

COURT OF APPEALS

Case number: PAKR 161/16

Date: 15 September 2016

Basic Court of Mitrovica: P. no. 122/2014

The Court of Appeals, in the Panel composed of EULEX Judge Hajnalka Veronika Karpati, as presiding and reporting Judge, Kosovo Court of Appeals Judge Abdullah Ahmeti and EULEX Judge Radostin Petrov as panel members, assisted by Vjollca Kroci-Gerxhaliu, EULEX legal advisor, acting in the capacity of a recording officer,

in the criminal case concerning the accused:

B. J., (aka 'xxx'), born on xxx in xxx, Kosovo xxx, father's name xxx, mothers name xxx;

charged with the Indictment PP 363/2012 of the Mitrovica Basic Prosecution Office dated 10 October 2014 that was filed with the court on the same day, and with an amended Indictment dated 12 November 2014 that was filed with the court on 13 November 2014. The Indictment charged the accused (and 7 other defendants) with the criminal offences of:

- **Endangering United Nations and Associated Personnel** contrary to Article 142 Paragraphs (3) (6.2.i) of the Criminal Code of Kosovo (CCK) in conjunction with Article 23 of CCK, currently criminalized under Article 174 Paragraphs (3) and (6.2.1) of the Criminal Code of the Republic of Kosovo (CCRK) in conjunction with Article 31 of CCRK (Count B.1),
- **Obstructing Official Persons in Performing Official Duties** in violation of Article 316 Paragraph (1) of CCK in conjunction with Article 23 of CCK , currently criminalized under Article 409 Paragraph (1) of CCRK in conjunction with Article 31 of CCRK (Count B.2),
- **Attacking Official Persons Performing Official Duties** in violation of Article 317 Paragraph (1) of CCK in conjunction with Article 23 of CCK , currently criminalized under Article 410 Paragraph (1) of CCRK in conjunction with Article 31 of CCRK (Count B.3),
- **Participating in a Crowd Committing a Criminal Offence** in violation of Article 320 Paragraph (1) CCK in conjunction with Article 23 CCK, currently criminalized under Article 412 paragraph (1) CCRK in conjunction with Article 31 of CCRK (Count B.4) ,
- **Damage to Movable Property** in violation of Article 260 Paragraphs (1) and (2) in conjunction with Article 23 of CCK, currently criminalized under Article 333 Paragraphs (1) and (4) in conjunction with Article 31 of CCRK (Count B.5),

with the Judgment of the Basic Court of Mitrovica P. no. 122/2014 dated 23 October 2015, found guilty and sentenced for the criminal offences under count B of the indictment as follows:

- 1) Endangering United Nations and Associated Personnel contrary to Article 142 Paragraph (2) of CCK and sentenced him to 1 year and 4 months of imprisonment,
- 2) Obstructing Official Persons in Performing Official Duties in violation of Article 316 Paragraphs (1) and (3) of CCK and sentenced him to 4 months of imprisonment,
- 3) Attacking Official Persons Performing Official Duties in violation of Article 317 Paragraph (1) of CCK and sentenced him to 6 months of imprisonment,
- 4) Damage to Movable Property in violation of Article 260 Paragraph (1) of CCK and sentenced him to a fine of EUR 700,

also found separately guilty for the same acts committed in co-perpetration with another defendant and 18-28 other unknown perpetrators and one identified person and sentenced to 1 year and 6 months of imprisonment, 8 months of imprisonment, 10 months of imprisonment and fine of EUR 1000, respectively, *the* aggregate punishment was determined in 1 year and 10 months of imprisonment suspended for 4 years and a fine of EUR 1,500,

ordered to pay EUR 150 as part of the costs of the criminal proceedings with the rest of the costs to be paid from budgetary resources;

acquitted of the charge of Participating in a Crowd Committing a Criminal Offence contrary to Article 320 Paragraph (1) in conjunction with Article 23 of CCK,

seized by the appeal against the aforementioned judgment filed by the defence counsel Faruk Korenica on 8 February 2016;

having considered the response of the EULEX Prosecutor filed on 15 February 2016;

having considered the motion of the Appellate State Prosecutor filed with the Court of Appeals on 18 April 2016;

after having held a public session of the Court of Appeals on 15 September 2016;

having deliberated and voted on 15 September 2016;

acting pursuant to Articles 389, 390 Paragraph (4), 394, 398 Paragraph (1) point 1.1 and 1.4, Article 401 and 403 of the Criminal Procedure Code of Republic of Kosovo (hereinafter: CPC),

renders the following:

JUDGEMENT

I. The appeal of defence counsel Faruk Korenica filed on behalf of the accused B. J. on 8 February 2016 against the Judgment of the Basic Court of Mitrovica P. no. 122/2014 dated 23 October 2015, is partially granted; the Judgment of the Basic Court of Mitrovica P. no. 122/2014 dated 23 October 2015 is amended:

- **The charge of Damage to Movable Property in violation of Article 260 Paragraphs (1) of CCK, currently criminalized under Article 333 Paragraphs (1) and (4) of CCRK and the same charge in conjunction with Article 23 of CCK, currently pursuant to Article 31 of CCRK, is rejected pursuant to Article 363 Paragraph (1) point (1.3) of CPC as the absolute bar of statutory limitation has elapsed on 3 April 2016 pursuant to Article 90 Paragraph (1) point 6) of CCK in conjunction with Article 91 Paragraph (6) of CCK;**
- **In the remaining parts the appeal of defence counsel Faruk Korenica, is rejected as ungrounded;**

II. The Judgment of the Basic Court of Mitrovica P. no. 122/2014 dated 23 October 2015 is amended *ex officio* as follows:

The Accused B. J. who was found separately guilty concerning the criminal acts on 3 April 2012 at about 11:00 near the village of xxx and the criminal acts on 3 April 2012 between about 11:10-12:05 near xxx, committed in concurrence and in continuity the criminal offences of:

- **Endangering United Nations and Associated Personnel contrary to Article 142 Paragraphs (3) CCK committed partially in co-perpetration pursuant to Article 23 of CCK, and is sentenced to 1 year and 6 months of imprisonment,**
- **Obstructing Official Persons in Performing Official Duties in violation of Article 316 Paragraphs (1) and (3) committed partially in co-perpetration pursuant to Article 23 of CCK, and is sentenced to 8 months of imprisonment,**
- **Attacking Official Persons Performing Official Duties in violation of Article 317 Paragraph (1) committed partially in co-perpetration pursuant to Article 23 of CCK, and is sentenced to 10 months of imprisonment,**

The accused B. J. is sentenced to an aggregate punishment of 1 (one) year) and 10 (ten) months of imprisonment pursuant to Article 71 Paragraph (2) point 2.1 and 2.2 of CCK

suspended pursuant to Article 43 Paragraph (2) and Article 44 Paragraphs (1) and (2) of CCK for the verification period of 4 (four) years.

III. In the remaining part, the Judgement of the Basic Court of Mitrovica P. no. 122/2014 dated 23 October 2015, is affirmed.

REASONING

I. PROCEDURAL BACKGROUND

The events giving rise to this criminal case occurred on 3 April 2012 at approximately 11:00 hours in the village of xxx and xxx, and it involved a EULEX vehicle Toyota Landcruiser driven by EULEX police officer Tino Anderson who was performing his official duties.

On 13 March 2014, the President of the Assembly of EULEX Judges issued decision no. 2014.OPEJ.0147-0001 dated 13 March 2014 in which the case was assigned into the competence and responsibility of EULEX Judges.

On 23 March 2015 Kosovo Judicial Council has issued a decision no. 23/2015 approving the request from EULEX to continue the trial of the case P. no 122/14. The reasoning reads "*EULEX's request to assign this case to a trial panel composed of EULEX judges was justified based on its urgency and high sensitivity ...*" It further reads "*... confirms that the above case will be tried by the EULEX judges ... and that this matter is considered as an "ongoing case"*".

The detailed description of the procedure up until the announcement of the Judgment of the Basic Court of Mitrovica can be found in the Judgment dated 23 October 2015.

The written judgment was served to **B.J.** on 1 February 2016 and to his defence counsel Faruk Korenica on 29 January 2016 and to the EULEX Prosecutor on 28 January 2016. On 8 February 2016, defence counsel Faruk Korenica filed an appeal dated 4 February 2016 against the Judgment. On 15 February 2016, the EULEX Prosecutor filed a Response to the appeal dated 12 February 2016.

The case was transferred to the Court of Appeals (hereinafter: CoA) for a decision on the appeal on 14 March 2016. The case was sent to the Appellate Prosecution office on the same day and received the case back with the Appellate State Prosecutor's motion on the 18 April 2016.

The session of the Court of Appeals Panel (hereinafter: Panel) was held on 15 September 2016 in the presence of the Appellate Prosecutor. Defence counsel Faruk Korenica on behalf of the defendant was duly summoned as it is demonstrated by the delivery slips in the case file, but did not attend. The summon for the session of the Panel was sent to the accused **B. J.** in due time and was returned to the CoA with the notice 'unknown person' written on the envelope. The Panel continued the session pursuant to Article 390 Paragraph 4 of CPC.

The Panel deliberated and voted on 15 September 2016.

II. SUBMISSIONS OF THE PARTIES

The appeal

Defence counsel of the accused, Faruk Korenica timely filed an appeal dated 04 February 2016 and filed with the Basic Court of Mitrovica on 08 February 2016 on the grounds of:

- Substantial violation of the criminal procedure (Article 384 Paragraph (1), Subparagraph 1.12 and Paragraph (2) subparagraph 2.1 of CPC)
- Violation of Criminal Code (Article 385 Paragraph (1) Subparagraph 1.3 of CPC)
- Erroneously and incompletely established state of facts (Article 386 Paragraphs (1) (2) (3)) of CPC)
- Decision on the punishment (Article 387 Paragraph (1) of CPC).

The Defence counsel argues that the enacting clause of the judgment is incomprehensible, to a great extent contradictory in itself and to the reasoning of the judgment. It contains no reasons on decisive facts and it is unclear as to the established factual situation. There is no description of the actions of **B. J.** with regard to the four criminal offences. There is no discussion of how the court established the existence of the defendant's intent in the whole judgment and also in which are the facts that makes him a co-perpetrator.

The defence counsel claims that the court violated Article 442 Paragraph (4) of CPC by not rejecting the amended indictment as it did not contain anything new compared to the original indictment.

The defence counsel also claims that EULEX personnel cannot be treated as "associated personnel" as that term is clearly explained in Article 142 Paragraph (6) Subparagraph 2) of CCK.

He also claims that Article 385 Paragraph (1) Subparagraph 1.3 of the procedure code was violated as the criminal offences under Articles 316 and 317 (Obstructing Official Persons in Performing Official Duties and Attacking Official Persons Performing Official Duties) fall under the Law on Amnesty No. 04/L-209 dated 11/07/2013, therefore criminal prosecution is precluded by law.

He also claims that the judgment is based on photos taken by EULEX police officers without Court's permission and police reports that should not be considered as evidence. The Court rejected the motion of the defence to summon and examine KFOR soldiers on circumstances if **J.** caused any damage to any

EULEX vehicles. Furthermore the in-court identification of the defendant by the witnesses was not in line with the principles set out in the CPC.

From the enacting clause of the judgment the only criminal offence allegedly committed by his client is the offence of Obstructing Official Persons in Performing Official Duties and no other criminal offence.

He also claims that the judgment lacks 3 more enacting clauses that should have been adjudicated upon.

He proposes to the Court of Appeals to modify the judgment by rejecting the charges under Article 316 Paragraphs (1) and (3) and Article 317 Paragraph (1) of CCK as amnesty bars the prosecution. Concerning the offences of Endangering United Nations and Associated Personnel under Article 142 Paragraph (3) of CCK he proposes acquittal, as well as the offence of Damaging Movable Property under Article 260 Paragraph (1) as the absolute statutory limitation pursuant to Article 90 Paragraph (6) read in conjunction with Article 91 Paragraph (6) of CCK has expired. Alternatively, the judgment should be annulled and the case returned to the Basic Court for re-trial.

Response to the Appeal

EULEX Prosecutor Pascal Persoons filed a response dated 12 February 2016 on 15 February 2016.

The Prosecutor points out that the judgment – unlike it is claimed by the defense counsel – fully describes the unlawful actions of the defendant. He submits that the issue of intent is not material to the facts and elements of the commission of the offences for which the defendant was convicted.

He argues that the defence counsel criticism towards the indictment and the judgment is wrong, erroneous and irrational as the defence counsel completely disregards the reasoning part of the judgment as to the detailed role of the defendant and the reasoning concerning the definition of “Associated Personnel”.

Furthermore, the offences for which the defendant has been found guilty do not fall under the ambit of the classes of offences described in Article 3 of the Law on Amnesty. He underlines that the other assessment of the judgment by the defence counsel is immaterial and inconsequential to the facts and in no way undermine the culpability of the defendant. He also rejects the defense counsel arguments concerning the admissibility of the photos as they were lawfully gathered and corroborated by other evidence like witness statements and police reports.

The Prosecutor proposes to reject the appeal as ungrounded and affirm the judgment of the first instance court.

Motion of the Appellate Prosecutor

The Appellate Prosecutor, Anca Stan in her detailed Proposal dated 15 April 2016 and filed with the Court of Appeals on 18 April 2016, addresses all the claims of the defence counsel in a structured form.

Concerning the admissibility of the photos she points out that the authorization by the court was not required at all. What's more, the police officer was not only allowed to take such photos but he had the duty to make a record of the facts and circumstances.

Concerning the admissibility of police reports, she points out that the Court was in line with Article 123 (2) CPC.

Concerning the admissibility of In-Court Identification of the defendants, the Appellate Prosecutor underlines that there are no specific rules prohibiting the in-court identification and all time the defendants' right to a fair trial was fully respected and the witness made it clear that he recognized **B. J.** from the pictures only. Furthermore, the defence had the opportunity to cross examine the witness.

The appellate prosecutor states in her motion that the defence claims that the enacting clause of the judgment contains neither any description of **B. J.** actions nor a reference to co-perpetration are clearly groundless by reading the enacting clause as both the description of acts and reference to Article 23 of CCK are there.

She points out that the defence' claims that the enacting clause fails to indicate that UN personnel was attacked and only mentions EULEX personnel and that EULEX personnel cannot be seen as "associated personnel" are groundless, as the judgment clearly explains the reasons why EULEX personnel meets the criteria under Article 142 (6.2.i) CCK. In this connection she recalls Article 5 of UN Security Council Resolution 1244 and the Council Joint Action 2008/124/CFSP that established EULEX.

Concerning the defence' claim that the amended indictment should have been rejected by the court as it did not contain anything new, the appellate prosecutor points out that the only requirement was to present the original indictment in a more structured form, which the amended indictment fulfilled. Anyhow, the admissibility of this amended indictment was ruled upon by the Court of Appeals.

The Appellate Prosecutor opines that contrary to the argument of the defence, the Law on Amnesty does not apply for the criminal offences of Obstructing and Attacking Official Persons in Performing Official Duties. Such offences are amnestied only if they were "committed with the aim of committing the criminal offence of call for resistance" pursuant to Article 3 (1.1.13 sub-items 10. 11.) of the Law on Amnesty, which is not the case here.

Furthermore, the statutory limitation was reached neither in the case of Damaging Movable Property nor in the case of Endangering United Nations and Associated Personnel.

Concerning the alleged omission of 3 charges, the appellate prosecutor underlines that the Basic Court did adjudicate all the charges against **B.J.**

She also points out that there is no discrepancy between the enacting clause and the reasoning, as claimed by the defence. Furthermore, the judgment did establish the intent of the accused.

The court properly rejected the defence' motion to summon KFOR soldiers as the defence failed to explain the relevance of these testimonies.

The appeal of the defence concerning the sentencing should be dismissed as inadmissible because the appeal did not address this issue with a single word, therefore it does not comply with the requirements under Articles 382 (1), (1.2) and 376 CPC.

The Appellate Prosecutor proposes to the Court of Appeals to reject in its entirety the Appeal as ungrounded.

III. FINDINGS OF THE APPELLATE PANEL

A. Competence of the Panel of the Court of Appeals

No objections to the composition of the panel or to its competence were raised by the parties. Pursuant to Article 472(1) CPC the Panel has reviewed its competence.

As noted above the Kosovo Judicial Council has on 23 March 2015 confirmed that the case is an “ongoing case”. The legal practice in Kosovo had an established interpretation according to which a case assigned to EULEX majority would continue to be adjudicated with EULEX majority throughout the entire course of the criminal proceedings at any stage or judicial instance until a final court decision is taken. This practice has been explicitly included in the new Law on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (Law No. 05/L-103) Article 3 which rewords the Article 1 A paragraph 2 of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo -Law no 03/L-053 - as amended by the Law no. 04/L-273 to read as follows: “*For the purpose of this law, the case set forth in paragraph 1. of this Article, shall be deemed as an ongoing case in the entire course of the criminal proceedings at any stage or judicial instance until a final court decision is taken, including the review on the basis of extraordinary legal remedies.*”

The Panel concludes that EULEX has jurisdiction over the case and that the Panel is competent to decide the respective case in the composition of two EULEX judges and one Kosovo appellate judge.

B. Admissibility of the appeal

The judgment of the Basic Court was announced on 23 October 2015. The written judgment was served to the accused **B. J.** on 1 February 2016 and to his defence counsel Faruk Korenica on 29 January 2016. The appeal was filed on 8 February 2016, within the 15-days deadline counting the date when the defendant has

received the Judgment pursuant to Article 478(4) CPC. The appeal is also admissible as filed by an authorized person, pursuant to Article 380(1) CPC.

C. Findings on the merits

Allegations and arguments raised in the appeal:

1. Allegation that the enacting clause of the judgment is incomprehensible, to a great extent contradictory in itself and to the reasoning of the judgment

The Panel does not support this allegation. The judgment of the Basic Court contains all necessary elements required by the law as provided in Article 384 (1.12) in relation to Article 370 of CPC. It provides comprehensive description of the decisive facts and understanding of the committed criminal offences as legal designation and on the basis of what facts the sentence was imposed.

In no event the impugned judgment shows contradiction with itself. The Basic Court has made correct assessment of the evidence individually and towards each of the defendants and has comprehensively explained the exact participation of the accused **B.J.** in the various criminal offences, subject of the indictment and the judgment. The correct legal designation of the criminal offences is based on evidence as presented at the main trial. Therefore this ground of the appeal is rejected as ungrounded.

2. Allegation on violation of Article 442 Paragraph (4) of CPC as court did not reject the amended indictment as it did not contain anything new compared to the original indictment

The Panel finds the allegation of the defence in this regard as ungrounded. Referring to Article 442 Paragraph (4) of CPC, the presiding trial Judge acted pursuant to the above mentioned article correctly when instructed the Prosecutor to reconfigure the Indictment of 10 October 2014 in the sense of presenting *'the charges in an orderly manner'*. Following the Judge's instruction, the Prosecutor filed a structured and corrected Indictment on 14 October 2014 containing the counts against each particular accused *'described in a transparent way'* and *'presented together with their relevant legal classification'*, as stated in the impugned judgment. Therefore it is concluded that the presented Indictment fulfils the requirements of Article 241 of CPC.

Moreover, the admissibility of the Indictment has been already discussed in detail by the Court of Appeals on 2 and 3 April 2015 in its Ruling PN 79/15, therefore the Panel will suffice with its findings in this Ruling.

3. Allegation that EULEX personnel cannot be treated as "associated personnel"

The Panel rejects this allegation. As correctly pointed out in the Judgement and in the Appellate Prosecutor's motion, the correct term of UN personnel and 'associated personnel' is clearly explained in Article 142 of CCK.

The UN Security Council Resolution 1244, in its Article 5 *'decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required'*.

EULEX was established by a Council Joint Action of 2008/124/CFSP that was approved on 4 February 2008 and the final decision was made on 16 February 2008. It reads:

'[...] The Secretary- General/High Representative (SG/HR) was requested to prepare the mission in discussion with the responsible authorities in Kosovo and the United Nations. [...] In this regard, the United Nations Secretary-General has stated that the United Nations, with the support of the relevant stability. [...] The United Nations Secretary-General also noted the readiness of the EU to play an enhanced role in Kosovo, as reflected in the conclusions of the Brussels European Council on 14 December'.

Therefore, there can be no doubt that EULEX personnel does meet the requirements under Article 142 Paragraph (6) 2) of CCK and therefore should be considered as Associated Personnel as correctly evaluated by the trial panel.

4. Allegation of violation of Article 385 Paragraph (1) subparagraph 1.3 of the CCK as the criminal offences under Articles 316 and 317 (Obstructing Official Persons in Performing Official Duties and Attacking Official Persons Performing Official Duties) fall under the Law on Amnesty No. 04/L-209 dated 11/07/2013

The Panel notes that the Law on Amnesty No. 04/L-2009 dated 11 July 2013 refers to criminal offenses committed before 20 June 2013 (Article 2 of the Law No. 04/L-209) which is the case at hand, however, it limits the amnesty to perpetrators of offenses listed in Article 3 of the Law and only in accordance with the terms and conditions set in Article 3 of the same Law. Article 3 (1.2.8) grants amnesty for the criminal offense of Call for Resistance (Article 319 CCK) when the commission of it has resulted in commission of another criminal offence and the same Article further lists some other criminal offenses whose perpetrators are amnestied only if the offenses were committed with the purpose of committing the criminal offense of call for resistance. The criminal offences foreseen in Articles 316 and 317 of CCK are listed in this Article under (1.2.8.7 and 1.2.8.8.), therefore, they are amnestied only if they were committed with the purpose of committing the criminal offense of call *for resistance*, which is not the case at hand.

In relation to call for resistance, Article 319 of CCK provides:

‘Whoever calls upon others to prevent, by use of force or serious threat, the execution of lawful decisions or measures issued by a competent authority or an official while carrying out an official activity shall be punished by imprisonment for a term not exceeding three years.’

Corresponding Article 411 of the CCRK states:

1. Whoever calls upon others to resist against or disobey lawful decisions or measures issued by a competent authority or an official shall be punished by imprisonment of up to three (3) years.

2. If the offense provided for in paragraph 1 of this Article results in a severe hindrance or the impossibility of implementing a lawful decision, measure or official action, the perpetrator shall be punished by imprisonment of six (6) months to five (5) years.

Due to the lack of the commentary on old criminal code of Kosovo, the Panel of the Court of Appeals makes reference to the commentary of the new Criminal Code in relation to the meaning of **call for resistance**.

Although the punishment is not the same, the elements of the criminal offence of *call for resistance* remain the same:

- a) The fundamental element is the call addressed to others to violently resist against the lawful decision and measures of the competent authority or officials in performing official duties.
- b) The action of call. The call for resistance addressed to others should provoke the decision of others to resist against the lawful decision and measures of the competent authority or officials in performing official duties.
- c) The resistance should be against the lawful decision and measures. Usually such call for resistance is used *i.e.* to hinder the measures of import, the prohibition of movement in certain places.
- d) This criminal offence is committed only with intention that includes the consciousness that his call addressed to other constitutes the call for resistance. The actor of this criminal offence can be anyone

There is no evidence whatsoever to show that **B.J.** has initiated the riots in any way or has provoked the decision of others or that he called others for resistance. There was no such factual description in the indictment and he was also not charged in connection with such activities. Therefore the Panel rejects this allegation of the appeal as ungrounded.

5. Allegation that the judgment of the Basic Court of Mitrovica is based on photos taken by EULEX police officers without Court’s permission and that the police report should not be considered as evidence

As already established by the first instance court, the incriminating actions of attack took place against the EULEX Special Police Department convoy. The EULEX police officers in this convoy were tasked

to be present at Gate 31 of the border. The fact that the attack was conducted against the police officers who also witnessed the commitment of the criminal offence, vested them with the duty to act in a way the police officer witnesses the commitment of any crime. As correctly pointed out in the motion of the Appellate Prosecutor, Article 70 (2) of CPC gives the right to the police to investigate the criminal offences and take all necessary steps to obtain as much as possible the evidence of the criminal offence and collect information of use for the criminal proceeding. Such actions were exactly taken by the EULEX police officers by taking photos from the crime scene and are admissible in the court.

As to the allegation of the defence counsel that the police report should not have been considered as evidence according to the provisions of the CPC, the Panel notes that the first instance court did not consider the statements of witnesses included in the report as evidence. According to the rules of taking evidence the witnesses have to be heard directly about the facts they witnessed, however the police report is a documentary evidence of the circumstances of the criminal case and can be used as such during the examination of the witness as correctly evaluated by the presiding judge during the main trial session of 27 July 2015 as documented by the minutes of that session. The Panel comes to the conclusion that the judgement is based only on evidence administered during the main trial. The report was used according to the provisions of the CPC, only for the purpose of testing the credibility of the witness statement. The Panel therefore rejects this allegation.

6. The Basic Court rejected the motion of the defence to summon and examine KFOR soldiers on circumstances if **B. J.** caused any damage to any EULEX vehicles

The Panel notes that the first instance court has acted correctly when rejected the defence's request to examine the KFOR soldier. Namely, on 8 September 2015 during the trial session, the defence counsel orally requested to summon the KFOR soldiers without specifying any relevance of it to the case. Although instructed by the presiding trial judge to present the written motion on the request, the defence counsel did not act accordingly. The main trial continued to other sessions without any objections made by the defence counsel on this issue. Considering that the defence counsel did not bring any concrete reason to relate a particular piece of evidence to a particular fact, the Panel finds the rejection made by the first instance court as justifiable. The Panel did not find it necessary to schedule a hearing and take this new evidence as anyhow the charge of Damage to Movable Property has to be rejected due to the absolute bar of prosecution.

7. Allegation that in-court identification of the defendant by the witnesses was not in line with the principles set out in the CPC

It is known that witness testimonies are often inaccurate and uncertain because they are based on subjective perceptions which undergo various changes caused by error, self-deception or suggestion. However, none of this is applicable to the case at hand. The accused **B.J.** was identified by the witness Simon Siegel/EULEX Police officer who happened to be one of the police officers in EULEX convoy when attacked by the accused and others. The witness did not just have a quick glance on the accused **B.J.**, but

had the opportunity to see him very well in action for much more than just a moment and even take a picture of him.

During the main trial of 4 September 2015, the witness Simon Siegel/EULEX Police testified and identified the accused **B.J.** describing clearly his apparel and his actions. The identification was conducted from the photos that were objected by the defence counsel of the accused **B.J.**

Considering that the witness has not met the accused prior or after the incident, it is logical that he had to refer to the picture to 'refresh' his mind. Moreover, the identification based on photo is permitted by provisions of CPC. Article 120 of CPC does recognize so called '*indirect identification based on the photography*'. Considering that there is no specific provision in CPC to prohibit the in-court identification in this manner, the Panel asserts that the identification was conducted without breach of the defendant's right to a fair trial. All possibilities of objections were given to the defence during the main trial.

The Panel of the Court of Appeals notes that the general principle of evaluation of evidence should rely on a direct and immediate examination of evidence by a panel of judges. The examination of documents and other material evidence is in general more accurate in the trial because often those pieces of evidence have to be supported and be consistent with other evidence and subject to oral explanations by witnesses or parties.

Considering the above, the Panel does not find legal reasons to consider the identification of the accused from the photo as unacceptable and in breach with the provisions of CPC.

8. Allegation that the criminal offence of Damaging Movable Property under Article 260 Paragraph (1) and the criminal offences of Endangering United Nations and Associated Personnel under Article 142 Paragraph (3) of CCK is banned by statutory limitation pursuant to Article 90 Paragraph (1) 6) read in conjunction with Article 91 Paragraph (6) of CCK

The CoA concurs with the defence position on statutory limitation concerning the criminal offence of Damaging Movable Property under Article 260 (1) of CCK. Pursuant to Article 91 of CCK, the period of statutory limitation on criminal prosecution commences on the day when the criminal offence was committed. The criminal offence occurred on 3 April 2012. The punishment for this criminal offence is up to six months of imprisonment. Therefore, pursuant to Article 90 Paragraph (1) 6) of CCK, the statutory limitation for this criminal offence is two years. It is true that each act undertaken for the purpose of prosecution interrupts the period of statutory limitation but the law sets an absolute bar for prosecution, meaning that regardless of the actions of the authorities, the prosecution is prohibited after that period of time: Article 91 Paragraph (6) of CCK stipulates that the, '*criminal prosecution shall be prohibited in every case when twice the period of statutory limitation has elapsed (absolute bar on criminal prosecution)*'.

As the criminal offence was committed on 3 April 2012, the absolute bar on criminal prosecution has been reached on 3 April 2016, already before the CoA has received the Appellate Prosecutor's Motion on 18 April 2016.

Therefore, the absolute statutory limitation for criminal prosecution against the accused **B. J.** in relation to the charge of Damaging Movable Property under Article 260 Paragraph (1) of CCK had been reached before the date the appellate panel deliberated in the case.

The Panel finds unsustainable the allegation of the defence counsel that the criminal offence of Endangering United Nations and Associated Personnel under Article 142 Paragraph (3) of CCK has reached the limit of statutory limitation. Paragraph (3) of this article prescribes the punishment by imprisonment from one to ten years. Pursuant to Article 90 Paragraph (1) 3) of CCK, the statutory limitation for this criminal offence is ten years.

Considering the date of 3 April 2012 as the date when this criminal offence is committed, the prohibition on criminal prosecution does not meet the time limit requirements of even relative bar on criminal prosecution as per Article 90 Paragraph (1) 6) of CCK. Therefore, the Panel rejects this allegation.

9. Defence counsel argues that the impugned Judgment lacks 3 more enacting clauses

The allegation of the defence in this regard is unclear. The defence counsel does not bring forward any argument to support this allegation. The Accused **B. J.** was indicted for the criminal offences as described in the Indictment and was found guilty for four criminal offences separated in 8 counts. The judgment also clearly explained that the criminal offence of Participating in a Crowd Committing a Criminal offence was not established. There is no factual description in the Indictment that would not have been covered by the judgment. The Panel of the Court of Appeals rejects this allegation.

10. Ex officio matters

The Panel does not concur with the solution of the first instance court that divided the actions of the accused **B.J.** in two sets of criminal offences, namely when he acted individually in xxx at around 11:00 on 3 April 2012 and separately in co-perpetration with other defendants near xxx some 10 minutes later, at around 11:10-12:05.

The first instance panel correctly found that there was sufficient evidence to prove beyond reasonable doubt that the defendant **B.J.** had committed the criminal offences of Endangering United Nations and Associated Personnel, Obstructing Official Persons in Performing Official Duties and Attacking Official Persons Performing Official Duties in concurrence. However, the Panel of the Court of Appeals finds that instead of separate two counts for each criminal offence, each of the aforementioned concurrent criminal offence was committed in continuity, partially in co-perpetration.

The continuation of the criminal acts of the accused **B.J.** derives from the same event that developed from the initial place, namely near the village of xxx, to nearby location of xxx. The criminal offences were committed by the same accused against the same injured party/protected interest within a short period of

time. The Panel notes that unlike the new CCRK, the CCK - that was in force when the acts were committed and that was correctly applied by the first instance court - does not contain the legal provision when the criminal acts shall be considered as committed in continuity. However, the legal theory and legal practice applied this solution which is more favourable for the defendant already at the time when the CCK was in force and also under the old Yugoslav Criminal Code (CCSFRY). The conditions to consider that not two separate but only one criminal offence in continuation happened are met in the present case. The accused has committed exactly the same criminal offences in both locations within a short period of time against the same injured party/protected interest. Considering this, the Panel finds that these criminal acts should be considered as criminal offences in real fictive concurrence, committed in continuity and partially in co-perpetration, as specified in the enacting clause.

Due to the above changes, the Panel set aside the first set of individual punishments that was imposed separately for the offences committed in xxx and the imposed fines due to the absolute statutory limitation of the criminal offence for which the fines were imposed. At the same time the Panel found the imposed individual punishments of the second set of punishments for the offences committed near xxx, as well as the aggregate punishment (without the fine) imposed by the first instance court are within the limits set by law, reflecting the mitigating and aggravating circumstances in the case and meeting the double purpose of punishment as set in Article 34 of CCK and in line with Article 71 of CCK on Punishment of Concurrent Criminal Offences.

11. Other issues

The Panel rejected the charge of Damage to Movable Property due to the absolute bar of statutory limitation. It has to be noted that pursuant to the principle of *beneficium cohaesionis*, expressed in Article 419 of CCK, the Panel would have to act by rejecting the same charge for the accused S. S., as well. Nonetheless, the Panel notes that the Judgment P.no. 122/2014 dated 23 October 2015 became final for S.S. 15 days after he received the Judgment on 1 February 2016 and the absolute bar on criminal prosecution has expired only on 3 April 2016, meaning after the Judgment became final for the Accused S. Therefore, being bound by the circumstances of the case, the Panel will suffice by not adjudicating on this matter in relation to the accused S.S.

As stated above, pursuant to Article 401 of CPC and Article 403 of CPC the Court of Appeals decided as in the enacting clause.

The Judgment is drafted in English language.

Presiding and Reporting Judge

Hajnallka Veronika Karpati, EULEX Judge

Panel Members

Radostin Petrov, EULEX Judge

Abdullah Ahmeti, Kosovo CoA Judge

Recording Officer

Vjollca Gërxhaliu-Kroçi, EULEX Legal Advisor

KOSOVO COURT OF APPEALS

PAKR no. 161/15

15 September 2016