

**THE SUPREME COURT OF KOSOVO**

**PRISHTINË/PRIŠTINA**

**Case number: PML-241/15**

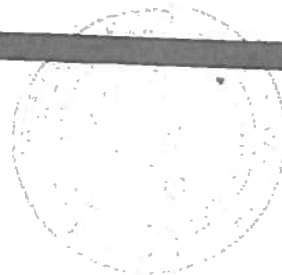
**Date: 19 April 2016**

**IN THE NAME OF THE PEOPLE**

The Supreme Court of Kosovo, in the Panel composed of EULEX judge Anna Adamska-Gallant, presiding and reporting judge, EULEX Judge Krassimir Mazgalov, and the Supreme Court Judge Nesrin Lushta as panel members, assisted by Adnan Isufi, EULEX legal advisor, acting in the capacity of a recording clerk,

in the criminal case against the defendants:

1. V. J. [REDACTED]
2. S. J. [REDACTED]
3. G. L. [REDACTED]
4. G. XI [REDACTED]
5. Q. R. [REDACTED]
6. M. A. [REDACTED]
7. S. S. [REDACTED]
8. E. M. [REDACTED]
9. A. Z. [REDACTED]



10. [REDACTED] S [REDACTED] [REDACTED]

sentenced with the judgment of the Basic Court of Gjilan, nr 53/13, dated 16 October 2013, partially modified by the Judgment of the Court of Appeals PAKR, nr 145/2014 dated 01 July 2015,

for the following criminal offences:

1. V [REDACTED] J [REDACTED] for Commission of Terrorism, in violation of Articles 109 (1.10), 110 (1) of the CCK, currently criminalized by Articles 135 (1.10), and 136 (1) of the CCRK and Organization of a Terrorist Group, in violation of Article 113 paragraph 1 of the CCK, currently criminalized by Article 143 paragraph 1 of the CCRK, for the aggregate punishment of 8 (eight) years of imprisonment and fine of 1000 (one thousand) Euros;
2. S [REDACTED] J [REDACTED] for Commission of Terrorism, in violation of Article 109 paragraph 1.10. 110 paragraph 1 of the CCK, currently criminalized by Article 135 paragraph 1.10 and 136 paragraph 1 of the CCRK and Participation in a Terrorist Group, in violation of Article 113 paragraph 3 of the CCK, currently criminalized by Article 143 paragraph 2 of the CCRK, for the aggregate punishment of 6 (six) years and 6 (six) months of imprisonment;
3. G [REDACTED] L [REDACTED] for Commission of Terrorism, in violation of Article 109 paragraph 1.10, 110 paragraph 1 of the CCK, currently criminalized by Article 135 paragraph 1.10 and 136 paragraph 1 of the CCRK and Participation in a Terrorist Group, in violation of Article 113 paragraph 3 of the CCK, currently criminalized by Article 143 paragraph 2 of the CCRK, for the aggregate punishment of 5 (five) years and 6 (six) month of imprisonment;
4. G [REDACTED] X [REDACTED] for Commission of Terrorism, in violation of Article 109 paragraph 1.10, 110 paragraph 1 of the CCK, currently criminalized by Article 135 paragraph 1.10 and 136 paragraph 1 of the CCRK and Participation in a Terrorist Group, in violation of Article 113 paragraph 3 of the CCK, currently criminalized by Article 143 paragraph 2 of the CCRK, for the aggregate punishment of 5 (five) years and 6 (six) month of imprisonment;
5. Q [REDACTED] [REDACTED] for Commission of Terrorism, in violation of Article 109 paragraph 1.10, 110 paragraph 1 of the CCK, currently criminalized by Article 135 paragraph 1.10 and 136 paragraph 1 of the CCRK and Participation in a Terrorist Group, in violation of Article 113 paragraph 3 of the CCK, currently criminalized by Article 143 paragraph 2 of the CCRK, for the aggregate punishment of 4 (four) years of imprisonment;



6. M██████ A██████ for Commission of Terrorism, in violation of Article 109 paragraph 1.10, 110 paragraph 1 of the CCK, currently criminalized by Article 135 paragraph 1.10 and 136 paragraph 1 of the CCRK and Participation in a Terrorist Group, in violation of Article 113 paragraph 3 of the CCK, currently criminalized by Article 143 paragraph 2 of the CCRK, for the aggregate punishment of 5 (five) years and 6 (six) months of imprisonment;
7. S██████ S██████ for Commission of Terrorism, in violation of Article 109 paragraph 1.10, 110 paragraph 1 of the CCK, currently criminalized by Article 135 paragraph 1.10 and 136 paragraph 1 of the CCRK and Participation in a Terrorist Group, in violation of Article 113 paragraph 3 of the CCK, currently criminalized by Article 143 paragraph 2 of the CCRK, for the aggregate punishment of 5 (five) years and 6 (six) months of imprisonment;
8. E██████ M██████ for Commission of Terrorism, in violation of Article 109 paragraph 1.10, 110 paragraph 1 of the CCK, currently criminalized by Article 135 paragraph 1.10 and 136 paragraph 1 of the CCRK and Participation in a Terrorist Group, in violation of Article 113 paragraph 3 of the CCK, currently criminalized by Article 143 paragraph 2 of the CCRK, for the aggregate punishment of 5 (five) years and 6 (six) months of imprisonment;
9. A██████ Z██████ for Commission of Terrorism, in violation of Article 109 paragraph 1.10, 110 paragraph 1 of the CCK, currently criminalized by Article 135 paragraph 1.10 and 136 paragraph 1 of the CCRK and Participation in a Terrorist Group, in violation of Article 113 paragraph 3 of the CCK, currently criminalized by Article 143 paragraph 2 of the CCRK, for the aggregate punishment of 5 (five) years and 6 (six) month of imprisonment;
10. J██████ S██████ for unauthorized supply and sale of weapons, in violation of Article 372 of the CCRK, and for unauthorised control and possession of weapons in violation of Article 328 of CCRK, for the aggregate punishment of 2 (two) years and 2 (two) months;

acting upon the requests for protection of legality filed by:

1. the defence counsel M██████ M██████ on behalf of the defendant M██████ A██████ on 14 August 2015,
2. the defence counsel D██████ R██████ on behalf of the defendant S██████ S██████ on 24 August 2015;
3. the defence counsel S██████ P██████ on behalf of the defendant G██████ L██████ on 14 October 2015;



4. the defendant V [redacted] J [redacted] on 13 August 2015;
5. the defendant S [redacted] J [redacted] on 18 August 2015;
6. the defendant G [redacted] X [redacted] on 31 August 2015;

having considered the response of the Office of the State Prosecutor, filed with the Court on 11 November 2015,

having deliberated and voted on 14 March and 19 April 2016;

acting pursuant to Articles 436, 438 (1.2), and 439 of the Criminal Procedure Code of Kosovo (hereinafter "CPC")

renders the following:

#### Judgment

- I. The requests for protection of legality filed by the defence counsel on behalf of the accused M [redacted] A [redacted] S [redacted] S [redacted], and G [redacted] L [redacted], and by the accused S [redacted] J [redacted] are hereby partially granted, and the judgments both of the Basic Court of Gjilan/Gnjilane PKR nr 53/13 and of the Court of Appeals PAKR nr 145/2014 in the part referring to the accused M [redacted] A [redacted], S [redacted] S [redacted], G [redacted] L [redacted], and S [redacted] J [redacted] are annulled, and the case is returned for retrial to the Basic Court of Gjilan/Gnjilane.
- II. The judgments both of the Basic Court of Gjilan/Gnjilane PKR nr 53/13 and of the Court of Appeals PAKR nr 145/2014 in the part referring to the accused V [redacted] J [redacted] G [redacted] X [redacted] Q [redacted] R [redacted] E [redacted] M [redacted] and A [redacted] Z [redacted] are *ex officio* annulled as the reasons for deciding in their favour exist.
- III. The requests for protection of legality filed by the accused V [redacted] [redacted] and G [redacted] X [redacted] are rejected as ungrounded.
- IV. Pursuant to Article 435 paragraph 4 of the CPC, the Supreme Court of Kosovo orders immediate termination of serving of sentences imposed by the final Judgment against all the accused V [redacted] J [redacted] S [redacted] J [redacted] G [redacted] X [redacted] M [redacted] A [redacted] S [redacted] [redacted] Q [redacted] R [redacted], E [redacted] M [redacted] and A [redacted] Z [redacted] but they are to stay in detetnion until a decision on measures to ensure the presence of the defendants is made by the Basic Court of Gjilan/Gnjilane.



## REASONING

### I. PROCEDURAL BACKGROUND

1. On 20 February 2013, the Special Prosecution Office of the Republic of Kosovo (SPRK) filed an indictment in this case.

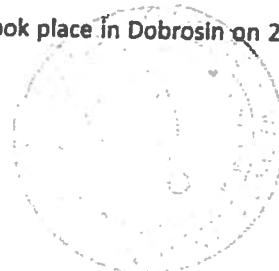
#### *Judgement of the 1<sup>st</sup> Instance*

2. With the Judgement dated 16 October 2013, the Basic Court of Gjilan/Gnjilane found

V [REDACTED] J [REDACTED], S [REDACTED] J [REDACTED] G [REDACTED] L [REDACTED] G [REDACTED] X [REDACTED] Q [REDACTED] R [REDACTED]  
M [REDACTED] A [REDACTED] S [REDACTED] S [REDACTED] E [REDACTED] M [REDACTED] and A [REDACTED] Z [REDACTED] guilty of:

Commission of Terrorism (Article 109 (1.10), Article 110 (1) of the CCK (old one) currently criminalized by Article 135 (1.10) and 136 (1) of the CC of Republic of Kosovo, because the accused, in co-perpetration with other participants in a self-styled terrorist group known as "Movement of Freedom", with the intent to unduly compel the Government of the Republic of Serbia to cease its policing activities in the Bujanovac region, unduly compel members of Serbian Police forces of Albanian nationality to leave their work place, and unduly compel the "international community" to deploy peacekeeping forces in the region, and

- they, in co-perpetration, illegally possessed and controlled an undetermined number of weapons (including assault rifles, machine guns and rocket launchers) which were at the disposal of the terrorist group "Movement of Freedom", in an unspecified location, starting from April 2012, V [REDACTED] J [REDACTED] G [REDACTED] X [REDACTED] Q [REDACTED] R [REDACTED] M [REDACTED] A [REDACTED] until 01 July 2012, S [REDACTED] J [REDACTED] until 16 October 2012, G [REDACTED] L [REDACTED] until 13 February 2013, S [REDACTED] S [REDACTED] and E [REDACTED] M [REDACTED] until 16 October 2012, A [REDACTED] Z [REDACTED] until 17 October 2012;
- V [REDACTED] J [REDACTED] G [REDACTED] X [REDACTED] and E [REDACTED] M [REDACTED] in co-perpetration, took part in an attack which damaged the Serbian Border Police container located in Bujanovac and caused light bodily injuries to the Serbian police officer B [REDACTED] M [REDACTED] by firing with different weapons, all illegally possessed and used, an undetermined number of various calibre rounds (in any case superior 100). The attack took place in Dobrosin on 28 June 2012 at around 04:00 hrs;



- S [redacted] J [redacted] and E [redacted] M [redacted] in co-perpetration with each other and with an unidentified number of additional perpetrators, took part in an attack which damaged the Serbian border Police container located in Bujanovac by firing with different weapons, all illegal possessed and used, an undetermined number of various caliber rounds; The attack took place in Dobrosin (Gjilan Municipality) on 7 October 2012 around 21:35 hrs;

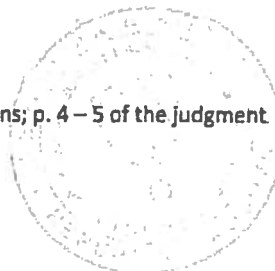
V [redacted] J [redacted] guilty of Organization of a terrorist group, Article 113 (1) of the CCK (old) currently criminalized by Article 143 (1) of the CCRK because he organized and directed a self – styled terrorist group known as “Movement of Freedom” by procuring armaments, uniforms and other means needed for the activities of the group, deciding what activities are to be carried out by the group, deciding when, where and by whom such activities are to be carried out, personally taking part in at least one of the attacks carried out by the group, described above, laying out the political objectives of the group, including by dictating claims of responsibility for attacks carried out by the group. The activities took place in an unspecified location, starting at the latest from April 2012 until 1 July 2012;

S [redacted] J [redacted] G [redacted] L [redacted], G [redacted] X [redacted], Q [redacted] R [redacted], M [redacted] A [redacted], S [redacted] S [redacted], E [redacted] M [redacted] and A [redacted] Z [redacted] guilty of:

Participation in a Terrorist group contrary to Article 113 (3) of the CCK, currently criminalized by Article 143 (2) of the CCRK, because the defendant, in co-operation with V [redacted] J [redacted] E [redacted] M [redacted], G [redacted] L [redacted], A [redacted] Z [redacted] G [redacted] X [redacted], S [redacted] S [redacted], M [redacted] A [redacted] and Q [redacted] R [redacted] actively participated in a self-styled terrorist group known “Movement of Freedom”:

- S [redacted] J [redacted] by drafting claims of responsibilities, looking for armaments, committing the criminal offences described above<sup>1</sup>, and otherwise putting himself at the disposal of the terrorist group for its activities. The activities took place in an unspecified location of Kosovo, starting at latest from April 2012 until 16 October 2012;
- G [redacted] L [redacted] by putting himself at the disposal of the terrorist group for its activities. The activities took place in an unspecified location of Kosovo, starting at latest from April 2012 until 13 February 2013;

<sup>1</sup> Taking part in an attack on 07 October 2012, possessing of weapons; p. 4 – 5 of the judgment



- G [REDACTED] X [REDACTED] by looking for armaments, committing the criminal offences described above<sup>2</sup>, and otherwise putting himself at the disposal of the terrorist group for its activities. The activities took place in an unspecified location of Kosovo, starting at latest from April 2012 until 01 July 2012;
- C [REDACTED] R [REDACTED] by putting himself at the disposal of the terrorist group for its activities. The activities took place in an unspecified location of Kosovo, starting at latest from April 2012 until 01 July 2012;
- M [REDACTED] A [REDACTED] by putting himself at the disposal of the terrorist group for its activities. The activities took place in an unspecified location of Kosovo, starting at latest from April 2012 until 01 July 2012;
- S [REDACTED] S [REDACTED] by putting himself at the disposal of the terrorist group for its activities. The activities took place in an unspecified location of Kosovo, starting at latest from April 2012 until 16 October 2012;
- E [REDACTED] M [REDACTED] by looking for armaments, putting himself at the disposal of the terrorist group for its activities, and by committing the criminal offences described above<sup>3</sup>. The activities took place in an unspecified location of Kosovo, starting at latest from April 2012 until 01 July 2012;
- A [REDACTED] Z [REDACTED] by putting himself at the disposal of the terrorist group for its activities. The activities took place in an unspecified location of Kosovo, starting at latest from April 2012 until 17 October 2012;

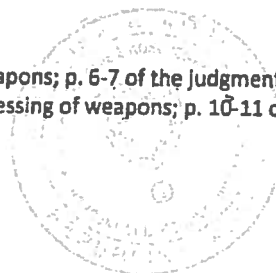
In case of G [REDACTED] L [REDACTED], Q [REDACTED] R [REDACTED] M [REDACTED] A [REDACTED] S [REDACTED] S [REDACTED] and A [REDACTED] Z [REDACTED] the Court indicated that the terrorist group "Movement of Freedom" committed the attacks on Serbian Police installations on 17 May, 28 June, and 07 October 2012;

The defendants were sentenced as follows:

V [REDACTED] J [REDACTED] to an aggregate punishment of 9 years and fine of 1000 (one thousand euro) based on article 39 (1) and (2) of the CCRK paid no later than 3 (three) months after the judgment becomes final;

<sup>2</sup> Taking part in an attack on 28 June 2012, possessing of weapons; p. 6-7 of the Judgment

<sup>3</sup> Taking part in an attack on 28 June, 07 October 2012, possessing of weapons; p. 10-11 of the Judgment



- S [REDACTED] J [REDACTED] to an aggregate punishment of 8 years;
- G [REDACTED] L [REDACTED] to an aggregate punishment of 5 years and 6 months of Imprisonment;
- G [REDACTED] X [REDACTED] to an aggregate punishment of 6 years and 6 months of imprisonment;
- Q [REDACTED] R [REDACTED] to an aggregate punishment of 5 years and 6 months of imprisonment;
- M [REDACTED] A [REDACTED] to an aggregate punishment of 5 years and 6 months of imprisonment;
- S [REDACTED] S [REDACTED] to an aggregate punishment of 5 years and 6 months of imprisonment;
- E [REDACTED] M [REDACTED] to an aggregate punishment of 6 years and 6 months of imprisonment;
- A [REDACTED] Z [REDACTED] an aggregate punishment of 5 years and 6 months of imprisonment.

**Judgement of the 2<sup>nd</sup> Instance**

3. The Judgment of the Basic Court was appealed by all the defendants and their defence counsel. The written judgment of the Court of Appeals was completed on 1<sup>st</sup> July 2015, and then served on the parties.
4. With the mentioned judgment, the Court of Appeals decided as follows:

The appeals of the defense counsel of the accused V [REDACTED] J [REDACTED] S [REDACTED] J [REDACTED] G [REDACTED] L [REDACTED], G [REDACTED] X [REDACTED], M [REDACTED] A [REDACTED] S [REDACTED] S [REDACTED] E [REDACTED] M [REDACTED] A [REDACTED] Z [REDACTED] and J [REDACTED] S [REDACTED] and the appeals filed by the accused V [REDACTED] J [REDACTED] and G [REDACTED] X [REDACTED] against the Judgment rendered by the Basic Court of Gjilan were rejected as unfounded.

The appeal of the defence counsel of the accused Q [REDACTED] R [REDACTED] was partially accepted. The appealed Judgment was modified in a part imposing punishment which was modified from 5 (five) years to 3 (three) years of imprisonment. Taking into consideration the sentence of 2 (two) years of imprisonment imposed by the first instance Court for the criminal offence of Participation in a Terrorist Group as per article 113 (3) of the CCK, the aggregate sentence was modified to 4 (four) years of imprisonment.

The Judgment rendered by the Basic Court in relation to the defendants V [REDACTED] J [REDACTED] S [REDACTED] J [REDACTED], G [REDACTED] X [REDACTED] and E [REDACTED] M [REDACTED] was *ex officio* modified to be read as follows:

The defendant V [REDACTED] J [REDACTED] was found guilty

of Commission of Terrorism contrary to Article 136 (1) in conjunction with article 135 (1.10) of the CCRK, because he, in co-perpetration with other participants in a self-styled terrorist group



known as "Movement of Freedom", with the intent to unduly compel the Government of the Republic of Serbia to cease its policing activities in the Bujanovac region, unduly compel members of Serbian Police forces of Albanian nationality to leave their work place, and unduly compel the "international community" to deploy peacekeeping forces in the region;

- he illegally possessed and controlled an undetermined number of weapons (including assault rifles, machine guns and rocket launchers) which were at the disposal of the terrorist group "Movement for Freedom", in co-perpetration with G [REDACTED] X [REDACTED], G [REDACTED] L [REDACTED], S [REDACTED] A [REDACTED] Z [REDACTED], E [REDACTED] M [REDACTED] S [REDACTED] S [REDACTED], M [REDACTED] A [REDACTED] Q [REDACTED] R [REDACTED] in an unspecified location, starting at the latest from April 2012 until 1 July 2012;

of Organization of a Terrorist Group as per article 113 (1) of the CCK, because he organized and directed a self – styled terrorist group known as "Movement of Freedom" by procuring armaments, uniforms and other means needed for the activities of the group, deciding what activities are to be carried out by the group, deciding when, where and by whom such activities carried out by the group, deciding when, where and by whom such activities are to be carried out, personally taking part in at least one of the attacks carried out by the group, described above, laying out the political objectives of the group, including by dictating claims of responsibility for attacks carried out by the group. The activities took place in an unspecified location, starting at the latest from April 2012 until 1 July 2012 and until 1 July 2012;

By reason thereof, the defendant V [REDACTED] J [REDACTED] was sentenced for the criminal offence described in count one: the Commission of Terrorism as per article 136 (1) in conjunction with article 135 (1.10) of the CCRK to 5 (five) years of imprisonment; for the criminal offence described in count two: the Organization of a Terrorist Group as per article 113 (1) of the CCK to 7 (seven) years of imprisonment and fine of 1000 (one thousand) euro based on Article 39 (1) and (2) of the CCK paid no later than 3 (three) months after the judgment becomes final. Based on Article 71 (1) (2) point 2 of the CCK an aggregate punishment of 8 years of imprisonment is imposed on the defendant. The time spent in detention on remand shall be accredited towards the sentence pursuant to Article 365 (1) 5) of the KCCP; the defendant shall be relieved of the duty to reimburse the costs of the criminal proceedings in accordance with Article 453 (4) of the CCK.

S [REDACTED] J [REDACTED] was found guilty



Of Commission of Terrorism contrary to Article 136 (1) in conjunction with article 135 (1.10) of the CCRK, because he, in co-perpetration with other participants in a self-styled terrorist group known "Movement of Freedom" with the intent to unduly compel the Government of the Republic of Serbia to cease its policing activities in the Bujanovac region, unduly compel members of the Serbian police forces of Albanian nationality to leave their work place and unduly compel the 'international community' to deploy peacekeeping forces in the region;

- he illegally possessed and controlled an undetermined number of weapons (including assault rifles, machine guns and rocket launchers) which are at the disposal of the terrorist group "Movement of Freedom", in co-perpetration with V [REDACTED] J [REDACTED] E [REDACTED] M [REDACTED] G [REDACTED] L [REDACTED], A [REDACTED] Z [REDACTED] G [REDACTED] X [REDACTED] S [REDACTED] S [REDACTED] M [REDACTED] A [REDACTED] Q [REDACTED] R [REDACTED] in an unspecified location, starting at the latest from April 2012 and until 16 October 2012.

Of Participation in a Terrorist group contrary to Article 113 (3) of the CCK, because it was proven beyond reasonable doubt that he, in co-operation with V [REDACTED] J [REDACTED] E [REDACTED] M [REDACTED] G [REDACTED] L [REDACTED], A [REDACTED] Z [REDACTED] G [REDACTED] X [REDACTED] S [REDACTED] S [REDACTED] M [REDACTED] A [REDACTED] and Q [REDACTED] R [REDACTED] actively participated in a self-styled terrorist group known "Movement of Freedom" by drafting claims of responsibilities, looking for armaments, committing the criminal offences described above, and otherwise putting himself at the disposal of the terrorist group for its activities. The activities took place in an unspecified location of Kosovo, starting at latest from April 2012 until 6 October 2012.

By reason thereof, the defendant S [REDACTED] [REDACTED] was sentenced for the criminal offence described in count one: the Commission of Terrorism as per article 136 (1) in conjunction with article 135 (1.10) of the CCRK to 5 (five) years of imprisonment; for the criminal offence described in count two: the Participation in a Terrorist group contrary to Article 113 (3) of the CCK, to 4 (four) years of imprisonment; Based on Article 71 (1) (2) point 2 of the CCK an aggregate punishment of 6 (six) years and 6 (six) months of imprisonment is imposed on the defendant. The time spent in detention on remand shall be accredited towards the sentence; the defendant shall be relieved of the duty to reimburse the costs of the criminal proceedings in accordance with Article 453 (4) of the CPCK.

G [REDACTED] X [REDACTED] was found guilty



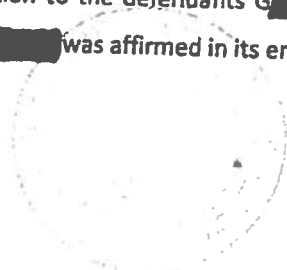
of Commission of Terrorism contrary to Article 136 (1) in conjunction with article 135 (1.10) of the CCRK, because he, in co-perpetration with other participants in a self-styled terrorist group, known as "Movement of Freedom", with the intent to unduly compel the Government of the Republic of Serbia to cease its policing activities in the Bujanovac region, unduly compel members of the Serbian police forces of Albanian nationality to leave their work place and unduly compel the 'international community' to deploy peacekeeping forces in the region;

- he illegally possessed and controlled an undetermined number of weapons, all illegally possessed and controlled an undetermined number of weapons (including assault rifles, machine guns and rocket launchers) which are at the disposal of the terrorist group "Movement of Freedom" in co-perpetration with V. J., S. J., G. L., A. Z., E. M., S. S., M. A., Q. R. in an unspecified location starting at the latest from April 2012 until 1 July 2012;

of Participation in a Terrorist group contrary to Article 113 (3) of the CCK, because it was proven beyond reasonable doubt that he in co-operation with V. J., S. J., G. L., A. Z., E. M., S. S., M. A., Q. R. actively participated in a terrorist group which refers to itself as "Movement of Freedom", by looking for armaments, committing the criminal offences described above, and otherwise putting himself at the disposal of the terrorist group for its activities in an unspecified location of Kosovo, starting at the latest from April 2012 until 1 July 2012;

By reason thereof, the defendant G. X. was sentenced for the criminal offence described in count one: the Commission of Terrorism as per article 136 (1) in conjunction with article 135 (1.10) of the Criminal Code of the Republic of Kosovo, to 5 (five) years of imprisonment; for the criminal offence described in count two: the Participation in a Terrorist group contrary to Article 113 (3) of the CCK, to 2 (two) years of imprisonment; based on Article 71 (1) (2) point 2 of the CCK an aggregate punishment of 5 (five) years and 6 (six) months of imprisonment is imposed on the defendant. The time spent in detention on remand shall be accredited towards the sentence; the defendant shall be relieved of the duty to reimburse the costs of the criminal proceedings in accordance with Article 453 (4) of the CCK.

The Judgment rendered by the Basic Court of Gjilan in relation to the defendants G. L., M. A., S. S., A. Z. and J. S. was affirmed in its entirety.



### **Requests for protection of legality**

5. The requests for protection of legality against the judgment of the Court of Appeals were filed by the defence counsel: M [REDACTED] M [REDACTED] on behalf of the accused M [REDACTED] A [REDACTED] (14 August 2015), D [REDACTED] R [REDACTED] on behalf of the accused S [REDACTED] S [REDACTED] (24 August 2015), and S [REDACTED] P [REDACTED] on behalf of the accused G [REDACTED] L [REDACTED] (14 October 2015), and by the accused themselves: V [REDACTED] J [REDACTED] (13 August 2015), S [REDACTED] J [REDACTED] (18 August 2015), and G [REDACTED] X [REDACTED] (31 August 2015).
6. The State Prosecutor filed an opinion on the requests for protection of legality moving the Supreme Court of Kosovo to reject them as ungrounded. Prosecutor avers that the requests failed to properly substantiate any error in the challenged judgments which would warrant the impugned judgments being overturned or amended. Prosecutor further submits that alleged mistakes that were pointed out by the defence counsel or defendants does not qualify as a substantial violation of the provisions of criminal procedure capable of significant prejudice to the right of the accused to a fair trial.

## **II. Submissions of the Parties**

### **Defence of G [REDACTED] L [REDACTED]**

7. The defence counsel of G [REDACTED] L [REDACTED] based his request for protection of legality on the grounds of violation of criminal law and violation of the Criminal Procedure Code. He proposes to annul the appealed judgments and send the case back for retrial.
8. Violation of the Criminal Procedure Code:
  - Article 384 (1.12) of the CPC because the enacting clause is unclear, incomprehensible, its content and reasoning is contradictory, it does not contain any reasoning about the decisive facts and those presented are completely unclear.
9. Violation of the criminal law:
  - Article 385 (1), 1.4 of the CPC because the subjective and objective elements of the criminal offences committed were not met; the first instance court failed to consider Article 31 of the CCK when finding that the defendant committed the offence in co-perpetration while there is no data to support such conclusion.

10. The analysis of the content of the request for protection of legality leads to the conclusion that the Defence also argues that the judgements are based on the erroneous and incomplete determination of the factual situation. In this context, he indicated that witnesses' statements are diametrically different, and do not refer to any actions which could be considered as incriminating G [REDACTED] L [REDACTED]. There is no evidence that he participated in the military style expedition on 14 and 15 June 2012.

**Defence of M [REDACTED] A [REDACTED]**

11. The request for protection of legality is based on grounds of the violation of the Criminal Procedure Code, erroneous application of the Criminal Code, and unjustified decision on the criminal sanction. The defence counsel proposes to amend the challenged judgments, and to release the defendant, or to annul the judgments and send the case back for retrial.

12. Violation of the Criminal Procedure Code:

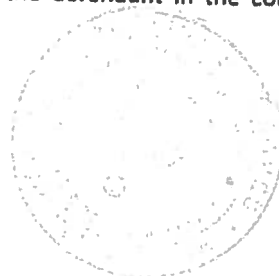
- Article 384 (1.12) and (2) in conjunction with Articles 369 (1) and 370 (7) of the CPC, because the enacting clause is unclear, incomprehensible, its content and reasoning is contradictory, and it does not contain any reasoning about the decisive facts, and those presented are completely unclear;
- Article 269 (1) of the CPC as the judgment was issued 75 days after the deadline, and that this argument was not assessed by the Court of Appeals

13. Violation of the criminal law:

- Article 113 of the CCK which provides that the criminal offence of terrorism can be committed only by active participation.

14. The Defence further raised a number of arguments which shall be assessed that the judgements are based on the erroneous and incomplete determination of the factual situation. According to him, there is no evidence to support the conclusions reached by the courts of both instances in the challenged judgments. The Defence further argues that the element of intention and the other elements of the criminal offence had not been established.

15. Additionally, the Defence contests the punishment imposed on the defendant. According to him, the decision on punishment is too severe, and contrary to the law. The Defence counsel argues that the court failed to consider the behaviour of the defendant in the court, and his family situation.



**Defence of S [REDACTED] S [REDACTED]**

16. The Defence argues that the contested judgements contain essential violation of the criminal procedure, other violations of the criminal procedure, and violation of the criminal law. He proposes to acquit the defendant or annul the challenged judgments and send the case for retrial.

17. Violations of the Criminal Procedure Code:

- Article 370 (7) of the CPC because the grounds of the judgment were not explained, particularly because there is no assessment of contradictory evidence. Furthermore, the judgement does not provide any justification of the rejection of the request to summon an expert witness to provide his opinion about the authenticity of photos, especially about the time and place of photographing.
- Article 222 of the CPC because the prosecutor could not file an indictment charging a defendant with additional charges which were not subject to the investigation itself. During the investigation, the defendant was not interrogated about the charge of the criminal offence of terrorism; he was interrogated only about the participation in a terrorist group and possession of weapons. There is no ruling on the initiation of investigation regarding these two criminal offences; the prosecutor could not file indictment with additional charges as indicated in item 1 of the indictment against S [REDACTED] S [REDACTED] because there was no investigation conducted against him.
- Article 6 of the European Convention on Protection of Human Rights and Fundamental Freedoms, and Article 30 of the Constitution of the Republic of Kosovo which guarantees the right of the defendant to be immediately informed about the charges against him.
- Article 384 (2) of the CPC as the defendant was not informed during the investigation of the charges against him until he received the indictment.

18. Violation of the criminal law

- Article 135 (1.10) and Article 136 of the CCK by accepting that this criminal offence can be committed by the mere fact that the defendant was posing with the gun;
- Article 113 (3) of CCK or Article 143 par 2 of the CCRK because active participation in a terrorist group is a necessary element to determine the commitment of the criminal offence. Any other type of participation does not meet elements of this criminal offence;

- the Law on Amnesty 04/L-209 which grants amnesty for the criminal offence under Article 328 of CCK and respectively under Article 374 of the CCRK. Thus, the defence counsel argues that the basic criminal offence constituting the alleged commission of terrorism is included in the Law on Amnesty; therefore the criminal prosecution cannot be held for the commission of the criminal offence of terrorism.

19. Similarly, as the other defence counsel, the Defence of S [REDACTED] S [REDACTED] argues that the judgements contain the erroneous and incomplete determination of the factual situation. According to the defence counsel, the elements of the criminal offences for which the defendant was convicted had not been proved by any evidence. The Defence argues that in the case of S [REDACTED] S [REDACTED] there was no evidence showing that he was an active member of the armed terrorist group. Furthermore, the only incriminating evidence against him is three photos with weapons in hand taken in an undetermined place. The Defence further argues that the direct will of the defendant to commit these offences has not been established. According to the defence counsel, the court merely relied upon on the three photos, cited some notes taken from the electronic diary found in the computer of V [REDACTED] and S [REDACTED] J [REDACTED] and some or phone conversations with V [REDACTED] J [REDACTED] which were unclear. The judgement did not establish the crucial facts, such as the type of weapon, serial number, manufacturer's year, brand of weapon, calibre, etc. The defence counsel claims that the judgements wrongly concluded that S [REDACTED] S [REDACTED]'s intention was to force the government of Serbia to terminate its police actions in the Bujanovc area, force members of the Serbian police of the Albanian nationality to leave their working places or force the international community to place peacekeeping forces in the region.

V [REDACTED] J [REDACTED]

20. The defendant in his request argues that the judgements contain the erroneous application of the criminal law pursuant to Article 432 (1) (1.1), (1.2) and (1.3) of the CPC, substantial violation of the provisions of the criminal procedure pursuant to Article 384 (1) of the CPC, and violation of the provisions of the criminal law.

21. Violation of the Criminal Procedure Code:

- Article 384 (1.8) of the CPC claiming that the judgment was based on the inadmissible evidence. Specifically, he argues that items relied upon by the courts were seized from the flat of his brother while he lived in Hotel Fontana. He argues that the search was in fact



conducted without the court's search order contrary to Article 249 of CPC and Article 111 (1) of the CPC;

- Article 155 and Article 257 (4)(4.1) of the CPC as for his examination the prosecutor impaired his freedom by using his tiredness.

22. Violation of criminal code:

- According to the defendant, the legal elements for the crimes he was convicted for had not been met.

23. Additionally, the defendant avers that the prosecutor in charge of investigating this case changed his statements given during the course of the investigation.

S. J.  
S [REDACTED]

24. The defendant filed a unified application which contained requests for three separate legal remedies: protection of legality, reopening of the criminal proceedings, and extraordinary mitigation of punishment. In part which can be classified as the request for protection of legality, he demands to reject the charges against him, and to amend and review the challenged judgments. He opines that the Courts of both instances violated the provisions of the Criminal Procedure Code, and Criminal Code.

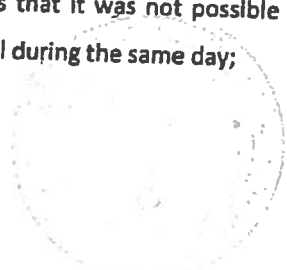
25. Violation of the Criminal Procedure Code:

- Article 423 (1.1) of the CPC as the judgment has been issued by the judges of the Basic Court and the Court Appeals that were under the influence from Serbia. He claims that he had requested for the disqualification of a EULEX judge from the panel based on Article 39 and not on Article 40 of the CPC as indicated in the judgment;
- the Law On Amending and Supplementing the Laws related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (03/L-273) because the composition of the panel was not in accordance with it. He also claimed unconstitutionality of Agreement between the Head of EULEX and the Judicial Council of Kosovo, dated 18 June 2014;
- Article 314 (1.2) of CPC which foresees the conclusion of the trial within 120 days while in this case the trial lasted for one year;
- Article 369 (1) of the CPC as the written judgment was delayed from 14 October 2013 until 27 January 2014;





- Article 32 of the Constitution of the Republic of Kosovo, namely principle *ne bis in idem*, because he was charged with the same criminal offences for which he was prosecuted also by the authorities in Serbia;
  - Article 262 of the CPC since there is no single material evidence, fact or statement which supports the guilty verdict. This should be considered as a ground of the erroneous or incomplete factual findings.
26. In his request, S [REDACTED] J [REDACTED] indicates many other violations of the criminal procedure allegedly committed by the courts of both instances, but he does not specify exact legal provisions which allegedly were breached. The analysis of his submission leads to the conclusion that he contested:
- The prosecutor's competence to conduct prosecutorial activities on behalf of the institutions of the Republic of Kosovo and prosecute criminal offence committed in the territory of another state- such as those occurring in Presheva-Serbia;
  - The time when the indictment was filed as it was not done within the period of eight months when a person is in detention;
  - The prosecutor did not provide the defendants with a copy of the prosecution material to enable the effective preparation for the trial;
  - The court did not comply with the deadlines, *i.e* the second hearing was held after 45 days, and not within 40 days as required by the law;
  - The trial was not public as it was not public to the media;
  - He was deprived from the effective defence counsel since the defence counsel appointed *ex officio* did not provide any legal assistance;
  - His statement of 19 February 2013 was not completely read to him in Albanian, it was only partially translated by the translator and only the English version was signed;
  - The search was done without the court order;
  - His submissions were not reviewed, as *f.e.* on 14 October 2013 he submitted the written version of his final speech of around 20 pages. On the same day, the court conducted its deliberation and voting. He argues that it was not possible for his final speech to be translated and reviewed by the panel during the same day;



- He was not allowed to speak during the trial about the terror of Serbia against himself, his family and his people, and to present facts that were in his favour;
- The final judgment is based on the forged and false statement of experts and translators, and on inadmissible evidence.

27. Violation of the criminal law:

- Article 135 of the CCRK because there is no evidence to prove the existence of the terrorist group, construction and structure of the group, the time frame, and the existence of the purpose of complicity. He further argues that the intention of the group was to terminate the state of terror but not to commit any crimes. He submits that the criminal offence for which he is being charged relates to the self-defence and therefore cannot be qualified as terrorism;
- He argues that there is the erroneous qualification of the criminal offences because the prosecutor did not charge him for assault and causing grievous bodily injuries. He states that the intention for the commission of the offence of terrorism was not established. The defendant argues that the prosecutor wrongly presented that the fighters of Bujanovc published a declaration appealing to terminate the police activities in the region of Bujanovc. The real goes on the fighters was to stop the state of terror;
- He claims that under Article 109 of the Old Criminal Code of Kosovo the offence of the attack and light bodily injuries is not accepted as it is under Article 135 (1.3) of the CCRK. Taking into account that at the material time, the old code was applicable, the defendant cannot be charged for the attack and light bodily injuries under Article 136 of the CCRK.

28. Significant part of the submission filed by S [REDACTED] J [REDACTED] contains arguments against the factual findings done by the Courts of both instances. In his opinion, the facts were established erroneously and incompletely, and they are not supported by the evidence presented during the main trial.

G [REDACTED] X [REDACTED]

29. The defendant argues that the Court of Appeals did not review all the violations mentioned in his appeal. The judgment of the first instance was unjust and the Court of Appeals did not address violations of material and procedural laws, and about establishment of factual situation.

III. Findings of the Supreme Court



### **Composition of the Panel**

30. The Panel of the Supreme Court was composed in accordance to Article 21 (6) of the *Law on Courts* (Law No. 03/L-199), and Article 3 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 (known as *Omnibus Law*, and hereinafter referred like this), and clarified through the *Agreement between the Head of Eulex Kosovo and the Kosovo Judicial Council*, dated 18 June 2014.
31. Article 1.A. of the *Omnibus Law* provides that EULEX judges have jurisdiction in two types of cases that are considered as ongoing cases. The term "Ongoing cases", for purpose of this law, mean:
- Cases for which the decision to initiate investigations has been filed before 15 April 2014 by EULEX prosecutors in accordance with the law,
  - Cases that are assigned to EULEX judges before 15 April 2014.
32. The Panel notes that the present case falls within the jurisdiction of EULEX judges since the investigation in it has been initiated before 15 April 2014.
33. In relation to the composition of the panel, Article 3.2 of the *Omnibus Law* states: "panels in which EULEX judges exercise their jurisdiction in criminal proceedings will be composed of a majority of local judges and presided by a local judge". However, this provision does not clarify in which of the two types of the ongoing cases it shall be applied, i.e. cases for which the decision to initiate investigations has been filed before 15 April 2014 by EULEX prosecutors in accordance with the law and/or for cases that are assigned to EULEX judges before 15 April 2014.
34. In the view of the Panel, Article 3.2 of the *Omnibus Law* may eventually be applicable in cases according to the Article 1.A. par 1, respectively, for which the decision to initiate investigations was filed before 15 April 2014 by EULEX prosecutors in accordance with the law. That means if the decision to initiate investigations was filed before 15 April 2014; however, the investigation was concluded and the Indictment was filed after entry into force of the *Omnibus Law*, then the provisions of the *Omnibus Law* may be applicable in regard to the composition of the trial panel.
35. The situation is different in cases which were already assigned to EULEX judges before 15 April 2014 (before entry into force of *Omnibus Law*) in accordance to Article 1.A. par 2. In this situation, if a case is assigned to EULEX judges prior to 15 April 2014, then the case shall continue to be dealt with by EULEX judges in accordance to the law which was in force at the time when the case

was assigned to EULEX judges. The subsequent changes in the law, as it occurred here with the entry into force of *Omnibus Law*, in the view of the Panel, cannot have retroactive effect on the composition of the panel, irrespectively of the stage of proceedings.

***The admissibility of the requests for protection of legality***

36. The Panel established that all the requests for protection of legality are admissible. They have been filed by authorized persons (Article 433 (1) of the CPC), within the prescribed deadline (Article 433 (2) of the CPC), and with the competent court (Article 434 (1) of the CPC).
37. The Supreme Court of Kosovo considered the requests for protection of legality in the session of the panel, as prescribed by Article 435 (1) of the CPC. Parties' notification about the session was not required.

**Findings on the merits**

***Scope of the assessment:***

38. The Panel will restrict its analysis only to the violations which can constitute the ground to file a request for protection of legality, as prescribed in Article 432 (1) of the CPC. Therefore, the allegation that the judgments were based on the erroneous or incomplete factual findings will not be considered, as accordingly to Article 432 (3) of the CPC it cannot be a ground for the request for protection of legality.

***Violation of Article 384 (1.12) in relation to Article 370 of the CPC***

39. The analysis of the requests for protection of legality filed by all Defense counsel and by the defendant S [REDACTED] J [REDACTED] leads to the conclusion that the crucial violation of the criminal procedure allegedly committed by the courts of both instances refers to the fact that the judgments do not meet the requirements prescribed in Article 384 (1.12) in connection with Article 370 of the CPC. This argument in relation to the judgment of the Basic Court had already been assessed by the Court of Appeals, and rejected as ungrounded. The applicants in their submissions repeated the arguments against the judgment of the court of the first instance, and also raised the same arguments against the decision of the Court of Appeals.
40. The Supreme Court has thoroughly examined the judgments of both instances which have to be currently read in conjunctions as the judgement of the second instance refers directly to the judgement of the court of the first instance. The analysis of these documents leads to the conclusion that both judgments do not meet the requirements as prescribed in Article 384 (1.12)

in connection with Article 370 of the CPC. They are not consistent and comprehensible, and it is not clear what facts were established by both courts to conclude that the defendants committed criminal offences they were charged with.

41. As result, according to the judgment of the Basic Court of Gjilan/Gnjilane, defendants V [redacted] J [redacted] G [redacted] L [redacted], G [redacted] X [redacted] S [redacted] J [redacted] A [redacted] Z [redacted] E [redacted] M [redacted] S [redacted] S [redacted], M [redacted] A [redacted] and Q [redacted] R [redacted] were acting in co-perpetration in the self-styled terrorist group known as "Movement of Freedom", with the intent to unduly compel the Government of the Republic of Serbia to cease its policing activities in the Bujanovac region, unduly compel members of the Serbian Police forces of the Albanian nationality to leave their work place, and unduly compel the "international community" to deploy peacekeeping forces in the region.

The acts of terrorism were committed in the following way:

- On 28 June 2012, at around 4.00 hrs in Dobrosin (Gjilan/Gnjilane Municipality), V [redacted] J [redacted] G [redacted] X [redacted] and E [redacted] M [redacted] took part in the attack which damaged the Serbian Border Police container located in Bujanovac and caused light bodily injuries to the Serbian police officer B [redacted] M [redacted] by firing with different weapons, all illegally possessed and used, an undetermined number of various calibre rounds (in any case superior to 100);
- On 07 October 2012, at around 21.35 hrs in Dobrosin (Gjilan/Gnjilane Municipality), S [redacted] J [redacted] and E [redacted] M [redacted] with an unidentified number of additional perpetrators took part in the attack which damaged the Serbian Border Police container located in Bujanovac, by firing with different weapons, all illegally possessed and used, an undetermined number of various calibre rounds;
- Starting at the latest from April 2012 until 1 July 2012 V [redacted] J [redacted] G [redacted] X [redacted] Q [redacted] R [redacted] and M [redacted] A [redacted] until 16 October 2012 S [redacted] J [redacted], S [redacted] S [redacted] and E [redacted] M [redacted] until 17 October 2012 A [redacted] Z [redacted] and until 13 February 2013 G [redacted] L [redacted] in co-perpetration, illegally possessed and controlled an undetermined number of weapons (including assault rifles, machine guns and rocket launchers) which were at the disposal of the terrorist group "Movement of Freedom".

V [redacted] J [redacted] starting at latest from April 2012 until 01 July 2012, organized and directed the self-styled terrorist group known as "Movement of Freedom" by procuring armaments, uniforms and other means needed for the activities of the group, deciding which activities are to be carried out

by the group, deciding when, where and by whom such activities are to be carried out, personally taking part in at least one of the attacks carried out by the group, laying out the political objectives of the group, including dictating claims of responsibility or attacks carried by the group.

Starting at the latest from April 2012 until 1 July 2012 G [REDACTED] X [REDACTED], Q [REDACTED] R [REDACTED] and M [REDACTED] A [REDACTED] until 16 October 2012 S [REDACTED] J [REDACTED] S [REDACTED] S [REDACTED] and E [REDACTED] M [REDACTED] until 17 October 2012 A [REDACTED] Z [REDACTED], and until 13 February 2013 G [REDACTED] L [REDACTED] in an unspecified location of Kosovo actively participated in co-perpetration in the self-styled terrorist group known as "Movement of Freedom". S [REDACTED] J [REDACTED]<sup>4</sup>, G [REDACTED] X [REDACTED]<sup>5</sup>, E [REDACTED] M [REDACTED]<sup>6</sup> participated in it by drafting claims of responsibilities, looking for armaments, committing the criminal offences described above, and otherwise putting themselves at the disposal of the terrorist group for its activities. G [REDACTED] L [REDACTED]<sup>7</sup>, Q [REDACTED] R [REDACTED]<sup>8</sup>, M [REDACTED] A [REDACTED]<sup>9</sup>, S [REDACTED] S [REDACTED]<sup>10</sup> and A [REDACTED] Z [REDACTED]<sup>11</sup> were putting themselves at the disposal of the terrorist group for its activities. In case of these five accused, the Basic Court also established that the terrorist group in which they participated committed attacks on the Serbian Police installations on 17 May, 28 June and 07 October 2012.

V [REDACTED] J [REDACTED] found guilty of organizing the group, was also mentioned as a participant in the group<sup>12</sup>.

42. In its judgment, the Court of Appeals underlined that the assessment of the evidence conducted by the Basic Court was accepted. Despite of this, the first instance judgment was *ex officio* modified in the part of factual findings, what further resulted in the mitigation of the punishment imposed on some of the accused.

43. The Court of Appeals eliminated certain actions from the criminal behaviour attributed to the following accused:

- V [REDACTED] J [REDACTED] and G [REDACTED] [REDACTED] – participation in the attack held on 28 June 2012 at around 04.00 hrs;
- S [REDACTED] [REDACTED] - participation in the attack held on 07 October 2012 at around 21.35 hrs;

<sup>4</sup> P.5 of the BC judgment

<sup>5</sup> P. 7

<sup>6</sup> P. 11

<sup>7</sup> P. 6

<sup>8</sup> P. 8

<sup>9</sup> P. 9

<sup>10</sup> P. 10

<sup>11</sup> P. 12

<sup>12</sup> P. 5



- E [redacted] M [redacted] – participation in attacks held on 28 June 2012 at around 04.00 hrs, and on 07 October 2012 at around 21.35 hrs.

Furthermore, the Court of Appeals established that V [redacted] J [redacted] S [redacted] J [redacted] G [redacted] X [redacted] and E [redacted] M [redacted] acting in co-perpetration with G [redacted] L [redacted] A [redacted] Z [redacted] S [redacted] S [redacted] M [redacted] A [redacted] and Q [redacted] R [redacted] in the self-styled terrorist group known as "Movement of Freedom", with the intent to unduly compel the Government of the Republic of Serbia to cease its policing activities in the Bujanovac region, unduly compel members of the Serbian Police forces of the Albanian nationality to leave their work place, and unduly compel the "international community" to deploy peacekeeping forces in the region, illegally possessed and controlled an undetermined number of weapons (including assault rifles, machine guns and rocket launchers) which were at the disposal of the terrorist group "Movement for Freedom". These activities were to be taken in an unspecified location, starting at the latest from April 2012 until 1 July 2012 in case of V [redacted] J [redacted] and G [redacted] X [redacted], and until 16 October 2012 in case of S [redacted] J [redacted] and E [redacted] M [redacted]

44. In the same judgment, the Court of Appeals affirmed in its entirety the factual findings made by the Basic Court in relation to the defendants G [redacted] L [redacted], M [redacted] A [redacted] S [redacted] S [redacted] A [redacted] Z [redacted] and Q [redacted] R [redacted]. As a consequence, it was established with the final judgment that these accused, in co-perpetration with other persons, acting with the same intent as V [redacted] J [redacted] S [redacted] J [redacted] G [redacted] X [redacted] and E [redacted] M [redacted], participated in the self-styled terrorist group known as "Movement of Freedom", which committed attacks on the Serbian Police installations on 17 May, 28 June and 07 October 2012. The activities took place in an unspecified location, starting at the latest from April 2012, until 1 July 2012 in case of Q [redacted] R [redacted] and M [redacted] A [redacted], until 16 October 2012 in case of S [redacted] S [redacted] until 17 October 2012 in case of A [redacted] Z [redacted], and until 13 February 2013 in case of G [redacted] L [redacted]
45. The judgment of the Court of Appeal does not contain any justification why the factual findings of the Basic Court regarding the accused V [redacted] J [redacted] S [redacted] J [redacted] G [redacted] X [redacted] and E [redacted] M [redacted] were modified. Furthermore, because of this amendment, the judgment became internally contradictory as some events connected to the activities of the terrorist group "Movement of Freedom" were eliminated in reference to the defendants mentioned above, and on the other side the judgment was upheld in its entirety in reference to the accused G [redacted] L [redacted], M [redacted] A [redacted], S [redacted] S [redacted] A [redacted] Z [redacted] and Q [redacted] R [redacted] where the attacks on

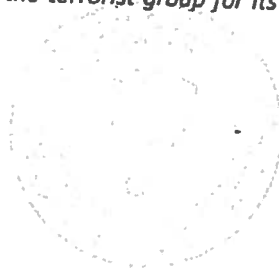
the Serbian Police installations are still contained in the description of the criminal offences attributed to them. Therefore, it is even not clear if the attacks were held by this group at all.

46. Additionally, despite of the fact that the enacting clause of the Court of Appeals' judgment does not connect the defendants to specific attacks, in the reasoning it is read: "from the evidence it was proven beyond reasonable doubt that V [redacted] J [redacted] G [redacted] X [redacted] and B [redacted] M [redacted] committed the attack on 28 June 2012"<sup>13</sup>. Further, the Judgment of the Court of Appeals in the reasoning part states that "the seized evidence, namely the photographs confirm that the defendant S [redacted] J [redacted] with other defendants took part in additional expeditions on 18 March, 28 April, 1 and 6 May 2012"<sup>14</sup>. Similarly, in relation to G [redacted] X [redacted] the Court of Appeals states that it was established that "he also participated in the two military-style expeditions with V [redacted] J [redacted] S [redacted] J [redacted] Q [redacted] R [redacted] M [redacted] A [redacted] S [redacted] S [redacted] A [redacted] Z [redacted] and G [redacted] L [redacted] on 15 May and 14 and 15 June 2012"<sup>15</sup>.
47. The judgment of the Basic Court is also not clear. The enacting clause and the reasoning do not explain in an exhaustive way what facts were established by the court of the first instance. The court did not establish the basic elements. The court did not establish in a definite way the period when the terrorist group "Movement of Freedom" was operating as different dates were indicated as termination of the activities in case of each defendant. It is not clear whether besides the defendants there were any other members of this group. It is not clear what factual basis allowed the court to conclude that the group existed between 16 October 2012 and 13 February 2013, and why the final date of actions is connected with G [redacted] L [redacted] the only participant of the terrorist group who was still active.
48. The enacting clause itself raises many doubts as to the actions attributed to each defendant because they are presented in a very ambiguous way. In case of defendants G [redacted] L [redacted] A [redacted] Z [redacted], S [redacted] S [redacted] M [redacted] A [redacted] and Q [redacted] R [redacted], it is not comprehensible whether they participated themselves in the attacks held on 17 May, 28 June and 07 October 2012, since the relevant parts of the enacting clause in case of each of the defendant reads as follows:
- "(...) actively participated in a self – styled terrorist group known as "Movement of Freedom" which committed the attacks on Serbian Police installations on 17 May, 28 June and 07 October 2012, buy putting himself at the disposal of the terrorist group for its activities and*

<sup>13</sup> Court of Appeals Judgment, Page 32, English version.

<sup>14</sup> Court of Appeals Judgment, Page 33, English version.

<sup>15</sup> Court of Appeals Judgment, Page 34, English version.





by committing the criminal offences described above in an unspecified location, starting at the latest from April 2012 (...)"<sup>16</sup>

49. There is no proper assessment of the evidence, particularly of the exculpatory evidence. Actually, such analysis had been presented only in case of V [REDACTED] J [REDACTED] and E [REDACTED] M [REDACTED]. In case of other defendants, the Court mainly presented the inculpatory material against them, often restraining itself just to the conclusion that there is a lot of evidence, without indication the exact pieces of it, as for example:

*"On top of it, there is sufficient evidence that G [REDACTED] L [REDACTED] took part in a military type expedition on 14 – 15 June 2012."*<sup>17</sup>

*"It did not escape the attention of the panel that E [REDACTED] M [REDACTED] participated in two additional "Movement of Freedom" expeditions, on 18 March and 16 May 2012. The understanding of this panel is that these military expeditions were meant to enhance military capacities of the group preparing it for terrorist attacks against the government of Republic of Serbia."*<sup>18</sup>

*"G [REDACTED] X [REDACTED]'s membership to the group is also proven by the fact that, as explained above, he was seen together with V [REDACTED] J [REDACTED] and E [REDACTED] M [REDACTED] on the day when he participated in the attack the Movement carried out on 28 June 2012."*<sup>19</sup>

50. The judgment of the Basic Court does not contain sufficient reasoning as to the charge of possession of weapons allegedly committed by all defendants as an act of terrorism. There are only short indications of some circumstances related to this, but only in case of V [REDACTED] J [REDACTED] and G [REDACTED] L [REDACTED].

51. Furthermore, there are many contradictions between the enacting clause and the reasoning of the judgment of the Basic Court. Firstly, the enacting clause is in contradiction to reasoning in relation to the attacks in which the defendants participated.

52. The first instance court in the enacting clause held that V [REDACTED] J [REDACTED] G [REDACTED] X [REDACTED] and E [REDACTED] M [REDACTED] "in co-perpetration have taken part in the attack dated 28 June 2012". Similarly, concerning S [REDACTED] J [REDACTED] it states that "he in co-perpetration with E [REDACTED] M [REDACTED] had taken part in the attack dated 7 October 2012". Thus, in its enacting clause, it is implicated that S [REDACTED]

<sup>16</sup> Basic Court Judgment, Page 6, 8, 9, 10, 12, English version.

<sup>17</sup> Basic Court Judgment, Page 31 English version.

<sup>18</sup> Basic Court Judgment, Page 34 English version.

<sup>19</sup> Basic Court Judgment, Page 37, English version.



J [redacted] participated only in the attack that occurred on 7 October 2012. However, in the reasoning part it states that *"the pictures found on J [redacted] brother's computer clearly show that S [redacted] J [redacted] took place at least four additional expeditions on 18 March, 28 April, 1 and 6 May 2012"*.<sup>20</sup>

53. Concerning E [redacted] M [redacted] in the enacting clause the court implicates him in the attack dated 28 June 2012, while in the reasoning it states that E [redacted] M [redacted] *"proved to be a devoted member of "freedom of movement" who took active role in two terrorist attacks launched against the Serbian Border Police on 28 June and 7 October 2012"*<sup>21</sup>. Further, in the reasoning it states that *"it did not escape the attention of the panel that he participated in two additional "Movement of Freedom" expeditions, on 18 March and 6 May 2012"*<sup>22</sup>.
54. With regard to G [redacted] L [redacted] the enacting clause implicates him in the attacks dated 17 May, 28 June and 7 October 2012, while the reasoning reads *"on top of this, there is sufficient evidence that G [redacted] L [redacted] took part in military type expeditions on 14-15 June 2012"*<sup>23</sup>.
55. In the same way, in relation to A [redacted] Z [redacted] the reasoning states that *"there is strong evidence that he participated in two military -type expeditions in mid-May and mid-June 2012"*. It further states that *"he took part in a reconnaissance activity together with S [redacted] J [redacted] on 17-18 June 2012"*<sup>24</sup>. The enacting clause implicates him in the attacks on 17 May, 28 June and 7 October 2012.
56. Similarly, concerning M [redacted] A [redacted] the reasoning reads that *"his membership in this terrorist organization is also proven by the fact that he took part himself in the mid-June 2012 as well as in the mid-May 2012 expeditions during which he was photographed while wielding war weapons"*<sup>25</sup> while the enacting clause implicates him in the attacks on 17 May, 28 June and 7 October 2012.
57. Further, concerning G [redacted] X [redacted], in the enacting clause it is stated that he had participated in the expedition dated 28 June 2012 while the reasoning reads that *"he also participated in the two military -style expeditions with the other "movement of freedom" members V [redacted] J [redacted], S [redacted] J [redacted], Q [redacted] R [redacted] M [redacted] A [redacted] S [redacted] S [redacted] A [redacted] Z [redacted] and G [redacted] L [redacted] on 15 May and 14/15 June 2012"*<sup>26</sup>.

<sup>20</sup> Basic Court Judgment, Page 26, English version.

<sup>21</sup> Basic Court Judgment, Page 33, English version.

<sup>22</sup> Basic Court Judgment, Page 34, English version.

<sup>23</sup> Basic Court Judgment, Page 31, English version.

<sup>24</sup> Basic Court Judgment, Page 32, English version.

<sup>25</sup> Basic Court Judgment, Page 40, English version.

<sup>26</sup> Basic Court Judgment, Page 37, English version.

58. As far as it concerns S [REDACTED] S [REDACTED] in the reasoning it is stated that "it was established that he took part not only in the expedition in May 2012, but also in another in mid-June 2012<sup>27</sup>", while the enacting clause refers to expeditions, 17 May, 28 June and 7 October 2012.
59. The Panel finds that the judgment of the court of the first instance evaluated the evidence provided by the prosecution separately from the other evidence, By doing so, it artificially selected the incriminatory evidence against the defendants, breaching the basic principles of the criminal procedure, such as the presumption of innocence and the right to fair trial. The Panel notes that the elements of the improper assessment of the evidence by the trial courts, when relating to the essential elements of the case (as is the case here –elements related to the participation of the defendants in the attacks) can lead to unfair determination of the facts in the particular case.
60. Concerning the attack that occurred on 7 October 2012, it is alleged by defendant S [REDACTED] J [REDACTED] that during this time the security measure of reporting to police station was imposed on him. The court has no evidence in the case file that the police complied with the law i.e notifying the public prosecutor or the court immediately of the breach of the security measure if it has occurred. The Police Reports about the compliance of defendants with the imposed restriction measures would at least have confirmed the defendants' version of events or provided the court with substantial information in order to undermine the credibility of their account. However, the courts have not authorized any such test.
61. The judgments do not provide sufficient explanation from which one could draw conclusion about the nexus between the defendants and their incriminatory actions. With regard to the possession of weapons as an act of terrorism, the lower courts merely make reference to the photographs in which defendants appear in uniforms, and interceptions reports which formed predominant foundation for the conviction of all defendants. However, the Panel finds that there is no sufficient clarification showing that the weapons which the defendants carry in the photographs are actually connected with the alleged terrorist group. As matter of facts, the weapons referred to by the courts as being used in the attacks were never found or seized. The only weapon, a handgun found and seized during the search on 1 June 2012, in the apartment of the J [REDACTED] brothers, was not mentioned as having been used in the attacks. Therefore, this complex of elements relating to the handling of evidence by the trial and appellate courts raise questions as to the fairness of the proceedings.

---

<sup>27</sup> Basic Court Judgment, Page 42, English version.

62. It is evident from the minutes of the main trial that the court of the first instance heard several witnesses and expert witnesses. Even though a number of witnesses testified during the trial, the judgement of the Basic Court does not provide detailed analysis on the credibility and evidentiary value of their testimonies.
63. The trial panel also heard the defendants, but the judgment does not contain any assessment of their statements, except of the defendants S [REDACTED] J [REDACTED] and E [REDACTED] M [REDACTED]. In case of the other defendants, there is neither the presentation of their testimonies, nor any explanation why the court did not accept their version of the incidents.
64. The Court of Appeals acknowledged that the judgement of the first instance court is not very detailed, and noted the presence of contradictions, discrepancies and inconsistencies in evidence produced during the trial. In particular, there were a lot of contradictions comparing the statements of the defendants obtained at the earlier stages of the criminal proceedings with the ones given at the main trial stage.
65. The Supreme Court underlines that the presence of contradictions or inconsistencies does not automatically disqualify the defendant's testimony. It must be stressed that in every instance the court needs to examine the nature of the contradiction in each testimony. In particular, it is necessary to assess whether the contradictions concern substantive or secondary factual elements, whether they are explicable or not, and whether in the light of the overall circumstances the testimony has the probative value. The proper argumentation must be presented in the written judgment, what is strictly provided in Article 370 of the CPC.
66. The court should apply particular scrutiny when the vast majority of the evidence is based on the interception, and the defendants or attribution of the commission of specific criminal activity to the defendants is based on the photographs or documentary evidence, as it is in the present case. Substantive discrepancies that occur between testimonies given during the investigative and the trial stages should not be automatically and collectively disregarded to the effect of substantially favoring the prosecution.
67. The judgment of the Basic Court does not contain proper reasoning as to the legal classification of the criminal offenses attributed to the defendants. Quotation *in extenso* of all the provisions of the Criminal Code regarding the terrorism does not fulfill the requirement to state clearly and exhaustively why the specific provisions of the criminal law were applied. Unfortunately, this

mistake has not been remedied by the Court of Appeals despite of the fact that some of defense counsels raised this argument in their appeals<sup>28</sup>.

68. The Supreme Court does not purport to exhaust all the contradictions and omissions in the judgments of the lower courts. The flaws discussed above are sufficient to call into question the lower courts' approach relating to the presentation of findings, and the assessment of the evidence which leads to lack of fairness of the trial proceedings. Consequently, the accuracy of the trial and appellate courts' findings is undermined.
69. The Panel finds appropriate to underline that its evaluation is confined whether lower courts violated the defendants' procedural rights. In other words, it is not the scope of the Supreme Court acting upon an extraordinary legal remedy to either express the opinion on the relevance of the evidence thus offered or rejected, nor more generally on the defendants' guilt or innocence.
70. Having considered the above, the Panel finds that the requests for protection of legality filed by the defense counsels of G [REDACTED] L [REDACTED], M [REDACTED] A [REDACTED], and S [REDACTED] S [REDACTED] and by the defendant V [REDACTED] based on the grounds of the violation of the criminal procedure code, specifically Article 384 (1.12) of the CPC in connection with Article 370 of the CPC are grounded. In the opinion of the Panel the gravity of violations does not allow to modify the judgments, and the case must be sent back for retrial to the Basic Court.

#### *Improper composition of the Court of Appeals*

71. This argument, raised by the accused S [REDACTED] J [REDACTED] shall be treated as the one based on Article 384 (1.1) of the CPC, and as such can constitute as a ground to file the request for protection of legality against the judgment (Article 432 (1.2) of the CPC). The Panel finds it ungrounded, as the panel of the Court of Appeals was composed in accordance with the *Law on Courts* and the *Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law no 03/L-053)* as amended by the Law no. 04/L-273. The interpretation of these provisions has been thoroughly elaborated in the part referring to the composition of this Panel, therefore it is not necessary to explain it again.

#### *Other violations of the provisions of criminal procedure*

<sup>28</sup> Most appeals against the first instance court judgment argue violation of the criminal code provisions as a result of alleged violation of the provisions of the Criminal Procedure Code. Specifically, the appeals claim that the enacting clause of the challenged judgment does not contain essential elements of the crimes for which the defendants were found guilty. Three defence counsels (S [REDACTED] P [REDACTED] in his appeal filed on behalf of the defendant G [REDACTED]; counsels G [REDACTED] E [REDACTED] and R [REDACTED] G [REDACTED] in their appeal filed on behalf of the defendant Q [REDACTED] and counsel [REDACTED] in his appeal filed on behalf of the defendant S [REDACTED] S [REDACTED] had argued explicitly violation of Article 113 (3) of the CCRK, respectively Article 143 (2) of the CCK

*Articles 314 (1.2) and 369 (1) of the CPC*

72. Defendant S [REDACTED] J [REDACTED] raised the objection that the trial lasted longer than 120 days in violation of Article 314 (2) of the CPC. Further, he and the defense of M [REDACTED] A [REDACTED] argued that the provision of Article 369 (1) of the CPC was violated by the Basic Court as the judgment was issued 75 days after the deadline, and this argument was not assessed by the Court of Appeals.

73. The Panel agrees that the raised violations occurred. Nevertheless, the deadlines for conclusion of the main trial and for the delivery of the written judgment do not fall within the category of the strictly prescribed period of time. Both deadlines have only an instructive character as the law does not provide any consequences if they are not respected. Therefore, this procedural violation did not affect the lawfulness of the judicial decisions in this case (Article 432 (1.3) of the CPC).

*Principle ne bis in idem*

68. Defendant S [REDACTED] J [REDACTED] raised the argument that the principle *ne bis in idem* was violated as he was charged with the same criminal offence for which he was prosecuted by the authorities of Serbia.

69. The principle of *ne bis in idem* is regulated in Article 4 of the CPC:

*No one can be prosecuted and punished for a criminal offence, if he or she has been acquitted or convicted of it by a final decision of a court, if criminal proceedings against him or her were terminated by a final decision of a court or if the indictment against him or her was dismissed by a final decision of a court.*

70. The Panel finds that the allegation raised by defendant S [REDACTED] J [REDACTED] that the principle of *ne bis in idem* was violated is ungrounded as there is no final judgment against him for the charges being the subject matter of the case.

*Articles 222, 384 (2) of the CPC, and Article 6 of the European Convention on Protection of Human Rights and Fundamental Freedoms*

71. The Defense of S [REDACTED] S [REDACTED] did not justify in what way these alleged violations of the criminal procedure could have affected the judicial decision. Therefore, the Panel did not find necessary to consider these grounds as the request for protection of legality cannot be based on them (Article 432 (1.3) of the CPC).

*Violation of the criminal law*



*Article 113 CCK/143 CCRK*

72. All defense counsels who filed the requests for protection of legality indicated that the Court of Appeals and the Basic Court violated the criminal law. The defense of S [REDACTED] S [REDACTED] and M [REDACTED] A [REDACTED] argued that there was the violation of Articles 113 of the CCK/143 CCRK because the courts wrongly accepted that the participation in the terrorist organization can be committed passively, without any activity while the provision in question strictly provides that "active participation" is a crucial element of this criminal offence. The Defense of G [REDACTED] L [REDACTED] specified that Article 31 of the CCK was violated as the courts failed to consider its definition properly.
73. The participation in a terrorist group is penalized by Article 143 (2) of the CCRK, and was penalized in Article 113 (3) of the CCK. The definitions provided in both codes are slightly different as the present Code reads:
- "Whoever participates in the activities of a terrorist group (...)"*
- while the previous Code provided:
- "Whoever actively participates in a terrorist group (...)"*.
74. The Panel finds necessary to remind that the definition of the criminal offence shall be strictly construed and the interpretation by analogy is not permitted. This is one of the basic principles of the criminal law, expressed in a well-known expression "*nullum crimen sine lege*". Such approach is supported by the extensive jurisprudence of the European Court of Human Rights on Article 7 of the European Convention on Protection of Human Rights and Fundamental Freedoms which sets the principle that only the law can define a crime and prescribe a penalty. It follows that offences and the relevant penalties must be clearly defined by law.
75. To respect the principle of legality, the scope of the crime and the applicable punishment must be set out in clear terms before its commission. Given the function of the criminal law in the society, it is also an essential requirement of substantial fairness that individuals know beforehand whether their acts are liable to punishment. The principle of legality is thus an important factor of legitimacy of any system of the criminal law. Although the need for criminal provisions to be unambiguous is not expressed in the international conventions directly, the requirement of certainty is generally considered to be a natural component of the principle of legality. The requirement of certainty derives from the origins of the criminal provisions. It postulates that the criminal conduct has to be defined in such a manner that the individual, if need be with the

assistance of pre-existing judicial interpretations of the law and/or the aid of legal counseling, and taking into account possible specific qualifications of the typical addressee, could see from the wording of the definition of the criminal conduct what acts or omissions are prohibited.

76. The starting point for the interpretation of any legal provision is a linguistic approach. Anyone who wants to determine the elements the criminal offence, must begin from the verbal understanding of the legal norm. There is also a presumption that the legislator is rational, and as such does not use any words superfluously. Each expression must have its own meaning.
77. In the opinion of the Panel there is a significant difference between "active participation" and mere "participation", as well as between the notions of "participates in the activities of a terrorist group" and "participates in a terrorist group". The terms "active participation" and "participates in the activities of a terrorist group" indicate higher level of participation. It means that it is required to prove some specific actions, personal engagement in the execution of the criminal offense. Overall, it is necessary to show a particular action in the activity of a terrorist group. It is not enough just to demonstrate the will of participation, or simple aid and support which could be sufficient to define the term of "participation".
78. Such differentiation between *participation* and *active participation* is visible also in the international law. As an example, according to Article 5 of *United Nations Convention against Transnational Organized Crime in Palermo*<sup>29</sup>:

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:*

*(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;*

*(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:*

---

<sup>29</sup> <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>



*a. Criminal activities of the organized criminal group;*

*b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;*

The other example of the double model of responsibility is contained also in the EU legislation, *i.e.* in the *Council Framework Decision on the Fight against Organised Crime* which refers to criminalization of the participation in a criminal organization. According to Article 2:

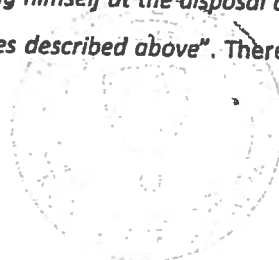
*Each Member State shall take the necessary measures to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences:*

*a. conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation's criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organisation's criminal activities;*

*b. conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity.*

79. If a defendant does not participate in the activities of a terrorist group (Article 143 (3) of the CCK), or does not actively participate in a terrorist group (Article 113 (3) of the CCRK), such person cannot commit a criminal offence as prescribed in the relevant provisions of both codes. Nevertheless, it is necessary to consider if a specific behavior of the defendant may constitute a criminal offence under another provision of the criminal law as the court is not bound by the motions of the prosecutor regarding the legal classification of certain act (Article 360 of the CPC).

80. As mentioned above, the judgments of both instances are not clear in regard to the way how defendants G [REDACTED] L [REDACTED] Q [REDACTED] R [REDACTED] M [REDACTED] A [REDACTED] and S [REDACTED] S [REDACTED] participated in the terrorist organization. The enacting clause of the Basic Court's judgment, affirmed by the Court of Appeals, indicates that each of them "was putting himself at the disposal of the terrorist group for its activities, and by committing criminal offences described above". Therefore, it is not



clear if the defendants actively participated in the terrorist group/participated in a terrorist group, or they only "offered to participate" in it, whatever it means in the specific case.

81. The Panel finds that the term "putting at disposal" does not equal to the term "active participation" or "to participate in the activities." Depending on the specific factual circumstances, it is necessary to consider if any other legal provision could be used for classification of such behavior.
82. Without any prejudice to the outcome of the retrial in this case, the Supreme Court notes that "putting at disposal of the terrorist group" may constitute a criminal offence provided in Article 144 (1) of the CCK which penalizes the preparation for the commission of criminal offenses under Articles 135 – 142 of the CCK. For the purpose of this Article "preparation of criminal offense" includes supplying or making available for the perpetrators the means to commit a criminal offense, removing the impediments to the commission of a criminal offense, agreeing, planning or organizing with other persons the commission of a criminal offense, any other activities that create conditions for the direct committal of a criminal offense, but which do not constitute the act itself (Article 144 (2) of the CCK). The punishment that can be imposed is imprisonment from 1 to 5 years.
83. These activities, which now shall be classified under Article 144 (1) of the CCK, constituted a criminal offence also according to the previous criminal law. Under that law, they could have been classified as providing support to a terrorist group, according to Article 113 (2) of the CCRK what was punishable by imprisonment of three to ten years.
84. Having considered the above, the Panel finds that the requests for the request of protection of legality filed by the defense of S [REDACTED] S [REDACTED] and M [REDACTED] A [REDACTED] on the base of violation of the criminal law, specifically Article 113 of the CCK are grounded.

*Article 31 of the CCRK*

85. The defense of G [REDACTED] L [REDACTED] based the request for protection of legality also on the alleged violation of Article 31 of the CCRK. The Defense failed to explain how this provision was breached by the courts, as in fact the submission in this regard concentrated on convincing the Supreme Court that there are the factual findings were erroneous. Therefore, the Panel finds this allegation ungrounded.

*The Law on Amnesty*



86. The alleged violation of the *Law on Amnesty* raised by the Defense of S [REDACTED] S [REDACTED] has been already found as ungrounded by the Court of Appeals. The Panel fully agrees with the legal interpretation of this law presented by the Court of Appeals<sup>30</sup>, so there is no need to repeat it. Therefore, this allegation is rejected as ungrounded.

*Articles 135 (1.10) and 136 of the CCRK*

87. The Defense of S [REDACTED] S [REDACTED] did not support the allegation related to the violation of Articles 135 (1.10) and 136 of the CCRK, as he mainly contested the factual findings made by the courts of lower instance. Therefore, there are no grounds to accept this allegation.

*Beneficium cohaesionis*

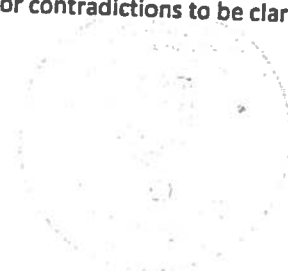
88. The Panel finds that the reasons for deciding in favor of the accused M [REDACTED] A [REDACTED] S [REDACTED] S [REDACTED] G [REDACTED] L [REDACTED] and S [REDACTED] J [REDACTED] also exist in respect to other co-accused who did not file the request for protection of legality (Q [REDACTED] R [REDACTED], E [REDACTED] M [REDACTED] and A [REDACTED] Z [REDACTED]), or was filed but was not granted (V [REDACTED] J [REDACTED] G [REDACTED] X [REDACTED]). Therefore, acting upon Article 436 (2) of the CPC, the Panel decided to proceed *ex officio* as if such requests had also been filed, and annulled the judgments of both instances also in reference to the accused V [REDACTED] J [REDACTED] G [REDACTED] X [REDACTED] Q [REDACTED] R [REDACTED] E [REDACTED] M [REDACTED] and A [REDACTED] Z [REDACTED].

*Guidance for the re-trial*

89. The Basic Court shall conduct the main trial from the beginning, where the evidence shall be presented in a way as provided in the *Criminal Procedure Code* to avoid any violations and shortcomings which were observed by the Panel in the previous proceedings.

90. The Panel finds necessary to underline that one of the elements of the principles of the fair trial and right to defense is the right to be heard, which derives from proper examination of the statements during the main trial. In this context, the Panel observed that the examination of the statements of the defendants was not conducted in accordance to Article 346 of the CPC which provides that the testimony of the defendant, if he decides to declare, shall be taken in a proper order, i.e. the leading counsel starts direct examination, then the prosecutor cross - examines him, and at the end the defense counsel may conduct redirect examination. Only after completion of these stages, there is time for a single trial judge or presiding judge to continue with examination, if there are still some gaps, ambiguities or contradictions to be clarified.

<sup>30</sup> Judgment of the Court of Appeals, P. 35 - 37, English version



91. The minutes of the main trial clearly show that the Basic Court failed to respect the prescribed way of conducting the examination, surprisingly without a proper reaction of the defense, not only by violating the order of questioning the defendants, but also by limiting the examination to the confirmation of statements given during the investigation. Most of the defendants did not remember their content, therefore they were given the minutes to read, and then asked if they sustained their previous testimonies. In this way, this evidence was not collected in accordance to the provisions of the Criminal Procedure Code, and the defendants were deprived of the possibility to be heard properly.
92. One of the core principles of criminal law is that the defendant would know clearly for which acts he or she is found guilty. For this reason, the court has an obligation to examine the elements of crimes and the facts established during the trial in a great detail, and to ensure that established facts prove each element of crime. The importance of the establishment of facts in particular case cannot be regarded separately from the elements of crimes which the defendant allegedly committed. It is absolutely necessary to establish both - each element of crime and the factual circumstances of the case.
93. Elements of the crime are set forth in criminal statutes, or cases in jurisdictions that allow for common-law crimes. With exceptions, every crime has at least three elements: a criminal act, also called *actus reus*; a criminal intent, also called *mens rea*; and concurrence of the two. First, the material (or objective) elements should be established – what type of criminal activity was committed and what elements are collected in the case to show that each material element of a particular crime exist. Further, a person may be found criminally responsible and liable for punishment for a crime within a jurisdiction of certain court only if material elements of the crime are committed with intent and knowledge (subjective element). Existence of intent and knowledge can be inferred from relevant facts and circumstances.
94. Having established facts in connection to each element of crime, the court shall establish that no other logical explanation can be derived from the facts except that the defendant committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty. As such, the court needs to ensure that in the reasoning of the judgement it is clearly and explicitly explained that there is enough evidence to prove beyond reasonable doubt the existence of each element of crime as it is established in the Criminal Code.
95. After the completion of the main trial, the court shall issue the judgment which must meet all the requirements prescribed in the law. The enacting clause must be clear, specific and concrete. In

case if the court finds the defendants guilty, the judgment must contain all the decisive facts and circumstances that constitute the elements of the criminal offences and that confirm that a person committed the referenced criminal offence. In the written judgment, the court shall state clearly and exhaustively which facts it considered proven or not proven, as well as the grounds for this. The court shall, in particular, make the evaluation of the credibility of conflicting evidence, the grounds for not approving individuals motions of the parties, and the reasons by which the court was guided in settling points of law and, in particular, in establishing the existence of a criminal offence and the criminal liability of the accused and his or her act.

96. The parties are entitled to present new facts and evidence.

97. In rendering the new decision, the court shall be bound by the prohibition under Article 395 of the CPC.

***Decision regarding termination of punishment***

98. Taking into account that the Judgments rendered in the first and second instance courts have been quashed, the panel considers that the defendants' serving of sentence must be immediately terminated pursuant to Article 435 paragraph 4 of the CPC. However, the defendants are to stay in detention on remand until a decision on measures to ensure their presence is made by the Basic Court of Gjilan/Gnjilane. It is in the discretion of the Basic Court of Gjilan/Gnjilane to make an evaluation which for the list of security measures provided for by the procedure code suffices for ensuring the presence of the defendants in the proceedings. The decision must however be made by the Basic Court as soon as possible.

**CONCLUSION**

Having considered the above, the Supreme Court of Kosovo decided as in the enacting clause of this Judgment.

**THE SUPREME COURT OF KOSOVO  
PRISHTINË/PRIŠTINA**

**PML-241/15**



*[Handwritten Signature]*

**Presiding Judge**

**Anna Adamska - Gallant**

**EULEX Judge**

*[Handwritten Signature]*

**Krassimir Mazgalov**

**EULEX Judge**



**Recording Officer**

**Adnan Isufi**

**EULEX Legal Advisor**

**Nesrin Lushta**

**Supreme Court Judge**