COURT OF APPEALS

Case number: PAKR 513/2013

(P 50/2012 BC Mitrovica)

28 May 2014

JUDGMENT OF THE COURT OF APPEALS OF KOSOVO, IN A PANEL COMPOSED OF EULEX JUDGE MANUEL SOARES, PRESIDING AND REPORTING, EULEX JUDGE TORE THOMASSEN AND JUDGE DRITON MUHARREMI, AS MEMBERS OF THE PANEL, WITH THE ASSISTANCE OF THE EULEX LEGAL OFFICER KERRY MOYES, ACTING AS RECORDING OFFICER.

DEFENDANTS

M.I., residing in Mitrovica, Serbian nationality;

Z.Č., residing in Mitrovica, Serbian nationality;

D.M., residing in Mitrovica, Serbian nationality;

M.R., residing in Mitrovica, Serbian nationality;

A.K., Kosovo nationality;

N.J., residing in Mitrovica, Serbian nationality;

JUDGMENT OF THE COURT OF APPEALS

Pursuant to Articles 407-429 of the CPC[1], regarding the appeals filed against the judgment of the Basic Court of Mitrovica, dated 28 March 2013, in the case nr. 50/2012, the panel of the Court of Appeals decides as follows:

1) The appeal filed by the prosecutor on 13 August 2013 is dismissed as belated;

2) The appeals filed by defense counsel L.P. on behalf of the defendant M.I., on 28 August 2013, by defence counsel D.V. on behalf of the defendant M.I., on 5 August 2013, and by defence counsel F.K. on behalf of the defendant D.M., on 1 August 2013, are hereby rejected and the impugned judgment affirmed.

[1] The following abbreviations referring to the pertinent codes will be used hereinafter: previous Criminal Code: CCK, current Criminal Code: CCRK, previous Criminal Procedure Code: CPC, current Criminal Procedure Code: CPCK.

STATEMENT OF GROUNDS

1. Summary of the relevant proceedings

The criminal investigation was initiated by UNMIK prosecution on 6 June 2008 against the accused D.M., M.I., A.K. and Z.Č. and on 15 September 2011 against the accused M.R. and N.J.

On 12 June 2012 the prosecutor filed with the District Court of Mitrovica the indictment dated 29 May 2012.

On 19 October 2012 the confirmation judge issued the ruling on confirmation of the indictment.

The presiding judge with a ruling dated 08 January 2013 rejected the motion of the prosecutor to summon family members of the late I.K. and the UN police officers K., S. and G. as injured parties.

The main trial proceedings were opened on 26 February 2012.

During the main trial hearing of 20 March 2013, the prosecutor modified the indictment.

On 28 March 2013 the Basic Court of Mitrovica rendered the impugned judgment.

The prosecutor filed an appeal on 13 August 2013.

Responses to this appeal were filed by defence counsels of the defendants D.M., M.R. and N.J.

Appeals were filed by defense counsel L.P. on behalf of the defendant M.I. (28 August 2013), by defence counsel D.V. on behalf of the defendant M.I. (on 5 August 2013) and by defence councel F.K. on behalf of the defendant D.M. (on 1 August 2013).

The prosecutor filed a response to the defense counsels' appeals on 4 October 2013.

The opinion of the appellate prosecutor was filed with the Court of Appeals on 5 February 2014.

The public Session was held on 28 May 2014.

The panel of the Court of Appeals deliberated and voted on 28 May 2014

The written judgment was concluded on 30 July 2014.

2. Charges filed against the defendants[2]

M.I.

[2] Reference is made to the indictment dated 12 June 2012 (indictment), to the ruling of the confirmation judge dated 19 October 2012 (confirmation of the indictment) and to the modification of the indictment dated 20 March 2013 (modification of the indictment)

Indictment: the defendant was charged with the criminal offenses of *Unlawful Occupation of Real Property* (Article 259.1 CCK), *Call to Resistance* (Article 319 CCK), *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and *Endangering United Nations and Associated Personnel* (Article 142.3 CCK).

Confirmation of the indictment: the charge for the criminal offense of *Unlawful Occupation of Real Property* (Article 259.1 CCK) was dismissed due to the expiry of the period of statutory limitation. In relation to all remaining charges the indictment was confirmed.

Modification of the indictment: the prosecutor charged the defendant for the criminal offenses of *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK, *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and *Endangering United Nations and Associated Personnel* (Article 142.3 CCK). The criminal offense of *Call to Resistance* (Article 319 CCK) charged in the indictment and confirmed by the confirmation judge was not mentioned in the application for modification of the indictment.

Z.Č.

Indictment: the defendant was charged with the criminal offenses of *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and *Endangering United Nations and Associated Personnel* (Article 142.3 CCK).

Confirmation of the indictment: the indictment was confirmed in relation to all charges.

Modification of the indictment: the prosecutor charged the defendant as in the indictment for the criminal offenses of *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and *Endangering United Nations and Associated Personnel* (Article 142.3 CCK).

D.M.

Indictment: the defendant was charged with the criminal offenses of *Unlawful Occupation of Real Property* (Article 259.1 CCK), *Damage of Movable Property* (Article 260.1 CCK), *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and *Endangering United Nations and Associated Personnel* (Article 142.3 CCK).

Confirmation of the indictment: the charges for the criminal offenses of *Unlawful Occupation of Real Property* (Article 259.1 CCK) and *Damage of Movable Property* (Article 260.1 CCK) were dismissed due to the expiry of the period of statutory limitation. The indictment was confirmed in relation to the remaining charges.

Modification of the indictment: the prosecutor charged the defendant for the criminal offenses of *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and *Endangering United Nations and Associated Personnel* (Article 142.3 CCK). The charge for *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK) was withdrawn by the prosecutor.

M.R.

Indictment: the defendant was charged with the criminal offenses of *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.2 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK), *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK) and *Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance* (Article 115.1 CCK).

Confirmation of the indictment: the charge for *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK) was dismissed because the confirmation judge considered that this criminal offense is mutually exclusive with the concurrent criminal offense of *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.2 CCK). The indictment was confirmed in relation to the remaining charges.

Modification of the indictment: the prosecutor charged the defendant for the criminal offense of *Call to Resistance* (Article 319 CCK.). The criminal offenses charged in the indictment and confirmed by the confirmation judge were not mentioned in the prosecutor's application for modification of the indictment.

A.K.

Indictment: the defendant was charged with the criminal offenses of *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK), *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK), *Endangering United Nations and Associated Personnel* (Article 142.3 CCK) and *Attacking Official Persons Performing Official Duties* (Article 317.1 CCK).

Confirmation of the indictment: the charge for *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.2 CCK) was dismissed because the confirmation judge considered that this criminal offense is mutually exclusive with the concurrent criminal offense of *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK). The indictment was confirmed in relation to the remaining charges.

Modification of the indictment: the prosecutor charged the defendant as in the confirmation ruling for *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK), *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK), *Endangering*

United Nations and Associated Personnel (142.3), and *Attacking Official Persons Performing Official Duties* (Article 317.1 CCK).

N.J.

Indictment: the defendant was charged with the criminal offenses of *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.2 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK).

Confirmation of the indictment: the charge for *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK) was dismissed because the confirmation judge considered that this criminal offense is mutually exclusive with criminal offense of *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.2 CCK). The indictment was confirmed in relation to the remaining charges.

Modification of the indictment: the charges against this defendant were not mentioned in the prosecutor's application for modification of the indictment.

3. First instance judgment

The first instance court decided the charges as follows:

M.I.

This defendant was sentenced for (1) *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK) to 6 months imprisonment, (2) *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK) to 4 months imprisonment, (3) *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) to 6 months imprisonment and (4) *Endangering United Nations and Associated Personnel* (Article 142.2 CCK) to 1 year and 6 months imprisonment. The aggregate sentence was set as 1 year and 10 months imprisonment.

The first instance court established that on 17 March 2008 in Mitrovica before 7.00 am, at the junction between Filipa Višnjića street, where the courthouse of Mitrovica is located at, and the street leading to Zvečan, a couple of meters beyond the north gate of the court compound, the defendant threw a hand size big stone or a hard object of equivalent size towards a group of UN police officers and KFOR soldiers and hit the shield of one of the officers. Before doing so, he also spread transparent liquid out of a bottle in the direction of the aforementioned officers. He acted within a group of at least 20 persons who were facing a front line of the officers; members of the group threw hand size big and pebble stones and a long metal chain into the police/KFOR line which created a general danger for the officers involved and the severe risk of escalation

which accordingly happened thereafter. His actions and the actions of the members of the group hindered the official forces to safely escort a UN convoy with around 50 protestors who had been arrested before in the courthouse and who were meant to be transported to Pristina. This group with the participation of the defendant jointly hindered UN and KFOR forces in their efforts to maintain and restore a safe environment and public order, which was what he intended. The defendant knew that by his presence and his participating acts he also supported the present crowd in their actions and encouraged them to continue to act in that manner. He was aware of the risk that the situation could escalate which did not stop him from acting as he did. The courthouse was at that time under UNMIK administration according to UN-Resolution 1244.

It was also established in the judgment that on the very morning of 17 March 2008, once a crowd of hundreds of persons had gathered around 10.15 am, the defendant ran up and down the part of the street in front of the courthouse and he made hand movements waving at the crowd. He also threw rocks or wood. This happened after several hand grenades had already been thrown against UN and KFOR forces and after a hand grenade had hit the Ukrainian UN police officer I.K. at around 8h am on this day. I.K. died as a result of his severe injuries in the evening of the critical day at about 22.00 h. There were numerous hand grenade attacks and AK 47 fire from the crowd, and tear gas had been launched by KFOR. On both the protestors' side and on the international side there were over 100 injured persons, some of them were very seriously injured. UN vehicles and a bus had been burned down by the crowd. The crowd had managed to set arrestees free by attacking the convoy. By his presence at the crime scene after the tear gas had been launched, the defendant knew that there was not a peaceful protest ongoing, but a very violent one which resulted in immediate danger for life and bodily integrity of UN and KFOR forces and other persons present and significant material damage. However, he did not distance himself, but accepted these consequences.

The defendant was acquitted of (1) *Participation in a Group Obstructing Official Persons in Performing Official Duties*, for actions on 14 March (Article 318.1 CCK), (2) *Call to Resistance*, for actions on 17 March (Article 319 CCK) and (3) *Endangering United Nations and Associated Personnel*, for actions on 17 March (Article 142.3 CCK).

The first instance court established that had not been proving that the defendant, on 14 March 2008, in the early morning, had already been present and actively involved in any actions of a crowd which was destroying the gate of the courthouse, which used fences as a shield against present UN police officers and then entered, without permission, the courthouse building in order to occupy it. In favor of the defendant, it was found that he arrived only at a later stage, when the rush on the courthouse was finished and a group of persons was already inside the building; he then climbed on the roof of the building and tampered with the UN flag.

It was also not proven that the defendant was involved in organizing and directing ambulances which on the 17 March 2008 at about 6.30 am were driving up and down King Peter street with their sirens on, in order to alert the Serbian community and make them gather in order to prevent the UN convoy to leave to Pristina and that at 6.41 am on this day he used hand sirens to do so. The judgment further established as not proven that on 17 March 2008 the defendant

participated in a violent attack upon the courthouse building itself, nor on UN vehicles, which was likely to endanger a UN staff member because it was proven that the actions he was found guilty of happened outside the north gate and therefore not in the compound of the courthouse and were directed against UN personnel outside the premises of the building and not inside. As far as the burned down and attacked UN-vehicles are concerned, it was not proven that the defendant was involved in such actions.

Z.Č.

This defendant was sentenced for (1) *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK) to 2 months imprisonment, (2) *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK) to 1 month imprisonment, (3) *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) to 2 months imprisonment and (4) *Endangering United Nations and Associated Personnel* (Article 142.2 CCK): to 8 months imprisonment. The aggregate sentence was set as 9 months imprisonment suspended for a verification period of 1 year.

The first instance court found that on 17 March 2008, at the junction between Filipa Višjnića street and the street leading in Zvečan direction, a couple of meters beyond the north gate of the compound of Mitrovica courthouse, before 7.00 am, being part of a crowd of at least 20 persons in which also the first defendant was present and when persons within the crowd threw pebble stones and a long metal chain against a line of UN police officers and KFOR soldiers, the defendant threw a stick of an approximate length of 20-30 cm, that he had spontaneously picked up from the ground, from a distance of less than 5 m, in an arc against the aforementioned officers who were safeguarding the convoy of transport of protestors to Pristina, and who were maintaining public safety and order. Even though the officers were in body armor and with protection shields, and it could not have been proven that anybody was hurt at this stage, the joint actions of the group were likely to lead to the situation escalating and to cause a general danger for the involved international forces. Later, after 7.00 am, several persons were injured and one UN police officer died. About 5 seconds later, still before 7.00 am of the same day, at the same location, he threw a second stick of about 30 cm length, which he had spontaneously picked up from the ground, in the direction of the international forces. By doing so, he hit a shield of one person of the protecting UN/KFOR forces.

In the judgment it was also established that the group and the defendant in a common action hindered the international forces in escorting and protecting the protestor's convoy, and hindered them in maintaining and restoring public safety and order. Then he ran away and remained for about 10 seconds at the crime scene. He acted in the above described way knowing that he, both individually and as a part of the group, hindered the official forces to safely escort the UN convoy and to maintain public safety and order and he accepted that. He further knew that by his presence and his participating acts he was also supporting the present crowd in their actions, and encouraged them to continue to do so. He was aware of the risk that the situation caused immense danger, could escalate and he accepted that.

The defendant was acquitted of *Endangering United Nations and Associated Personnel*, for actions on 17 March (Article 142.3 CCK).

The first instance court found as not proven that the defendant was still within the crowd, in particular when after 7.00 am when the first hand grenade was thrown and when a hand grenade hit the late UN police officer I.K. at about 8.00 am and which caused his death later on that day, and the situation turned extremely violent. It was not found either that the defendant participated in a violent attack upon the courthouse building nor that he participated in attacks on UN vehicles which had been likely to endanger a UN staff member, because the actions he was found guilty of happened outside the north gate and therefore not in the compound of the courthouse and were directed against persons and not against the courthouse building or UN-vehicles. Because of these reasons, it could not be proven that the defendant was present at a later stage when UN vehicles were damaged and burned.

D.M.

This defendant was sentenced for (1) *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK) to 4 months imprisonment, (2) *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK) to 2 months imprisonment, (3) *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) to 4 months imprisonment and (4) *Endangering United Nations and Associated Personnel* (Article 142.2 CCK) to 1 year and 3 months imprisonment. The aggregate sentence was set as 1 year and 6 months imprisonment.

It was proven in the judgment that on the morning of 17 March 2008 the defendant was arrested by UNMIK International police officers while being inside the premises of the courthouse building in Mitrovica. While being in a UNMIK van travelling as part of a large convoy of vehicles with other arrestees, he was set free after the convoy had been attacked by a crowd. After having regained his liberty, he did not return home but remained at the crime scene. There he joined the group of not less than 30 persons who had gathered at the junction of Filipa Višnjića street and the street leading to Zvečan, outside the north gate of the courthouse. He managed to get himself a gas mask in order to protect himself against the tear gas that had already been launched. Persons in the group threw not less than one Molotov cocktail and stones in the direction of the UN and KFOR troops who were on the street in the vicinity of the north gate. The defendant himself was also picking up a stone to get ready to throw it against the present international forces. Close to the junction he kicked on the door of an empty UN Hyundai vehicle (it remained unclear if the door was already damaged before). The defendant acted in the aforementioned way after the first hand grenade was thrown after 7.00 am and tear gas had been deployed, when there was gun fire and when the riots became severely violent and caused numerous injuries on both the protestors' side and on the side of the international forces. The UN police officer I.K. later at 22.00 pm died because of his injuries. The KFOR soldiers and UNMIK police officers were trying to safeguard the transport of arrestees in a convoy to Pristina and to restore public safety and order. The defendant knew that with his presence and

his participating acts he supported the present crowd in their actions and encouraged them to continue to do so. He was aware of the risk that the situation which was already extremely violent could further escalate and he accepted that.

The defendant was acquitted of (1) *Participation in a Group Obstructing Official Persons in Performing Official Duties,* for actions on 14 March (Article 318.1 CCK) and (2) *Endangering United Nations and Associated Personnel,* for actions on 17 March (Article 142.3 CCK).

It was established as not proven that on 14 March 2008, the defendant was part of a large crowd people who gathered at the main gate of the courthouse and who removed it and then forced its way into the inner perimeter of the court yard. It was not proven either that he was part of the crowd when, having removed the gates, these gates were used as a shield to push backwards the UNMIK International police officers who were maintaining public safety and security. In favor of the defendant it could only be proven that at some point on the 14 March 2008 he entered the courthouse building and removed the UN flag from the balcony of the building, and he was found inside the premises of the courthouse on 17 March 2008 when he got arrested.

Further, the first instance court did not consider proven that the defendant was engaged in an attack of the UN premises, because the abovementioned attack of the crowd in which he participated was directed against UN persons and not against the courthouse itself. It could not be proven that he, when kicking the right door of a Hyundai Vehicle, was endangering UNMIK and associated personnel and their liberty, because the vehicle was empty and therefore it was not likely that UN personnel were in danger. When the vehicle in which he was sitting in as an arrestee was attacked, he was inside the car and not involved in that attack.

M.R.

The defendant was acquitted of (1) *Inciting National, Religious or Ethnical Hatred, Discord or Intolerance* (Article 115.1 CCK), (2) *Call to Resistance* (Article 319 CCK), (3) *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.2 CCK) and (4) *Participation in a Crowd Committing a Criminal Offense* (Article 320.1 CCK).

Even though it was proven that sometime between 29 February 2008 and 14 March 2008 the defendant said in the presence of witnesses M. and D. in an unknown location the sentence "*I would come with 250.000 Serbians to take control of the courthouse, and they would die following over each other to gain entry*", and he could be heard by Serbs present, the first instance court found that he said this sentence only spontaneously in an outburst of anger after he was told that the courthouse would be under the control of Kosovo Ministry of Justice, but it was not part of a prepared speech to Serbs and not meant to be, it was not repeated in order to make a message clear and was not meant to trigger seriously a feeling of national or ethnic hatred among the present audience. It was not proven either that the sentence caused any reaction among the persons who might have heard it. It was not proven that the defendant claimed to have any significant influence on the arrival of such a large and unrealistic number of Serbs and on the administrative and political status of the courthouse as such.

In the judgment it was established as not proven that the defendant on 17 March 2008 in Mitrovica with the defendant N.J., following or not following a joint plan, directed two big white dump trucks and a tanker-truck to be placed at the main gate in order to block the police station of Mitrovica North, to prevent a UN convoy with arrested protestors leaving the compound to drive to Pristina, and to hinder the international forces who were attempting to safeguard and maintain public safety and order. It was also not proven that on the same day the defendant was present at the courthouse and its vicinity when a huge crowd gathered and hampered a UN convoy containing arrested persons, which was attempting to drive to Pristina. Ii was not found that he was present at the courthouse on that day when the abovementioned crowd threw objects, including hand grenades and explosive devices in the direction of UN police officers and KFOR soldiers, which caused a number of injuries and the death of the Ukrainian police officer I.K., or that he was involved in the planning of the gathering of the crowd or that he had any role as a leader in the preparation of the riots on 17 March 2008.

A.K.

The defendant was acquitted of (1) *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK), (2) *Attacking Official persons in Performing Official Duties* (Article 317.1 CCK), (3) *Participation in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and (4) *Endangering United Nations and Associated Personnel* (Article 142.3 CCK).

It was not proven that the on 17 March 2008 in the morning in Mitrovica that whilst being in a group it was the defendant and not a third person who was adding a tire to an already burning road block in the vicinity of the courthouse building of Mitrovica and it was not proven either that on the same day he threw at least one object towards the line and security cordon of KFOR soldiers who were safeguarding the courthouse in on-going riots which started on the very day after UN personnel arrested the protestors within the Mitrovica courthouse.

N.J.

The defendant was acquitted of (1) *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.2 CCK) and (2) *Participation in a Crowd Committing a Criminal Offense* (Article 320.1 CCK).

Is was not considered proven that on 17 March 2008 in Mitrovica, together with the defendant M.R., following or not following a common plan, and being part of a group, he was directing two large white trucks and a tanker truck in order to be placed at the main gate of the court building to prevent a convoy with around 50 persons, who had been arrested by UN police that day in the courthouse, leaving the compound and driving to Pristina, or that he was involved in any planning of the riots or had any role as a leader in the preparation or execution of the attack on UN and KFOR personnel within the riots on 17 March 2008.

4. Submissions of the parties

The prosecutor appealed against the judgment, challenging the acquittals and the sentences imposed on the defendants – considered too lenient – and requested that the Court of Appeals modify the judgment by increasing the sentences and convicting the acquitted defendants. Responses to this appeal were filed by the defence counsels of the defendants D.M., M.R. and N.J. For reasons that will be pointed out below, the prosecutor's appeal was filed belated and has to be dismissed. It is unnecessary to summarize the contents of the appeal, the respective responses and the appellate prosecutor's motion.

The defence counsel of the defendant M.I. appealed stating that there has been violation of the provisions of criminal procedure, wrong determination of facts and wrong decision on punishment. He suggests alternatively that the case is returned to the Basic Court for retrial, that he is released from all charges or that he is given a more lenient sentence.

In regard to the violations of criminal procedure he alleged that the judgment is in contradiction with itself. On page 1 the defendant is charged with 5 criminal offences; however, in the enacting clause he is convicted of 4 offences and acquitted of 3 offences. Further, he argued that he was both convicted and acquitted of the same offence (*Endangering United National and associated personnel*) in violation of Article 241.3 CPC. He also claimed that the judgment exceeded the indictment because the prosecutor amended the indictment on 20 March 2013, but the court added it rather than replaced it in its consideration. Finally, he disputed the validity of video recording and photographs as admissible evidence, since they are unreliable and of unknown origin.

As to the wrong determination of the factual situation, the appellant alleged that the video recording cannot be relied upon with absolute certainty to show the defendant. He further added that the witness R.D. did not tell the truth regarding the defendant. He first said that he did not see him on 17 March 2008 but 2 days later said that he did and gave many details. No explanation was given other than his memory returned after he refreshed it. Further, as was demonstrated by a site visit, it was not possible for him to have witnessed the events from the balcony of the northern police station as he claimed in his testimony. He was also unreliable in claiming that mortars were used.

The appellant challenged the determined punishment, alleging that the assessment of the aggravating features was incorrect. It was stated that material damage was caused, but there is no evidence that he caused any such damage. His 'active role' in the events of 14 March 2008 cannot be an aggravating feature as he was not convicted on any offences on that day. He also claims that not all mitigating circumstances were evaluated. He behaved immaculately during the proceedings, he has no previous convictions....

The defense counsel of the defendant Z.Č. appealed but his submission contains no detail other than stating that the judgment wrongly and incompletely established the factual situation as per Article 386 CPC, and also that it is based on footage which is inadmissible. He referred the Court of Appeals to the minutes of the main trial and to his closing speech. His proposal is that the case is returned to the Basic Court for retrial or that the defendant is acquitted of all charges.

Finally, an appeal was filled by the defence counsel of the defendant D.M. He states that there has been violation of criminal procedure, wrong and insufficiently establishment of the factual situation and wrong decision on the criminal sanction. He proposed that the defendant is acquitted of all charges or that the case is returned to the Basic Court for retrial or at least that a milder punishment is given.

According to this appellant's opinion, the judgment of the first instance court is in violation of the criminal procedure rules of Article 384 1.10, 1.12 and 2.1 CPC. The enacting clause is not understandable and is contradictory. On 20 March 2013 the Prosecutor filed an amended indictment charging the defendant with only 2 offences: *Participation in a group which commits a criminal act* and *Endangering UN Staff*. The Prosecutor withdrew the 2 charges regarding *Obstructing Official Persons* by the amended indictment. Therefore he was charged with 2 offences but convicted for 4 offences. It was also alleged that the verdict does not contain reasons for the determination of facts. More, he states that the court based its decision exclusively on photos and footage without knowing who filmed them, which makes the evidence inadmissible.

The challenged wrong determination of the factual situation lies on the alleged lack of evidence. It was wrong of the court to say that defense counsel did not clearly state which documents he disputed and why. This is partly the duty of the trial panel.

As to the wrong determination of punishment, the appellant argued that the court did not properly consider the mitigating circumstances: the defendant's age, lack of previous convictions, that his family is poor, lack of job, and that the offences occurred over 5 years ago and he has not committed any other offence in this period.

The prosecutor replied to the defence counsel appeals as follows:

M.I.'s appeal:

Violation of criminal procedure: the amendment of the indictment only enlarges the facts in detail for each defendant and does not affect the validity of the original indictment; the evidence adduced in respect of video footage and photographs is admissible.

Wrong determination of the factual situation: the defendant is clearly visible and identifiable in the video and photographs. It was never claimed that they were of bad quality, and he was identified in them by prosecution witnesses D. and M. The Basic Court did not find the

evidence of the witness R.D. inaccurate or flawed, and never stated that he lied or in any way impinged upon his credibility in its findings.

Wrong determination of punishment: all mitigating circumstances mentioned in the appeal were considered by the Basic Court.

Z.Č.'s appeal:

The prosecutor notes that this appeal alleged summarily that the establishment of the factual situation is wrong and incomplete as per Article 386 CPC.

D.M.'s appeal[3]:

Violation of criminal procedure: regarding the rules of Article 7 CPC, a full and accurate record was provided when the verdict was issued and the prosecution fully compiled with the requisites of that provision. Regarding the charge for *Obstructing Official Persons in Performing Official Duties*, the court decided this issue pursuant to Article 363 CPC as stated in the modified indictment. All evidence adduced was admissible as it complied with the rules of evidence as provide in the criminal procedure code.

Wrong determination of the factual situation: the film footage and photographs, being admissible evidence, clearly show what all defendants did that day. This evidence was corroborated by the oral testimony of the prosecution witnesses D. and M., and by witness statements and by police reports.

The appellate prosecutor filed a motion moving the court to reject the appeals of all defense Counsel.

M.I.'s appeal: according to Article 360 CPC the court is bound by the acts as described in the indictment whereas the legal classification of those acts as proposed by the prosecutor is not binding. The court assessed all the acts described in the indictment and attributed them a legal classification. Therefore there is no violation of procedural law. The source of the challenged evidence of video recordings and photographs does not necessarily identify the person who actually took them. This evidence was collected by authorized UNMIK and KFOR police officers in accordance with the criminal procedure code in force at the time. There was no claim of poor quality or manipulated videos or photographs during the trial. The Court analyzed every single photo and recording. The court gave in its judgment the reasons why it attached the weight it gave to the testimonies. The discrepancies in Mr. D.'s evidence were explained, and credibility established. He even mentioned facts in the favor of the accused.

Z.Č.'s appeal: the appeal does not meet the legal requirements and should be dismissed.

D.M.'s appeal: the defendant was charged with four charges in the indictment and not with two as he claimed. Regarding the issue of the legal classification of criminal acts and the submissions related to the admissibility of video and photographic evidence, the appellate

[3] The prosecutor heads this paragraph, and within it refers to M.R.'s appeal. However, this defendant was acquitted of all charges and has not filed an appeal. The prosecutor must mean D.M.

prosecutor refers to his previous response. The court considered as mitigating circumstances the defendant's age and the time since the commission of the crimes. However, these factors are not outweighed by the aggravating circumstances of the case.

4. Applicable procedural law

The proceedings initiated before the new *Criminal Procedure Code of Kosovo* entered in force on 1 January 2013. The initiation of investigation, filing of the indictment, confirmation of the indictment and initiation of the main trial occurred while the previous *Criminal Procedure Code* was still in force. Only the judgment was completed after that moment. The first instance court decided to apply the new *Criminal Procedure Code of Kosovo* in all proceedings posterior to 1 January 2013. The parties also filed their appeals in accordance with the provisions of the new code.

The appellate panel has a different opinion. The general rule of Article 539 CPCK *a contrariu senso* is that to criminal proceedings initiated before the new code entered in force the previous code remained applicable. Exceptions set by Articles 540 and 541.1 CPCK are not to be considered because on 1 January 2013 the indictment was already filed and confirmed. The appellate panel is aware of the difficulty resulting from the interpretation of Article 541.2 CPCK, as it states that the new code is applicable even in cases on which the indictment was confirmed before that date. But these provisions have to be subject to combined and coherent interpretation, as it is clear that paragraphs 1 and 2 of the referred Article 541 are in contradiction. The general rule on sequence of laws is that the new law only produces effect for the future, and retroactive application is exceptional[4]. Also, it does not make much sense that the proceedings on a certain procedural stage may be regulated by different laws, as this may introduce unnecessary difficulties and disputes on the applicable rules, especially if the sequence or form of the acts are different. The appellate panel shares the opinion of the Supreme Court[5], according to which in case the main trial has already commenced before 1 January 2013 the previous procedural code remains applicable.

The determination of the applicable law is a matter of legal qualification that the Court of Appeals can examine and decide *ex officio*. The fact that the first instance court did not apply the procedural rules correctly does not affect the validity of the judgment. Thus, all procedural actions performed by the court and the parties will have to be evaluated and decided in light of the applicable law, which is the *Criminal Procedure Code*.

[4] The appellate panel agrees that the new criminal procedural law may be applied in case it establishes more favorable rules for the exercise of defence rights, but this has to be assessed in light of a specific procedural right and not of a general and unrestricted application of the new law.

[5] Exception on the final of paragraph 1 of the Opinion no. 56/2013, dated 23 January 2013, of the General Session of the Supreme Court. The legal opinion of the Supreme Court issued in general terms is not binding for courts but it can be assessed as a valid element of legal interpretation.

5. Admissibility of the appeals

All defence appeals were filed timely and are admissible.

The appellate panel, however, considers that the prosecutor's appeal was filed belated.

A report was secured from the first instance presiding judge, pursuant to Article 409(4) CPC. The documents are in the case file and the report states that:

- The judgment was served upon the prosecution on 26 July 2013;

- The prescribed period of time to appeal is 15 days from the day the copy of the judgment was served[6]; this period elapsed on 12 August 2013;

- The prosecutor's appeal was filed on 13 August 2013;

- The presiding judge's legal officer invited the prosecutor to submit the reasons for the appeal being late;

- The prosecutor filed a submission to the judge justifying the delay, stating that the translation of the appeal into Serbian was only completed at approximately 19.29 hours on 12 August 2013 and that, given the time of the receipt of the Serbian translation, the appeal was only filed on the following day, because the administrative practice of the Basic Court registry is to accept only the documents from the prosecution in both English and Serbian languages, even when the English version is available and the translation is pending.

- The appeal of the prosecutor had already been served to the defendants for reply and the presiding judge did not dismiss it pursuant Article 407(2) CPC[7], nor issue a decision on the given justification;

- The presiding judge in first instance, as to her knowledge and to the information she requested concerns, does not confirm the existence of a practice of the registry as alleged by the prosecutor. On the contrary, the information obtained is that the registry of the court would accept and stamp all submissions filed, and that an appeal filed only in English would not be rejected;

- The prosecutor did not file a request for a return to the *status quo ante* pursuant to Articles 96 to 98 CPC.

When asked to justify the delay, the prosecutor could have filed a request for a return to the *status quo ante* pursuant to Articles 96 to 98 CPC. This was not done and the prosecutor chose to submit a written justification stating that the appeal had been timely filed because of the given reasons related to the delay on the translation and the practice of the court registry. None of these reasons, however, are acceptable. English is one of the official languages of the proceedings, and appeals may be submitted in that language (Article 15 (1) and (4) CPC). So, if

[6] Article 398(1) CPC

[7] As the proceedings in the first instance were applying the new procedure code that has no equivalent provision, the presiding judge considered that Article 407(2) was not applicable.

such a practice of the court registry existed it would be unlawful because the appeal could be submitted in English and translated later. Moreover – and this has to be considered somehow disturbing – the alleged practice given to justify the prosecution's delayed action is not confirmed[8]. The fact that the Serbian translation may have been concluded after working hours on the last day of the deadline is not a relevant justification, since each party is obliged to organize its work in order to fulfil its procedural obligations.

The fact that the presiding judge did not dismiss the appeal before serving it to the defendants to reply does not prevent the Court of Appeals to examine this matter. Article 420 (1.1) CPC allows the dismissal of a belated appeal in the judgment on appeal.

For the abovementioned reasons, the appeal filed by the prosecutor is dismissed.

6. Merits of the appeals

6.1 Substantial violations of the provisions of criminal procedure

Inadmissible evidence

The inadmissibility of the video recordings and photos as evidence was raised as ground for the appeals filed on behalf of the defendants M.I., Z.Č. and D.M. According to their allegations, in brief, such evidence is forbidden because its origin is unknown which makes it unreliable, according to Article 259.2 CPCK.

Inadmissible evidence is such when it is obtained in violation of procedural provisions and expressly prescribed as such by law. That evidence cannot be used as a basis of a court's decision (Article 153 CPC). Article 403 (1) 8) CPC stipulates that use of inadmissible evidence is a substantial violation of criminal procedure. If that violation occurs the judgment has to be annulled and the case returned to retrial, pursuant Article 424 (1) CPC (except for situations that are not relevant now).

During the trial the parties challenged the admissibility of the video and photos as evidence, but the trial panel rejected the objection and found it admissible evidence. Since the parties raised this matter at the time the evidence was submitted in the proceedings, they are allowed now to ground their appeal on the same issue (Article 154 (1) CPC). Summarily, the reasons given by the appellants to claim the inadmissibility of the evidence are the following: it is not known who made the videos and photos, therefore they are intrinsically unreliable in accordance with the mentioned legal provision; the collecting of that evidence did not follow the proceedings applicable to securing technical measures of surveillance in the investigation envisaged in Article 257 CPC.

[8] The Court of Appeals believes that there must have been some kind of misunderstanding as it cannot be expected that the prosecution would fail to provide truthful and reliable information to justify its own delay.

Defense counsel of the defendant M.I. referred to the European Court of Human Rights (ECHR) cases of *Hysein and others v Azerbaijan* and *Asadbejly and others v Azerbaijan*. Two cases were found with similar names: *Huseyn and others v Azerbaijan*[9] and *Asadbeyli and others v Azerbaijan*[10] but they don't relate to the disputed issue. It would be expected that defence would provide proper referencing when citing case-law to support their arguments. The names were misspelt and the citations and dates of judgments were missing. More crucially, there was no detail as to the ECHR findings (paragraph numbers or quotes) in these cases that would support the defence submission on this point. It is not for the Court of Appeals to hunt through lengthy judgments to guess which arguments may support the submissions of the parties. Otherwise, the Panel cannot see how these cases assist the appeals.

As to the specific legal arguments to challenge the use of videos and photos as evidence, the appellate panel notes that no provision on the applicable procedural law[11] expressly prescribes that evidence as inadmissible. Article 259.2 CCPK had no equivalent in CCP. The principle of unreliability of evidence of unknown origin aims to ensure that the parties are provided with the possibility to check the source of the evidence and thus may dispute its value. In the lack of such a provision in the applicable procedural law, the validly of the evidence cannot be questioned, but its credibility is an issue that the court has to assess while establishing the facts. In this case the parties did not question the authenticity of the evidence. It is undisputable that the videos and photos show the events which occurred on the relevant date and place. So, the fact that the origin of the evidence may not be known becomes irrelevant because the parties accepted that the images captured in the videos and photos are authentic and relate to the events. Moreover, the appellate panel is of the opinion that the evidence in question could not anyway be considered of unknown origin, although it was not determined who were the actual persons who made it. It is clear that the videos and photos were captured from behind the security line that was trying to contain the crowd involved in the riots and from a helicopter in the air. This allows the court to infer that official persons either from UN Police or KFOR captured the images. Its origin was not impossible to check and therefore cannot be qualified as unknown, in the sense that is not determinable. Nevertheless, that matter has no relevance as the parties accepted that the images are related to the events.

The appellate panel finds obvious that the rules to collect covert photographic or video surveillance set in Articles 257-267 CPC, namely the need of a judicial order, by definition would not be applicable to photos or videos taken in public spaces prior to a criminal investigation. It is not reasonable to read the law in such a manner that would prescribe an impossible result. In the face of the events that were occurring, it was simply impossible that a ruling on initiation of investigation, an application requesting surveillance measures and a pre-trial judge's ruling ordering the measures could be completed. This is not reasonable and it is even doubtful if it can be considered a serious argument.

[9] 35485/05, 45553/05, 35680/05, 36085/05 Final of 26 July 2011
[10] 3653/05, 14729/05, 20908/05, 26242/05, 36083/05, 16519/06 Final of 11 December 2012.
[11] As pointed out earlier, the previous *Criminal Procedural Code* is applicable.

The trial panel concluded that the images were recorded in a public place and, in face of such ongoing suspected criminal actions, Article 201 CPC allowed police authorities to secure evidence, taking the necessary steps to establish the identity of the perpetrators and to gather information of their actions. The appellate panel agrees completely with the reasoning of the trial panel.

Additionally, the appellate panel finds that the fundamental right to privacy and protection of image is not breached if someone is committing a crime in a public place, voluntarily in front of everyone and in a context on which is reasonable to expect that the authorities will take photos or make videos. By acting in such a manner it has to be understood that the perpetrator is waiving his/her right to privacy.

The right to privacy is contained in Article 8 of the European Convention on Human Rights (ECHR). The Convention admits interference by a public authority with the exercise of this right if it is in accordance with the law and is necessary in a democratic society namely in the interests of national security, public safety, prevention of disorder or crime or for the protection of the rights and freedoms of others. In *Friedl v Austria*[12] ((1995) 21 EHRR 88) the applicant had taken part in a demonstration causing an obstruction to the highway. The police took photographs of the participants, including the applicant. The Commission of Human Rights that referred that case to the Court, noting that there had been no intrusion into the 'inner circle' of the applicant's private life, that the demonstration was public and the applicant was there voluntarily, found that the taking and retention of the photographs did not breach Article 8.

Finally, the argument that YouTube policy forbids the download of videos is completely irrelevant to this discussion. The court is dealing with the admissibility and value of a video as evidence and this matter is not affected by any possible infringement of copyright rights or equivalent.

The evidence is therefore admissible. It was within the discretion of the trial to afford it whatever weight it considered that it merited. The appellate panel finds no valid reason to disagree.

Judgment exceeded the scope of the charge

Defence counsel of defendants M.I. and D.M. argued that the judgment exceeded the scope of the charges as they were convicted for criminal offenses that they were not indicted with. Both the prosecutor and the appellate prosecutor disagree.

This substantial violation is foreseen in Article 403 (1) 10) of the CPC.

In order to analyse this issue it is necessary to determine exactly what the defendants were charged with, as the indictment was modified first in the confirmation hearing and later on 20 March 2013 by the prosecutor. The doubt about the content of the charge arises from the fact that the prosecutor filed an application modifying the indictment in a dubious manner. It may be

[12] The case terminated with an agreement but the opinion of the Commission of Human Rights is annex to the decision of the ECHR: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57917#{"itemid":["001-57917"]}

considered unclear if the prosecutor amended the indictment, annulling the previous one (as the defendants seem to argue) or if it supplemented it (as the trial panel found and the appellate prosecutor reads it). Reading carefully the prosecutor's submission, although it is clear that it could and should have been more enlightening, the appellate panel is of the opinion that the modification supplemented the original charges but left untouched those charges that were not mentioned or modified. This conclusion derives from the fact that the prosecutor did not include in the modification a number of charges that had been confirmed by the confirmation judge, but at the same time did not withdraw them[13]. The fact that the trial proceeded addressing the omitted charges suffices to make defendants aware of the fact that they had not been implicitly withdrawn. So, the charges that the trial panel had to decide upon are those confirmed by the confirmation judge and supplemented on the application to modify the indictment.

M.I. in the confirmation ruling was charged with the criminal offenses of *Call to Resistance* (Article 319 CCK), *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and *Endangering United Nations and Associated Personnel* (Article 142.3 CCK). The prosecutor supplemented the indictment charging the defendant also with *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK). He was sentenced for *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK), *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and *Endangering United Nations and Associated Personnel* (Article 142.2 CCK). He was acquitted of *Participating in a Group Obstructing Official Persons in Performing Official Duties*, for actions on 14 March (Article 318.1 CCK), *Call to Resistance*, for actions on 17 March (Article 319 CCK) and *Endangering United Nations and Associated Personnel*, for actions on 17 March (Article 142.3 CCK).

D.M. in the confirmation ruling[14] was charged with the criminal offenses of *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and *Endangering United Nations and Associated Personnel* (Article 142.3 CCK). The prosecutor supplemented the indictment charging the defendant also with *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK). He was sentenced for *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK), *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and (4) *Endangering United Nations and Associated Personnel* (Article 142.2 CCK). He was acquitted of *Participation in a Group Obstructing Official Persons in Performing Official Duties*, for actions on 14 March (Article 318.1 CCK) and *Endangering United Nations and Associated Personnel*, for actions on 17 March (Article 142.3 CCK).

[13] For example in the case of the defendant N.J. the prosecutor did not mention any of the charges in the modification application.

[14] He was also charged with *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK) but the prosecutor withdrew that charge on 20 March 2013. However, withdrawal did not affect the factual charges, as the prosecutor only proposed a new qualification that consumed the referred criminal offense.

There is no doubt that the relevant facts to fulfil the requirements of the criminal offense must be included in the indictment (Article 305 (1) (2) of the CPC). Once confirmed by the confirmation judge, the factual situation charged in the indictment will limit the object of the main trial, and the facts that may be considered to prove someone's guilt in the judgment. The indictment may also be modified by the Prosecutor during the main trial, but in that situation the defence will be granted the right to give its opinion and to present evidence (Article 376 of the CPC). The enacting clause is the part of the judgment that contains the executable decision and the relevant facts found proven (Articles 391 (1) 1) and 396 (3), (4) of the CPC). The statement of grounds will indicate the facts that were proven and not proven and the evidence assessed to reason the decision (Article 396 (7) of the CPC). The judgment may only relate to facts contained in the charge (Article 386 (1) of the CPC). If it exceeds the factual situation in relation to the charged offenses, i.e. if the enacting clause contains different facts from those of the indictment, it will incur in substantial violation of the procedures (Article 403 (1) 10) of the CPC).

The appellate panel notes that the factual content of the indictment was not modified. The facts the defendants' were accused of are the same that the trial panel dealt with in the judgment, establishing them as proven or not proven. The objection of the appellants refers to the legal qualification of those facts that was modified several times throughout the proceedings. Defendant D.M. were convicted for the criminal offense foreseen in Article 316.3 of the CCK that the prosecutor had previously withdrawn, but – and is essential to note this – based exactly and solely on the same facts. On the other hand, both he and defendant M.I. were convicted and acquitted of the criminal offenses of Articles 318.1 and 142 of CCK, but, again, not in contradiction but instead as a result of the fact that the trial panel did not establish as proven certain facts imputed on the defendants. So, the question that has now to be answered is if the trial panel, although not adding new facts, was allowed to modify the legal qualification of the facts in the final judgment without giving warning to the parties.

The court is not bound by the motions of the prosecutor with regard to the legal qualification of the act (Article 386 (2) of the CPC). This means that, as long as the court does not exceed the facts included in the accusation, it is free to qualify them differently and convict for criminal offenses not proposed by the prosecution. But the question remains: can the court do it without giving the defence the opportunity to submit an opinion on this regard, namely if the modification is in detriment of the defence? This question relates directly to the protection given to the right to an effective defence as one of the aspects of the right to a fair trial.

The right to a fair trial as one of the fundamental rights is protected in Article 31 of the Constitution of the Republic of Kosovo. The constitutional protection given to this right has to be interpreted to the same extent as in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as defined by the jurisprudence of the ECHR (Articles 22 (2) and 53 of the Constitution). Thus, it is important now to see how far the ECHR jurisprudence goes on Article 6.3(a) of the Convention, regarding the right to be informed promptly and in detail of the nature and cause of the accusation.

In the case *Salvador Torres v. Spain* it was alleged that the fact that the defendant had been convicted of an offence with an aggravating circumstance with which he had never be expressly charged constituted a violation of Article 6.3(a). The investigating judge in the case found that the facts established by him disclosed the offence of "embezzlement of public funds". The first instance court found that the paragraph of embezzlement of public funds was not applicable because he was not a civil servant as required and the embezzled money was not public funds and found him guilty of simple embezzlement and sentenced him to 18 months imprisonment. The prosecution appealed and the accused did not. The Supreme Court also found that "embezzlement of public funds" was not applicable. They however found him guilty of an aggravated form of simple embezzlement because he had taken advantage of the public nature of his position in performing duties entrusted to him and sentenced him to five years imprisonment. The court found that the public nature of the applicant's position was an element intrinsic to the original accusation of embezzlement of public funds and hence known to the applicant from the very outset of the proceedings. He must accordingly be considered to have been aware of the possibility that the courts would find that this underlying factual element could, in the less severe context of simple embezzlement, constitute an aggravating circumstance for the purpose of determining the sentence. No infringement of the applicant's rights under Article 6 was found. Here the court stated that the modification of the legal qualification should be expected by defence as it was implicit in the accusation.

In the case *T. v. Austria* the applicant in an ongoing case filed a request for legal aid. He submitted a declaration of means, according to which he had no income, property or other assets. The standard form for this declaration contained a warning that, in case the legal aid was obtained improperly by making false or incomplete statements a fine for abuse of process could be imposed. The court, without a hearing, dismissed the applicant's request and imposed a fine for abuse of process. The appeals court found that the applicant's submission that he had savings which allowed him to pay rent constituted new facts which were inadmissible in the appeals proceedings. The court had rightly found that he had made incomplete or false statements and the fine had been properly imposed. The ECHR noted that the applicant only learned about the accusations levelled against him when the court's decision was served on him. Even though he had a right to appeal, the appeal was not capable of remedying the shortcomings of the first instance proceedings because the appeals court confirmed the first instance court without a hearing and the submissions made by the applicant in his defence were inadmissible on appeal. In this case the court found a violation of Article 6.3(a). This case decides a significantly different situation because it relates to previous knowledge of a factual situation that the court assessed and decided upon, and not only to a different legal qualification.

In the case *Dallos v. Hungary*, the applicant was prosecuted for and in the first instance convicted of embezzlement. The Court of Appeals reclassified the offence as fraud; something that the court never made him aware was a possibility. The ECHR recalled that the fairness of proceedings must be assessed with regard to the proceedings as a whole. The provisions of Article 6.3 (a) point to a need for special attention to be paid to the notification of the

accusation to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him. This provision of the Convention affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should be detailed. The ECHR found that the applicant was indeed not aware that he might face a reclassification of his offence as fraud. This circumstance certainly impaired his chances to defend himself in respect of the charges he was eventually convicted of. However, in this respect, the ECHR attributed decisive importance to the subsequent proceedings before the Supreme Court. It noted that the Supreme Court entirely reviewed the applicant's case, both from a procedural and a substantive-law point of view. In addition to having studied the lower courts' case file and submissions by the applicant and the prosecution, the review bench heard, at a public session, oral addresses from the applicant's defence counsel and the Attorney-General's office. Moreover the Supreme Court itself could have replaced the applicant's conviction with a decision of acquittal. Thereby the ECHR found that the applicant had the opportunity to advance before the Supreme Court his defence in respect of the reformulated charge. Assessing the fairness of the procedure as a whole – and in view of the nature of examination of the case before the Supreme Court – the ECHR was satisfied that any defects on the proceedings before the Regional Court were cured before the Supreme Court.

In the case *Sipavičius v. Latvia*, the applicant was in the indictment charged with obtaining property by deception and abuse of office. He was acquitted of these charges. However the Regional Court found that he had performed his duties as a police officer improperly because of negligence. This failure amounted to a breach of a certain provision of the Police Act and the judge found him guilty of the offence official negligence. He was not made aware that a reclassification was a possibility. The ECHR recalled and reiterated what was found in *Dallos v. Hungary*. It found that it was undisputed that until the conviction the applicant indeed was not aware that the Regional Court might reclassify the offence as official negligence. This circumstance certainly impaired his ability to defend himself of the charge. However the ECHR reiterated that compliance with Article 6 must be determined in light of the proceedings as a whole, including the appeal procedures. In the case the applicant was entitled to contest his conviction in respect of all relevant legal and factual aspects before the Court of Appeals, which heard the parties at an oral appeal hearing and the reviewed the applicant's complaints about the reclassification of the charge from both the procedural and substantive point of view. It had not been alleged that the appeal court lacked power to quash the conviction and acquit the applicant or that at the appeal level the applicant was unable to defend himself against the reformulated charges. The fact that the applicant's pleadings against the reclassification were unsuccessful does not indicate that the review of the procedures were not capable of remedying the shortcomings of the first instance proceedings. The Court further stated that this case must be distinguished from *T. v. Austria* because in that case the applicant's complaints against the reclassification were rejected as constituting new facts which were inadmissible on appeal and without an appeal hearing being held.

In the light of the aforementioned decisions, the ECHR has been very clear stating that while evaluating the effectiveness of the right to defence, the proceedings as a whole must be considered. If the defendant has the right to an appeal in which he or she can argue against what was previously unknown to him and the appeals court has the possibility to review the case and change it if it finds that the first instance was wrong in its decision, Article 6 has not been infringed.

According to this jurisprudence, the appellate panel cannot consider that the defendants' rights were violated. They had the right to appeal and the Court of Appeals, after holding a session where their arguments could be presented, is permitted to review the case on both procedural and on substantive-law all the possibilities in the law to amend or even quash the judgment are granted. Therefore there has been no violation of Article 6 of the Convention and there is no ground for annulling the judgment due to a possible excess of the scope of the charge that may be corrected if so is needed.

Incomprehensibility or inconsistency of the enacting clause

Defendant M.I. argued that the enacting clause is not clear because he was charged with 5 offenses and judged for 7 offenses.

This substantial violation is foreseen in Article 403 (1) 12) of the CPC. It is related to the previous alleged substantial violation and has been answered by the appellate panel.

As stated before, the defendant was charged with the criminal offenses of *Participating in a Group Obstructing Official Persons in Performing Official Duties*, *Call to Resistance*,) and *Endangering United Nations and Associated Personnel*, foreseen respectively in Articles 318.1, 319 and 142.3 of the CCK, and referring to actions he was accused of allegedly occurred on 14 and 17 March 2008. The prosecutor qualified actions which occurred on two different occasions as only one criminal offense and this was the way the indictment was filed. The trial panel took a different approach as to the legal qualification and considered that actions committed on different days correspond to different criminal offenses. Consequently, as some facts were establish as proven and others not, the defendant was convicted for the criminal offenses in relation to which the facts were proven and acquitted to those in relation to which they were not proven.

The enacting clause is not incomprehensible or inconsistent. The way the trial panel concluded the decision corresponds to the reasoning of the judgment. There is no contradiction. On the contrary, if the trial panel was of the opinion that actions committed on different days imply the commitment of two criminal offenses and found some proven and some not proven, the logical consequence was the one that it was reached: acquittal for actions not proven and conviction for actions proven.

The appellate panel considers that none of the substantial violation alleged by the appellants was committed in first instance.

Additionally, having reviewed the case file and assessed all relevant documents, the appellate panel is also of the opinion that no other procedural violation that could be examined *ex officio* pursuant to Article 415 (1) of the CPC occurs.

6.2 Erroneous or incomplete determination of the factual situation[15]

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

Defendant M.I. stated that the videos and the photos cannot establish his presence at the scene; testimony of witness D. is not reliable nor impartial, as he stated in one day he did not see the defendant there and in the other day he said the opposite giving a lot of details, he lied by saying that some details could be seen from the place he was watching the events when the court's visit to the site showed it to be impossible, and he strangely confused the sound of hand grenades with the sound of mortar grenades.

Defendant Z.Č. stated conclusively that the factual situation is wrongly established.

Defendant D.M. stated that the court established the facts completely wrongly because failed to mention that the death of the police officer occurred due to lack of medical assistance and not directly to the wounds caused by the blast of the grenade and relied only on photo and video footage without finding out who filmed these materials.

The appellate panel reminds that the review of the first instance court's decision regarding the determination of the facts is bounded by the allegations of the appellants. They have to, in the words of the law, provide "*an explanation of the appeal*" (Article 401 (10.3) of the CPC). The motivation of the appeal to challenge the established facts must be precise and explain clearly which evidence would show that a certain fact should have been considered proven or not proven and why. The law does not grant the parties the right to a second judgment but only the possibility to a review of the judgment, which is different. The Court of Appeals is not to be expected to repeat the examination of all evidence as if no previous judgment existed.

As it was affirmed previously by the Court of Appeals[16], when Article 405 of the CPC defines the terms "erroneous determination of the factual situation" and "incomplete determination of the factual situation", it is referring to errors or omissions related to "material facts" that are critical to the verdict reached[17]. Only if the first instance court committed a fundamental mistake while assessing the evidence and determining the facts will the Court of Appeals overturn the judgment[18].

---

[15] According to the order of issues established in the CPC, violation of criminal law regulated in Article 404 precedes erroneous or incomplete determination of factual situation regulated in Article 405. The appellate panel choses to address these matters in the logic order, as the application of the law has to be assessed after the determination of the facts.

[16] PAKR 1121/12, judgment dated 25/09/2012.

[17] The mentioned judgment refers to B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366, para. 3.

[18] PaKr 1122/12, Judgment dated 25.04.2013.

As a general principle the evaluation of evidence should rely on a direct and immediate examination of oral testimonies and statements by a panel of judges. The reading of the record of the evidence examined in the trial, however faithful and accurate it may be, is always a less reliable instrument for evaluation of evidence. Even the examine of documents and other material evidence is in general more accurate in the trial because often those piece of evidence have to be conjugated with other elements and subject to oral explanations by witnesses or parties. Therefore, as affirmed by this court in other occasions[19], "*It is a general principle of appellate proceedings that the Court of Appeals must give a margin of deference to the finding of fact reached by the Trial Panel because it is the latter which was best placed to assess the evidence*". The Supreme Court of Kosovo has held that it must "*defer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so.*" The standard which the Supreme Court applied was "*to not disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous*".[20]

The appellate panel reviewed carefully all the evidence examined in the first instance court and the assessment made by the trial panel in the judgment. The appealed judgment, in the opinion of the appellate panel, did not make any critical mistake on evaluation of evidence and establishment of facts. The appellants failed to show that the first instance court erred or was not complete in determining the factual situation. All they did to extract conclusions that are not acceptable was enlightening certain contradiction or inconsistency in piece of evidence out of the general context, ignoring other concurring evidence and even the rules of interpretation based in common sense and logic. They want to convince the Court of Appeals that they were not present at the scene of the events doing the actions described in the judgment when they clearly appear on videos and photos doing it in a manner that the trial panel explained extensively and convincingly.

On the other hand, the autopsy of the killed police officer is undisputable as to the determination of the cause of the death, as it completely establishes that it occurred due to the wounds caused by the blast of a grenade.

Finally, the appellate panel sees no reason to cast doubt on the impartiality and reliability of witness R.D. Defendant M.I. tried to explore some inconsistencies and contradictions he isolated from the whole context of the evidence. The appellate panel is aware of the fact that the witness could not remember precisely all the details of statements he had given years ago. He stated he knew the defendant and that he saw him on the spot. But, even if he was not entirely clear on that, the fact is that the trial panel established the defendants' presence on the scene and his actions not only based on the witness testimony but also on the video and photos. So, the

[19] PAKR 1121/12, judgment dated 25/09/2012.
[20] Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, paragraph 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, paragraph 30.

contradiction on D.'s evidence becomes irrelevant to dispute the truthfulness of his testimony as it was profusely corroborated by other undisputable evidence.

In conclusion, the witnesses' evidence, both given in the investigative stage and in the main trial, was examined exhaustively by the first instance court. The same careful assessment was done in relation to the abundant documental and forensic evidence. The judgment explains in detail the meaning of that evidence and of the contradictions between them in such a convincing manner that moves the appellate panel to accept that the facts established in the judgment as proven are the only reasonable, logic and possible explanation for the evidence. Therefore, is not found that the judgment contains erroneous or incomplete determination of the factual situation.

6.3 Violation of criminal law

The appeal on behalf of defendant D.M. invoked expressly violation of criminal law as one of the grounds to challenge the judgment. Reading carefully his appeal the conclusion is that no violation matching the grounds set in Article 404 of the CPC was specifically alleged.

There is, however, a critical issue that the appellate panel finds it necessary to address related to the legal qualification of the facts and in consequence to the criminal offenses of which the defendants' were convicted. Article 426 (1) of the CPC allows the Court of Appeals to examine *ex officio* the correct application of the law to the factual situation and to modify the judgment if necessary and if possible.

The trial panel found all three convicted defendants guilty and sentenced them for the criminal offenses of *Obstructing Official Persons in Performing Official Duties* (Article 316.3 CCK), *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK), *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) and *Endangering United Nations and Associated Personnel* (Article 142.2 CCK). Acknowledging that the defendants were "convicted of several crimes arising from the same actions" the trial panel concluded, in respect of the concurrence of crimes, that the actions can be considered as a single behavioural incident of each of the defendants because they were based on a single decision, occurred without interruption and under closely linked circumstances and time. Discussing the theory of ideal concurrence, the panel found that amongst criminal offenses of Articles 142, 316, 318 and 320 of the CCK none can be considered *lex specialis* as to absorb the others, because each one of them contains specific elements that are absent in the others, and the protected legal interests are not fully overlapping. The trial panel also found no relation of subsidiarity between the legal provisions since none is set as alternative of the others.

Without prejudice to recognize that the first instance court sought to base its decision on the theories of concurrence of crimes, the appellate panel does not agree with the conclusion. This is not the place and the moment to dissect the theory of concurrence. It would be inappropriate – and perhaps impossible – to cover all aspects and to solve all difficulties that this issue raises

in a synthetic way. The purpose of a judicial decision is not to enunciate legal doctrine but solve a case according to the law. Nevertheless, it is useful to define some concepts before applying them to the case.

While deciding on the plurality of punishments for the same action, is frequent to see common law courts applying the so called "Blockburger test"[21]. The Supreme Court of United States held that punishment for two statutory offenses arising out of the same criminal act or transaction does not violate the "Double Jeopardy Clause" if each provision requires proof of an additional fact while the other does not. This method was mainly designed to avoid violation of the principle *ne bis in idem*, i.e. that the same fact cannot originate two criminal sanctions.

In civil law systems – such as in Kosovo – courts tend to solve the same problem by applying the rules of theory of concurrence.

Real concurrence consists in the perpetration by the same person of a plurality of criminal offenses through distinct actions[22]. This is a case of concurrence of crimes that will result in a plural conviction for all the crimes effectively committed. Ideal concurrence, on the other hand, consists on the perpetration of a single action that apparently fulfils the legal requisites of several legal provisions (heterogeneous ideal concurrence) or of the same legal provision several times (homogeneous ideal concurrence)[23] but regarding which only one can be applied. More properly this can be seen as concurrence of legal qualifications instead of concurrence of crimes, as it deals with a single action that covers the content of norms of several law texts. In these cases, according to the circumstances and consequences of the action and the values protected by each infringed norm, the identification of the applicable norm or norms will be determined by the type of relation existent between them: speciality, subsidiarity, alternativity and consumption. If conflicting norms applicable to the same action are in one of those four types of relation, a case of ideal concurrence occurs and one single punishment is applicable.

Two norms are in a relation of speciality when one (the special provision) contains all the elements of the other (the general provision) plus an additional one. In this case the principle that *lex specialis derrogate lex generalis* is applicable and the perpetrator will be punished solely for the criminal offense foreseen on the provision that "captures" his/her action more completely. Example: false statement of a cooperative witness of Article 393 of the CCRK is special in relation to false statement of a witness of Article 392 of the CCRK.

Two norms are in a relation of subsidiarity when one (the subsidiary provision) is only applicable if it is not possible to apply the other (the primary provision) and is set to cover that situation. The subsidiarity may be expressly foreseen in the law or be implicit in it. Examples: criminal liability of the chief editor of a media publication under Article 37 of the CCRK is expressly subsidiary to general criminal liability of the same person (Article 39 of the CCRK); a father that with intent to kill his young child son abandons him in a dangerous situation and lets him die, commits an aggravated murderer of Article 179.1.1 of the CCRK and not an offense of

[21] Blockburger v. U.S., 1932.
[22] For example, one person robs, rapes and kills the same victim or robs, rapes and kills different victims.
[23] For example, one person throws a grenade that kills a plurality of victims (homogeneous) or throws a grenade that kills victims and damages property (heterogeneous).

abandoning incapacitated persons of Article 192.1 of the CCRK because the legal protection of the mere danger is implicitly subsidiary to the protection of the effective result of that danger.

Two norms are in a relation of alternativity when more than one legal description might apply to an action but there is a description that predominates in relation to the other – this is the case of criminal offenses than can be perpetrated by multiple alternative actions. Example: a person that starts a fire and causes an explosion to damage property of another person commits only on criminal offense of Arson (Article 334 of the CCRK) although the perpetrator's act fulfilled both typical actions.

Finally, two norms are in a relation of consumption when one (the absorbent provision) contains the elements of the other less serious one (the absorbed provision). The "principle of the lesser included offense" means that one criminal lesser action is accessory or instrumental to commit the criminal greater action. Example: the perpetrator that threatens another person in one of the forms foreseen in Article 185.1 of the CCRK with intent to extort the victim commits the criminal offense of Extortion of Article 340 of the CCRK and not both – in this situation the lesser action of threat is the instrumental instrument of the greater action of extortion. Normally, when norms are in a relation of consumption the punishment foreseen for the absorbent norm is greater than the one foreseen for the absorbed norm. But in some situations the opposite occurs and the punishment applicable to the instrumental action is greater. In those situations, the better protection of the infringed value imposes that the action must be punished pursuant to the provision that foresees a greater punishment. Example: the perpetrator that, in order to commit a fraud, uses a falsified public document as an instrument to deceive the victim, will be subject to the punishment foreseen in Article 398.2 and not to the one foreseen in Article 335.1 of the CCRK. In this case the absorbed action is greater than the absorbent action and logically the "principle of the lesser included offense" is not applicable.

Having these concepts in mind, the appellate panel will now determine which criminal offenses were committed by the defendants. It is essential to define the scope of each one and the limits between them.

Obstructing Official Persons in Performing Official Duties (Article 316. 1 and 3 CCK) consists of obstructing an official person in performing official duties of public security, order and policing by use of force or threat of immediate use of force and is punishable with imprisonment of 3 months to 3 years[24]. This provision covers the situations in which there is evidence of individual specific actions of obstruction performed by the perpetrator. *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK) consists in participating in a common action of a group to obstruct or attempt to obstruct an official person in performing official duties or to force him/her to execute official duties and is punishable with fine or imprisonment of up to 3 years[25]. This provision covers the situations in which there is evidence that the perpetrator was in the group and took part in the common actions, but it is not possible to establish the specific individual actions of obstruction

[24] The corresponding provision in the current law is Article 409.5 of the CCRK and the punishment is imprisonment of 1 to 5 years.
[25] The corresponding provision in the current law is Article 409.2 of the CCRK and the punishment is the same.

committed by him/her. The rationale behind this lesser punishment for actions aimed to produce the same result in violation of the same protected value lies in the fact that the gravity of the offense is lower when is not proven that specific acts against public authority were committed by the perpetrator. The appellate panel finds that these provisions are in a relation of ideal concurrence in the modality of implicit subsidiarity. The lesser offense is subsidiary to the situations on which the greater offense is not established.

Therefore the appellate panel is of the opinion that the punishment for both criminal offenses, as decided by the appellate panel, would not be admissible because they are not in a relation of real concurrence. Moreover, notwithstanding the previous assertion, the punishment for the mentioned criminal offense of obstruction of official persons performing official duties, in the view of the appellate panel, must give way before the existence of a criminal offense that is special in relation to this.

Criminal offense of *Endangering United Nations and Associated Personnel* (Article 142.2 of the CCK) consists in engaging in attack on the person or liberty of United Nations or associated personnel and is punishable with imprisonment of 1 to 10 years[26]. When the attack results in the death of one or more persons, the punishment is at least of 5 years (paragraph 5 of the same Article[27]), if the death is attributable to the perpetrator's negligence, according to Article 17 of the CCK[28]. The law does not define "attack" but this concept includes all actions of physical violence, use of force and threat that affects the persons or liberty of the victims and certainly includes all actions foreseen in the criminal offense of obstruction of official persons performing official duties. The law is also not express on stating that endangering United Nations Personnel only covers the situation on which the victims are performing official duties, but this conclusion results from the definitions of paragraph 6 of the referred Article 142. These two criminal offenses of *Obstructing Official Persons in Performing Official Duties* and *Endangering United Nations and Associated Personnel* are in a relationship of ideal concurrence in the modality of speciality. Both aim to protect official persons performing official duties against violent or threatening actions. But the second one carries a special element not present in the first one, which is the specific international nature of certain official persons, as a result of which the offense is greater.

Given the fact that was proven that a police officer died as a result of the wounds caused by the attack on which all defendants were involved and that they were aware of the risk that might occur, the criminal offense of *Endangering United Nations and Associated Personnel* also absorbs the criminal offense of *Participating in a Crowd Committing a Criminal Offense* (Article 320.1 CCK) for which the defendants were simultaneously convicted. This criminal offense consists in participating in an assembled crowd which by collective action deprives another person's life and is punishable with imprisonment of 3 months to 5 years[29]. Again in

[26] The corresponding provision in the current law is Article 174.2 of the CCRK and the punishment is imprisonment of 3 to 12 years.
[27] In this situation, Article 174.4 of the CCRK foresees a punishment of at least 10 years.
[28] For intentional deprivation of live the criminal offense is the one of paragraph 1 of the Article.
[29] The corresponding provision in the current law is Article 412.1 of the CCRK and the punishment is imprisonment of 6 months to 5 years

this situation no proof of a specific individual action by the perpetrator is needed. The appellate panel finds that these two legal provisions are in a relation of ideal concurrence in the modalities of implicit subsidiarity and speciality, for reasons identical to those mentioned above. Incrimination of collective acts in a crowd is subsidiary to incrimination of individual specific proven acts of the perpetrator. And incrimination of an attack that causes the death of a United Nations or Associated Personnel person is special in relation to the incrimination of a collective action that caused the death of another person.

The appellate panel therefore affirms that the correct legal qualification applicable to the facts established by the first instance court is that all the defendants incurred in the criminal offense of endangering United Nations and Associated Personnel, punishable with imprisonment of 5 to 10 years, pursuant to Article 142 (2) and (5) of the CCK[30]. This is the legal provision that captures and sanctions in a more complete and effective way the whole of the wrongfulness of the perpetrator's criminal actions.

The appellate panel faces now an uncommon, and in some ways also uncomfortable, situation that deserves some attention.

The Court of Appeals finds that the correct legal qualification of the criminal offense committed by the defendants is punishable with imprisonment of 5 to 10 years. For the criminal offenses found by the first instance court the defendants were sentenced to much lesser aggregated punishments of 1 year and 10 months of imprisonment, 9 months of imprisonment suspended for 1 year and 1 year and 6 months of imprisonment. The Court of Appeals is allowed in general to modify *ex officio* the legal qualification of the facts. It can also increase the sentences if deciding upon an appeal of the prosecution. In this case, however, due to the fact that only appeals in favour of the accused are being decided, aggravation of the sentences is not admissible. This would result in violation of Article 417 of the CPC that forbids *reformation in pejus*, i.e. modification of the judgment with respect to the legal qualification and the criminal sanction to the detriment of the defendants.

The Court of Appeals is also not authorized to annul the judgment and return the case to the first instance court for retrial because no substantial procedural violation was committed, either alleged by the parties or being examined *ex officio* (pursuant to Article 415 of the CPC). Even if a substantial procedural violation had occurred, the appellate panel is convinced that in the absence of a valid appeal from the prosecution, an annulment to the detriment of the accused would be questionable, due to the principle set in Article 424 (2) of the CPC[31].

As seen above, no substantial violation of the proceedings occurred and the judgment is valid. The opinion of the appellate panel is that the substantive law was not applied correctly in the first instance. But in the absence of an appeal filed by the prosecution, a modification of the judgment in detriment of the accused is forbidden. Therefore, the appellate panel has no alternative but affirm the judgment in regard to the legal qualification of the criminal offenses.

[30] CCK is more favourable that the CCRK because this code foresees imprisonment of at least 10 years.

[31] This provision covers another situation but the principle protected there is inherent to the principle of fair trial. Acting *ex officio* to annul a judgment that the prosecution did not validly challenged in detriment of the accused would raise a question of fairness and effectiveness of defence rights.

6.4 Erroneous determination of the punishment

The appellants M.I. and D.M. challenged the determination of punishments considering it too severe. In brief, the first one argued that the trial panel failed to assess as mitigating circumstances; his family, economic and health status, and that it could not have assessed as an aggravating circumstances the material damage he did not cause, and his role in the events of 14 March for which he was not convicted. The second alleged that the trial panel ignored mitigating circumstances related to his youth, family, economic and professional status and absence of previous convictions.

Under the provisions of Articles 34 and 64 to 71 of the CCK, the applicable principles of fairness and proportionality and the social purpose of criminal law, the rules to calculate the punishment are the following:

- The criminal sanction is the last resort to protect social values and cannot intervene beyond what it is found as strictly necessary. A sanction must not be higher that the necessity of justice enforcement and disproportionate to the fact that endangered the social protected values. Therefore, a principle of minimum intervention of the criminal law implies that the lower punishment foreseen in the provision will be sufficient, adequate and normal for standard situations that may be subsumed in the legal incriminating;

- The punishment is bounded by the purposes of ensuring individual prevention and rehabilitation and general prevention, expressing social disapproval for the violation of the protected social values and strengthening social respect for the law;

- While determining the punishment, the maximum penalty applicable in concrete will be given by the level of guilt of the perpetrator and the minimum by the intensity of social reprobation needs. Within this new limit, the sanction must not be in contrary to the referred principles of prevention and rehabilitation and shall consider in a proportionate manner all specific mitigating and aggravating circumstanced related to the criminal fact and the conduct and personal and social circumstances of the offender;

As said before, the adequacy of the sentences will be assessed in relation to the lesser criminal offenses that the defendants were convicted for and not to the greater one that according to the appellate panel's opinion they should have been. This has no direct impact on the decision – as the judgment cannot be modified in detriment of the defendants – but is mentioned to stress that due to a belated appeal of the prosecution in the final outcome, whatever it may be, the appellants cannot in any way complain of excessive severity of the court[32].

The appellate panel, 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. It is not bound by the specific weight given by the trial panel to each aggravating and mitigating

[32] Defendant Z.Č., whose sentencing was not challenged and therefore cannot be reviewed, was even sentenced to 8 months imprisonment for the criminal offense of Article 142.2 of the CCK that sets a minimum of 1 year.

circumstances. Other conjectural facts in favour of the defendants but not established by the trial panel cannot be considered now to determine the punishment. If the appellants wanted to bring new facts to be established they should have alleged the evidence from which the facts derive and asked the Court of Appeals to establish them. They failed to do so and the appellate panel's role is not to dig *ex officio* into the evidence looking for new facts in favour of any of the parties.

M.I. was sentenced to imprisonment of 6 months for the criminal offense of Article 316.3 that sets a punishment from 3 months up to 5 years, 4 months for the criminal offense of Article 318.1 that sets a punishment up to 3 years, 6 months for the criminal offense of Article 320.1 that sets a punishment from 3 months up to 5 years and 1 year and 6 months for the criminal offense of Article 142.2 that sets a punishment from 1 up to 10 years. As aggregate punishment, from a minimum of 1 year and 6 months up to a maximum of 2 years and 10 months, he was sentenced to 1 year and 10 months.

D.M. was sentenced for the same criminal offenses to imprisonment of 4 months, 2 months, 4 months and 1 year and 6 months. As aggregate punishment, from a minimum of 1 year and 6 months up to a maximum of 2 years and 4 months, he was sentenced to 1 year and 6 months.

The appellate panel, as a preliminary remark, finds it adequate to point out that as the defendants were sentenced to imprisonment periods very close to the applicable minimums it is not easily understandable how they can be arguing for more lenient sentences.

Defendant M.I. claims that his family, economic and health status was not considered. The trial panel took into consideration his status of widower, the absence of previous convictions and his will to be good citizen. No fact was established as to other aspects of the defendant's personal life that the appellate panel may assess now. He claimed that the material damage caused in the events and his role on 14 March were wrongly assessed as aggravating circumstances. The appellate panel finds that he is not right. The intensity of injury to the protected value, the circumstances on which the act was committed, and the past conduct of the perpetrator are elements that the trial panel had to consider according to Article 64 of the CPC. The correct assessment of the punishment could not have ignored the result of the group actions on which the defendant intentionally participated. The fact that he was not punished for any crime committed on 14 March does not impede that his actions are considered because they are part of his past conduct and directly relevant to the weight of the gravity of his actions on 17 March.

D.M. claims that his youth, family, economic and professional status and absence of previous convictions were ignored as mitigating circumstances. The trial panel assessed his intention to marry soon, his will to integrate into society as good citizen, his youth when the crimes were committed. No fact other was established as to different aspects of the defendant's personal life that the appellate panel may assess now.

The appellate panel finds, in conclusion, that within the limits of imprisonment sentencing given by the criminal offenses found by the trial panel and in light of the legal criteria applicable, the appellants have failed to convince that their sentences should be reduced.

7. Conclusions

The prosecution appeal is belated and cannot be examined. This circumstance impedes the appellate panel to assess the reasons alleged by the prosecutor to establish as proven any facts in detriment of the defendants. Consequently, her intent to reverse the acquittal of the defendants M.R., A.K. and N.J. and to increase the sentences imposed on the defendants M.I., Z.C. and D.M. was not addressed by the Court of Appeals.

No essential procedural violation that should determine the annulment of the judgment and the return of the case to retrial was found.

No error or omission on the establishment of the factual situation was found.

The appellate panel found that the criminal offense committed by the defendants M.I., Z.C. and D.M. was *Endangering United Nations and Associated Personnel* punishable with imprisonment of 5 to 10 years, pursuant to Article 142 (2) and (5) of the CCK. However, due to the fact that in the absence of an appeal by the prosecution the Court of Appeals is not allowed to modify the legal qualification in detriment of the defendants, it was decided to affirm the legal qualification decided in the first instance judgment.

The defence appeals requesting acquittal or lowering of sentences were not grounded.

Presiding Judge

_____

Manuel Soares, EULEX Judge

Panel Member

_____

Tore Thomassen, EULEX Judge

Panel Member

_____

Driton Muharremi, CoA Judge

Recording Officer

_____

Kerry Moyes, EULEX Legal Officer