Овај документ прибављен је од Канцеларије Шефа особља Мисије Европске уније на Косову.

Документ достављен је организацији „Три тачке“ као одговор на допис / захтев упућен Мисији ЕУЛЕКС 8. јануара 2020. године.

COURT OF APPEALS

IN THE NAME OF THE PEOPLE

Case number: **PAKR 299/16**

Date: **19 December 2016**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Radostin Petrov as Presiding and Reporting Judge, and EULEX Judge Anna Bednarek and Kosovo Court of Appeals Judge Driton Muharremi as Panel Members, with the participation of Noora Aarnio, EULEX Legal Officer, as the Recording Officer,

in the criminal proceedings against

OI;

DD;

NV;

IV;

AL;

charged under the Indictment of the Special Prosecution office of the Republic of Kosovo PPS 04/2013 dated 8 August 2014 and filed with the Basic Court on 11 August 2014 as follows:

1) **War Crimes Against Civilian Population** in serious violation Article 3 § 1(a) Common to four Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War and Article 4 § 2(a) of the Additional Protocol II relating to the protection of Victims of Non-International Armed Conflicts of 8 June 1977, pursuant to Article 152 § 1 and 2.1 in conjunction with Articles 16 and 32 of the Criminal Code of Kosovo (CCK) and criminalized also at the time of the commission of the offence under Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia dated 28th September 1976 (CCSFRY) **(OI),**

2) **Ad.1: Incitement to Commit the Offence of Aggravated Murder in Co-perpetration** in the form of depriving another person of his or her life because of national motives, in co-perpetration and pursuant to Article 179 (1.10) in conjunction with Articles 31 and 32 of the

CCK and criminalized also at the time of the commission of the criminal offence under Article 30 Paragraph (2) of the CLSAPK in conjunction with Articles 22 and 23 of the CCSFRY; **(OI and DD),**

Ad.2: Incitement to Commit the Offence of Attempted Aggravated Murder in Co-perpetration in the form of depriving another person of his or her life because of national motives, resulting in grievous bodily injury in co-perpetration, pursuant to Article 179 (1.10) and Article 189 (2.1) and (5) in conjunction with Articles 28, 31 of the CCK, and criminalized also at the time of the commission of the criminal offence under Article 30 Paragraph (2) and Article 38 Paragraph (2) of the CLSAPK in conjunction with Articles 19, 22 and 23 of the CCSFRY; **(OI and DD),**

Ad.3: Incitement to Commit the Offence of Attempted Aggravated Murder in Co-perpetration in the form of depriving another person of his or her life because of national motives in co-perpetration, pursuant to Article 179 (1.10) in conjunction with Articles 28, 31 and 32 of the CCK, and criminalized also at the time of the commission of the criminal offence under Article 30 Paragraph (2) of the CLSAPK in conjunction with Articles 19, 22 and 23 of the CCSFRY; **(OI and DD),**

3) **Ad.1: Aggravated Murder in Co-perpetration** in the form of depriving another person of his or her life because of national motives in co-perpetration, pursuant to Article 179 § 1.10 in conjunction with Article 31 of the CCK and criminalized also at the time of the commission of the offence under Article 30 § 2 of the CLSAPK in conjunction with Article 22 of the CCSFRY; **(NV, IV and AL),**

   Ad.2: Attempted Aggravated Murder in Co-perpetration in the form of depriving another person of his or her life because of national motives in co-perpetration, resulting in grievous bodily injury in co-perpetration, pursuant to Article 179 § 1.10 and Article 189 § 2.1 and 5 in conjunction with Articles 28 and 31 of the CCK and criminalized also at the time of the commission of the offence under Article 30 § 2 and Article 38 § 2 of the CLSAPK in conjunction with Articles 19 and 22 of the CCSFRY; **(NV, IV and AL)**

   Ad.3: Attempted Aggravated Murder in Co-perpetration in the form of depriving another person of his or her life because of national motives in co-perpetration, pursuant to Article 179 § 1.10 in conjunction with Articles 28 and 31 of the CCK and criminalized at the time of commission of the offence under Article 30 § 2 of the CLSAPK in conjunction with Articles 19 and 22 of the CC SFRY; **(NV, IV and AL)**

adjudicated in first instance by the Basic Court of Mitrovica with the Judgment P. no. 98/2014, dated 30 March 2016 as follows:

OI was found guilty of **Count 1**, criminal offence of *War crime against the civilian population* criminalised under Article 142 of the Criminal Code of the Federal Republic of Yugoslavia (CCFRY) and in violation of Article 3 § 1 (a) Common to four Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War and Article 4 § 2 (a) of the Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977.

The defendant **OI** was sentenced 9 years of imprisonment. He was also ordered to reimburse the sum of EUR 750 as part of the costs of the criminal proceedings.

With regard to **Count 2 sub charge Ad 1**, the defendants **OI** and **DD** were found not guilty and acquitted of committing the criminal offence of *incitement to commit the offence of aggravated murder in the form of depriving another person of his or her life because of national motives in co-perpetration*, pursuant to Article 179 § 1.10 in conjunction with Articles 31 and 32 of the CCK and criminalized also at the time of the commission of the offence under Article 30 § 2 of the CLSAPK in conjunction with Articles 22 and 23 of the CCSFRY.

With regard to **Count 2 sub charge Ad 2** the defendants **OI** and **DD** were found not guilty and acquitted of the criminal offense of *incitement to commit the offence of attempted aggravated murder in the form of depriving another person of his or her life because of national motives in co-perpetration*, resulting in grievous bodily injury in co-perpetration, pursuant to Article 179 § 1.10 and Article 189 § 2.1 and 5 in conjunction with Articles 28, 31 of the CCK and criminalized also at the time of the commission of the offence under Article 30 § 2 and Article 38 § 2 of the CLSAPK in conjunction with Articles 19, 22 and 23 of the CCSFRY;

With regard to **Count 2 sub charge Ad 3**, the defendants **OI** and **DD** were found not guilty and acquitted of the criminal offense of *incitement to commit the offence of attempted aggravated murder in the form of depriving another person of his or her life because of national motives in co-perpetration*, pursuant to Article 179 § 1.10 in conjunction with Articles 28, 31 and 32 of the CCK and criminalized also at the time of the commission of the offence under Article 30 § 2 of the CLSAPK in conjunction with Articles 19, 22 and 23 of the CCSFRY;

With regard to **Count 3 sub charge Ad 1,** the defendants **NV, IV,** and **AL** were found not guilty and acquitted of committing the criminal offence of *aggravated murder in the form of depriving another person of his or her life because of national motives in co-perpetration*, pursuant to Article 179 § 1.10 in conjunction with Articles 31 of the CCK and criminalized also at the time of the commission of the offence under Article 30 § 2 of the CLSAPK in conjunction with Articles 22 of the CCSFRY.

With regard to **Count 3 sub charge Ad 2** the defendants **NV, IV,** and **AL** were found not guilty and acquitted of the criminal offense of *attempted aggravated murder in the form of depriving another person of his or her life because of national motives in co-perpetration*, resulting in grievous bodily injury in co-perpetration, pursuant to Article 179 § 1.10 and Article 189 § 2.1 and 5 in conjunction with Articles 28 and 31 of the CCK and criminalized also at the time of the commission of the offence under Article 30 § 2 and Article 38 § 2 of the CLSAPK in conjunction with Articles 19 and 22 of the CCSFRY;

With regard to **Count 3 sub charge Ad 3**, the defendants **NV, IV,** and **AL** were found not guilty and acquitted of the criminal offense of *attempted aggravated murder in the form of depriving another person of his or her life because of national motives in co-perpetration*, pursuant to Article 179 § 1.10 in conjunction with Articles 28 and 31 of the CCK and criminalized also at the time of the commission of the offence under Article 30 § 2 of the CLSAPK in conjunction with Articles 19 and 22 of the CCSFRY;

The injured parties **XS, SK, KA,** as well as **RA, SA, EX, GX, GS, SC, LA, HS, HR, MH** and **UA** were instructed that they may pursue their property claim in civil litigation pursuant to Article 463 Paragraph (1) CPC. The Panel did not address the property claim by **ML** since he was not considered of having the capacity of injured party in this case.

Deciding upon the following appeals, filed against the Judgment of the Basic Court of Mitrovica P.no. 98/2014, dated 30 March 2016

- appeal of **OI** personally, filed on 18 April 2016
- appeal of the defence counsels on behalf of **OI**, filed on 18 April 2016
- appeal of the EULEX Prosecutor Romulo Mateus, filed on 19 April 2016,

having reviewed the responses filed as follows

1) on 3 May 2016 by the Prosecutor;
2) on 3 May 2016 by Nebojša Vlajić and Ljubomir Pantović (for, **OI**);
3) on 10 May 2016 by Miodrag Brkljač (for **DD**);
4) on 28 April 2016 by **NV**;
5) on 27 April 2016 by Zarko M. Gajic (for **NV**);
6) on 27 April 2016 by Dobrica Lazić (for **IV**);
7) on 4 May 2016 by Živojin Jokanović (for **AL**);

and the motion of the Appellate Prosecutor filed on 1 July 2016

after having held public sessions of the Appellate Panel on 28 September 2016 and 11 and 12 October 2016, as well as a hearing on 22 November 2016;

having deliberated and voted on 24 and 25 October 2016, 30 November 2016 and 19 December 2016,

pursuant to Articles 389, 390, 391, 392, 393, 394 and 398 CPC,

renders the following

JUDGMENT

I. **The appeal of OI personally, filed on 18 April 2016, and the appeal of the defence counsels Nebojša Vlajić and Ljubomir Pantović on behalf of OI, filed on 18 April 2016, both in relation to Count 1, are partially granted.**
II. **The appeal of the EULEX Prosecutor Romulo Mateus, filed on 19 April 2016 is rejected as unfounded.**
III. **The Judgment of the Basic Court of Mitrovica P.no. 98/2014, dated 30 March 2016 is annulled in relation to Count 1, and the case is returned for retrial for this Count. The Judgment is confirmed in relation to Counts 2 and 3.**
IV. **Detention on remand against the defendant OI is extended until the Basic Court of Mitrovica renders a Ruling pursuant to Article 193 of the CPC.**

REASONING

I. RELEVANT PROCEDURAL BACKGROUND

The description of the procedure up until the announcement of the Judgment of the Basic Court of Mitrovica can be found in the Judgment dated 30 March 2016.[1]

The written Judgment was served to **OI** on 4 April 2016 and his defence counsels Nebojša Vlajić and Ljubomir Pantović on 4 April 2016; to **DD** on 5 April 2016 and his defence counsel Miodrag Brkljač on 4 April 2016; to **NV** on 4 April 2016 and his defence counsel Zarko M. Gajic on 4 April 2016; to **IV** on 4 April 2016 and his defence counsel Dobrica Lazić on 4 April 2016; to **AL** on 4 April 2016 and his defence counsel Živojin Jokanović on 5 April 2016, to Victim Advocate Burhan Maxhuni on 4 April 2016; and to the EULEX Prosecutor on 4 April 2016.

The appeals and the responses were filed as described above.

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The case was transferred to the Court of Appeals for a decision on the appeal on 25 May 2016.

On 1 July 2016 the Appellate Prosecutor filed a motion.

On 19 August 2016 defence counsels of the defendant **OI** requested, amongst other matters, that the venue of the session of the Court of Appeals be changed to the Basic Court of Mitrovica. On 22 September 2016 Acting President of the Court of Appeals decided to reject the request.

The sessions of the Court of Appeals Panel were held on 28 September 2016 and 11 and 12 October 2016 in the presence of the Appellate Prosecutor Lars Agren, the representative of the injured parties **BM**, defence counsels Nebojša Vlajić and Ljubomir Pantović (for **OI**), defence counsel Miodrag Brkljač and Dejan Vasic (for **DD**), defence counsel Zarko M. Gajic (for **NV**), defence counsel Dobrica Lazić (for **IV**), and defence counsel Živojin Jokanović (for **AL**).

Defendant **OI** attended the sessions. Defendants **DD, NV, IV,** and **AL** were duly invited to the session as demonstrated by the delivery slips in the case file but did not attend. The injured parties attend as follows: **IM, KA, SC** and **HS** on 28 September 2016, **GX** and **SC** on 11 October 2016, and **SK** and **SC** on 12 October 2016.

The Appellate Panel deliberated and voted on 24 on 25 October 2016 and decided to hold a hearing in relation to Count 1 and the question of *ne bis in idem*.

A hearing was held on 22 November 2016 in relation to Count 1 and the question of *ne bis in idem*. Present were Appellate Prosecutor Lars Agren, the representative of the injured parties **BM**, defence counsels Nebojša Vlajić and Ljubomir Pantović (for **OI**), and defendant **OI**. The injured party **SK** was present.

II. APPEAL OF THE PROSECUTOR AND THE REPLIES TO THEREOF

SPRK Prosecutor Romulo Mateus filed an appeal dated 19 April 2016 with the Basic Court on the grounds of:

In relation to Count 1:

- Erroneous and incomplete determination of the factual situation under Article 383 (1.3) in conjunction with Article 386 (3) of the CPC;
- The decision on criminal sanctions under Article 383 (1.4) in conjunction with Article 387 (1) and (2) of the CPC.

In relation to Count 1 the Prosecutor proposes to confirm the conviction of **OI** and to modify the Judgment in relation to the punishment by aggravating the sentence.

In relation to Count 1 the Prosecutor opines that the determination of the factual situation by the Basic Court is erroneous and incomplete in relation to aggravating and mitigating circumstances as well as sentencing.

As to the aggravating circumstances the Prosecutor notes that international jurisprudence generally as well as Article 41 (1) of the CCSFRY recognizes a position as a superior as an aggravating factor, when it is not an element of the criminal offence. Further, the Prosecutor notes that the position as leader of the group can be established *de jure* or *de facto*. The Prosecutor asserts that **OI** had a position as a leader over the Serbian police/paramilitary unit escorting the nine Albanians to be executed. This can be concluded from the following facts: the nine Albanians were not irreparably harmed before the intervention of **OI** but it was his words that set in motion the execution squadron; during the mop-up operation **OI** was part of the police/paramilitary at the checkpoint; his advice was sought even after previously independently deciding to release six Albanians; he was addressed as a "Chief"; he was standing in front of the armed group; he was standing just a few meters away from the execution; the orders given by **OI** were neither questioned, objected to nor overruled, but were followed immediately by all the men, unlike the orders given by the soldier stopping the killings; at the time **OI** was generally a well-known figure and a prominent leader. Thus the Basic Court failed to establish this fact.

The Prosecutor further notes that international jurisprudence generally as well as Article 41 (1) of the CCSFRY recognizes abuse of power as an aggravating factor. The Prosecutor also asserts that **OI** abused his power as a superior when he enforced the order to kill the Albanians even though he had the power, authority and choice to suspend the previously given order. Thus, the Court erroneously determined the factual situation as it failed to establish **OI**`s abuse of power.

The Prosecutor also notes that international law as well as Article 41 (1) of the CCSFRY recognizes the possibility of not only co-perpetrating in a criminal offence but also prompting someone to commit the same criminal offence. The Prosecutor thus asserts that an inciter can take part in the criminal act he incited, just as he can be both a leader and an inciter. Further, it suffices that the inciter "contributes substantially" to the criminal act – it is not a prerequisite that the incitee has not decided to commit the criminal act. As **OI's** reply "Just apply orders" prompted the killings immediately and without questioning, there is a causal link between his order and the criminal act. Lastly, as the killing was stopped by the person wearing green, it is illogical that the killings would have begun without **OI's** approval. Thus, **OI**'s instructions had a pivotal role in the killings – a factual situation which the Basic Court failed to establish and thus erroneously determined.

The Prosecutor notes further that international law as well as Article 41 (1) of the CCSFRY recognizes a discriminatory state of mind as an aggravating factor, when it is not an element of

the criminal offence. The prosecution contends that **OI** was aware of the expulsions and killing of Albanians based on their ethnicity, and yet he willingly complied with this order. Further, a discriminatory ethnic motivation is not an element of the criminal offence of "War Crimes against Civilian Population" pursuant to Article 142 of the CCSFRY.

The Prosecutor also notes that international law as well as Article 41 (1) of the CCSFRY recognizes a particularly defenceless situation of the victim as an aggravating factor, when it is not an element of the criminal offence. The Prosecutor asserts that during the conflict in Kosovo the basic human rights of the Albanians were discarded and the Serbian forces behaved lawlessly against them. During the mop-up operation no exceptions were made. In this situation the victims had no effective means to protect themselves or to escape the attack.

Lastly the Prosecutor notes that international law as well as Article 41 (1) of the CCSFRY recognizes particularly cruel manner of commission of an offence and suffering of the victims as an aggravating factor. The Prosecutor states that the persons waiting in the line were able to hear what was happening behind them. In this situation the fear for their own lives and also the shock of the loss of the lives of others can only be considered as cruel.

To conclude the Prosecutor states that the Basic Court has erred when it has not taken these aggravating factors into account when deciding on the sentence.

As to the mitigating circumstances the Prosecutor asserts that the level of **OI**'s participation was not low. On the contrary, he was not a passive spectator but had a central role and expressed his support to the "general plan". Further, the Basic Court did not specify what constituted the "good character" of **OI**, or why this was a mitigating factor. Also, the prosecution opines that it is grotesque that someone who committed the offence of war crime, murder and attempted murders with a discriminatory intent based on ethnicity would be found to have a friendly attitude towards the very same ethnic group. The Prosecutor opines that on the contrary, **OI**'s nationalistic attitude can be seen even today. Finally, the Prosecutor finds it highly discriminatory when a Court considers the intelligence of a person as a mitigating circumstance as this would necessarily mean that uneducated and less intelligent people should be kept in prison for longer for the same crimes.

In conclusion, the Prosecutor states that the Basic Court has erred when it has taken these mitigating factors into account when deciding on the sentence.

As to the sentencing the Prosecutor asserts that the established sentence of 9 years imprisonment is far too lenient. The prosecution refers to the national jurisprudence and remarks that in similar cases the defendants were punished with a more severe punishment.

In relation to Count 2:

- A substantial violation of the provisions of criminal procedure under Article 383 (1.1) in conjunction with Article 384 (2.1) of the CPC;
- An erroneous or incomplete determination of the factual situation under Article 383 (1.3) in conjunction with Article 386 (3) of the CPC.

In relation to Count 2 the Prosecutor proposes to modify the Judgment by convicting **OI** and **DD** as charged in the Indictment. The Prosecutor further asks the Court of Appeals to accept as new evidence the **X** document.

In relation to Count 2 the prosecution first discusses "the Bridge Watchers", then the new evidence, followed by incitement and co-perpetration, and by final remarks and a conclusion.

"The Bridge Watchers"
Firstly, the Prosecutor asserts that the Basic Court violated the criminal procedure code as the Judgment does not clearly and exhaustively state which facts it considers proven or not proven, as well as the grounds for this (Article 370 (7) of the CPC). This approach leaves doubt as to whether the Basic Court has assessed the evidence exhaustively.

In particular, the Prosecutor states that the witnesses **NK** and **NS** lack objectivity and credibility due to their nationalistic views and obvious bias. Thus the conclusion based on their testimonies that **OI** was not the organiser and leader of the Bridge Watchers is erroneous. Further, the Basic Court did not clearly and exhaustively examine each piece of evidence as it identifies only **BP**'s and **NK**'s statements when establishing that **OI** was "merely" a member of the Board of the SNC. Nor does the Basic Court explain why it in this matter trusted **OI**'s testimony. These mistakes lead to an erroneous determination of the factual situation. With regard to the testimony of **FH** the Prosecutor opines that it is not contradictory, but simply refers to different periods of time – before and after the NATO bombings. Also, his statements regarding the tracksuit and a blue jacket with a Serbian insignia are corroborated by the statements of Witness Y, the Japanese video and witness **IR**. Nor is there real contradiction in **FH**'s statement in relation to the activities of **OI** as the witness describes seeing him commanding a unit of any kind only after the war. Also, **FH**'s claim about violence by the Bridge Watchers within the view of the French KFOR is supported by other evidence. Thus, the Basic Court has not assessed **FH**'s testimony as is required by the CPC, which led to an erroneous description of the factual situation.

Apart from the testimony of Witness Y, the Basic Court does not clearly state the evidence on which it concluded that there was some connection between the Bridge Watchers and MUP.

Thus the Judgment does not meet the requirements of Article 370 (7) of the CPC and in this regards leads to erroneous determination of factual situation.

Further, Witness Y's testimony that he did not know many of the Bridge Watchers personally is logically explained by the fact that many of them did not originate from North Mitrovica and that he did not take them seriously. But it is irrational to draw from this the conclusion, as the Basic Court has done, that the Bridge Watchers was not an organised structure. The further evidence cited by the Basic Court – the statements of **S** and **D** - cannot be relied on as they are biased due to nationalistic views. Further, the Prosecutor opines that the Basic Court failed without any explanation to assess the testimony of Witness Y in its entirety. Had it done so, it could only have reached the conclusion that the Bridge Watchers was a very organised structure and as such had to have a leader. The Prosecutor also points out that the Basic Court failed to explain why it, against the testimony of Witness Y, did not consider **OI** as a leader. When disagreeing with Witness Y's conclusions on the two incidents he witnesses, the Basic Court made an incomplete assessment and determined the factual situation erroneously. Also, as mentioned before, the Basic Court failed to make a connection between the testimony of Witness Y regarding a characteristic jacket which **OI** wore, as well as the testimony of **FH** and the jacket seen in the Japanese video. As this jacket connects **OI** to the Bridge Watchers, and also to MUP member **DD**, the Basic Court failed again to clearly and exhaustively assess every piece of evidence. Lastly, the Basic Court violated the criminal procedure code when it prohibited the Prosecutor from asking clarifying questions from Witness Y.

With regards to Witness X, the Basic Court's general approach to discredit his testimony as hearsay was inappropriate, as he also testified about things he had seen himself. The pre-trial testimonies provided detailed information about the Bridge Watchers, as well as establishing a connection between **OI** and **DD**. Most crucially, the testimony of Witness X given at the main trial should be meticulously compared with that of his pre-trial testimony, as they differ significantly. The Prosecution stresses that the inconsistencies and omissions in relation to his pre-trial statement were not clarified in the examination before the Court. On the contrary, the Presiding Judge barred the Prosecutor from confronting the witness with the contradictions. The Prosecutor recalls that although there has been a major philosophical shift in the criminal procedure code to focus more on the protection of the rights of the parties and in adjudication, and more towards an adversarial system, the current system is a hybrid system still allowing the trial Panel to collect evidence in order to fulfil its obligation to a "fair and complete determination of the case". Thus, by not clarifying the inconsistencies and omissions in the statement, the Basic Court violated its obligation to find the truth – a violation which resulted in erroneous determination of the factual situation. Moreover, witness intimidation was clearly an issue.

Further, the Prosecutor asserts that a great deal of evidence was not assessed at all, and therefore the evidence was not assessed exhaustively.

The Basic Court did not assess every piece of evidence separately. Nor did the Basic Court consider evidence in relation to other evidence, such as the testimonies of Witnesses X and Y, for example. It also omitted to consider some witness statements in relation to some issues, such as **BR**'s statement in relation to the organization of the Bridge Watchers, **GR**'s testimony about the influence of **OI** over the Bridge Watchers, or **EB**'s testimony about the leadership of **OI.** These failures have led to erroneous determination of the facts.

Further, the Basic Court rendered a general and vague opinion of "no evidentiary rule" in relation to the entire documentary evidence. This documentary evidence includes, for example, letters of recommendation by a member of the UN Civilian Police **N** and by the Head of the Regional Office for Northern Kosovo **G**, the credibility of which is not in doubt as they are provided by the defence of **OI.** It also included newspaper publications that were corroborated mutually, as well as partially by witness testimonies, and documents originating from international organizations such as UNMIK and the European Community Monitoring Mission, the authenticity of which were not contested by the defence. These failures have, again, led to erroneous determination of the facts.

The Prosecutor finds as surprising how the Basic Court in the same Judgment first finds **OI** guilty of war crimes against the ethnically Albanian population, and then states that his intention was to help Albanians. At the least, the Prosecutor expected an explanation from the Basic Court.

New evidence

The Prosecution submits as new evidence the article **X**. In this article **OI** expresses his leadership over the Bridge Watchers.

Conclusion

The Prosecutor concludes that there is no appropriate assessment of the evidence in relation to Count 2 as each piece of evidence was only considered individually. Thus the Basic Court failed to form a full understanding of the situation. An appropriate assessment of the evidence inevitably leads to the conclusion that the Bridge Watchers were a well-organized organization lead by **OI.**

In relation to the issues of incitement and co-operation, the Prosecutor begins by noting that the ethnic violence in Mitrovica did not stop when the war was formally over, and that harassment and intimidation occurred on a daily basis in this effectively partitioned city. The Serbian community perceived the river Ibar as a "last line of defence" and the defence of the bridge needed to be organized to be successful.

Planning
The Prosecutor opines that the criminal acts described in the Count 2 were not merely retaliation to the explosion. The Basic Court has cited Witness Y out of context and interpreted his statement wrongly. There was plenty of evidence to support the planning of the attacks, for example: **DD**'s note that Witness Y was late to arrive to the scene; the number of the targets; the selection of only ethnic Albanians as targets; the duration of the attacks; the determination of the attackers; the use of machine guns and hand grenades. Thus the Basic Court has failed to assess the evidence correctly, and this error has led to erroneous determination of the factual situation.

Incitement
The Judgment does not discuss the incitement by **OI** or **DD** at all, even though it is a central allegation of the Indictment. Thus, it has established the factual situation incompletely.

*Incitement by **DD***
The Prosecutor recalls that "incitement" is completed once the inciting act has been completed, regardless whether or not the incitee commits the act. Secondly, the Prosecutor points out that the Basic Court has erred when it assessed that there is no corroborating evidence to the statements of Witness X as is required by Article 262 (3) of the CPC. The statements of Witnesses X and Y were credible and mutually corroborative. Further, the statement of **H** is fully compatible to the facts described by Witnesses X and Y. Also, **DD** and **S** place themselves where Witness X said they were. Thus, the statement of Witness X was not the sole or decisive evidence. Thirdly, the Prosecutor avers that the right to cross-examination is not an obligation. As the defence counsel of **DD** was duly summoned and thus granted the possibility to cross-examine witness **NA**, the Basic Court erred when it placed only limited probative value on his testimony.

The incitement by **DD** can be constituted from the following facts: he was surrounded by MUP members and joined also by some Bridge Watchers; he addressed them stating that the area should be cleansed of Albanians; he reminded a member of this group about his "job"; his words triggered the criminal acts, immediately and without questioning; as no clarification was sought, there must have been a "common plan"; acknowledgement of one more Albanian family in a building prompted **DD** to order "Go and get this done"; while negotiation with UNMIK Police about the evacuation of **DG**, **DD** was leading a group; and **DD** himself agreeing that there was a hierarchical command structure.

Therefore, the Panel erroneously established the fact that **DD** did not incite to the events of 3 February 2000.

*Incitement by **OI***

The Prosecutor avers that contrary to the findings of the Basic Court, **OI** was in the building from the beginning of the attack and well before the arrival of the KFOR. The Prosecutor further avers that the intention of **OI** was not to calm down the situation. This is proven for example by: **OI** giving instructions; **OI** in the corridor wearing the jacket characteristic to the Bridge Watchers, and someone calling him "Ola"; **BR** addressing **OI** through a communication devise as if he was the leader of the group; **OI** in front of the building actively participating in the group and the group consulting him, yet he did nothing to prevent the criminal activities; **OI** involved in the negotiations about a young Serbian who was being kept by the Albanian barricade; and **OI**'s involvement of the looting of the flat of witness **HR**. Also, the Basic Court misunderstood the testimony of **MH**. She did not deny the statements she gave in the pre-trial investigation. On the contrary, she stated that she stands by these statements. However, in the main trial she did not remember, and was also clearly anxious to give a statement. The Basic Court has completely neglected some witness statements, and also failed to correlate the statements of other witnesses, and thus properly assess the evidence. This in turn led to erroneous determination of the factual description.

Co-perpetration
To start with the Prosecutor notes that the Judgment does not discuss the issue of co-perpetration between MUP and the Bridge Watchers. Both Witnesses X and Y state this co-operation as a widely known fact. They give examples of this co-operation, such as: shared task to defend the bridge; coordinated tactics; the presence of both **OI** and **DD** during violent clashes; the permission of MUP to use the facilities of the Bridge Watchers; task-specified coactivity of **OI** and **DD**; **OI** and **DD** both wearing the jackets characteristic for Bridge Watchers; attacks of mixed groups on the evening described in the Indictment; and the logical conclusion that the joined activities of two well-established institutions require the cooperation of their leaders. Further, the pre-trial statement of Witness X provides additional information, such as the distribution of tasks and the chain of command of the Bridge Watchers, and the friendship between **OI** and **DD**. However, the Court failed to confront him on these omissions. Altogether the Basic Court failed to consider the evidence clearly and exhaustively, which has led to erroneous determination of the factual situation.

Lastly, the Prosecution notes that the statement of **DG** on her expulsion is corroborating evidence as it clarifies the general situation, and as such should it not be excluded.

Conclusion
To summarize the Prosecution notes that all the above mentioned omissions and erroneous assessments have led to a false acquittal.

In relation to Count 3:

- A substantial violation of the provisions of criminal procedure under Article 383 (1.1) in conjunction with Article 384 (2.1) of the CPC;
- An erroneous or incomplete determination of the factual situation under Article 383 (1.3) in conjunction with Article 386 (3) of the CPC.

In relation to Count 3 the Prosecutor proposes to modify the Judgment by convicting **NV, IV** and **AL** as charged in the Indictment.

In relation to Count 3 the Prosecutor notes that it is clear that the intension of the attack against the **A** family was to annihilate **NA**, who had worked for the Serbian State Security. This transpires from the following: the duration and the relentlessness of the attack that ended only after KFOR intervened, as well as the concrete casualties.

The Prosecutor points out that the Basic Court has, as a general rule, not trusted a witness statement that is not corroborated. This method of assessment is not based on the criminal procedure code, and is flawed.

The Prosecutor opines that **VA** provided a calm, solid and structured statement. Her testimony puts **NV** and **AL** at the crime scene. She also tells of her father **NA**'s surprise when he realized his neighbours **IV, NV** and **AL** were amongst the assailants. The presence of **NV** at the crime scene was also confirmed by witness **RA**. Also she heard her father **NA** speaking to "**I**", "**N**" and "**S**". **VA** further tells of the throwing of hand grenades into her apartment – a fact which is corroborated by other witnesses. Also, witness **GX** tells that **NA** had asked for help from **IV**, thus placing him at the crime scene.

When failing to establish the guilt of **IV, NV** and **AL** the Basic Court had failed to clearly and exhaustively assess the evidence, thus leading to an erroneous and incomplete determination of facts.

Responses to the Appeal of the Prosecutor

Defence counsels of the accused **OI**, lawyers Nebojša Vlajić and Ljubomir Pantović, filed a response to the appeal of the Prosecutor. They refer to their appeal and further opine that the appeal of the Prosecutor contains no arguments to confirm its merits. They claim that the unacceptable allegations are based on erroneous interpretation of the Judgment, partial and out-of-context assessment of the Judgment, and by stressing of incorrect data.

In relation to the determination of the factual description of Count 1, they more specifically state that first of all that **OI** was not present at the crime scene. Secondly, the Prosecutor bases his accusations of position of authority over the paramilitary/police on just two sentences – "Why do

you ask me? Follow the orders given." Further, misleadingly the Prosecutor speaks of orders in plural even though he only identifies the abovementioned two sentences. Further, the appeal is based on the Prosecutor's own conclusions that are not backed by evidence, such as the generally known strong organizational structure of the Serbian paramilitary, and **OI**'s role as a leader. Also, the Prosecutor failed to clarify the dilemma that the bodies were not found where witness **M** said they were killed. Lastly, the Prosecutor completely omitted the assessment of the alleged question of **OI** "Why do you ask me?"

In relation to the determination of the factual description of the Count 2, the defence counsels of **OI** more specifically state that the Prosecutor showed bias when he labelled the defence witnesses as Serbian nationalists, and accepted the obvious lies of the Prosecution's witnesses. Further, witness **BR** stated that while working as the Prime Minister for Kosovo or as the Minister of Internal Affairs he had not heard of **OI** as the leader of the Bridge Watchers even though during his testimony he gave a lot of information about the said organization. Also, the Prosecutor insinuates, but does not provide any evidence, of the intimidation of Witness X. When hearing Witness X, the Basic Court followed the procedure correctly, even when it did not give the Prosecutor the right to re-examine this witness. The Prosecutor is inconsistent when evaluating witnesses. He presents some statements of witness **SH** as proof and others he ignores. Witness **EB** and International officials get the same treatment. Also, the Prosecutor has completely misunderstood the purpose of the Bridge Watchers – it was to stop the KLA from entering North Mitrovica. Lastly, as the Basic Court has rightly concluded, witnesses **IM, SH, IR, SA** and **VA** are not reliable witnesses.

The defence opines that the Prosecutor violated his obligation to find the material truth as his only aim seems to be to convict **OI**.

As to the punishment, the defence points out that some of the sentencing examples provided by the Prosecutor were not final decisions and have been overturned – such as the 12 years for property destruction etc., and 12 and 10 years for rape. Based on these findings the defence also questions the validity of the other examples given by the Prosecutor. Further, the defence finds the claims of the Prosecutor on aggravating circumstances totally unacceptable and without any evidence to back them.

Lastly, the defence objects to the additional evidence suggested by the Prosecutor as it has no evidentiary value.

Defence counsel of the accused **DD**, lawyer Miodrag Brkljač, filed a response to the appeal of the Prosecutor dated 6 May 2016. He considers the appeal of the Prosecutor as ungrounded and proposes to reject it. The Judgment of the Basic Court should be confirmed.

As to the "planning of the attacks", the defence opines that the Basic Court reached the right conclusion, namely that the attack was not planned. The defence refers to his closing arguments in the Basic Court. He further argues that after a detailed scrutiny the Basic Court reached the correct conclusion, namely that the attacks were a spontaneous response to the attack on Serbian youth at the Bel Ami (Belle Amie) cafe. The defence points out that it is illogical that Witness Y, who is a leader of one of the "combat groups" and was often in the company of **DD**, did not have any previous information about the attack. Also, not only was **SK** not sent to pick up Witness Y but he was not even in town that evening. Further, the defence argues that as the attack at the Bel Ami (Belle Amie) cafe was not planned and took everyone by surprise, so could the following "counter-attack" not have been planned. Regarding the alleged list of targets, the defence points out that on the one hand there were many Albanians living in the area that were not targeted. Lastly, the defence points out that if there was "a joint plan" then the actual perpetrators should have been found by now.

As to the incitement by **DD** the defence opines that the attack on the entrance of **X** Street did not happen and that the Witness X must have lied. Had such an attack happened, it would surely have been included in the Indictment. Further, contrary to the statements of the Prosecutor, the claims of Witness X are not compatible with the statements of Witness Y, **SH, RS** or **DD.** Also, the defence notes that even though the obedience of the subordinates in an organization is common, it is also known that an order to commit a serious crime would not be obeyed but referred to a superior. The defence also opines that the statement of **DD** about his subordinates returning to the tavern with him when he so orders, proves that he was in fact in this tavern, and not at the crime scene. Moreover, the Basic Court had clearly and convincingly reasoned the reliability of the witness **NA**. In essence, his testimony does not correspond with the trustworthy statements of witnesses **GX** and **SA**. Also, the desire for vengeance of the witnesses **VA** and her husband **SA** was obvious.

The defence underlines the failures in the alleged timescale. As the attack on the Bel Ami (Belle Amie) cafe indisputably took place at around 20.20 hours, the time of the event stated by the Witness X does not match. Also, the claim by the Prosecutor that **DD** briefly left the tavern does not match the timescale. Also, **H** could not have seen **DD** negotiating with UNMIK about the eviction of **DG** at around 18.00 hours, as the explosion had not yet taken place. More so, witness **H** could not from his apartment have seen the negotiations at all if they took place where he said they did.

As to the alleged co-perpetration the defence refers to his closing statement. He further points out that the Serbian National Council was opposing the official authorities, and they could thus not cooperate. More specifically, **DD** had been given orders to distance himself from **OI**, and witness Y confirms this "chilling of relationships". The defence avers that defending the bridge

was a spontaneous, population wide and legitimate activity. Lastly, the defence avers that 7 or 8 former police officers could not form "an institution" or perform any police duties.

To summarize, the Basic Court did not substantially violate the provisions of criminal procedure. It determined the factual situation based on complete and appropriate assessment of the administered evidence. And it implemented the substantive law properly.

NV personally filed a response to the appeal of the Prosecutor dated 27 April 2016. He requests that the appeal of the Prosecutor is rejected and the Judgment of the Basic Court is confirmed.

Firstly, **NV** states that he is not a lawyer, and that he was released from house detention on 5 August 2015.

He avers that the Prosecutor has not provided any new evidence and opines that the Prosecution has no grounds for appeal. The Basic Court has correctly assessed the statement of the witness **VA** as tailored to meet the evidence of her husband, and contrary to other, reliable evidence. She has, for example, incorrectly stated that: **GX** arrived at **NA**'s apartment at 20.00 hours; people started gathering outside the building S-3 already at 20.00 hours; **NV**'s name is **NI; NV** was wearing dark clothes; and that **VA** knows **NV**. She has correctly stated that she or anyone else did not see the bombs being thrown.

Also, the Basic Court has correctly assessed the statement of the witness **SA** as unreliable. For example, he: mistook completely the identification **NV**; falsely claimed that they knew each other; changed his testimony from one day to another; and against logic stated that **NV** was in uniform and fully armed even though this would have been impossible due to UNMIK and KFOR controls.

None of the prosecution witnesses **GX, RA, SA** – who the Basic Court considered reliable - or **AA** have mentioned details that connect **NV** to the assault. On the contrary, **RA** testified that she or her father **NA** did not see **NV** at the crime scene. Similarly, **SA** stated that she or her husband did not see **NV** at the crime scene. Also, **GX** states that he did not see **NV** at the crime scene nor did **S** or **N** recognize any of the attackers. According to **GX, N** had only asked the help of his neighbours. Nor did the Witnesses X and Y – who were also considered reliable by the Basic Court – see **NV** participating in the criminal activities. Lastly, there is no evidence to connect **NV** to the Bridge Watchers.

Witness **MT** as well as defendant **NV** testified that **NA** and his father **M** were angry that his neighbours did not help him. They did not speak of **NV**'s participation. According to **NV** his father IV spoke of the same. Witness **ID** speaks of similar discussions with **MA**.

NV accepts the Basic Court's assessment that it would be illogical for him to attack the flat next to his family's flat and thus put his own family in danger. In fact **NV** and his father could not reach the apartment until the UNMIK Police came but they had to stay and wait on the street.

To summarize, **NV** opines that the Basic Court has assessed the evidence clearly and exhaustively.

Lastly, **NV** points out that a criminal procedure has already been conducted in this case, namely Hep.no.139/02. In these proceedings the District Court issued a Ruling rejecting the request for initiation of investigations against **NV**. This Ruling has become final. No request for retrial has been made, nor new evidence presented.

Defence counsel of the accused **NV**, lawyer Zarko M. Gajic, filed a response to the appeal of the Prosecutor dated 26 April 2016. He requests that the appeal of the Prosecutor is rejected as unfounded and the Judgment of the Basic Court is confirmed.

The defence counsel avers that the allegations of the Prosecutor do not stand. Witness **SA** did not tell the truth in the proceedings. Thus, the claims made by the Prosecutor based on his statements cannot be accepted. Also witness **VA** is an unreliable witness. She has been heard on several occasions and given contradictory statements. Further, the Prosecutor's claim that parts of her statements are confirmed by other witnesses does not stand.

Also, the Prosecutor is neglecting the testimonies of **DK** and **ID**, who fully confirm the statements of **NV**. Further, the statements given by **GX, RA, SA** and **AA** do not confirm the involvement of **NV** in the criminal activities. Nor did witness **EX** see **NV** or **IV** taking part in the criminal activities.

Defence counsel of the accused **IV**, lawyer Dobrica Lazić, filed a response to the appeal of the Prosecutor dated 26 April 2016. He requests that the appeal of the Prosecutor is rejected as unfounded and the Judgment of the Basic Court is upheld.

Firstly, witness **SA** is not credible. His statements changed from one hearing to another, and some of his statements were against common sense or logic, or other evidence or facts in the case file. Secondly, **VA** is not credible. Her statements are not even partially confirmed by other witnesses. Thirdly, witnesses **GX, RA, SA** and **AA** could not confirm that **IV** was involved in the attack.

As the Basic Court has noted, it would be illogical that **IV** would attack the apartment next to his own, thus endangering his close relatives. In keeping with this assessment witnesses **DK** and **ID** confirm **IV**'s statement that he waited in front of the apartment until the entrance of the building was unblocked.

Defence counsel of the accused **AL**, lawyer Zivojin Jokanovic, filed a response to the appeal of the Prosecutor dated 4 May 2016. He requests that the appeal of the Prosecutor is rejected as unfounded and the Judgment of the Basic Court is affirmed.

The defence contests the allegations of the Prosecutor in their entirety. The Basic Court has with sufficient attention as well as with comprehensive and subtle assessment of the presented evidence, separately and in relation to other evidence, carefully and comprehensively assessed the evidence.

The Indictment is based on several faulty assumptions, such as: **AL** was a member of the Bridge Watchers; the Bridge Watchers was a structured organization with **OI** as its leader; the Bridge Watchers was a malicious group that committed crimes; that there was some kind of common plan for the attacks on 3 February 2000; and that the alibi of **AL** would also allow the actions alleged by the Prosecutor.

The testimony of **SA** was not truthful. Witness **VA** did not connect **AL** with any criminal activities - quite the contrary. The same applies to the protected Witness. The defence opines that none originally from North Mitrovica, who knew **NA,** would have chosen him as a target. Witness **X** testified truthfully. Further, the defence opines as ridiculous the claim of someone throwing a bomb to a flat above, as this is impossible. Also, the damages alleged caused by this bomb are not realistic.

To sum up, the Basic Court has correctly reached the material truth, namely the decision that the charges have not been proven.

III. APPEALS OF OI AND THE REPLY TO THEREOF

OI personally on 18 April 2016 timely filed an appeal dated on the same day with the Basic Court on the grounds of:

- Substantial violation of the provisions of criminal procedure;
- Substantial violation of the criminal law;
- Erroneous or incomplete determination of the factual situation; and

- Erroneous determination of the criminal sanctions.

OI requests that the Judgment of the Basic Court is modified and he is acquitted. Alternatively, **OI** requests the Judgement to be annulled in connection to Count 1 and sent for retrial. In any case, **OI** finds the sentence excessive and requests a less severe punishment to be imposed.

OI insists that he was not present at the crime scene, nor did he in any way participate, contribute or agree to what happened in 1999.

OI opines that the Basic Court established the subjective element of the criminal offence erroneously based on objective criterion of affiliation and "collective knowledge". The subjective element - the will of a particular perpetrator – is a core requirement in the doctrine of individual liability in criminal law. The opposite – strict liability based on membership – did not exist in Yugoslavia. The Basic Court has not provided reasoning as to how it concluded that **OI** was aware of this alleged "collective plan" or his acceptance of it. Thus, **OI** cannot be held accountable for the impulsive actions that lead others to commit more serious criminal offences.

Contrary to what the Basic Court has concluded[2], **OI** was not aware of the alleged "collective plan", and so did not foresee the consequences. The alleged "collective plan" did not include deprivation of life as can be seen from the actions of the soldier that ceased the shootings. At most, the alleged "collective plan" was to deport civilians to Albania, as can be inferred from the numerous orders given by the soldiers, police officers and paramilitary to the ethnic Albanian. Anyhow, **OI**'s actions were outside of the scope of this alleged "collective plan".

Article 142 of the CCSFRY requires either immediate commission of the offence or giving orders to commit the offence. The Basic Court has explicitly stated that **OI** was not an inciter. The Basic Court has not specified the direct incriminating individual actions of **OI**. The actions of **OI** found proven by the Basic Court[3] do not constitute direct commission of the criminal offence.

The Basic Court has erred in establishing the co-perpetration. **OI** was not aware of the alleged "collective plan" nor did he agree to it or its goals. Further, **OI** did not *ex ante* substantially contribute to the commission of the criminal offence as his actions were not linked to the actions of the perpetrators nor did his actions supplement those of the perpetrators. Thus, the objective condition of the criminal liability is not fulfilled. Also, the judicial construct of "joint criminal enterprise" is not acknowledged in Kosovo. The lack of joint plan, the intent and the knowledge of the consequences are discussed above. The further prerequisites of co-perpetration, namely a

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[2] Judgment, paragraph 302
[3] Judgment, pages 7 – 8

specific role and ability to prevent the criminal act, are not met in relation to **OI**. On the contrary, **OI**'s alleged comment expressed surprise that he was asked for instructions.

The Judgment lacks precise reasoning as to how the acts **OI** has been proven to commit fulfil the criminal offence as it is described in the Indictment. Further, the Judgment lacks sufficient reasoning as to how the Basic Court concluded that **OI** was aware of the alleged "common plan" to kill Albanians. Instead, the Court contradicts itself by stating that the killers might have overstepped the initial orders.[4] **OI** opines that co-perpetration could not be concluded from the two sentences that he allegedly uttered. On the contrary, asking a professional to follow the rules cannot be assumed to lead to illegalities.

OI claims that the laws applicable in Kosovo do not recognize the concept of "indirect intent", and even if they did, indirect intent of **OI** was not proven by the Basic Court.

The Judgment must be clear, specific and concise. Further, the written Judgment must correspond with the publicly announced enacting clause. The failure of the Basic Court to do so results in violation of the procedure code.

Article 3 of the Additional Protocol II of the Geneva Conventions stipulates that "Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State." Thus **OI** opines that the application of this Protocol in this case is disputable as the so called "Serbian forces" were merely trying to re-establish and sustain law and order and defend the territorial integrity through legal means.

The Basic Court has violated the principle *in dubio pro reo* when it has not, when in doubt, considered the facts benefitting the defendant as proven, and place a higher level of proof to the facts to the detriment of the defendant. The rights of **OI** have also been violated when he has not been given sufficient time to prepare his defence or his appeal, and this has influenced the rendering of a lawful and fair Judgment. Also, granting some witnesses the status of protected witnesses further diminished **OI**'s possibility to defend himself.

Further, a site inspection was performed in 15 April 1999 by a Judge Miletic and a record was compiled of the murder scene at the time. This record was duly processed by the investigative bodies lawful at the time. The prosecution has not provided new evidence as is required by law since the investigation has been dropped previously.

[4] Judgment, paragraph 226

The Basic Court was biased when establishing “the general picture” of the situation in 1999, as can be seen from its selective acceptance of witness statements. Further, the evaluation of evidence was flawed due to the refusal of the Basic Court to permit leading questions by the Prosecutor, and by the refusal of the Court to acknowledge that traumatic events affect the perception and memory of witnesses and this reduces the reliability of their evidence.

The Court has not been able to understand the different actors at the time but erroneously uses the terms paramilitary/police. Thus, an important fact has not been established, nor was the credibility of the witnesses questioned when they have been unable to distinguish between the two. Further, the Basic Court has not defined what it means by the paramilitaries “taking over” the individuals, not explained how it established that individuals were physically attacked, or why it deemed it necessary to establish the criteria according to which the nine individuals were selected to be killed, or describe precisely how the individuals were escorted. Also, when assessing the credibility of the witness statements the Basic Court ignored the importance of the statements of the many of the witnesses who said that they had spoken with **IM** about the identity of **OI**. Lastly, **OI** assesses the testimony of **IM** as illogical, internally conflicting and not credible, and the testimony of **HB** as utterly unreliable. Thus, the Basic Court has based its Judgment on unreliable evidence.

The mental capacity of **OI** at the time was not established at the trial. Nor are the alleged facts that **OI** was "a well-known personality", that he had a "successful career in martial arts", or that he had "a variety of commercial enterprises". In fact, all the witnesses have recognized him only after the war when **OI** appeared as a Serb leader, and when the rumours and gossips started to circulate.

Defence counsels Nebojša Vlajić and Ljubomir Pantović on behalf of **OI** on 18 April 2016 timely filed an appeal dated on the same day, in relation to Count 1, with the Basic Court on the grounds of:

- Erroneous or incomplete determination of the factual situation;
- Substantial violation of the criminal law;
- Substantial violation of the provisions of criminal procedure, including the European Convention on Protection of Human Rights and Fundamental Freedoms; and
- Erroneous determination of the criminal sanctions.

Defence counsels request that the Judgment of the Basic Court is confirmed in relation to the acquittal. Further, the defence counsels request that the Judgment is modified and **OI** is acquitted also from Count 1. Alternatively, the defence counsels request the Judgment be annulled in connection to Count 1 and sent for retrial.

a) Erroneous or incomplete determination of the factual situation

The defence counsels opine that the presence of **OI** at the crime scene was not established beyond a reasonable doubt.

IM is the main witness. His different testimonies are contradictory to one another, especially in the following: concerning what **OI** allegedly said; the affiliation of the "**s**"; where the ethnic Albanians were ordered to go; who was wearing what; whether or not **OI** had a Motorola in his hand; and, was **OI** sitting or standing when he put his mask on. Further, unlike **IM** initially claimed, he did not know **OI** before the conflict. Also, the bodies were not found where **M** said they were shot. As he answers with assumptions and fabrications when he doesn't know the answer, he is not a reliable witness. Witness **SK** did not know who **OI** was before **IM** told him. Thus his alleged recognition of **OI** at the crime scene is unreliable. Further, the details of **K**'s statement contradict those of **M**'s. Witness **XS** does not confirm any of the observations of **IM** even though he was present at the scene of the crime as one of the injured parties. Witness **MLl** was not present at the crime scene. Further, he claims that **OI** addressed him in Serbian, although it is known that **OI** speaks Albanian. There were further inconsistencies in his statement that should have rendered it unreliable. Witness **KA's** statement is in profound contradiction with the statements of other witnesses thus diminishing their credibility. Witnesses **BF** and **MM** do not confirm any of the observations of **IM** even though they were present at the scene of the crime as one of the injured parties. The only thing in common is the acknowledgement that **IM** mentioned **OI** to them. Witness **LA**, who knows **OI** very well, did not see him that day. Further, his pension checks were stolen by Serbian officials who later used them in Serbia. Witness **C** is completely unreliable as she forgets things. Furthermore, she is clearly biased and driven by hatred. Also, her testimony is contradicting her previous testimony in another case but concerning the same events. Witness **FP** only remembers for certain that **M** told her about **OI**. Witness **QI** has left **M** before the events described in the Indictment. Further, his testimony is discredited by a statement which was proven as fabricated in the court proceedings. This was the inclusion of a phone number that did not exist at the time the statement was given. Witness **ZA**'s testimony is not credible as he only learned the identity of **OI** long after he claimed to have met him. His credibility is further diminished by the fact that he could not remember such an important date as when he was expelled from his house. Also, he claims to have reported O**I** to the police when in fact he did not. His wife, witness **NA**'s statement clearly contradicts his claims. Witness **BS** was present at the crime scene but could not tell anything about the events.

There is no evidence connecting O**I** to the Serbian forces during 1999. On the contrary, he was helping people. Witnesses **BI, BR, IR, SH, EB, AD** and both of the protected witnesses all testify that **OI** was working in **F** at 1999. This is confirmed by **OI**'s diary and his employment booklet. There are no official records of his involvement either as military or as police at 1999. The alleged response of **OI**, "Why do you ask me?" also reflects his non-affiliation to the parties

of the conflict. Further, if he did instruct a professional to follow the rules, surely this would refer to the lawful rules.

The Prosecutor has been misled by **IM** whose testimony has been constantly changing. All the other witnesses agree on having talked to **IM** about **OI,** albeit at different times.

As no one saw the actual execution and as the bodies were not found where the witnesses said they were killed, it has not been proved that the named victims died at the location described in the Indictment.

The Judgment does not explain how the evidence was assessed. There is no mention about any legal test or any explanation as to how the Basic Court deemed evidence credible and trustworthy, even when the testimonies had changed. This would have been particularly important as a lot of time had passed since the events took place. The Basic Court showed bias by regularly finding justification to the detriment of the defendant. Thus, the Basic Court did not assess the credibility of the witness' testimonies properly.

b) Substantial violation of the criminal law

The Basic Court violated the principle "*ne bis in idem"* because the case has been adjudicated previously by the Prosecutor and UNMIK. The witnesses heard in UNMIK procedure are the same that have been heard in this trial. As there is no new evidence, the procedure code does not allow for retrial.

Article 22 of the CCSFRY on co-perpetration stipulates that a co-perpetrator is someone who participates in the act of commission, or in some other way jointly commits the criminal act. As **OI** did not take any action towards the commission of the criminal offence, mere presence at the crime scene would make him a witness. Also, the Basic Court omitted to point out that the contribution should be essential. In addition, the concept of co-perpetrator includes both subjective and objective elements. The acts of **OI** that has been proven - namely being present, safeguarding the checkpoint, reminding someone to follow his orders and to act according to his previous decision – cannot be subsumed under co-perpetration. Most importantly, the existence let alone the content of the alleged "common plan" were not established by the Basic Court. Further, as the Basic Court found that "the level of involvement of the defendant in the commission of the criminal act was reduced"[5], **OI** cannot have contributed substantially to the commission of the criminal offence.

The Indictment charged **OI** for ordering and/or inciting the commission of the criminal offence. However, the Basic Court did not find him guilty of either. The broad and creative interpretation

[5] Judgment, paragraph 319

of the law as done by the Basic Court to enable finding **OI** guilty is unlawful. Further, the laws applicable in Kosovo do not recognize the concept of "joint criminal enterprise". As **OI** did not give an order but simply reminded the other soldier of his responsibility to follow orders, the subjective element, or "*mens rea",* of a criminal offence is not fulfilled. By stating "Why do you ask me?" **OI** clearly denies any involvement. Lastly, **OI** was not in a position to prevent the criminal offence from happening – which is an element of co-perpetration.

c) Substantial violation of the provisions of criminal procedure, including the European Convention on Protection of Human Rights and Fundamental Freedoms (ECHR);

The facts stated in the Indictment and the findings of the trial Panel do not correspond. As the Prosecutor did not amend the Indictment, the Judgment exceeded the scope of the charges. The application of Article 360 of the CPC by the Basic Court was faulty and without proper reasoning. When read in its entirety, the Article allows the modification of the legal classification of the offence but not the modification of the factual description of the acts (identity of the acts). These violations resulted in a violation of the rights of the defence, and influenced the issuance of a legal and fair Judgment.

The modification of the factual description without a modification of the Indictment violated the right of the defendant to properly prepare his defence. The modification of the legal qualification by the Basic Court without informing the defendant of this intent also violated his right to a defence. These are violations of a fair trial as guaranteed by Article 6 of the ECHR.

d) Erroneous determination of the criminal sanctions;

As **OI** should have been acquitted of all charges any punishment is unfair.

The **Prosecutor Romulo Mateus** in his Response dated 3 May 2016 opines that the appeals are ungrounded. He requests that the Court of Appeal rejects the appeals and to uphold the Judgment of the Basic Court of Mitrovica. In relation to sentencing he refers to his own appeal.

As a general remark the Prosecutor notes that the appeal elaborates on jurisprudence and doctrine without citing references.

As to the alleged procedural mistakes the Prosecutor first notes that the Judgment did not establish any facts that had not already been included in the Indictment. Thus, the Judgment is based solely on the Indictment. As the Basic Court has rightfully pointed out, it is not bound by the legal qualification presented by the Prosecutor (Article 360 (2) of the CPC). Further, the Judgment is based only on evidence considered in the main trial. Both the domestic rules and the

stipulations of the European Convention for the Protection of Human Rights and Fundamental Freedoms were respected. Secondly the Prosecutor points out that O**I** did not in the Basic Court raise the issue of the failure to properly investigate the case, and in accordance with Article 382 (3) and (4) of the CPC this claim should be rejected. Thirdly, the Prosecutor opines that as **OI** did not during the main trial object to the procedure of establishing the facts and administering the evidence, he is barred from doing this in the appellate stage according to the Article 382 (3) and (4) of the CPC. The same applies to **OI**'s claims of the lack of clarification of certain facts. Fourthly, as all the rejections of the motions of **OI** are justified, the Basic Court did not favour the prosecution.

As to the alleged mistakes in the application of the law, the Prosecutor opines that **OI**'s claim of violation of the principle of *ne bis in idem* is not precise enough to allow the prosecution to comment on it. Further, as this claim has been made only at the appellate stage it should be rejected. In relation to the applicability of Protocol II to the Geneva Conventions, the Prosecutor points out that the existence of an internal armed conflict in Kosovo at the time has been established both in the jurisprudence of the ICTY[6] and in the Courts in Kosovo. In any case, the applicability of the Common Article 3 has not been challenged. Also, the Prosecutor points out that several of the cases cited in **OI**'s appeals refer to cases decided in foreign jurisdictions and are thus not applicable. The same applies to the Rome Statute of the ICC[7]. Further, although the Basic Court mistakenly refers to "indirect intent" it actually describes "direct intent" when ascertaining the intent of **OI**. In relation to the criteria for co-perpetration, Article 22 of the CCSFRY stipulates modes of liability other than "immediate commission". The requirements of co-perpetration are fully met. The "mop-up" operation in **M** was a typical ethnic cleansing operation consisting both of regular armed forces as well as irregular forces, and its existence has been carefully assessed by the Basic Court Panel and is indisputable. The question addressed to **OI** makes him an active participant and excludes the possibility of him being a bystander or a passive observer. Further, the Basic Court has correctly assessed that the role of **OI** was essential as his words triggered the killings.

A common purpose can be inferred from the concrete facts, such as the recurrent instruction to leave Kosovo, the common actions, the seamless handling of the group of ethnic Albanians and that there is no doubt that there was obedience to instructions. Further, **OI** did not seem

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[6] The Prosecutor refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, created by United Nations Security Council Resolution 827 of 25 May 1993

[7] The Prosecutor refers to the Rome Statute of the International Criminal Court (1998), U.N. Doc. A/CONF. 183/9 (1998), *reprinted in* 37 I.L.M. 999 (1998). On 17 July 1998, the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the ICC

astonished, shocked or surprised to see the executions taking place close by. Thus the Basic Court rightly concluded that **OI** was aware of the "common plan" to expel and kill ethnic Albanians.

The principle of *in dubio pro reo* was not violated. The Basic Court has carefully explained how it has reached its conclusions.

As to the alleged mistakes in establishing the factual situation, the Prosecutor notes that the pre-trial interviews cannot be used as direct evidence. Instead, they can be used as a tool to question the credibility of a witness but only if the witness is confronted with them. Also, the Basic Court has addressed the slight discrepancies in the various pre-trial interviews of **IM**, and provided an explanation as to why it considers his statement credible. Contrary to the claims of **OI**, the Prosecutor finds **IM** as a credible witness because his account is very detailed; he addresses the whole day in same level of detail; he uses direct speech when describing the statements of others and gives explanations of discrepancies; he admits when he does not know the answer to questions; he did not contradict himself during his long examination in the Court; even at the most emotional moment he only testified about what he heard and his conclusions from it; and immediately after the incident he identified **OI** as the perpetrator to the other survivors. As to the testimony of **SK**, the Prosecutor opines that it is not contrary to the testimony of **IM**. In addition, **K**'s testimony is clearly affected by the traumatic events as he remembers only the key points vividly. Even so, the discrepancies are only minor, apart from one exception. In relation to the weight attributed to the witnesses **C**, **P**, **L**, the **A**, **B** and **M**, the Prosecutor refers to his appeal.

The Prosecutor points out that the defence did not challenge any of the alleged shortcomings by questioning the witnesses or by objecting to the proceedings.

OI misinterprets the situation and twists the words of the witnesses and the Court, for example by not asking certain specific questions; ignoring the proof that O**I** was a member of the reserves of the Special Police Forces at the time; emphasizing a false discrepancy in the testimonies and the place where the bodies were found; alleging discrepancies in the description of the assault; and claiming the incorrect identification of his uniform. Further, the Basic Court has thoroughly and in depth scrutinized the alibi of **OI** and reached well-grounded findings.

As final remarks the Prosecutor notes that the submission of **OI** expresses nationalistic tendencies. Also, he expresses insider knowledge that only persons involved in war activities at the time could have known.

IV. PROPOSAL OF THE APPELLATE PROSECUTOR

The Appellate Prosecutor, Claudio Pala in his Motion dated 1 July 2016, moves the Court of Appeals to reject **OI**'s appeals in their entirety and to grant the appeal of the SPRK in its entirety.

The Appellate Prosecutor concurs with the SPRK.

He further submits that the trial Panel engaged in an artificial exercise of analysing of each piece of circumstantial evidence in isolation. However, from the evidence it is clear that **OI** was in fact a superior of the executioners. The final encouragement, to execute the prisoners came from **OI**. The executioners committed the murders immediately after the defendant`s words, literally meters away from the checkpoint. At the absolute minimum, the evidence shows that by his exchange of words with the leader of executioners **OI** aided and abetted the commission of crimes charged under Count 1 of the Indictment.

The facts that **OI** ordered the commission of the criminal offence, abused his position or authority and possessed a discriminatory intent should be considered as aggravating. The trial Panel`s reliance on the defendant`s "reduced" level of participation in the criminal offence is thus questionable. The Appellate Prosecutor concurs with the Special Prosecutor and finds the imposed sentence manifestly too low.

With regard to Count 2 the Appellate Prosecutor refers to several witness testimonies and the letter of recommendation and underlines that the structure, functioning and leadership within the Bridge Watchers emerged by the evidence, and these corroborate each other. All the pieces of evidence are mutually corroborative as to the structure and aim of the Bridge Watchers and as to the leading role exercised within it, at the relevant time, by the defendant **OI**.

The trial Panel erred in not allowing the prosecution to confront Witness X with his previous statements since this is a "weapon" of cross-examination. Since Witness X was a key witness, the Panel`s error caused irreparable damage to the prosecution`s case. His credibility could not have been effectively challenged. However, the questioning or examination of a witness is restricted only in the circumstances enumerated in Article 257 (4) of the CPC.

Regarding the incident of 3 February 2000, the trial Panel disregarded the relevant evidence of Witness Y showing that the defendant was an inciter of the events that day.

The Appellate Prosecutor submits that despite the anonymity granted by the trial Panel, the defence for **DD** was well aware of Witness X`s identity. Therefore, the defendant was not entitled to the protection of Article 262 (3) of the CPC.

The Court erred in excluding the causal connection between **DD**`s instigation of the commission of the crimes and the *actus reus*. The only reasonable conclusion is that at least some of the direct perpetrators of the crimes listed in the Indictment were aware of and influenced by D**D**`s incitement to cleanse the area of Kosovo Albanians. He incited the commission of the crimes under Count 2 of the Indictment.

In response to the defence appeals he refers to the legal standards for any appellate intervention in the area of the assessment of witness credibility. The defence counsel and **OI** try to discredit the identification by the witnesses and their account of his presence at the check point area. The clear account rendered by witnesses **M** and **K** is corroborated by the statements of witnesses **C**, **P**, and **L** who were expelled from their houses on the same occasion and interacted with the defendant. On the contrary, the evidence proposed by the defence only offers general information and is contradicted. The evidence does not leave any room for doubt that the victims were shot by their escort.

The assertion of a violation of the *ne bis in idem* principle does not stand and should be dismissed. The Prosecutor submits that when it comes to a legal qualification of the act in the Indictment, a trial Panel is not bound by the legal classification proposed by a Prosecutor. The assertion that a re-classification is allowed only if this is not to the detriment of the defendant, is not supported by the reading of the CPC. Moreover, there was a plan for the murder of some selected Albanian males and **OI** knew of such plan. He was put on notice of the allegations concerning all the elements that were subsequently used by the trial Panel in finding him responsible for the murders as a co-perpetrator. Article 6 of the ECHR was not violated.

The Appellate Prosecutor opines that the plan for the mop-up operations encompassed killings of at least some of the Kosovo Albanian able-bodied men. There was a plan to liquidate at least some of the able-bodied men, presumably suspected for their links with the KLA. At a minimum, the killings were a natural and foreseeable consequence of the large-scale violent, forced movement of the population.

OI had some influence among the "blues" and he was their *de jure* or *de facto* superior. He participated in the execution of the common plan by manning the checkpoint and using his influence in urging the executioners to carry on with their order to murder the previously selected able-bodied Kosovo Albanian men. He possessed the requisite *mens rea*. Based on the above the trial Panel did not err in finding that **OI** co-perpetrated the crimes charged under Count 1 of the Indictment.

V. FINDINGS OF THE APPELLATE PANEL

A. <u>Competence of the Panel of the Basic Court</u>

The Court of Appeals has reviewed the competence of the Basic Court of Mitrovica and since no objections were raised by the parties will suffice with the following.

On 23 March 2015 the Kosovo Judicial Council has issued a decision no 25/2015 approving the request from EULEX to continue the trial. The decision reads "*The case which is currently with the Basic Court of Mitrovica will remain with the EULEX Judges*." It further reads "... *confirms that the above case will be tried by the EULEX judges since this matter is an "ongoing case*"… .

In accordance with the Law on Courts as well as the Law on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (Law no. 04/L-273), and also the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, the Panel concludes that EULEX had jurisdiction over the case and that the Basic Court trial Panel was competent to decide the case in the composition of EULEX Judges.

B. Competence of the Panel of the Court of Appeals

The defence counsels have raised an objection as to the Panel member Driton Muharremi. Pursuant to Article 42 (1.3) of the CPC the objection was forwarded to the President of the Court of Appeals. On 6 October 2016 the President of the Court of Appeals rejected the request as ungrounded.

Also, pursuant to Article 472(1) of the CPC the Panel has reviewed its competence. The Panel notes the following:

Due to the change in the EULEX mandate and the new Law no 05/L-103 on Amending and Supplementing the laws related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo, the President of the EULEX Judges has, by a letter dated 22 August 2016, requested the Kosovo Judicial Council for the assignment of a Panel composed of two EULEX Judges and to assign a EULEX Judge as the Presiding Judge.

The Kosovo Judicial Council has, on 27 September 2016, issued a decision to approve the request of the President of the EULEX Judges to decide the case in a Panel composed of majority of EULEX Judges, and with a EULEX Judge presiding.

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

C. Admissibility of the appeals

The impugned Judgment was announced on 21 January 2016. The written Judgment was served to the defendants and their defence counsels, and to the EULEX Prosecutor as stated above. The appeals were filed within the 15-day deadline pursuant to Article 380(1) of the CPC. The appeals were filed by the authorized persons.

The appeals contain all other information pursuant to Article 382 *et seq* of the CPC. They are therefore admissible.

The Appellate Panel will discuss all grounds of appeal raised under relevant headings below.

D. Findings on the merits – Count 1

D.1. Violations of criminal procedure code

Ne bis in idem

The Panel recalls Article 4 (1) of the CPC which reads "*No one can be prosecuted and punished for a criminal offence, if he or she has been acquitted or convicted of it by a final decision of a court, if criminal proceedings* ***against him or her*** *were terminated by a final decision of a court or if the indictment* ***against him or her*** *was dismissed by a final decision of a court*."

Also, the Panel recalls Article 385 (1.3) of the CPC which stipulates "*There is a violation of the criminal law: ... circumstances exist which preclude criminal prosecution and, in particular, whether criminal prosecution is prohibited by the period of statutory limitation or precluded due to an amnesty or pardon, or* ***prior adjudication by a final judgment****; ...*"

Lastly, the Panel recalls Article 363 (1.2) of the CPC which stipulates "*The court shall render a judgment rejecting the charge, if: ... the accused was previously convicted or acquitted of the same act under a final judgment* ***or proceedings against him or her*** *were terminated in a final form by a ruling; ...".* The Panel notes that the word "*shall*" refers to an obligation, and thus the Basic Court should have decided on this *ex officio.*

The appealed Judgment mentions that witness **BM** was "*an investigative judge at the time*…"[8] In his witness statement **BM** states that he "…*had signed the minutes on the truthfulness of the findings. I signed it before the Judge of the Special Chamber for War Crimes of the Higher Court in Belgrade."*[9]

[8] Judgment, heading "people killed", paragraph 113
[9] Minutes, 24 March 2015, paragraph 21

The Basic Court was also notified of the possibility of the applicability of the principle of *ne bis in idem* in relation to this Count as on 24 March 2015 the Prosecutor stated "….*we found some information that there was a complete case file of this particular investigation and that it should be in **R** or **K** and we request from the prosecution in Belgrade to receive a copy of the case file.*"[10]

Further, the case file contains an UNMIK document[11] "Interoffice memorandum" dated 22 September 2000 by Jean Pinet, CCIU Pristina. Amongst other things, in relation to **OI** it states that according to the witness **BM** a report was forwarded to the District Court of **R** or **K**, and that "*The documents regarding this person have already been passed on to the International Prosecutor."* The document concludes that "*As requested by the International Prosecutor in Mitrovica, the present document is passed on to this magistrate in order to determine if there are sufficient elements of charge in order to prosecute the suspect with War crimes, as defined in FRY criminal law, chapter 6, article 142."*

Witness **MH** testified that there had been an investigation by the French Gendarmerie that led to filing of the application for the initiation of investigation. **H** had "… *in capacity of a judge, I issued a ruling to start the investigative actions at that time…led by investigating officer form Canada… who concluded the investigation…"*[12]

Also, in his closing argument defence counsel Nebojša Vlajić recalls that an international Judge and an UNMIK Public Prosecutor have evaluated the evidence thus triggering the principle of *ne bis in idem.* [13]

To conclude, the Appellate Court became aware that official action had been taken in relation to the offence described in Court 1. As the appealed Judgment had not elaborated on the issue, the Appellate Court held a hearing to clarify the issue.

In the hearing in the Court of Appeals on 22 November 2016, witness **H** stated that he had initiated an investigation against 6-7 persons, none of which were **OI**. During the investigations 2 or 3 witnesses implicated **OI**, but at the time it was not possible to investigate him, and thus the investigation was not expanded to include O**I**. Instead, the witness statements were passed on to the CCIU unit of UNMIK which dealt with war crimes.

Defendant **OI** also admitted that prior to 2014 he had not been summoned in relation to the events of 14 April 1999.

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[10] Minutes, 24 March 2015, paragraph 30
[11] Binder III, Documentary evidence, pages 705-711
[12] Minutes, 26 March 2015, paragraph 29
[13] Minutes 17 December 2015, paragraph 10, page 5 of the English version

Defence counsel of **OI** agreed that the investigative Judge did not take any formal action after the witnesses implicated **OI**. However, the defence still maintains that the principle of *ne bis in idem* should be applied. The defence counsel had three lines of argumentation: firstly, the investigation should at the time have been expanded to include **OI** and the failure of the Prosecutor to do so should not be to the detriment of the defendant. Thus, it should be presupposed that he was investigated and that the investigation was ended before the Indictment stage, and the principle of *ne bis in idem* should be applied; secondly, as the testimonies/evidence has been previously assessed as inadmissible and/or unreliable in a case concerning another defendant, this evidence cannot now be assessed differently; thirdly, the principle of legal certainty requires that evidence collected 17 years ago is not recycled and reactivated.

In his closing statement the Appellate Prosecutor informed the Court that the response from Republic of Serbia to the request of the Prosecutor in relation to **OI** was that they have sent all the material they have, namely a witness statement and record of a site inspection.

The Panel recalls that Article 4 (1) of the CPC requires a formal and final decision concerning the accused. The Panel notes that it is not disputed that there was no formal investigation in relation to **OI**, and thus no formal decision has been issued. The Panel further notes that the arguments of the defence are not based on law. **Therefore, the Panel finds that the principle of *ne bis in idem* does not apply to OI in Count 1.**

The discrepancy between the announced and the written enacting clause

The Panel recalls Article 370 (1) of the CPC, which reads "*The judgment drawn up in writing shall be fully consistent with the judgement as it was announced. ….*"

The Panel notes that the minutes of the main trial session of 21 January 2016 states "*3. The verdict is being read.*"[14] The case files include a document [15] dated 21 January 2016 and signed by all the Basic Court Panel members. This document is the verdict which was read.

When comparing the above mentioned document and the Judgment, the Panel concludes that in relation to the enacting clause of the Count 1 they are identical. Therefore, the Panel finds that there is no discrepancy between the Judgment as it was announced and the written Judgment.

Correspondence of the enacting clause and the reasoning of the Judgment

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[14] Minutes of the main trial, paragraph 3 (originally in italics)
[15] Binder 14, Document 9

The enacting clause of the Judgment lists the facts the Basic Court has established beyond reasonable doubt.[16] Amongst others, it was established that "…***OI** was a part of the group of paramilitaries/policemen present at the checkpoint.",* that "*He was wearing a blue uniform and he was armed.",* that to a question addressed to **OI** by one of the men escorting the group of persons, four of which were later killed, **OI** *"...replied something to the effect of: "Why you ask me, apply the orders!*", and finally that "…***OI** was aware of the operation of expelling and killing civilian ethnic Albanians… by acting as described above, he willingly complied with the plan, knowing that it would result in the killings."* The enacting clause further states that it could not be established beyond reasonable doubt that **OI** "… *acted in the capacity of a leader…"* or that he "*...incited the group … by ordering them".*

However, as a conclusion the enacting clause states that **OI** is found guilty of the criminal offence of "war crimes against the civilian population" criminalized under Article 142 of the Criminal Code of the Federal Republic of Yugoslavia (CCFRY). This Article reads: "*Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, **orders** that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or **who commits one of the foregoing acts**, shall be punished by imprisonment for not less than five years or by the death penalty."*[17] Thus, Article 142 of the CCSFRY requires either immediate commission of the offence or giving orders to commit the offence. The enacting clause further refers to Common Article 3 (1a) which can be found in all four of Geneva Conventions of 12 August 1949, and which states that " *Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, **the following acts are and shall remain prohibited** at any time and in any place whatsoever with respect to the above-mentioned persons: (a) **violence to life and person, in particular murder of all kinds**,*

[16] Judgment, pages 6-8
[17] Emphasis added

mutilation, cruel treatment and torture;…"[18] Finally the clause refers to Article 4 (2a) of the Additional Protocol II which reads "*Without prejudice to the generality of the foregoing,* ***the following acts*** *against the persons referred to in paragraph 1* ***are and shall remain prohibited*** *at any time and in any place whatsoever: (a)* ***violence to the life, health and physical or mental well-being of persons, in particular murder*** *as well as cruel treatment such as torture, mutilation or any form of corporal punishment;…"*[19]

Therefore, as the Basic Court did not find that **OI** ordered, or personally and directly committed the criminal offence, the Panel finds that the enacting clause is in contradiction with itself.

Furthermore, the reasoning of the Judgment states that **OI** "*…participated as a co-perpetrator in the commission of the criminal offence."*[20], that "*The defendant is a co-perpetrator…"*[21] and that *"…the relevant conduct of the Accused and we qualified it as co-perpetration."*[22] The Judgment claims that "*Commission includes co-perpetration…*"[23] The Court of Appeals disagrees with this assessment as the CCSFRY, separately in Article 22, discusses the concept of co-perpetration thus defining it as a separate form of criminal liability.
It should be underlined here that the enacting clause of the Judgment does not refer to Article 22 – which discusses the concept of co-perpetration thus defining it as a separate form of criminal liability – nor does it state that **OI** acted as a co-perpetrator. For that reason the Panel finds that the enacting clause is in further contradiction with the reasoning of the same Judgment.

Also, as to the five men that survived, the reasoning of the Judgment states that "*Their direct intent is established in regards to all nine Albanian. It was only by chance that only four of them were shot."*[24] It further states that *"Regarding the other five who survived, the criminal offence of murder is qualified as an attempted."*[25] The Court of Appeals notes that as with co-perpetration discussed above, attempt is a separate form of criminal liability. As the conclusion of the enacting clause states that **OI** is found guilty for the immediate commission of criminal offence of "war crimes against the civilian population" and omits to state that in relation to these five men, the correct form of criminal liability is attempt. Therefore the enacting clause is not compatible with the reasoning.

Since the enacting clause is in contradiction with itself and with the reasoning of the Judgment, the Court of Appeals opines that there is a substantial violation of the provisions of criminal

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[18] Emphasis added
[19] Emphasis added
[20] Judgment, paragraph 289
[21] Judgment, paragraph 304
[22] Judgment, paragraph 306
[23] Judgment, paragraph 284
[24] Judgment, paragraph 301
[25] Judgment, paragraph 283

procedure under Article 384, paragraph 1, subparagraph 1.12 in connection with Article 370 of the CPC. The Court of Appeals further finds that the discrepancies between the enacting clause and the reasoning are so grave and they make it impossible to understand of what **OI** was found guilty. Therefore, the Appellate Panel concludes that a new main trial before the Basic Court is necessary because of the substantial violation of the provisions of criminal procedure.

Correspondence between the Indictment and the findings of the Basic Court

First, the Panel recalls Article 360 (1) of the CPC which stipulates "*The judgment may relate …only to an act which is the subject of a charge contained in the indictment as initially filed or as modified or extended in the main trial.*"

Article 241 of the CPC, which stipulates the content of the Indictment, orders that the Indictment shall contain, amongst others "*… the time and place of commission of the criminal offence, the object upon which and the instrument by which the criminal offence was committed, and other circumstances necessary to determine the criminal offence with precision;…*"(sub paragraph 1.5) and "*… an explanation of the grounds for filing the indictment on the basis of the results of the investigation and the evidence which establishes the key facts;* …" (sub paragraph 1.7) The Panel points out that the Article does not stipulate the structure of the Indictment.

The Panel of the Court of Appeals points out that in the "Preliminary remarks" the appealed Judgment reproduces part of the Indictment. The Judgment goes on noting "*The Indictment, in its enacting clause does not elaborate more on the factual situation. The alleged facts are described in the reasoning part of the Indictment and intercalated with the argumentation of the prosecutor, in rather unprecise way. The Panel looked both at the enacting clause and the reasoning as a whole and endeavoured to assess the facts relevant to the criminal offence subject to the Indictment as identified in both parts.*"[26]

The Panel also recalls Article 31 (2) of the Constitution of Kosovo and Article 5 (1) of the CPC, both of which guarantee the right of a defendant to a fair trial. As to the fairness of the trial, the Panel seeks guidance from, among other sources, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECHR), which is directly applicable law in Kosovo (Article 22(2) of the Constitution of the Republic of Kosovo).

Article 6 of the ECHR stipulates, amongst other guarantees, that "*Everyone charged with a criminal offence has the following minimum rights: (a) to be informed ... in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; ...*" (paragraph 3) The European Court of Human Rights (ECtHR) has noted that there is "*…the need for special attention to be paid to the notification of the*

[26] Judgment, paragraph 76

"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 notice of the factual and legal basis of the charges against him…"[27] Further, the ECtHR has established that Article 6 § 3 (a) of the ECHR "*…does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him.*"[28] However, "*…the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence*."[29]

Further, the Panel recalls that in his closing statement defence counsel Nebojša Vlajić notes that "*Mr. **OI** has been accused for direct perpetration of those criminal offences by inciting and ordering and by co-perpetration. ... Therefore, co-perpetration must be proven* ..."[30] The Panel therefore concludes at least at the end of the main trial it was clear to **OI**'s defence that the Basic Court also considered this form of participation of the criminal offence.

The Panel notes that as the case is returned for retrial in relation to Count 1, there is no need for a further detailed examination of the correspondence between the Indictment and the findings of the Basic Court. However, as Article 384 (1.10) of the CPC stipulates that there is a substantial violation of the provisions of criminal procedure "... *if the judgment exceeded the scope of the charge*", and as the defendant has raised this question in his appeal the Court of Appeal takes this opportunity to draw the attention of the Basic Court to this issue. Also, the Basic Court shall give a detailed reasoning about the re-classification of the criminal act (Art. 360 (2) of the CPC), more specifically which are the facts in the Indictment which justify the re-classification from inciter to co-perpetrator.

Assessment of witnesses' testimonies

As to the witnesses **HB,** Witness Y and **GP**, the Panel notes that the Basic Court has specified them as witnesses for Count 2.[31] However, in paragraphs 161 – 163 (**B**) and 183 (Witness Y and **P**) the Basic Court discusses their testimonies in relation to Count 1. The Court of Appeals finds this inappropriate.

D.2. Erroneous and incomplete determination of the factual situation, Violations of criminal law and Criminal sanctions

[27] Pélissier and Sassi v. France , no. 25444/94, para. 51
[28] Pélissier and Sassi v. France , no. 25444/94, para. 53
[29] Pélissier and Sassi v. France , no. 25444/94, para. 54
[30] Minutes of the main trial, 17 December 2015, paragraph 10
[31] Judgment, witness number 19 (**B**), 44 (Witness Y) and 64 (**P**)

As to the determination of the factual situation, the violations of criminal law and the criminal sanction, the Panel opines that as the case is returned for retrial in relation to Count 1 there is no need for a detailed examination of this alleged violations.

Costs of criminal proceedings

In the retrial the Basic Court has to decide on the costs of criminal proceedings in relation to Count 1.

Detention on Remand

In accordance with Article 402 (4) of the CPC the Court of Appeals shall examine whether there are still grounds for detention on remand and shall extend or terminate detention on remand by a Ruling.

The Court of Appeals opines that in the present circumstances the requirements of Article 187 (1) of the CPC to extend the detention on remand of the defendant until the Basic Court of Mitrovica renders its Ruling pursuant to Article 193 of the CPC are met.

There is grounded suspicion that the defendant committed the criminal offence of *War Crimes against Civilian Population* as described in Count 1. Having in mind the severity of the charge the Panel finds the risk of flight very high. Turning to the risk of witnesses' intimidation, the Panel finds that it has increased since the case is returned for retrial.
The Court of Appeals further finds that there is no less restrictive measure than detention on remand which would eliminate the established risks at this stage of the proceedings.

Therefore, the defendant **OI** will remain in detention on remand until the Basic Court renders a deviating Ruling pursuant to Article 193 of the CPC.

E. Findings on the merits – Count 2

In relation to Count 2 the Prosecutor claims:

- A substantial violation of the provision of criminal procedure under Article 383 (1.1) in conjunction with Article 384 (2.1) of the CPC;
- An erroneous or incomplete determination of the factual situation under Article 383 (1.3) in conjunction with Article 386 (3) of the CPC.

The Prosecutor claims substantial violation of Article 383 (1.1.) in conjunction with Articles 384 (2.1.) and 370 (7) of the CPC because the Basic Court did not clearly and exhaustively state the facts the Court considers proven or not proven as well as the legal grounds for this.

The Court of Appeals does not agree with Prosecutor. The Panel finds the allegation groundless since the Basic Court clearly stated which facts did find proven and which facts not proven. It is clear from the appeal that the Prosecutor does not agree with the findings of the Basic Court to consider not proven certain facts.

The Court of Appeals stresses out that there is a major difference between a fact found not proven and a fact not discussed. The Basic Court reached the right conclusion in paragraph 513 of its Judgment that *"... it is not altogether clear from the evidence if Bridge Watchers indeed had a clear structure and organisation and if yes, what they were*." It is clear from the Judgment that the latter Court did not reach this conclusion based only on the testimonies of **NK** and **NS**. The Basic Court of Mitrovica assessed correctly the relevant evidence before reaching this conclusion.

Also, the Court of Appeals appreciates how the Basic Court assessed the testimonies of Witness Y and Witness X. The first instance Panel came to the right conclusion that the structure and the leadership of the Bridge Watchers cannot be established on their testimonies since during the main trial they did not state facts upon which the structure and the leadership could be considered as proven.

The Prosecutor also claims substantial violation of Article 383 (1.1.) in conjunction with Articles 384 (2.1.), 7 (1) and 329 (4) of the CPC because the Basic Court did not confront Witness X with his pre-trial statement.

In the appeal of the Prosecutor it is not specified whether this statement is pre-trial interview or pre-trial testimony. The Court of Appeals finds that the pre-trial interview session of Witness X was conducted by the Prosecutor on 7 October 2013[32], after the new CPC entered into force. It is clear from Article 123 (2) of the CPC that *"...Evidence obtained during the pre-trial interview may be used as a basis to substantiate pre-trial investigative orders, orders for detention on remand, and indictments. Evidence obtained during the pre-trial interview may not be used as direct evidence during the main trial, but may be used during cross-examination to impeach witnesses if the witness has testified materially differently from the evidence given by the witness during the pre-trial interview."* Since Witness X was not cross-examined during the main trial there was no possibility for confronting him with his pre-trial interview. The obligation of the Court under Article 7 (1) of the CPC to truthfully and completely establish the facts which are important for rendering a lawful decision under Article 329 (4) of the CPC, which states that "*in*

[32] Binder IV, page 974, Record of the witness pre-trial interview session

addition to the evidence proposed by the parties or the injured party, the trial panel shall have the authority to collect evidence that it considers necessary for the fair and complete determination of the case", entrust the Court to search for the truth but only within the limits of the procedure for gathering evidence. These provisions do not entrust the Court with the power to search for the truth breaching the rules for the gathering of evidence. In this particular case the provisions of the CPC are more than clear – during the main trial the pre-trial interview can be used as a tool for cross-examination. The Court of Appeals opines the Basic Court properly applied the provisions of the CPC when it decided not to confront Witness X with his pre-trial interview.

Finally, the Court of Appeals stresses that there is a major difference between confronting a witness with his pre-trial interview and using the pre-trial interview to refresh his/her memory. The second option can be used when the witness states he/she does not remember the facts. When the witness gives different testimony in the main trial than in his pre-trial statement, then the pre-trial interview can be used for cross-examination. As Witness X did not say he did not remember the facts, there was no need for the Basic Court to use the content of his pre-trial interview to refresh his memory.

The Prosecutor submits that the Basic Court did not evaluate all evidence administered during the main trial in a fair manner, separately and as a whole.

The Panel recalls Article 259 (1) and (2) of the CPC which stipulates that manifestly irrelevant and intrinsically unreliable evidence is inadmissible. The Panel also recalls Article 361 (2) of the CPC which stipulates that "*The court shall be bound to assess conscientiously each item of evidence separately and in relation to other items of evidence and on the basis of such assessment to reach a conclusion whether or not a particular fact has been established*."

The Court of Appeals finds that all documentary evidence administered during the main trial is listed in paragraph 20 of the Judgment[33]. The Panel recalls that the appealed Judgment contains a listing of 126 pieces of documentary evidence admitted into evidence. In addition, the appealed Judgment contains a listing of 5 pieces of documentary evidence rejected by the trial Panel of the Basic Court. It is concluded by the Basic Court of Mitrovica that "*Several KFOR and UNMIK reports and memoranda portraying* ***OI*** *as leader or commander of paramilitary/police formations were submitted as documentary evidence. The Panel found that there is no indication as to their sources, nor have these been in any way corroborated in court. Similar considerations are put forward regarding the several press articles adduced as evidence.*"[34] In relation to the video put forward as evidence, the Judgment reads *"Also, the Prosecution submitted a recording*

[33] Judgment, pages 35-45
[34] Judgment, paragraph 526

*made by a Japanese TV station which shows **OI** on the bridge. No clear conclusion can be drawn regarding his concrete activities or as a matter of fact regarding the period when the recording was made. ... "*[35] and as summarized above, the Judgment continues by stating that the video has no evidentiary value, and is of such nature that no conclusion on **OI**'s alleged position in the Bridge Watchers can be made. Thus, the Basic Court has assessed this piece of evidence.

The Court of Appeals opines the assessment *"... no evidentiary value is attached to these documents and recording*"[36] is in fully compliance with their nature. No positive conclusion incriminating the defendant can be made based on these pieces of evidence.

The Prosecutor avers the testimonies of witnesses **B R**, **G R**, **E B** and **SH** were not considered at all on the issue of the group of Bridge Watchers and **OI** as their leader. The Court of Appeals finds that in paragraph 18 of the Judgment are listed the witnesses whose testimonies have been heard during the main trial: 16) **BR**, 46) **GR**, 40) **EB** and 33) **SH**. From paragraph 347 to paragraph 355 of its Judgment the Basic Court gave explanation about the topics on which the witnesses' testified. In paragraph 356 the Basic Court considered "*The rest of witnesses' testimonies do not concern strictly the events on 3 February 2000, but rather the general context of the events or are meant to provide evidence on the Bridge Watchers' activities."*[37]

The Prosecutor submits that the omissions of the Basic Court in assessing the evidence resulted in erroneous and incomplete determination of the factual situation.

The Court of Appeals does not agree with this allegation. It is clear from Article 386 of the CPC that it is not sufficient for the appellant to demonstrate only an alleged error of fact or incomplete determination of fact by the trial Panel. Rather, as the criminal procedure code requires that the erroneous or incomplete determination of the factual situation relates to a "material fact", the appellant must also establish that the erroneous or incomplete determination of the factual situation indeed relates to a material fact, i.e. is critical to the verdict reached.[38] Furthermore, 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 trial Panel which is best placed to assess the evidence.

The applicability of this principle has been affirmed also in the jurisprudence of the Kosovo Courts. The Court of Appeals has, for example, ruled that: *"The law does not grant the parties the right to a second judgment of the same evidence as opposite to the review of the way it was*

[35] Judgment, paragraph 526
[36] Judgment, paragraph 526
[37] Judgment, page 128
[38] See also B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366, para. I. 3.

established. As it was affirmed previously by the Court of Appeals[39]*, the terms "erroneous determination of the factual situation" and "incomplete determination of the factual situation" are referred to errors or omissions related to "material facts" that are critical to the verdict reached*[40]*. Only if the first instance court committed a fundamental mistake while assessing the evidence and determining the facts the Court of Appeals will overturn the judgment*[41]*.*

Generally, 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 its evaluation. Even the examination of documents and other material evidence is in general more accurate in the trial because often that evidence has to be analyzed in relation with other elements and subject to oral explanations by witnesses or parties. Therefore, as affirmed by this court in other occasions[42]*, "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"*[43]*.*

The Supreme Court of Kosovo has frequently held that it must "*defer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so*." The standard which the Supreme Court applied was "*to not disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous*" (Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, para. 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, para. 30).

With the above in mind, the Panel has reviewed the assessment of the Basic Court with regard to the admissible evidence and finds the following: the Basic Court has thoroughly explained the assessment of the main witnesses in its Judgment.

In the Indictment, the Prosecutor alleges that both **DD** and **OI** acting in co-perpetration, upon a previously agreed common plan, and in the capacity – **DD** as M Police Commander of MUP and **OI** as a leader of the paramilitary Serbian group known as the "Bridge Watchers" – with the direct intent to compel ethnic Albanians by force to abandon their houses and leave the territory of Mitrovica North. The eventual intent was to murder or inflict bodily injury upon them, and in pursuance of this intent they incited/ordered the group of subordinate police officers and Bridge

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[39] PAKR 1121/12, Judgment dated 25 September 2013.

[40] 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.

[41] PaKr 1122/12, Judgment dated 25 April 2013.

[42] PAKR 1121/12, Judgment dated 25 September 2013.

[43] Court of Appeals Judgment PAKR 215/14, pages 9-10

Watchers to raid several buildings and to forcefully clear them of ethnic Albanians. As a result, several of them were murdered or seriously injured.

The Court of Appeals shares the most common opinion[44] that two conditions are needed in order for incitement to exist. The first condition is that those who are being incited and who become the perpetrator/s must not have yet formed a decision to commit a criminal act. Two situations are possible in that regard: that this person has not been thinking at all about committing the act or that this person did not have the intention to commit the act; and the second situation is that this person did have an idea about committing the act before the actions of the inciter, but the decision was strengthened only after the actions of the inciter. The second condition is that the inciter with intent[45] undertook a certain activity by which he formed or strengthened the decision on the part of the future perpetrator to commit the criminal act. The incitement includes also that somebody else will commit the criminal act.[46]

OI and **DD** are charged with successful incitement, in this particular case resulting in aggravated murders, attempted aggravated murders and attempted aggravated murders resulting in grievous bodily injuries. They are not charged with unsuccessful incitement[47] under Article 23 (2) of the CCSFRY (Article 31 (3) of the CCK) in which the offence is not even attempted. Therefore, not only the incitement must be proven beyond reasonable doubt but also that the act was committed or attempted.

The Basic Court has correctly established the criminal acts - aggravated murders, attempted aggravated murders resulting in grievous bodily injury, and attempted aggravated murders. None of the parties contested the factual situation regarding the casualties of the raids.

[44] See: Ljubisa Lazarevic, Commentary of the Criminal Code of FRY, Article 23, page 74, point 1

[45] Article 13 of the CCSFRY reads: A criminal act is considered committed with intent when the perpetrator was aware of his action and desired its commission; or when he was aware that due to his act or omissions a prohibited consequences can occur and accedes to its occurrence.

[46] See: Ljubisa Lazarevic, Commentary of the Criminal Code of the FRY, Article 23, page 75, point 3

[47] Ljubisa Lazarevic, Commentary of the Criminal Code of the FRY, Article 23, page 76, point 5 "Liability and punishability of the instigator is not, as a rule, based only on the action of instigation, but also on the participation in the commission of the criminal act, meaning that the decision formed by the instigator is in a way realized. In principle, the instigator is being punished for the same thing for which the perpetrator is being punished, thus for the commission of a criminal act, attempt of a criminal act and undertaking punishable preparatory actions. The law foresees one exception to this rule, regulated in paragraph 2 of this Article. It is punishment for the so-called **unsuccessful instigation**, which has the same characteristics as a successful instigation; … The difference is that there was no punishable conduct of the instigated person; he/she did not commence the act of commission of a criminal act or undertake a punishable preparatory action."

The Prosecutor further avers that the Judgment does not discuss the incitement by **OI** or **DD** at all, even though it is a central allegation of the Indictment. Thus, it has established the factual situation incompletely[48].

The Court of Appeals fully disagrees with the Prosecutor and finds his allegations groundless and without any merits. The Appellate Panel reiterates again that there is a major difference between a fact found not proven and a fact not discussed in the Judgment. Regarding the adjudication of the issue of incitement by **OI** in the activities described in the Count 2, the Panel notes that the Indictment qualified the alleged criminal acts as "*incitement to commit the criminal offence of aggravated murder ...*" and *"incitement to commit the criminal offence of attempted aggravated murder ..."*. The Incitement further describes the activity as "*incited/ordered"*.

Also, the "enacting clause" of the Judgment concludes that it could not have been established beyond reasonable doubt that "***OI*** *... incited/ordered the group..."* Thus, the issue of incitement is an integral part of the trial.

The Court of Appeals recalls that in the reasoning the Basic Court concluded that "... *the Panel cannot draw any positive conclusion regarding the perpetrators or regarding any involvement of the Defendants in the attack on the* ***A*** *family's apartment"*.[49] In relation to the **V** family the Basic Court concluded that "... *no connection to the Defendants can be established."*[50], and in relation to the **C** and **A** families that "...*no link can be established between the perpetrators of the attacks and in the building and the Defendants."*[51] In relation to the **S** family the Basic Court concluded that "... *the panel could not establish the involvement of the Defendants in the attack."*[52], and in relation to the **S** family that "...*no link can be established between the perpetrators and the Defendants."*[53] In relation to the **B**, **R** and **H** families the Basic Court concluded that "... *it cannot be established beyond a reasonable doubt that either* ***OI*** *or* ***DD*** *were in any way involved in the attack."*[54] Lastly, in relation to the **R** and **R** families the Basic Court found that "... *no link can be established between these attacks and the Defendants."*[55]

The Basic Court also assesses the "behaviour" of the defendants **OI** and **DD** during the activities described in the Court 2. In relation to **OI** the Basic Court found that "...*no link can be established between the behaviour displayed by the Defendant on the street and the attacks subject to the Indictment."*[56] In relation to **DD** the Basic Court found that "*The Panel cannot*

[48] Appeal of the Prosecutor, page 49, paragraph 128
[49] Judgment, paragraph 446.
[50] Judgment, paragraph 447.
[51] Judgment, paragraph 452.
[52] Judgment, paragraph 454.
[53] Judgment, paragraph 457.
[54] Judgment, paragraph 472
[55] Judgment, paragraph 475.
[56] Judgment, paragraph 482

*safely rely in the limited evidence presented above to establish beyond reasonable doubt that **DD** encouraged any person to conduct the attacks subject to the Indictment."*[57] To conclude the Basic Court states that "*... the evidence is found insufficient to prove beyond a reasonable doubt any involvement of either of the Defendants ... in the attacks."*[58]

Therefore, the Panel opines that upon the evaluation of the evidence, the Basic Court came to the right conclusion that there was no proven connection between the attackers and the defendants **OI** and **DD**. The Panel understands the establishment of "no link" also excludes the possibility of incitement or ordering.

The Prosecutor has challenged various aspects of the legal and factual findings by the trial Panel, as well as the reasoning of the Judgment. The Court of Appeal has carefully reviewed all of these challenges. Particularly, the Court of Appeals states the following:

The Panel recalls that the Basic Court has assessed the statements given by **SA** and **VA** and found them not credible. The discrepancies between **SA's** various accounts and also the discrepancies between his testimony given at the main trial and the testimonies of other witnesses are so grave that make his testimony not credible. The Court of Appeals fully concurs with the Basic Court of Mitrovica that **VA**'s testimony seems tailored after that of her husband, **S**, both in terms of content and regarding the general tenor of the evidence. It is properly considered that **AA** did not offer relevant details he witnessed personally on the critical night but states what he heard from his uncle **NA**. The Basic Court in a detailed manner evaluated the testimonies of **GX**, **RA** and **SA**. Based on them, especially on **GX's** testimony [59] who knew very well who the defendants were, the first instance Court properly concluded that, "*…cannot draw any positive conclusion regarding the perpetrators or regarding any involvement of the Defendants in the attack on the **A** family's apartment"*[60]. Further, the Court of Appeals opines that the statement of **NA** has a limited value and is contradicted by the reliable witnesses.

IM's testimony is not reliable. In the first place it is not corroborated with other evidence. In second place, when asked if KFOR vehicles nearby had their engines on or off, he replied "At that moment I could not hear from the noise". This means that he had limited ability to hear and understand what was said on the street. The assessment of the Basic Court with regard to this testimony is correct[61].

[57] Judgment, paragraph 503
[58] Judgment, paragraph 505
[59] Judgment, paragraph 442
[60] Judgment, paragraph 446
[61] Judgment, paragraph 480

The Basic Court reached the correct conclusion based on the testimonies of **HR** and **AS** that **OI** came to the building in which the apartments of the **B**, **Rr** and **H** families were located, around the time when KFOR forces arrived.[62]

No positive conclusion can be based on the testimonies of **SH** and **EB** that I incited/ordered the attack of their building. Properly no probative value was given to the account of **MH**. During the main trial she repeatedly said she did not remember. To the Prosecutor's question of whether she saw **OI** she answered "*I don't remember. I have forgotten.*"[63] At the time of the event she knew who O**I** was[64], and she knew him as resident of Mitrovica.

The Prosecutor's allegation[65] that the general cooperation between the Bridge Watchers and MUP was never discussed in the Judgment is also groundless. The Basic Court, in a detailed manner, discussed the alleged cooperation, coordination and the common planning from paragraph 533 to paragraph 542 of the Judgment. As mentioned above, the testimonies of Witness X and Witness Y were assessed in a detailed manner. The Basic Court properly decided that no positive conclusion can be based on them. The Court of Appeals reiterates that the negative outcome of the prosecution case does not mean that the Basic Court neglected the evidence.

New evidence

The Prosecutor in his appeal submits as new evidence the article X. The Prosecutor avers that in this article **OI** expresses his leadership over the Bridge Watchers.

Pursuant to Article 382 (3) of the CPC new evidence may be presented in the appeal.

The Appellate Panel rejects the motion for new evidence as unsubstantiated and also unnecessary. The Panel notes that a number of pieces of written evidence have already been admitted as evidence with regard to the alleged leadership of **OI** over the Bridge Watchers. The Panel also opines that the newly submitted evidence has no evidentiary value.

Conclusion

Finally, the Court of Appeals Panel would like to explain that the structure and leadership of the Bridge Watches (also the jacket of **OI**) and the cooperation of the Bridge Watchers with MUP are not of crucial importance for establishing whether **OI** and **DD** are guilty of the criminal offences of incitement to commit the offences of aggravated murder and incitement to commit the offence of attempted aggravated murder (also resulting in grievous bodily injury). **It is of**

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[62] Judgment, paragraph 468

[63] Minutes of the main trial, 1 December 2015, paragraphs 263-264

[64] Minutes of the main trial, 1 December 2015, paragraphs 312-315

[65] Appeal of the Prosecutor, page 62, paragraph 168

utmost importance that it was not proven beyond reasonable doubt that OI and/or DD incited/ordered the perpetrators to the incitement of aggravated murders and attempted aggravated murders as described in the Indictment. Even if it was established that **OI** was the leader of the Bridge Watchers, this would not engage his criminal liability if some of the Bridge Watchers have participated in the commission of the criminal offences of aggravated murder or attempted aggravated murder. The same applies to **DD** who at that time was the Mitrovica Police Commander of MUP. In order to be considered guilty, it should be proven beyond reasonable doubt that they incited or ordered the perpetrators to commit the criminal offences.

For all the above mentioned reasons the Court of Appeal confirms the Judgment of the Basic Court with regard to Count 2.

F. Findings on the merits – Count 3

In relation to Count 3 the Prosecutor claims:

- A substantial violation of the provision of criminal procedure under Article 383 (1.1) in conjunction with Article 384 (2.1) of the CPC;
- An erroneous or incomplete determination of the factual situation under Article 383 (1.3) in conjunction with Article 386 (3) of the CPC.

The Court of Appeals finds that the first instance Panel clearly and exhaustively elaborated the administered evidence. As stated above in relation to Count 2, the discrepancies between **SA**'s various accounts and also the discrepancies between his testimony given at the main trial and the testimonies of the other witnesses are so grave that they make his testimony not credible. The Court of Appeals fully concurs with the Basic Court of Mitrovica that **VA's** testimony seems tailored after her husband **S**'s, both in terms of content and regarding the general tenor of the evidence. It is properly considered that **AA** did not offer relevant details he witnessed personally on the critical night but states what he heard from his uncle **NA**. The Basic Court acted properly when it did not evaluate the testimony of **NA** since it is inadmissible in relation to Count 3. The Basic Court in a detailed manner evaluated the testimonies of **GX, RA** and **SA**.

The Panel of the Court of Appeals finds the decision of the Basic Court established on the administered evidence. The conclusion that it could not be proven beyond reasonable doubt that **NV**, **IV** or **AL**, acting in co-perpetration upon a previously agreed common plan, launched an attack with explosive devices on the **A** family's apartment is based on the reliable evidence.

For all the above mentioned reasons the Court of Appeal confirms the Judgment of the Basic Court with regard to Count 3.

VI. Closing remarks

With regard to the impugned Judgment of the Basic Court, the Court of Appeals for the reasons elaborated above partially grants the appeal of **OI** personally, filed on 18 April 2016, and the appeal of the defence counsels Nebojša Vlajić and Ljubomir Pantović on behalf of **OI**, filed on 18 April 2016, both in relation to Count 1. The Panel concludes that a new main trial before the Basic Court is necessary because of the Substantial Violation of the Provisions of Criminal Procedure. The Judgment is annulled in relation to Count 1 and the case is returned for retrial for this Count. Detention on remand against the defendant **OI** is extended until the Basic Court of Mitrovica renders a Ruling pursuant to Article 193 of the CPC.
The Panel rejects the appeal of the EULEX Prosecutor Romulo Mateus, filed on 19 April 2016 and confirms the Judgment in relation to Counts 2 and 3.

Done in English, an authorized language. Reasoned Judgment completed on 7 February 2017.

Presiding Judge

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Radostin Petrov
EULEX Judge

Panel member	Panel member
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Driton Muharremi Kosovo Court of Appeals Judge	Anna Bednarek EULEX Judge

Recording Officer

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Noora Aarnio
EULEX Legal Officer

COURT OF APPEALS OF KOSOVO
PAKR 299/16
19 December 2016