COURT OF APPEALS

Prishtinë/Priština

Case number: **PAKR 220/16**
(PKR 1098/13 Basic Court of Prishtinë/Priština)

Date: **26 April 2017**

IN THE NAME OF PEOPLE

The Court of Appeals, in a Panel composed of the Court of Appeals Judge Vahid Halili (Presiding), EULEX Judge Radostin Petrov (Reporting), and the Court of Appeals Judge Fillim Skoro as Panel members, and EULEX Legal Officer Sandra Gudaityte as the Recording Officer, in the criminal case against, among others, the defendants

G.K.;

S.S.;

N.D.;

S.A.;

N.Z.;

J.R.;

N.S.;

Xh.H.;

V.K.;

Z.S.;

I.R.;

charged under Indictment PP: II 111/2013 dated 11 December 2013 and supplemented on 8 July 2014 for the following criminal offences:

G.K., S.S., N.D., S.A., N.Z., J.R., N.S., Xh.H., V.K., Z.S. and I.R. with COUNT 1: Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the Criminal Code of Kosovo (hereinafter "CCK") in conjunction to Article 31 of the CCK; COUNT 2: Assault, contrary to Article 187(1) of the CCK in conjunction to Article 31 of the CCK; COUNT 3: Assault, contrary to Article 187(2) of the CCK in conjunction to Article 31 of the CCK; COUNT 4: Assault, contrary to Article 187(3) of the CCK in conjunction to Article 31 of the CCK;

G.K., N.D. and S.A. with COUNT 5: Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction to Article 31 of the CCK;

S.A. with COUNT 6: Threat, contrary to Article 185(4) in connection with paragraph 1 of the CCK;

G.K. with COUNT 7: Threat, contrary to Article 185(4) in connection with paragraph 1 of the CCK; COUNT 8: Assault, contrary to Article 187(1) of the CCK; COUNT 9: Assault, contrary to Article 187(2) in conjunction to paragraph 1 of the CCK; COUNT 10: Assault, contrary to Article 187(3) in conjunction to paragraph 1 of the CCK;

S.S., N.Z., N.S. and Xh.H. with COUNT 11: Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction to Article 31 of the CCK;

V.K., Z.S., J.R. and I.R. with COUNT 12: Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction to Article 31 of the CCK;

G.K. with COUNT 13: Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK; COUNT 14: Assault, contrary to Article 187(3) in conjunction to paragraph 1 of the CCK;

S.S. with COUNT 15: Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK; COUNT 16: Assault, contrary to Article 187(3) in conjunction to paragraph 1 of the CCK;

G.K. and N.D. with COUNT 17: Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction to Article 31 of the CCK; COUNT 18: Assault, contrary to Article 187(2) in connection with paragraph 1 of the CCK in conjunction to Article 31 of the CCK; COUNT 19: Assault, contrary to Article 187(3) in connection with paragraph 1 of the CCK in conjunction to Article 31 of the CCK;

acting upon the appeals against the Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 filed by defence counsel A.R. on behalf of defendant G.K. on 12 March 2016, defence counsel N.S. on behalf of defendant S.S. on 10 March 2016, defence counsel R.D. on behalf of defendant S.A. on 10 March 2016, defence counsel K.P. on behalf of defendant N.D. on 16 March 2016, defence counsel G.A. on behalf of defendant N.Z. on 16 March 2016, defence counsel A.K. on behalf of defendant I.R. on 14 March 2016, defendant I.R. on 9 March 2016, and EULEX Basic Prosecution Office (hereinafter "Prosecutor") on 11 March 2016;

having considered responses to the appeal of EULEX Basic Prosecution Office filed by defence counsel R.D. on behalf of defendant S.A. on 21 March 2016, defence counsel F.B. on behalf of defendant N.S. on 22 March 2016, defence counsel M.S.E. on behalf of defendant Z.S. on 23 March 2016, defence counsel N.S. on behalf of defendant J.R. on 31 March 2016, and the response to the appeals filed by the defence counsel and defendants by the Prosecutor on 6 April 2016;

having considered the motion of the Appellate Prosecution Office (hereinafter "Appellate Prosecutor") filed on 9 June 2016;

having held a public session on 25 April 2017;

having deliberated and voted on 26 April 2017;

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

renders the following

JUDGMENT

I. The appeal against the Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 filed by EULEX Basic Prosecution Office on 11 March 2016 is <u>rejected as unfounded</u>.

II. The appeals against the Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 filed by defence counsel A.R. on behalf of defendant G.K. on 12 March 2016, defence counsel N.S. on behalf of defendant S.S. on 10 March 2016, defence counsel R.D. on behalf of defendant S.A. on 10

March 2016, defence counsel K.P. on behalf of defendant N.D. on 16 March 2016, defence counsel G.A. on behalf of defendant N.Z. on 16 March 2016, defence counsel A.K. on behalf of defendant I.R. on 14 March 2016, defendant I.R. on 9 March 2016 are partially granted.

III. The Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 is modified as follows:

a. Defendant G.K.

Defendant G.K. is acquitted of the criminal offences of Assault, contrary to Article 187(1) of the CCK (*Count 2*) and Assault, contrary to Article 187(1) of the CCK (*Count 8*), as it is described in the first instance judgment, because the criminal offence of Assault as it is described in Article 187(1) of the CCK is subsumed by more specific criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization as it is described in Article 198(1) of the CCK.

Defendant G.K. is acquitted of the criminal offences of Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (*Count 3*), Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (*Count 18*) and Assault, contrary to Article 187(2) of the CCK (*Count 9*), as it is described in the first instance judgment, because the elements of the criminal offence of Assault as it is described in Article 187(2) of the CCK are not met insofar that it has not been proven that the assault was committed with a weapon, a dangerous instrument or another object capable of causing grievous bodily injury or a serious impairment to health.

Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 remains not modified in parts that it has been proven beyond reasonable doubt that defendant G.K. committed the criminal offences of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed against injured party M.J. (*Count 1*), Mistreatment during Exercise of Official Duty or

Public Authorization, contrary to Article 198(1) of the CCK committed against injured party I.P. (*Count 1*), Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK committed in continuation against injured party B.M. (*Counts 5 and 13*), Threat, contrary to Article 185(4), in connection with paragraph 1 of the CCK, and in conjunction of Article 31 of the CCK committed against injured party BM (*Count 7)*, and Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK committed against injured party D.V. (*Count 17*).

Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 <u>remains not modified</u> in parts that pursuant to Article 364(1)(1.3) of the CCK, defendant G.K. was acquitted of the criminal offences of Assault, contrary to Article 187(3) in connection with paragraph 1 of the CCK in conjunction of Article 31 of the CCK (*Count 4*), Assault, contrary to Article 187(3) in connection with paragraph 1 of the CCK (*Count 10*), Assault, contrary to Article 187(3) in connection with paragraph 1 of the CCK (*Count 14*), and Assault, contrary to Article 187(3) in connection with paragraph 1 of the CCK in conjunction of Article 31 of the CCK (*Count 19*).

The sentence is modified as follows:

For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed against injured party M.J. (*Count 1*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 8 (eight) months with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed against injured party I.P. (*Count 1*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced

to the imprisonment of 8 (eight) months with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK committed in continuation against injured party B.M. (*Counts 5 and 13*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 8 (eight) months with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK committed against injured party D.V. (*Count 17*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 8 (eight) months with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

For the criminal offence of Threat, contrary to Article 185(4), in connection with paragraph 1 of the CCK, and in conjunction of Article 31 of the CCK committed against injured party B.M. (*Count 7),* pursuant to Articles 41, 45, 74 and 185(4) of the CCK, the defendant is sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

Pursuant to Article 80 of the CCK, the Court of Appeals imposes the aggregate punishment of 1 (one) year and 6 (six) months of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 3 (three) years if the defendant does not commit another criminal offence during the verification period.

b. Defendant S.S.

Defendant S.S. is acquitted of the criminal offence of Assault, contrary to Article 187(1) of the CCK (*Count 2*), as described in the first instance judgment, because the criminal offence of Assault as it is described in Article 187(1) of the CCK is subsumed by more specific criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization as it is described in Article 198(1) of the CCK.

Defendant S.S. is acquitted of the criminal offences of Assault, contrary to Article 187(2) of the CCK (*Count 3*), as described in the first instance judgment, because the elements of the criminal offence of Assault as it is described in Article 187(2) of the CCK are not met insofar that it has not been proven that the assault was committed with a weapon, a dangerous instrument or another object capable of causing grievous bodily injury or a serious impairment to health.

Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 remains not modified in parts that it has been proven beyond reasonable doubt that defendant S.S. committed the criminal offences of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed in continuation against injured party B.M.1 (*Counts 1 and 15*), and Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed against injured party I.P. (*Count 1*).

Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 remains not modified in parts that pursuant to Article 364(1)(1.3) of the CCK, defendant S.S. was acquitted of the criminal offences of Assault, contrary to Article 187(3) in connection with paragraph 1 of the CCK in conjunction of Article 31 of the CCK (*Count 4*), Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction with Article 31 of the CCK (*Count 11*), and Assault,

contrary to Article 187(3) in connection with paragraph 1 of the CCK in conjunction of Article 31 of the CCK (*Count 16*).

The sentence is modified as follows:

For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed in continuation against injured party B.M.1 (*Counts 1 and 15*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed against injured party I.P. (*Count 1*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

Pursuant to Article 80 of the CCK, the Court of Appeals imposes the aggregate punishment of 1 (one) year and 6 (six) months of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 3 (three) years if the defendant does not commit another criminal offence during the verification period.

c. Defendant S.A.

Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 remains not modified in parts that it has been proven beyond reasonable doubt that defendant S.A. committed the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of

Article 31 of the CCK against injured party B.M. (*Count 5*), and of Threat, contrary to Article 185(4), in connection with paragraph 1 of the CCK, and in conjunction of Article 31 of the CCK committed against injured party B.M. (*Count 6).*

Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 remains not modified in parts that pursuant to Article 364(1)(1.3) of the CCK, defendant S.A. was acquitted of the criminal offences of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction to Article 31 of the CCK (*Count 1*), Assault, contrary to Article 187(1) of the CCK in conjunction of Article 31 of the CCK (*Count 2*), Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (*Count 3*), and Assault, contrary to Article 187(3) in connection with paragraph 1 of the CCK in conjunction of Article 31 of the CCK (*Count 4*).

The sentence is modified as follows:

For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK against injured party B.M. (*Count 5*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

For the criminal offence of Threat, contrary to Article 185(4), in connection with paragraph 1 of the CCK, and in conjunction of Article 31 of the CCK against injured party B.M. (*Count 6),* pursuant to Articles 41, 45, 74 and 185(4) of the CCK, the defendant is sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

Pursuant to Article 80 of the CCK, the Court of Appeals imposes the aggregate punishment of 1 (one) year and 6 (six) months of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

d. Defendant N.D.

Defendant N.D. is acquitted of the criminal offences of Assault, contrary to Article 187(1) of the CCK, as described in the first instance judgment, because the criminal offence of Assault as it is described in Article 187(1) of the CCK is subsumed by more specific criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization as it is described in Article 198(1) of the CCK.

Defendant N.D. is acquitted of the criminal offences of Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (*Count 18*), as described in the first instance judgment, because the elements of the criminal offence of Assault as it is described in Article 187(2) of the CCK are not met insofar that it has not been proven that the assault was committed with a weapon, a dangerous instrument or another object capable of causing grievous bodily injury or a serious impairment to health.

Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 remains not modified in parts that it has been proven beyond reasonable doubt that defendant N.D. committed the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK against injured party B.M. (*Count 5*), and Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK against injured party D.V. (*Count 17*).

Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 remains not modified in parts that pursuant to Article 364(1)(1.3) of the CCK, defendant

N.D. was acquitted of the criminal offences of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction to Article 31 of the CCK (*Count 1*), Assault, contrary to Article 187(1) of the CCK in conjunction of Article 31 of the CCK (*Count 2*), Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (*Count 3*), Assault, contrary to Article 187(3) in connection with paragraph 1 of the CCK in conjunction of Article 31 of the CCK (*Count 4*), and Assault, contrary to Article 187(3) in connection with paragraph 1 of the CCK in conjunction of Article 31 of the CCK (*Count 19*).

The sentence is modified as follows:

For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK against injured party B.M. (*Count 5*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK against injured party D.V. (*Count 17*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

Pursuant to Article 80 of the CCK, the Court of Appeals imposes the aggregate punishment of 1 (one) year and 6 (six) months of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

e. Defendant N.Z.

Defendant N.Z. is acquitted of the criminal offences of Assault, contrary to Article 187(1) of the CCK (*Count 2*), as described in the first instance judgment, because the criminal offence of Assault as it is described in Article 187(1) of the CCK is subsumed by more specific criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization as it is described in Article 198(1) of the CCK.

Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 remains not modified in parts that it has been proven beyond reasonable doubt that defendant N.Z. committed the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed in continuation against injured party I.P. (*Counts 1 and 11*).

Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 remains not modified in parts that pursuant to Article 364(1)(1.3) of the CCK, defendant N.Z. was acquitted of the criminal offences of Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (*Count 3*), and Assault, contrary to Article 187(3) in connection with paragraph 1 of the CCK in conjunction of Article 31 of the CCK (*Count 4*).

The sentence is modified as follows:

For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed in continuation against injured party I.P. (*Counts 1 and 11*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 6 (six) months with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

f. Defendant I.R.

Defendant I.R. is acquitted of the criminal offences of Assault, contrary to Article 187(1) of the CCK (*Count 2*), as described in the first instance judgment, because the criminal offence of Assault as it is described in Article 187(1) of the CCK is subsumed by more specific criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization as it is described in Article 198(1) of the CCK.

Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 remains not modified in parts that it has been proven beyond reasonable doubt that defendant I.R. committed the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK against injured party B.M.1 (*Count 1*).

Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 remains not modified in parts that pursuant to Article 364(1)(1.3) of the CCK, defendant I.R. was acquitted of the criminal offences of Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (*Count 3*), Assault, contrary to Article 187(3) in connection with paragraph 1 of the CCK in conjunction of Article 31 of the CCK (*Count 4*), and Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction to Article 31 of the CCK (*Count 12*).

The sentence is modified as follows:

For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK against injured party B.M.1 (*Count 1*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 6 (six) months with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 1 (one) year if the defendant does not commit another criminal offence during the verification period.

IV. The remaining parts of the appeals listed in part II of this enacting clause are rejected as unfounded.

REASONING

I. Procedural Background

1. On 12 December 2013, EULEX Basic Prosecution Office filed Indictment PP: II 111/2013 against G.K. and other defendants charging them under 19 counts with the criminal offences of Mistreatment during Exercise of Official Duty or Public Authorization in violation of Article 198 of Criminal Code of Kosovo (CCK), Assault in violation of Article 187 of the CCK, and Threat in violation of Article 185 of the CCK.

2. The main trial commenced on 8 July 2014, and was concluded on 11 November 2015. It consisted of 43 court sessions. On 18 November 2015, the Basic Court rendered its Judgment PKR 1098/13.

3. **G.K.** was found guilty for the following criminal offences: Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK, committed in part in co-perpetration pursuant to Article 31 of the CCK; Assault, in violation of Article 187(1) of the CCK; Assault, in violation of Article 187(2) of the CCK, committed in co-perpetration pursuant to Article 31 of the CCK; and Threat, in violation of Article 185(4) of the CCK, committed in co-perpetration pursuant to Article 31 of the CCK. He was sentenced to an aggregate punishment of 1 (one) year and 6 (six) months of imprisonment, and prohibited from exercising public administration or public service functions for 2 (two) years. G.K. was acquitted of the following charges: Assault, in violation of Article 187(3) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 4); Assault, in violation of Article 187(3) in connection with paragraph 1 of the CCK (Count 10); Assault, in violation of Article 187(3) in connection with paragraph 1 of the CCK (Count 14); Assault, in violation of Article 187(3) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 19).

4. **S.S.** was found guilty for the following criminal offences: Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK; Assault, in violation of Article 187(2) of the CCK; and Assault, in violation of Article 187(1) of the CCK. He was sentenced to an aggregate punishment of 2 (two) years of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 3 (three) years, and prohibited from exercising public administration or public service functions for 3 (three) years. S.S. was acquitted of the following charges: Assault, in violation of Article 187(3) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 4); Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK, in conjunction with Article 31 of the CCK (Count 11); and Assault, in violation of Article 187(3) in connection with paragraph 1 of the CCK (Count 16).

5. **S.A.** was found guilty for the following criminal offences: Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK in conjunction with Article 31 of the CCK; and Threat, in violation of Article 185(4) of the CCK, committed in co-perpetration pursuant to Article 31 of the CCK. He was sentenced to an aggregate punishment of 1 (one) year and 6 (six) months of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years, and ordered to refrain from carrying any kind of weapon for the time of the verification. The defendant was further imposed a punishment of prohibition of exercising public administration or public service functions for 2 (two) years. S.A. was acquitted of the following charges: Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK, in conjunction with Article 31 of the CCK (Count 1); Assault, in violation of Article 187(1) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 2); Assault, in violation of Article 187(2) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 3); Assault, in violation of Article 187(3) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 4).

6. **N.D.** was found guilty for the following criminal offences: Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK in conjunction with Article 31 of the CCK; Assault, in violation of Article 187(1) of the CCK, and Assault, in violation of Article 187(2) of the CCK, committed in co-perpetration pursuant to Article 31 of the CCK. He was sentenced to an aggregate punishment of 2 (two) years of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years. The defendant was further imposed a punishment of prohibition of exercising public administration or public service functions for 3 (three) years. N.D. was acquitted of the following charges: Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK, in conjunction with Article 31 of the CCK (Count 1); Assault, in violation of Article 187(1) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 2); Assault, in violation of Article 187(2) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 3); Assault, in violation of Article 187(3) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 4); Assault, in violation of Article 187(3) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 19).

7. **N.Z.** was found guilty for the following criminal offences: Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK; and Assault, in violation of Article 187(1) of the CCK. He was sentenced to an aggregate punishment of 1 (one) year of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years. The defendant was further imposed a punishment of prohibition of exercising public administration or public service functions for 2 (two) years. N.Z. was acquitted of the following charges: Assault, in violation of Article 187(2) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 3); and Assault, in violation of Article 187(3) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 4).

8. **I.R.** was found guilty for the following criminal offences: Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK; and Assault, in violation of Article 187(1) of the CCK. He was sentenced to an aggregate punishment of 1

(one) year of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years. The defendant was further imposed a punishment of prohibition of exercising public administration or public service functions for 2 (two) years. I.R. was acquitted of the following charges: Assault, in violation of Article 187(2) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 3); Assault, in violation of Article 187(3) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 4); and Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK, in conjunction with Article 31 of the CCK (Count 12).

9. **J.R., N.S., Xh.H., V.K. and Z.S.** were acquitted of the following charges: Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK, in conjunction with Article 31 of the CCK (Count 1); Assault, in violation of Article 187(1), in conjunction with Article 31 of the CCK (Count 2); Assault, in violation of Article 187(2) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 3); and Assault, in violation of Article 187(3) in connection with paragraph 1, in conjunction with Article 31 of the CCK (Count 4). **N.S. and Xh.H.** were further acquitted of the charge of Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK, in conjunction with Article 31 of the CCK (Count 11). **J.R., V.K. and Z.S.** were further acquitted of the charge of Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK, in conjunction with Article 31 of the CCK (Count 12).

10. The appeals against the Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština dated 18 November 2015 were filed by defence counsel A.R. on behalf of defendant G.K. on 12 March 2016, defence counsel N.S. on behalf of defendant S.S. on 10 March 2016, defence counsel R.D. on behalf of defendant S.A. on 10 March 2016, defence counsel K.P. on behalf of defendant N.D. on 16 March 2016, defence counsel G.A. on behalf of defendant N.Z. on 16 March 2016, defence counsel A.K. on behalf of defendant I.R. on 14 March 2016, defendant I.R. on 9 March 2016, and the Prosecutor on 11 March 2016.

11. The responses of to the appeal of EULEX Basic Prosecution Office were filed by defence counsel R.D. on behalf of defendant S.A. on 21 March 2016, defence counsel F.B. on behalf of defendant N.S. on 22 March 2016, defence counsel M.S.E. on behalf of defendant Z.S. on 23 March 2016, defence counsel N.S. on behalf of defendant J.R. on 31 March 2016. The response to the appeals filed by the defence counsel and defendants was filed by the Prosecutor on 6 April 2016;

12. On 9 June 2016, the Appellate Prosecutor filed its motion.

13. On 25 April 2017, the Court of Appeals held a session pursuant to Article 390 of the CPC.

II. Submissions of the parties

a. Appeals

- *Appeal filed by defence counsel A.R. on behalf of defendant G.K. on 12 March 2016*

14. The defence counsel claims that the impugned judgement contains essential violation of provisions of criminal proceedings and CCK, as well as erroneous determination of factual situation, and erroneous decision on the conviction of imprisonment and prohibition to exercise the public function or public service for 2 (two) years. The defence therefore moves the court to modify the impugned judgement and to acquit the defendant or to annul the judgement and send the case back for re-trial.

15. The defence claims that the judgement is in violation of Article 384(1)(11) and (12) in conjunction with Article 370(7) and (8) of the CPC. The enacting clause of the judgement is incomprehensible and is in contradiction with the reasoning laid down in the judgement. The defence counsel further alleges that the Basic Court erroneously established the factual situation in several points. The defence also claims that the Basic Court's judgement contains violations of criminal law. As a consequence of the violations of criminal procedure and criminal law as well as erroneous determination of the factual situation, the Basic Court

erroneously applied the criminal sentence to the defendant. The exact allegations will be addressed in the reasoning of the present judgement.

- *Appeal filed by defence counsel N.S. on behalf of defendant S.S. on 10 March 2016*

16. The defence claims that the judgement of the Basic Court contains violations of criminal law as described in Article 385(1.4) of the CPC. Therefore, the defence moves the Court of Appeals to modify the impugned judgement, and to either acquit defendant S.S. of all charges or to find him guilty only for the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization in violation of Article 198(1) of the CCK and to revoke the additional sentences. The exact allegations will be addressed in the reasoning of the present judgement.

- *Appeal filed by defence counsel R.D. on behalf of defendant S.A. on 10 March 2016*

17. The defence claims that the judgement of the Basic Court contains essential violations of the criminal procedure provisions, violation of criminal law, erroneous and incomplete determination of factual situation, and erroneous decision on penal sanctions. Therefore, the defence proposes to modify the impugned judgement by acquitting defendant S.A. or to annul the impugned judgement and send the case for re-trial.

18. The defence claims that the impugned judgement contains a number of violations of the criminal procedure, and it erroneously and incompletely established the factual situation. The defence further claims that the impugned judgement contains violations of the criminal law. The judgement is in violation of Article 24 of the CCK, because S.A. was charged with and convicted for the criminal offences which he did not commit. The exact allegations will be addressed in the reasoning of the present judgement.

- *Appeal filed by defence counsel K.P. on behalf of defendant N.D. on 16 March 2016*

19. The defence claims that the impugned judgement contains essential violations of the provisions of criminal procedure in relation to the evidence, violation of criminal law,

erroneous and incomplete determination of factual situation, and erroneous decision on criminal punishment. The defence therefore moves the Court of Appeal to annul the judgement of the Basic Court and reject the indictment, or to annul the Basic Court judgement and send the case for re-trial. The exact allegations will be addressed in the reasoning of the present judgement.

- *Appeal filed by defence counsel G.A. on behalf of defendant N.Z. on 16 March 2016*

20. The defence claims that the impugned judgement contains substantial violations of the provisions of criminal procedure, violations of criminal law, erroneous and incomplete determination of the factual situation and erroneous decision on the criminal sanction. The defence moves that Court of Appeals to annul the impugned judgement and send the case for re-trial or to modify the impugned judgement. The exact allegations will be addressed in the reasoning of the present judgement.

- *Appeal filed by defence counsel A.K. on behalf of defendant I.R. on 14 March 2016*

21. The defence counsel states that the impugned judgement contains substantial violations of the provisions of criminal procedure, violations of criminal law, erroneous and incomplete determination of the factual situation and erroneous decision on the criminal sanction. Therefore, the defence moves the Court of Appeals to modify the judgement of the Basic Court and acquit the defendant, or to annul the judgement of the Basic Court and send the case for re-trial.

22. The defence claims that the judgement contains a number of violations of the criminal procedure, and it erroneously established the factual situation. The exact allegations will be addressed in the reasoning of the present judgement.

- *Appeal filed by defendant I.R. on 9 March 2016*

23. The defendant claims that the impugned judgement contains essential violations of the criminal procedure provisions, erroneous and incomplete determination of the factual situation, violation of criminal law and erroneous decision on punishment. As such, the defendant moves the Court of Appeals to annul the impugned judgement and send the case for the re-trial, or to amend the impugned judgement and to acquit the defendant of all charges.

24. The defendant claims that there are multiple violations of the criminal law pursuant to Article 386 of the CPC. The Basic Court erroneously applied legal provisions and convicted the defendant instead of dismissing the indictment; the Basic Court exceeded the scope of the charge by announcing the accessory punishment; and the Basic Court ignored the recommendation of the Court of Appeals stating that the criminal offence of Assault is subsumed by other criminal offences. The decision of punishment was rendered in violation of legal provisions because the criminal offences in relation to I.R. were not proven beyond reasonable doubt. The exact allegations will be addressed in the reasoning of the present judgement.

- *Appeal filed by EULEX Basic Prosecution Office on 11 March 2016*

25. The Prosecutor filed the appeal against the judgement of the Basic Court on the ground of erroneous and incomplete determination of factual situation as per Article 383(1.3) in conjunction with Article 386 of the CPC. The Prosecutor moves the Court of Appeals to annul the acquittal of the following defendants: S.A. and N.D. for the criminal offences referred to in Counts 1, 2, and 3 of the Indictment; J.R., V.K. and Z.S. for the criminal offences referred to in Counts 1, 2, 3, and 12 of the Indictment; N.S. and Xh.H. for the criminal offences referred to in Counts 1, 2, 3, and 11 of the Indictment; S.S. for the criminal offence referred to in Count 11 of the Indictment; and I.R. for the criminal offence referred to in Count 12 of the Indictment, and to modify the impugned judgement by finding them guilty and imposing an adequate sentence.

26. The Prosecutor notes that defendants S.A., N.D., J.R., N.S., Xh.H., V.K. and Z.S. were acquitted of the criminal offences as indicated in Counts 1, 2, and 3. Further, the Prosecutor notes that defendants S.S., N.S. and Xh.H. were acquitted of the criminal offence as it is described in Count 11 while defendants I.R., J.R., V.K. and Z.S. were acquitted of the criminal offence as it is described in Count 12. Contrary to the conclusions of the Basic Court, the Prosecutor maintains that there are compelling and sufficient arguments warranting a guilty verdict of these defendants. The Prosecutor submits that the Basic Court misinterpreted the existing evidence and incorrectly established the existence of the elements of co-perpetration as it is defined in Article 31 of the CCK. The exact allegations will be addressed in the reasoning of the present judgement.

b. Responses

- *Response to the appeal of EULEX Basic Prosecution Office by the of defence counsel N.S. on behalf of defendant J.R.*

27. The defence alleges that the Prosecutor failed to present any arguments to prove that the challenged judgement is incorrect and moves the Court of Appeals to dismiss the appeal filed by the Prosecutor and to inform the defendant about the next session.

28. The defence claims that the Prosecutor did not properly assess the institution of co-perpetration as it is defined in Article 31 of the CPC and concurs with the Basic Court that the mere presence at the crime scene is not enough to prove the commission of the criminal offence. The defence indicated that the Prosecutor erroneously claims that defendant J.R. was part of the so called “corridor”. Based on the evidence presented by M.J., it is apparent that J.R. left the premises together with the fist detainee B.M. who was accompanied by V.K.. Further, there is no proof of the existence of so-called “corridor”. Finally, the defence claims that the Basic Court correctly evaluated the statement of M.J. and the apparent discrepancies of this statement.

- *Response to the appeal of EULEX Basic Prosecution Office by the of defence counsel R.D. on behalf of defendant S.A.*

29. The defence counsel moves the Court of Appeals to reject the Prosecutor's appeal as ungrounded and grant the appeal filed by the defence counsel by acquitting defendant S.A.. The defence counsel claims that the appeal has no legal basis as the defendant did not commit any criminal offence. The defence further alleges that the trial was affected by the political and ethnical motives and the criminal proceedings were not carried out in a professional manner.

- *Response to the appeal of EULEX Basic Prosecution Office by the of defence counsel M.S.E. on behalf of defendant Z.S.*

30. The defence alleges that the Basic Court rightly and completely confirmed the factual situation and correctly assessed the obtained evidence and therefore moves the Court of Appeals to reject the appeal filed by the Prosecutor and to affirm the Judgement of the Basic Court.

- *Response to the appeal of EULEX Basic Prosecution Office by the of defence counsel F.B. on behalf of defendant N.S.*

31. The defence alleges that the Basic Court rightly and completely confirmed the factual situation and correctly assessed the obtained evidence and therefore moves the Court of Appeals to reject the appeal filed by the Prosecutor and to affirm the Judgement of the Basic Court.

- *Response to the appeals filed by the defence counsel and defendants by the SPRK*

32. The Prosecutor submits that the arguments in the appeals have already been raised number of times during the main trial and were addressed in great detail in the Prosecutor's closing

speech and appeal filed on 11 March 2016. The Prosecutor therefore moves the Court of Appeals to reject the appeals as unfounded.

c. Motion of the Appellate Prosecutor

33. The Appellate Prosecutor concurs with the appeal filed by the EULEX Basic Prosecution Office and indicates that the main issue if the erroneous interpretation of co-perpetration as it is defined in Article 31 of the CCK. The Appellate Prosecutor argues that it was proven beyond reasonable doubt that all defendants were present at the crime scene and they were part of the group of police officers responsible to bring the detainees to the Minor Offences Court. Therefore, the Appellate Prosecutor claims that they are responsible for the criminal offence as co-perpetrators who committed it by omission.

34. The Appellate Prosecutor claims that the appeals filed by the defence counsel of the defendants and by one defendant himself are without merit. The appeals contain a number of claims that are not supported by any argument or reasoning.

35. The Appellate Prosecutor concurs with the assessment of the Basic Court that the elements of the criminal offences of Assault and Mistreatment during Exercise of Official Duty or Public Authorization are of a different nature and the two criminal offences cannot be considered as one criminal offence. Therefore, these claims of the defence counsels of G.K., S.S., N.D. should be rejected as without merit. Further, the Appellate Prosecutor claims that the defence counsel of G.K., S.A. and I.R. does not give any proper reasoning as why the enacting clause is contradictory and claims that these allegations are without merit.

36. In relation to the erroneous and incomplete factual determination, the Appellate Prosecutor alleges that the description of the events and examination of witnesses/injured parties during the main trial was concluded in compliance with the provisions of the CPC. Therefore, the evidential material made available to the Basic Court suffices to establish the guilt of the defendant beyond reasonable doubt. The Appellate Prosecutor alleges that the Basic Court correctly assessed the statement of B.M. who clearly testified that defendant N.D. hit him.

Therefore, the actions of N.D. cannot be qualified as actions of minor significance. In relation to the assessment of the credibility of the witnesses, the Appellate Prosecutor claims that the Basic Court is in the best position to assess the witnesses and their statements and the Court of Appeals should give a margin of deference to the findings of facts of the Basic Court. Mere disagreement of the defence in relation to the factual determination does not mean that the factual circumstances were evaluated erroneously.

III. Composition of the Panel

37. The Panel unanimously decided that pursuant to Article 3 (Article 1A (1.4) of the Law on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in Kosovo (05/L-103) (hereinafter "Omnibus Law") *inter alia* modifying Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (03/L-053), this case is to be considered as an 'ongoing case'. Thus, EULEX judges have jurisdiction in this case. Pursuant to Article 3.3 of the Omnibus Law, the panel shall be composed of a majority of local judges and presided by a local judge.

IV. Findings of the Panel

a. Admissibility

38. The Panel finds that the appeals filed by defence counsel A.R. on behalf of defendant G.K. on 12 March 2016, defence counsel N.S. on behalf of defendant S.S. on 10 March 2016, defence counsel R.D. on behalf of defendant S.A. on 10 March 2016, defence counsel K.P. on behalf of defendant N.D. on 16 March 2016, defence counsel G.A. on behalf of defendant N.Z. on 16 March 2016, defence counsel A.K. on behalf of defendant I.R. on 14 March 2016, defendant I.R. on 9 March 2016, and the Prosecutor on 11 March 2016 are admissible. They were filed by an authorised person (Article 381(1) of the CPC), within the prescribed

deadline (Article 380(1) of the CPC), and to the competent court (Article 374(1)(1.1) of the CPC).

b. The Basic Court Panel did not have jurisdiction to adjudicate the case

39. Defendant I.R. states that the Basic Court judgement is in violation of Article 384(1)(1.1) of the CPC, in conjunction with Articles 21(3) and 25(2) of the CPC. The indictment filed against the defendant does not contain any criminal offence that falls under the competence of the Department of Serious Crimes. The indictment should have been filed with the General Department and addressed by the single trial judge.

40. In this regard, the Panel notes that in accordance to Article 15(1.19) of the Law No. 03/L-199 on Courts, **criminal offenses against official duty including**, but not limited to, abuse of official position or authority, misappropriation in office, fraud, accepting bribes, and trading influence and related conduct shall be adjudicated by the Serious Crimes Department of the Basic Court. In the present case, among other criminal offences, the defendants are charged with Mistreatment during Exercise of Official Duty or Public Authorization as it is described in Article 198 of the CCK. One of the elements of this criminal offence is that the perpetrator is acting in his or her official position of public authorization. Therefore, the Panel considers that the requirements set in Article 15 of the Law No. 03/L-199 on Courts are met and the case was correctly adjudicated by a trial panel of 3 (three) professional judges, with 1 (one) judge designated to preside over the trial panel. The allegation that the case should have been adjudicated by a single trial judge is therefore rejected as unfounded.

c. Incomprehensive and contradictory enacting clause

41. The defence counsel of G.K., S.A., N.D. and I.R. claim that the enacting clause is incomprehensible, contradictory to its content and reasoning of the judgement. The formulations do not contain any description of facts or circumstances that would describe the criminal offences allegedly committed by the defendants as it is required in Article 370(4) of the CPC. The defence of G.K. further claims that the enacting clause in parts describing

G.K.'s actions against M.J., I.P., B.M. and D.V. does not contain legal criteria prescribed in Articles 365(1)(1.1), 370(4) and 384(1.10) of the CPC.

42. The Panel considers that the enacting clauses of the Judgement of the Basic Court is drawn in accordance to the requirements set in Article 370 (3) and (4) in conjunction with Article 365 of the CPC. The enacting clause contains full description of the acts of which the defendants were found guilty or acquitted together with the description of the facts and circumstances indicating their criminal nature and the application of pertinent provisions of the criminal law. The Basic Court Judgement clearly indicates the circumstances of the criminal offence, clear description of each act committed by each defendant, indicates which acts were committed in co-perpetration, and precisely names the injures parties.

43. However, the Panel agrees with the defence that the Basic Court does not precisely address the facts it considered proven or not proven and the evidence relied upon by the court when rendering the judgement. In this regard, the Panel notes that the lawmaker does not set the requirement to detail proven and disproven facts in the enacting clause. This is rather the requirement of the reasoning as it is indicated in Article 370(7) of the CPC. The aim of the lawmaker in this regard is to ensure that the enacting clause is as short and concise as possible, and describes only the elements detailed in Article 365 of the CPC. A judgement is a complex document that has to be read in its entirety including the enacting clause and the reasoning. The enacting clause and the reasoning are inseparable parts of every judgement and certain part and/or sentences of the judgement cannot be read in isolation.

44. Therefore, the Panel considers that the defence counsel did not provide any concrete violations of Articles 365(1)(1.1), 370(4) and 384(1.10) of the CPC. The allegations of the insufficient and inconsistent enacting clause are rather related to the disagreement with the factual determination. The Panel notes that possibly erroneously or incompletely established factual situation does not automatically mean that there is a substantial violation of the criminal procedure. These are two separate ground of an appeal which do not necessary interrelate. Therefore, the allegations raised by the defence counsel of G.K., S.A. and I.R. in relation to the contradictions in reasoning, and between the enacting clause and the reasoning are rejected as unfounded.

45. The defence of G.K. indicates that the enacting clause is contradictory to itself as it refers to "item 4" for which the defendant was found guilty and imposed a sentence; however, later in the judgement it is indicated that the defendant is acquitted for Count 4. The defence therefore alleges that the enacting clause is in contradiction with itself.

46. In this regard, the Panel considers that this allegation is rather a misunderstanding of the Judgement. The Basic Court Judgement is long and complex document which contains a descriptions of the acts of 11 (eleven) defendants and 19 (nineteen) counts. This might require careful reading and a great attention to detail. In this particular situation, the "item 4" does not correspond to Count 4. The actions of defendant G.K. were divided into 4 parts based on the description of the acts against 4 (four) injured parties. At the end of the description of each item, the relevant count is clearly indicated. Hence, the Panel considers that the enacting clause is not in contradiction with itself and it clearly determines for which acts the defendant was found guilty or acquitted of. The defence's allegation is therefore rejected as unfounded.

d. Testimonies of the injured parties via video-conference link

47. The defence of G.K. further claims that the interest of the defence was seriously damaged when the injured witnesses refused to appear in person during the trial and were instead granted the permission to testify via video-link.

48. Generally, both local and international courts, such as the International Criminal Court, have fairly well-established, with evidentiary rules outlining the permissible use of video-link testimony.[1] In these situations the court merely has to evaluate whether the conditions for video-conference are met. However, the present CPC does not have a clear evidentiary rule on video-conferences. Therefore, the Panel has to assess whether the use of video-conference and the potential advantage in hearing the testimony of the injured parties which otherwise

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[1] *See*, e.g., Mrksic, Case No. IT-95-13/1; Rome Statute of the International Criminal Court art. 68, July 17, 1998, 2187, U.N.T.S. 3 (1998).

would have been unavailable is balanced against the defendants' right to confrontation. It is generally accepted that the two-way video conference and the technology available nowadays are fully in compliance with the goals and protections intended by the right of confrontation. This technology allows for the defendant to see and be seen by the witness and vice versa, and ensures the ability of the defendant to cross-examine the witness. The Panel stresses that these factors are the vital elements of the right of confrontation.

49. There are no rules defining in which situations the witness or injured party could be heard using video-conference link. Therefore, it is in the Trail Panel's discretion to determine whether the particular situation would warrant for the witness to testify using the video-conference technology and to balance it to the possible negative affect to the defendants' right of confrontation.

50. This issue has been raised and discussed in great detail during the main trial (*see,* pages 3 – 4 of Record of the Main Trial, 24 September 2014, and pages 8 – 12 of Record of the Main Trial, 9 October 2014). The Trial Panel informed the parties about the security concerns raised by the injured parties and proposed three options to sort the issue. The Prosecutor and the defence counsel were allowed to express their views on each proposed option. The Trial Panel subsequently issued a ruling indicating that the most practical and speedy solution is to hear the injured parties using the video-conference technology; however, the provisions of Article 343 of the CPC shall be applicable in case video-conference is insufficient to hear certain evidence (*see,* page 12, Record of the Main Trial, 9 October 2014).

51. In the present case, the parties had an opportunity to express their views on possibilities to hear the injured parties who did not appear at the trial due to the security concerns. Furthermore, the defence did not raise any objection to use the video-conference technology. The defence only raised the security concerns in case the provisions of Article 343 of the CPC would have been used. During the testimonies of the injured parties, the Prosecution and all defence counsel were able to pose questions and conduct an effective cross-examination of all injured parties who testified using the video-conference link. Therefore, the Panel finds that the issue of hearing the injured parties using video-conference technology was addressed in a proper manner, all possibilities were examined and alternative

methods were determined. Further, the Panel is satisfied that the defendants' right of confrontation was properly guaranteed, and they were fully able to cross-examine the injured parties. Therefore, the allegations of the defence of G.K. are rejected as unfounded.

e. Violations committed during the investigative stage

52. The defence of S.A. and I.R. claim that the judgement of the Basic Court is in violation of Article 103 of the CPC because it did not evaluate the material evidence presented in the pre-trial proceedings. According to the defence, the criminal proceedings were started because of the involvement of the politicians from Belgrade. Further, the Prosecution violated the requirement to collect both inculpatory and exculpatory material by threatening one of the protected witnesses to give the statement that would suit the Prosecutor's case. For these reasons, the defence claims that the indictment would have not been filed if the Prosecutor would have followed the provisions of the CCK and the CPC.

53. The Panel notes that the defence raises allegation that the investigation was affected by the political motives without indicating any specific violation or providing any specific proof on how the investigation was affected by the politicians in Belgrade. The Panel notes that the investigation and the trial were concluded in accordance to the provisions of the CPC. The Indictment was confirmed at the initial hearing, the evidence was presented during the main trial, the defence was able to challenge all evidence presented by the Prosecution and to bring its own evidence. Therefore, the Panel considers that there is no indicia of political interference or manipulation of the witnesses, and considers the allegations of the defence without merit.

f. Failure to provide the defence with the requested information during the investigation stage

54. The defence of G.K. claims that the Prosecution failed to provide the defence with the information related to the development of the criminal proceedings.

55. In the context of criminal proceedings, the disclosure has been defined as a constitutional duty on the prosecution to disclose and to make available to the defence any material in the possession or procurement of the prosecution which may be relevant to the case which could either help the defence or damage the prosecution. This duty is central to the criminal justice process. The duty of disclosure arises from the accused's constitutional rights to a trial in due course of the law and to fair procedures.

56. The general requirement to disclose the relevant material is set in Article 244 of the CPC. Article 245(4) of the CPC further adds that during the initial hearing, the single trial judge or the presiding judge shall ensure that the prosecutor fulfilled the obligations set in Article 244 of the CPC. The issue of disclosure in the present case was addressed during the initial hearing in great detail (*see* Record of the Initial Hearing, 28 January 2014 and 4 February 2014). The Presiding Judge concluded that the duty of disclosure of the Prosecutor was fulfilled.

57. The Prosecutor further has certain disclosure obligations during the investigative stage. For example, Article 138(5) of the CPC states that the expert's report shall be disclosed to the defendant or defence counsel. In the present case, the SPRK informed all defendants on the IT Forensic Report dated 14 March 2013 in due time. The Panel considers that this example clearly shows that the Prosecution respected the obligation to inform he defendant on the development of the investigation.

58. The Panel therefore concludes that the Prosecution clearly respected the disclosure obligation both during the investigative stage, and upon filing the indictment. The Prosecution disclosed all material that was collected during the investigation to the defendants and the defence counsel, and gave the opportunity for the defence counsel to review the information which was redacted due to the protective measures applied to certain witnesses (*see* Record of the Initial Hearing, 28 January 2014 and 4 February 2014). The defendants and their defence counsel had full knowledge of the Prosecution's case, and were in position to assess the case against them and defend themselves. Thus, the Panel considers that the allegation of the defence of G.K. is without merit, and is therefore rejected as unfounded.

g. Erroneously and incompletely determined factual situation

- *Standard of the appellate review*

60. The defence of S.A., N.D., N.Z. and I.R. claim that the impugned judgement is in violation of Article 7 of the CPC, because the Basic Court failed to truthfully and completely establish the facts which are important to render the lawful decision. The court did not take into consideration of the discrepancies in the testimonies of the injured parties nor any evidence presented to the defendant's favour. The arguments of the parties are detailed below.

61. At the outset, the Panel notes that standards of appellate review are drawn from and, to some extent reflect, the limited role of the appellate court in a multi-tiered judicial system. As a general rule, appellate judges are concerned primarily with correcting legal errors made by lower courts, developing the law and setting forth precedent that will guide future cases. The Basic Court judges, in contrast, are entrusted with the role of resolving relevant factual disputes and making credibility determinations regarding the witnesses' testimony because they see and hear the witnesses testify. A trial judge's factual findings are accorded great deference because the judge has presided over the trial, heard the testimony, and have the best understanding of the evidence. Under the clearly erroneous standard, it is not enough to show that the factual determination was questionable. An appellate court will affirm the trial court's fact determinations unless, based on a review of the entire record, it is left with the definite and firm conviction that a mistake has been committed. The wide margin of deference was also affirmed by the Supreme Court in previous cases "*defer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so." 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".[2]

62. The standard of the appellate review of the factual determination is set in Article 386 of the CPC. This article affirms that it is not enough to show the alleged error or incomplete determination of the fact by the trial panel. Rather, as the criminal procedure code requires that the erroneous or incomplete determination of the factual situation relates to a "material fact", the appellant must also establish that the erroneous or incomplete determination of the factual situation indeed relates to a material fact, i.e. is critical to the verdict reached. Therefore, the Panel in the present case will address all allegations related to the erroneous and incomplete factual determination in light of the abovementioned standard of review.

- *The injuries of the injured parties were not properly evaluated*

63. The defence of G.K., N.D. and N.Z. argues that the Basic Court failed to correctly assess the claimed injuries of the injured parties and to take into consideration the contradictions in the statements of the injured parties.

64. All injured parties refused to get the medical treatment at EULEX Medical Centre; they presented documents of medical treatment from Leposavic and Mitrovica Police Station 8 (eight) to 10 (ten) days after the alleged events. Further, the injured party claims that he had sustained grievous body harm; however, EULEX forensic doctor in her report confirmed only light bodily injuries. Furthermore, EULEX forensic experts confirmed that all injured parties suffered slight injuries without permanent consequences; and there was no recorded post-traumatic stress. The defence of G.K. argues that the enacting clause is in contradiction with the statements of several witnesses (N.G., J.M. and R.H., and defence counsels of the injured parties B.A., G.H. and A.H.) who testified that they did not observe any injuries of the detainees.

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[2] Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, para. 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, para. 30.

65. The Panel notes that the Basic Court assessed the testimony of the EULEX forensic expert C.B. and concluded that due to blunt trauma it is possible to conclude that the injured parties have suffered light bodily injuries (*see* page 66 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština, and page 6 of Minutes of the Main Trial dated 12 March 2015). The expert witness in great detail explained how it is possible to determine when the bruise was inflicted and concluded that it could have been done a day before or day after the event in question; however, taking into consideration the medical records are dated 9 January 2013, it could be concluded that the injuries were caused before 9 January 2013 (*see* pages 16-17 of Minutes of the Main Trial dated 12 March 2015). The Basic Court further in great detail addressed the credibility of the medical records issued by North Mitrovica Hospital and concluded that the medical reports compiled by this hospital are generally in line with the reports drafted by the EULEX Doctor (*see* page 66 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština, and Minutes of the Main Trial dated 12 March 2015).

66. The Panel notes that the opinion of the expert witness has always to be weighed against the other evidence presented in the case. In the present case it appears that contrary to the conclusion of the forensic expert and the defence witnesses, the injured parties claimed that they sustained severe injuries. However, the overall impression is that the evidential weight given by the Basic Court to the expert opinion was directly related to the possibility to corroborate the testimony of the expert witness with other evidence presented in the case, in particularly, the statement of the EULEX Doctor, the medical report of North Mitrovica Hospital, and the witness statements (*see* pages 66 and 98-99 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). Therefore, the Panel concludes that the Basic Court reached the only logical conclusion that the injured parties sustained light injuries at around the time of the alleged events. The alleged serious injuries were rejected as unproven by the Basic Court (*see* page 104 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). It further appears that the parties in their appeal concur with the findings of the Basic Court, in particularly that the injured parties suffered light injuries. Therefore, in absence of any claimed violation the Panel rejects the allegations related to the evaluation of the injuries as unfounded.

- *The Basic Court failed to address the contradictions in the statements of the injured parties*

67. In making its assessment, the Basic Court primarily relied on the statements provided by 9 injured parties, 3 (three) anonymous witnesses, the forensic expert, 10 (ten) other witnesses brought by the SPRK, 10 (ten) witnesses brought by the defence, and by the defendants (*see* pages 40-85 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). The Basic Court further took into consideration the records of cameras. The Basic Court concluded that the statements of the injured parties are generally credible. Their accounts are broadly similar in relation to the major issues in the case. The discrepancies were minor and stemmed from the fact that they had been through the traumatic experience (*see* page 98 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština).

68. All defence counsel, contrary to the conclusion of the Basic Court, claim that the statements of the injured parties are inconsistent and unreliable. The statements are contradictory and should be considered as inadmissible.

69. The defence of S.A. points out that BM. stated that during the entire drive to the Minor Offences Court he had his head down and did not see the face of the driver; however, the Prosecutor manipulated this statement to support his own case. In relation to the statement of D.V., the defence of S.A. notes that contrary to his statement, the van by which he was taken to the Minor Offences Court did not have a radio or another music appliance. The defence of N.D. also claims that D.V.'s statement is contradictory and should be regarded as inadmissible. In particular, D.V. stated that the second person who escorted him to the toilet had a short weapon while according to the official police reports N.D. was assigned long barrel weapon.

70. The defence of N.Z. claims that the defendant was found guilty based on the statements of injured party I.P. which was used as admissible in breach of Article 262(1) to (4) of the CPC. Based on this statement, I.P. merely recognized the defendant but did not indicate any abuse or mistreatment committed by the defendant.

71. The defendant I.R. claims that the Basic Court erroneously determined the factual situation in relation to the fact that the defendant hit detainee B.M.1. The statement of B.M.1 is not clear; he does not give the details about the hit, where it happened, and whether he was hit in the van or when he was being escorted. The defendant claims that none of the witnesses confirmed that he was in the van or that he hit anybody. The defence of IR claims that the statements of the injured parties B.M., D.T. and D.V. given in the present case are contradictory and not logical.

72. Finally, the defence of S.A. and I.R. claim that there are contradictions in evidence given by the injured parties during the criminal proceeding at Minor Offences Court and via video-link in the present criminal proceedings. The defence points out that none of the injured parties reported any misconduct committed by the police officers during the proceedings in the Minor Offences Court.

73. The Panel notes that the Basic Court has already dismissed parts of the statements of the injured parties which were vague in regarding the description of specific perpetrators and specific actions. For example, only the parts of the statement of I.P. where he recognized defendants S.S., N.Z. and G.K. were considered as proven (*see* page 102 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). The parts of the statement of B.M. in which he could not recognize the police officers who were in the van and who were beating him were clearly rejected by the Basic Court. However, the parts of the statement where B.M. clearly recognized S.A. as a driver and who pointed out the gun on his knee were considered as credible and corroborated by statements of witnesses B.M.1 and D.V. (*see* pages 95 and 105 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština, and page 43 of Main Trial Minutes of 3 December 2014). The Panel considers that the Basic Court addressed in great detail the statements of injured party D.V. in relation to the beating in the toilet of Minor Offences Court, and concluded that D.V. clearly recognized N.D. and G.K. as persons who beat him in the toiled of the Minor Offences Court (*see* pages 95-96 and 104 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). Further, the Basic Court clearly established that B.M.1 was hit by I.R. (*see* page 96 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština, and page 38 of Main Trial Minutes of 24 October 2014).

74. The Panel further notes that the Basic Court was mindful of the contradictions between the statements of the injured parties in the present trial and the statements given at the Minor Offences Court. Notably, the injured parties did not report the incident during the proceedings at the Minor Offences Court. The Basic Court concluded that the injured parties gave reasonable explanations why they have changed their accounts, and considered their statements credible and reliable taking into consideration that they were corroborated by other witnesses such as J.D., C.B., nun I.P. and forensic doctor C.B. (*see* pages 42, 44, 60, 64, 98-99 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština).

75. The Panel recalls that the Basic Court has full discretionary power in determining the appropriate weight and credibility to be accorded to the testimony of a witness. This assessment is based on a number of factors, including the witness's demeanour in court, his role in the events in question, the plausibility and clarity of his testimony, whether there are contradictions or inconsistencies in his successive statements or between his testimony and other evidence, any prior examples of false testimony, any motivation to lie, and the witness's responses during cross-examination.

76. A review of the Basic Court Judgement and the trial record as it is detailed above reflects that there are certain contradictions between the accounts of the injured parties. Contrary to the submissions of all defence counsel, these contradictions are generally minor and do not call into question the decision of the Basic Court to rely on the accounts of the injured parties. The Panel further recalls that the Basic Court has the main responsibility to resolve any inconsistencies that may arise within or among witnesses' testimonies. It is within the discretion of the Basic Court to evaluate any such inconsistencies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence. The Panel further recalls that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.[3] Furthermore, corroboration does not require witnesses' accounts to be

[3] ICTY, LUKIĆ & LUKIĆ (IT-98-32/1-A), Appeal Judgement - 04.12.2012, paragraph 112.

identical in all aspects since "[e]very witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others".[4] Rather, the main question is whether two or more credible accounts are incompatible.

77. Accordingly, the Panel concludes that the Basic Court correctly addressed the discrepancies in the statements of the injured parties, and affirms the analysis of the Basic Court that the injured parties were able to recognize the defendants; their accounts in majority were corroborated by the statements of other injured parties and witnesses. The Panel recalls that it is not an error of law per se to accept and rely on evidence that is inconsistent with a prior statement or other evidence. The Basic Court has the discretion to accept a witness's evidence, notwithstanding inconsistencies between the said evidence and his previous statements. However, the Basic Court must take into account any explanations offered for such inconsistencies when determining the probative value of the evidence. With regards to the inconsistencies between witness statements during the main trial and the proceedings in the Minor Offences Court, the Panel notes that during the examination and cross-examination, the injured parties explained the reasons of the contradictions and indicated that it was mainly due to the fear. Therefore, in the opinion of the Panel, the defence has not demonstrated that it was unreasonable to accept the testimonies of the injured parties because of the alleged inconsistencies with the statements given during the proceeding in the Minor Offences Court.

78. Further, the Panel is not convinced that the inconsistencies such as failure to precisely describe the weapon carried by one of the defendants or the radio in the vehicle by D.V. would require to declare the entire testimony of the witness as not reliable. It is well established that the first instance courts have the discretion to accept some but reject other parts of a witness's testimony. Therefore, the Panel considers that the defence counsel did not demonstrate that the Basic Court's assessment is unreasonable. The allegations in relation to the contradictions between the statements of the witnesses and their credibility are therefore rejected as unfounded.

[4] ICTR, MUNYAKAZI Yussuf (ICTR-97-36A-A), Appeal Judgement - 28.09.2011, paragraph 103.

- *The Basic Court failed to correctly evaluate the evidence to the benefit of the defendants*

79. The defence of G.K. claim there is no evidence that G.K. accompanied M.J. or mistreated him, or that G.K. hit I.P. with his hands. Defendant G.K. was armed with a long weapon and was appointed for the external observation. From the evidence presented in the case, notably video recordings, it is apparent that G.K. merely observed the situation and did not take any action against the detainees. In relation to the actions against B.M., the defence of G.K. alleges that the defendant was not able to do the described actions at the same time; that he did not have a "pistol" as indicated in the enacting clause; and that there is no evidence in the case file to show that G.K. assaulted, intimidate or threatened anybody with a weapon. The defence of G.K. claims that the Basic Court intentionally omits to describe the movement of the vehicles, the direction, speed and duration of the trip. Moreover, detainees B.M., B.M.1, D.V. and other testified that they met G.K. for the first time only in vehicle Mercedes, license plate Police 413-01. Further, the defence of G.K. claims that in relation to Counts 17 and 18, the Basic Court did not take into account that there was no abuse committed against D.V.; G.K. correctly implemented the detainees request to use the bathroom.

80. In particularly, the Basic Court states that defendant S.A. accompanied detainee B.M. from the reception of the Detention Centre to the vehicle while the detainee himself testified that the defendant did not accompany him to the vehicle. Further, it was not established why defendant S.A. pointed the gun specifically to B.M.'s knee or how the defendant could beat B.M. and drive the vehicle at the same time.

81. The Trial Panels are tasked with determining the guilt or innocence of the accused and must do so in light of the entirety of the evidence admitted into the record. In accordance to Article 370(7) of the CPC, the Basic Court in its reasoned decision shall state clearly and exhaustively which facts it considers proven and not proven, as well as the grounds for this. In particular, a Basic Court is required to make findings on those facts which are essential to the determination of guilt on a particular count. The absence of any relevant legal findings in a trial judgement also constitutes a manifest failure to provide a reasoned opinion. A

reasoned opinion in the trial judgement is essential for allowing a meaningful exercise of the right of appeal by the parties and enabling the Court of Appeal to understand and review the Basic Court's findings as well as its evaluation of the evidence.

82. The Panel reiterates its analysis on the credibility of the statements of the injured parties as it is detailed in the previous chapter and stresses that the Basic Court had a wide discretion to weight the statements of the injured parties against the statements of the defendants. The Basic Court is bound to assess all relevant factors and carefully consider the totality of the circumstances in which it was tendered. Whereas the assessment of an evidentiary factor in a vacuum might fail to establish an essential matter, the weight of all relevant evidence taken together can conclusively prove the same matter beyond reasonable doubt.

83. Turning to the specific allegations, the Panel notes that the defence of S.A. claims that B.M. has never testified that S.A. escorted him to the vehicle. The Panel notes that this is in line with the conclusion set out in the judgement of the Basic Court where S.A. was found guilty for the action taken against B.M. inside the vehicle (*see* pages 10 and 95 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). In absence of any apparent contradiction, the allegations of the defence are therefore rejected as unfounded.

84. Further, the statement of G.K. that he was merely assigned to observe the perimeter and did not assault any of the injured parties is in contradiction to the statements of the injured parties and other witnesses. The assessment of the guilt of G.K. is the result of a complex evaluation of all the evidence presented in relation to that defendant. The Panel considers that the Basic Court correctly evaluated the totality of the evidence and took careful consideration of the contradictions noticeable in the statements of the injured parties. The Basic Court further carefully evaluated the parts of the statements of the injured parties where the identification of the defendant was not sufficient and rejected those parts as not proved. Therefore, in the opinion of the Panel, the Basic Court carefully fulfilled its duty to provide reasoned decision and assess the totality of the evidence presented in the case. Absent any contrary finding, a Basic Court's decision to ultimately rely upon the cumulative evidence of the injured parties whose evidence required corroboration reflects the Basic Court's determination that, taken as whole, the evidence was sufficiently credible and reliable.

85. The standard "'beyond reasonable doubt' connotes that the evidence establishes a particular point and it is beyond dispute that any reasonable alternative is possible." It requires that the Basic Court be satisfied that there is no reasonable explanation of the evidence other than the guilt of the defendant. The Panel carefully reviewed the evidence presented in relation to the guilt of G.K. and finds that the Basic Court came to only possible logical conclusion. The Panel finds that the Basic Court correctly interpreted the statements of the injured parties and carefully weighted them against the statement of the defendant. The Panel fully adopts and affirms the analysis of the Basic Court, therefore considers that the defence failed to show any error in the factual determination. This ground of appeal is dismissed as unfounded.

- *Failure to assess the testimonies related to the "corridor"*

86. The Prosecution notes that defendants S.A., N.D., J.R., N.S., Xh.H., V.K. and Z.S. were acquitted of the criminal offences as indicated in Counts 1, 2, and 3. The Prosecution claims that the Basic Court erred in determination of factual situation by failing to establish that all seven defendants at one point were part of the "corridor" of the SOU officers on they stairways or/and lead at least one of the injured parties through this "corridor" and as such participated or substantially contributed to the criminal offences of Mistreatment and Assault.

87. The Prosecution further claims that the Basic Court disregarded the statements given by these seven defendants during the pre-trial and the main trial, and did not present any reasoning pursuant to Articles 123(5), 261(1) and 262(2) of the CPC why these statements were not taken into consideration. All detainees admitted that they escorted at least one detainee through the "corridor". This was confirmed by the statements of the injured parties. This information proved that each defendant took at least one detainee, held him forcibly through the stairwell allowing other defendants to use violence.

88. According to the Prosecution, the Basic Court failed to evaluate the pre-trial testimonies given by the three anonymous witnesses. The Court did not discuss the credibility of these witnesses or did not corroborate their testimonies with other evidence. All three anonymous witnesses confirmed the "corridor" of the SOU officers as well as the mistreatment and the

abuse of the detainees while they were escorted though this “corridor”. The Prosecution alleges that the credibility of these witnesses is without a question. They gave a consistent and accurate testimony and did not provide any contradictions.

89. The Prosecution claims that it is unclear why the Basic Court indicated that the original footages from the cameras in the parking lot are not clear.

90. In assessing the existence of the “corridor”, the Basic Court considered the statements of the injured parties, statements of 3 (three) anonymous witnesses, and the records of the camera (*see* pages 64-65, 97, 100-102, and 105 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). Contrary to the allegations of the Prosecution, the Basic Court took into consideration that injured parties D.S., I.S., B.M.1, I.P., M.J., M.P., and B.M. were not able to identify any of the defendants who were part of the “corridor”, and that their accounts as to the number of the defendants who were part of the “corridor” differ greatly (*see* pages 41, 43, 47, 50-51, 57-59, 62, 100-102, and 105 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). Further, the Basic Court took into consideration the statements of the 3 (three) anonymous witnesses in relation to the “corridor”. In these statements none of the anonymous witnesses were able to identify any of the defendants which were part of the “corridor” (*see* pages 64-65 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština, and Minutes of Main Trial of 16 April 2015). In relation to the recordings of cameras, the Basic Court took into consideration the low quality of the video recording and concluded that it is not possible to identify the defendants from the footage beyond reasonable doubt. The Basic Court further indicated that the footage can be used to help the participants to remember the events as some of the injured parties were able to recognise themselves (*see* pages 45, 50 and 97 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština, and pages 25-26 of the Minutes of Main Trial dated 23 October 2014).

91. The Panel does not agree with the Prosecution’s allegations that the Basic Court’s assessment of the evidence is unreasonable and lacks argumentation. The Basic Court appropriately explained that the statements of the injured parties and the anonymous witnesses are sufficiently reliable and credible. The Panel notes that contrary to the allegation of the Prosecution, the Basic Court did not reject the statements of the injured parties, the

anonymous witnesses and the recordings of the cameras pursuant to Articles 123(5), 261(1) and 262(2) of the CPC. The Basic Court considered that the parts of the witness statements where they were testifying about the "corridor" does not prove beyond reasonable doubt who was a part of the "corridor" as none of the injured parties or witnesses were able to identify the defendants (*see* page 109 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). Even though the reasoning of the Basic Court is spread over several pages in different chapters of the Judgement, it is clear that the Basic Court considered proven that the injured parties were escorted through so-called "corridor" and beaten while being escorted.

92. The Panel considers that the Prosecution did not show any grounds of the erroneous and insufficient assessment of the recordings of camera done by the Basic Court. Firstly, the Basic Court did not declare the recordings of camera as inadmissible. The Basic Court indicated that due to low quality of the video, this evidence can be used only as a measure to assist the injured parties and witnesses in their testimonies. The recording of camera were considered as relevant to the case and was used in great extent during the questioning of the injured parties (*see* pages 25-26 of the Minutes of Main Trial dated 23 October 2014). Further, the Basic Court took the video recordings into consideration when deciding on the clothing of the defendants (*see* page 107 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). One of the key points in assessing video recordings is that the video accurately depicts the scene of the crime. In the present case, the injured parties were not able accurately recognize the witnesses depicted in the recordings. Therefore, following the principle *in dubio pro reo*, the Basic Court correctly concluded that in case of low quality of the image, the video recordings can be used only to help the injured parties and the witnesses to remember the details.

93. The Panel once again recalls that it is within the responsibility of the Basic Court to assess the totality of the evidence and to determine whether the Prosecution fulfilled its obligation to prove beyond reasonable doubt that defendants S.A., N.D., J.R., N.S., Xh.H., V.K. and Z.S. were part of the so-called "corridor". The Basic Court considered that none of the injured parties were able to recognize any of the police officer who might have been a part of

the “corridor”. The lack of identification of the perpetrator is a major main issue casting reasonable doubt on the guilt of the defendants. Therefore, the Panel considers that the Prosecution did not demonstrate that the Basic Court’s assessment of the evidence related to the existence of the “corridor” is unreasonable.

- *Failure to assess the statements of the injured parties in relation to Counts 11 and 12*

94. The Prosecutor notes that defendants S.S., N.S. and Xh.H. were acquitted of the criminal offence as it is described in Count 11 while defendants I.R., J.R., V.K. and Z.S. were acquitted of the criminal offence as it is described in Count 12.

95. In relation to Count 11, the Prosecutor claims that the Basic Court failed to evaluate the testimonies of victims placed in vehicle Mercedes, license plate Police 288-01. In this regard, injured parties I.P., M.P., D.S. and I.S. testified in great detail that the assault and mistreatment continued in the vehicle throughout the entire trip from the Detention Centre to the Minors Offences Court. All victims testified that they were in a bent position with very limited possibility to see each other. Their testimonies are fully corroborated with other evidence and should be considered as credible.

96. In relation to Count 12, the Prosecution claims that the Basic Court failed to take into consideration the testimonies of defendants I.R., J.R., V.K. and Z.S., and to correctly evaluate the testimony of victim M.J.. The injured party stated that he was assaulted all the way from the Detention Centre to the Minor Offences Court while the Basic Court erroneously concluded that the injured party was assaulted when the vehicle was stationary at the car parking. The entire testimony of the injured party was consisted and there were no contradictions. The testimony is corroborated with other evidence and therefore there is no doubt that all four defendants assaulted and mistreated M.J. in vehicle Toyota, license plate Police 293-01 during the escort from the Detention Centre to the Minor Offences Court. Further, the injured party also positively identified J.R.. The identification process was strictly followed in accordance to Article 120 of the CPC and it does not matter that the identification was done during the pre-trial stage.

97. The Panel once again reiterates that contrary to the claim of the Prosecutor, the Basic Court did not declare the statements of injured parties I.P., M.P., D.S. and I.S. as fully credible. The admissibility, credibility and the assessment of the contradictions of the statements of the injured parties have already been addressed in paragraphs 75-77 of the present judgement. The Basic Court has a possibility to declare parts of the statement credible and other parts as not credible. The Basic Court applied the same standard of the assessment of the credibility of the witnesses; therefore, the Panel sees no error in declaring the parts of the statement of injured parties I.P., M.P., D.S. and I.S. related to Count 11 as partially credible.

98. However, the Panel would like to note that even though the statements were declared as admissible and reliable, the Basic Court found that the elements of the crime in relation to Count 11 were not met. The Basic Court took into consideration primarily that none of the 4 (four) injured parties were able to recognize any of the police officer in the vehicle with licence plate 288-01 (*see* pages 41, 47 and 52 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). The lack of identification of the perpetrator is a major main issue casting reasonable doubt on the guilt of the defendants. Therefore, the Panel considers that the Prosecution did not demonstrate that the Basic Court erred in its assessment of the evidence related to Count 11.

99. In the same vein, the Panel considers that the Basic Court correctly assessed the statement of injured party M.J. in relation to the identification of the four police officers who were in the vehicle. The Basic Court concluded that this part of the statement of M.J. has too many contradictions and it is not possible to conclude beyond reasonable doubt that I.R., J.R., V.K. and Z.S. hit him in the vehicle (*see* page 103 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština).

100. The Panel notes that in the criminal proceedings, the identification of the defendant as the perpetrator of the crime is an element that must be proven by the Prosecution beyond a reasonable doubt. In the present case, the injured party did not identify I.R., V.K. and Z.S. at all. M.J. was able to identify J.R. during the pre-trial proceedings in accordance to Article 120 of the CPC; however, he changed his account during the main trial. The Basic Court also took into consideration that it has been proven that the four defendants were in the vehicle,

and that V.K. was the driver; however, the injured party was not able to identify the police officers during the main trial. The Panel is mindful that the human mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated. Therefore, the contradiction in such major issue as the identification of the person who hit the injured party shall be addressed in great caution.

101. Pursuant to Article 3(2) of the CPC, doubts regarding the existence of facts relevant to the case shall be interpreted in favour of the defendant. As such, the Panel considers that the Basic Court correctly applied the principle *in dubio pro reo* and acquitted I.R., J.R., V.K. and Z.S. of the criminal offence as it is detailed in Count 12.

h. Violation of the application of the concept of co-perpetration

102. The Prosecution claims that the Basic Court correctly applied the notion of co-perpetration as it is set in Article 31 of the CPC and the Indictment.

103. The Prosecution claims that the defendants who were not namely recognized by the injured parties are also responsible for the criminal offences. Firstly, they all had active roles in the criminal offences. It was proven during the main trial that they all either escorted the detainees from the detention center or were part of so called "corridor", and were in the vans where the detainees were abused. Secondly, the Prosecutor claims that there is sufficient evidence to prove the elements set in Article 31 of the CCK: (1) the defendants committed the crimes described in Counts 1, 2, 3, 11 and 12 willingly either by abusing and mistreating the parties or substantially contributing to the abuse and mistreatment; (2) all defendant acted in co-perpetration even without having a specific arrangement about their roles and actions; (3) the defendants as police officers were aware of the possibility that the crime would occur also as a consequence of their omissions. All defendants being representatives of the state had a positive obligation to protect the victims who were detained at the time from any form of assault or mistreatment. Such obligation arises from the Law on Police, Constitution of Kosovo and the ECHR.

104. The Prosecution disagrees with the Basic Court's conclusion that the defendants' acts were not sufficient to infer the indirect intent and that the Indictment contains allegations for commission of the criminal offences by act and not by omission. The Prosecution indicates that Article 31 of the CCK clearly states that co-perpetration exists when two or more persons jointly commit the criminal offence by participating in the criminal offence or by substantially contributing to its commission in any other way. Further, in accordance to Article 8(1) of the CCK, the criminal offence can be committed by act or omission. In this regard, the Prosecution presents detailed analysis of the jurisprudence of the Supreme Court and the international courts to support its claim.

105. Finally, the Prosecution disagrees with the conclusion of the Basic Court that the Indictment does not foresee the commission of the criminal offences by omission. Instead, the Prosecution claims that the Indictment meets the requirements set in Article 241(1.4) of the CPC. The commission of the criminal offence by omission should be read as part of the definition of the co-perpetration as it is defined in Article 31 of the CCK.

106. The Basic Court addressed the issue of co-perpetration in great detail in light of its assessment of the factual determination. The Basic Court concluded that the police officers who were not identified by the injured parties cannot be held liable for the direct participation in co-perpetration. The Basic Court agreed with the Prosecution's closing speech in part that given that the presence of all defendants was established at the crime scene, they could be held responsible for the criminal offence committed by omission. However, as the defendants were not charged for the criminal offences committed by omission in the indictment (*see* pages 108-110 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština).

107. Pursuant Article 31 of the CCK, the co-perpetration is defined as follows: "*When two or more persons jointly commit a criminal offense by participating in the commission of a criminal offense or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offense*". The elements of co-perpetration according to this Article are: plurality of person, participation in perpetration

or providing a decisive contribution which is important and without which the criminal offence would not be committed or would not be committed in the planned way, and willingness to commit a criminal offence as his own (shared intent). Co-perpetration is a form of perpetration where several persons, each of them fulfilling required elements for a perpetrator, knowingly and wilfully commit certain criminal acts. Contrary to an aider or an instigator, co-perpetrators do not participate in an act accomplished by another person. A co-perpetrator participates in his own act, while aiders and instigators participate in someone else's act.

108. In the present case, it has been established that all defendants were present at the crime scene. However, in relation to Counts 1, 2 and 3, the injured parties were not able to identify the exact number of the defendants that were part of the "corridor", or the identities of those defendants (*see* paragraphs 86-93 of the present judgement). In relation to Counts 11 and 12, it has been established which defendants were present in the two vehicles; however, the injured parties were not able to identify the defendants or attribute certain action to a particular defendant (*see* paragraphs 94-101 of the present judgement).

109. In this regard, the Panel notes that in order the defendants to be held liable for co-perpetration, it is necessary to show each of the defendant's contribution to certain act and that without this contribution the criminal offence would not be committed. It is further crucial to show that the particular defendant shared the intent of other defendants to commit the criminal offence of his own. The Panel shares the opinion of the Basic Court that the mere presence in the crime scene is not enough to determine the contribution of each defendant to the common cause of the criminal offence or to show that they intended to commit the same criminal offence. The mere presence cannot sufficiently prove the participation or intent; therefore, the Panel considers that the elements of the direct co-perpetration are not met.

110. The criminal offence can be committed by act or omission. An omission is a failure to act, which generally attracts different legal consequences from positive conduct. In the criminal law, an omission will constitute an *actus reus* and give rise to liability only when the

law imposes a duty to act and the defendant is in breach of that duty. Responsibility for omission presupposes a duty to act on the part of a person with the specific position.

111. In the present case, all defendants are the police officers and they were officially assigned to escort the detained from the Detention Centre to the Minor Offences Court (*see* page 97 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). According to Article 10(1) of the Law No. 04/L-076 on Police, "*the Police shall have the following general duties: 1.1. to protect the life, property and offer safety for all people; 1.2. to protect the human rights and fundamental freedoms of all citizens*". Further, in accordance to Article 13(3) of the Law No. 04/L-076 on Police, "*A Police Officer shall not inflict, instigate, support or tolerate any torture act or inhuman or degrading treatment under any circumstances, and no issued order can justify any such action*". Thus, all defendants were on official duty during the alleged events, and had a duty to act in case of inhuman or degrading treatment. There is no evidence in the case file showing that the defendants took any action to prevent the mistreatment of the injured parties. However, the Panel also notes that the commission of the criminal offence by omission was not argued or brought up during the main trial. Further, the Indictment in description of Counts 1, 2, 3, 11 and 12 mentioned only active participation in the criminal offences by the defendants.

112. In accordance to Articles 10 and 241(1)(1.4) of the CPC, defendant have to be informed clearly about the criminal offence they have been charged with. This is an absolute obligation of the Prosecution and it cannot be shifted on the Trial Panel or the defence. While the Panel in principle agrees that Article 31 of the CCK is broad enough to include the co-perpetration by act or omission, the Indictment in the present case clearly and exclusively describes only the active participation in the criminal offences. Therefore, all doubts related to either factual determination or the application of legal provisions should be treated in light of principle *in dubio pro reo*. For this reasons, the Panel concurs with the Basic Court that the defendants cannot be found guilty for the commission of the criminal offences in co-perpetration by omission as they were not charged with this type of act. Consequently, the allegations of the Prosecution in relation to the application of the elements of the concept of co-perpetration are therefore rejected as unfounded.

i. Wrongly qualified criminal offence of Assault as it is described in Article 187(1) and (2) of the CCK

113. The defence of G.K., S.S., N.D. and defendant I.R. alleges that the Basic Court's judgement contains violations of criminal law. The Basic Court erroneously convicted a defendant for more than one criminal offence as a result of the same act. The defendant should have been convicted only for Mistreatment during Exercise of Official Duty or Public Authorization in violation of Article 198(1) of the CCK as this criminal offence subsumes the other criminal offences. The defence claims that the criminal offence of Assault is subsumed by the criminal offence of Mistreatment during Exercise of Official Duty because of the following aspects: (1) the criminal offence of Assault does not have the element of physical impact of injured parties while even the smallest physical impact is considered as an element of the criminal offence of Mistreatment during Exercise of Official Duty; (2) the criminal offence of Assault can be committed by anybody while the criminal offence of Mistreatment during Exercise of Official Duty can be committed only by persons acting in their official capacity; (3) the criminal offence of Assault is widely defined and has broader elements than the criminal offence of Mistreatment during Exercise of Official Duty.

114. The defence claims that defendant N.D. was found guilty for the criminal offence of Assault as defined in Article 187(2) of the CCK (Count 18) for hitting detainee D.V. with military boots. The defence claims that the Basic Court erroneously qualified the criminal offence of Assault as it is defined in Article 187(2) of the CCK. The criminal offence of Assault requires that the act would be committed either with "dangerous object" or "another object capable of causing grievous bodily harm or a serious impairment to health". In the present case, the Basic Court did not clarify whether the military boots are considered as a dangerous object or another object. Even if the military boots would be considered as another object, the Basic Court failed to show that the consequence of grievous bodily harm or a serious impairment to health was caused.

115. At the outset, the Panel notes that after the initial and the second hearing, the defendants filed objections to the Indictment PP: II 111/2013 filed on 12 December 2013 pursuant to

Articles 249 and 250 CPC. The Presiding Trial Judge issued the Ruling on the objections on 14 April 2014, rejecting them as unfounded as well as rejecting all challenges related to admissibility of evidence in the case file. The parties used their right of the appeal as it is set in Article 250(4) of the CPC. On 3 June 2014, the Court of Appeals issued its Ruling PN 262/14 in which the Indictment of 12 December 2013 was supplemented with regards to legal qualification of the charges as it is detailed in the enacting clause of the Ruling PN 262/14 (*see* pages 7-9 of Ruling PN 262/14 dated 3 June 2014).

116. In relation to Article 187(1) of the CCK, the Court of Appeals concluded the following: "*Having excluded the application of Articles 187(2) and 187(3) CCRK, the Panel must now determine the relationship between the criminal offence of Mistreatment during exercise of official duty or public authorization in Article 198(1) CCRK and the criminal offence of Assault (basic form) in Article 187(1) CCRK. The Panel finds that the more specific qualification in light of the alleged facts is the criminal offence of Mistreatment during exercise of official duty or public authorization pursuant to Article 198(1) CCRK. The defendants are alleged to have abused their position and authorization as police officers entrusted with the transport of detainees and have through different actions allegedly insulted their dignity and/or mistreated them. The legal concept of mistreating someone using force and causing bodily injury by an official person already punishes the application of force of a typical criminal offense of assault. The Panel accordingly finds that, at face value, the criminal offences alleged amount to the said criminal offence under Article 198(1) CCRK*". Further, in relation to Article 187(2) of the CCK, the Court of Appeals concluded the following: "*Further, also the elements of the criminal offence in Article 187(2) CCRK are not met. The provision requires that the assault is committed with a weapon, a dangerous instrument or another object capable of causing grievous bodily injury or a serious impairment to health. The prosecutor in the Indictment does not refer to the use of any such weapons or instruments in the alleged mistreatment*".

117. On 8 July 2014, EULEX Basic Prosecution Office issued the supplement of the charges against the defendants following the supplement of the charges done by the Court of Appeals

in its Ruling dated 3 June 2014. The supplemented charges were served on the defendants 11 July 2014.

118. The Panel is mindful that the Court of Appeals in its ruling dated 3 June 2014 acknowledged that the re-qualification of the charges was done only based of the Indictment, and the Trial Panel still has the power to ultimately determine the appropriate legal qualification in a definite manner. However, there is nothing in the case file that would suggest that the Basic Court reviewed the supplemented charges and issued a reasoned opinion why such changes should be reversed to the initial Indictment. Further, the issue of the supplemented indictment is not addressed in the Basic Court Judgement.

119. The Panel further notes even though without any reference to the supplemented charges, the Basic Court expressed its disagreement that the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization in violation of Article 198(1) of the CCK subsumes the criminal offence of Assault in violation of Article 187(1) and (2) of the CCK. The Basic Court and the Court of Appeals differed in their opinions that the two criminal offences are protecting the same legal value. Specifically, the Basic Court claims that the two criminal offences are set out in two different chapters. Therefore, the Basic Court concluded that the two criminal offences co-exist and can be committed simultaneously by one act (*see* page 107 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). While the Court of Appeals found that the lawmaker intended to protect the same value because the legal concept of mistreating someone using force and causing bodily injury by an official person already punishes the application of force of a typical criminal offense of assault.

120. Subsuming is a term used to record a number of criminal acts as one crime. In order to determine whether one criminal offence is subsumed by another, it is necessary to carefully examine the elements of each criminal offence. Consumption refers to relationships between offences of the same kind, but of considerably different gravity, that are designed to protect the same or closely related social interests, but which differ in relation to particular elements. It is, however, an established principle is that punishment should not be imposed for both a greater or more specific offence and a lesser included offence. Instead, the more serious crime subsumes the less serious (*lex consumens derogat legi consumptae*). The rationale here

is that the greater and the lesser included offence constitute the same core offence, without sufficient distinction between them, even when the same act or transaction violates two distinct statutory provisions. Indeed, it is not possible to commit the more serious offence without also committing the lesser included offence. Therefore, it is not enough to indicate that the criminal offences are listed in the different chapters of the CCK.

121. In the present case, the Panel notes that there is no strict hierarchical relation between the criminal offences of Assault as it is defined in Article 187(1) of the CCK and Mistreatment during Exercise of Official Duty or Public Authorization as it is defined in Article 198(1) of the CCK. However, the Panel notes that the two criminal offences share the same core offence – mistreatment of someone and applying force against someone has the same nature and is directed against a person. However, the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization as it is defined in Article 198(1) of the CCK requires an additional element – the mistreatment has to be committed by an official person in abusing his or her position or authorization. As such, the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization as it is defined in Article 198(1) of the CCK is more specific criminal offence which requires the proof of an additional element. In case the additional element is not proven, the actions of the perpetrator would be considered as the criminal offence of Assault as it is defined in Article 187(1) of the CCK.

122. For this reason, the Panel shares the opinion of the Court of Appeal, and considers that the criminal offence of Assault as it is defined in Article 187(1) of the CCK is subsumed by the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization as it is defined in Article 198(1) of the CCK. Therefore, the appeals of the defence counsel of G.K., S.S., N.D. and I.R. are granted in this part.

123. In relation to the criminal offence of Assault as it is defined in Article 187(2) of the CCK, the Basic Court referred to the definition of the dangerous object laid down in Article 120(32) of the CCK, and concluded that the military boots worn by trained men could be considered as dangerous instruments which can cause serious bodily injury. Further, the

reasoning of the Basic Court Judgement is incomplete and it is not clear how the criminal offence of Assault as it is described in Article 187(2) of the CCK was qualified in relation to defendant G.K. (*see* page 107 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština).

124. The Panel notes that the Basic Court again did not refer to the modified charges and did not explain why it derived from those charges. The Basic Court further explained only the use of military boots as dangerous instrument. The reasoning of the judgement in relation to the use of other object is incomplete and inconclusive. The Panel considers that the Basic Court did not provide enough reasoning indicating that the military boots or any other object can be considered as a dangerous instrument and shares the opinion of the Court of Appeals expressed in Ruling PN 262/14 dated 3 June 2014 that the Prosecution does not refer to any weapon or a dangerous object in the Indictment. Therefore, the requirements of the Article 187(2) of the CCK are not met because it has not been proven that the assault was committed with a weapon, a dangerous instrument or another object capable of causing grievous bodily injury or a serious impairment to health. Therefore, the appeal of the defence counsel of N.D. is granted in this part.

125. **Defendants G.K., S.S., N.D., N.Z. and I.R. are therefore acquitted of the criminal offences of Assault, contrary to Article 187(1) of the CCK, as described in the enacting clause of the present judgment.**

126. **G.K. is further acquitted of the criminal offences of Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (*Count 3*), Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (*Count 18*) and Assault, contrary to Article 187(2) of the CCK (*Count 9*), defendant S.S. is acquitted of the criminal offences of Assault, contrary to Article 187(2) of the CCK (*Count 3*), and defendant N.D. is acquitted of the criminal offences of Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (*Count 18*) as described in the enacting clause of the present judgment.**

j. Act of minor significance

127. The defence of N.D. claims that contrary to the enacting clause of the impugned judgement, in the reasoning the Basic Court noted that B.M. identified N.D. as a person who attempted to hit the detainee in the municipality building. The defence of N.D. adds that there is no evidence in the case file that N.D. hit B.M.. The injured party himself identified N.D. as the police officer who attempted to hit him. Further, the statement that B.M. was hit in the courtroom of the Minor Offences Court is not supported by any other evidence or witness statement and is in contradiction to his other statements in which he did not identify N.D. at all.

128. Therefore, the attempt to hit should be qualified act of minor significance as described in Article 11 of the CCK. During the relevant events, defendant N.D. acted as a part of SOU. This unit is obliged to follow the legal requirements set in Law No. 04/L-076 on Police. In accordance to this law, the members of the police including the SOU should not be held criminally liable for the acts of minor significance. These acts fall under the disciplinary offences as described in Articles 11 and 12 of the Law on Police.

129. The Basic Court indeed recognized that defendant N.D. attempted to hit B.M. in the court room. However, in the reasoning set in page 95 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština, the Basic Court explains that it was further established that when B.M. was sitting in the chair, he received a number of blows. This action is covered by Count 5. Based on this statement, the statement of injured party D.V. and the police report, the Basic Court concluded that defendant N.D. is liable for hitting B.M. (*see* pages 95-96 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština; pages 20 and 45 of Main Trial Minutes dated 19 November 2014). The Panel therefore fully subscribes to this reasoning and considers that the defence did not demonstrate any error in the determination of the factual situation in this regard.

130. The Basic Court indicates that the acts committed by the defendant is in violation of his official duties and obligations set in Article 12 and 13 of the Law No. 04/L-076 on Police which cannot be considered as an act of minor significant as it is defined in Article 11 of the CCK (*see* page 99 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština).

131. The Panel notes that in assessing the act of minor significance, it is necessary to take into consideration the overall circumstances of the case. Article 11 of the CCK indicates that the acts shall be deemed of minor significance when the danger involved is insignificant due to the nature and gravity of the act; absence or insignificance of the intended consequences; the circumstances in which the act was committed; the low degree of criminal liability of the perpetrator; or the personal circumstances of the perpetrator. In the present case, there are 11 (eleven) defendants and 10 (ten) injured parties. The defendants were on official duty during the commission of the criminal offence. The criminal act took place at the premises of the Detention Centre, official police vehicles and the Minor Offences Court. Therefore, the Panel shares the opinion of the Basic Court that due to high number of the defendants, and injured parties, the serious nature of the criminal offence and the fact that the defendants were on official duty is enough to conclude that the acts of the defendants cannot be considered as act of minor significance. Therefore, the requirements of Article 11 of the CCK are not met. For this reason, the allegations of the defence counsel of N.D. are rejected as unfounded.

k. Failure to assess the motive

132. The defence of S.S. and I.R. claims that the Basic Court failed to assess the motive of the criminal offences.

133. Contrary to the statement of the defence, the Basic Court judgement established that it is doubtful that the mistreatment was based on the ethnic motives (*see* page 101 of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština). However, the Panel would like to stress that the Basic Court judgement is not entirely clear on its conclusions that the defendants committed the alleged mistreatment based on the ethnic motives.

134. The Panel recalls that elements of the criminal offences of Mistreatment during Exercise of Official Duty or Public Authorization as it is defined in Article 198(1) of the CCK and Threat, contrary to Article 185(4) in connection with paragraph 1 of the CCK do not include the necessity to determine the motive of the defendants. In this regard, the notion of motive should not be treated equally with the notion of intent. Intent means conscious objective or

purpose. Thus, a person commits a criminal act with intent when that person's conscious objective or purpose is to engage in the act which the law forbids or to bring about an unlawful result. Motive, on the other hand, is the reason why a person chooses to engage in criminal conduct. In cases where intent is an element of a charged crime, that element must be proved beyond a reasonable doubt. Motive, however, is not an element of the crimes charged. Therefore, there is no requirement to prove a motive for the commission of the charged crime(s). In case there is evidence of a motive, it should be considered, for example, in determining the mitigating and aggravating circumstances.

135. In the present case, the Basic Court rejected the evidence related to the alleged motive. Therefore, the Panel considers that there is no violation on behalf of the Basic Court for not taking the possible motive into consideration. Consequently, the allegation of the defence counsel of S.S. and I.R. are rejected as unfounded.

l. Exceeding the charges

136. Defendant I.R. claims that the Basic Court exceeded the scope of the charge by announcing the accessory punishment. The judgement is violation of Article 384(1)(1.10) of the CPC because the Basic Court exceeded the scope of the charges by imposing the accessory punishment. This punishment was not requested in the indictment.

137. The Panel notes that in accordance with Article 62(1) of the CCK, an accessory punishment may be imposed together with a principal or alternative punishment. The formulation of this article, in particular the use of word "may" shows that the Basic Court has discretion to decide whether the particular circumstances of the case warrant the imposition of the accessory punishment. Therefore, the Panel considers that there was no need to have this type of punishment included in the indictment. The allegations of the defendant I.R. are rejected as unfounded.

m. Erroneous calculation of the aggregate punishment

138. Defendant I.R. claims that the Basic Court violated Article 384(1)(1.12) of the CPC in conjunction with Articles 370(5) of the CPC and 80(2)(2.2) of the CCK. In accordance to Article 80(2)(2.2) of the CCK, the imposed aggregate punishment cannot be as high as the sum of all prescribed punishments. In case of I.R., the Basic Court imposed 6 (six) months of imprisonment for each criminal offence; while the aggregate punishment is 1 (one) year.

139. Defendant I.R. was punished to 6 (six) months of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 1 (one) years for the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK, and 6 (six) months of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 1 (one) years for the criminal offence of Assault, in violation of Article 187(1) of the CCK. He was sentenced to an aggregate punishment of 1 (one) year of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years.

140. The Panel notes that in accordance to Article 80(2)(2.2) of the CCK, the aggregate punishment of imprisonment must be higher than each individual punishment but the aggregate punishment may not be as high as the sum of all prescribed punishments. This article clearly regulates the calculation of the punishment of concurrent criminal offences and does not leave it to the discretion of the Trial Panel to impose a punishment that is equal to the sum of all prescribed punishments. Therefore, the Panel considers that the calculation of the aggregate punishment in relation to defendant I.R. was done in violation of the provisions of Article 80(2)(2.2) of the CCK.

141. The amendment of the imposed punishment to defendant I.R. will be addressed in the following chapter.

n. Determination of the criminal sanction

142. The defence of G.K., S.A., N.D., and defendant I.R. claim that as a consequence of the violations of criminal procedure and criminal law as well as erroneous determination of the

factual situation, the Basic Court erroneously applied the criminal sentence to the defendant. The defence of S.S. adds that the additional sentence of prohibition of exercising public administration or public service functions for 3 (three) years is unnecessary as it results of violation of criminal law and the purpose of the sentence could be easily achieved without the additional sentence.

143. The Panel considers that the Basic Court, apart from the violation of Article 80(2)(2.2) of the CCK detailed in paragraphs 138-141 of the present judgement, correctly determined the criminal sanction to all defendants. The Basic Court followed the requirement of law and correctly applied the principles on the application of the criminal sanction. The Basic Court duly considered all mitigating and aggravating circumstances.

144. The Panel further takes taking into consideration the modification of Judgment PKR 1098/13 of the Basic Court of Prishtinë/Priština in relation to acquittals discussed in paragraphs 113-126 of the present judgement and the violation of Article 80(2)(2.2) of the CCK detailed in paragraphs 138-141, and considers that the criminal sanction imposed by the Basic Court shall be modified.

145. In relation to the determination of the criminal sanction, the Panel recalls the main principles set in Articles 41, 73, 74 and 80 of the CCK. A criminal sanction shall be considered as a last resort aiming to protect social values and cannot intervene beyond what it is found as strictly necessary. A sanction must not be higher than the necessity of justice enforcement and cannot be disproportionate considering the social protected values. Therefore, according to this principle of minimum intervention, it must be assumed that the lower punishment foreseen in the law will be sufficient, adequate and a reference point for standard situations that may be subsumed in the legal incriminating provision. A criminal sanction is bound by the purposes of ensuring individual prevention and rehabilitation, ensuring general prevention, expressing social disapproval of the violation of the protected social values and strengthening social respect for the law.

146. Pursuant to Article 73 of the CCK, the court when rendering a judgment has to take into consideration the purpose of punishment, all the circumstances that are relevant to the

mitigation or aggravation of the punishment, in particular, the degree of criminal liability, the motives for committing the criminal offence, the intensity of danger to the protected value, the circumstances in which the act was committed, the past conduct of the perpetrator, the personal circumstances and his behaviour after committing the criminal offence. The punishment shall finally be proportionate to the gravity of the offence and the conduct and circumstances of the offender.

147. Generally, the Court of Appeals, in reviewing the sentences, is limited by the factual situation established in the judgment and by the evaluation of the legal rules applicable to determination of punishment by the Basic Court. The Panel is not bound by the specific weight given by the Basic Court to each aggravating and mitigating circumstances. Other conjectural facts in favour or to the detriment of the defendants but not established by the Basic Court cannot be considered to determine the punishment.

148. The Panel acquitted defendant G.K. of the criminal offences of Assault, contrary to Article 187(1) of the CCK in conjunction of Article 31 of the CCK (Count 2), Assault, contrary to Article 187(1) of the CCK (Count 8), Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (Count 3), Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (Count 18) and Assault, contrary to Article 187(2) of the CCK (Count 9).

149. Taking into consideration that defendant G.K. was acquitted of 5 (five) counts, the Panel considers that the imposed punishment has to be reconsidered. The Panel takes into consideration the following aggravating circumstances: the defendant committed the criminal offence against the several injured parties who at the time were handcuffed, he used violence, and highly participated in the criminal offence. The Panel further considers the following mitigating circumstances: the defendant has no previous criminal record, had good personal character, and behaved with a great respect during the trial. The Panel further concurs with the Basic Court assessment that the defenant's official position during the criminal offence should not be considered as an aggravating circumstance because this is one of the elements of the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization. The Panel, however, does not agree with the Basic Court that the imposition

of the accessory punishment would help to achieve the purpose of the criminal sanction. Therefore, the Panel removes the accessory punishment in relation to defendant G.K..

150. Having considered all abovementioned circumstances, defendant G.K. is hereby sentenced as follows: for the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed against injured party M.J. (*Count 1*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 8 (eight) months with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period. For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed against injured party I.P. (*Count 1*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 8 (eight) months with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period. For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK committed in continuation against injured party B.M. (*Counts 5 and 13*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 8 (eight) months with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period. For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK committed against injured party D.V. (*Count 17*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 8 (eight) months with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period. For the criminal offence of Threat, contrary to Article 185(4), in connection with paragraph 1 of the CCK, and in conjunction of Article 31 of the CCK committed against injured party B.M. (*Count 7),* pursuant to Articles 41, 45, 74 and 185(4) of the CCK, the defendant is sentenced to the imprisonment of 1 (one) year with the

execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period. Pursuant to Article 80 of the CCK, the Court of Appeals imposes the aggregate punishment of 1 (one) year and 6 (six) months of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 3 (three) years if the defendant does not commit another criminal offence during the verification period.

151. The Panel acquitted defendant S.S. of the criminal offences of Assault, contrary to Article 187(1) of the CCK (*Count 2*), and the criminal offences of Assault, contrary to Article 187(2) of the CCK (*Count 3*).

152. Taking into consideration that defendant S.S. was acquitted of 2 (two) counts, the Panel considers that the imposed punishment has to be reconsidered. The Panel takes into consideration the following aggravating circumstances: the defendant was a team leader and had exclusive responsibility to supervise the other defendants, committed the criminal offence against the several injured parties who at the time were handcuffed, used violence, and highly participated in the criminal offence. The Panel further considers the following mitigating circumstances: the defendant has no previous criminal record, had good personal character, and behaved with a great respect during the trial. The Panel further concurs with the Basic Court assessment that the defenant's official position during the criminal offence should not be considered as an aggravating circumstance because this is one of the elements of the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization. The Panel, however, does not agree with the Basic Court that the imposition of the accessory punishment would help to achieve the purpose of the criminal sanction. Therefore, the Panel removes the accessory punishment in relation to defendant S.S..

153. Having considered all abovementioned circumstances, defendant S.S. is hereby sentenced as follows: For the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed in continuation against injured party B.M.1 (*Counts 1 and 15*), pursuant to Articles 41, 45, 74 and 198(1) of

the CCK, the defendant is sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period; for the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed against injured party I.P. (*Count 1*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period. Pursuant to Article 80 of the CCK, the Court of Appeals imposes the aggregate punishment of 1 (one) year and 6 (six) months of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 3 (three) years if the defendant does not commit another criminal offence during the verification period.

154. The Basic Court found S.A. found guilty for the following criminal offences: Mistreatment during Exercise of Official Duty or Public Authorization, in violation of Article 198(1) of the CCK in conjunction with Article 31 of the CCK, and was sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period and prohibition of exercising public administration or public service function for 2 (two) years; and Threat, in violation of Article 185(4) of the CCK, committed in co-perpetration pursuant to Article 31 of the CCK, and was sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period, and ordered to refrain from carrying any kind of weapon for the time of the verification. He was sentenced to an aggregate punishment of 1 (one) year and 6 (six) months of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years, and ordered to refrain from carrying any kind of weapon for the time of the verification. The defendant was further imposed a punishment of prohibition of exercising public administration or public service functions for 2 (two) years.

155. The Panel considers that the Basic Court correctly applied the mitigating and aggravating circumstances in relation to defendant S.A.; however, the Panel disagrees that setting the additional obligations during the suspended sentence or the imposition of the accessory punishment would help to achieve the purpose of the criminal sanction. Therefore, the accessory punishment and the additional obligations set pursuant to Articles 58(2) and 59(1)(1.11) of the CPC are removed in relation to S.A..

156. The Panel acquitted defendant N.D. of the criminal offences of Assault, contrary to Article 187(1) of the CCK, and the criminal offences of Assault, contrary to Article 187(2) of the CCK in conjunction of Article 31 of the CCK (*Count 18*).

157. Taking into consideration that defendant N.D. was acquitted of 2 (two) counts, the Panel considers that the imposed punishment has to be reconsidered. The Panel takes into consideration the following aggravating circumstances: the defendant committed the criminal offence against D.V. in a very violent manner, and was beating somebody who was already beaten. The Panel further considers the following mitigating circumstances: the defendant has no previous criminal record, had good personal character, and behaved with a great respect during the trial. The Panel further concurs with the Basic Court assessment that the defenant's official position during the criminal offence should not be considered as an aggravating circumstance because this is one of the elements of the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization. The Panel, however, does not agree with the Basic Court that the imposition of the accessory punishment would help to achieve the purpose of the criminal sanction. Therefore, the Panel removes the accessory punishment in relation to defendant N.D..

158. Having considered all abovementioned circumstances, defendant N.D. is hereby sentenced as follows: for the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK against injured party B.M. (*Count 5*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of

2 (two) years if the defendant does not commit another criminal offence during the verification period; and for the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK in conjunction of Article 31 of the CCK against injured party D.V. (*Count 17*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 1 (one) year with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period. Pursuant to Article 80 of the CCK, the Court of Appeals imposes the aggregate punishment of 1 (one) year and 6 (six) months of imprisonment with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

159. The Panel acquitted N.Z. of the criminal offence of Assault, contrary to Article 187(1) of the CCK (*Count 2*).

160. Taking into consideration that defendant N.Z. was acquitted of 1 (one) count, the Panel considers that the imposed punishment has to be reconsidered. The Panel takes into consideration the punishment set by the Basic Court in the only remaining count and considers that the Basic Court correctly evaluated the mitigating and aggravating circumstances. The Panel, however, does not agree with the Basic Court that the imposition of the accessory punishment would help to achieve the purpose of the criminal sanction. Therefore, the Panel removes the accessory punishment in relation to defendant N.Z..

161. Having considered all abovementioned circumstances, defendant N.Z. is hereby sentenced as follows: for the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK committed in continuation against injured party I.P. (*Counts 1 and 11*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 6 (six) months with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 2 (two) years if the defendant does not commit another criminal offence during the verification period.

162. The Panel acquitted defendant I.R. for the criminal offence of Assault, contrary to Article 187(1) of the CCK (*Count 2*).

163. Taking into consideration that defendant I.R. was acquitted of 1 (one) count, the Panel considers that the imposed punishment has to be reconsidered. The Panel takes into consideration the punishment set by the Basic Court in the only remaining count and finds that the Basic Court correctly evaluated the mitigating and aggravating circumstances. The Panel, however, does not agree with the Basic Court that the imposition of the accessory punishment would help to achieve the purpose of the criminal sanction. Therefore, the Panel removes the accessory punishment in relation to defendant I.R..

164. Having considered all abovementioned circumstances, defendant I.R. is hereby sentenced as follows: for the criminal offence of Mistreatment during Exercise of Official Duty or Public Authorization, contrary to Article 198(1) of the CCK against injured party B.M.1 (*Count 1*), pursuant to Articles 41, 45, 74 and 198(1) of the CCK, the defendant is sentenced to the imprisonment of 6 (six) months with the execution being suspended pursuant to Article 51(2) of the CCK for the verification period of 1 (one) year if the defendant does not commit another criminal offence during the verification period.

165. The Court of Appeals – for reasons elaborated above – partially grants the appeal of the defence and imposes more lenient punishments.

For the above it has been decided as in the enacting clause.
Reasoned written judgment completed on 10 July 2017.

Presiding Judge	**Recording Officer**

Vahid Halili
Court of Appeals Judge

Sandra Gudaityte
EULEX Legal Officer

Panel members

Radostin Petrov
EULEX Judge

Fillim Skoro
Court of Appeals Judge