COURT OF APPEALS

Case number: PAKR 145/2014

(Pkr no. 53/2013 BC Gjilan)

Judgment of the Court of Appeals of Kosovo, in a panel composed of EULEX Judge Elka Filcheva-Ermenkova, presiding and reporting, EULEX Judge Willem Brouwer and Court of Appeals Judge Fllanza Kadiu, as members of the panel, with the assistance of the EULEX legal advisor Vjollca Kroci-Gerxhaliu, acting as recording officer and in open sessions on 17 April 2015 and 15 May 2015;

Defendants:

1. **V.J.**, father's name xxx, male, born on xxx, born in xxx, Municipality of xxx, last address xxx;
2. **S.J.**, father's name xxx male, born on xxx in xxx, street xxx;
3. **G. L.**, father's name xxx, male, born on xxx, Municipality xxx. Last address: xxx
4. **G. Xh.**, father's name xxx, male, born on xxx in xxx
5. **Q. R.**, father's name xxx male, born on xxx, residing and last address: xxx, Municipality of xxx;
6. **M. A.**, father's name xxx, male, born on xxx in xxx, last address xxx, Kosovo;
7. **S.S**, father's name xxx male, born on xxx in xxx, Kosovo, residing in xxx, Municipality of xxx;
8. **E.M.,** male, born on xxx in xxx, last address xxx, Municipality of xxx;
9. **A.Z.**, father's name xxx, male, born on xxx in xxx, residing and last address: xxx
10. **J. Sh.**, father's name xxx, male, born on xxx in xxx, last address: xxx

charged by the Indictment PPS no. 56/12 dated 12 February 2013 and found guilty for the following criminal offences:

1. **Commission of Terrorism** Article 109 (1.10) and Article 110 (1) of the Criminal Code of Kosovo (hereinafter: CCK) currently criminalized by Article 135 (1.10) and 136 (1) of the Criminal Code of Republic of Kosovo (hereinafter: CCRK);
2. **Organization of a terrorist group**, Article 113 (1) of the CCK currently criminalized by Article 143 (1) of the CCRK;
3. **Participation in a Terrorist Group**, contrary to Article 113 (3) of the CCK, currently criminalized by Article 143 (2) of the CCRK;
4. **Unauthorized Control and Possession of Weapons**, (Article 328 of the CCK currently criminalized by Article 374 of the CCRK;
5. **Unauthorized Supply and Sale of Weapons,** foreseen and punishable by Article 327 of the CCK, currently criminalized by article 372 of the CCRK;
6. **Use of Weapons,** foreseen and punishable by Article 375 of the CCRK;

acting upon **the following appeals filed against the Judgment of the Basic Court of Gjilan PKR no. 53/13 dated 16 October 2013:**

1. **The appeal of the defense counsel Murat Demolli on behalf of the defendant V.J. and the appeal of the defendant, both filed 4 February 2014;**
2. **The appeal of the defense counsel Ramiz Sylejmani on behalf of the defendant S.J. filed on 28 January 2014;**
3. **The appeal of the defense counsel Shemsedin Piraj on behalf of the defendant G.L. filed on 24 January 2014;**
4. **The appeal of the defense counsel Sherif Sherifi filed on behalf of the defendant G.XH. on 29 January 2014, and the appeal of the defendant filed on 6 February 2015;**
5. **The appeal of the defense counsel Gafur Elshani on behalf of the defendant Q.R. filed by mail on 29 January 2014 and stamped by the Court registry on 31 January 2014;**
6. **The appeal of the defense counsel Mustafe Musa on behalf of the defendant M. A. filed on 27 January 2014;**
7. **The appeal of the defense counsel Destan Rukiqi for the defendant S.S. filed by mail on 29 January 2014, stamped by the Court registry on 31 January 2014;**
8. **The appeal of het defense counsel Xhymshit Shymshiti for the defendant E.M. filed on behalf of the defendant on 27 January 2014;**
9. **The appeal of the defense counsel Halit Azemi for the defendant A.Z. filed on 20 January 2015;**
10. **The appeal of the defense counsel Lumnije Azemi for the defendant J.Sh. filed on 20 January 2015.**

having considered the response of the EULEX Special Prosecutor filed on 13 February 2014 to the appeals filed on behalf of the defendants and motion of the Appellate State Prosecution of Kosovo no. PPA/I-KTZH/I.nr. 156/14 filed on 27 March 2014

having deliberated and voted on 17 April 2015, 15 May 2015 **and 27 May 2015**

pursuant to Article 398 of CPCRK *renders the following*

JUDGMENT

OF THE COURT OF APPEALS

I. The appeals of the respective defense counsel of the accused V.J., S.J, G.L., G.Xh., M.A., S.S., E.M., A.Z. and J.Sh. and the appeals filed personally by the defendants V.J. and G.Xh. against the Judgment rendered by the Basic Court of Gjilan PKR no. 53/13 dated 16 October 2013, <u>are hereby rejected as unfounded</u>;

II. The appeal of the defence counsel of the accused Q. R. <u>is partially accepted</u>. The Judgment rendered by the Basic Court of Gjilan PKR no. 53/13 dated 16 October 2013, is hereby modified to be read as follows:

- **Pursuant to Article 75 (1.2) of the CCRK, the following sentence is imposed on defendant Q. R.:**
- **The punishment for the criminal offence of Commission of Terrorism as per article 136 (1) in conjunction with article 135 (1.10) of the CCRK is 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 is modified to 4 (four) years of imprisonment.

- **In the remaining part the appeal of the defence counsel of the accused Q. R. is rejected as unfounded and the Judgment rendered by the Basic Court of Gjilan PKR no. 53/13 dated 16 October 2013, is hereby affirmed in the remaining part.**

III. The Judgment rendered by the Basic Court of Gjilan PKR no. 53/13 dated 16 October 2013 in relation to the defendants V.J., S. J., G. Xh. and E.M. is hereby *ex officio* modified to be read as follows:

1. The defendant V. J. is:

FOUND GUILTY

a) **Of (Count one) Commission of Terrorism contrary to Article 136 (1) in conjunction with article 135 (1.10) of the CCRK,** because it was proven beyond reasonable doubt that:

- the defendant, 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 "Mevement for Freedom", in co-perpetration with G.Xh., G. L., S. J., 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;

b) **Of (count two) Organization of a Terrorist Group as per article 113 (1) of the CCK, because** it was proven beyond reasonable doubt that:

- the defendant 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;

c) **The Count of Unauthorized Control and Possession of Weapons**, Article 328 of the CCK currently criminalized by Article 374 of the CCRK against the defendant V. J. is Rejected according to Article 363 (1.1) of the CPCK because the prosecutor withdrew the charge.

By reason thereof, the defendant V. J. is

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 CPCK.**

2. **<u>The defendant S.J is:</u>**

FOUND GUILTY

a) **Of (Count one) Commission of Terrorism contrary to Article 136 (1) in conjunction with article 135 (1.10) of the CCRK,** because it was proven beyond reasonable doubt that:

- the defendant, 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. J., E. M., G. L., A. Z., G.Xh., S. S., M.A., Q.R. in an unspecified location, starting at the latest from April 2012 and until 16 October 2012.

b) **Of (Count two) Participation in a Terrorist group** contrary to Article 113 (3) of the CCK, because it was proven beyond reasonable doubt that:

- the defendant, in co-operation with V. J., E. M., G. L., A. Z., G.Xh., S. S., M. A. and Q. R., 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, and

c) **The Count of Unauthorized Control and Possession of Weapons**, Article 328 of the CCK (old one) currently criminalized by Article 374 of the CCRK against the defendant S. J. is Rejected according to Article 363 (1.1) of the CPCK because the prosecutor withdrew the charge.

By reason thereof, the defendant S. J. is

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.**

3. **The defendant G. Xh. is:**

FOUND GUILTY

a) **Of (Count one) Commission of Terrorism contrary to Article 136 (1) in conjunction with article 135 (1.10) of the CCRK,** because it was proven beyond reasonable doubt that:

- because it was proven beyond reasonable doubt that the defendant, 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;

b) Of (Count two) Participation in a Terrorist group contrary to Article 113 (3) of the CCK, because it was proven beyond reasonable doubt that:

- the defendant 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. Xh. is

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 CPCK.**

4. The defendant E. M. is:

FOUND GUILTY

a) Of (Count one) Commission of Terrorism contrary to Article 136 (1) in conjunction with article 135 (1.10) of the Criminal Code of the Republic of Kosovo, because it was proven beyond reasonable doubt that:

- the defendant, in co-operation 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 (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., G.Xh., S. S., M. A., and Q. R. in an unspecified location, starting at the latest April 2012 until 16 October 2012,

b) **Of (Count two) Participation in a Terrorist group** contrary to Article 113 (3) of the CCK, because it was proven beyond reasonable doubt that:

- the defendant, in co-operation with V. J., S. J., G. L., A. Z., G. Xh., S. S., M. A. and Q. R. actively participated in a terrorist group which refers to itself as "Movement of Freedom", inter alia by looking for armaments, putting himself at the disposal of the terrorist group for its activities and by committing the criminal offence described above in an unspecified location of Kosovo, starting from April 2012 until 16 October 2012;

By reason thereof, the defendant E.M. is:

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 **2 (two) years of imprisonment;**

- **Based on Article 71 (1) (2) point 2 of the CCK (old) 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 CPCK.**

IV. Judgment rendered by the Basic Court of Gjilan PKR no. 53/13 dated 16 October 2013 in relation to the defendants G. L., M. A., S. S., A. Z. and J. Sh. <u>is affirmed in its entirety</u>.

<u>REASONING</u>

1. <u>Procedural History</u>

On 20 February 2013 the Special Prosecutor of the Republic of Kosovo filed an indictment against the all defendants. The defendants were charged for the criminal offences of:

- **Commission of Terrorism** (Article 109 (1.10, Article 110 (1) of the CCK currently criminalized by Article 135 (1.10) and 136 (1) of the CC of Republic of Kosovo;
- **Organization of a terrorist group**, Article 113 (1) of the CCK currently criminalized by Article 143 (1) of the CCRK;
- **Participation in a Terrorist Group**, contrary to Article 113 (3) of the CCK, currently criminalized by Article 143 (2) of the CCRK;
- **Unauthorized Control and Possession of Weapons**, (Article 328 of the CCK (old one) currently criminalized by Article 374 of the CCRK;
- **Unauthorized Supply and Sale of Weapons,** foreseen and punishable by Article 327 of the Criminal Code of Kosovo, currently criminalized by article 372 of the CCRK;
- **Use of Weapons,** foreseen and punishable by Article 375 of the CCRK;

The initial hearing was held in accordance with the Article 245 of the Criminal Procedure Code No. 04/L-123. All defendants pleaded not guilty. The second hearing was held on 14 April 2013.

The case proceeded to a main trail. The first session of the main trail was held on 25 June 2013. 11 trial sessions were conducted as follows: 25 June 2013, 26 June 2013, 27 June 2013, 22 July 2013, 23 July 2013, 24 July 2013, 26 July 2013, 19 August 2013, 11 September 2013 and 26 September 2013.
The judgment (hereinafter: impugned judgment) was pronounced on 16 October 2013.

The appealed Judgement

The judgment (hereinafter: impugned judgment) finds the defendants guilty beyond the reasonable doubt as charged by the indictment, as follows:

a) **Defendant V. J.:**
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 defendant, 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; 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. M., by firing with different weapons, all illegally possessed and used, an undetermined number of various caliber rounds (in any case superior 100), in co-perpetration with G. Xh. and E.M.; The attack took place in Dobrosin on 28 June 2012 at around 04:00 hrs; **Organization of a terrorist group**, Article 113 (1) of the CCK (old) currently criminalized by Article 143 (1) of the CCRK because the defendant 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; **Unauthorized Control and Possession of Weapons**, (Article 328 of the CCK (old one) currently criminalized by Article 374 of the CCRK. He illegally possessed heavy weapons in the disposal of the terrorist group "Movement of Freedom" in co-perpetration with the co-defendants G. Xh., G. L., S. J., A. Z., E. M., S. S., M. A., Q. R;

b) **Defendant S. J.**

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 defendant, 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, 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, in co-perpetration with E.M. and with an unidentified number of additional perpetrators. The attack took place in Dobrosin (Gjilan Municipality)[1] on 7 October 2012 around 21:35 hrs and because he illegally possesses 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., E. M., G. L., A.Z., G. Xh., S. S., M. A., Q.R. in an unspecified location, starting at the latest from April 2012 and until 16 October 2012. **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. J., E. M., G. L., A. Z, G. Xh, S.S, M.A. and Q. R, 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 and **Unauthorized Control and Possession of Weapons,** foreseen and punishable by Article 328 of the CCK, currently criminalized by Article 374 of the CCRK;

c) **Defendant G. L.**

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 defendant, 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, 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, A Z, Q. R, G Xh, M. A, E.

M., S.S., in an unspecified location, starting from April 2012 until 13 February 2013; **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.J., S. J., A. Z., Q. R., G. X., M. A., E.M., and S.S., 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 7 October 2012 by putting himself at the disposal of the terrorist group for its activities and by committing the criminal offences described above in an unspecified location, starting at the latest from April 2012 and until 13 February 2013.

d) **Defendant G.Xh.**

Commission of Terrorism, contrary to Article 109 (1.10), Article 110 (1) of the CCK, currently criminalized by Article 135 (1.10) and 136 (1) of the CCRK, because the defendant, 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, 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.M., by firing with different weapons, all illegally possessed and used, an undetermined number of various caliber rounds (in any case superior to 100), in co-perpetration with V.J. and E.M. in Dobrosin on 28 June 2012 at around 04:00 hrs. and because 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, **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. 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;

e) **Defendant Q.R.**

Commission of Terrorism, contrary to Article 109 (1.10), Article 110 (1) of the CCK, currently criminalized by Article 135 (1.10) and 136 (1) of the CCRK, because the defendant, in co-operation 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, 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., G. Xh., M. A., E.M., S. S. in an unspecified location, starting at the latest April 2012 until 1 July 2012.

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. J., S. J., G. L., A. Z., G. Xh., M. A., E.M., S. S., actively participated in a terrorist group which refers to itself as "Movement of Freedom", which committed the attacks on Serbian Police installations on 17 May, 28 June and 7 October 2012 by putting himself at the disposal of the terrorist group for its activities and by committing the criminal offences described above in an unspecified location, starting at the latest from April 2012 until 1 July 2012, **Unauthorized Control and Possession of Weapons,** foreseen and punishable by Article 328 of the CCK, currently criminalized by Article 374 of the CCRK against the defendant Q. R. is rejected according to Article 363 (1.1) of the CPC because the prosecutor withdrew the charge;

f) Defendant M. A.:

Commission of Terrorism, contrary to Article 109 (1.10) Article 110 (1) of the CCK, currently criminalized by Article 135 (1.10) and 136 (1) of the CCRK, because the defendant, in co-operation 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, 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., G. Xh., E. M., S. S., E. M., Q. R. in an unspecified location, starting at the latest April 2012 until 1 July 2012, **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. J., S. J., G. L., A. Z., G. Xh., S. S., E. M. and Q. R. actively participated in a self- styled terrorist group known as "Movement of Freedom", which inter alia committed the attacks on Serbian Police installations on 17 May, 28 June and 7 October 2012 by putting himself at the disposal of the terrorist group for its activities and by committing the criminal offences described above in an unspecified location, starting at the latest from April 2012 until 1 July 2012;

g) Defendant S. S.

Commission of Terrorism, contrary to Article 109 (1.10) Article 110 (1) of the CCK, currently criminalized by Article 135 (1.10) and 136 (1) of the CCRK, because the defendant, in co-operation 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, 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., G. Xh., M. A., E. M. and Q. R. in an unspecified location, starting at the latest April 2012 until 16 October 2012, **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. J., S. J., G. L, A. Z., G. Xh., M. A., E. M. and Q. R. actively participated

in a self- styled terrorist group known as "Movement of Freedom", which inter alia committed the attacks on Serbian Police installations on 17 May, 28 June and 7 October 2012 by putting himself at the disposal of the terrorist group for its activities and by committing the criminal offences described above in an unspecified of Kosovo location, starting at the latest from April 2012 until 16 October 2012;

h) Defendant E.M.

Commission of Terrorism, contrary to Article 109 (1. 10) Article 110 (1) of the CCK, currently criminalized by Article 135 (1.10) and 136 (1) of the CCRK, because the defendant, in co-operation 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, 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. M., by firing with different weapons, all illegally possessed and used, an undetermined number of various caliber rounds (in any case superior to 100), in co-perpetration with V. J. and G.Xh.in Dobrosin (Gjilan/Gnjilane municipality), on 28 June 2012 at around 04:00 hrs; because he took part in an attack on the Serbian Border Police container located in Bujanovac, by firing with different weapons, all illegally possessed, an undetermined number of various caliber rounds; in co-perpetration with S. J. and with an unidentified number of additional perpetrators in Dobrosin (Gjilan/Gnjilane municipality), on 7 October 2012 at around 21:35 hrs and because 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.J., S. J., G.L., A.Z., G. Xh., S. S., M. A., and Q. R. in an unspecified location, starting at the latest April 2012 until 16 October 2012, **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.J., S. J., G. L., A. Z., G.Xh., S.S., M. A. and Q.R. actively participated in a terrorist group which refers to itself as "Movement of Freedom", inter alia by looking for armaments, putting himself at the disposal of the terrorist group for its activities and by committing the criminal offence described above in an unspecified location of Kosovo, starting from April 2012 until 16 October 2012;

i) Defendant A. Z.

Commission of Terrorism, contrary to Article 109 (1.10) Article 110 (1) of the CCK, currently criminalized by Article 135 (1.10) and 136 (1) of the CCRK, because the defendant, in co-operation 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, 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., Q. R., G. Xh., M.A., E.M. and S. S. in an unspecified location, starting at the latest April 2012 until 17 October 2012; **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-perpetration with V. J., S. J., G. L., Q. R., G.Xh., M. A., E. M., S. S., actively participated in a self- styled terrorist group which refers to itself as "Movement of Freedom", which *inter alia* committed the attack on Serbian Police installations on 17 May, 28 June and 7 October 2012 by putting himself at the disposal of the terrorist group for its activities and by committing the criminal offences described above in an unspecified location, starting at the latest from April 2012 until 17 October 2012.

j) Defendant J. Sh.

Unauthorized Supply and Sale of Weapons, foreseen and punishable by Article 327 of the Criminal Code of Kosovo, currently criminalized by article 372 of the CCRK because the defendant without authorization brokered and concluded a number of transactions for the sale of firearms of different caliber, including selling of the unspecified firearms mentioned under count 3 in an undetermined location on 7 November 2012, **Use of Weapons,** foreseen and punishable by Article 375 of the CCRK, that the defendant used and fired a weapon which he illegally possessed and **Unauthorized Control and Possession of Weapon** foreseen and punishable by Article 328 of the CCK, currently criminalized by Article 374 of the CCRK.

The defendants were sentenced as follows:

a) Defendant V. J. found guilty for the criminal offence of Commission of Terrorism and Organization of a terrorist group and sentenced 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;
b) Defendant S. J. found guilty for the criminal offence of Commission of Terrorism Participation in a Terrorist group and sentenced to an aggregate punishment of 8 years;
c) Defendant G. L. found guilty for the criminal offences of Commission of Terrorism and Participation in a Terrorist group and sentenced to an aggregate punishment of 5 years and 6 months of imprisonment;
d) Defendant G. Xh. found guilty for the criminal offence of Commission of Terrorism and Participation in a Terrorist Group and sentenced to 6 years and 6 months of imprisonment;
e) Defendant Q. R. found guilty for the criminal offence of Commission of Terrorism and Participation in a Terrorist Group and sentenced to 5 years and 6 months of imprisonment;
f) Defendant M.A. found guilty for the criminal offence of Commission of Terrorism and Participation in a Terrorist Group and sentenced to 5 years and 6 months of imprisonment;
g) Defendant S. S. found guilty for the criminal offences of Commission of Terrorism and Participation in a Terrorist Group and sentenced to 5 years and 6 months of imprisonment;
h) Defendant E. M. found guilty for the criminal offences of Commission of Terrorism and Participation in a Terrorist Group and sentenced to 6 years and 6 months of imprisonment;
i) Defendant A. Z. found guilty for the criminal offences of Commission of Terrorism and Participation in a Terrorist Group and sentenced to 5 years and 6 months of imprisonment;
j) Defendant J. Sh. found guilty for the criminal offences of Unauthorized Supply and Sale of Weapons and Use of Weapons and sentenced to 2 years and 2 months of imprisonment.

The criminal offence of Unauthorized Control and Possession of Weapons, under article 328 of the CCK currently art. 374 CCRK against the defendants V. J., S. J., Q.R. and J. Sh. were rejected as the Prosecutor withdrew these charges based on the Law on Amnesty.

In the cases of all defendants the time spend in detention is credited against the imposed punishments. The defendants were relieved of the duty to pay the costs for the criminal proceedings related to the accusations that were found grounded. The Presiding trial Judge issued a separate Ruling dated 16 October 2013 on extension of detention on remand against the defendants V. J., S. J., G. L., G. Xh. and E. M. until the Judgement becomes final; replaced the measure of house detention with the detention on remand against the defendants Q. R., M. A., S. S. and A. Z. until the Judgement becomes final; replacing the measure of detention on remand with the measure of house detention against the defendant J. Sh. until the judgment becomes final.

Based on the principle of most favorable law, Article 3 CCK, the first instance court applied the substantive law of the CCRK as follows:

a) In relation to criminal offence of Commission of Terrorism, the new criminal code was applied as more favorable to the defendants;
b) In relation to the criminal offence of Organization of a Terrorist Group, which applies exclusively to V. J., the previous criminal code was applied as more favorable to the defendant;
c) In relation to the criminal offence of Participation in a Terrorist Group, the old criminal code was applied as more favorable to the defendants;
d) In relation to the criminal offence of Unauthorized Supply and Sale of Weapons which applies exclusively to the defendant J. Sh., the old criminal code was applied as more favorable to the defendant;
e) In relation to the criminal offence of Use of Weapons which applies exclusively to the defendant J.Sh., the court of the first instance applied provisions of Article 375 of the new code;
f) In relation to the criminal offence of Unauthorized Control and Possession of Weapons the Prosecutor applied law on amnesty (Law no. 04/L-209) and dropped the following charges against the defendants: V. J., S. J., Q. R .and J. Sh..

The appealed Judgment applied the article 64 of the CCK when determined the punishment for each defendant separately considering the mitigating and aggravating circumstances.

This Judgment was thereafter appealed by the defendants to the appellate instance by the defense counsel on behalf of respective defendants. The Special Prosecutor did not file an appeal against the Judgment but filed a reply on the appeals of the defense counsel.

2. Submission of the parties

2.1 Appeals of the defendant V. J.

Two appeals were field separately: one by the defense counsel Murat Demolli on 31 January 2014 and the second one filed by defendant himself on 4 February 2014.

2.1.*1 Allegations made by the defense counsel:*

Substantial violations of the CPC, Article 384 (1) point (1.8): Defence counsel alleges that the Judgment violates the Article 384 (1) point (1.8) since it is based on inadmissible evidence. The Judgment, according to the defense counsel is comprehensive and contradictory. He challenges the grounded suspicion stating that the court established the grounded suspicion only on transcripts of the phone conversation and pictures. He challenges the legal qualification of the criminal offence.

a) **Erroneous and incomplete determination of the factual situation:** Defense states that actions undertaken by the accused as specified in the enacting clause of the judgment have not been proven by any evidence. There is a lack of evidence to establish the elements of the criminal act the defendant is found guilty. Therefore, in absence of the evidence the court has turned the factual situation in the detriment of the accused. The allegation of the Prosecutor in the count 2 of the Indictment that the defendant V.J. was Leader of the Organization of e terrorist group has not been proven during the main trial. V. J. was leader of the political entity named "Movement of Freedom" that was dealing with the resolution of the Albanian issues by political means in Preshevo, Bujanovc and Medvegje.
b) **Violation of the Criminal Law:** The defense counsel states that if the evidence of the case, the defense allegations and the testimonies of the witness' would have been elaborated in proper way, the legal qualification of the criminal act would be different from the one in the enacting clause of the appealed judgment.
c) **Decision on criminal sanction:** Defense counsel considers that the aggregate punishment of 9 years is high since the purpose of the punishment would have been achieved with more lenient measure. He submits that the court of the first instance did not consider the mitigating circumstances such are the fact that the defendant has never before violated the law, he is a master degree student and that he was correct to the court.

   He proposes to the Court of Appeals to Grant the appeal and sent the case back for retrial, or change the judgment imposing a more lenient measure.

2.1.2 *Allegations made by the defendant V.J.:*

Defendant V.J. finds the Judgment as ungrounded, undetermined, contradictory in itself and based on hypothesis and as such violates the Article 361 (1 and 2) and Article 365 (1) as well as Convention on Protection of Human Rights and Fundamental Freedoms adopted in Rome as well as Universal Declaration of Human Rights adopted in General Assembly of UN (Resolution 217). He claims that he was convicted unjustly and requires from the Court of Appeals fair application of the law. He states there is no evidence leading to the conclusion of the Judge that he was compelled by extreme ideas. He farther states that judge erroneously determined the telephone interception approaching it in non-analytical and unprofessional manner but only relaying on prosecutors opinion as described in the Indictment. The telephone conversation was friendly and there has no incriminating content. Therefore, there is a violation of Article 386 (1, 2, and 3) of CPCK.

2.2 Appeal of the defense counsel on behalf of the defendant S. J.

Allegations:

a) **Substantial violations of the CPC, Article 384 (1) point (1.8) – The judgment is based on inadmissible evidence:** Defense counsel alleges that there was no concrete evidence to prove that the other defendants had attacked the border checkpoints in Kosovo-Serbian border, somewhere close to Dobrosin village. There is no evidence the defendant has damaged the premises at the border. It was never proven that the defendants possessed the certain weapons; the court only assumed that the same have possessed weapons.

b) **Erroneous and incomplete determination of factual state:** Defense counsel argues that the group "Freedom of Movement" was not terrorist group as alleged by the court. The defendant has completely denied his violent commitment to solve the issue of Albanians of Presheva valley. The charges are based only on allegations without demonstration of concrete evidence on the case. He proposes to the CoA to dismiss the appealed Judgment in its entirety, or to return the case for re-trial.

2.3 Appeal of the defense counsel on behalf of the defendant G.L.

Allegations:

a) **Substantial violations of the CPC, Article 384 (1) point (1.12) – The Judgment was not drawn up in accordance with Article 370 of the CPC:** Defense counsel argues that the enacting clause of the Judgment is in contradiction with its reasoning. The enacting clause doesn't contain the incriminatory actions in relation to the accused G.L.. The legal facts have different content from the one stated in the enacting clause.

b) **Violation of criminal law from Article 385 (1) 1.4) of the CPC:** The defense counsel states that the absolute violation of the criminal law occurred to the detriment of the accused as the term terrorism hasn't been elaborated in a broader manner. According to the defense counsel, the court did not refer to Article 31 of the CC when stated that the defendant has committed the criminal act in co-perpetration with other accomplices in a terrorist group. By not applying this Article, the first instance court has violated the provisions of the CC.

c) **Erroneous and incomplete determination of factual state:** Defense counsel argues that the court has to determine the decisive facts in order to completely reveal the relevant legal facts. The statements of the witnesses' do not provide the incriminatory actions of the defendant G.L.. He denies involvement of G. L. in the Dobrosin actions. The defendant himself denied his involvement and court was supposed to confirm that fact. The defense counsel states that by imposing more lenient sentence, the purpose of the punishment will be achieved.

2.4 Appeal of the defense counsel on behalf of the defendant G. Xh.

Two appeals were filed separately by the defense counsel Sherif Sherifi on 29.01.2014 and the second one filed by defendant himself on 6.02.2014.

2.4.1 *Allegations made by the defense counsel*:

a) Substantial violations of the CPC,
b) Violation of the Criminal Code,
c) Erroneous and incomplete determination of factual state and
d) Decision on Punishment

He submits that the court did not introduce the facts clearly and did not asses the accuracy of the contradictory evidence. He further submits that the reasoning of the Judgments, in relation to this defendant, was based only on Police report regarding the covert measures/interception of the telecommunication which does not provide the reasonable doubt that the defendant has committed the criminal acts he was sentence for. The defendant has not confessed having committed the criminal acts. In relation to the punishment, defense counsel states that even if the criminal liability of the defendant would be proved, the sentence is too high. He proposes to the CoA to approve his appeal as grounded and amend the impugned Judgment in the way to find the defendant not guilty or to annul the challenged Judgment and return the case on retrial and consideration.

2.4.2 ***Allegations made by the defendant G. Xh.:***

Defendant G.Xh. in his appeals alleges that there is a violation on the proceedings. He was not able to elaborate the intercepted telephone calls between him and others that the Court considers relevant. He further alleges that the reasoning of the Judgment is a copy/paste of the indictment. He states that he hopes the Judgment won't become final by the CoA.

2.5 Appeal of the defense counsel on behalf of the defendant Q. R.:

Allegations:

a) Substantial violations of the CPC: Defense Counsel alleges that the elements of the criminal offences are missing in the Judgment. The first instance court has essentially changed the factual state of evidence in the detriment of the defendant. Enacting clause is not clear and not understandable, it is rather confusing. Firstly definition of the criminal offence of Terrorism cannot be defined as actions of the accused. Referring to the photos where the defendant is seen with Kalashnikov and the internet talk, the Court has found it as of specific importance. The actions undertaken by the defendant did not produce consequences of a terrorist as defined by law. The reasoning in the Judgment is in direct contradiction with the evidence confirmed in a main trial. This makes the impugned Judgment unsustainable and should be quashed.

b) Violation of the Criminal Law: The impugned Judgment is not supported in evidence. Defense states that in the present case, in no way criminal offences of commission of the terrorism and participation in a terrorist group can be talked. According to the opinion of the defense in the main trial was not presented and confirmed any action the defendant that would justify the existence of the criminal offences he is sentenced. Therefore the defendant should have been acquitted from the charges in the Indictment.

c) Erroneous and incomplete determination of the factual situation: Defense counsel alleges that factual situation of this case is not properly ascertained. Judgment was based

only on prejudices. The intercepted phone conversation by defendant Q. shows that he had not taken part in any action that would be qualified as terrorist action. From the conversation between Q. and V. court finds that V. was offended that he did not take part in the action. The Basic Court considered this as incriminating evidence instead of using it as a mitigating circumstance.

d) Decision on criminal sanction: Defense states that the Court of the Basic Court of Gjilan did not consider the mitigation circumstance of the young age of the defendant, the fact that he was not convicted before; he is e student of medicine. Therefore the court if decides to support the findings of the Basic Court, then to impose more lenient sentence.
He proposes to the CoA to approve the Appeal, amend the impugned Judgment and acquit the defendant Q. R. from the charges.

2.6 Appeal of the defense counsel on behalf of the defendant M. A.

Allegations:

a) Essential violation of the CPCRK: The essential violation of the CPCRK constitutes on the fact that that the enacting clause of the impugned Judgment is in contradiction with its reasoning. The Judgment was not drafted within a time limit as provided in Article 369 (1) of CPCRK, but the Judgment was served after 90 days.

b) Erroneous and incomplete determination of the factual situation: He alleges that the intercepted phone conversations were not properly assessed. He further argues that during the investigation and at the main trial, the culpability of the accused is not established for the criminal offences he is charged by the indictment. The claims that the defendants by their action forced Albanian members of the Serbian police to leave their work, was never established. None of them left the work as a result of the actions taken by the defendant. The phone interceptions do not show the preparation for any armed attack. Statements of the witnesses are irrelevant as none of them describe incriminating actions of the defendant. He further states that the substantive law was erroneously applied. The definition of the terrorism contains the intimidation of a population.

c) Decision on punishment is severe. Defense submits that Court should have taken into consideration other mitigating circumstances as well, i.e. he is decent and family man, father of two juvenile children. Therefore by imposing even less severe sentence, the purpose of the punishment will be achieved.

2.7 Appeal of the defense counsel on behalf of the defendant S. S.

Allegations:

a) Substantial violations of the CPC, Article 384 CPC: Defense counsel states that the impugned Judgment is unlawful, legally ungrounded due to the Substantial violations of the Article 384 (1) 1.12 and para. (2) of the CPC. The Judgment is not compiled according to the Article 370 (7) of the CPC. The court has not determined the accuracy of the

contradictory evidence. The facts are found only in three pictures of a defendant with a weapon in an unspecified place. The possession and control of unspecified number of weapon has not been proven. Neither the "participation in a terrorist group" from Article 113 (3) of the CCK was gone beyond reasonable doubt. The "active participation" was established as the elements of criminal offence require active participation in a terrorist group. The intent (dolus) was not found in cumulative manner. This makes the impugned Judgment deficient.

The Impugned Judgment is in violation of Article 384 (1)1.12) in conjunction with Article 370 (7) and 384 (2) of the CPC since it does not contain the reasons of rejection of defense's motion regarding the expertise of pictures by an independent expert.

b) **Erroneous and incomplete determination of the factual situation, Article 386 CPC:** Defense argues that the Court of the first instance did not correctly determine the factual situation in relation to the criminal acts. The defense has disputed the authenticity of the pictures. The telephone conversation is not properly evaluated. The Court's conclusion that the defendant is active member of the group is wrong. During the main trial among others, V. J. states that does not remember where and when the photo was taken with S. S. The defendant S. J. states during the pre-trial procedure that he did not know S.S. He knows him only since the Indictment was field. He is not the member of the Movement of freedom. Defense counsel further refers to the statement of M. A. and S. S. himself stating that the Judgment relies on the factual situation confirmed contrary to Article 386 of CPC therefore needs to be annulled.

c) **Violation of the Criminal Law** to the detriment of the defendant, Article 385 of CCK: In relation to the criminal offence of Commission of Terrorism, defense counsel states that elements of this criminal offence i.e. "keeping in possession and in control illegally of undefined number of weapons…" are under the Law on Amnesty, thus the defendant must be acquitted. He further states that it is unacceptable that the criminal act of Commission of Terrorism is based only on three photos with arms at hands in unidentified time and place. The evidence in the main trial did not show the active participation of the defendant in any terrorist group.

d) Decision on the sanction, Article 387 of CCK: Defense counsel submits that any sanction imposed on defendant S. S. in unlawful since in his actions there are no elements of the criminal offence the court found him guilty for. When imposed the sentence, the first instance Court has violated the Article 73 of CC as the court established the aggravating circumstance on the determination in achieving goals, failure to respect the rule of law in the sense that was ready to destroy or destabilize fragile political structure of Kosovo. Defense counsel proposes to the CoA to approve his appeal.

2.8. <u>Appeal of the defense counsel on behalf of the defendant E.M.</u>

<u>Allegations:</u>

a) Substantial violations of the CPC, Article 384 (1) 1.8): Defense counsel states that Indictment failed to establish facts and the court permitted the violation by elaborating facts

that were not confirmed during the sessions. The Prosecution has failed to provide the facts as required by law in relation to the defendant.

b) **Erroneous and incomplete determination of the factual situation, Article 386 (1.2.3) of CPC:** In the main trial, the Prosecutor failed to confirm any evidence in relation to the criminal acts the defendant is found guilty. The prosecutor failed to provide facts in relation to the criminal offence of commission of terrorist acts in co-perpetration in a group as the existence of the group in question was not confirmed because defendants had no other relation other than university friendship. Only G. Xh. was his relative. The picture of E. M. was taken randomly while he accompanied S.J. to Presheva. The pictures and telephone interceptions are not sufficient to find E. M. guilty for the terrorist act as they don't go beyond reasonable doubt for the commission of these criminal acts. In relation to the definition of the terrorism, defense counsel submits that the group and E. M. did not represent danger to the state, namely Republic of Serbia. The criminal liability in relation to the defendant is not established.

c) **Decision on criminal sanction, Article 386 (1) CCRK:** Defense counsel submits that the decision on criminal sanction was not applied (defense counsel refers wrongly to Article 386 and 387 of the CCRK). The Court based its decision on the intercepted phone calls, photos, various cartridges and the statement of injured party/police. This evidence was not confirmed in any of the sessions therefore the criminal sanction has no legal base in relation to the defendant E.M.. Criminal sanction is unsustainable and unfair. He proposes to the CoA to grant the appeal, to terminate the impugned Judgment and to return the case to the first instance court for re-trial.

2.9. Appeal of the defense counsel on behalf of the defendant A. Z.

Allegations:

a) **Substantial violations of the CPC**;
b) **Erroneous and incomplete determination of the factual situation;**
c) **Violation of the Criminal Law; and**
d) **Decision on criminal sanction**

Defense counsel submits that the Judgment is based on unacceptable evidence, namely on the evidence of others and used against the defendant A. Z.. With no evidence is proved that the defendant has committed the criminal offences he is found guilty for. Neither the Indictment nor the Judgment constitutes the criminal actions undertaken by the defendant. A. Z. does not know other defendants unless V. J. whom he know from the university. He and V. J. talked only in relation to the exams. This can be confirmed from the phone call dated 17. 06. 22012. A computer of his brother was confiscated. Nothing was found to incriminate him. The defendant didn't even know that terrorist group of freedom of Movement exists. The terrorist group cannot exist as they don't know each other. Abdullah never met other co-defendants until he met them in the trial session.

In relation to the criminal act of terrorism, the defense counsel explains the meaning of terrorism by stating that the terrorism understands the violence, conducting the attacks, imposing of explosive

and fire, various chemical and biological poisons which present the criminal offence with the extraordinary consequences for life and health of people for the serious intimidation of the civilian people.

He further states that there is no any concrete fact to conclude that the accused participated or assisted. The Indictment wrongly mentioned that the defendant have possessed various types of weapons while one the other side nothing was found.

The sentence is ungrounded therefore he proposes to the CoA to annul the first instance Judgment and return the case for retrial or amend the Judgment in the absence of evidence and acquit the defendant A.Z. for the charges.

2.10. Appeal of the defense counsel on behalf of the defendant J.Sh.

Allegations:

a) **Substantial violations of the CPC,**
b) **Substantial violations of the CPC**;
c) **Erroneous and incomplete determination of the factual situation;**
d) **Violation of the Criminal Law and**
e) **Decision on criminal sanction**

Substantial violation of the CPC constitute on the fact that there is no grounded and relevant evidence but only ordinary conversation of the accused.

She further states that, quotation: "Taking into consideration that the accused is charged and being tried for the period of May, June 2012, whereas he is accused and being tried with legal provisions of the Criminal Law which entered into force on 1st January 2013, so the new law does act retroactively, because every law is effective after entering into force. But in the concrete case there are applied the legal provisions of the Criminal Law which entered into force on 6th April 20014, which does not foresee the legal provision of using of weapon. Therefore, the provisions of the new law cannot be applied; they can be applied only after the law enters into force, and not for the previous periods."
She further refers to the Law on Amnesty stating that this law clearly emphases the illegal possession of fire arms, pursuant to Article 3 point 1.2.5 refereeing to the persons to whom the amnesty is granted. Therefore, defendant J. Shabani should be acquitted of all charges. One person cannot be charged for all the offences in that chapter. Therefore she considers the Judgment random, abstract and unfounded because there are no description of concrete actions it is rather based on undetermined weapons, undetermined places, the selling of undetermined weapons, the undetermined control and possession of the undetermined use of weapon.

In relation to the phone conversation, the defense counsel states that were random, abstract and unrealized. She further states that it should be considered the fact that any fire arm was not found except some 20 bullets unused and rust that remained from the time of war whereas the defendant is sentenced from the chapter in relation to weapons.

Defense counsel proposes to the CoA to annul the impugned Judgment and returns the case to the Basic Court of Gjilan for re-trial, or amend it in the way that accused is acquitted of the charges, or less serious measure to be imposed on him.

3. Findings of the court of appeals

3.1 Preliminary procedural issues

The Panel of the Court of Appeals held a session in the case on 17 April 2015 and 15 May 2015; and held deliberation on 17 April 2015 and 15 May 2015. At the deliberation session on 17 April 2015, the panel decided in relation to the service of the sentence of the defendant J. Sh. as pronounced by the appealed judgment and rendered the separate Ruling.

3.2 Court Competency and the Composition of the Panel

The Court of Appeals is the competent court to adjudicate upon the appeals filed by the Parties against first instance court judgments, pursuant to Articles 17 and 18 of the Law on Courts (Law No. 03/L-199).

The Panel of the Court of Appeals is constituted in accordance with Article 19 (1) of the Law on Courts 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, and clarified through the Agreement between the Head of Eulex Kosovo and the Kosovo Judicial Council dated 18 June 2014.

The amending Law no. 04/L-273 (also known to the public as the Eulex Omnibus Law) in Article 1.A defines what cases constitute ongoing cases which fall within Eulex jurisdiction. The present case clearly constitutes an on-going case pursuant to Article 1A (1) of the said law. The investigation in the case was initiated in 2012, the first instance judgment issued in September 2013 and the case has been pending before the Court of Appeals since January 2014.

Having affirmed EULEX jurisdiction over the case, the next issue that arises is the panel composition of an ongoing EULEX case.

Pursuant to Article 3.3 of the Law no. 04/L-273 the panels of cases under EULEX jurisdiction should be composed of majority of Kosovo judges unless the Kosovo Judicial Council (KJC) decides that the panel should be composed with the majority of EULEX Judges.
This provision and the requirement for a decision from the KJC gave rise to Section 2 of the Agreement between EULEX and the Kosovo Judicial Council of 18 June 2014. The KJC through this Agreement decided that in all ongoing cases the trial panels will consist of majority of EULEX judges and “will continue with a majority of EULEX judges on the panel for the continuation of all phases of the trial and the remainder of the proceedings.” The term “remainder of the proceedings” must be read as a clear reference to the

proceedings with legal remedies. The provision therefore extends also to the appellate proceedings in such ongoing cases.

Pursuant to the above legal basis, the Appellate Panel in the case at hand is therefore correctly composed of two EULEX judges and one Kosovo CoA Judge.

In the session held on 17 of April 2015 the defendant S. J. raised an objection regarding the participation of the presiding judge Elka Filcheva-Ermenkova. He requested her exclusion from the panel claiming impartiality on the basis of her Bulgarian nationality, pretending her Bulgarian (thus Slavic) origin makes her biased towards the defendant and inferring that she will be influenced in her decision making by, in words of the defendant, "Belgrade". The defendant as well referred to an, in his own words, "well known fact" that "judges from South-Eastern Europe are corrupted".

The objection is legally qualified under art. 39.3 of the Criminal Procedure Code, which provides a ground for exclusion of a judge because of circumstances not provided for in art. 39 (1 and 2) *ibid*. Unlike the imperative of the provision of art. 40 (1) *ibid*, which explicitly and unconditionally requires the involvement of the President of the Court of Appeals in any case of a disqualification objection under any of the circumstances, enlisted in art. 39 (1 and 2) *ibid*, the hypothesis of art. 40 (2) *ibid* leaves it to the discretion of the judge, subject of the objection for exclusion, to "consider" or not whether there are circumstances which would justify disqualification. At the case at hand the judge in question and the Panel in its entirety agreed that the Bulgarian nationality of the presiding judge does not invoke the application of art. 39 (3) and art. 40 (2) *ibid* and in that respect the Panel did not discontinue the proceedings, as was the wish of the defendant.

Applicable Criminal Procedure Law

According to Article 540 of the CPCK in force since 1 January 2013, the same code is the applicable one in this case.

Admissibility of the Appeals

a) **Appeal for the defendant V. J.:** The Judgement was served to the defendant on 21. 01. 2014, to the defense counsel on Murat Demolli 17. 01. 2014. Defendant himself filed an appeal on 4.02.2014 and defense counsel Murat Demolli on behalf of the defendant on 4.02.2014. Both appeals are filed by mail as evidenced by the envelope in the case file and stamped by the Court registry with the same date.

b) **Appeal for the defendant S.J.:** The Judgement was served to the defendant on 27. 01. 2014, to the defense counsel Ramiz Sylejmani on 15. 01. 2014. The Appeal filed on behalf of the defendant on 28. 01. 2014 as stamped by the Court registry.

c) **Appeal for the defendant G. L.:** The Judgment was served to the defendant on 21. 01. 2014, to the defense counsel Shemsedin Piraj on15. 01. 2014. The Appeal filed by defense counsel on 24. 01. 2014 as stamped by the Court registry;

d) **Appeal for the defendant G. Xh.:** The Judgement was served to the defendant on 21. 01. 2014, to the defense counsel Sherif Sherifi on 15. 01. 2014.Appeal filed by the defendant is stamped with the date 06. 02. 2014 and the appeal of defense counsel on behalf of the defendant filed on 29. 01. 2014 as stamped by the Court registry;

e) **Appeal for the defendant Q. R.j:** The Judgement was served to the defendant on 15. 01. 2014, to the defense counsel Gafur Elshani on 16. 01. 2014. The Appeal filed on behalf of the defendant by mail on 29. 01. 2014 and stamped by the Court registry on 31. 01. 2014;

f) **Appeal for the defendant M. A.:** The Judgement was served to the defendant on 21. 01. 2014, to the defense counsel Mustafe Musa on 15. 01. 2015. The Appeal filed on behalf of the defendant on 27. 01. 2014 as stamped by the Court registry;

g) **Appeal for the defendant S. S.:** The Judgement was served to the defendant on 21. 01. 2014, to the defense counsel Destan Rukiqi on 15. 01. 2014. The Appeal filed on behalf of the defendant by mail on 29. 01. 2014, stamped by the Court registry on 31. 01. 2014.

h) **Appeal for the defendant E. M.:** The Judgment was served to the defendant on 24. 01. 2014, to the defense counsel Xhymshit Shymshiti on 15. 01. 2014.The Appeal filed on behalf of the defendant on 27. 01. 2014 as stamped by the Court registry;

i) **Appeal for the defendant J. Sh:** The Judgement was served to the defendant on 22. 01. 2014, to the defense counsel Lumnije Azemi on 15. 01. 2014. The Appeal filed on behalf of the defendant on 20. 01. 2014 as stamped by the Court registry;

Thus, The Panel of the Court of Appeals finds all appeals as timely filed.

Findings on the merits

All appeals allege that the impugned Judgment is incomprehensible and contradictory; the violation as per Article 383 of the CPC, namely substantial violation of the provisions of criminal procedure as per article 384 (1.8) CPC, Violation of Criminal Law article as per 385 CPC, Erroneous and incomplete determination of the factual situation article as per article 386 CPC and decision on criminal sanction as per article 387 of CPC.

The appeals were all rejected. The Court ex officio modified the appealed judgment in relation to the sentencing of the defendants V.J., S. J., G. Xh. and E. M.. The appeal of the defendant Q. R. is partially accepted in relation to the decision on punishment.

The Court of Appeals will discuss all grounds for appeal raised by the all 10 defendants and their defense councils under different headings. The appellants raise some identical challenges; therefore they will be addressed jointly. The specific allegations of different defendants will be addressed individually. When referring to appeals by individual defendants the Court of Appeals would also refer to the appeals filed on their behalf by their defense counsel and address allegations raised by defendants personally and by the counsels jointly.

4. Alleged violations of the criminal procedure provisions – admissibility of evidence

The defendants invoke violations of art. 384 (1.8), of the Criminal Procedure Code, namely that the judgement was based on inadmissible evidence. The defendants do not specify what evidence and for what reason would be inadmissible. Since the defense do not refer to specific evidence that, according to them, has not been properly evaluated, the Panel of the Court of Appeals acting according to article 394 of the CPC examines *ex officio* the alleged violation.

The Criminal Procedure Code provides that the inadmissible evidence is to be considered when there is a violation of article 155 in relation to the admissibility of defendants statement, article 128 in relation to the circumstances when the statement is inadmissible, article 249 (4) in relation to the excluded evidence and article 111 of the CPC on admissibility of evidence from search. The panel of the Court of Appeals has evaluated the evidence in a case file and in the light of this the Panel does not find any procedural action to breach the above-mentioned articles that would constitute the essential violation of criminal procedure provisions.

The panel of the Court of Appeals notes that the Judgment is based on real documentary evidence that demonstrated the active participation of the defendants in criminal acts they were found guilty for. All these evidences are admissible and therefore are considered of a probative nature.

Therefore the Court dismisses this allegation as unsubstantiated.

- Alleged violation of art. 384 (1.12) in relation with art. 370 *ibid* that the appealed judgement is incomprehensible and contradictory

Allegation raised by the defendants V.J., G. L., G.Xh.(not directly but referring to the enacting clause as one which "leaves much to wish for") Q.R., M. A., S. S.. The defence of S.S. elaborates in details that the judgement contradicts the provision of art. 370 (7) *ibid* as the Court of first instance has not presented clearly and completely which facts it considers established and which not and the judgement contains a very short reasoning with regard this defendant.

This ground for appeal is rejected as ungrounded. The Court of Appeals agrees that the judgement is not very detailed. However it contains the elements required by the law in art. 384 (1.12) in relation to art. 370 *ibid*. It provides comprehensive description of the decisive facts and understanding of the committed criminal offences as legal designation and on the basis of what facts the sentence was imposed. The Basic Court made an assessment of the evidence and explained the reasons in setting points of facts and law with the exception to the four defendants V. J., S.J., G.Xh. and E.M. on which the Court would elaborate later in the decision.

It is understood from the judgement that all defendants but J. Sh. were found guilty for committing a Terrorism as defined in art. 135 (1.10) CCK in forms of possessing and controlling undetermined number of weapons (including machine guns and rocket launchers) between April 2012 and 1 July 2012. It is understood that V. J. was convicted for organising a terrorist group and all other defendants but J. Sh. for taking part in the activities of this same group (crimes under the relevant hypotheses of art. 143 of the CCK, previously criminalised under relevant provisions of art. 113 of

the old Provisional CCK). The four defendants V. J., S.J., G. Xh. and E. M. were also convicted and sentenced under the legal designation of art. 135 (1.10) CCK because of three different attacks on a Serbian border police container, on which, the Court will elaborate later. It is clear as well from the judgement for what crimes defined properly as facts and law was convicted the defendant J. Sh..

The Basic Court has made the correct assessment of the evidence individually and towards each of the defendants and has comprehensively explained the exact participation of each of them in the various crimes, subject of the indictment and the verdict with exception for the above mentioned four defendants.

Alleged violations of Article 7(2) CPC (the duty of the court to establish a full and accurate record) and Article 3 CPC (the principle of presumption of innocence)

The defense of all defendants alleges that the basic court failed to evaluate the evidence separately and jointly and has failed to respect the principle of presumption of innocence. Implicitly, the defense thus argues there has been a substantial violation of criminal procedure pursuant to Article 384(2) CPC.

Article 7(2) CPCK stipulates that "subject to the provisions contained in the [CPCK], the court, the state prosecutor and the police participating in the criminal proceedings have a duty to examine carefully and with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in his or her favor, and to make available to the defense all the facts and pieces of evidence, which are in favor of the defendant, before the beginning of and during the proceedings."

Article 3 CPC codifies the principles of presumption of innocence and in *dubio pro reo*. The Panel finds no violation of these provisions in this case.

Insofar Article 7 (2) CPC is concerned; it is clear from the analysis contained in the reasoning of the impugned judgment, that the basic court has performed a careful and meticulous analysis of the evidence in the case. The basic court was fully aware of the contradictions in evidence and has addressed them.

The defense may or may not agree with the conclusions the basic court drew after completing its analysis of the evidence. However, the defense however cannot reasonably claim that the basic court did not fulfil its duty to carefully examine the evidence with maximum professional devotion.

Moreover, the analysis of the record of the main trial reveals that the trial panel throughout the proceedings was dedicated to establishing the truth in the proceedings. There has therefore been no violation of Article 7(2) CPC.

Insofar the defense alleges a violation of Article 253 CPC; such argument is unclear and also unfounded.

Insofar the presumption of innocence is concerned; the Panel finds no violation of the principle. The presumption of innocence does not mean that a defendant cannot be convicted. The principle protects against the defendants being considered and treated as guilty before a final judgment is rendered. There is no indication in the case file that the basic court would have acted in this manner. The trial panel conducted the trial impartially and gave careful consideration to motions for evidence from the defense and prosecution alike and has carefully weighed the evidence and arguments of both parties. This is clear from the impugned judgment and the reasoning given by the trial panel therein.

Insofar the principle of in *dubio pro reo* is concerned, the Panel reiterates that the principle is relevant only when the court is faced with doubts regarding the existence of facts relevant for the case or implementation of a criminal law provision. The Court has properly established the existence of a terrorist group **and** the participation of the relevant defendants in it. The Court has established the leading role in the group of V. J. and the terrorist activities of all defendants but J. Sh. in the form of unauthorized control and possession of weapons. The Appellate Panel therefore did not have any obligation to apply Article 3(2) CPC because it found the relevant facts proven beyond reasonable doubt on the basis of the evidence administered during the trial. There has accordingly been no violation of procedural law in this regard.

Again, the Appellate Panel reiterates that whether the conclusions of the basic court on determination of facts were correct and complete is a separate issue and this will be assessed in the next section of this judgment.

5. Erroneous or Incomplete Determination of the Factual Situation: Article 386 CPC

All appellants challenged the determination of the factual situation by the trial panel.

5.1 Defense counsel of the defendant V. J. in his appeal stated that the actions undertaken by the accused as specified in the enacting clause of the judgment have not been proven by any evidence. There is a lack of evidence to establish the elements of the criminal act the defendant is found guilty. Therefore, in absence of evidence related to the elements of the criminal offence, the court has turned the factual situation in the detriment of the accused. In the case of V. J. the court has considered the evidence of the phone conversation transcripts, pictures, the witnesses who testified about the retrieved shells and testimonies of experts[2] who only testified wherefrom these bullets were fired. The weapons allegedly use to commit the criminal offences, were never retrieved. The allegation of the Prosecutor in the count 2 of the Indictment that the defendant V. J. was Leader of the Organization of e terrorist group has not been proven during the main trial. V. J. was leader of the political entity named "Movement of Freedom" that was dealing with the resolution of the Albanian issues by political means in Preshevo, Bujanovc and Medvegje.

5.2 Defendant V. J. in his appeal states that there is no evidence leading to the conclusion of the Judge that the defendant was compelled by extreme ideas. He farther states that the judge erroneously determined the telephone interception approaching it in non-analytical and unprofessional manner but only relying on the prosecutor's opinion as described in the Indictment.

[2] The witness expert was proposed by the prosecutor

The telephone conversation was friendly and there was no incriminating content. Therefore, there is a violation of Article 386 (1, 2, 3) of CPCK.

5.3 Defense counsel of the defendant S.J. argues that the group "Freedom of Movement" was not a terrorist group as alleged by the court. The defendant has completely denied his violent commitment to solve the issue of Albanians of Presheva valley. The charges are based only on allegations without demonstration of concrete evidence on the case.

5.4 Defense counsel of the defendant G.L. argues that the court has to determine the decisive facts in order to completely reveal the relevant legal facts. The statements of the witnesses do not provide the incriminatory actions of the defendant G.L.. He denies involvement of G.L. in the Dobrosin actions. The defendant himself denied his involvement and the court was supposed to confirm that fact. Defense counsel states that in the case file there is a report about the injuries of the police officer of the Republic of Serbia, but it was not verified that the defendant was involved in commission of the injuries. The court has not reconstructed the case. The defense counsel states that by imposing more lenient sentence, the purpose of the punishment will be achieved.

5.5 Defense counsel of the defendant G.Xh. submits that the court did not introduce the facts clearly and did not asses the accuracy of the contradictory evidence. He further submits that the reasoning of the Judgment, in relation to this defendant, was based only on Police report regarding the covert measures/interception of the telecommunication which does not provide the reasonable doubt that the defendant has committed the criminal acts he was sentenced for. The intercepted conversation between G.Xh. and V.J., which is cited in the reasoning of the Judgment, cannot prove that G. had taken part in the commission of the criminal act. The first instance court did not prove the participation of G. in the attack of 28 June 2012. Defendant G.Xh. doesn't bring any concrete allegations in the appeal filed by him.

5.6 Defense counsel of Q. R. submits that the judgment was based only on prejudices. The intercepted phone conversation by defendant Q. shows that he had not taken part in any action that would be qualified as terrorist action. The findings of the court that Q. was trying to involve his cousin in the Movement of Freedom, is only assumption.

5.7 Defense counsel of the defendant Q. R. in his appeal alleges that the intercepted phone conversations were not properly assessed. He was arrested in vicinity of the Prishtina bus station where he worked and he was alone, not with V.J. as said. During the main trial none of the accused persons have engaged the defendant in any of the incriminating actions. Valon and S.J. as well as persons/countrymen of the defendant confirmed that defendant M.A. was never member of the "Mevement of Freedom". The claims that the defendants by their action forced Albanian members of the Serbian police to leave their work, was never established. None of them left the work as a result of the actions taken by the defendant. The phone interceptions do not show the preparation for any armed attack. Statements of the witnesses are irrelevant as none of them describe incriminating actions of the defendant.

5.8 Defense counsel of the defendant S.S. in his appeal alleges that the Court of the first instance did not correctly determine the factual situation in relation to the criminal act of Commission of Terrorism contrary to Article 109 (1.10) Article 110 (1) of the CCK, currently criminalized by

Article 135 (1.10) and 136 (1) of the CCRK and Participation in a Terrorist Group, contrary to Article 113 (3) of the CCK, currently criminalized by Article 143 (2) of the CCRK. The defense disputed the authenticity of the pictures. The conclusion of the Court that the pictures were taken late afternoon on 15 May 2012 is not proven with any judicial and reliable evidence. The telephone conversation is not properly evaluated. The Court's conclusion that the defendant is active member of the group is wrong. During the main trial on 19. 08. 2013 among others, V.J. states that he does not remember where and when the photo was taken with S.S.. The defendant S.J. states during the pre-trial procedure that he did not know S.S.. He knows him only since the Indictment was filed. He is not e member of the Movement of freedom. Defense counsel further refers to the statement of Q. R. and S.S. himself stating that the Judgment relies on the factual situation confirmed contrary to Article 386 of CPC.

5.9 The Defense counsel of the defendant E.M. in his appeal alleges that in the main trial, the Prosecutor failed to confirm any evidence in relation to the criminal acts the defendant is found guilty. The prosecutor failed to provide facts in relation to the criminal offence of commission of terrorist acts in co-perpetration in a group as the existence of the group in question was not confirmed because defendants had no other relation other than university friendship. The picture of E.M. was taken randomly while he accompanied S.J. to Presheva. He met with some unknown people in uniforms and out of curiosity asked them to take pictures with their weapons and uniforms. Defence submits that he cannot be found guilty as picture is not a fact. The pictures and telephone interceptions are not sufficient to find E.M. guilty for the terrorist act as they don't go beyond reasonable doubt for the commission of these criminal acts. It is not true that the defendant has participated in three terrorist acts, as prosecutor alleges. This was not confirmed in a trial session. There were no evidence or witness statements to prove that the defendant used a certain type of weapons or took part in any attack or about any wounds from the attack. The testimony that a Serbian Police was wounded during the attack in Bujanovc Police Station is unacceptable.

5.10 The defense counsel of the defendant A.Z. in his appeal states that there is no evidence to prove that the defendant has committed the criminal offences he is found guilty of. Neither the Indictment nor the Judgment constitute the criminal actions undertaken by the defendant. A.Z. does not know other defendants unless V.J. whom he knows from the university. He and V.J. talked only in relation to the exams. This can be confirmed from the phone call dated 17. 06. 22012. He further states that he neither used telephone conversation nor internet as defendant lived in a village without network. The EULEX police did not find during the search any weapon. A computer of his brother was confiscated. Nothing was found to incriminate him. The defendant didn't even know that a terrorist group Freedom of Movement exists. Defense counsel states that in order for the Freedom of Movement to be recognized as a terrorist group, it has to be listed in UN Organization list regarding the terrorist group. The defendant was never accused in Serbia, he doesn't know even where the border is. The terrorist group cannot exist as they don't know each other. A. never met other co-defendants until he met them in the trial session. There is no photo of A.Z. with other defendants.

5.11 The defense counsel of the defendant J.Sh. in his appeal states that phone conversations were random and abstract. Although they talked, the weapons did not exist. The transactions of 300 euro, the cost of weapon, never happened. She further states that it should be considered that no fire arm

was found except some 20 unused rusty bullets that remained from the time of war whereas the defendant is sentenced from the chapter in relation to weapons.

Assessment of the Panel

Before assessing the merits of the arguments presented by the parties, the Panel deems it necessary to clarify the standard of review on appeals regarding the factual findings made by the Trial Panel. Article 386 of the CPCK defines the terms "erroneous determination of the factual situation" and "incomplete determination of the factual situation". It is clear from these definitions that it is not sufficient for the appellant to demonstrate only an alleged error of fact or incomplete determination of fact by the Trial Panel. Rather, the criminal procedure code requires that the erroneous or incomplete determination of the factual situation relates to a material fact, *i.e.* a fact which is critical to the verdict reached.[3] Consequently, only in such instances will the Appeals Court overturn a decision of the Trial Panel on factual grounds.

It is a general principle of appellate proceedings that the Court of Appeals must give a margin of deference to the findings of facts reached by the first trial panel because it is the first trial panel which is best placed to assess the evidence. The Supreme Court of Kosovo has frequently held that it must "*defer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so.*" The standard which the Supreme Court applied was "*to not disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous*" (*Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, para. 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012 30*). The approach taken by the Supreme Court reflects as well a principle of the appellate proceedings – although with some variance – both in common law and civil law jurisdictions and in international criminal law proceedings as well.

The motivation of the appeal to challenge the established facts must clearly explain which evidence would show that a certain fact should have been considered proven or not proven and why. The law does not grant the parties the right to a second judgement but the right to a review of the judgement. The Court of Appeals is not to be expected to repeat the examination of all evidence as if no previous judgement existed.

In the case at hand it was confirmed beyond reasonable doubt that the defendants have committed the criminal acts they are found guilty for. In the case file there is ample of evidence to show the defendant's involvement in the criminal activities as charged.

In relation to the defendant V.J., from the Report dated 21.06.2012 results that series of intercepted phone conversations were conducted by the defendant V.J. and J.Sh. which revealed the role of the defendant V.J. played in organization of the terrorist group known as "Movement of Freedom". There are other intercepted phone conversations to affirm his organizational role such is the intercepted phone conversation on 13 June 2012 at 21:50 min between Q. R. and V.J.. On 07 June 2012 from 12:26 to 13: 06 there were series of calls from G.Xh. to V.J. when they discussed the

[3] See also B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366 (3).

German uniforms. The conversation between V.J. and G.Xh. shows that V.J. has a final word in relation to the individual members in the activities of "Movement of Freedom'. Other intercepted phone conversations show that V.J. was informed about the initiatives of the group as well as what equipment is needed. From the intercepted phone conversations it was confirmed as well that V. was responsible for procuring weapons and uniforms for the group including J.Sh. .

The panel of the Court of Appeals concurs entirely with the finding of the first instance Court that all these intercepted phone conversation demonstrate the leading role of V.J. as the leader of the terrorist group "Movement of Freedom".

Not only the intercepted phone conversations confirmed the leading role of V.J., but this was confirmed by him as well during the interrogation on 1 July 2012 and 18 February 2013 when he stated that he is the president of the "Movement of Freedom". He also admitted that he signed the communication admitting the responsibility of the "Movement of Freedom" for terrorist attack on 17 May and 28 June of 2012. The statements of V.J. were confirmed by crucial evidence seized during the searches in V. and S.J.'s place of residence on 1 June 2012.

From the evidence it was proven beyond reasonable doubt that V.J., G.Xh. and E.M. committed the attack on 28 June 2012. On this date, around 04:00 am the Serbian checkpoint in Dobrosin was attacked by gunfire where police officer B.M.was lightly wounded. The next day, the "Movement of Freedom" published a communication on internet to claim the responsibility for the attack. The Panel notes that defendant V.J. admitted that he signed this communication although he denied his participation. An evening before the attack, the series of phone conversations between V.J., E.M. and G.Xh. were conducted in relation to preparation for this attack. The intercepted phone conversations clearly indicate that the defendants were preparing for the attack. Amongst the phone conversations, there is a most incriminating conversation between V. and G.Xh.. In this conversation V. says that "border police just went upward…remove the car as soon as possible and come to Pograxha". G.Xh. confirms by saying "OK". It is a completely different issue whether the involvement in these attacks has been properly legally qualified both by the prosecutor and the basic court which will be discussed further by the Court of Appeals.

There is sufficient incriminating evidence to confirm the participation of the defendant S.J. in a terrorist group. The seized evidence, namely the photographs confirm that the defendant S. J. with other defendants took part in additional expeditions on 18 March, 28 April, 1 and 6 May 2012. It was also confirmed that defendant S.J. drafted the communication to the public regarding the attack from 28 June 2012. The original document of this evidence was found in S. J.s residence. The other evidence to show the involvement of the defendant S.J.in e terrorist group is his electronic diary and confiscated paper during the search. The diary shows the ventures of the "movement of Freedom" on numerous occasions to collect weaponry and other incriminating actions. Defendant S. J. participated in an attack of 7 October 2012 right after he was released from his arrest.

By the intercepted phone conversations it was established as well that on 7 September 2012 the Serbian Check point in Dobrosin was attacked by gunfire. The phone conversations took place on 29 September 2012 at 01:03 am, G.L. called S.J.. He told S. to come the next day because he was going to "bake a chicken". On 30 September 2012 S. calls E.M. telling him that they shouldn't speak too much on the phone. There are other phone conversations between the defendants showing their involvement in the attacks.

Moreover, the defendant S.J. in his testimony of 16 October 2012 admitted he had signed the claim of responsibility as *Gjorgji Shqiperia* and published it in the internet from his email account.

The telephone interceptions show the involvement of G. L. as an active member of the terrorist group "Movement of Freedom". His role was participation in purchasing the weapons. The role of G.L. is described in the electronic diary of S.J. as well. One intercepted phone conversation between G.L. and V.J., shows that they talked about the "heavy chicken with 30 birds that costs 300". Valon replied that there is no money for that but he says "check it first if it works or not". The defendants used encrypted language during their phone conversation with the purpose to hide the truth. Fulfilling the plans of "Movement of Freedom" G.L. informs Valon of possibility to buy a Kalashnikov AK47. There is sufficient evidence to confirm the participation of G.L. in activities to obtain the weapons for the "Movement of Freedom".

By the evidence administered during the main trial sessions, it was proven beyond reasonable doubt that the defendant A.Z. was an active member of "Movement of Freedom". The evidence collected during the investigation, clearly shows that he took part in two military expeditions during 2012 as well as additional missions as a member of this group. There is a picture found in residence of S.J. showing A.Z.and S.J. carrying an AK 47 with UCPMB. It was also proven that A.Z. has knowledge of the location of the weapons of the group.

The other active member of the group is E.M.. He denied his involvement on the attack of 7 October 2012. This testimony is considered not credible and in contradiction with credible evidence that shows presence of E.M. in a nearby place from where they conducted an attack, and not at home as he claimed. It was proven beyond reasonable doubt that he took part in this attack and in the attack of 27 June 2012. E. M. took part in expedition of 18 March and 6 May 2012 proven by series of pictures recovered on the personal computer confiscated at S.J.'s residence.

In relation to the defendant G.Xh., there is a plentiful evidence to confirm his active role in the group. He was in close phone contact with V.J.. The CTU investigator report dated 21 June 2012 articulates that, in several phone conversations G.Xh. informed V.J. in relation to the procurement of at least 6 German uniforms for the group. On 18 June 2012 G.Xh. called V.J. to discuss the activity and strategy plans of the group in relation to the armed attacks. When the second attack in Dobrosin took place on 27 June 2012, V. calls G.Xh. asking him about borrowing E. car in order to arrange the transport for the members of the group. The pictures, the handwritten and electronic diary of S.J. confirm that G.Xh. was involved in procurement of weapons for the group. It was established that G.Xh. also participated in the two military – style expeditions with V.J., S.J., Q. R., M.A. , S.S., A.Z. and G. L. on 15 May and 14/15 June 2012.

As to the defendant Q. R., it was proven beyond reasonable doubt that he was a member of the terrorist group "Movement of Freedom". There are series of phone conversations between him and V.J. talking in relation to the attacks. There was a list of code words frequently used between the members of the group found in the pocked of Q. R.. There are series of photos to show Q. R. posing with Kalashnikov.

During the main trial it was proven beyond reasonable doubt that M.A. was an active member of the terrorist group "Movement of freedom". There are phone interceptions of him with S.J. and V.J.. There is also the evidence obtained by the court order surveillance that shows M.A. and V.J. together right after the attack of 28 June 2012. In this surveillance V. J. mimics the shooting actions

with gestures. There is evidence found in electronic diary of S.J. that involves the defendant Mohamed Aliu to be engaged in procurement of weapons for the group.

The evidence in the case file show that defendant S. S. was member of the group. He gathered together with the other members of the group to pose with the heavy weapons. The electronic diary of S.J. shows the conversation between him and S.S. and other friend about the attack. By evidence it was also established that S.S. took part in expedition of May 2012 and in mid-June 2012.

In relation to the defendant J.Sh , the evidence in a case file proves beyond reasonable doubt that he has committed the criminal offence of Unauthorized Supply and Sale of Weapons and the criminal offence of Use of Weapons. The analyzed phone conversations show the discussion of J.Sh. about the sale of weapons to M.K.. In relation to the criminal offence of Use of Weapons, it was proven beyond reasonable doubt that defendant J.Sh. possessed and fired the firearm.

Conclusion

In view of all evidences collected during the investigation and administered in the main trial, the Panel of the Court of Appeals concurs with the findings of the first instance court that it was proven beyond reasonable doubt that the defendants have committed the criminal offences they are found guilty for, giving the strong evidentiary value to this evidence and to the findings based upon this evidence.

Alleged violations of criminal law

Most of the defendants allege mistakes of the Basic court in applying the material criminal law. They can be summarized basically with erroneous application of the law defining the crime of commission of terrorism and organizing/taking part in a terrorist group.

The defense council of **S.S.** more concretely stipulates that the Court of the first instance did not correctly determine the factual situation in relation to the criminal act of Commission of Terrorism contrary to Article 109 (1.10) Article 110 (1) of the CCK, currently criminalized by Article 135 (1.10) and 136 (1) of the CCRK and Participation in a Terrorist Group, contrary to Article 113 (3) of the CCK, currently criminalized by Article 143 (2) of the CCRK. In the case at hand, even though the relevant facts occurred under the CCK of 2003, the new CCRK is applicable as the more favorable law (principle enshrined in art. 3(2) *ibid*. The commission of the terrorism is criminalized in art. 136 CCRK but the various possible hypotheses of the criminal act are listed in art. 135 *ibid*. All the acts listed from point 1.1 to point 1.19 (including these under point 1.10, which are the relevant in this case) of art. 135 constitute criminal acts alone but the special intent with which they are committed qualifies them as terrorism, that is when these actions are committed with the intent to, using the language of the law : *"seriously intimidate a population, to unduly compel a public entity, government or international organization to do or abstain from doing any act, or to seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of the Republic of Kosovo, another State or an international organization".* In the case at hand the special intent of the first nine defendants was *"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".* It would be very naïve for anyone, let alone the Court to credit assertions like the one made by one of the defendants that just by chance

they met some unknown people and out of curiosity made pictures with their guns or that they were really talking about chickens and not guns over the phone or that the proclamations some of them made via social media had nothing to do with terrorism. In that regard the Court of Appeals found no challenge in defining the acts of the first nine defendants as terrorism in the hypothesis of art. 135 (1.10) *ibid*.

The other allegation of violation of criminal law is raised by defense counsel of the defendant **G.L**.. In his appeal he alleges that the court did not refer to Article 31 of the CC when stated that the defendant has committed the criminal act in co-perpetration with other accomplices in a terrorist group. He states that by not applying this article, the first instance court has violated the provisions of the CC.

The Panel of the Court of Appeals agrees that the enacting clause of the impugned Judgment does not refer to article 31 of the CC when explains the commission of criminal offence of Commission of Terrorism in co-perpetration. The Panel observes that the reasoning of the impugned Judgment clearly describes the criminal activity of the defendants to be committed in co-perpetration although the enacting clause of the Judgment does not mention it in the enacting clause in a specific article.

The Article 31 of the CC stipulates:

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

In fact, the first instance Court has acted as described in this article by sentencing each defendant accordingly, namely by sentencing each defendant according to the individual contribution to the criminal offences committed in co-perpetration. There is no impairment in account to the defendants nor in benefit of the defendants if in the enacting clause appear the article "31" as long as the elements of the criminal offence foreseen in this article remain valuable in the reasoning of the judgment. The fact that the defendants have acted in co-perpetration, has been extensively explained above.

The other allegation to be addressed is the appeal of the defense counsel Destan Rukiqi on behalf of defendant S.S.. In his appeal he states that the criminal offence of Commission of Terrorism is included in the Law no. 04/L-209 on Amnesty.

In relation to this, the Panel of the Court of Appeals rejects the allegations of the defense counsel due to a wrong interpretation of the Law on Amnesty by the defense counsel. Defense counsel refers to:

1. Article 1.1.10. of Law no. 04/L-209 on Amnesty: Unauthorized ownership, control or possession of weapons (Article 374);

2. Article 1.2.5. of Law no. 04/L-209 on Amnesty: Unauthorized ownership, control or possession of weapons (Article 328, paragraph 2.); and ownership, control, possession or

use of weapons if he or she is not the holder of a valid weapon authorization card", (Article 8.6 regarding the Article 8.2 of UNMIK Regulation no. 2001/7 of the date 21 February 2001, Official Gazette of Republic of Kosovo no.2003/7).

Panel notes that Article 1.1.10 refers to unauthorized ownership, control or possession of weapons as foreseen in Article 374 of the new CCK and is applicable only when the defendant is found guilty and sentenced for the criminal offence pursuant to this Article 374 and not when he is found guilty for commission of terrorism in the hypothesis of Article 136 (1) in relation with Article 135 (1.10), that is acquisition, ownership, control, possession or use of weapons with the intent, as defined in art. 135 (1). Same amounts for the Article 1.2.5. of Law no. 04/L-209 on Amnesty: Unauthorized ownership, control or possession of weapons applicable for the cases when the defendant is found guilty for the criminal offence as per Article 328, paragraph 2 of an old criminal code of Kosovo. Therefore, the Panel rejects this allegation as groundless.

6. Decision on punishment

The defence counsel in their appeals challenge the imposed criminal sanctions.

The court of first instance, when determining the sentence against the accused, considered the manner of the commission of the criminal offense. In addition, the court of first instance specified the additional aggravating and mitigating circumstances also for each accused:

- With regard to the accused V.J., the court of the first instance considered as mitigating circumstances the young age and no previous criminal record. As aggravating circumstances the court considered the highly political approach and determination in achieving goals; disrespect to the rule of law in the sense that he was ready to destroy or destabilise fragile political structure of Kosovo by starting military conflict between Kosovo and Republic of Serbia by launching guerrilla war; exceptional and leading role he played in the group; taking part in the terrorist attack on Serbian Border Police in Dobrosin on 28 June 2012.
- With regard to the defendant S.J., the court of the first instance considered as mitigating circumstances the young age and no previous criminal record. As aggravating circumstances the court considered the highly political approach and determination in achieving goals; disrespect to the rule of law in the sense that he was ready to destroy or destabilize fragile political structure of Kosovo by starting military conflict between Kosovo and Republic of Serbia by launching guerrilla war; Exceptional and leading role he played in the group; Taking part in the terrorist attack on Serbian Border Police in Dobrosin on 7 October 2012.

- With regard to the defendant G.L., the court of the first instance considered as mitigating circumstances the young age and no previous criminal record. As aggravating circumstances the court considered the highly political approach and determination in achieving goals; disrespect to the rule of law in the sense that he was ready to destroy or destabilize fragile political structure of Kosovo by starting military conflict between Kosovo and Republic of Serbia by launching guerrilla war.

- With regard to the defendant G.Xh., the court of the first instance considered as mitigating circumstances the young age and no previous criminal record. As aggravating circumstances the court considered the highly political approach and determination in achieving goals;

disrespect to the rule of law in the sense that he was ready to destroy or destabilize fragile political structure of Kosovo by starting military conflict between Kosovo and Republic of Serbia by launching guerrilla war; Taking part in the terrorist attack on Serbian Border Police in Dobrosin on 28 June 2012.

- With regard to the defendant Q. R., the court of the first instance as mitigating circumstances the young age and no previous criminal record. As aggravating circumstances the court considered the highly political approach and determination in achieving goals; disrespect to the rule of law in the sense that he was ready to destroy or destabilize fragile political structure of Kosovo by starting military conflict between Kosovo and Republic of Serbia by launching guerrilla war;

- With regard to the defendant M.A. , the first instance court considered as mitigating circumstance the fact that he has a family, no previous criminal record. As aggravating circumstances the court considered the highly political approach and determination in achieving goals; disrespect to the rule of law in the sense that he was ready to destroy or destabilize fragile political structure of Kosovo by starting military conflict between Kosovo and Republic of Serbia by launching guerrilla war;

- With regard to the defendant S.S., the court of the first instance considered as mitigating circumstances the relatively young age and no previous criminal record. As aggravating circumstances the court considered the highly political approach and determination in achieving goals; disrespect to the rule of law in the sense that he was ready to destroy or destabilize fragile political structure of Kosovo by starting military conflict between Kosovo and Republic of Serbia by launching guerrilla war;

- With regard to the defendant E.M., the court of the first instance considered as mitigating circumstances the young age and no previous criminal record. As aggravating circumstances the court considered the highly political approach and determination in achieving goals; disrespect to the rule of law in the sense that he was ready to destroy or destabilize fragile political structure of Kosovo by starting military conflict between Kosovo and Republic of Serbia by launching guerrilla war; Taking part in the terrorist attack on Serbian Border Police in Dobrosin on 7 October 2012.

- With regard to the defendant A.Z., the court of the first instance considered as mitigating circumstances the relatively young age and no previous criminal record. As aggravating circumstances the court considered the highly political approach and determination in achieving goals; disrespect to the rule of law in the sense that he was ready to destroy or destabilize fragile political structure of Kosovo by starting military conflict between Kosovo and Republic of Serbia by launching guerrilla war;

- With regard to the defendant J.Sh, the court of the first instance considered as mitigating circumstances the young age and no previous criminal record. As aggravating circumstances the court considered the determination to achieve illegal income by selling lethal weapons and Disrespect of human life considering that the weapons may be used to serious harm people and deprive them of lives.

Assessment of the Panel of the Court of Appeals

The Panel of the Court of Appeals fully concurs with the assessment of the first instance Court in relation to the mitigating and aggravating circumstances of the defendants G.L., M.A., S.S., A.Z. and J.Sh. .

In relation to the defendants V.J., S.J., G.Xh. and E.M., the Panel of the Court of Appeals finds discrepancies in assessment of the aggravating circumstances, apart from the allegations raised by the defense counsel.

Namely, the enacting part of the impugned Judgment, in relation to the defendant V.J. reads:

> *"…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. M., by firing with different weapons, all illegally possessed and used, an undetermined number of various caliber rounds (in any case superior to 100), in co-perpetration with G.Xh. and E.M.; The attack took place in Dobrosin on 28 June 2012 at around 04:00 hrs…"*

In *relation to the defendant S.J., the enacting clause reads:*

> *"…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, in co-perpetration with E.M. and with an unidentified number of additional perpetrators. The attack took place in Dobrosin (Gjilan Municipality)*[4] *on 7 October 2012 around 21:35 hrs…"*

In relation to the defendant G.Xh., the enacting clause reads:

> *"…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. M., by firing with different weapons, all illegally possessed and used, an undetermined number of various caliber rounds (in any case superior to 100), in co-perpetration with V.J. and E.M. in Dobrosin on 28 June 2012 at around 04:00 hrs…"*

And in relation to the defendant E.M., the enacting clause reads:

> *"…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.M., by firing with different weapons, all illegally possessed and used, an undetermined number of various caliber rounds (in any case superior to 100), in co-perpetration with V.J. and G.Xh. in Dobrosin (Gjilan/Gnjilane municipality), on 28 June 2012 at around 04:00 hrs; because he took part in an attack on the Serbian Border Police container located in Bujanovac, by firing with different weapons, all illegally possessed, an undetermined number of various caliber rounds; in co-perpetration with S.J. and with an unidentified number of additional perpetrators in Dobrosin (Gjilan/Gnjilane municipality), on 7 October 2012 at around 21:35 hrs…"*

As read above, the description of the factual situation in the abovementioned part of the enacting clause contains the elements of different criminal offences. The facts above should have been

[4] Wrong, it is not Gjilan Municiaplity, but is Bujanovac Municipality in Serbia. See V.J. appeal, page, 5 para.3

properly qualified as two different acts of commission of terrorism, executed in real concurrence, one act related to the possession and the usage of weapons under art. 135 (1.10) and the other act related to the attack/attacks, the latter being a different crime/s and not part of the factual circumstances of the crime under art. 135 (1.10). The Prosecutor failed to legally define it in the Indictment in accordance with article 241 (1.4) .The first instance court did not correct this mistake as it was possible pursuant to article 360 (2) of the CPC. Instead of giving the proper legal qualification to the terrorist attack/attacks and then either convict or acquit the four concerned defendants (V.J., S.J., G. Xh. and E.M.) for that particular crime/crimes, the first instance court used this/these fact/s as aggravating circumstance/s, thus determining the sentence in disadvantage of the defendants. It would be a pure speculation to elaborate whether the defendants in question would have been convicted or acquitted if properly indicted as any modification in that regard could have been done only at the level of the first instance Court.

The Court of Appeals is not in a position to rectify a mistake in the indictment and/or the first instance Court which may end up in violation of the restriction of *reformatio in peius*. However the Court of Appeals is obliged to rectify a mistake in the law which lead to an aggravated sentence on the basis of facts which were not properly qualified by the Prosecutor and the first instance Court (argument after art.394 (1.4) CPCK. As long as these four defendants were not properly indicted for the attack/attacks and they were neither acquitted nor convicted they could not have been sentenced with higher punishments for commission of terrorism in the form of possession and usage of weapons because of these same attack/attacks. The latter constitute/s separate crime/s and not aggravating circumstance/s. Therefore the Panel of the Court of Appeals acting *ex officio*, modified the enacting clause by removing the paragraph described above in relation to the defendants V.J., S.J., G.Xh. and E.M. and imposed sentence set out in the enacting clause with regard to this defendants as follows:

- The Panel sentenced the defendant V.J. by unanimous votes with 5 (five) years of imprisonment for the criminal offence of Commission of Terrorism and 7 (seven) years of imprisonment for the criminal offence of Organization of a terrorist group. The Panel unanimously agreed that the reasonable aggregate sentence will be 8 years of imprisonment. The remaining part of the impugned Judgment concerning the defendant V.J. in relation to the fine of 1000 (one thousand) euro, remains unchanged;
- The Panel sentenced the defendant S.J. by unanimous votes with 5 (five) years of imprisonment for the criminal offence of Commission of Terrorism. The majority of the Panel agreed with the sentence of 4 (four) years of imprisonment as provided in the first instance court for the criminal offence of Participation in a Terrorist Group. By majority votes Panel decided that the reasonable aggregate sentence will be 6 years and 6 months of imprisonment.
- The Panel sentenced the defendant G.Xh. by unanimous votes with 5 (five) years of imprisonment for the criminal offence of Commission of Terrorism. The majority of the Panel agreed with the sentence of 2 (two) years of imprisonment as provided in the first instance court for the criminal offence of Participation in a Terrorist Group. By majority votes Panel decided that the reasonable aggregate sentence will be 5 years and 6 months of imprisonment.
- The Panel sentenced the defendant E.M. by unanimous votes with 5 (five) years of

imprisonment for the criminal offence of Commission of Terrorism. The majority of the Panel agreed with the sentence of 2 (two) years of imprisonment as provided in the first instance court for the criminal offence of Participation in a Terrorist Group. By Majority votes Panel decided that the reasonable aggregate sentence will be 5 years and 6 months of imprisonment.

In this regard, the panel of the CoA, by examining the judgment *ex officio* according to article 394, (1.4) of CPCK in relation with art. 385 (1.4) *ibid* , art. 365 (1.2) *ibid* concluded that the criminal law *i.e.* the principle of legality was violated - art. 2 (3-first sentence) of CCRK. The law prescribes that a definition of a criminal offence should always be strictly construed and in case of ambiguity it must be interpreted in favor of a defendant. In the case at hand a factual situation was subsumed under a legal definition which does not correspond to the facts. On top of that the same facts were later used as aggravating circumstance which is a violation of the criminal law of its own (art. 74(2) CCRK, which contains an exhaustive list of aggravating circumstances). As mentioned above elements of one crime do not constitute aggravating circumstance of another crime, unless the law provides otherwise (for example when a criminal offence was committed as part of the activities of an organized criminal group – art. 74 (2.11), which is an exception and is not relevant to the case at hand).

In relation to the defendant Q. R., the Panel of the Court of Appeals has accepted the appeal filed by the defence counsel only in the part considering the allegations made on decision on punishment. The Panel of the Court of Appeals finds that there are conditions for particular mitigation of the punishment as provided in article 75 (1.2) of the CCK in relation to the defendant Q. R.. The Panel considers that the defendant Q. R., at the time of commission of the criminal offence had just recently prior the commission of the crimes turned the age of 19. Based on the re-assessment of aggravating and mitigating circumstances, the Panel of the Court of Appeals unanimously has imposed sentence of 3 (three) years of imprisonment for the criminal offence of Commission of Terrorism. The majority of the Panel agreed with the sentence of 2 (two) years of imprisonment as provided in the first instance court for the criminal offence of Participation in a Terrorist Group. By Majority votes Panel decided that the reasonable aggregate sentence will be 4 years of imprisonment.

The Court of Appeals considers that the punishments imposed by the Panel of the Basic Court against the defendants V.J., S.J., G. Xh., E..M. and Q. R. are in harmony with the intensity of protected value, the degree of criminal responsibility of the accused as perpetrators of the criminal offenses. Pursuant to Article 73 (2) CCK the punishment must be proportionate to the gravity of the offence, the conduct and circumstances of the offender. The Court of Appeals finds that this punishment will fulfill the purposes of punishment as prescribed in article 41 of the CCK.

The remaining conclusions of the first instance court in relation to the defendants G.L., M.A. , S.S., A.Z. and J.Sh. are correct and are also considered by the Court of Appeals when determining the sentences. Therefore the part of the impugned Judgment in relation to these defendants remains unchanged.

Other issues

Since the defendant J.Sh. was sentenced for the criminal offence of Unauthorized Supply and Sale of Weapons to imprisonment of 2 (two) years, and the criminal offence of Use of Weapons to imprisonment of 1 (one) year, with an aggregate punishment of 2 (two) years and 2 (two) months, the Panel of the Court of Appeals assessed the time spent in detention on remand and house detention for the defendant J.Sh. from the date of his arrest on 13 February 2013 until the date of first deliberation of the panel of the Court of Appeals on 17th of April 2015, concluding that the sentence of an aggregate punishment of 2 (two) years and 2 (two) months of imprisonment imposed with the Judgment PKR no. 53/13 of the Basic Court of Gjilan/Gnjilane, dated 16 October 2013, has been already served.

Having acted in accordance with article 173 (3) of Criminal Procedure Code of Kosovo (CPCK) and article 183 (7) in relation with article 367 (6) and (7) of CPCK, the Panel of the Court of Appeals lifted the house detention of the defendant J.Sh. with the immediate effect by rendering the Ruling on 17 April 2015.

The costs of the criminal proceedings for all defendants shall be paid from budgetary resources.

As stated above, pursuant to Article 389 of the CPC, the Court of Appeals decided as in the enacting clause.

The Judgment is drafted in English language. Reasoned Judgment completed on 1st of July 2015.

Presiding Judge

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Elka Filcheva-Ermenkova, EULEX Judge

Panel Members

_____

Fllanza Kadiu, Kosovo Judge

_____

Willem Brouwer, EULEX Judge

Recording Officer

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Vjollca Kroçi - Gërxhaliu, EULEX Legal Advisor

COURT OF APPEALS

PAKR 145/2014