehending a perpetrator of a criminal offence or guarding a person deprived of liberty, the perpetrator shall be punished by imprisonment of three months to five years. Article 409(1 and 2) CCRK states that (1) Whoever, by force or serious threat, obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties shall be punished by imprisonment of three (3) months to three (3) years and (2) Whoever participates in a group of persons which by common action obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties shall be punished by a fine or by imprisonment of up to three (3) years. Whereas, Article 318(1) of the CCK states that (1) Whoever participates in a group of persons which by common action obstructs or

attempts to obstruct an official person in performing official duties or in a similar way forces him or her to execute official duties shall be punished for participation by a fine or by imprisonment of up to three years.

113 - As explained before, this Panel concurs with the factual evaluation of the Basic Court. Based on the EULEX Prosecutors appeal and the appellate Prosecutors motion, the only thing to be adjudicated is therefore whether the proven actions of the defendants include the relevant elements described in the Article 316(1, 3) CCK (namely use of force or threat of immediate use of force) or in the Article 409(1, 2) CCRK (namely use of force or serious threat). Firstly, this Panel notes that the proven actions of the defendants include forcing the Kosovo Police stop at the barricade, refusing to obey the orders given by the Kosovo Police to free the road, showing hand signs in offensive and vulgar manner and shouting at the Kosovo Police. This Panel considers that it is not proven that either of the defendants would have used any kind of force during the time they were on the barricades protesting and participating in the protest. Therefore, the Panel moves to assess whether the proven actions of the defendants could be qualified as threats of immediate use of force or serious threats as per the relevant Articles. This Panel concurs that the whole situation at the (second) barricade was obstructing the road and refusing to obey the Police orders to clear the road, together with the insults made with the fingers and shouting.

114 - However, there is no established fact (or evidence that might sustain it) that the defendants in question would have stated any serious threats or threats of immediate use of force towards the Kosovo Police. The proven actions of the Defendants cannot therefore be qualified in the way that the Articles 316(1, 3) CCK and the Article 409(1, 2) CCRK require as the essential elements are missing. Therefore the appeal of the EULEX Prosecutor and the motion of the Appellate Prosecutor are rejected with regard to these claims. The contested (by the Prosecution) used wording “passive resistance” may be not the best possible wording, but indeed it explains the understanding of the Court, of this Court and of any objective observer, as to what the defendants were doing (taking part of): an obstruction (not an “active” attack) to the passage of the police convoy.

115 - The Panel further agrees with the Basic Court Judgment considering the qualification of criminal act committed by the Basic Court (exemption made to the co-perpetration, as we will see later). The Basic Court correctly established the facts and also the Panel of the Court

of Appeals concurs that the proven actions of Defendants V. and R. qualifies the criminal offence of "Participation in a Group Obstructing Official Person in Performing Official Duties".

E5. Counts 1-3 – Co-perpetration and Assistance

116 - The EULEX Prosecutor claims in her appeal that the Basic Court failed to apply the concept of co-perpetration in the Judgment in regard to counts 1-3 of the Indictment. The Prosecutor inserts that the Defendants were acting in co-perpetration according to its definition set in the Articles 23 CCK and in the Article 31 of the CCRK and with their actions substantially contributed to the commission of these criminal offences.

117 - The Appellate Prosecutor partially supports the appeal of the EULEX Prosecutor claiming that the defendants should be found guilty of the act Assistance/complicity to Negligent murder of E.Z. or Assistance to causing grievous bodily harm of E.Z. by negligence/carelessness.

In relation to Counts I, II, III

118 - In relation to the counts 1, 2 and 3, this Panel agrees with the factual evaluation conducted by the Trial Panel at the Basic Court. There is no direct or indirect evidence proving that the act requirement would be fulfilled in these counts in regard to the Defendants R. and V..

119 - The Panel further notes that the Basic Court did not assess further the concept of co-perpetration as it found that the act requirement could not be established in regard to the Defendants. In the appeal of the EULEX prosecutor it is claimed - as in the Indictment as well - that the defendants were accused of co-perpetration in counts 1, 2 and 3 as they substantially contributed to the criminal actions in these counts. Therefore, this Panel moves to evaluate the claims considering the co-perpetration and whether the defendants could be held criminally liable in counts 1, 2 and 3 based on the alleged co-perpetration.

120 –Articles 23 of the CCK (and 31 of the CCRK [3]) define co-perpetration as follows: "*When two or more persons jointly commit a criminal offense by participating in the commission of a criminal offense or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offense*". The elements of co-perpetration according to these Articles are: plurality of person, participation in perpetration or providing a decisive contribution which is important and without which the criminal offence would not be committed or would not be committed in the planned way, and a willingness to commit a criminal offence as his own (shared intent). Co-perpetration is a form of perpetration where several persons, each of them fulfilling required elements for a perpetrator, knowingly and wilfully commit certain criminal acts. Contrary to an aider or an instigator, co-perpetrators do not participate in an act accomplished by another person. A co-perpetrator participates in his own act, while aiders and instigators participate in someone else's act.

121 - Co-perpetration is a very complex concept, subject to different doctrinal approaches; the one encompassed in Article 31 CCK is very broad[4]. In the most obvious and clear form of co-perpetration, there must be a previous and true agreement, whereas on the other forms this "agreement" can be only **implied [emphasis added]**[5], but, in both cases, the "participating" or "substantially contributing" still has to lead to an objectively joint contribution to the commission of the same criminal offence[6]; it is required therefore that in the light of the facts it is possible to come to the conclusion that the individuals wanted to execute the **same** criminal offence (which implies knowledge of the criminal offence, of the

[3] Some references will be made to the commentary on the CCRK as to the issue at hand, of theoretical nature, it applies.

[4] In the same way, see point 1 of the Commentary to Article 31 CCRK. About "objective and subjective connection", points 6 and 7 ["6.*Objective connection is that each collaborator should undertake an action in which contributes to commission of criminal offense. All actions that are taken by the collaborators regardless whether they undertake at the same time and in the same place, should be related among them and directed in order to be achieved the same result, in order to be caused the specified consequence. With other words, the consequence of criminal offense should be the joint result of actions of all collaborators. 7 Subjective connection is that all collaborators should be aware that in commission of specified criminal offense will take part, will act together in different ways* (…)].

[5] See point 18A, *in fine*, of the Commentary to Article 31 CCRK, "*based on this it results that the co-perpetration can be expressed even in cases when there was no previous agreement but at the meantime during the commission has been expressed. Regarding the existence of co-perpetration either the lawmaker does not foresees the agreement as necessary condition*".

[6] See points 15 and 16 of the Commentary to Article 31 CCRK, "*(...) together commit their joint offense, in which each of them gives an important contribution without which the criminal offense would not be achieved or would not be completed (...).Everybody's contribution is an important part of achievement of criminal plan. One's contribution is fulfilled with the other's contribution and all of them are liable for the whole committed criminal offense*".

plan, at least), that a given result might be achieved as a consequence of their act / omission, but it is not necessary that all the co-perpetrators take part in all acts of execution.

122 - Consequently, there is no need for an express agreement, as a **conscious collaboration** in the activity of other(s)[7] in order to fulfil, or complete, the criminal offence will suffice to the co-perpetration. There is co-perpetration, despite the fact there was no express agreement, when the circumstances in which the individual acted or omitted to act indicates that there was an implied agreement. This implied agreement is based on the existence of a conscious willingness to collaborate, assessed in the light of common experience. So, if in some of the events the agreement was explicit, made and arranged in advance, in other events if not explicit it was at least implicit, by joining the execution at a given stage. This is a case of **"successive co-perpetration".** Successive co-perpetration exists in cases where another person joins a person who is committing the criminal offense and, by his or her acts, participates in committing that criminal offence[8], but acts can also be omissions, "*Co-perpetration at criminal offenses by omission of action is shown in cases when two or more persons together are obliged to undertake an action but they do not undertake it*"[9]. It is also the case when acts are comprised by actions and omissions, and omissions can be, in the case of border officials, not fulfilling their duties.

123 - Finally, co-perpetration is one of the elements in criminal law and it does not require or imply that all other relevant elements in the commission of a criminal offence are *ipso facto* applicable to all co-perpetrators, this to say that not necessarily implies that all relevant elements and circumstances that may be found in the case of one co-perpetrator are extended or applicable to all co-perpetrators (modalities of commission of criminal offence, mitigating and aggravating circumstances, etc.); the corner stone is always the level of awareness, of intent, and the individual liability – see, for instance, in this regards, Article 27 CCK (or Article 36 CCRK) on "Limits on Criminal Liability and Punishment for Collaboration: (1) A co-perpetrator is criminally liable within the limits of his or her intent or negligence, while a person who incites or assists in the commission of a criminal offence shall be held criminally liable within the limits of his or her intent".

[7] See point 19 of the Commentary to Article 31 CCRK about the concept of "necessary co-perpetration".
[8] See point 22 a) of the Commentary to Article 31 CCRK.
[9] See point 22 c) of the Commentary to Article 31 CCRK.

124 - In the light of the said above, the Prosecution is right when it claims that in co-perpetration is not needed that all co-perpetrators take part in the same acts or omissions or act, or fail to act, at the same time ("the participation of the defendants (…) does not require them to be in possession of weapons but to have substantially contributed to the commission of these criminal offences"), but such is part of the doctrinal construction of co-perpetration.

125 - The issue, the core of the problem, is that the relevant facts for such were not established, it was not established that the defendants were somehow responsible or even involved (not to say aware of) in the shooting that unfortunately lead to a death, and without such it is not possible to consider co-perpetration as it is construed in the criminal code, Article 23, "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".

126 - Taking into account that this Panel concurs with the factual findings of the Basic Court, this Panel needs to elaborate a bit more on the matter whether the attendance of the defendants at the barricade, can be qualified as co-perpetration to the criminal offences in counts 1, 2 or 3 or as presented by the appellate prosecutor, following the doctrinal background set above. This Panel firstly notes that the Basic Court correctly found the defendants (guilty of) participating in a group obstructing official persons, in the protest at the barricades against Kosovo Police according to the Basic Court Judgment. According to several witness testimonies of the members of the Kosovo Police attending the crime scene, the defendants participating in the protesting at the Barricades were not armed. According to the record of the main trial and the Basic Court Judgment Witness B. testified to have witnessed the distribution of weapons and ammunition and that people near the Varage Warehouse had fire arms. The shooting took place after the Kosovo Police began to break the barricade and the protesters withdraw to forest. Actually, nowhere in the judgment it is said (and no-one raises this issue in the appeals) that any or both defendants moved into the forest.

127 - This Panel wishes to clarify that the protesting the defendants were found having committed against the Kosovo Police is a separate action in relation to the shooting that took place after the Kosovo Police started to break the barricades and the protestors withdraw, despite from a chronological perspective, the shooting took place after the barricade and

protesting. As there is absolutely no evidence concerning the actions of the defendants after the protesting ended, it is impossible to know their role in the actions took place after they withdraw from protesting. Even though this Panel finds that there is a great possibility that the Defendants were to some extent aware of fire arms and the fact that other protesters would have been armed, it has not been proven beyond reasonable ground that the defendants would have substantially contributed to the shooting causing the death of E.Z..

128 - Therefore, the appeal of the EULEX Prosecutor is rejected on this part as the element of co-perpetration cannot be established in relation to counts 1, 2 and 3 regarding both of the defendants.

129 - With regard to the Appellate Prosecutors motion, the Panel refers to what is said above about the factual findings conducted by the Basic Court, the co-perpetration and further recalls that Assistance is defined in the Article 25(1 and 2) of the CCK as follows: (1) Whoever intentionally assists another person in the commission of a criminal offence shall be punished as provided for in Article 65(2) of the present Code and (2) Assistance in committing a criminal offence includes giving advice or instruction on how to commit a criminal offence, making available for the perpetrator the means to commit a criminal offence, removing the impediments to the commission of a criminal offence, or promising in advance to conceal evidence of the commission of a criminal offence, the identity of the perpetrator, the means used for the commission of a criminal offence, or the profits which result from the commission of a criminal offence. The definition is almost the same in the Article 33(1 and 2) of the CCRK.

130 - The Panel rejects the Appellate Prosecutor’s motion that the Defendants should be found guilty to Assistance/complicity to Negligent murder of E.Z. or Assistance to causing grievous bodily harm of E.Z. by negligence/carelessness. Referring to the above said, there is no evidence of the actions committed by the defendants after their withdrawal from the protest. In light of the facts and evidence it cannot be established that the defendants would have substantially contributed to the shooting that took place after the protesters withdraw nor that they would have assisted in the shooting as described by the appellate Prosecutor. The mere participation to the protest before the shooting took place cannot be interpreted in a way that the defendants should have known that taking part to a protest at the road block, this participation would result in shooting. Further this Panel is unable to qualify the actions of

the defendants in a way that the defendants would be found to criminal offences committed by negligence. As said before, the protesting and the shooting were separate actions, and it is impossible to link the defendants to the shooting as perpetrators, co-perpetrators or aiders.

131 - Without explicitly stating it, as such form of criminal liability is not enshrined in the domestic criminal law, the Prosecution follows basically the logics that matches the Joint Criminal Enterprise (JCE) in its third form. Departs from an (abstract) group, links different events that took place and then wants to extend the criminal liability for every action to other individuals, *rectius*, to the defendants charged and found guilty of committing one criminal offence related to a particular action within the context of the events that happened on the critical day. The Appellate Prosecution resorts to *assistance to negligent murder or causing grievous bodily harm*, but such legal construction / and facts sustaining it, not only were not in the indictment (though the Court is free to engage in different qualification of the facts), but also it is now being done without factual basis pertaining the defendants' *mens rea* that might sustain it.

Let us then address the said JCE and its 3 forms, pursuant the I.C.T.Y. Appeals Chamber's analysis of customary international law.

1) All co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in executing this common design (and even if each co-perpetrator carries out a different role within it), they [...] all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have materially executed the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.

This form of JCE falls within the "classic" construction of co-perpetration as a mode of participation or collaboration.

2) It is described as a type of the first form, and it was found to have served cases where the offences charged were allegedly to have been committed by members of military or administrative units, such as those running concentration camps and comparable "systems": ["three requirements identified by the Prosecution as necessary to establish guilt in each case:

(i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, *i.e*., encouraged, aided and abetted or in any case participated in the realisation of the common criminal design. The convictions of several of the accused appear to have been explicitly based upon these criteria. This category of cases (which obviously is not applicable to the facts of the present case) is really a variant of the first category, considered above. The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatment, because of their objective "position of authority" within the concentration camp system and because they had "the power to look after the inmates and make their life satisfactory" but failed to do so". It would seem that in these cases the required *actus reus* was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel] [10].

With regards the forms of participation or collaboration in a criminal offence, Articles 23 to 26 CCK *pari materia* Articles 31to 36 CCRK, the acts or omissions, the actions, must obviously fit one of the forms set in the law.

3) It is characterized by a common criminal design to pursue a course of conduct where one or more of the co-perpetrators commit an act which, while outside the common design, is a natural and foreseeable consequence of the implementation of that design, a consequence of JCE's execution (objective element or *actus reus*) and the accused (subjective element, about the "state of mind", or *mens rea*) was aware of it (that the disputable or committed crime was a possible consequence of the execution of the JCE, and participated with that awareness): "What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems)" [11]. In sum, it requires **(i)** Plurality of persons. A joint criminal enterprise exists when a plurality of persons participates in the realization of a common criminal objective. The persons

[10] See pp. 88, 89 of the Appeal Judgment in Gotovina et al.
[11] Idem, p. 99.

participating in the criminal enterprise need not be organized in a military, political, or administrative structure.950 They must be identified with specificity, for instance by name or by categories or groups of persons. **(ii)** A common objective which amounts to or involves the commission of a crime provided for (…).The third form of the JCE depends on whether it is natural and foreseeable that the execution of the JCE in its first form will lead to the commission of one or more other statutory crimes. In addition to the intent of the first form, the third form requires proof that the accused person took the risk that another statutory crime, not forming part of the common criminal objective, but nevertheless being a natural and foreseeable consequence of the JCE, would be committed. According to the Appeals Chamber, the common objective need not have been previously arranged or formulated. This means that the second JCE element does not presume preparatory planning or explicit agreement among JCE participants, or between JCE participants and third persons. Moreover, a JCE may exist even if none or only some of the principal perpetrators of the crimes are members of the JCE. For example, a JCE may exist where none of the principal perpetrators are aware of the JCE or its objective, yet are procured by one or more members of the JCE to commit crimes which further that objective. Thus, "to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan". **(iii)** Participation of the accused in the objective's implementation. This is achieved by the accused's commission of a crime forming part of the common objective (and provided for in the Statute). Alternatively, instead of committing the intended crime as a principal perpetrator, the accused's conduct may satisfy this element if it involved procuring or giving assistance to the execution of a crime forming part of the common objective. A contribution of an accused person to the JCE need not be, as a matter of law, necessary or substantial, but it should at least be a significant contribution to the crimes for which the accused is found responsible. In relation to the first two elements of JCE liability, it is the common objective that begins to transform a plurality of persons into a group, or enterprise, because what this plurality then has in common is the particular objective. It is evident, however, that a common objective alone is not always sufficient to determine a group, because different and independent groups may happen to share identical objectives. It is thus the interaction or cooperation among persons – their joint action – in addition to their common objective, that forges a group out of a mere plurality. In other words, the persons in a criminal enterprise must be shown to act

together, or in concert with each other, in the implementation of a common objective, if they are to share responsibility for crimes committed through the JCE" [12].

132 - Having said this, again and as always, the established facts are the premise of the law, *da mihi factum dabo tibi jus*, or "give me the facts and I will give you the Law". The 3rd form of JCE, in the opinion of this panel, cannot be accepted beyond the scope of the *dolus eventualis*, eventual intent [Article 15(3)] and, as all forms of negligence and intent, can be inferred from the facts (see Article 22 CCRK which clearly enshrines this principle), such norm has to be read together with the causal link and liability for graver consequences (Articles 14 and 17 CCK)[13]. Though this may sound redundant for being obvious, some recitals and interpretations on the 3rd form of JCE almost leave room for an objective criminal liability, where an individual can be found guilty of a criminal offence committed in furtherance of another to which he /she is linked, as long as it can be interpreted or considered as a "foreseeable consequence" of the latter. Also, different systems are more strict than others when it comes to the limits of the criminal liability.[14]

133 - As, apart from what was stated above, it cannot be established that the defendants participated in the shooting anyhow, as it was not established they were somehow involved (or even had knowledge of) in other actions (acts or omissions) rather than those that were established.

[12] Appeals Chamber in Gotovina et al.

[13] In CCRK, respectively: *Causal link*, "A person is not criminally liable if there is no causal link between the action or omission and the consequences" (Article 20 CCRK); *Liability for graver consequences*: "When the commission of a criminal offence causes consequences which exceed the intent of the perpetrator and the law has provided for a more severe punishment, the more severe punishment may be imposed if the consequence is attributable to the perpetrator's negligence" (Article 24 CCRK), and *Limits on criminal liability and punishment for collaboration*: "A co-perpetrator is criminally liable within the limits of his or her intent or negligence. A person who incites or assist in the commission of a criminal offence shall be held criminally liable within the limits of his or her intent" + the issue of the circumstances related to the unlawfulness or guilt of one of the perpetrators in relation to the others… (Article 36 CCRK)".

[14] If one of the participants commits a crime not envisaged in the common purpose or common design, he /she alone will incur in criminal liability for such a crime; these countries include Germany, The Netherlands and Portugal. Other countries also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of them are criminally liable for another crime, whatever the role played by each of them, if one of the persons taking part in the common criminal plan or enterprise perpetrates another offence that was outside the common plan but, nevertheless, "foreseeable" - these countries includes France or Italy.

134 - Moreover, there is no evidence at all that the shooting at the vehicles was planned to take place in any case, no matter what (and this cannot be inferred from the distribution of weapons, also because no-one knows to who they were distributed and who was in the forest shooting). What is known is that the shooting happened when the Police started to move to pull away the cars, which leads to the question: had the Police's decision been different (for instance, simply turn around and go back), would any shooting have taken place? This is not proved, meaning, the existence of a plan to commit such shooting in any case was not part of the indictment, much less established. If such plan existed, and the defendants were part of it, then it would be possible to analyse to what extent they might be held liable for graver consequences (light or grievous bodily injury, even death, resulting from shooting at police officers or vehicles with individuals inside)…

135 - There is no "objective" liability in criminal law; it is a basic principle that each defendant is to be found criminally liable only within the limits of own guilt, *nulla poena sine culpa*, and in the light of this, this Court draws the attention to the following provisions of the CCK: Article 11, Criminal Liability, "(1) a person is criminally liable if he or she is mentally competent and has been found guilty of the commission of a criminal offence. A person is guilty of the commission of a criminal offence when he or she commits a criminal offence intentionally or negligently" (emphasis added) and Article 14, Causal Link, "a person is not criminally liable if there is no causal connection between the action or omission and the consequences or there is no possibility of the realization of the consequences", currently provided for in Articles 17 and 20 CCRK.

136 - For all the stated above, with regards counts 1, 2 and 3, this Panel fully concurs with the assessment made by the Basic Court and finds without merit the grounds of both the Prosecutor and of the Appellate Prosecutor.

In relation to Count IV

137 - This Panel agrees with the facts and legal qualification as per Article 318(1) CCK, as the references to paragraph 2 are obviously mistakes in typing, considering not only the established facts, but also the correct references also made in the impugned judgment to paragraph 1.

138 - No need to say that all perpetrators of such criminal offence end up acting jointly within the context and concept of group, but the reason to have an autonomous criminal offence beyond the concept of restrict or classic (the most clear form mentioned earlier) of co-perpetration was to make sure, to facilitate, the protection of the juridical value, given that a group has a different dynamics by itself, which increases the dangerousness.
The legislative technique used may be questionable, as for instance, the protected juridical value in the CCRK is not an autonomous criminal offence, rather it is part of the description of the criminal offence of obstructing official persons in performing official duties, current second paragraph of Article 409 CCRK, but this Court does not agree with the Basic Court in the regards the participation in a group does not require co-perpetration, which is being challenged by the Prosecution: the legal criterion applied by the Basic Court when found them perpetrators, not co-perpetrators, but here this Court, as already said, disagrees with the first instance, when it considered the defendants did not act in co-perpetration as per Article 23 CCK.

139 - The action for this criminal offence is to take part in a group of persons ["whoever participates in a group of persons which by common action obstructs (…)"], which is an (individual) act which would not imply co-perpetration in the most strict (*stricto sensu*), clear and classic form of co-perpetration as explained earlier (explicit plan, existing since the beginning or *ab initio*, joint execution or substantially contributing to the envisaged criminal result).

140 - In this case, and again reference to what the Court stated above on the theory of co-perpetration, this is a case of if not explicit, at least implicit, agreement to a criminal plan, by (if not since the beginning) joining the execution of a criminal offence taking place – it is the case of successive co-perpetration, as explained. Accordingly, reference must be made to Article 23 CCK, together with Article 313(1) CCK.

141 - Therefore, in the enacting clause and statement of grounds where defendants are found guilty of the criminal offence of Participation in a Group Obstructing Official Persons in Performing Official Duties as per Article 318 (1) CCK, reference to Article 23 CCK, co-perpetration, is made.

142 - The EULEX Prosecutor claims in her appeal that, the Basic Court erred in its reasoning in counts 5 and 6 as both of the offences are distinct and separate. The Basic Court reasoning in respect of the principles of Apparent real concurrence, ideal concurrence and subsidiarity is erroneous.

143 - The Basic Court found that criminal offences in counts 5 and 6 are in relation of concurrence with each other. Moreover, the Basic Court found that the apparent concurrence based on subsidiarity exists and that special crime (Endangering Public Traffic) consumes the general crime (Causing General Danger).
The Court of Appeals will continue addressing each count at the time.

In relation to Count V

144 - The criminal offence at hand is "Endangering public traffic by dangerous act or means, described and punishable under Article 299(1) of the CCK as read in conjunction with Article 23 of the CCK *pari materia* Article 380(1) of the CCRK as read in conjunction with Article 31 of the CCRK"
The punishment foreseen in Article 299(1) CCK sets the range of the possible punishment up to three years. The Article 380(1) CCRK provides the same length of imprisonment as maximum penalty. As this criminal offense is punishable by imprisonment up to 3 years, it leads to the application of the statutory limitation period of 3 years: according to Article 90 (1.5) CCK, "unless otherwise provided for by the present Code, criminal prosecution may not be commenced after the following periods have elapsed: (…) Three years from the commission of a criminal offence punishable by imprisonment of more than one year", whereas pursuant to Article 91(1) "the period of statutory limitation on criminal prosecution commences on the day when the criminal offence was committed" and, as per paragraph 6, of the same Article, "criminal prosecution shall be prohibited **in every case when twice the period of statutory limitation has elapsed** (absolute bar on criminal prosecution)" – emphasis added.

145 - Article 363(1.3) CPC, on its turn, states "the court shall render a judgment rejecting the charge, if (…) the period of statutory limitation has expired (…)", the statutory limitation and the absolute bar on criminal prosecution took place on 26 July 2017 and this Panel rejects the Indictment on this part, as explained.

146 - Hence, the Court of Appeals *ex officio* declares the absolute bar on criminal prosecution considering both defendants with regards the criminal offence in count V, pursuant to Article 299 (1) CCK, read together with Articles 90 (1.5) CCK, 91 (1 and 6) CCK and following Articles 362(1) and 363(1.3) CPC the Court rejects the charge in relation to the criminal offense.

In relation to Count VI

None of the material actions constituent of the criminal offence was, or can be, established. Accordingly, it is not sustainable to defend upon appeal that the defendants should be found guilty of this criminal offence.

In relation to Count VII

147 - The EULEX Prosecutor claims that in count 7 of the indictment, Basic Court erroneously found that it was a general opinion that the crowd should be bigger than seven (7) or at least ten (10) persons. The Prosecution claims that according to the opinion of the Supreme Court on 21 October 2010 in respect of Article 320 (1) of the CCK, an Assembled crowd means 8 or more persons. The provisions of Article 412 of CCK 2013 explicitly state that an assembled crowd consists of eight or more persons.

148 - Bearing in mind that now there is a requalification in count IV to which the Court of Appeals concurs, it is in the light of such that this Count has to be addressed, to assess whether there are facts that match the constituent elements of the criminal offence and whether is there real concurrency of criminal offences or rather a legal or apparent concurrency.

149 - However, before addressing the legal concurrency and its modalities, it is convenient to make the distinction in relation to other terms, namely ideal and real concurrency, as ideal and real concurrency are different concepts related to the *actus reus*, to whether with one material action, meaning an act or an omission, as per the terminology used in Article 8 (1) CCRK, (more precise than the one used in Article 20 CCRK, where “action” is used when

"act" should be the proper word, in contrast to "omission") more than one criminal offence is committed (ideal concurrency) or with more than one material action (real) more than one criminal offence is committed. Also, in both cases, the concurrency can be homogeneous (the same type of criminal offence) or heterogeneous (different types of criminal offences), depending on what juridical value, incriminating provision (criminal offence) was perpetrated.

150 - Obviously, the established facts and inferable intent are the starting point of any legal review or remedy. It was established (and this Court concurs) that defendants wanted to take part, to participate in a group obstructing official persons in performing official duties – as per Article 318(1) CPC.

151 - Having said this, it is then time to address the legal concurrency of criminal provisions, also known as apparent concurrency.

There are three kinds of relations between incriminating norms, encompassing (or absorption) [(15)], subsidiarity and speciality.

Let us start with **encompassing or absorption**: We can say that one criminal offence encompasses another when the commission of an action would (by itself) constitute by itself the perpetration of one criminal offence (absorbed), but in the case it is only part of the commission (means to, or action of execution) of a graver criminal offence. The decision on which criminal offence the defendant is to be found guilty of, will depend on the facts, both related to the *actus reus* and the *mens rea* – inferred at least, if not directly established, as we can find cases where the graver offence is beyond the intent, for instance in the cases of liability for graver consequences (Article 24 CCRK), as we also may have cases where the less grave criminal offence is only the commission of the graver intended, being the typical example the criminal offence of bodily harm being absorbed by murder (intended).

With regards **subsidiarity**, it exists when there is legal prevalence to be given to the criminal norm enshrining a higher punishment but, if the threshold for the punishment or all elements constituent of the criminal offence are not met, then the subsidiary criminal offence should be applied (as long as all the constituent elements of the more lenient criminal offence are met –

[15] Regardless the difficulty of translating continental law concepts of criminal law doctrine to the wording that might make sense in English (not to mention that Common Law substantially differs from the Continental law criminal models, both German and French, that have influenced most of the countries) we will address only the essence of this legal construction, as it poses also different kinds of modalities.

no need to say…), as the legislator sees the more lenient criminal offence as a "safety valve" to avoid that a type of action goes unpunished - *lex primaria derogat lex subsidiariae*.
Finally, **speciality** exists where a fact is – apparently – in violation of more than one criminal norm, but one of these norms enshrines a plus in relation to the other in apparent concurrency. The decision on the relation of speciality is a general assessment, not depending on the concrete case or in the threshold of punishment; it does not depend on the evaluation of the facts, rather it relies on the systematic interpretation and understanding of protected criminal values; it exists when a more particular or detailed action is subject of an autonomous criminal offence, for example, murder vs. murder of infants after birth as the latter also entails murder - *lex specialis derogat generali*).

In contrast to what the Prosecution implies, doctrinal constructions and theories are not neither irrelevant nor aim at replacing the law, they are a constituent part of the criminal theory in the light of which the criminal provisions are to be understood and applied.
In this case, and in relation to the criminal offence set in Article 320 PCCK, not only the material facts are not established in relation to the majority of the actions constituent of this criminal offence (only the objective elements "or commits other offences of grave violence, or attempts to commit such offences" might be considered, as obviously it is not disputable that the facts cannot be interpreted as meeting the other elements, "by collective action deprives another person of his or her life, inflicts a grievous bodily harm on another person, causes a general danger, damages a property on a large scale" – as in relation to the murder there is no guilt, as we saw before), but also, in relation to the participation in a crowd committing a criminal offence (count VII, Article 320 PCCK) *vs.* participates in a group of persons which by common action obstructs or attempts to obstruct an official person in performing official duties (count IV, Article 318 PCCK), it would be covered by the principle of speciality, as "a more particular or detailed action is subject of an autonomous criminal offence" – a group of persons which by common action obstructs or attempts to obstruct an official person in performing official duties. It is a general assessment, not depending on the concrete case or in the threshold of punishment; it does not depend on the evaluation of the facts, rather it relies on the systematic interpretation and understanding of protected criminal values, as stated above. herefore, the defendants have to be acquitted from this count.

152 - Moreover, apart from what results from this judgment, including in terms of modifying the first instance decision, this Panel is satisfied with the factual and legal reasoning conducted by the Basic Court.

E 6 Decision on the criminal sanction

153 - Both the EULEX Prosecutor and Appellate Prosecutor move the Court of Appeals to modify the Basic Court's Judgment and modify the sentencing accordingly. Moreover, the Appellate Prosecutor finds the sentences, imposed to the defendants for the sole criminal offence they were found guilty of by the Basic Court, too lenient and in contradiction with the Articles 64 and 65 of the CCK *pari materia* Articles 73 and 74 of the CCRK.

154 - The defence Counsel of M.V. appealed with regard to the decision on criminal sanction. Although the wording used in the appeal is not clear, it is understandable that the punishment is being challenged and a more lenient punishment is being requested from this Court –in the event the judgment of the Basic Court, as a whole, is upheld.

155 - With regards the determination of punishments, the factual situation has to be amended, complemented, pursuant to Article 403(1) read together with Article 392 *a contrario*, as the relevant documentary evidence for such is in the case file – the period related to both defendants with regards the periods they were at large (as the Basic Court mentioned it only in relation to defendant R.R.).

156 - From the detention binders it is possible to establish that on 11 August 2011 the EULEX Pre- Trial Judge issued arrest orders against R.R. and M.V.. Indeed, R. was arrested on 11 April 2014 (he at large 2 years and 8 months) and M.V. was arrested on 3 February 2014 (he was at large 906 days, meaning almost 2 years and 6 months – as pointed out by the Basic Court.
With regards the previous conviction of defendant R.R. [relevant pursuant to Article 64(1) CCK, to the criterion "the past conduct of the perpetrator", and as a prior conviction – as the judgment is dated 11/11/2002], the Basic Court mentions that he "was convicted for the very serious criminal offence of murder". It is true that it was murder, but it was negligent murder

using a weapon, for which he was convicted to 9 months of imprisonment, in concurrency with the criminal offence of robbery, for which he was convicted also to 9 months of imprisonment and to the aggregated punishment of 16 months (1 year and 4 months) – the judgment can be found on tab 15 of trial court binder II.

157 - Before proceeding, it is important to take into consideration the following: despite the fact the appeal by defendant R.R. was dismissed, a violation of the criminal law can be assessed *ex officio* in the scope of the review by the Court of Appeals, pursuant to Articles 387 (1), 394 (1.4) C.P.C.
And why is the Court saying this? – Because if any violation of the criminal law with regards the punishment is found, then it would have to be assessed whether it is of "purely personal nature" of the defendant M.V., then the principle of ***beneficium cohaesionis*** (Article 397) should be abided by.

158 - Now going back to the judgment of the Basic Court, as to the aggravating circumstances applied to both defendants. With all due respect for different opinion, this Panel does not agree with the Basic Court as to the fact that they were absconding and to the third aggravating circumstance, as the invoked reason falls within the protection of the juridical value by the criminal offence the defendants were found guilty of, participation in a group obstructing official persons performing official duties, as per Article 318 (1). The same fact cannot be considered twice for different purposes, namely in the frame of Article 64 CPC, governing the determination of the sanction.

159 - Therefore, the appeal filed by the defence counsel of the defendant M.V. is partially being grounded, as to the determination of the punishment. Accordingly, this Panel decides to reduce the length of the punishment applied to the defendant M.V., in 3 months and his punishment is modified and now set in 1 year and 3 months of imprisonment; the verification period remains unchanged (3 years).

160 - As the motive leading this panel to reduce the sanction imposed to this defendant is not of "purely personal nature", rather it is a juridical matter of interpretation of the law, then the principle of *beneficium cohaesionis* (Article 397) applies.
As a consequence, the concrete punishment imposed to the defendant R.R. will be reduced by 3 months as well.

Consequently, the punishment of R.R. is modified and it is now set in 1 year and 9 months of imprisonment; the verification period remains unchanged (4 years). As in the impugned judgment, pursuant to Article 73(1) CCK, the time in detention on remand and deprivation of liberty from 11 April 2014 until 22 April 2015 shall be included (discounted) in the punishment in the event the suspended sentence is revoked.

161 - Considering the EULEX Prosecutors appeal to find the defendants guilty as per the Indictment and modify the sentencing accordingly, partially supported by the Appellate Prosecutor. The appellate Prosecutor claims in addition that the sentences imposed to the defendants based on the sole criminal offence they were found guilty of at the Basic Court are unduly lenient and not in accordance with the relevant Articles of the CCK and the CCRK.

162 - However, in the light of what was just decided in relation to the determination of the punishments and their reduction, this Panel does not grant the appeal by the Prosecution, also in this regards, and rejects it as ungrounded in such matter.

163 - So, and as an abstract:

- The Court of Appeals ex officio declares the absolute bar on criminal prosecution considering both defendants with regard to the criminal offence in count V, pursuant to Article 299 (1) CCK, read together with Articles 90 (1.5) CCK, 91 (1 and 6) CCK. Pursuant to Articles 362(1) and 363(1.3) CPC, as the absolute period of statutory limitation has expired on 26 July 2017, the court rejects the charge in relation to the criminal offense in count V of the Indictment.

- The appeal filed by defence counsel Z.J. on behalf of the defendant R.R. dated 27 February 2017 is dismissed, not considered, for not complying with the legal requirements as set in the law, pursuant to Articles 376 (1.1.4 and 1.1.7) and (4) CPC, 379 CPC, 382 (1.2) and Article 398 (1.1) and paragraph 3 (joint determination of all appeals of the same judgment).

- The appeal filed by the EULEX Prosecutor on 27 February 2017 as to consider the existence of (successive) co-perpetration in Count IV, pursuant to Article 23 CCK is granted. The remainder is rejected as ungrounded.

- The appeal filed by the defence counsel of the defendant M.V. as to the violation of the criminal law in determining the punishment is granted and as a consequence, the length of the punishment imposed was reduced in 3 months.

The remainder of the appeal is rejected as ungrounded.

-The defendant M.V. has his punishment modified and set in 1 year and 3 months of imprisonment; the verification period remains unchanged (3 years).

-The defendant R.R. has his punishment modified and set in 1 year and 9 months of imprisonment – modification due to the principle *beneficium cohaesionis*; the verification period remains unchanged (4 years). As in the impugned judgment, pursuant to Article 73(1) CCK, the time in detention on remand and deprivation of liberty from 11 April 2014 until 22 April 2015 shall be included (discounted) in the punishment in the event the suspended sentence is revoked.

- Pursuant to Article 398 (1.4), read together with Article 370 (1 and 2) and 403 CPC, corrects the date of the original judgment to 7 February 2017 and the recording officer, who is still a EULEX staff member, shall sign the original judgment and date it as per the date it does take place, following the determination by this Court.

- Pursuant to article 370 (1 and 2) in the first instance judgment where it is written Article 318 (2) CCK it is a typo that should be read "Article 318 (1) CCK" – in accordance with the last paragraph of page 39 of the English version.

-In the enacting clause and statement of grounds where defendants are found guilty of the criminal offence of Participation in a Group Obstructing Official Persons in Performing Official Duties as per Article 318 (1) CCK, reference to Article 23 CCK, (successive) co-perpetration, is made.

- As to the rest, the Judgment of the Basic Court of Mitrovica P. no. 61/2016 dated 21 November 2016 is hereby upheld.

Reasoned completed on 7 December 2017.

Presiding Judge

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Jorge Martins Ribeiro
EULEX Judge

Recording Officer

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Timo Torkko

EULEX Legal Officer

COURT OF APPEALS OF KOSOVO
PAKR 158/17
7 December 2017