COURT OF APPEALS
PRISTINA

Case number: **PAKR 440/13**
Date: **11 August 2015**

Basic Court: **Pristina, P 448/2012**

Original: **English**

The Court of Appeals, in a Panel composed of EULEX Court of Appeals judge Radostin Petrov, as presiding and reporting judge, EULEX Court of Appeals judge Roman Raab and Kosovo Court of Appeals judge Tonka Berishaj as panel members, assisted by Alan Vasak, EULEX legal officer, acting in the capacity of a recording officer,

in the case concerning the defendant:

> **L.G.**, aka Commander "L.", Kosovo Albanian, father's name R., mother's name R. and maiden name S., born on [] in [], Municipality of [], [], currently residing in [], not in detention, ID [];
>
> **N.M.**, aka "D.", Kosovo Albanian, father's name H., mother's name S. and maiden name H., born on [] in [], municipality of [], [], [], currently residing in [], not in detention, ID [];
>
> **R.M.**, aka "R.", Kosovo Albanian, father's name M., mother's name N. and maiden name I., born on [] in [], [], currently residing in [], not in detention, ID [];

charged under the Special Prosecution Office of the Republic of Kosovo's (SPRK) amended indictment Hep. No. 65/2002 dated 30 June 2003, limited to Count 8 and the events alleged at the Llapashtica camp only, with the following criminal offence, prosecuted *ex officio*:

> *War Crime against the Civilian Population*, in particular, inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures intimidation and terror, and torture in violation of Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (Official Gazette SFRY No. 44 of October 8, 1976) (CCSFRY), in conjunction with Articles 22, 24 26 and 30 of the CCSFRY, because from October 1998 until late April 1999, L.G., N.M. and R.M., with superior and personal

liability, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians illegally detained in the detention center located at Llapashtica in an attempt to force those detainees to confess to acts of disloyalty to the KLA;

adjudicated in first instance by the Basic Court of Pristina with judgment P 448/2012, dated 7 June 2013,

by which the defendants L.G., N.M. and R.M. were found guilty of War crime against the civilian population, in particular, inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror, and torture in Violation of Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), in conjunction with Articles 22, 24, 26 and 30 of the CCSFRY, because from October of 1998 until late April of 1999, L.G., N.M. and R.M., with superior and personal liability, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians illegally detained in the detention center located in Llapashtica in an attempt to force those detainees to confess to acts of disloyalty to the KLA;
and by which L.G. was sentenced under count 8 to 5 (five) years of imprisonment, N.M. was sentenced under count 8 to 3 (three) years of imprisonment and R.M. was sentenced under count 8 to 4 (four) years of imprisonment. Pursuant to Article 48, paragraph 2 of the CCSFRY and Article 357, paragraph 5 of the LCP, the aggregate punishments were determined as follows: L.G. shall serve an aggregate punishment under Counts 5, 8 and 14 of 6 (six) years of imprisonment; N.M. shall serve an aggregate punishment under Counts 5 and 8 of 3 (three) years of imprisonment; R.M. shall serve an aggregate punishment under Counts 5 and 8 of 4 (four) years of imprisonment;

seised of the appeals filed by defense counsel Mexhid Syla and Bajram Tmava for the defendant L.G., defense counsel Fazli Balaj for the defendant N.M. and defense counsel Aziz Rexha for the defendant R.M.,

having considered the response of the SPRK,

having considered the motion of the appellate state prosecutor,

after having held a public session of the Court of Appeals on 29 July 2015,

having deliberated and voted on 30 July and 11 August 2015,

acting pursuant to Articles 370, 371, 372, 376, 377, 378, 379, 380, 381, 382, 384, 387, 388 and 390 of the Law on Criminal Proceedings (LCP),

renders the following:

JUDGMENT

I. The appeal of defense counsel Fazli Balaj for the defendant N.M. against the judgment of the Basic Court of Pristina P 448/2012 dated 7 June 2013 is dismissed as belated.

II. The appeal of defense counsel Mexhid Syla and Bajram Tmava for the defendant L.G. against the judgment of the Basic Court of Pristina P 448/2012 dated 7 June 2013 is partially granted, in so far as the time spent in detention on remand which shall be credited towards the sentence is to be included in the enacting clause. The remainder of the appeal is rejected as unfounded.

III. The appeal of defense counsel Aziz Rexha for the defendant R.M. against the judgment of the Basic Court of Pristina P 448/2012 dated 7 June 2013 is partially granted, in so far as the time spent in detention on remand which shall be credited towards the sentence is to be included in the enacting clause. The remainder of the appeal is rejected as unfounded.

IV. The judgment of the Basic Court of Pristina P 448/2012 dated 7 June 2013 is modified in its enacting clause. The time the defendants L.G. and R.M. spent in detention on remand which shall be credited towards the sentence shall be included as follows:

> **Pursuant to Article 50 §1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia the time the defendant L.G. spent in detention from 28 January 2002 until 23 July 2005 and from 3 October 2009 until 9 June 2010 shall be credited towards the sentence.**
>
> **Pursuant to Article 50 §1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia the time the defendant R.M. spent in detention from 11 August 2002 until 23 July 2005 shall be credited towards the sentence.**

V. The judgment of the Basic Court of Pristina P 448/2012 dated 7 June 2013 is *ex officio* modified in its enacting clause. The time the defendant N.M. spent in detention on remand which shall be credited towards the sentence shall be included as follows:

Pursuant to Article 50 §1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia the time the defendant N.M. spent in detention from 28 January 2002 until 23 July 2005 shall be credited towards the sentence.

VI. In the remaining parts the judgment is affirmed.

REASONING

I. PROCEDURAL BACKGROUND

The original indictment was filed against the defendants L.G., N.M. and R.M. on 19 November 2002 in the District Court of Pristina, subsequently amended on 4 February and 30 June 2003, alleging a number of counts of War Crimes Against the Civilian population contrary to the Criminal Code of the Socialist Federal Republic of Yugoslavia (hereinafter the 'CCSFRY') Article 142 pursuant to UNMIK Regulation 1999/24 as amended by UNMIK Regulation 2000/59. It is the amended indictment of 30 June 2003, Count 8 that is now placed before this panel; L.G. already being subject to a final guilty verdict on Counts 5 and 14 and N.M. and R.M. both already being subject to a final guilty verdict on Count 5 of the said amended indictment.

The first instance (original) trial was held at Pristina District Court which issued its verdict on 16 July 2003, which dismissed several charges completely and several elements of some charges and convicted all three defendants on the remaining elements for the criminal offence of War Crimes Against the Civilian Population, sentencing them as follows: L.G. 10 years, N.M. 13 years and R.M. to 17 years imprisonment.

After a defence appeal against all convictions and a prosecution appeal against the sentence for L.G. only, the Supreme Court of Kosovo in case Ap Kz 139/2004 issued its decision dated 21 July 2005 in which it 'cancelled in their entirety' Counts 1, 2, 3 and 12, acquitted the defendants for Count 11 and sent the remaining Counts back for re-trial.

The first re-trial panel in 2009 (P526/05) heard the re-trial, fully receiving evidence afresh on Count 5, 9 and 14 of the amended indictment of 30 June 2003 [NOTE: there had been a proposed further amended indictment filed on 14 April 2009, but that was rejected by the re-trial panel and therefore requires no further comment]. On Count 8 the first re-trial panel determined that the evidence had already been properly and lawfully received and thus confined itself to re-consideration of the sentence. During the proceedings, the prosecutor withdrew Count 9.
On 2 October 2009 the first re-trial panel convicted the defendants as follows:

a. L.G. of War Crimes Against the Civilian Population on Count 5 (sentence 2 years imprisonment), Count 8 (sentence 5 years imprisonment) and Count 14 (sentence 2 years imprisonment) - aggregate sentence 6 years imprisonment.
b. N.M. of War Crimes Against the Civilian Population on Count 5 (sentence 1 year 6 months imprisonment) and Count 8 (sentence 3 years imprisonment) - aggregate sentence 3 years imprisonment.
c. R.M. of War Crimes Against the Civilian Population on Count 5 (sentence 2 years imprisonment) and Count 8 (4 years imprisonment) - aggregate sentence 4 years.

On 15, 16, and 18 February 2010, all three defendants appealed the convictions and sentence. The prosecutor did not appeal against the sentences.

On 26 January 2011 (Ap Kz 89/2010) the Supreme Court issued its verdict in which the first instance re-trial decisions on Count 5 and 14 were confirmed. Those convictions and sentences became final. The Supreme Court however quashed the conviction on Count 8 and returned it to the District Court for a second re-trial. The basis of that decision was the failure of the first re-trial panel to hear the witnesses afresh on Count 8. The original 2003 trial panel convicted upon Count 8 of the amended indictment of 30 June 2003 with regards to the events at Llapashtica detention centre only. The panel acquitted the defendants regarding the events within the count relating to Majac and Potok. That verdict was considered by the Supreme Court in its decision 21 July 2005 and it concluded that the evidence had been properly and lawfully received in accordance with the Procedural Code. Yet despite that, the Supreme Court remitted the Count back to the first instance court for re-trial on the grounds that the original verdict 'treated the various counts in the indictment as one singular war crime as to each defendant'. The first re-trial panel with regard to this Count considered its obligation pursuant to the Supreme Court's decision to be limited to the question of sentence, but that consideration of the Count remains limited only to events at Llapashtica because the acquittal relating to events at Majac and Potok remains final. As a result of this stance, the first re-trial panel failed to hear the witnesses afresh, convicted the defendants and re-considered the sentences imposed. The task of the second re-trial panel was to only re-try Count 8, limited to the events at Llapashtica, and to re-examine the relevant witnesses again (subject to any agreement between the parties to read witnesses' records into the record, or to order witnesses' records into the record on grounds such as death or untraceability.) Furthermore, as the prosecution did not appeal the sentence imposed, the second re-trial panel was limited by way of maximum sentence to the sentence imposed on this Count by the first re-trial panel. Having undertaken that task, the second re-trial panel then considered the appropriate aggregate sentence for each defendant.

On 26 February 2013 the second re-trail panel held the pre-trial hearing and main trial hearings open to the public commenced on 25 March 2013 and continued on 26, 27 March, 11 April, 7, 8, 10 and 22 May and 4 and 7 June 2013, as well as a partially closed session on 11 April 2013.

The deliberation and voting was held on 6 June 2013 and the verdict was announced on 7 June 2013 in open court.

The written judgment was served to the defendant L.G. on 24 September 2013 and to his defence counsel Mexhid Syla and Bajram Tmava on 24 September 2013. The defendant, through his defence counsel, appealed the judgment, filed on 8 October 2013.

The written judgment was served to the defendant N.M. on 28 September 2013 and to his defence counsel Fazli Balaj on 9 October 2013. The defendant, through his defence counsel, appealed the judgment, filed on 22 October.

It is unclear from the delivery slip when the written judgment was served to the defendant R.M.. The written judgment was served to his defence counsel Aziz Rexha on 4 October 2013. The defendant, through his defence counsel, appealed the judgment, filed on 16 October 2013.

On 12 November 2013 the SPRK filed a response to the appeal.

The case was transferred to the Court of Appeals for a decision on the appeal on 14 November 2013.

On 29 November 2013 the appellate state prosecutor filed a motion.

The session of the Court of Appeals Panel was held on 29 July 2015 in the presence of the defendants, their defence counsel (Rame Gashi for N.M.) and the appellate state prosecutor Claudio Pala.

The Panel deliberated and voted on 30 July and 11 August 2015.

II. SUBMISSIONS OF THE PARTIES

A. Appeal of the defence on behalf of the defendant L.G.

Defence counsel Mexhid Syla and Bajram Tmava on 8 October 2013 filed an appeal dated 7 October 2013 with the Basic Court on behalf of the defendant L.G. on the grounds of:

- Substantial violation of the provisions of criminal procedure
- Erroneous or incomplete determination of the factual situation
- Violation of the criminal law
- Error in the decision on criminal sanctions

The defence submits that the examination of protected or anonymous witnesses during the pre-trial stage violated the legal provisions regulating this procedure, as the witnesses were examined without the presence of the defense counsel, were blackmailed with different promises, and in many cases were not examined in their mother tongue, but through interpreters who did not speak the Albanian language. This relates in particular to witness 7 R.B. and witness 4 A.A. Furthermore, the material evidence during the pre-trial proceedings was provided in an unlawful manner. The defendant was also denied the guaranteed right by the Constitution and the international conventions for a fair trial within a reasonable time.

Concerning violations of the provisions of criminal procedure, the defence submits that the judgment exceeded the scope of the indictment, in violation of paragraph 1.9 of Article 364 LPC. If one carefully analyzes the enacting clause of the indictment and the enacting clause of the judgment, it is clear that the indictment was exceeded due to the attribution of acts by the defendants in the judgment, which were not foreseen in the indictment.

Furthermore the enacting clause of the judgment is unclear and confusing, due to the following wording: "with superior and personal liability, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians."

The defence further submits that it is unacceptable that after three main trials in the first instance and two main trials in the second instance, the other individuals the defendants allegedly cooperated with, still have not been identified.

The Basic Court in the impugned judgment manipulates the general term regarding the "Albanian civilians" who were subject to the suffering and torture, due to not specifying who those Albanians were and what the level of the committed torture was.

Furthermore, in the reasoning of the judgment nothing is stated regarding the superior and personal liability of the defendant L.G. There are contradictions even among the records of the main trial, the evidence elaborated during those trials and what is stated in the reasoning of the appealed judgment.

The defence contends that the diary of the defendant L.G., which was lost, is the main piece evidence which supports his defence and confirms his alibi.

The defence further submits that the provisions of the criminal procedure code were violated when the other evidence was assessed by the Basic Court, as this was done according to double criteria focusing on incriminating the defendant.

With regard to the erroneous and incomplete determination of the facts, the defence contends that the Basic Court did not evaluate all the evidence administered during trial in a fair manner and as a whole. The evidence does not confirm that the defendant L.G. ordered and participated in the beating and torturing of Kosovo Albanian civilians. On the contrary, the administrated evidence confirms that he had no commanding authority and also had nothing to do with the detained persons. The evidence confirms that he used to be the chief of the information center. He had no commanding authority regarding the supervisors of the detained persons.

The defence further points out that there are discrepancies with regard to many circumstances between the statements of witness R.B. given during the investigation and the statements given during the main trial sessions. Given these discrepancies, the defence argues that the testimonies of witness R.B. have no legal validity and a conviction therefore cannot be based on his statements.
The defence further submits that the Basic Court should have declared the testimony of witness A.A. given to the pre-trial judge on 18 October 2002 as inadmissible evidence, as it was taken contrary to the legal provisions regarding witness' examination.
The defence also considers that from the statements of other witnesses "C, P, I, J, H, D, E, G, F and M" no concrete circumstances have been proven. The defence reiterates its position that the Basic Court should have assessed these statements as circumstantial evidence because all these witnesses in their testimonies gave account of what they were told by other persons, not about what they saw or heard themselves. With regard to to the other group of witnesses: V.J., K.H., G.Z., N.I., K.K. etc., the Basic Court has assessed their testimonies in a biased manner and to the detriment of the defendant L.G.
With regard to violations of the criminal law, the defence contends that the Basic Court erred in law when finding the defendant L.G. guilty for the criminal offense of War Crime under Article 142 CCSFRY in the capacity of co-perpetrator with other accused, while the criminal liability is also connected to Article 26 CCSFRY, which relates to criminal association.
The defense further submits that the defendant L.G. was a KLA member, but that this in no way implies he was a member or founder of a criminal organization or enterprise, as specified in Article 26 CCSFRY.
The Basic Court also holds the defendants criminally liable as co-perpetrators, pursuant to Article 22 CCSFRY). However, since they are also being held liable according to Article 26 CCSFRY, they cannot be held liable according to Article 22 CCSFRY as co-perpetrators as well, because liability according to Article 26 CCSFRY absorbs the liability according to Article 22 CCSFRY.
Furthermore, a violation of the criminal law also occurred when the defendant L.G. was found guilty for three criminal offences of War Crimes against Civilian Population, which should have been treated as one single criminal offence.
The criminal law was also violated due to the calculation of the imposed detention on remand not being specified in a clear manner.
Finally, as to the decision on criminal sanctions, the defence contends the imposed punishment is neither fair nor lawful. In this particular case any punishment is unlawful and a just and lawful verdict would only be a judgment of acquittal.

For all these reasons, the defence requests the Court of Appeals to modify the judgment and to acquit L.G.

B. Appeal of the defence on behalf of the defendant N.M.

Defence counsel Fazli Balaj on 22 October 2013 filed an appeal dated 22 October 2013 with the Basic Court on behalf of the defendant N.M. on the grounds of:

- Substantial violation of the provisions of criminal procedure
- Erroneous or incomplete determination of the factual situation
- Violation of the criminal law
- Decision on criminal sanction

Concerning violations of the provisions of the criminal procedure, the defence submits that the judgment is not comprehensible and that the criminal offence for which the defendant N.M. was found guilty is unclear; as a consequence the impugned judgment should be annulled.
With regard to the erroneous and incomplete determination of the facts, the defence opines that the Basic Court did not evaluate all the evidence administered at the trial in a fair manner. No witness has ever mentioned that the defendant N.M. has ordered or participated in the abuse and torture of the detained civilians.
Regarding the violations of the criminal law, the defence contends that the Basic Court erred when it found the defendant N.M. guilty for the criminal offense he is charged with.
Finally, as to the decision on criminal sanctions, the defence contends that the imposed punishment is neither fair nor lawful.

For all these reasons, the defence requests the Court of Appeals to annul the judgment and return the case for retrial or modify the judgment and to acquit the defendant N.M.

C. Appeal of the defence on behalf of the defendant R.M.

Defence counsel Aziz Rexha on 16 October 2013 filed an appeal dated 14 October 2013 with the Basic Court on behalf of the defendant R.M. on the grounds of:

- Substantial violation of the provisions of criminal procedure
- Erroneous or incomplete determination of the factual situation
- Violation of the criminal law
- Decision on criminal sanction

The defence submits that no statement of any witness implicates that the defendant R.M. was involved in the criminal offense of War Crime against the Civilian Population. The defence reiterates that the trial against him is of a political nature. The defence contends that in the impugned judgment neither evidence nor explanations are presented regarding the intent, actions or omissions of the defendant R.M.
With regard to the violations of the provisions of the criminal procedure, the defence submits that the judgment exceeded the scope of the indictment, in violation of paragraphs 1.9, 1.11 and 2 of Article 364 LPC. If one carefully analyzes the enacting clause of the indictment and the

enacting clause of the judgment, it can be established without doubt that the indictment is exceeded due to attributing to the defendants actions that the prosecutor did not foresee in his indictment. Furthermore, the enacting clause of the judgment is unclear and confusing.
The defence contends that in the impugned judgment the court failed to elaborate on the co-perpetration, pursuant to Article 22 CCSFRY, the assistance, pursuant to Article 24 CCSFRY, as well as other legal provisions which were mentioned in the enacting clause.
The facts presented in the reasoning of the judgment are not correct, because the defendant did not "admit that he was a commander in Lapashtica region". This statement is incorrect and biased because the defendant R.M. was the commander for the entire ZOLL (Operative Zone of Llap), and not only for Lapashtice village. Furthermore, there is not even a single sentence with regard to the supposed incriminating actions the defendant R.M. is charged with. The defendant R.M. cannot be held responsible for anything that happened at the detention center in Lapashtica, because he was not aware and not informed by his subordinates, who, in the chain of command, had the direct authority and responsibility. With regard to the lack of reasoning concerning the command responsibility, the defence refers to the case-law of the ICTY.
Regarding the erroneous and incomplete determination of the facts, the defence opines that the Basic Court did not evaluate all the evidence administered at the trial in a fair manner and as a whole. The factual situation has been determined in an erroneous manner and to the detriment of the defendant R.M. The defendant R.M. was neither aware nor able to know that his subordinates might have committed the criminal offence as stated in the enacting clause and in the reasoning of the impugned judgment.
The defence submits that the judgment does not produce any evidence that would indicate beyond any suspicion that the defendant R.M. was managing an illegal detention regime of beatings and torture.

With regard to violations of the criminal law, the defence contends that the Basic Court erred in law when finding the defendant R.M. guilty for the criminal offense of War Crime under Article 142 CCSFRY in the capacity of co-perpetrator with other accused. Furthermore, the defence claims that Article 26 CCSFRY is applied improperly.

Finally, as to the decision on criminal sanctions, the defence contends the imposed punishment is neither fair nor lawful. In this particular case any punishment is unlawful and a just and lawful verdict would only be a judgment of acquittal.

For all these reasons, the defence requests the Court of Appeals to modify the judgment and to acquit the defendant R.M.

D. Response of the SPRK

The special prosecutor on 12 November 2013 filed a response to the appeals of the defence and requests the Court of Appeals to reject the appeals as unfounded and affirm the judgment of the Basic Court.

The special prosecutor states that each of the appeals fails to substantiate an error in the judgement which would warrant a successful appeal. There are no grounds for overturning the verdict of the Basic Court and to send the case back for retrial. He opines that the appeals exemplify not that the Basic Court has erred either in its handling of the main trial or in the drafting of its judgement, but simply that the defendants disagree with the decision that has brought their impunity for the commission of this criminal offence to an end.

E. Motion of the Appellate Prosecution Office

Appellate Prosecutor on 29 November 2013 filed a motion requesting the Court of Appeals to reject the appeals filed on behalf of the defendants L.G. and R.M. as unfounded and to reject the appeal filed on behalf of the defendant N.M. in accordance with Article 382 LCP as being late. In his detailed motion the EULEX Prosecutor elaborates on the raised issues in the appeals; Substantial violations of the provisions of criminal procedure, Erroneous or incomplete determinations of the factual situation, Violations of the criminal law and the Decision on criminal sanction. The Appellate Prosecutor states that no substantial violations of the provisions of criminal procedure were made by the Basic Court. He further contends that contrary to what the defendants argue, the Basic Court correctly assessed the factual situation and did not violate the criminal law as raised by the appeals. He also opines that the decision on the Criminal Sanction was not wrongful as stated in the appeals. Therefore he motions the Court of Appeals to reject the appeals.

III. FINDINGS OF THE PANEL

A. Applicable Procedural Law in the Case

The indictment in the case was filed with the District Court of Pristina on 19 November 2002 and amended on 4 February 2002 and 30 June 2003, before the entry into force of the Provisional Criminal Procedure Code of Kosovo, which was in force from 6 April 2004 until 31 December 2012.

The Provisional Criminal Procedure Code of Kosovo included a transitional provision in Article 550, pursuant to which all criminal proceedings in which the indictment was filed prior to Provisional Criminal Procedure Code of Kosovo entering into force and were not completed by 6

April 2004 were to be continued according to the provisions of the previously applicable law (Law on Criminal Proceedings, 1986) until the judgment rendered at main trial became final.

On 1 January 2013 a new procedural law entered into force in Kosovo – the Code of Criminal Procedure, criminal law no. 04/L-123. This Code repealed the Provisional Criminal Procedure Code of Kosovo. The new Code applies in all on-going criminal proceedings initiated prior to its entry into force except in the cases where the main trial commenced before 1 January 2013 or where a case was returned for re-trial (See also Legal Opinion of the Supreme Court no. 56/2013 adopted in its General session on 23 January 2013).

In the case at hand the applicable procedural law pursuant to the newly applicable CPC would thus be the Provisional Criminal Procedure Code of Kosovo, because the trial in this case commenced prior to the entry into force of the CPC. The Provisional Criminal Procedure Code of Kosovo via Article 550, as noted, however derogates to the Law on Criminal Proceedings, 1986, therefore pursuant to Article 550 Provisional Criminal Procedure Code of Kosovo the applicable procedural law in this case remains to be the Law on Criminal Proceedings, 1986. The Court of Appeals accordingly conducted the proceedings pursuant to the Law on Criminal Proceedings.

B. Competence

Pursuant to Article 117 LCP the Panel has reviewed its competence and since no formal objections were raised by the parties the Panel will suffice with the following. In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, 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 one Kosovo judge and two EULEX judges.

C. Admissibility of the appeal

a. The appeal filed on behalf of the defendant N.M.

The Panel notes that the impugned judgment was served on the defendant N.M. on 28 September 2013. The impugned judgment was further served on his defence counsel Fazli Balaj on 9 October 2013. The appeal filed by defence counsel Fazli Balaj on behalf of the defendant N.M. is dated 22 October 2013, as can be seen on the appeal itself.

Pursuant to Article 359 of the Law on Criminal Proceedings, the parties may file an appeal against a judgment within fifteen (15) days of being served with the judgment. Pursuant to

Article 123 of the Law on Criminal Proceedings, when a decision is served both on the defendant and his defence counsel, the prescribed period of time for pursuing a legal remedy shall commence on the date when the document is served on the defendant.

In this case nothing indicates that the defendant or his defence counsel were in any way prevented from being able to effectively use the right to appeal within the time limits. The 15-days deadline for filing an appeal therefore expired on 13 October 2013. The appeal on behalf of the defendant was only filed on 22 October 2013, and is therefore belated.

Accordingly, the Panel of the Court of Appeals finds the appeal of defence counsel Fazli Balaj filed on 22 October 2013 on behalf of the defendant N.M. as belated and therefore will not adjudicate on the merits of his case.

b. The appeals filed on behalf of the defendants L.G. and R.M.
The appeals of defense counsel Mexhid Syla and Bajram Tmava for the defendant L.G. and defense counsel Aziz Rexha for the defendant R.M. are admissible. The appeals were filed within the 15-day deadline pursuant to Article 359 of the Law on Criminal Proceedings. The appeals were filed by authorized persons and contain all other relevant information pursuant to Article 360 and 362 LCP.

D. Determination of the factual situation

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

Before assessing the merits of the arguments presented by the defence on the alleged erroneous or incomplete determination of facts, the Panel reiterates the standard of review regarding the factual findings made by the trial panel.

It is clear from Article 366 LCP 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.[1] 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 Supreme Court of Kosovo has frequently held that it must "*defer to the assessment by the trial panel of the credibility of the*

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

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).

The Basic Court in the impugned judgment in detail analyses the evidence administered during the main trial. The Panel examined the thorough analysis of the witness statements which is set out in paragraphs 34 to 101 of the impugned judgment (English version pagination). In the view of the Panel, the Basic Court comes to logical conclusions in its assessment of that evidence and finds no contradiction in the stance of the Basic Court. The Panel furthermore autonomously reviewed all the evidence. After this careful evaluation the Panel is still fully persuaded by the conclusions and reasoning of the Basic Court. The Panel finds that there is sufficient evidence to proof beyond a reasonable doubt that the defendants are guilty of War crime against the civilian population, in particular, inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror, and torture in Violation of Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), in conjunction with Articles 22, 24, 26 and 30 of the CCSFRY, because from October of 1998 until late April of 1999, L.G., N.M. and R.M., with superior and personal liability, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise - as for the joint criminal enterprise it was already established by the Supreme Court (judgment Ap.-Kz. No. 89/2010, 26 January 2011) regarding Count 5 - ordered and participated in the beating and torture of Kosovo Albanian civilians illegally detained in the detention center located in Llapashtica in an attempt to force those detainees to confess to acts of disloyalty to the KLA.
The Panel therefore does not see a need to repeat the complete detailed analysis of the Basic Court. The Panel will however elaborate on the following.

a. Admissibility of the witness statements
The defence argues that the examination of certain protected and anonymous witnesses during the pre-trial stage violated the legal provisions regulating this procedure. The Basic Court in paragraphs 5 to 8 of the impugned judgment (English version pagination) in detail elaborates on the issue of admissibility of the witness statements and also refers to earlier decisions taken by the Basic Court prior to the judgment. As was agreed by all parties, the written evidence of witnesses H, J, D, E, G, F, V.J., M, F.M., K.H., G.Z., K.K. and N.I. was admitted as evidence by the Basic Court. The Basic Court further found that the initial police statements of witnesses R.B., C, D, E, F, G, H and P would not be used for evidence. With regard to the witness statements before the investigating judge, the Basic Court ruled that the statement of R.B. before

the Investigating Judge on 23 August 2002 is admissible, that the statement of A.A. before the Investigating Judge on 14 May 2002 is inadmissible and that the statement of A.A. before the Investigating Judge on 18 October 2002 is admissible. After careful consideration of the witness statements and procedure, the Panel fully concurs with the assessment made by the Basic Court and affirms the decisions. With regard to the statement of R.B. the Panel specifically reiterates the decision of the Basic Court delivered orally on 4 April 2013, namely that what happened during the interview appears to have been a free voluntary account of the witness as to what happened in Lapashtica and that no breaches were made by the investigating judge.[2] As with regard to the statement of A.A. the Panel concurs with the decision of the Basic Court to exclude the statement given on 14 May 2002 as the defence was not present. The Panel furthermore concurs with the decision of the Basic Court that there are no grounds however to exclude the statement given on 18 October 2002, as the witness was heard in the presence of the defence on that occasion.

b. Credibility and reliability of the witnesses

The defence challenges the credibility and reliability of the incriminating statements of the witnesses, in particular witnesses R.B. and A.A. The appeal of the defence elaborates on the inconsistencies and contradictions of the witness statements, predominantly regarding the evidence given by the witnesses concerning the forced detainment at the detention center in Lapashtica and the beatings of the detainees.

As a general remark concerning witness statements the Panel notes that it is well aware of the difficulties associated with identification and/or recognition evidence and that it must carefully evaluate any such evidence, before accepting it as a basis for sustaining a conviction.[3] With this in mind the Panel has carefully analyzed the statements of the witnesses in this criminal proceeding along with the reasoning of the Basic Court in the impugned judgment. The Panel further has carefully reviewed the arguments presented in the appeals, the replies and the motion of the appellate prosecutor.

Although the Basic Court did not explicitly link the evidence of the incriminating, statements of R.B. and A.A. with other specific evidence, the statements find enough support in the evidence presented by the Basic Court in its reasoning throughout paragraphs 34 to 101 of the impugned judgment (English version pagination).

The testimony of Witness 7 R.B.

---

[2] Minutes of the Main Trial 4 April 2013, page 7-8.

[3] *Prosecutor v. Kupreskic et al. (Appeal Judgment)*, IT-95-16-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 23 October 2001, paragraphs 34-41. *Prosecutor v. Clément Kayishema and Obed Ruzindana (Trial Judgment)*, ICTR-95-1-T, International Criminal Tribunal for Rwanda (ICTR), 21 May 1999, paragraphs 71-72. *Prosecutor v. Haradinaj et al. (Trial Judgment)*, IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008, paragraph 29.

R.B. states that he was held at detention center in Lapashtica and that during his second interrogation (end of November/beginning of December 1998) N.M. and L.G. were the ones interrogating him; L. was interviewing and N. beat him up.[4] R.B. further states he was released on 31 December 1998. Two days before that he was interrogated for the third time. It was L. and N.M. who conducted the interrogation. He was beaten too. Other detainees included H.H., I.S., A.T.M., N.H., M., A.X. and two brothers. R.B. confirms that these detainees were beaten too. Beatings would also sometimes occur within the stable form other KLA soldiers, and the detainees were sometimes made to beat each other.[5]

During the second re-trial on 2013 R.B. denied that there were any beatings in Llapashtica, as he also denied during the trials in 2003 and 2009. The Court of Appeals opines that the Basic Court properly assessed the different and contradictory testimonies of R.B. With the Basic Court, the Panel finds that R.B.'s accounts during the main trial in 2003, 2009 and 2013 in which he denies that any improper treatment, beatings or torture occurred at Llapashtica detention centre, are manifestly false. The evidence that R.B. gave in his original account is corroborated by the accounts of other witnesses which the Panel accepts as truthful. These witnesses are:
Witness I (brother of A.M.) – A.M. (T.) told Witness I about the detention in Llapashtica. A.M. (T.) head been tortured and all had been emotionally and physically maltreated. A. had scars and bruises on his front and back. A. said that L.G. had beaten him.[6]
Witness J (sister of A.M.) – A. told Witness J that he and other defendants had been maltreated by L.G. and A. showed his family his scars.[7]
Witness P – brother of I.S. – The letter from I. read L.G. is maltreating and abusing him.[8]

The testimony of Witness 4 A.A.
A.A. states that he was held at detention center in Lapashtica and that he was immediately beaten by the military police.[9] The other prisoners present included: N.H., H. from B., B. from Pristina, I.S., A.M., M. from Kerpime, M. from Dvrishta and M. from Podujeva.[10] After several days, A. was beaten again by the Military Police with batons and electricity. A. witnessed others being taken for questioning and saw and discussed their injuries form the beatings.[11]A. was released about 23 March and at that time prisoners included V.J., A.K., H., D. and others.[12]

[4] Statement to Investigating Judge 23 August 2002, page 7, 8 and 9.
[5] Statement to Investigating Judge 23 August 2002, page 17 and 19.
[6] Statement to Investigating Judge 20 February 2002, page 7. Minutes of the Main Trial 20 June 2003, page 5 and minutes of the Main Trial 11 April 2013, page 7-8.
[7] Statement to Investigating Judge 19 February 2002, page 7.
[8] Statement to Investigating Judge 7 March 2002, page 4. Minutes of the Main Trial 6 May 2003, pages 4 and 6.
[9] Statement to Investigating Judge 18 October 2002, page 3.
[10] Statement to Investigating Judge 18 October 2002, page 3-4.
[11] Statement to Investigating Judge 18 October 2002, page 5-7 and 9-10.
[12] Statement to Investigating Judge 18 October 2002, page 12-13.

During the second re-trial on 2013 A.A. denied that there were any beatings in Llapashtica, as he also denied during the trials in 2003. The Court of Appeals opines that the Basic Court properly assessed the different and contradictory testimonies of A.A. With the Basic Court, the Panel finds that A.A.'s accounts during the main trial in 2003 and 2013 in which he denies that any improper treatment, beatings or torture occurred at Llapashtica detention centre, are manifestly false. The evidence that A.A. gave in his original account is corroborated by the accounts of other witnesses which the Panel accepts as truthful. These witnesses are:
Witness D (wife of A.K.) – A. told Witness D, in a secret meeting arranged by Commander Y., that he was detained in Llpashtica, the conditions were very bad and that L.G. "is killing him". A. was tired, pale, and had bruises.[13]
Witness E (daughter of A.K.) – Y. arranged a secret meeting between A. and his family. Witness E describes the condition of her father as very bad, all swollen, he was trembling and his hands were covered in blood. He was crying, saying that "they are beating me, they are killing me, L. is beating me and making others beat me."[14]
Witness F (nephew of A.K.) – A.'s hands were black and he looked as if he had been beaten.[15]
Witness G (daughter of A.K.) – Y. arranged a secret meeting between A. and his family. Witness F describes that A. had had wounds. A. was crying.[16]
Witness H (son of D.B.) – G. had a distinctive mole on his cheek. When D. was questioned, witness H was able to see from his room and look through a window. He saw L.G. holding a gun to his mother.[17] Witness H saw another detainee at the detention center called I.S.[18]
Witness V – Witness V went to Llapashtica with his son and his father. Having identified himself to the soldiers he was put in a room with 12-13 other detainees. He was beaten on the first night. He remembers A.A. was detained with him.[19]

c. Diary of L.G.
The defence submits that due to the diary being lost at some stage between the first trial in 2003 and the re-trial in 2009, the defendant L.G. was harmed in his defence.

The Panel concurs with the conclusion of the Basic Court that no substantial prejudice can be caused to the defendant L.G. by the absence of his diary, as set out in paragraph 9 of the impugned judgment (English pagination version). The diary merely contains a personal account of the events that occurred. This is not objective evidence, yet simply another source of the

[13] Statement to Investigating Judge 12 February 2002, page 12-13. Minutes of the Main Trial 7 April 2003, pages 8-9.
[14] Statement to Investigating Judge 12 February 2002, page 5-6. Minutes of the Main Trial 8 April 2003, pages 5-8.
[15] Statement to Investigating Judge 13 February 2002, page 2-4.
[16] Statement to Investigating Judge 14 February 2002, page 8 and 13. Minutes of the Main Trial 8 April 2003, pages 15-17.
[17] Statement to Investigating Judge 5 February 2002, page 10. Minutes of the Main Trial 5 May 2003, page 4.
[18] Statement to Investigating Judge 5 February 2002, page 11.
[19] Statement to Investigating Judge 1 March 2002, page 5.

statement of the defendant L.G. With the Basic Court, the Panel therefore finds that the absence of the diary does not prevent a fair trial for the defendant L.G.

d. Roles of the defendants

The Panel notes that the specific role, and thus the liability, of each defendant has been described specifically in the reasoning of the impugned judgment of the Basic Court. The Panel affirms this assessment.

As specified in paragraph 102 (English pagination version) there is sufficient evidence that the defendant L.G. bears both command and direct personal liability for directing the illegal detentions, beatings and torture of detainees and personally engaging in questioning victims whilst they were beaten, as he was the Chief of Military Intelligence for the Llapi zone and thus was centrally involved in the operation of the detention center in Llapashtica.

With regard to the defendant R.M., paragraph 104 of the impugned judgment (English pagination version) specifies that the defendant R.M. was zone commander of the Llapi zone and responsible for and directed the regime of illegal detention, beatings and torture and was fully aware that such conduct was occurring under his authority.

e. Conclusion

In conclusion, the Panel is satisfied that the Basic Court completely and correctly established the factual situation and that the arguments raised in the appeals do not undermine these findings. This ground of the appeal of the defence is therefore rejected as unfounded.

E. Armed conflict

The Panel concurs with the reasoning of the Basic Court that an ongoing armed conflict existed in Kosovo, including the detention center located at Llapashtica, between October 1998 until late April 1999 when the criminal offence was committed. Moreover, the nexus between the conduct of the defendants and the said armed conflict has also been correctly established by the Basic Court, as well as the status of the victims. Seeing as the defence did not dispute the existence of the armed conflict, nor the elements of the underlying offence, the Panel will refrain from further elaboration on this issue. The Panel affirms the findings of the Basic Court, as set out at paragraphs 24 to 27 of the impugned judgment (English version pagination).

F. Joint criminal enterprise

The defence submits that the defendants cannot have been part of a joint criminal enterprise, seeing as they acted for the KLA and the KLA cannot be qualified as a joint criminal enterprise.

As was explicitly stressed in all the previous decisions so far, the actions of the defendants are subject of review and not the actions of the KLA as a whole. The KLA is therefore not to be

qualified as a joint criminal enterprise; rather the collaboration between the defendants, and other unknown perpetrators, amongst each other is to be regarded as the joint criminal enterprise. The Basic Court in a clear manner elaborated on this in paragraphs 105 to 108 of the impugned judgment (English pagination version) and the Panel adopts this assessment in its entirety.

G. Enacting clause

a. Exceedance of the indictment

The defence asserts that the scope of the indictment was exceeded as the enacting clause of the impugned judgment attributed actions to the defendants they were not charged with, thus violating 364 §9 LCP in conjunction with Article 346 §1 LCP.

The Panel notes that the Basic Court in the impugned judgment on pages 1 and 2 does not include the exact wording of Count 8 of the indictment in its entirety. However, the Panel finds no violation with regard to the exceeding of the indictment in the enacting clause. The enacting clause contains a conviction for:

> "inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror, and torture [...], because from October of 1998 until late April of 1999, L.G., N.M. and R.M., with superior and personal liability, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians illegally detained in the detention center located at Llapashtica [...]"

Although the order of certain phrases and sentences in the enacting clause differ from Count 8 of the amended indictment Hep. No. 65/2002, dated 30 June 2003, the proven acts and terminology in the enacting clause corresponds exactly with the indictment:

> "From October of 1998 until late April of 1999, L.G., N.M. and R.M., acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians illegally detained in the detention center located at Llapashtica [...]
> By ordering and participating in the beating and torture of Kosovo Albanian civilians illegally detained in the detention centers located at Llapashtica [...], L.G., N.M. and R.M. incurred personal and superior responsibility for the war crimes of inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror and torture [...]"

The Panel therefore finds the enacting clause in accordance with Article 346 §1 LCP, as the enacting clause "pertains solely to the criminal act which is the subject of the charge contained in the indictment filed originally or as amended or expanded during the main trial".

b. Elaboration of acts

The defence further asserts that the acts of 'inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror and torture' are not elaborated on in the impugned judgment, thus violating Article 364 §11 LCP.

The Panel observes that although not explicitly stated in the reasoning of the impugned judgment, it is explicitly stated in the enacting clause that the 'inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror and torture' refers to the ordering and participating in the beating and torture of Kosovo Albanian civilians illegally detained. The Panel finds that the severity of the beatings combined with circumstance of the victims being illegally detained are of sufficient gravity to be qualified as 'inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror and torture'.[20] Given the fact that the judgment needs to be read as a whole, enacting clause and reasoning, the Panel finds no violation of Article 364 §11 LCP.

c. Identification of co-perpetrators

The defence submits that Article 364 §11 LCP has been violated by not identifying the individuals with whom the defendants acted in concert with.

The Panel notes that this submission of the defence has already been discussed by the Supreme Court in its judgment Ap.-Kz. No. 89/2009, 26 January 2011, namely paragraphs 62 to 64 (English pagination version). The Panel fully subscribes to this reasoning and adopts the conclusion of the Supreme Court that the fact that the names of the co-perpetrators are not mentioned in the enacting clause does not render the Basic Court judgment invalid.

d. Identification of the victims

The defence submits that Article 364 §11 LCP has been violated by not specifying the identity of the victims in the enacting clause.

The Panel notes that this submission of the defence has already been discussed by the Supreme Court in its judgment Ap.-Kz. No. 89/2010, 26 January 2011, namely paragraphs 51 to 58 (English pagination version). The Panel fully subscribes to this reasoning and adopts the

[20] *Kordić and Čerkez* Appeal Judgement, paras 106-107; *Blaškić* Appeal Judgement, paras 143, 155 (beatings, physical or psychological abuse, and intimidation can constitute persecution); *Vasiljević* Appeal Judgement, para. 143; *Krnojelac* Appeal Judgement, para. 188. *See also Kvočka et al.* Appeal Judgement, paras 323-325 (harassment, humiliation, and psychological abuse can constitute the material elements of the crime of persecution).

conclusion of the Supreme Court that the fact that the identity of victims such as names, surnames, date and place of birth, etc. has never been required so far. The Panel therefore finds no violation of Article 364 §11 LCP.

e. Superior liability

The defence asserts that the superior liability as included in the enacting clause is not reasoned upon sufficiently, thus violating Article 364 §11 LCP.

The Panel notes that the liability of each defendant has been described specifically in the reasoning of the judgment.

As specified in paragraph 102 (English pagination version) the defendant L.G. has been found guilty for both command and direct personal liability for directing the illegal detentions, beatings and torture of detainees and personally engaging in questioning victims whilst they were beaten, as he was the Chief of Military Intelligence for the Llapi zone and thus was centrally involved in the operation of the detention center in Llapashtica.

With regard to the defendant R.M., paragraph 104 of the impugned judgment (English pagination version) specifies that the defendant R.M. was zone commander of the Llapi zone and responsible for and directed the regime of illegal detention, beatings and torture and was fully aware that such conduct was occurring under his authority.

The ascertainment of the commanding roles of the respective defendants is based primarily on the evidence given by the defendants themselves, as detailed in the judgment in paragraphs 29.c-h, 31.a-b and 33.a-e (English pagination version). The Panel specifically notes that R.M. stated that L.G. was chief of intelligence for the zone and that it was his job to discover potential threats to the army and the people.

Furthermore, the Panel takes into consideration and adopts the decision already taken by the Supreme Court in this case in judgment Ap.-Kz. No. 89/2010, 26 January 2011, namely paragraphs 109 to 113 (English pagination version), regarding the legal framework governing superior liability (i.e. command responsibility).

In the light of the above, the Panel finds that the superior liability of the defendants is sufficiently elaborated on in the impugned judgment and rejects this ground of the appeal.

f. Articles 22 and 26 CCSFRY

The defence argues that since the defendants are being held liable pursuant to Article 26 CCSFRY, they cannot also be held liable pursuant to Article 22 CCSFRY as co-perpetrators as well, because liability according to Article 26 CCSFRY absorbs the liability according to Article 22 CCSFRY.

The Panel notes that this submission of the defence has already been discussed by the Supreme Court in its judgment Ap.-Kz. No. 89/2010, 26 January 2011, namely paragraphs

139 and 140 (English pagination version). The Panel fully subscribes to this reasoning and adopts the conclusion of the Supreme Court that no violation can be established with regard to the defendants being found guilty under Article 142 CCSFRY as read with Articles 22 and 26 CCSFRY.

g. Time spent in detention on remand

The Panel agrees with the submission of the defence that the Basic Court failed to include in the enacting clause the time spent in detention on remand which is to be credited towards the sentence. The Panel shall therefore modify the judgment accordingly and credit the time spent in detention on remand towards the sentence, pursuant to Article 50 §1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia. With regard to the defendant L.G., his time spent in detention from 28 January 2002 until 23 July 2005 and from 3 October 2009 until 9 June 2010 shall be credited towards the sentence. With regard to the defendant R.M., his time spent in detention from 11 August 2002 until 23 July 2005 shall be credited towards the sentence.

Although the appeal of the defendant N.M. is dismissed as belated, the Panel shall nonetheless *ex officio* modify the judgment in his case as well, pursuant to Article 380 LCP. With regard to the defendant N.M., his time spent in detention from 28 January 2002 until 23 July 2005 shall be credited towards the sentence.

H. Criminal acts of War Crimes against the Civilian Population

The defence asserts that the criminal law has been violated due to the defendant L.G. being found guilty for three criminal offences of War Crimes against Civilian Population, which should have been treated as one single criminal offence.

The Panel notes that this submission of the defence has already been discussed by the Supreme Court in its judgment Ap.-Kz. No. 89/2010, 26 January 2011, namely paragraphs 76 to 82 (English pagination version). The Panel fully subscribes to this reasoning and adopts the conclusion of the Supreme Court that the prescribed conditions for extended criminal acts do not exist in cases of War Crimes against the Civilian Population, because the single criminal acts that may constitute a war crime cannot be considered as creating an apparent actual concurrence between them in the present case. The Panel therefore finds no violation.

I. Time period

The defence raises the issue of the relatively long period of time that has passed between the initiation of the criminal proceedings and the verdict to be reached by this Panel. The Supreme Court in its judgment AP.-Kz No. 89/2010 dated 26 January 2011, addressed this issue in detail in paragraphs 148 to 153 (English version pagination). The Supreme Court concluded that

Article 6 §1 of the European Convention on Human Rights and Basic Freedoms (ECHR), which for each trial includes the need for a reasonable duration, was not violated in this case. The Panel adopts this reasoning in its entirety. Furthermore, the Panel also finds no grounds to conclude Article 6 §1 ECHR has been violated from the time when the aforementioned judgment of the Supreme Court was issued until the rendering of this judgment of the Court of Appeals. The delay is also due to the fact that the case was re-assigned to the presiding/reporting judge on 29 September 2014 but he was not able to exercise his judicial functions until the end of March 2015, when he was officially appointed by the President of Kosovo.

J. Decision on the criminal sanction

The defence challenged the determination of punishments, considering it unfair and unlawful.

Pursuant to Article 357 paragraph 8 LCP the Basic Court in paragraphs 105-114 of the impugned judgment (English version pagination) considered all the relevant factors needed to determine an adequate punishment. The Panel fully concurs with this analysis. The Basic Court appropriately assessed and weighed all the mitigating and aggravating circumstances and came to proportional sentences. The defence did not bring forth any new circumstances that have not already been considered by the Basic Court. The Panel therefore rejects the submissions of the defence.

K. Closing remarks

The Court of Appeals – for reasons elaborated above – partially grants the defence appeals in so far as the time spent in detention on remand which shall be credited towards the sentence is to be included in the enacting clause, and modifies the enacting clause accordingly. The other grounds of the appeals are rejected and the impugned judgment is affirmed in the remaining parts.

Reasoned written judgment completed on 7 October 2015.

Presiding Judge

Radostin Petrov
EULEX Judge

Panel member

Panel member

Tonka Berishaj
Kosovo Judge

Roman Raab
EULEX Judge

Recording Officer

Alan Vasak
EULEX Legal Officer

Court of Appeals
Pristina

PAKR 440/14

11 August 2015

COURT OF APPEALS
PRISTINA

IN THE NAME OF THE PEOPLE

Case number: **PAKR 52/14**
Date: **6 November 2015**

Basic Court: **Pristina, P 309/10 & 340/10**

Original: **English**

The Court of Appeals, in a Panel composed of EULEX Court of Appeals judge Radostin Petrov, as presiding and reporting judge, Kosovo Court of Appeals judge Mejreme Memaj and EULEX Court of Appeals judge Dariusz Sielicki as panel members, assisted by Dr. Bernd Franke and Alan Vasak, EULEX legal officers, acting in the capacity of recording officers,

in the case concerning the defendants:

L. D.	
Name of father:	H. D.
Mother's maiden name:	E. M.
Personal ID number:	[]
Nationality:	Kosovo Albanian
Citizenship:	Kosovar
Date of birth:	[]
Place of birth:	[]
Place of residence:	Pristina
Family status	[]
Occupation:	[]
Educational level:	[]
Income per year:	[]
Financial status:	[]
Other criminal proceedings:	None
Detention status:	Not detained

A. D.

Name of father:	L. D.
Mother's maiden name:	V. S.
Personal ID number:	[]
Nationality:	Kosovo Albanian
Citizenship:	Kosovar
Date of birth:	[]
Place of birth:	[]
Place of residence:	Pristina
Family status:	[]
Occupation:	[]
Educational level:	[]
Income per year:	[]
Financial status:	[]
Other criminal proceedings:	None
Detention status:	Not detained

S. H.

Name of father:	R. H.
Mother's maiden name:	S. S.
Personal ID Number:	[]
Nationality:	Kosovo Albanian
Citizenship:	Kosovar
Date of birth:	[]
Place of birth:	[]
Place of residence:	Pristina
Family status:	[]
Occupation:	[]
Education level:	[]
Income per year:	[]
Financial status:	[]
Other criminal proceedings:	None
Detention status:	Not detained

I. B.

Name of father:	I. B.
Personal ID number:	[]
Nationality:	Kosovo Albanian
Citizenship:	Kosovar
Date of birth:	[]

Place of birth:	[]
Place of residence:	[]
Family Status:	[]
Occupation:	[]
Education level:	[]
Other criminal proceedings:	None
Detention status:	Not detained

S. D.

Name of father:	B. S.
Personal ID number:	[]
Nationality:	Kosovo Albanian
Citizenship:	Kosovar
Date of birth:	[]
Place of birth:	[]
Place of residence:	Pristina
Family Status:	[]
Occupation:	[]
Education level:	[]
Other criminal Proceedings:	None
Detention status:	Not detained;

charged under the Special Prosecution Office of the Republic of Kosovo's (SPRK) amended indictment PPS 02/09 dated 22 March 2013 with the following remaining criminal offences:

Count 1
Trafficking in Persons, in violation of Article 139 of the Provisional Criminal Code of Kosovo (PCCK), punishable by imprisonment of two years to twelve years, committed in Co-perpetration, Article 23 of the PCCK, against L. D., A. D. and S. H..

Count 2
Organized Crime, in violation of Article 274, paragraph 3, of the PCCK, punishable by a fine of up to 500 000 EUR and by imprisonment of seven years to twenty years, committed in Co-perpetration, Article 23 of the PCCK, against L. D..

Count 3
Organized Crime, in violation of Article 274, paragraph 1, of the PCCK, punishable by a fine of up to 250 000 EUR and by imprisonment of at least 7 years, against A. D. and S. H..

Count 7
Grievous Bodily Harm, in violation of Article 154 of the PCCK, punishable by imprisonment of 1 year to 10 years or in the alternative section 5 punishable by imprisonment of 6 months to 3 years or in the alternative sections 1 (4) punishable by imprisonment of 6 months to 5 years committed in Co-perpetration, Article 23 of the PCCK, against L. D., S. H., I. B. and S. D..

adjudicated in first instance by the Basic Court of Pristina with judgment P 309/10 and 340/10, dated 29 April 2013, by which:

The defendants L. D. and A. D. were found guilty of Count 1, committing the criminal offence of Trafficking in Persons, in violation of Article 139 CCK, committed in co-perpetration (Article 23 CCK), by – briefly put – in the case against L. D., being personally involved in many of the illegal transplant operations at the Medicus Clinic. As the owner of the clinic, he was responsible for its overall development and functioning with regard to illegal kidney transplants; in the case against A. D., as the manager of the clinic he had a central role and was responsible for the numerous activities related to the illegal kidney transplant operations.

Count 1, the criminal offence of Trafficking in Persons, in violation of Article 139 CCK, committed in co-perpetration (Article 23 CCK), against the defendant S. H. was requalified as per Negligent Facilitation of the criminal offence of Trafficking in violation of Article 139, paragraph 4, CCK and was rejected.

The defendant L. D. was further found guilty of Count 2, committing the criminal offence of Organised Crime, in violation of Article 274, paragraph 3, CCK, by – briefly put – organizing, establishing, supervising and managing the overall illegal activity of Count 1, in concert with Dr. Y. S., M. H., A. D., Dr. K. D. and others, in order to obtain financial/material benefits.

The defendant A. D. was found guilty of Count 3, committing the criminal offence of Organised Crime, in violation of Article 274, paragraph 1, CCK, by – briefly put – being the manager of the Medicus Clinic and committing the illegal activity of Count 1, in order to obtain financial/material benefits.

The defendant S. H. was acquitted from Count 3, the criminal charge of Organised Crime, in violation of Article 274, paragraph 1, CCK.

Count 4, the criminal offence of Unlawful Exercise of Medical Activity, in violation of Article 221, paragraph 1, CCK, committed in co-perpetration (Article 23 CCK), against the defendants L. D., D. J., I. B., S. D. and S. H. was rejected.

Count 5, the criminal offence of Abusing Official Position or Authority, in violation of Article 339, paragraph 1, CCK, against the defendant D. J. was requalified as per

Abusing Official Position or Authority, in violation of Article 339, paragraph 3, CCK and was rejected.

The defendant I. R. was acquitted from Count 6, the criminal charge of Abusing Official Position or Authority, in violation of Article 339, paragraph 1, CCK.

Count 7, the criminal offence of Grievous Bodily Harm, in violation of Article 154, paragraph 4, CCK, against the defendant L. D. was rejected. The defendant A. D. was acquitted from Count 7, the criminal charge of Grievous Bodily Harm, in violation of Article 154, paragraph 1, subparagraph 2, CCK, committed in co-perpetration (Article 23 CCK). Count 7, the criminal offence of Grievous Bodily Harm committed in co-perpetration against the defendants S. H., I. B. and S. D. was requalified as per Article 154, paragraph 1, subparagraph 2, CCK: destroying or permanently and substantially weakening a vital organ or a vital part of the body of the other person and the defendants were found guilty of this criminal offence, by – briefly put – knowingly participating in medical procedures which were unlawful under the laws of Kosovo, namely the removal of kidneys for transplantation and thereby permanently and substantially weakening a vital organ.

Count 8, the criminal offence of Fraud, in violation of Article 261 CCK, against the defendants L. D. and A. D. was rejected.

Count 9, the criminal offence of Falsifying Documents, in violation of Article 332, paragraph 1, CCK, against the defendants L. D. and A. D. was rejected.

Count 10, the criminal offence of Falsifying Official Documents, in violation of Article 348 CCK, against I. R. was rejected.

The defendant L. D. was sentenced to 8 (eight) years of imprisonment and a fine in the amount of EUR 10.000 (ten thousand) Euro. In addition the defendant L. D. was prohibited from exercising the profession of urologist for the period of 2 (two) years starting from the day the judgment becomes final.

The defendant A. D. was sentenced to 7 (seven) years and 3 (three) months of imprisonment and a fine in the amount of EUR 10.000 (ten thousand) Euro.
The defendant S. H. was sentenced to 3 (three) years of imprisonment. In addition the defendant S. H. was prohibited from exercising the profession of anesthesiologist for the period of 1 (one) year starting from the day the judgment becomes final.

The defendants S. D. and I. B. were sentenced to 1 (one) year of imprisonment, with the execution of the punishment not to be executed if the defendants do not commit another criminal offence for the period of 2 years.

The injured parties W1, W2, W3, PM, DS, AK and Y. A. were each awarded partial compensation for the psychological and physical damages sustained during kidney

removal in the amount of 15,000 (fifteen thousand) Euro from L. D. and A. D. to be paid no more than 6 (six) months starting from the day the judgment becomes final.

A separate ruling was issued regarding the confiscation of the Medicus Clinic premise;

seized of the appeals filed by the SPRK (only regarding the confiscation ruling), defence counsel Linn Slattengren for the defendant L. D., defence counsel Petrit Dushi for the defendant A. D., defence counsel Ramë Gashi for the defendant S. H., defence counsel Ahmet Ahmeti for the defendant I. B. and defence counsel Hilmi Zhitia for the defendant S. D.,

having considered the responses of the SPRK, defence counsel Petrit Dushi for the defendant A. D., defence counsel Ramë Gashi for the defendant S. H. and defence counsel Ahmet Ahmeti for the defendant I. B.,

having considered the motion of the appellate state prosecutor,

after having held a public session of the Court of Appeals on 4 and 5 November 2015,

having deliberated and voted on 6 November 2015,

acting pursuant to Articles 409, 410, 411, 415, 417, 420, 421, 423, 424, 426 and 427 of the Provisional Criminal Procedure Code of Kosovo (PCPCK),

renders the following:

JUDGMENT

I. The appeal of defence counsel Linn Slattengren for the defendant L. D. against the judgment of the Basic Court of Pristina P 309/10 & 340/10 dated 29 April 2013 is partially granted with regard to the determination of the factual situation, insofar as the number of proven kidney transplants that took place at the Medicus Clinic in which the criminal organization, including the defendant L. D., was involved is to be established as seven and not twenty-four. The remainder of the appeal is rejected as unfounded.

II. The appeal of defence counsel Petrit Dushi for the defendant A. D. against the judgment of the Basic Court of Pristina P 309/10 & 340/10 dated 29 April 2013 is partially granted with regard to the determination of the factual situation, insofar as the number of proven

kidney transplants that took place at the Medicus Clinic in which the criminal organization, including the defendant A. D., was involved is to be established as seven and not twenty-four. The remainder of the appeal is rejected as unfounded.

III. The appeal of defence counsel Ramë Gashi for the defendant S. H. against the judgment of the Basic Court of Pristina P 309/10 & 340/10 dated 29 April 2013 is partially granted with regard to the determination of the factual situation, insofar as the number of proven kidney transplants that took place at the Medicus Clinic in which the criminal organization, including the defendant S. H., was involved is to be established as seven and not twenty-four. The remainder of the appeal is rejected as unfounded.

IV. The appeal of defence counsel Ahmet Ahmeti for the defendant I. B. against the judgment of the Basic Court of Pristina P 309/10 & 340/10 dated 29 April 2013 is granted insofar as the defendant I. B. is acquitted from Count 7, namely inflicting grievous bodily harm by carrying out unlawful medical procedures in the capacity as anesthetist, including the removal of organs (kidneys) and transplantations.

V. The appeal of defence counsel Hilmi Zhitia for the defendant S. D. against the judgment of the Basic Court of Pristina P 309/10 & 340/10 dated 29 April 2013 is granted insofar as the defendant S. D. is acquitted from Count 7, namely inflicting grievous bodily harm by carrying out unlawful medical procedures in the capacity as anesthetist, including the removal of organs (kidneys) and transplantations.

VI. The appeal of the Special Prosecution Office of the Republic of Kosovo against the judgment of the Basic Court of Pristina P 309/10 & 340/10 dated 29 April 2013 is partially granted insofar as the defendant S. H. is convicted for the criminal offence of Organized Crime in connection with Trafficking in Persons, insofar as the defendant A. D. is sentenced to a higher punishment, and insofar as the accessory punishments shall start after the defendants have served the imposed sentence of imprisonment.

VII. The judgment of the Basic Court of Pristina P 309/10 & 340/10 dated 29 April 2013 is modified as follows:

Count 7

I. B. and S. D. are acquitted of Count 7, the charge of Grievous Bodily Harm, in violation of Article 154 of the PCCK,
because pursuant to Article 390, paragraph 3, PCPCK it has not been proven that the accused committed the criminal offence with which they have been charged.

Count 1, 2 and 3

L. D. is guilty of committing the criminal offence of Organized Crime, in violation of Article 274, paragraph 3 of the PCCK in connection with Trafficking in Persons in violation of Article 139, paragraph 1, of the Criminal Code of Kosovo, committed in Co-perpetration, Article 23 of CCK.

A. D. is guilty of committing the criminal offence of Organized Crime, in violation of Article 274, paragraph 1 of the PCCK in connection with Trafficking in Persons in violation of Article 139 of the Criminal Code of Kosovo, committed in Co-perpetration, Article 23 of CCK.

S. H. is guilty of committing the criminal offence of Organized Crime, in violation of Article 274, paragraph 1 of the PCCK in connection with Trafficking in Persons in violation of Article 139 of the Criminal Code of Kosovo, committed in Co-perpetration, Article 23 of CCK.

Because the prosecutor has proved beyond a reasonable doubt that:

On or about 1 January 2008 through to 4 November 2008, Dr. L. D. in his capacity as transplant surgeon and owner of the Medicus clinic, A. D. in his capacity as director/manager of the Medicus clinic; Dr. S. H. in his capacity as chief anesthesiologist; a co-conspirator in the capacity as transplant surgeon; a co-conspirator in the capacity of recruiter and facilitator; together with a co-conspirator in the capacity as transplant surgeon; and others, recruited, transported, transferred, harbored and received persons from foreign countries into Kosovo for the purpose of the removal of their organs (kidneys) at the Medicus clinic and the transplantation of those organs into waiting recipients.

L. D., as owner of the Medicus Clinic, was responsible for the overall development and functioning of the Clinic with regard to illegal kidney transplants. He was personally involved in many of the illegal kidney transplant operations listed below.

A. D., in his capacity of manager of the Clinic, was responsible for numerous and indispensable activities related to the illegal kidney transplant operations at the Medicus Clinic, including the following: arranging the transfer of donors and recipients from the Pristina Airport to the Medicus Clinic and their return to the Airport, and in certain cases performing the transfer himself; managing all logistical activities for transplantation operations, such as scheduling and insuring the availability of proper medical supplies; signing and providing letters of

invitation to donors and recipients to facilitate their entry into Kosovo; assisting with financial arrangements, and providing receipts for payment in certain cases; maintaining close contact with a co-conspirator regarding logistical arrangements; and engaging in other related activities at the Clinic, such as accounting. All of these activities were carried out with the purpose of accomplishing illegal kidney operations at the Medicus Clinic.

S. H., as the lead anesthesiologist at the Medicus Clinic, personally interacted with most if not all of the donors and recipients involved in the 7 kidney transplant operations in preparation for surgery, and therefore knew that they were all foreign nationals. This striking fact should have, at the very least, aroused his suspicion that the Clinic was engaged in trafficking. He also participated in each of the surgeries, and, at the very least, should have known that kidney transplant operations were illegal in Kosovo, and that the Clinic had no license or authorization to conduct these operations.

Commencing in 2008, numerous persons were recruited in foreign countries, transported to Kosovo, transferred from Pristina airport to the Medicus clinic, received at the Clinic, and then harbored at the Clinic, all for the purpose of exploitation by the removal of their kidneys and the transplantation of their kidneys into waiting recipients. The donors were all victims of abuse of their position of vulnerability because of their extremely dire financial circumstances, and in certain cases also the victims of coercion, fraud and/or deception. Such conduct is contrary to Article 139 (1) and (8), subparagraphs 1 and 2, CCK.

Pursuant to Article 139, paragraph 8, subparagraph 3, CCK, the consent of the victim of trafficking to the intended exploitation is irrelevant for the purpose of Article 139, paragraph 1 CCK.

Beginning in March 2008 through to November 2008, the removal of organs from donors at the Medicus clinic, and the transplantation of those organs to waiting recipients, involved 7 separate cases, each one of which involved a donor and a recipient, as described below in chronological order.

The involved donors testified at the main trial, and were proven to be victims of abuse of their position of vulnerability, and in certain cases victims of coercion, fraud and/or deception, and were exploited by removal of their kidney within the meaning of article 139.

(1) **On 15 May 2008 the group of surgeons and anesthesiologists comprising Dr. L. D., Dr. S. H. and co-conspirators performed a kidney removal operation on the donor victim Protected Witness "W2". Protected Witness "W2" had been promised 15,000 USD in exchange for her kidney but only received 12,000 USD. Protected Witness "W2" had immigrated to Israel from the former Soviet Union in 2007 and was in poor financial condition. She was the victim of the abuse of her position of financial vulnerability, and the victim of fraud. It was not established how much the recipient "S." paid for this organ transplant;**

(2) **On 19 June 2008, the group surgeons and anesthesiologists comprising Dr. L. D., Dr. S. H. and co-conspirators performed a kidney removal operation on the donor victim Protected Witness "W1", the organ (kidney) then being transplanted to a recipient. The donor victim received 12,000 USD through a contact in Israel called "A.". Protected Witness "W1" sold his kidney due to large financial difficulties he found himself in, and was the victim of the abuse of his financial vulnerability. He saw a media advertisement promising 12,000 USD payment for kidney donation. The donor victim suffered considerable physical and psychological trauma and his medical state deteriorated following the operation due to improper functioning of his remaining kidney and post operatory complications;**

(3) **On 24 July 2008, the group surgeons and anesthesiologists comprising Dr. L. D., Dr. S. H. and co-conspirators performed a kidney removal operation on the donor victim, Protected Witness "W3," her organ (kidneys) then being transplanted to a recipient. The investigation established that the kidney transplant operation took place on this date; however, the prosecutor could not pair the donor victim with the recipient. Protected Witness "W3" had been in financial distress and immigrated to Israel from the former Soviet Union. She was offered 10,000 EUR through a newspaper announcement, to 'donate' a kidney, and she was the victim of the abuse of her financial vulnerability. Co-conspirators had made the necessary arrangements for her to travel to Pristina for the kidney removal procedure. She was paid the equivalent of 10,000 USD in EUR (8,100 or 8,200 EUR);**

(4) **On 09 September 2009, the group surgeons and anesthesiologists comprising Dr. S. H. and co-conspirators performed a kidney removal operation on the donor victim "PM", his organ (kidney) being then transplanted to a recipient. The donor victim had been facing serious financial distress in 2008 due to his familial situation, and he was the victim of the abuse of his financial**

vulnerability. Following an advertisement he had seen on a Russian website, he contacted an unknown person who promised a payment of a 30,000 USD for donating a kidney. He was persuaded to go to Istanbul for further tests, and in Istanbul he met a co-conspirator who managed the preparations for a transplant operation in Kosovo. After the operation he received 1,000 USD from the recipient's brother personally. The Protected Witness "PM" suffered significantly after the operation and he regretted he had agreed to give away his kidney. The donor victim was never provided any payment whatsoever for his organ (kidney) removed at the Medicus clinic, and was the victim of fraud.

(5) On 21 October 2008 the group surgeons and anesthesiologists comprising Dr. S. H. and co-conspirators conducted a kidney removal operation on the donor victim "DS," a Kazakhstani national, his organ (kidney) then being transplanted to a recipient. The donor victim underwent the procedure as he had serious familial and financial problems as a single parent, and he was the victim of the abuse of his position of financial vulnerability. He was persuaded by a person called Y., allegedly a kidney transplant donor victim himself, to have his kidney extracted in Kosovo, in exchange for 20,000 USD. After undergoing the kidney removal surgery he only received 6,000 USD and was promised more money only if he recruited other kidney 'donors'. Thus, he was also the victim of fraud. At the clinic, he was not advised of the consequences of the kidney removal and was coerced by A. D. to sign consent papers he did not understand. The inquiry could not establish the amounts paid by the recipient of the transplanted organ (kidney);

(6) On 26 October 2008 the group surgeons and anesthesiologists comprising Dr. S. H. and co-conspirators, conducted a kidney removal operation on the donor victim "AK", his organ (kidney) then being transplanted to a recipient. The donor victim had undertaken to have his kidney extracted in order to support his studies and help his sick father, and he was the victim of abuse of his position of financial vulnerability. He saw an advertisement on the internet and through two intermediaries, Y. and J. (Y.), he was offered 10,000 EUR in exchange for his kidney. After the operation, however, he only received 8,000 USD and was promised the rest of the money owed only after he recruited other kidney 'donors'. Finally, he was paid 500 USD for the outstanding debt and was threatened by the same intermediary J. to keep silent or suffer dire consequences. Thus, he was also the victim of fraud.

(7) On 31 October 2008 the group surgeons and anesthesiologists comprising Dr. L. D., Dr. S. H. and co-conspirators, conducted a kidney removal operation on

the donor victim Y. A., his organ (kidney) being then transplanted to the recipient B. S.. The recipient's family members, Protected Witness "A3" and Protected Witness "A4" confirmed that B. S. paid 90,000 EUR for the kidney transplant operation. The money was wired to the bank account of a co-conspirator in Turkey. The donor victim Y. A. was recruited in Istanbul by an intermediary, who had assured him he would receive 20,000 USD for his kidney, and he was the victim of the abuse of his position of financial vulnerability. His travel arrangements to the clinic in Pristina were managed by a co-conspirator. After the surgery, and at the time of the special investigative hearing, the donor victim had never received any money in exchange for his kidney, and was therefore the victim of fraud.

And thus

From on or about 1 January 2008 to 4 November 2008 at the Medicus clinic, Dr. L. D., in his capacity as transplant surgeon and the owner of the Medicus clinic with overall responsibility for the functioning of the Clinic, organized, established, supervised, managed and directed the activities of the organized criminal group which occurred at the Medicus Clinic. The organized criminal group was a structured group consisting of three or more persons, including L. D., A. D., S. H. and others. The group existed for at least several months during 2008, and was not randomly formed for the immediate commission of an offense. The group was formed with the aim of committing one or more serious crimes on an ongoing basis, specifically trafficking in persons, contrary to Article 139 CCK, in order to obtain, directly or indirectly, a financial or other material benefit, by means of the removal of organs (kidneys) and transplant to recipients who paid large sums of money for their kidney.

Beginning in March 2008 through to November 2008, the removal of organs at the Medicus clinic and transplantation to recipients involved 7 cases of organ removal and transplantation as specified in the above description of the trafficking charge in Count 1, which description is incorporated herein by reference. This illegal activity took place under the overall organization, establishment, supervision and management of L. D., acting in concert with others named above.

Dr. L. D. and the organized criminal group obtained financial or other material benefits including cash payments made directly to the Medicus clinic, and/or others from the recipients of organs (kidneys) including but not limited to the following cash payments:

(1) From Protected Witness "T3" in the amount of 100,000 USD
(2) From Protected Witness "T4" in the amount of 70,000 EUR
(3) From Protected Witness M2 in the amount of 108,000 USD
(4) From Protected Witness A1 in the amount of 79,000 EUR
(5) From T. S. in the amount of 25,000 EUR
(6) From R. F. in the amount of 80,000 EUR
(7) From Protected Witness "M1" in the amount of 77,000 EUR
(8) From Protected Witness "T2" in the amount of 90,000 EUR

and

From on or about 1 January 2008 to 4 November 2008 at the Medicus clinic, A. D., in his capacity as director/manager of the Medicus clinic, with the aim of committing one or more serious crimes, committed the offence of trafficking in persons, contrary to Article 139 CCK, in order to obtain, directly or indirectly, a financial or other material benefit, by means of the removal of organs (kidneys) and transplant to recipients.

A. D. and the organized criminal group obtained financial or other material benefits including the following cash payments made directly to the Medicus clinic, and/or others from the recipients of organs (kidneys):

(1) From Protected Witness "T3" in the amount of 100,000 USD
(2) From Protected Witness "T4" in the amount of 70,000 EUR
(3) From Protected Witness M2 in the amount of 108,000 USD
(4) From Protected Witness A1 in the amount of 79,000 EUR
(5) From T. S. in the amount of 25,000 EUR
(6) From R. F. in the amount of 80,000 EUR
(7) From Protected Witness "M1" in the amount of 77,000 EUR
(8) From Protected Witness "T2" in the amount of 90,000 EUR

And

From on or about 08 March 2008 to 04 November 2008 at the Medicus Clinic, Dr. S. H. in his capacity as chief anestheiologist, knowingly participated in medical procedures which were criminal and unlawful under the laws of Kosovo, namely the removal of organs (kidneys) for transplantation, and thus committed the offence of trafficking in persons, contrary to Article 139 CCK, in order to obtain, directly or indirectly, a financial or other material benefit, by means of the removal of organs (kidneys) and transplant to recipients

S. H. and the organized criminal group obtained financial or other material benefits including the following cash payments made directly to the Medicus clinic, and/or others from the recipients of organs (kidneys):

(1) From Protected Witness "T3" in the amount of 100,000 USD
(2) From Protected Witness "T4" in the amount of 70,000 EUR
(3) From Protected Witness M2 in the amount of 108,000 USD
(4) From Protected Witness A1 in the amount of 79,000 EUR
(5) From T. S. in the amount of 25,000 EUR
(6) From R. F. in the amount of 80,000 EUR
(7) From Protected Witness "M1" in the amount of 77,000 EUR
(8) From Protected Witness "T2" in the amount of 90,000 EUR

Punishments

Pursuant to Article 6, Article 11, Article 15, paragraph 1, Article 23, Article 274, paragraph 3 and Article 39, paragraph 1 and 2 of the CCK, L. D. is sentenced to imprisonment of 8 (eight) years and a fine of 10,000 (ten thousand) Euros that is to be paid no more than six months after the judgment is final.

Pursuant to Article 6, Article 11, Article 15, paragraph 1, Article 23, Article 274, paragraph 1, and Article 39, paragraph 1 and 2, of the CKK, A. D. is sentenced to imprisonment of 8 (eight) years months and a fine of 2,500 (two thousand five hundred) Euro that is to be paid no more than six months after the judgment is final.

Pursuant to Article 6, Article 11, Article 15, paragraph 1, Article 23, Article 274, paragraph 1, and Article 39, paragraph 1 and 2, of the CKK, S. H. is sentenced to imprisonment of 5 (five) years and a fine of 2,500 (two thousand five hundred) Euro that is to be paid no more than six months after the judgment is final.

Pursuant to Article 57, paragraph 1 and 2 of the CCK L. D. is prohibited from exercising the profession of urologist for the period of 2 (two) years starting from the day the prison sentence has been fully served.

Pursuant to Article 57, paragraph 1 and 2, of the CCK S. H. is prohibited from exercising a profession of anesthesiologist for the period of 1 (one) year starting from the day the prison sentence has been fully served.

VIII. The appeal of Linn Slattengren on behalf of L. D. and the companies Klinika Kardiokirkurgjike Medikus and Ordinanca Urologjike Medicus against the ruling of the Basic Court of Pristina P 309/10 & 340/10 dated 25 November 2013 is granted, insofar as there is no ground to close and confiscate the Medicus Clinic premises.

IX. The appeal of F. I. on behalf of the economic entity Medical Center LLC against the ruling of the Basic Court of Pristina P 309/10 & 340/10 dated 25 November 2013 is granted, insofar as there is no ground to close and confiscate the Medicus Clinic premises.

X. The appeal of the Special Prosecution Office of the Republic of Kosovo against the ruling of the Basic Court of Pristina P 309/10 & 340/10 dated 25 November 2013 is rejected.

XI. The ruling of the Basic Court of Pristina P 309/10 & 340/10 dated 25 November 2013 is modified insofar as the Prosecutor's Application for confiscation of the Medicus Clinic establishment dated 29 April 2013 is hereby rejected as unfounded.

REASONING

I. RELEVANT PROCEDURAL BACKGROUND

A. Judgment

On 12 November 2008 a ruling on initiation of investigation was issued regarding the alleged criminal offences that took place in 2008 with regard to kidney transplantations in the Medicus Clinic.

On 15 October 2010 indictment PPS 41/09 was filed, charging L. D., A. D., D. J., I. R. and S. H. with certain criminal offences. On 21 October 2010 indictment PPS 107/10 was filed, charging I. B. and S. D. with certain related criminal offences. The two indictments were joined into a single indictment on 29 November 2010, and confirmed by a three judge panel on 27 April 2011. The indictment was then amended and expanded on 22 March 2013 and 17 April 2013.

The full and final indictment contains the following charges:

Count 1
Trafficking in Persons, in violation of Article 139 of the Provisional Criminal Code of Kosovo (PCCK), punishable by imprisonment of two years to twelve years, committed in Co-perpetration, Article 23 of PCCK, against L. D., A. D. and S. H..

Count 2
Organized Crime, in violation of Article 274, paragraph 3, of the PCCK, punishable by a fine of up to 500.000 EUR and by imprisonment of seven years to twenty years, committed in Co-perpetration, Article 23 of the PCCK, against L. D..

Count 3
Organized Crime, in violation of Article 274 paragraph 1 of the PCCK, punishable by a fine up to 250 000 EUR and imprisonment of at least 7 years against A. D. and S. H..

Count 4
Unlawful Exercise of Medical Activity, in violation of Article 221, paragraph 1 of the PCCK, punishable by a fine or by imprisonment of up to one year, committed in Co-perpetration, Article 23 of PCCK, against L. D., D. J., I. B., S. D. and S. H..

Count 5
Abusing Official Position or Authority, in violation of Article 339, paragraph 1 of the PCCK, punishable by imprisonment of one year to eight years against D. J..

Count 6
Abusing Official Position or Authority, in violation of Article 339, paragraph 1 of the PCCK, punishable by imprisonment of one year to eight years against I. R..

Count 7
Grievous Bodily Harm, in violation of Article 154 of the PCCK, punishable by imprisonment of 1 year to 10 years or in the alternative section 5 punishable by imprisonment of 6 months to 3 years or in the alternative sections 1 (4) punishable by imprisonment of 6 months to 5 years committed in Co-perpetration, Article 23 of the PCCK, against L. D., S. H., I. B. and S. D..

Count 8
Fraud, in violation of Article 261 of the PCCK, punishable by imprisonment of 6 months to 5 years against L. D. and A. D..

Count 9
Falsifying Documents, in violation of Article 332, paragraph 1 of the PCCK, punishable by a fine or imprisonment of up to one year against L. D. and A. D..

Count 10
Falsifying Official Documents, in violation of Article 348 of the PCCK, punishable by imprisonment of up to three months to three years against I. R..

On 4 October 2011 the main trial hearings open to the public commenced and continued on 5, 6, 11, 12, 18, 19, 20 and 25 October 2011; 9, 10, 15, 17, 22, 23, 29 and 30 November 2011; 19, 20 and 21 December 2011; 6 and 13 February 2012; 16, 22 and 23 March 2012; 4 and 5 April 2012; 10, 18 and 24 May 2012; 13, 14, 18, 19, 20 and 21 June 2012; 24 July 2012; 4, 6, 7, 11, 13 and 25 September 2012; 9 October 2012; 14, 16 and 26 November 2012; 5 December 2012; 29 January 2013; 11, 12 and 26 February 2013; 1, 8, 22, 27 and 29 March 2013; 2, 3, 5, 10, 12, 16, 17, 19, 23 and 24 April 2013. The verdict was announced on 29 April 2013 in open court.

The defendants L. D. and A. D. were found guilty of Count 1, committing the criminal offence of Trafficking in Persons, in violation of Article 139 PCCK, committed in co-perpetration (Article 23 PCCK), by – briefly put – in the case against L. D., being personally involved in many of the illegal transplant operations at the Medicus Clinic. As the owner of the clinic, he was responsible for its overall development and functioning with regard to illegal kidney transplants; in the case against A. D., as the manager of the clinic he had a central role and was responsible for the numerous activities related to the illegal kidney transplant operations;

Count 1, the criminal offence of Trafficking in Persons, in violation of Article 139 PCCK, committed in co-perpetration (Article 23 PCCK), against the defendant S. H. was requalified as per Negligent Facilitation of the criminal offence of Trafficking in violation of Article 139, paragraph 4, PCCK and was rejected;

The defendant L. D. was further found guilty of Count 2, committing the criminal offence of Organized Crime, in violation of Article 274, paragraph 3, PCCK, by – briefly put – organizing, establishing, supervising and managing the overall illegal activity of Count 1, in concert with Dr. Y. S., M. H., A. D., Dr. K. D. and others, in order to obtain financial/material benefits;

The defendant A. D. was found guilty of Count 3, committing the criminal offence of Organized Crime, in violation of Article 274, paragraph 1, PCCK, by – briefly put – being the manager of the Medicus Clinic and committing the illegal activity of Count 1, in order to obtain financial/material benefits;

The defendant S. H. was acquitted from Count 3, the criminal charge of Organized Crime, in violation of Article 274, paragraph 1, PCCK;

Count 4, the criminal offence of Unlawful Exercise of Medical Activity, in violation of Article 221, paragraph 1, PCCK, committed in co-perpetration (Article 23 PCCK), against the defendants L. D., D. J., I. B., S. D. and S. H. was rejected;

Count 5, the criminal offence of Abusing Official Position or Authority, in violation of Article 339, paragraph 1, PCCK, against the defendant D. J. was requalified as per Abusing Official Position or Authority, in violation of Article 339, paragraph 3, PCCK and was rejected;

The defendant I. R. was acquitted from Count 6, the criminal charge of Abusing Official Position or Authority, in violation of Article 339, paragraph 1, PCCK;

Count 7, the criminal offence of Grievous Bodily Harm, in violation of Article 154, paragraph 4, PCCK, against the defendant L. D. was rejected. The defendant A. D. was acquitted from Count 7, the criminal charge of Grievous Bodily Harm, in violation of Article 154, paragraph 1, subparagraph 2, PCCK, committed in co-perpetration (Article 23 PCCK). Count 7, the criminal offence of Grievous Bodily Harm committed in co-perpetration against the defendants S. H., I. B. and S. D. was requalified as per Article 154, paragraph 1, subparagraph 2, PCCK: destroying or permanently and substantially weakening a vital organ or a vital part of the body of the other person and the defendants were found guilty of this criminal offence, by – briefly put – knowingly participating in medical procedures which were unlawful under the laws of Kosovo, namely the removal of kidneys for transplantation and thereby permanently and substantially weakening a vital organ;

Count 8, the criminal offence of Fraud, in violation of Article 261 PCCK, against the defendants L. D. and A. D. was rejected;

Count 9, the criminal offence of Falsifying Documents, in violation of Article 332, paragraph 1, PCCK, against the defendants L. D. and A. D. was rejected;

Count 10, the criminal offence of Falsifying Official Documents, in violation of Article 348 PCCK, against I. R. was rejected;

The defendant L. D. was sentenced to 8 (eight) years of imprisonment and a fine in the amount of EUR 10.000 (ten thousand) Euro. In addition the defendant L. D. was prohibited from exercising the profession of urologist for the period of 2 (two) years starting from the day the judgment becomes final;

The defendant A. D. was sentenced to 7 (seven) years and 3 (three) months of imprisonment and a fine in the amount of EUR 10.000 (ten thousand) Euro;

The defendant S. H. was sentenced to 3 (three) years of imprisonment. In addition the defendant S. H. was prohibited from exercising the profession of anesthesiologist for the period of 1 (one) year starting from the day the judgment becomes final;

The defendants S. D. and I. B. were sentenced to 1 (one) year of imprisonment, with the execution of the punishment not to be executed if the defendants do not commit another criminal offence for the period of 2 years;

The injured parties W1, W2, W3, PM, DS, AK and Y. A. were each awarded partial compensation for the psychological and physical damages sustained during kidney removal in the amount of 15,000 (fifteen thousand) Euro from L. D. and A. D. to be paid no more than 6 (six) months starting from the day the judgment becomes final;

A separate ruling was issued regarding the confiscation of the Medicus Clinic premise;

The written judgment was served on the defendant L. D. on 6 December 2013 and on his defence counsel Linn Slattengren on 29 November 2013. The defendant, through his defence counsel, appealed the judgment, filed on 13 December 2013.

The written judgment was served on the defendant A. D. on 6 December 2013 and on his defence counsel Petrit Dushi on 13 November 2013. The defendant, through his defence counsel, appealed the judgment, filed on 19 November 2013.

The written judgment was served on the defendant S. H. on 29 November 2013 and on his defence counsel Fazli Balaj on 13 November 2013. The defendant, through his defence counsel, appealed the judgment, filed on 26 November 2013.

The written judgment was served on the defendant D. J. on 30 November 2013 and on his defence counsels Ismet Shufta and Aqif Tuhina on 25 November 2013. The defendant did not appeal the judgment.

The written judgment was served on the defendant I. R. on 30 November 2013 and on his defence counsel Florin Vertopi on 12 November 2013. The defendant did not appeal the judgment.

The written judgment was served on the defendant I. B. on 4 December 2013 and on his defence counsel Ahmet Ahmeti on 12 November 2013. The defendant, through his defence counsel, appealed the judgment, filed on 19 November 2013.

The written judgment was served on the defendant S. D. on 4 December 2013 and on his defence counsel Hilmi Zhitia on 27 November 2013. The defendant, through his defence counsel, appealed the judgment, filed on 4 December 2013.

The written judgment was served on the prosecution on 25 November 2013. The prosecution appealed the judgment on 10 December 2013.

On 9 January 2014 defence counsel Petrit Dushi for the defendant A. D. filed a response to the SPRK appeal. On 10 January 2014 defence counsel Ramë Gashi for the defendant S. H. filed a response to the SPRK appeal. On 9 January 2014 defence counsel Ahmet Ahmeti for the defendant I. B. filed a response to the SPRK appeal.

B. Confiscation ruling

Throughout the period of 4 until 10 November 2008 the Medicus Clinic was searched and thereafter closed. On 31 December 2008 after receiving a request by Dr. T. P.'s defence counsel to return the key to the clinic or issue an appealable decision, the SPRK issued a decision affirming that the key should temporarily stay confiscated under the custody and control of the public prosecutor.

On 15 January 2009 the SPRK submitted an Application for Confiscation and closure of establishment regarding the clinic requesting the pre-trial judge to order the confiscation of the Medicus Clinic as well as to order the closure of the clinic. This submission was repeated on 10 February 2009 and on 6 March 2009 whereby the pre-trial judge ordered the closure of the clinic.

The "Notification report regarding the closing of the Clinic Medicus" dated 31 March 2009 stated that the clinic on the same day in the presence of the owner Dr. L. D. and his defence attorney was opened, inspected and then closed again with two signs being placed on the clinic reading "Clinic Medicus is closed". The entrance was sealed with evidence adhesive tape provided by the Kosovo police. Both Dr. L. D. and the defence attorney Mexhid Syla signed the report.

On 1 April 2009 defence counsels Bajram Tmava and Mexhid Syla appealed the Order requesting the court to approve their appeal, and thus allow the clinic to recommence its activities. On 3 April 2009 the pre-trial judge rejected the appeal on the basis that "an appeal is permissible only against judgments and rulings, not against orders". On 16 May 2009 the

defence counsels submitted a request for protection of legality to the Supreme Court proposing to the Supreme Court to annul the Order dated 6 March 2009 and the subsequent ruling by the pre-trial judge. On 1 June 2009 the Supreme Court of Kosovo dismissed the request for protection of legality as inadmissible.

On 18 May 2009 the defence sent a motion to the pre-trial judge requesting an order for the clinics (Klinika Kardiokirurgjike Medikus and Ordinanca Urologjike Medikus) "to open and operate as urological and cardiac surgical clinics during the pending criminal proceedings". In the motion is mentioned the names of persons who could manage the clinics' activities in the event that the court allowed the clinics to re-open. On 19 June 2009 the SPRK submitted a motion to reject this defence motion.

On 24 August 2009 defence counsel Linn Slattengren informed the SPRK that the "clinic building has now reopened" and requested the return of the seized items. On 8 September 2009 the SPRK responded to Slattengren referring to the Court's decision of 6 March 2009 and explaining that the "opening of the Medicus Clinic is not yet authorized". On 18 September 2009 Slattengren explained to SPRK that "[N]either the D.s nor I have seen the alleged decision of 6 March [...]". In a letter dated 20 October 2009, registered with the District court of Pristina on 2 November 2009, defence counsels Betjush Isufi and Linn Slattengren submitted a motion stating that they have not received any order from the court ordering searches, confiscations or closures in connection with the clinic. The defence counsel assert that they gave notice to the court police and others that the building would reopen on 4 August unless they received notice not to do so. No notice was received and therefore the clinic was reopened.

On 2 December 2009 two EULEX investigators visited the clinic to check "whether the implementation of the court order regarding the closure of Medicus clinic [...] issued on 6 March 2009 was respected". The investigators noted upon arrival that the main door was opened and there was no seal on it. According to their report the lawyer of Dr. D., Mr Bajrarn Tmava stated that they "had decided to reopen the clinic and start the activity again on 7 October 2009". According to the report L. D. stated that upon the advice of Mr. Linn Slattengren who assured him on the legality of the opening he had decided to enter the premises of the clinic and to perform medical activities.

On 8 December 2009 the same investigators again visited the clinic where they met Dr. D. and gave him two copies of the letter of entrustment written in Albanian and English and issued on 4 December 2009. They notified Dr. D. that he had 48 hours to transfer patients and prepare the clinic in order to put the building at police disposal. On 10 December 2009 in the presence of Dr. D. the clinic was closed in order to continue the implementation of the court Order. On the main entrance of the clinic were placed two closure signs. By motion dated 2 February 2010 defence

counsel Bejtush Isufi requested the court to issue a ruling by which the Order dated 9 March (actually 6 March) should be overturned.

On 10 February 2010 the pre-trial judge issued a ruling according to which he rejected the request to reopen the clinics. He ordered the public prosecutor to review the closure before the expiry of the ongoing investigation. The pre-trial judge found that "the previous ruling of the pre-trial judge dated 6 march 2009 is still valid and enforceable in regards to the Medicus Clinic".

In an appeal dated 15 February 2010 the defence counsel Bejtusha Isufi submitted an appeal against the ruling of 10 February 2010. He requested that the "panel issue an order rejecting and rescinding the ruling of the pre-trial judge and dismissing the order of the prior pre-trial judge closing the clinics". The appeal was decided by a three-judge panel on 17 May 2010. The panel issued the ruling according to which the appeal was rejected as ungrounded.

During the final stages of the main trial, of which the judgement was pronounced on 29 April 2013, the Prosecutor on 23 April 2013 provided a report which indicated that the clinic had been reopened. According to defence counsel Slattengren, Dr. D. sold the clinic in February 2012 and provided the court with a written contract according to which the clinic was sold on 16 February 2012 for € 300.000. On 12 June 2013 a hearing in the presence of the Presiding Judge was held wherein the buyer of the property, F. I., was asked to explain the background of the purchase. During the session the buyer explained that he is paying for the building in instalments and that he had applied for a practicing license for the clinic, now called the "Medical Center", which commenced work from April 2013.

On 29 April 2013 the SPRK filed an Application for confiscation of the Medicus Clinic establishment.

On 25 November 2013 the Basic Court of Pristina issued ruling P 309/10, P340/10, ordering the closure and confiscation of the Medicus Clinic, applying to the present and future owners of the premises.

The written ruling was served on the defendant A. D. on 6 December 2013 and on his defence counsel Petrit Dushi on 27 November 2013. The written ruling was served on the defendant L. D. on 6 December 2013. The defendant L. D. and the companies Klinika Kardiokirkurgjike Medikus and Ordinanca Urologjike Medicus, through defence counsel Linn Slattengren, appealed the ruling, filed on 6 December 2013.

The written ruling was served on the buyer F. I. as on 30 November 2013. F. I. – the owner of "Graniti Com" LLC and "Medical Center" LLC appealed the ruling, filed on 2 December 2013.

The written ruling was served on the SPRK on 26 November 2013. The SPRK appealed the ruling, filed on 29 November 2013.

C. Court of Appeals

The case was transferred to the Court of Appeals for a decision on the appeals on 28 January 2014.

On 19 February 2014 the appellate state prosecutor filed a motion.

The case was re-assigned to the presiding/reporting judge on 29 September 2014 but he was not able to exercise his judicial functions until the end of March 2015, when he was officially appointed by the President of Kosovo.

The session of the Court of Appeals Panel was held on 4 November 2015 in the presence of the defendants, their defence counsel and the appellate state prosecutor Claudio Pala.

The Panel deliberated and voted on 6 November 2015.

II. SCOPE OF THE APPEALS

The judgment of the Basic Court became final for the defendants D. J. and I. R., as neither the defendants nor the prosecutor filed an appeal in their case.

The defendants L. D., A. D., S. H., I. B. and S. D. all filed an appeal against the judgment.

The SPRK filed an appeal against the judgment regarding Counts 1 and 3 against the defendant S. H., regarding Count 7 against the defendant L. D. and regarding the imposed punishment against the defendants L. D., A. D., S. H., I. B. and S. D..

Alongside the imposed punishments, the following Counts are pending in the appeal:

Count 1, against L. D., A. D. and S. H.

Count 2, against L. D.

Count 3, against A. D. and S. H.

Count 7, against L. D., A. D., S. H., I. B. and S. D..

III. PRELIMINARY MATTERS

A. Applicable Procedural Law in the Case

On 1 January 2013 a new procedural law entered into force in Kosovo – the Criminal Procedure Code, law no. 04/L-123. This Code repealed the previous Provisional Criminal Procedure Code of Kosovo. Article 545 of the current Criminal Procedure Code stipulates that the determination of whether or not to use the present code of criminal procedure shall be based upon the date of the filing of indictment. Acts which took place prior to the entry of force of the present code shall be subject to the current Code if the criminal proceeding investigating and prosecuting that act was initiated after the entry into force of this code.

The indictments in the case were initially filed with the District Court of Pristina on 15 and 20 October 2010 and then joined into a single indictment on 29 November 2010, before the entry into force of the current Criminal Procedure Code. Pursuant to Article 545 of the current Criminal Procedure Code the applicable procedural law would thus be the Provisional Criminal Procedure Code of Kosovo, as the trial in this case commenced prior to the entry into force of the current Code. The Court of Appeals accordingly conducted the proceedings pursuant to the Provisional Criminal Procedure Code of Kosovo.

B. Competence

Pursuant to Article 121, paragraph 1, PCPCK the Panel has reviewed its competence and since no formal objections were raised by the parties the Panel will suffice with the following. In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, 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 one Kosovo judge and two EULEX judges.

C. Admissibility of the appeals

a. The appeals filed by the SPRK and the defence counsel on behalf of the defendants
The appeals filed by the SPRK, defence counsel Linn Slattengren for the defendant L. D., defence counsel Petrit Dushi for the defendant A. D., defence counsel Ramë Gashi for the

defendant S. H., defence counsel Ahmet Ahmeti for the defendant I. B. and defence counsel Hilmi Zhitia for the defendant S. D. are admissible. The appeals were filed within the 15-day deadline pursuant to Article 398 PCPCK. The appeals were filed by authorized persons and contain all other relevant information pursuant to 399 and 401 PCPCK.

b. The submission filed on behalf of the defendant L. D.
The Panel notes that the impugned judgment was served on the defendant L. D. on 6 December 2013. The impugned judgment was served on his defence counsel Linn Slattengren on 29 November 2013. The appeal filed by defence counsel Linn Slattengren on behalf of the defendant L. D. was filed on 13 December 2013. The initial appeal is thus filed within the 15-day deadline pursuant to Article 398 PCPK. However, the submission handed over during the session on 4 November 2015 by defence counsel Linn Slattengren is to be dismissed as belated with regards to the newly asserted grounds for challenging the judgment, namely the judicial bias of the presiding judge. These grounds were not included in the initial appeal and are therefore filed belated.

IV. SUBMISSIONS OF THE PARTIES

A. The appeal of defence counsel Linn Slattengren for the defendant L. D.

Defence counsel Linn Slattengren on 13 December 2013 filed an appeal dated 10 December 2013 (and supplement dated 18 December 2015) with the Basic Court on behalf of the defendant L. D. and requests the Court of Appeals to reject the judgment as ungrounded and acquit the defendant from all counts.

In summary, the defence argues the following:

The Basic Court had no jurisdiction since the investigation closed on 8 May 2009 with no indictment. The investigating judge dismissed the investigation and the investigation could not be legally continued after that. The investigation may have been reinstated. However, it was done illegally by a secret court proceeding with no notice to the defendant and no opportunity to appeal. The judge correctly denied the confirmation of the indictment and dismissed the case. This was wrongly reversed on appeal. The trial panel was improperly constituted, seeing as the president of the panel previously acted as an investigating judge in the case.

Furthermore, essentially all of the evidence in the case was obtained illegally. There was no court order when conducting the search of the Medicus Clinic. Article 240 PCPCK was therefore violated and the evidence obtained during the search was thus illegally obtained and must be declared inadmissible. There were also no exigent circumstances that provided an exception to

the requirement for a court order, as per Article 245. With regard to Article 201 of the PCPCK the defence argues that Article 201 merely gives authority to the police to conduct a search and seize evidence; the manner and the specific provisions to be followed by the police during the search and seizure however are laid down in the law. These provisions were clearly violated. Also, the Health Inspectorate Law does not obviate the need for a warrant or a justified exception, nor can it overrule the constitution. All of the evidence obtained during the search in the Medicus Clinic was therefore obtained illegally.
Moreover, under the doctrine of 'Fruit of the Poisonous Tree' all the evidence obtained secondarily as a result of the illegal search and seizure must be declared inadmissible as well.
Even if the evidence had been obtained legally, it was not properly submitted in the trial proceedings. The defence has no information as to what evidence the court admitted and what it considered in its judgment. The prosecution never prepared or submitted to the court an inventory of what was seized from the clinic, nor did it provide an itemized listing of the evidence submitted to the court as evidence.
In addition, the prosecution suppressed evidence. The "Medical Operations Protocol Book", a book which holds all official records of all the medical operations, the participating personnel and the results of the operations, was deliberately suppressed by the prosecution. This is especially unacceptable since the defendant L. D. asserts that the book will show that he is not guilty of the alleged criminal offences. The 'equality of arms' principle of Article 6 of the ECHR is therefore violated.

Even if all evidence is to be admitted, it is clear that the defendant L. D. is not guilty of the alleged criminal offences.
In the present case all the donors knew that they would donate a kidney. The reason they donated their kidneys was because they wanted to help dying persons and at the same time get some money to help their financial situation. In all cases the donors approached the fixers themselves. Therefore the elements of the criminal offence of Trafficking in Persons are not met. In any case, the defendant L. D. did not speak with any of the patients and on the rare occasion he did meet a person it was simply a routine passing except when he assisted in a lifesaving surgery. The defendant L. D. was not aware of any agreements made between the donors and Dr. S.. Furthermore, the defendant L. D. has no relation with M. H., A., Z., S., Y., etc. No evidence establishes that the defendant L. D. was involved or even knew about the organ trade that was taking place outside Kosovo. So even if there was a case of Trafficking in Persons and Organized Crime, the defendant L. D. had no part in this and he is to be acquitted of all charges.
Additionally, the kidney transplants were carried out in full compliance with the Kosovo law, but even if there was a violation of Article 46 of the Kosovo Health Law, it should only have administrative repercussions and not criminal.
In the event the court, contrary to all the evidence, should conclude that the defendant L. D. did threaten, defraud or coerce any donor, he clearly did not do so for the purpose of exploitation.

There is no evidence that the defendant L. D. received any compensation for the transplants. Concluding, the defendant should be acquitted from all counts.

B. The appeal of defence counsel Petrit Dushi for the defendant A. D.

Defence Counsel Petrit Dushi on behalf of defendant A. D. filed an appeal dated 19 November 2013 on the grounds of:

- Substantial violation of the provisions of criminal proceedings;
- Violation of criminal law;
- Punishment decision and approval of the legal property claim.

The defence submits that according to Article 396 of the PCPCK the court is obliged to provide clear reasoning for each point of the judgment, to present clearly and completely which facts and for what reasons it considers them confirmed and unconfirmed, to evaluate in a special way the correctness of the opposing evidence; reasons on which the resolutions of legal matters were based, in particular on the occasion of confirmation of existence of a criminal offense, and the criminal responsibility of the accused, and to provide reasoning related to the circumstances which it has taken into account when imposing the punishment. The court has to describe the capacity of evidence, the credibility, the importance and the testimony value of the evidence on which the judgment is based.
The defence asserts that these obligations are not fulfilled. Therefore, the judgment is unlawful. From the enacting clause it cannot be understood in what way the accused has been a member of a group and in which way he has committed the criminal offense. It is unclear for what reasons the defendant has been found guilty. With regard to the defendant the judgment is in full contradiction with the other part of the enacting clause, in full contradiction with the reasoning of the judgment and in full contradiction with the content of evidence on which the judgment is based. The evidence not only does not support the guilt of the defendant, but also strongly supports his innocence.
The defence finds that the complete search in the Medicus Clinic was unlawful. Therefore, the confiscated evidence is inadmissible. The judgment is based on a violation of Article 403 paragraph 1 subparagraph 8 PCPCK. All collected so-called evidence do not have the quality of evidence due to the fact that such an action is prohibited by the provision of Article 153 paragraph 1 PCPCK of the former criminal procedural code of Kosovo. In this context the defence refers to the principle *excessus in modo* (mistake on the action form).

Furthermore, the enacting clause is not understandable and is in contradiction with itself whereas the reasons of the judgment are unclear as well as contradictory. The court has violated Article 403, paragraph 1, subparagraph 10 and 12; therefore, the defence believes that these actions are absolute violations and damage his client. He finds that the authorities which have taken part in

the enforcement procedure from its initiation up to the pronouncement of the appealed judgment have done so in substantial violation of the criminal provisions foreseen in Article 403 paragraph 2, point 1 and 2. The court is obliged to confirm precisely and entirely the facts which are important to render a lawful decision. Suspicions have to be interpreted in favor to the defendant (*in dubio pro reo*). Instead, this principle is not present at any stage of the procedure. On the contrary, the actions have been in disfavor of this principle (*in dubio contra reum*). In all court hearings, the presiding judge when examining the witnesses has intervened. The defence challenges the impartiality of the trial panel and stresses that it is unlawful to show favor to any party.
Furthermore, the defence finds that the enacting clause of the judgment is unclear with regard to the defendant. His actions are not clearly identified and there is no connection among the activities. The time period cannot be considered as incriminating period and there is no causal connection of the mutual activities; the prosecutor only alleged the grounded suspicion that the defendant has committed the criminal offence. However, the prosecution failed to prove with either the material evidence, or with the testimonies of the witnesses, that the defendant was a so called "contact person". It grounded the charges on the exchange of the mobile phone messages ("SMS") which do not contain the essence of communication. As such they have no quality as evidence and cannot be called incriminating activities. Also the witness testimonies given during the main trial are in contradiction to the objections made by the defendant during the search of the clinic.

With regard to the factual situation the defence does not dispute that transplantations were conducted at the Medicus Clinic. However, he challenges the time period of incrimination and the concrete actions of the accused. The described violations of the provisions of criminal procedure have a direct impact on the factual situation. During the search the police failed to show him the search order. Then the police threatened, assaulted and handcuffed him and pressured him to sit in a chair. At the police station he was blackmailed and threatened again in various forms. Even now, the defendant does not know for what they arrested and detained him. The defendant declared he performed his activities at the clinic pursuant to the applicable law. The clinic was the first licensed clinic in Kosovo, namely the clinic that respected the applicable law. The defendant completed all administrative duties and he did not have any problems with the Medicus staff during the time he worked in the clinic, nor with any other person outside of it. Due to the erroneous and incomplete determination of the factual situation the court also violated the criminal code as the defendant was found guilty for two counts he never committed. There are no grounds, evidences and facts for the said offences.

Moreover, the Basic Court was supposed to stipulate the punishment for each count separately and after that, impose an aggregated punishment pursuant to provision of Article 71 paragraph 1 and 2. Referring to this, the defence claims a violation of Article 71.

Finally, the Basic Court fails to introduce and consider all mitigating circumstances and to find a proportional punishment. This failure itself makes the judgment unsustainable.

The defence proposes to adopt the appeal and to acquit the defendant from the charges or to annul the judgment and return the case for re-trial.

C. The appeal of defence counsel Ramë Gashi for the defendant S. H.

Defence Counsel Ramë Gashi on behalf of S. H. filed an appeal dated 26 November 2013 with the Basic Court of Pristina on the grounds of:

- Fundamental violation of the provisions of criminal procedure as provided for in Articles 383 and 384 of the PCPCK;
- Violation of the criminal law as provided for in Articles 383 and 385 of the PCPCK;
- Erroneous and incomplete determination of the factual situation, as provided for in Articles 383 and 386 of the PCPCK;
- Decision on punishment;
- Criminal sanction as provided for in Articles 383 and 387 of the PCPCK; and
- Accessory punishment from exercising a professional anesthesiologist for the period of one year.

The defence asserts that the judgment is not in compliance with Article 384, paragraph 1 subparagraphs 1.8 and 12.1, paragraph 2 subparagraph 2.2 of the PCPCK and therefore contains a substantial violation of the provisions of the criminal procedure. The first instance court incorrectly links the material evidence not only to the victims 3, 7, 19, 22, 23 and 24, but also to all other people listed in the enacting clause of the challenged judgment concerning S. H.. It is not proven by any form of suspicion that the indicated evidence in the judgment is related to illegal acts that could have been undertaken by the defendant. He not only had no role in people's arrival to the clinic, but also had no role regarding patient's physical admission or admission related documentation or internal procedures. There is no link between S. H. and any piece of evidence gathered whilst he was working at the Medicus Clinic.

According to the defence counsel the judgment is not in accordance with Article 370, paragraphs 6, 7 and 8 of PCPCK. The judgment does not contain a complete justification of established and unestablished facts, and fails to evaluate the exculpatory evidence and circumstances and also fails to consider whether the evidence and motions of the defence were granted or not. In this regard, the challenged judgment lacks a valid reasoning in terms of the evidence given by the defendant during the trial, and the same was not elaborated at all therein. Finally, the Kosovo Law on Health cannot be used. Being hired as an anesthesiologist, the defendant's actions did not violate any provisions. In no situation did the defendant violate any provisions of the Law on

Health. On the other hand he was not obliged to take care of registration, legal forms and the activities of the clinic and its licensing. This was not under his competency and his consent and his disapproval was not relevant.

Regarding the asserted violation of the criminal law the defence submits that a bodily injury as an element of the criminal offence has neither been inflicted by the actions of the defendant nor has he undertaken any other unlawful act. The actions the defendant is charged with do not constitute a serious bodily injury in the form as provided with the provision of Article 154 of the PCCK. The key substantial elements of the criminal offence are missing as explicitly provided by respective legal provision. Moreover, the Basic Court violated Article 385 paragraph 1 subparagraph 1.4 of the PCPCK when applying the provisions of the criminal law of Serbia to the detriment of the defendant. The defence sees a violation of Article 154 paragraph 1 subparagraph 2 of the PCCK. It has not been proven at all that the defendant intentionally has undertaken illegal actions.
With regard to the erroneous and incomplete determination of the factual situation, the defence lists and describes the duties of an anesthesiologist in detail based on the information provided by Net Online America Job Center Network Partner, Care Planer and the Canadian Anesthesiologists. Based on the description the defence finds that the first instance court has erroneously determined crucial facts as to the criminal liability and guilt of the defendant. He has not done any act which caused any serious bodily injury. He was not a surgeon and he did not assist in a kidney removal. The defendant had no competence and his task was only to attend to the patient's well-being during the surgery. Therefore, he was not aware of the illegal activities. He also could not have been aware of it. He neither had any authority nor responsibility as far as legal matters were concerned. He had nothing to do with the payment to persons and he was also not involved in the recruitment of possible persons for kidney removals or transplants. On this point neither the indictment nor the judgment provides any concrete evidence. The judgment erroneously interprets the opinion of the forensic doctor C. B., as the forensic report provides facts that do not correspondent with the legal provisions of Article 154 of the PCCK. Finally, the criminal law of Serbia is not applicable in Kosovo. Therefore, legal elements cannot be established by a legal provision from a different country.

The appealed judgment appears unsteady regarding the decision on punishment and the restriction on further performing the profession of anesthesiologist. The punishment of 3 years imprisonment appears to be drastic and vindictive and therefore unlawful against the backdrop that the defendant has not recruited, incited or deceived persons. When ordering the prohibition of performing his profession the first instance court has not respected legal conditions or prerequisites. The measure is unlawful and should not stay in force against the defendant.

The defence proposes to annul the judgment of the Basic Court of Pristina in relation to the defendant S. H. pursuant to Article 398 paragraph 1 subparagraph 1.3 and 1.4 of the PCPCK in

conjunction with Articles 402 and 403 of the PCPCK and to return the case for retrial. Alternatively, he proposes to modify the judgment of the first instance court and to acquit the defendant for the criminal offences he has been charged with. The defence proposes to terminate the accessory punishment from exercising a professional anesthesiologist for the period of one year as an unlawful measure.

D. The appeal of defence counsel Ahmet Ahmeti for the defendant I. B.

Defence Counsel Ahmet Ahmeti on behalf of defendant I. B. filed an appeal dated with 19 November 2013 on the grounds of:

- Essential violation of the PCPCK provisions;
- Erroneous and incomplete determination of the factual situation;
- Violation of the criminal law;
- Wrongful decision on the punishment.

With regard to the essential violations of the provisions of the criminal procedures the defence considers that the enacting clause of the impugned judgment is incomprehensible and contrary to the reasoning, whereas the facts presented in the reasoning are vague and contrary to the evidence found in the case files. The judgment is not based on relevant but on irrelevant facts. The Special Prosecution Office did not provide sufficient evidence. The first instance court has failed to prove that the defendant has committed the criminal offence of Grievous Bodily Harm pursuant to Article 154 par. 1, subparagraph 2 of the PCCK. It has not fully and objectively assessed the defence of the accused who has denied the criminal offence of Grievous Bodily harm which is also supported by the accused S. H.. The court should apply the principle *in dubio pro reo*, foreseen in Article 3 par. 2 of the PCPCK which was violated and ignored. Pursuant to Article 387 paragraph 1 and 2 of the PCPCK the court should base its judgment on the evidence presented and considered in the main hearing. Therefore, the defence assumes a violation of Article 3 paragraph 2, 7 paragraph 2, 8 paragraph 1 and 2 and Article 387 par. 1 and 2 of the PCPCK. Gaps in the challenged judgment itself are part of the essential violations of the provisions of criminal procedure, foreseen in Article 403 paragraph 1 item 12 of the PCPCK. As a consequence the challenged judgment, under enacting clause item VII becomes legally unsustainable and as such, the enacting clause item VII has to be quashed.

Not by a single material or formal evidence was the factual situation established completely and fairly regarding the offence of grievous bodily harm. It is out of question that the defendant himself or with someone else has contributed to the commission of this offense. Since the defendant was and remained only a professional anesthesiologist, the only premeditation is in the subjective sense, but lawful and just, was and remains the realization of his professional yearnings and objectives. It never crossed his mind if the clinic had a license or not, since

besides other things, the advertising posters with "Medicus" label were public and distinct for anyone, anytime. The defence stresses that the defendant has tried to base all his work in professionalism, constantly being dedicated to the work being carried out with honor and full professional responsibility and in the service of preserving the health of the patient and not to damage it, as is alleged by the prosecution. In fact, the defendant acted as an anesthesiologist. He did not have any physical contact with the patients since the transplantation as an action was carried out by surgeons. In accordance with one of the basic principles of criminal law, criminally responsible is that person who knowingly causes harmful and unlawful consequences to another person. Against this backdrop the actions of the defendant are not characterized by the intent nor the consequences caused to other people. Contrary to this, the alleged actions are not taken, nor have they been for the purpose of causing damages to the personality and health of others. The defence stresses that the defendant has not committed any crimes as the subjective and objective elements of the criminal acts are missing. Thus, the first instance court by substantial violation of the provisions of the PCPCK and PCCK and by erroneous and incomplete determination of the factual situation has unjustly found the accused guilty and imposed the decision on the criminal sanction.

The defence proposes to approve his appeal as grounded, to quash the impugned judgment of the Basic Court of Pristina with regard to the enacting clause of judgment, section 7, concerning the accused I. B. and to return the case to the first instance court for retrial, or to modify the judgment by acquitting the defendant from charges.

E. The appeal of defence counsel Hilmi Zhitia for the defendant S. D.

Defence Counsel Hilmi Zhitia on behalf of S. D. on 4 December 2013 filed an appeal with the Basic Court of Pristina on the grounds of:

- Fundamental violations of the provisions under Articles 403 par. 1 point 5, 10, 12 paragraph 2;
- Erroneous and incomplete determination of the factual situation - Article 405 of the PCPCK;
- Violation of the Criminal Law - Article 404 paragraph 1 point 1, 2, 3 and 4 of the PCPCK; and
- Criminal sanction - Article 406 of the PCPCK.

The defence submits that pursuant to Article 90 paragraph 1 of the former PCCK the court has rejected the part of the indictment pertaining the criminal offence under Article 221 of the former PCCK, although the representative of the prosecution in its final speech has introduced a new indictment accusing the defendant of the criminal offence of serious bodily injury pursuant to Article 154. However, the prosecution fails to give a description of the place, time, manner of

commission and against whom the crime has been committed. He only confines his remarks to the description of the criminal norm of Article 154 of the Criminal Code adding comments regarding the allegations of the defence. He asserts that the first instance Court has confirmed the indictment against the defendants I. B. and S. D.. However, such an indictment has de facto not been confirmed because the second instance court has not returned it for retrial. However, the defence had sought to reject the indictment due to the relative statutory limitation. Although the criminal offense the defendant was charged with has exceeded the statutory limitations, the defence supposes that the prosecution was keeping him under charges. The state prosecutor in its closing speech introduced a new indictment against the defendant, charging him also of the criminal offense of serious bodily injury under Article 154 of the former PCCK, although throughout the criminal proceedings nothing occurred or changed. There were no further facts or circumstances revealed that would make those charges be amended or corrected. In this regard, the prosecutor claims it is a new charge, whereas the court on some occasions does claim that it is a new indictment and on some other occasions says it is expanded.
This new indictment, filed by the prosecutor, is completely insupportable and incomprehensible and lacks the elements of an indictment as foreseen by Article 305 of the PCPCK. It is not clear what actions were undertaken by the defendant and whether he caused them intentionally or negligently. In this way, the first instance court violated Article 403 par. 1 point 5 of the PCPCK, because there was no such charge for the prosecutor. He only says that there is a serious bodily injury pursuant to Article 154 para. 5 of the former PCPCK. Therefore, the prosecutor left an alternative. The court was not allowed to find the defendant guilty. By doing so it violated the principle *in dubio pro reo*. An indictment with alternatives should always be interpreted in favor of the accused. As the court exceeded the scope of the indictment it violated the provision of Article 403 paragraph 1 item 10. Moreover, the defence refers to a violation of Article 403 paragraph 1 item 12 as the judgment is inconsistent, void and contradictory with its reasoning and the enacting clause therein and the judgment is based on an erroneous and incomplete determination of the factual situation.

Moreover, the defence raises a violation of the right to defend. Firstly, the defence requested to reject the indictment against the defendant because of the relative statutory limitation. The second instance court has instructed the first instance court to decide in this regard which it never did. Secondly, the new indictment filed by the prosecution is in contradiction to Article 305 of the PCPCK. It was not clear whether the offense was committed willfully, negligently, in co-perpetration, in accomplice and so forth. Therefore, this led to a violation of criminal law by Article 1 paragraph 3, but also of Article 3 paragraph 2 of the former PCPCK.
The defence stresses that the defendant has just performed his profession, respecting the methods and standards determined by medical regulation. In this context, the court also misunderstood the Serbian commentary. Due to the established facts and circumstances, it should give its own comment. The Court should fairly establish the factual situation and provide reasoning based on the applicable law in Kosovo.

Furthermore, the factual situation is not determined fairly and completely. Due to a letter from the permanent secretary and president of the board for licensing, the staff was convinced that a license existed. None of the controlling mechanism of the Ministry of Health made any objections nor controlled private clinics. Each individual, even the staff engaged in legal acts were certain in advance that for everything there was a license or the performed activity was based on law, otherwise the state would have interfered with its mechanism and would not have allowed such activity. The defendant as an anesthetist was not aware of any unlawful act.
The defence finds that the criminal offense of grievous bodily harm should be treated separately from the criminal offence of trafficking in human beings as the accused was not charged for this. The matter should be treated only as the commission of the criminal offence of grievous bodily harm as there is no indictment for trafficking in human beings and organized crime. Finally, the accused did not commit the grievous bodily harm because he only prepared the medications for anesthesia and filled in the list of anesthesia. He did not remove any kidney, this was done by a team of surgeons.

The defence asserts that there were no legal rules penalizing the transplantation of kidneys. From a legal perspective UNMIK regulation 2000/1 was applicable in Kosovo in default of a proper regulation. According to the commentary of criminal law of Serbia on page 147 it states that in case of the consent of the patient the unlawfulness is exempt. In the following case the patients gave their consent. They came from abroad due to their request and by an invitation. Secondly, the patients went through regular proceedings starting from reception office, medical examination, analyses of the surgical team and lastly reached the anesthesiologist. Due to their consent, the unlawfulness is excluded.
Since the actions of the accused do not contain any elements of a criminal offence, the defendant cannot be liable for that criminal offence pursuant to Article 154 paragraph 1 point 2 of the former PCCK. Therefore, no sanction can be imposed. When imposing the punishment the court violated the provisions of the former PCCK.
He proposes to approve the appeal as grounded, to annul the judgment with regard to defendant S. D. and to return the case for re-trial or to modify the judgment and to acquit the defendant on the grounds that there are circumstances that preclude the criminal liability.

F. The appeal of the SPRK

The SPRK on 10 December 2013 filed an appeal with the Basic Court on the grounds of:

- Substantial violation of the provisions of criminal procedure;
- Violation of the criminal law;
- Erroneous and incomplete determination of the factual situation;
- Decision on criminal sanctions.

In summary, the prosecution submits that the impugned judgment be modified in parts as follows.

The search and seizure of evidence at the Medicus Clinic should be confirmed as legal and the evidence ruled admissible under the following reasoning, rather than the reasoning used by the Basic Court. The prosecutor submits that the search and seizure of medical and business records, medical supplies and medications at the Medicus Clinic was reasonable and lawful, pursuant to Article 201 PCPCK. This article provides lawful authority for search and seizure of premises, separate and distinct from the powers and duties of the police executing searches, pursuant to an order by a pre-trial judge, or the court generally. Those powers and duties are set out in Articles 240-253 of the PCPCK. It is the prosecutor's contention that the requirements of Article 201 are met because it was imperative that the police attend at the Medicus Clinic as soon as possible after they became aware of possible crimes being committed there. Additionally, the police provided a report of the items seized, as per the requirements of Articles 201 paragraph 3 and 207 PCPCK and so complied with the procedural requirement for carrying out a search under Article 201 PCPCK.

Furthermore, there is nothing in Article 36 paragraph 2 of the Kosovo Constitution which suggests that a court must always give prior consent to the police for a search. In fact, the final sentence of Article 36 paragraph 2 merely states that "a court must retroactively approach such actions." This does not mean that a court order must be obtained retroactively to ensure the legality of the search. As such, the prosecutor submits that the constitution does not necessarily require that a search has to be approved by a court before it is carried out or that it is subsequently approved by a court in the form of an order. The court can implicitly approve a search by relying on evidence seized during the search or actively allowing for such evidence to be examined.

Alternatively, if the Court of Appeals rejects this argument, then the prosecutor contends that the search at the clinic was carried out lawfully under Article 245 PCPCK. In this case, it was clearly necessary for the police to enter the premises at Medicus and conduct a search under Article 245 paragraph 1 PCPCK to ensure the safety of potential victims and witnesses. The police only had information that a transplant had been carried out. It was imperative for them to enter the premises to ensure the safety of other potential victims. They knew that there had been a kidney "donor" and it was therefore a certainty that there would also be a recipient, who might require medical assistance.

Pursuant to Article 246 paragraph 6 PCPCK, a violation of Article 245 paragraph 2 PCPCK is not a ground for inadmissibility of the evidence. This article only excludes evidence obtained in violation of Article 245 paragraph 1, 3, 4 and 5 PCPCK. As a result the evidence obtained pursuant to the search done under Article 245 (1) PCPCK should be deemed to be admissible in light of Article 246 paragraph 6 PCPCK. Also the police complied with Article 245 paragraph 6

PCPCK because they provided a report to the prosecutor on 11 November 2008 following the conclusion of the search on 10 November 2008.

The content of the text messages received following the order of prosecutor Manoj John on 19 November 2008 should be admitted as evidence in this case and this content should be then be considered in regard to the sentences handed down to the accused.
The text messages were received through metering, not interception. In the spirit of both the Telecommunication Law and PCPCK, in force at the time, a substantial delineation is made between metering within the powers of prosecutor, and interception available through court order. Hence a court order was not required and the order of the prosecutor was sufficient.
Alternatively, the order of the prosecutor was issued in compliance with Articles 256, 257, 258 and 259 PCPCK. The prosecutor was very specific in seeking only those records which he was capable of ordering receipt of under Article 258 paragraph 1 and 4 of the PCPCK. At no point did the Prosecutor seek any material that was not within his remit under the PCPCK. Therefore it is submitted that Article 264 paragraph 1 of the KPPC under which this evidence may be excluded plainly does not apply to the matter at issue as no illegal order was issued by the Prosecutor.

Further, the defendant S. H. should be convicted of the offence of Trafficking in Persons. The contention of the Basic Court that S. H. acted only in a negligent manner is incongruent with an accurate interpretation of the factual situation. Instead, the court should determine that, in light of the factual situation, the defendant acted with direct intent, or at a minimum indirect intent, per Article 15 PCCK, in which case his actions are criminalized as trafficking in persons under both the PCCK and the Criminal Code of Kosovo currently in force.
The defendant S. H. should also be convicted of the offence of Organized Crime. The prosecution submits that the contribution of the defendant to the achievement of the unlawful aims of the organized criminal group was essential, indispensable, and in direct causality with the criminalized outcome. Although there is no evidence connecting the defendant to the recruitment or transportation or harboring of the trafficked persons, he was proven instrumental in the realization of the purpose of the group: the actual removal and transplantation of organs, which supplied the unlawful material benefit for its members.

Furthermore, the defendant L. D. should be convicted of Grievous Bodily Harm. Infliction of grievous bodily harm is not among any of the modalities or means to commit trafficking in persons, in the light of the provisions of the PCCK or of the Protocol to the UN-TOC. In light of the definition of the trafficking in persons offered by the PCCK, there is no required causality nexus between the modalities of such offence and the result of causing bodily harm. It is in practice perfectly possible that trafficking in persons be committed in any of the modalities and by any of the means provided for in Article 139 without actually inflicting physical injuries on a victim. As a result, the assertion of the Basic Court with respect to the criminal offence of

Grievous Bodily Harm committed by the defendant L. D. being absorbed into the offence of trafficking in persons committed by the same defendant, is erroneous and has no legal basis.

The prosecution further submits that the amount ordered for the psychological and physical damages sustained during kidney transplantations by the victims is too small and should be increased substantially.

The prosecution notes that the Basic Court stated that all the recipients were men, however at least one of the recipients (F. B. B.) was female. The prosecution also notes that contrary to the statement of the Basic Court, Y. K. has not been tried and convicted in the Ukraine.

The prosecutor submits that a confiscation ruling per Article 489 paragraph 3 PCPCK needs to be made in relation to the items seized from the Medicus Clinic.

With regard to the punishments the prosecutor submits the following:

The sentence imposed on L. D. is presumably an aggregate of the convictions for the two offences although this is not stated in the judgement. The punishment is on the very low end of the scale, considering the minimum sentences applicable for organized crime and trafficking. Furthermore L. D. should have been convicted of Grievous Bodily Harm as well and this criminal offence should be included in the punishment. The Basic Court failed to first pronounce the punishment for each act and then impose an aggregate punishment for all of the acts. This should be modified. The accessory punishment of the prohibition on L. D. from exercising the profession of urologist should be modified to include all practice by him and should be increased to the maximum of 5 years starting after he is released from prison.

Concerning the defendant A. D., the Basic Court failed to first pronounce the punishment for each act and then impose an aggregate punishment for all of the acts. This should be modified.

Regarding S. H. the imposed sentence is too low. Furthermore the accessory punishment of the prohibition from exercising his profession should be modified to include all practice and should also be increased starting after he is released from prison.

Lastly, the suspension of the imposed sentence on both I. B. and S. D. should be increased to five (5) years. Furthermore the accessory punishments should pertain to their entire profession, not just a specialization.

G. Response of defence counsel Ramë Gashi for the defendant of S. H.

In his response to the appeal filed by the Special Prosecutor on 10 December 2013 the defence counsel Ramë Gashi on behalf of S. H. finds that the allegations in the prosecutor's appeal are unfounded. The defendant has no connection with the evidence that was found, stored, and collected from the clinic. Both the evidence and the search related to the defendant are unacceptable and ineffective to any criminal liability. The defence stresses that S. H. never had any connection with any form of trafficking. The only duty he had was to help the patients without any interest as to who may be the patient undergoing the surgery and why. Attempts to attribute the elements of organized crime to the defendant were not supported by any evidence; the reasoning in the Special Prosecutor's appeal is unclear; therefore, the allegations are ungrounded. The assertion that the defendant had to be aware of a circumstance or something for which he had no clue is unsubstantiated by any relevant fact and represents a misinterpretation of the law. The Basic Court seriously misled the factual situation. The defence stresses that the punishment and the imposed sentence is inadequate.
The defence proposes to reject the Special Prosecutor's appeal PPS. No. 2/09 dated 10 December 2013 as ungrounded and to approve his own appeal as grounded.

H. Response of defence counsel Ahmet Ahmeti for the defendant I. B.

In his response to the appeal filed by the Special Prosecutor on 10 December 2013 the defence counsel Ahmet Ahmeti on behalf of I. B. finds that the prosecution did not provide any new circumstances that could lead to an amendment of the challenged judgment and to impose a sentence between three (3) and five (5) years. The appeal from SPRK is unjustified, ungrounded, unreasonable and without any new facts. Thus, he proposes to approve the response and to reject the appeal filed by SPRK.

I. Response of defence counsel Petrit Dushi for the defendant A. D.

In his response to the appeal filed by the Special Prosecutor on 10 December 2013 the defence counsel Petrit Dushi on behalf of A. D. finds that the prosecutor's submission is without any substance. He refers to his appeal challenging the judgment on the grounds of: a) substantial violations of the provisions of criminal procedure, b) erroneous and incomplete determination of the factual situation, c) the violation of the criminal law, d) the decision on punishment and e) the property claim. He moves the Court of Appeals to consider his claims as grounded and to reject the appeal filed by the prosecution as ungrounded in its entirety.

J. The motion of the appellate prosecution

The appellate prosecutor on 19 February 2014 filed a motion dated 19 February 2014 moving the Court of Appeals to reject the appeals of the defence counsel as ungrounded and to decide on the issues raised in the appeal of the SPRK as well as on those that can be examined *ex officio*.

I. B.

With regard to the appeal of behalf of I. B. the appellate prosecutor observes that the appeal does not meet the requirements of Article 401 paragraph 1 of the PCPCK and should be dismissed pursuant paragraph 2 of the same article. Alternatively, the appellate prosecutor observes that the impugned judgment provides a detailed account of the evidence against the defendant, including the statements of the witnesses who knew and saw I. B. working in the clinic as anesthesiologist assisting the surgeons in the organ transplants. The claims of the defence are ungrounded.

A. D.

With regard to the appeal on behalf of A. D. the appellate prosecutor observes the criminal offences the defendant was found guilty of are the same charges the defendant was charged with under the indictment.

The claims that the Basic Court violated its duty to truthfully and completely establish the facts which are important to rendering a lawful decision as per Article 7 of the PCPCK; and that the Court applied the principle *in dubio contra reum* in violation of Article 3 paragraph 2 of the PCPCK, do not contain any substantiate reasoning.

Further, the illegality of the transplant activities carried out in the clinic and mentioned in the enacting clause is sufficiently detailed in the reasoning part of the judgment. Despite the claims of the defence no license for kidney transplants was ever issued to the Medicus Clinic. Furthermore the appellate prosecutor observes that the Basic Court correctly and fully established the factual situation and that there is sufficient evidence to convict the defendant.

The appellate prosecutor observes that the Basic Court took into consideration all the relevant circumstances of the case and it properly balanced the mitigating circumstances with the aggravating ones.

The Basic Court however failed to determine the punishment for each criminal offence the defendant was convicted of, pursuant to Article 71 paragraph 1 of the PCCK.

S. H.

With regard to the appeal on behalf of S. H. the appellate prosecutor observes that the defence claims violation of the provision of the criminal procedure without substantiating them with a proper reasoning on the alleged mistakes the Court incurred on. As such the appeal does not meet the requirements of Article 401 paragraph 1 of the PCPCK and should be dismissed pursuant paragraph 2 of the same Article. Further, the criminal offences and the role of the defendant are correctly established and sufficiently elaborated on. The defendant was aware that

he was participating in his capacity as anesthesiologist in an illegal medical procedure aimed at the removal of kidneys for transplantation; and in doing so he gave a substantial contribution to the permanent and substantial weakening a vital organ of the donors in which the criminal offence of the grievous bodily harm consists.
Furthermore, the appellate prosecutor observes that – as no procedural, substantive or factual mistake can be detected in the reasoning of the Basic Court – the appraisal of the circumstances of the case and the imposition on the defendant of an accessory punishment of prohibition from exercising the profession as anesthesiologist are commensurate to the criminal responsibility of S. H..

S. D.
With regard to the appeal on behalf of S. D. the appellate prosecution observes that the defence had ample time and deemed possible to prepare the defence against the amended charge as raised by the state prosecutor. The Basic Court further has the power to classify the act regardless of the indicted qualification and did so based on the factual situation. Regarding the other issues raised by the defence, the appellate prosecution refers to its observations made with regard to the other appeals so far.

SPRK
With regard to the appeal of the state prosecutor the appellate prosecution refers to its opinion filed in the case PPN 58/13, PN 577/2013, P 8/2013 and PPS 425/2009 regarding the legality of the search at the Medicus Clinic. In addition the appellate prosecution observes that no provision of the law expressly prescribes the inadmissibility in criminal proceedings of evidence of criminal activity, legitimately collected by state institutions – other than the police – in the performance of their institutional functions. The fact that the outcome of the investigative activities of the police might be considered as inadmissible due to the infringement of the provisions of Article 240 et seq. of the PCPCK does not affect negatively the activities of the health inspectors which were carried out for different institutional purposes and are not subject to the same regime of admissibility as the former. The fact that in the present case the activities of the health inspectors were carried out in the context of a criminal investigation made by the Kosovo police does not affect the otherwise autonomous legal status of those activities and the Court keeps its authority to freely assess the probative value and the relevance of the collected evidence.
Regarding the admissibility of the SMS content the Kosovo Courts so far seem to point towards the conclusion that the acquisition of the content of text messages falls within the category of the ex post interception of telecommunications for which a court order is required pursuant to Article 258 paragraph 2 subparagraph 4 of the PCPCK. Article 264 paragraph 1 of the PCPCK imposes a declaration of inadmissibility of the evidence collected by covert or investigative measure in two cases: when the (judge or prosecutor's) order is unlawful, and when the implementation of

the (judge or prosecutor's) order is unlawful. In the present case, the issue at stake is exactly one of implementation contrary to the order issued by the prosecutor.
Regarding the remaining issues the appellate prosecution concurs with the arguments put forward by the state prosecutor and moves the Court of Appeals to decide accordingly.

L. D.
With regard to the appeal on behalf of L. D. the appellate prosecution observes that the claim of the defence that the investigation was closed with no indictment is without merit as all the legal requirements for filing, extending and confirming the indictment were met by the prosecution and the Basic Court. As for the claim that the presiding judge should have been excluded from the participation in the main trial, the appellate prosecution notes that since the extension of the investigation is a mere technical procedure based on the assessment of the complexity of the case without the judge entering into the merits of case, the claim is ungrounded.
Further, with regard to the search of the Medicus Clinic and the issue of admissibility of the evidence the appellate prosecutor refers to its observations made with regard to the other appeals so far. The evidence was furthermore properly submitted in the trial proceedings. The claim that the prosecution suppressed the 'Medical Operation Protocol Book' is completely without merit, and the claim that the book would have shown that the defendant is not guilty is unsubstantiated.
Furthermore, the appellate prosecutor observes that the factual situation was correctly and fully determined and shows that L. D., as owner of the private Medicus Clinic, was responsible for the overall development and functioning of the Clinic with regard to illegal kidney transplants and was personally involved in many of the illegal kidney transplant operations carried out in the institution in co-perpetration with the other defendants by taking advantage of the desperate financial situation of the donors under the deceitful assurance that kidney transplant was legal in Kosovo.

V. FINDINGS OF THE PANEL

A. Admissibility of the Appeals

a. The appeals filed on behalf of the defendants
The appeals filed by the SPRK, defence counsel Linn Slattengren for the defendant L. D., defence counsel Petrit Dushi for the defendant A. D., defence counsel Ramë Gashi for the defendant S. H., defence counsel Ahmet Ahmeti for the defendant I. B. and defence counsel Hilmi Zhitia for the defendant S. D. are admissible. The appeals were filed within the 15-day deadline pursuant to Article 398 PCPK. The appeals were filed by authorized persons and contain all other relevant information pursuant to Article 399 and 401 PCPK.

b. The submission filed on behalf of the defendant L. D.

The Panel notes that the impugned judgment was served on the defendant L. D. on 6 December 2013. The impugned judgment was served on his defence counsel Linn Slattengren on 29 November 2013. The appeal filed by defence counsel Linn Slattengren on behalf of the defendant L. D. was filed on 13 December 2013. The initial appeal is thus filed within the 15-day deadline pursuant to Article 398 PCPK. However, the submission handed over during the session on 4 November 2015 by defence counsel Linn Slattengren is to be dismissed as belated with regards to the newly asserted ground for challenging the judgment, namely the judicial bias of the presiding judge. This ground was not included in the initial appeal and thus is filed belated. The Panel shall however discuss this issue in general, seeing as the defence of the defendant A. D. raised this issue timely.

B. Impartiality of the Basic Court

The defence questions the impartiality of the Basic Court presiding judge Arkadiusz Sedek due to his prior involvement as a pre-trial judge when extending the investigation in this case on 9 November 2009 via ruling GJPP 361/08.

In pursuance of the decision of the President of the Assembly of EULEX judges, JC/EJU/OPEJ/2760/chs/11, dated 11 January 2012, the Panel finds that no objective or subjective elements can be found that would render the impartiality of presiding judge Arkadiusz Sedek doubtful. The mere fact that presiding judge Arkadiusz Sedek was involved in a decision on extending the investigation does not automatically disqualify him at a later stage of the same case. The scope and nature of the decision taken was not substantial and was merely based on the overall complexity of the case. In accordance with the practice of the European Court of Human Rights, the Panel therefore finds the composition of the judges panel of the Basic Court unambiguous and impartial.

The defence further submits that the Basic Court appeared to be partial at times when interfering during the defence counsel's questioning of witnesses and being too strict with regard to submissions and requests of the defence.

After carefully reviewing the minutes of the session of the main trial, the Panel finds the submission of the defence without merit. The conduct of the Basic Court at all times was in accordance with the law and the Panel finds no objective or subjective elements that would render the impartiality of the panel doubtful.

Concluding, the Panel rejects the appeal of the defence as unfounded.

C. Extension of Investigation

The defence argues that the extension on investigation was conducted illegally and contrary to the proper proceedings and thus the investigation was closed on 8 May 2009 with no indictment rendering the case against the defendants inadmissible.

The Panel notes the following procedural background:

On 12 November 2008 a ruling on initiation of investigation was issued against the defendants L. D., A. D. and others for Trafficking in Persons – Article 139, paragraph 1, and 23 PCPCK.

After the initiation of investigation the investigation was extended and expanded with new defendants.

On 12 May 2010 with ruling Pn-Kr 238/2010 the Supreme Court of Kosovo approved an extraordinary extension of investigation for an additional 6 months, until 12 November 2010.

The indictments were filed upon this court on 15 and 21 October 2010.

Considering the above sequence, there are no chronological gaps. Furthermore, all applications and respective decision on the extension of the investigation were decided pursuant to Article 225, paragraph 4, PCPCK. In such cases the defendants are not notified about the investigation and the request for extension. This procedure is in full concurrence with the law. Furthermore, the Supreme Court already issued a ruling on the extension and the Panel fully abides by this ruling and finds the extension in full concurrence with the law and finds the indictment timely filed.

The appeal of the defence is rejected as unfounded.

D. Consistency and Comprehensibility of the Enacting Clause

The defence submits that the enacting clause of the judgment is incomprehensible or internally inconsistent or inconsistent with the grounds for the judgment and that the judgment lacks sufficient grounds for a conviction. The defence submits that the impugned judgment is not drafted in accordance with Article 403, paragraph 12, PCPCK.

This ground of the appeal is rejected as unfounded.

The enacting clause is clear, logical and does not contradict itself or the reasoning. The enacting clause provides a coherent and comprehensive description of the decisive facts and contains all

the necessary data prescribed by Article 396, paragraph 3 and 4, PCPCK in conjunction with Article 391 PCPCK.

The enacting clause is fully coherent with the reasoning of the impugned judgment and reflects the findings elaborated therein. The Basic Court presented grounds for each individual point of its decision, as required by Article 396, paragraph 6, PCPCK.

The enacting clause read together with the detailed reasoning of the impugned judgment provides a comprehensive assessment of the evidence and of the facts the Basic Court considered proven and not proven. In accordance with Article 396, paragraph 7, PCPCK the Basic Court also made a detailed assessment of the credibility of the evidence and the reasons guiding the Basic Court in settling points of fact and law.

The enacting clause contains all the information that is compulsory.

The Court of Appeals Panel shall however modify the enacting clause of the Basic Court judgment when required in accordance with its findings as set out below.

E. Admissibility of Evidence

a. Search of the Medicus Clinic premises

The defence submits that the search of the Medicus Clinic premises and the confiscation of evidence therein are to be found inadmissible, while the prosecution submits that the search and confiscated evidence are to be found admissible.

The issue of the legality of the search and confiscation has been discussed and reviewed in detail by the Basic Court on page 27 to 45 of the impugned judgment. After careful analysis of this assessment and the casefile as a whole the Panel comes to a different conclusion than the Basic Court. The Panel finds that the search of the Medicus Clinic premises and the confiscation of evidence therein are inadmissible. The Panel fully concurs with the assessment made by judge Vitor Hugo Pardal in ruling PPS. No. 02/2009 of the Basic Court of Pristina, dated 31 January 2011. The Panel shall adopt the analysis and conclusions of this ruling as its own and reiterates the following (with some grammatical corrections):

> "As foreseen by article 200, paragraph 1 PCPCK, "The police shall investigate criminal offenses and shall take all measures without delay, in order to prevent the concealment of evidence". This article must be considered as a basic principle concerning the aim of judicial police (general duties and powers of the police – subchapter 1, chapter XIII PCPCK). This means specifically nothing but that all legally admissible measures must be taken without delay. Moreover, as per article 201, paragraph 1, "(...) the police have a

duty (...) ex officio (...) to take all steps necessary (...) to detect and preserve traces and other evidence (...) and objects which might serve as evidence (...)". According to paragraph 2, "the police shall have the power to (...) take the necessary steps to establish the identity of (...) objects (subparagraph 4); confiscate objects (...) (subparagraph 7)". However, the power to take those steps cannot be considered above all other articles specifically foreseeing the respective proceedings. Otherwise, some limits as defined, for instance, by the same article would be absolutely useless (as restricting a search only to vehicles, passengers and their luggage, or restricting it regarding premises of public entities only in the presence of the responsible person, respectively subparagraphs 2 and 6). The same applies for all limits considered under article 204 PCPCK. Moreover, article 245 PCPCK referring to conditions for a search performed by the judicial police would be also useless. Thus, an accurate hermeneutic and systematic interpretation of all referred articles leads to an undisputable conclusion: articles 240 to 253 PCPCK pointing specifically to search and temporary confiscation must always prevail, and no loopholes may be raised through the content of generic articles like 200 and 201 PCPCK. This is the only possible interpretation according to article 36 paragraph 2 of the Constitution of Kosovo, according to which, "Searches of any private dwelling or establishment that are deemed necessary for the investigation of a crime may be conducted only to the extend necessary and only after approval by a court after a showing of the reasons why such a search is necessary. Derogation from this rule is permitted if it is necessary if it is necessary for a lawful arrest, to collect evidence which might be in danger of loss or to avoid direct and serious risk to humans and property as defined by law. A Court must retroactively approve such actions".

Considering so, the performed search must be judged exclusively under the specific and correctly interpreted content of Articles 240 to 253 PCPCK.

This finding does not close the issue. If according to Article 240 PCPCK it is up to the pretrial judge to order a search of a house and other premises and property (paragraph 1) there are factual and legal conditions to be met for such investigative action (paragraph 2). Also several strict proceedings must be assured during the action (Articles 242 and 243 PCPCK).
However, those legal proceedings may be derogated by law in exceptional conditions as foreseen by Article 36 paragraph 2 of the Constitution of Kosovo. Those conditions and derogated proceedings are specifically described through Article 245, paragraph 1 PCPCK, according to which, "Police may, if necessary and to the extent necessary, enter the house and other premises of a person and conduct a search without an order of the pretrial judge if (...) the person concerned knowingly and voluntarily consents to the search (subparagraph 1); a person is calling for help (subparagraph 2); a perpetrator caught in the act of committing a criminal offence is to be arrested after a pursuit

(subparagraph 3); reasons of safety of people and property so require (subparagraph 4); or a person against whom an order for arrest has been issued by the court is to be found in the house or other premises (subparagraph 5)".

It is clear that, if it is up to the pretrial judge to authorize and order a search on premises and property, it is also possible that, in urgent circumstances as defined by law, police may perform a search without such a search order previously issued according to the proceedings as defined by Article 240, paragraph 4 and Article 245, paragraphs 2, 3, 4 and 6 PCPCK.

Considering the case at stake and conditions as listed in Article 245, paragraph 1, subparagraphs 1 to 5 PCPCK, the performed search could only stand on subparagraph 4 – "reasons of safety of people (...) so require". As a matter of fact, it is clear that no consent is documented on the file, no person was calling for help, no perpetrator was caught in the act and no order for arrest was previously issued by the court, so no other reason could be ground for it.
According to the same article, paragraphs 3 and 6, "exceptionally, in exigent circumstances, if a written order for a search cannot be obtained in time and there is a substantial risk of delay which could result in the loss of evidence or of danger to the lives and health of people, the judicial police may begin the search pursuant to the verbal permission of the pretrial judge" and "if the police have conducted a search without a written judicial order they shall send a report, to that effect to the public prosecutor and the pretrial judge, if any pretrial judge is assigned to the case, no later than 24 hours after the search".

Analyzing all above referred articles we shall consider the following: to enter the house or other premises of a person, police needs a previously issued judicial order except if any of the conditions under paragraph 1, subparagraphs 1 to 5 is verified. However, to conduct a search a written order must be previously issued by the pretrial judge, except in any of the conditions as foreseen by paragraph 3, and also a verbal permission is obtained from the pretrial judge. The reason for the difference is also comprehensible: the urgency for entering a house or premises may be not of the same level to conduct a subsequent search, since other measures might be applicable, namely the legal possibility to restrict movement in that specific area which is to be considered the strictly necessary measure, as demanded by the Constitution of Kosovo, Article 36, paragraph 2.

Pursuant Article 246 PCPCK, "evidence obtained by a search shall be inadmissible if (...) the search was executed without an order from a pretrial judge in breach of the provisions of the present code (paragraph 1); persons whose presence is obligatory were not present during the search – owner or his representative and 2 witnesses (paragraph 5

according to Article 243, paragraphs 1 and 2); the search was conducted in breach of Article 245, paragraph 1, 3, 4 and 5 of the present code (paragraph 6)".

Considering the raised issue, in order for a search, as conducted by judicial police, to be valid and all evidence gathered through this to be admissible, a written search order must be previously obtained; alternatively, a substantial risk of delay which could result on the loss of evidence or of danger to the lives and health of people – or reasons of safety of people as referred by Article 245, paragraph 1, subparagraph d) must be verified, as well as a verbal permission from the pretrial judge (Article 245, paragraph 3 PCPCK). If this is mandatory even for beginning a search, a fortiori it shall be mandatory to perform the proper search itself.

Taking into consideration the legal analysis and the factual frame as evaluated from the documents available, the legal consequence must be the inadmissibility of all evidence obtained by the search at stake.

As per Article 3 paragraph 6 of Law on Health Inspectorate, "In order to implement legal authorizations from its field of activity the Health Inspectorate cooperates and coordinates its activity with the Labor Inspectorate, the Sanitary Inspectorate, the Inspectorate of Environment, Water Inspectorate and other relevant inspectorates, Prosecutor's Offices, Kosovo Protection Corps (KPC) and the Kosovo Police Service (KPS)."

As per Article 7, paragraphs 1, 2, 4 and 8, "Health Inspectors possess authorization for free access in the inspection of the implementation of normative acts of health care institutions. Health Inspectors shall freely enter at any time to all working places within health care institutions during their inspection without any notification. Health Inspectors shall carry out necessary inspection and research to collect evidences that are considered important in order to ensure that legal provisions are being applied by health care institutions. Health Inspectors shall carry out control of all books and documents kept by the health care institution".
Finally, according to Article 7 paragraph 9, "The Inspector has the authorization to copy extracts from registers and documents and confiscate them in case they need evidence in the presence of the staff or witnesses, by keeping records on the materials confiscated from the respective health care institution (...)" A misleading and abusive interpretation of the above-transcribed articles would allow a search by the Prosecutor's office or by Kosovo Police in cooperation or coordination with Health inspectorate – rather than following a judicial authorization – once in order to implement legal authorizations from its field of activity, since this inspectorate is legally allowed not only to enter but also to search and confiscate evidence.

However it is worthy to bear in mind the search at stake was not motivated by health reasons as defined by Articles 2 and 6 of the referred law but "kidney transplantation is suspected to have taken place after a Turkish person who was apprehended by the Kosovo Police stated that he had sold a kidney at that hospital" instead, as it is specifically stated on Z. K. report. On the other hand on A. G. report it is clearly stated "By the District Prosecutor's order Mr. Osman Mehmeti was decided to block the entire building premises, and which should be examined in details on the incoming days". It was clearly a criminal search, motivated by criminal reasons, by Prosecutor's order, where evidence seized were carried on to criminal proceedings. It was not a simple cooperation on implementation of legal authorizations from health's field of activity.
A similar case – Funke vs. France (App. 10828/84 25th Feb 1993, Series A No. 256-A, (1993) 16 EHRR 297 – must be addressed here with similar interpretation, *mutatis mutandis*, but referring to specific powers attributed to customs police and their connectivity to criminal procedure. In this case it was considered that restrictions and limitations provided for in the law cannot be too lax and full of loopholes for the interferences to be strictly proportionate to the legitimate aim pursued. And it is always worthy to mention Article 53 of Constitution of Kosovo according to which "interpretation of human rights and fundamental freedoms must be interpreted consistent with the court decision of ECHR".

b. Consequence of the illegal search

Consequently the Panel also comes to the same conclusion as judge Vitor Hugo Pardal in ruling PPS. No. 02/2009 of the Basic Court of Pristina, dated 31 January 2011, with regard to the inadmissibility of certain evidence confiscated during the search. Although a review panel confirmed the indictment and determined that all of the disputed evidence was to be regarded as admissible, the Panel is not bound by this decision. As detailed above, the Panel is of the opinion certain evidence was obtained in violation of the law. Pursuant to Article 246 PCPCK such evidence shall be inadmissible. To determine what specific evidence is to be declared inadmissible the Panel shall apply the doctrine of the "fruit of the poisonous tree", namely if the source (the "tree") of the evidence or evidence itself is tainted, then anything gained (the "fruit") from it is tainted as well. However, certain exceptions apply, namely if the evidence was discovered in part as a result of an independent, untainted source or if the evidence would inevitably have been discovered despite the tainted source as well. Applying the aforementioned doctrine of the "fruit of the poisonous tree" the Panel considers the following evidence inadmissible seeing as it was directly obtained through the conducted search and/or it was directly grounded on the search, whilst it is not possible to have been obtained through a different, untainted source:

1. Clinic books and other documents confiscated during the search (Binder IV, page 6 to 150);

2. Pictures taken during and after the search (Binder V, page 80);
3. Report on expert examination on confiscated objects (Binder V, page 128-131) dated 20 January 2009;
4. Review of evidence: comparison of protocol book as seized evidence (B VII, page 647), dated 9 July 2009;
5. Reporting on expertise regarding evidence seized during the search, dated 9 June 2009, and 4 August 10 (B VIII, page 1086, 1140 and 1144);
6. Results of the analysis of the Medicus Clinic records, dated 24 November 2010 (Binder Post indictment evidences, page 75 to 80);
7. Evidences listed as result of confiscation during the search (Binder Post Indictment evidences, page 45).
8. Pictures taken during the search (Binders A and B).

As noted above, any evidence that inevitably would be discovered without the search must however be considered as admissible. The Panel finds that any list of eventual donors and/or recipients could be based on lists provided by entrance and departure official registries on the border, travel documents and air tickets issued as well as by all guarantees and invitation letters applied and provided before the search. Even though the same names could be confirmed on clinic books and registries seized, this was not the only and definitive source of them. Furthermore, the discovery of a witness is not evidence in itself because the witness is attenuated by separate interviews, in-court testimony and his or her own statements. Considering so, all of the witnesses statements are hereby considered as admissible evidence.

With similar reasoning as above, namely the search not being the only means or source to obtain the evidence, the following evidence is deemed as admissible:

- All witness statements, as detailed on pages 53 to 88 and 107 to 112 of the impugned judgment;
- Entry and Exit Data of Donors, Recipients, Foreign Doctors and Others, as detailed on page 93 to 98 of the impugned judgment;
- Forensic Medical Expertise Prepared by Dr. C. B. regarding Donors DS and AK, as detailed on page 88 to 89 of the impugned judgment;
- E-mail exchanges, as detailed on page 98 to 104 of the impugned judgment;
- Metering of Telephone Calls, as detailed on page 112 of the impugned judgment;
- The Ethics Committee, as detailed on page 112 of the impugned judgment;
- Letters of Invitation, as detailed on page 112 of the impugned judgment.

c. SMS

The prosecution submits that the content of the SMS text messages should be considered as part of the metering of phone calls, for which the order from the prosecution is sufficient, and therefore is admissible.

The Panel rejects the appeal of the prosecutor and adopts and affirms the finding of the Basic Court that the information of SMS text messages can only be disclosed upon an order of the pretrial judge under Article 258, paragraph 2, subparagraph 4, PCPCK, and therefore the evidence is inadmissible under Article 264, paragraph 1, PCPCK.

F. Determination of the Factual Situation

The defence submits that the Basic Court did not properly evaluate the evidence administered during the main trial and consequently came to wrong conclusions regarding the criminal offences and the role of the defendants.

Before assessing the merits of the arguments presented by the defence on the alleged erroneous or incomplete determination of facts, the Panel reiterates the standard of review regarding the factual findings made by the trial panel.

It is clear from Article 405 PCPCK 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.[1] 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 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*".[2]

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

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

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.

a. Witness statements of the kidney donors and recipients (and/or relatives)
The Panel examined the thorough analysis of the Basic Court regarding the witness statements of the kidney donors, as set out on pages 53 to 69 of the impugned judgment. The Panel also examined the thorough analysis of the witness statements of the recipients and/or their relatives, as set out on pages 69 to 87 of the impugned judgment. The Panel furthermore autonomously reviewed all the witness statements. In the view of the Panel, the Basic Court comes to logical conclusions in its assessment of the evidence, as elaborated on page 87-88. The Panel finds no reason to doubt the credibility of the witness statements. Nor does the Panel find that the Basic Court incorrectly interpreted the witness statements. The Panel fully adopts and affirms the analysis of the Basic Court that the kidney donors were recruited, transported, transferred, received and harboured. Furthermore, the kidney donors were subjected to abuse of their position of vulnerability, coerced, deceived and/or defrauded. The Panel affirms that the kidney donors were exploited by the removal of their kidneys.

b. Witness statements of others with knowledge of the activities
The Panel also examined the thorough analysis of the Basic Court regarding the witness statements of others with knowledge of the activities, as set out on pages 107 to 112 of the impugned judgment. The Panel furthermore again autonomously reviewed all the witness statements. The Panel finds that the Basic Court comes to logical conclusions in its assessment of this evidence as well. The Panel finds that the Basic Court correctly interpreted the witness statements. The Panel fully adopts and affirms the analysis of the Basic Court. Together with the other corroborating evidence as mentioned below, the Panel finds that the defendants L. D., A. D. and S. H. were substantially involved in the Trafficking of Persons and that the defendants L. D., A. D. and S. H. were also involved in a criminal organization.

c. Corroborating evidence
The Basic Court in detail analyzed the other corroborating evidence as well. The Panel again finds no flaws in the reasoning of the Basic Court and adopts the analysis and conclusions entirely. The following evidence supports the ascertainment that the defendants L. D., A. D. and S. H. were substantially involved in the Trafficking of Persons and that the defendants L. D., A. D. and S. H. were also involved in a criminal organization:

- Forensic Medical Expertise Prepared by Dr. C. B. regarding Donors DS and AK, page 88 to 89 of the impugned judgment;
- Entry and Exit Data of Donors, Recipients, Foreign Doctors and Others, page 93 to 98 of the impugned judgment;
- E-mail exchanges, page 98 to 104 of the impugned judgment;

- Metering of Telephone Calls, page 112 of the impugned judgment;
- The Ethics Committee, page 112 of the impugned judgment;
- Letters of Invitation, page 112 of the impugned judgment.

d. Number of kidney transplants

Although the Panel concurs with the assessment made by the Basic Court that kidney transplants took place in the Medicus Clinic, the Panel finds that there is only sufficient evidence to proof that seven kidney transplants took place, namely regarding Protected Witnesses W2, W1, W3, victims PM, DS, AK and Y. A.. The evidence of these specific transplants is directly based on the testimonies of the victims (six kidney donors testified during the main trial and one kidney donor testified during the pre-trial phase) and further on the remaining evidence as discussed under *a.*, *b.* and *c.* above. For the other seventeen kidney transplants initially proven by the Basic Court, the Panel finds there is insufficient evidence that these transplants took place, seeing as evidence directly obtained through the conducted search, such as the Clinic books and other documents, is inadmissible and no other sufficient evidence is available regarding the exact date of the other alleged transplantation operations and personal data of the alleged concerned donors and recipients.

e. Conclusion

Concluding, the Panel finds that the Basic Court erred when establishing that twenty-four kidney transplants took place at the Medicus Clinic. Article 405 PCPCK was thus violated and the Panel finds that the Basic Court incorrectly determined the factual situation. The Panel shall therefore modify the impugned judgment insofar as the number of proven kidney transplants that took place at the Medicus Clinic in which the criminal organization, including the defendants L. D., A. D. and S. H., were involved is to be established as seven and not twenty-four.

With regard to the seven kidney transplants, certain inadmissible evidence cannot be used to establish the factual situation regarding these transplants. However, with the remaining admissible evidence there is sufficient proof that these transplants took place and the criminal organization, including the defendants L. D., A. D. and S. H., were involved. The Basic Court therefore did not incorrectly determine the factual situation regarding these seven kidney transplants. Neither is there evidence that undermines the correctness or reliability of the determination of a material fact. Article 405 PCPCK was thus not violated regarding the assessment of aforementioned seven kidney transplants and the Panel finds that the Basic Court correctly and completely determined the factual situation.

The appeals of the defence are partially granted.

G. Legality of kidney transplants in Kosovo

The defence submits that the kidney transplants were carried out in full compliance with the Kosovo Health Law, and alternatively that the defendants were acting in good faith that the kidney transplants were in full compliance with the Kosovo Health Law.

The Basic Court on pages 45 to 52 in detail discussed whether or not the kidney transplants were in accordance with the Kosovo Health Law. The Panel finds no flaws in the reasoning of the Basic Court. The Panel comes to the same conclusion, namely that the kidney transplants carried out at the Medicus Clinic were in violation of Section 46, item d, of the Kosovo Health Law[3] and that the document of 12 May 2008 issued by I. R. was merely an advisory notice to the effect that if special authorizing legislation was enacted at some time in the future, the Medicus Clinic "in principle" would be permitted to conduct kidney transplants. The document, by its very terms, however was not a license or authorization; it was not intended to be a license or authorization; it was not understood by the Medicus Clinic to be a license or authorization; and it was not used as a license or authorization. This document does not provide any authorization and was of informative nature only. The performed kidney transplants in the Medicus Clinic were therefore illegal.
As respective director, manager and lead anesthesiologist of the Medicus Clinic, the defendants L. D., A. D. and S. H. at the very least should have been aware that the kidney transplants were illegal. Considering their combined professional background and expertise, the Panel therefore rejects the assertion that the defendants were acting in good faith.

The appeals of the defence are thus rejected as unfounded.

Moreover, whether or not the kidney transplants were in full compliance with the Kosovo Health Law is for the most part irrelevant for the determination of the criminal offence of Trafficking in Persons. It only affects the element of 'deception' as will be discussed below.

H. Trafficking in Persons

a. The criminal offence
It is not contested that kidney transplantations took place at the Medicus Clinic. The defence does however contest that the kidney transplantations constitute a criminal offence.

Article 139 PCPCK reads as follows:

[3] Private health activities are not allowed in the following fields: d) Collection, preservation transport and transplantation of tissues and human organs except in cases of auto-transplantation.

Trafficking in Persons

(1) Whoever engages in trafficking in persons shall be punished by imprisonment of two to twelve years.

(2) When the offence provided for in paragraph 1 of the present article is committed against a person under the age of 18 years, the perpetrator shall be punished by imprisonment of three to fifteen years.

(3) Whoever organizes a group of persons to commit the offence in paragraph 1 of the present article shall be punished by a fine of up to 500.000 EUR and by imprisonment of seven to twenty years.

(4) Whoever negligently facilitates the commission of trafficking in persons shall be punished by imprisonment of six months to five years.

(5) Whoever uses or procures the sexual services of a person with the knowledge that such person is a victim of trafficking shall be punished by imprisonment of three months to five years.

(6) When the offence provided for in paragraph 5 of the present article is committed against a person under the age of 18 years, the perpetrator shall be punished by imprisonment of two to ten years.

(7) When the offence provided for in the present article is committed by an official person in the exercise of his or her duties, the perpetrator shall be punished by imprisonment of five to fifteen years, in the case of the offence provided for in paragraph 1 or 2, by imprisonment of at least ten years, in the case of the offence provided for in paragraph 3, by imprisonment of two to seven years in the case of the offence provided for in paragraphs 4 or 5 or by imprisonment of five to twelve years, in the case of the offence provided for in paragraph 6.

(8) For the purposes of the present article and Article 140,

1) The term "trafficking in persons" means the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

2) The term "exploitation" as used in subparagraph 1 of the present paragraph shall include, but not be limited to, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

3) The consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant where any of the means set forth in subparagraph (1) of the present paragraph have been used against such victim.

4) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (1) of this paragraph.

As can be clearly read in paragraph 8, item 2, the removal of organs is a form of exploitation. Seeing as there is no doubt that the kidneys of the victims were removed in the Medicus Clinic, this condition of the criminal offence of Trafficking in Persons has been met.
There is also no doubt that the victims were transported and transferred from their place of residence to the Medicus Clinic specifically for the intent of removing the kidney. The Medicus Clinic furthermore harbored the victims in its premise prior, during and after the removal of the kidneys. This condition of the criminal offence of Trafficking in Persons is also met.
The key issue is whether or not the kidney donors were victims of either threat, use of force, coercion, abduction, fraud, deception, abuse of power or if they were in a position of vulnerability or if they were given payments or benefits to achieve the consent of a person having control over another person. With the Basic Court, the Panel finds that the victims were in a position of financial vulnerability. The victims that testified at the main trial were all foreign nationals from relatively poor countries and were personally experiencing acute financial distress. The victims were thus in a position of vulnerability. Furthermore, the victims were told that their specific kidney transplants were legal in Kosovo, when this in fact was not the case. Pursuant to Section 46, item d, of the Kosovo Health Law private health activities are not allowed with regard to the collection, preservation transport and transplantation of tissues and human organs. Thus their kidney transplants were illegal. This constitutes deception. Additionally, the victims were not provided valid information about the risks of the surgery and were escorted into surgery without ample to time to reconsider, constituting a form of coercion. In some cases the victims were also not given the full amount of money they had been promised or they were given no money at all. The condition of fraud has therefore also been met. Concluding, multiple means were used for the purpose of exploiting the victims for their kidneys.
Whether or not the kidney donors gave their consent for the removal of their kidney is irrelevant for the constitution of the criminal offence of Trafficking in Persons, pursuant to Article 139, paragraph 8, item 3, PCC.
Considering the above, the Panel fully concurs with the assessment of the Basic Court that the removal of kidneys from the victims and the surrounding course of events in the Medicus Clinic constitute the criminal offence of Trafficking in Persons.

b. The role of the defendants
b.i. L. D.
As can be derived from the witness statements, e-mail exchanges and statements of the defendants, L. D. set up a sophisticated medical facility with all of the necessary staff, equipment, supplies and procedures, with the purpose of conducting kidney transplants. L. D. on his own account initiated the quest to perform kidney transplants in the Medicus Clinic. L. D. then closely collaborated with Y. S. in order to run the Medicus Clinic as a place where the kidney transplants could take place. L. D. also employed several other persons in order to execute the kidney transplants. The specific surgeries were all conducted in the Medicus Clinic.

L. D. also was present during (some of) the kidney transplants. Furthermore, the defendant L. D. does not contest that kidney transplants took place in the Medicus Clinic and that he was either directly involved with or aware of the transplants.

The Panel therefore finds that it is proven beyond a reasonable doubt that the defendant L. D. deliberately, with direct intent, engaged in trafficking in persons, pursuant to Article 139, paragraph 1, PCC.

The appeal of the defence that the defendant L. D. is innocent is thus rejected as unfounded.

b.ii. A. D.

As can be derived from the witness statements, e-mail exchanges and statements of the defendants, A. D. helped to set up a sophisticated medical facility with all of the necessary staff, equipment, supplies and procedures, with the purpose of conducting kidney transplants. The specific surgeries were all conducted in the Medicus Clinic. A. D. closely corroborated with his father, L. D., to arrange the practical functioning of the modus operandi that was in place to successfully conduct the kidney transplants. For example, arranging the Medicus letters of invitation for the donors and recipients to show customs officials at the airport or picking up the donors from Pristina Airport for their transport to the Medicus Clinic. A. D. was also in close contact with Y. S..

Considering the nature of the acts committed by defendant A. D., the Panel finds that there is no other way than that the defendant A. D. was fully aware of the kidney transplants that were taking place at the Medicus Clinic.

The Panel therefore finds that it is proven beyond a reasonable doubt that the defendant A. D. deliberately, with direct intent, engaged in Trafficking in Persons, pursuant to Article 139, paragraph 1, PCC.

The appeal of the defence that the defendant A. D. is innocent is thus rejected as unfounded.

b.iii. S. H.

Count 1, the criminal offence of Trafficking in Persons, in violation of Article 139 PCCK, committed in co-perpetration (Article 23 PCCK), against the defendant S. H. was requalified by the Basic Court as per negligent facilitation of the criminal offence of Trafficking in violation of Article 139, paragraph 4, PCCK and was subsequently rejected. S. H. was then found guilty of Article 154, paragraph 1, subparagraph 2, PCCK: destroying or permanently and substantially weakening a vital organ or a vital part of the body of the other person, as this offence was requalified from the criminal offence of Grievous Bodily Harm, in violation of Article 154, paragraph 4, PCCK.

In its rejection of Count 1 the Basic Court came to the conclusion that the defendant S. H. committed the offense of trafficking in persons by unconscious negligence. The Panel, however, does not agree with this assessment.

As can be derived from the witness statements, e-mail exchanges and statements of the defendants, the defendant *S. H.* participated in a significant number of operations. He thus had to be aware that the operations involved kidney transplantations. He also had substantive and direct interaction with the patients before the surgery and thus had knowledge that they were foreign nationals. S. H. furthermore was the lead anesthesiologist at the Medicus Clinic and he therefore had a position in which he had, or at the very least should have had information about the kidney operations procedures. As corroborating evidence the Panel also takes into account that the defendant's name was mentioned in the email exchange between S. and L. D..

Based on the above, the Panel finds that the defendant's actions are too heavily involved to be considered 'unconscious negligence'. Considering his direct role in the operations and his leading role within the clinic, the Panel is therefore of the opinion – in contrast to the Basic Court and the defence – that there is sufficient evidence that S. H. had at the least eventual intent to engage in Trafficking in Persons. Given the gravity of the operations and his direct involvement in the operations, the defendant cannot hide behind his line of defence that he was so busy that he did not pay so much attention to the international patients and never asked L. D. for explanations. The Panel finds this explanation unreliable. The Panel therefore finds that there is sufficient evidence to proof beyond a reasonable doubt that the defendant S. H. committed the criminal offence of Trafficking in Persons.

The appeal of the defence that the defendant S. H. is innocent is thus rejected as unfounded.

The appeal of the prosecution on the other hand is granted. Pursuant to Article 426, paragraph 1, PPCPCK, the Panel thus modifies the judgment of the Basic Court insofar as the defendant S. H. is found guilty of the criminal offence of Trafficking in Persons. The enacting clause shall be modified accordingly.

I. Organized Crime

a. L. D.

With the Basic Court the Panel finds that there is sufficient evidence to proof that the kidney transplants were conducted by an organized criminal group. There was a well-structured international criminal group in place which profited greatly. The enterprise was well organized; it consisted of many persons including L. D., A. D., and others; and it involved many interrelated functions, such as recruitment, logistics, payment, transportation, availability of a suitable medical facility (Medicus Clinic), availability of trained medical doctors, and the performing of

specialized medical procedures (kidney transplants). While all of the participants did not necessarily know each other, they were all part of a structured group that produced a seamless criminal endeavor, namely the trafficking in persons.
The defendant L. D. on his own account initiated the quest to perform kidney transplants at the Medicus Clinic and he was eventually responsible for the overall organization, establishment, supervision, management and directing of the kidney transplants that took place at the Medicus Clinic. He thus had a substantial and crucial role in organizing the criminal group.

The Panel therefore finds that it is proven beyond a reasonable doubt that the defendant L. D. established and organized the activities of an organized criminal group, pursuant to Article 274, paragraph 3, PCC.

The appeal of the defence that the defendant L. D. is innocent is thus rejected as unfounded.

b. A. D.
With the Basic Court the Panel also finds that it is proven beyond a reasonable doubt that the defendant A. D. committed a serious crime, namely the Trafficking in Persons, as part of the organized criminal group as specified above, pursuant to Article 274, paragraph 1, PCC.
A. D. was the director/manager of the Medicus Clinic and closely corroborated with his father, L. D., to arrange the practical functioning of the modus operandi that was in place to successfully conduct the kidney transplants at the Medicus Clinic. He thus had a substantial and crucial role in the organized criminal group.

The appeal of the defence that the defendant A. D. is innocent is thus rejected as unfounded.

c. S. H.
Contrary to the Basic Court the Panel finds that it is proven beyond a reasonable doubt that the defendant S. H. committed a serious crime, namely the Trafficking in Persons, as part of the organized criminal group as specified above, pursuant to Article 274, paragraph 1, PCC.
S. H. participated in a significant number of operations. He thus had to be aware that the operations involved kidney transplantations. S. H. furthermore was the lead anesthesiologist at the Medicus Clinic and he therefore had a position in which he had, or at the very least should have had information about the kidney operations procedures. He thus had a substantial and crucial role in the organized criminal group.
As corroborating evidence the Panel also takes into account that the defendant's name was mentioned in the email exchange between S. and L. D..

The appeal of the defence that the defendant S. H. is innocent is thus rejected as unfounded.

d. Co-perpetrators

With regard to both L. D. and A. D., the Panel however modifies the enacting clause insofar that the names of the other co-perpetrators involved in the organized criminal group shall not be included, as will be discussed in more detail below (L.*b*.). This however does not affect the enacting clause and guilty verdict as a whole and the reasoning as discussed above still applies.

J. Same Criminal Act

a. Trafficking in Persons and Organized Crime

The Court of Appeals Panel finds that the Basic Court rightfully found the defendants L. D. and A. D. guilty of Trafficking in Persons and Organized Crime and correctly imposed the punishment for the two criminal offences.

It however has to be clarified that the defendants committed one criminal offence, instead of two separate criminal offences. The enacting clause will also be modified accordingly.

The Basic Court found the defendant L. D. guilty of the criminal offence of Trafficking in Persons in violation of Article 139 paragraph 1 of the PCCK, committed in co-perpetration pursuant to Article 23 of the PCCK (Count 1) and the defendant was found guilty of committing the criminal offence of Organized Crime, in violation of Article 274, paragraph 3 of the PCCK (Count 2). He was sentenced to imprisonment of 8 (eight) years and a fine of 10,000 (ten thousand) Euros.

A. D. was found guilty of committing the criminal offence of Trafficking in Persons in violation of Article 139 of the PCCK, committed in co-perpetration pursuant to Article 23 of the PCCK (Count 1) and the defendant was found guilty of committing the criminal offence of Organized Crime, in violation of Article 274, paragraph 1 (Count 3). He was sentenced to imprisonment of 7 (seven) years and 3 (three) months and a fine of 2,500 (two thousand five hundred) Euros.

The Court of Appeals stresses that in the case at hand both defendants cannot be convicted for the two separate criminal offences of Trafficking in Persons and Organized Crime. The Panel refers to previous decisions rendered by the Supreme Court/Court of Appeals confirming that "Organized Crime" is a qualifying act and therefore never can be taken as a separate criminal offence. The courts have held continuously that the defendant cannot *for the same criminal act* be convicted of both (i) Organized Crime **and** (ii) the underlying serious crime required as element of the criminal offence, in this case Trafficking in Persons. If a different approach would be taken, the defendant would be punished twice for the same act. The Supreme Court of Kosovo has in a previous judgment stressed that the offence of Organized Crime requires the commission of an 'underlying' offence, in addition to the offence of Organized Crime. The formulation used throughout Article 274 PCPCK clearly stipulates that the commission of an underlying offence is a constitutive element of this offence. Otherwise, an individual could be found guilty for the same act, forming part of both criminal offences, of Organized Crime and of the underlying

offence. This situation amounts to a breach of the prohibition to impose a double punishment for one single offence.[4]
The Court of Appeals Panel concurs with the above interpretation by the Supreme Court and finds that it necessitates the modification of the contested judgment. In the case at hand the criminal offence of organized crime subsumes the criminal offence of Trafficking in Persons as the 'underlying' criminal offence to it. As a result, the defendants L. D., A. D. and S. H. are found guilty for one criminal offence, namely Organized Crime in connection with Trafficking in Persons. The enacting clause shall be modified accordingly.

b. Trafficking in Persons and Grievous Bodily Harm
In accordance with the above mentioned principle that the defendant cannot be convicted for the same criminal act twice, the Panel furthermore adopts and affirms the reasoning of the Basic Court that Count 7 against the defendant L. D. is to be rejected, pursuant to Article 389, paragraph 4, due to the circumstance that this Count constitutes an element of Count 1, Trafficking in Persons, for which the defendant L. D. is already being convicted.

The appeal of the prosecution on this issue is therefore rejected as unfounded.

K. I. B. and S. D.

The defendants I. B. and S. D. were found guilty of Article 154, paragraph 1, subparagraph 2, PCCK: destroying or permanently and substantially weakening a vital organ or a vital part of the body of the other person, as this offence was requalified from the criminal offence of Grievous Bodily Harm, in violation of Article 154, paragraph 4, PCCK.

The Panel finds that there is indeed a suspicion that the defendants I. B. and S. D. were aware of the fact that illegal kidney transplants were taking place at the Medicus Clinic and that they were in fact performing their medical profession as anesthesiologist on the very donors and recipients of these kidney transplants. However, the Panel finds that with the inadmissibility of certain evidence confiscated at the Medicus Clinic there is insufficient evidence to proof beyond a reasonable doubt that the defendants I. B. and S. D. were so directly involved in the procedures at the Medicus Clinic and the specific kidney operations that they knew they were permanently and substantially weakening an organ of the other person, other than performing their medical profession to tend for the patients at hand.

The appeals on behalf of the defendants I. B. and S. D. are granted.

[4] See Judgment of the Supreme Court of Kosovo in case no. Ap-Kz 61/2012 dated 2 October 2012, para 48; see also Judgment of the Appellate Court of Kosovo, case no. PAKR 215/2014, dated 14 May 2015.

The Panel therefore acquits the defendants I. B. and S. D. of Count 7, Article 154, paragraph 1, subparagraph 2, PCCK: destroying or permanently and substantially weakening a vital organ or a vital part of the body of the other person, as this offence was requalified from the criminal offence of Grievous Bodily Harm, in violation of Article 154, paragraph 4, PCCK. The Panel modifies the judgment of the Basic Court accordingly, as specified in the enacting clause.

L. Enacting clause

a. Exceedance of the indictment

The defence asserts that the scope of the indictment was exceeded as the enacting clause of the impugned judgment attributed actions to the defendants they were not charged with, thus violating Article 403, paragraph 10, PCPCK in conjunction with Article 386, paragraph 1, PCPCK.

The Panel finds no violation with regard to the exceeding of the indictment in the enacting clause. The Panel finds that - with regard to the parts of the enacting clause of the Basic Court judgment that the Panel affirms - the proven facts match the charges as stipulated in the indictment. The Panel therefore finds the enacting clause in accordance with Article 386, paragraph 1, PCPCK, as the enacting clause relates "only to the accused and 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".

b. Identification of co-perpetrators

The co-perpetrators, other than the defendants, are not indicted in this specific case and they thus don't have an opportunity to defend themselves. Furthermore, other criminal proceedings are being or might be initiated against certain co-perpetrators. The Panel therefore *ex officio* modifies the enacting clause insofar as the names of all the co-perpetrators, not being the defendants, are removed and are merely defined and referred to as co-conspirators.

M. Decision on the Criminal Sanction

With regard to the punishment the prosecutor submits the following: The sentence imposed on the defendant L. D. is presumably an aggregate of the convictions for the two offences although this is not stated in the judgement. The punishment is on the very low end of the scale, considering the minimum sentences applicable for organized crime and trafficking. Furthermore, L. D. should have been convicted of Grievous Bodily Harm as well and this criminal offence should be included in the punishment. The Basic Court failed to first pronounce the punishment for each act and then impose an aggregate punishment for all of the acts. This should be modified. The accessory punishment of prohibition on L. D. from exercising the profession of

urologist should be modified to include all practice by him and should be increased to the maximum of 5 (five) years starting after he is released from prison.
Concerning the defendant A. D. the prosecution deems that the Basic Court failed to first pronounce the punishment for each act and then impose an aggregate punishment for all of the acts. This should be modified.
Regarding S. H. the imposed sentence is too low. Furthermore, the accessory punishment of the prohibition from exercising his profession should be modified to include all practice and should also be increased starting after he is released from prison.

The defence submits that the punishments are far too severe.

The Court of Appeals is of the opinion that based on Article 34 and Articles 64 to 71 PCPCK the applicable principles to calculate the punishment are the following:
A criminal sanction is the last resort to protect social values and cannot intervene beyond what it is found as strictly necessary. A sanction must not be higher than the necessity of justice enforcement and cannot be disproportionate considering the social protected values. Therefore, according to this principle of minimum intervention, it must be assumed that the lower punishment foreseen in the law will be sufficient, adequate and a reference point for standard situations that may be subsumed in the legal incriminating provision.
The Punishment is bound by the purposes of ensuring individual prevention and rehabilitation, ensuring general prevention, expressing social disapproval of the violation of the protected social values and strengthening social respect for the law.
While determining the punishment, the maximum penalty applicable in concrete will be given by the degree of guilt of the perpetrator and the minimum by the intensity of the demands of social reprobation. Inside this limit, the sanction must not be contrary to the referred principles of prevention and rehabilitation and must be proportionate to the specific mitigating and aggravating circumstances related to the criminal fact and the conduct and personal and social circumstances of the offender.

Pursuant to Article 64 (1) PCPCK, the court when rendering a judgment has to take into consideration the purpose of punishment, all the circumstances that are relevant to the mitigation or aggravation of the punishment, in particular, the degree of criminal liability, the motives for committing the criminal offence, the intensity of danger to the protected value, the circumstances in which the act was committed, the past conduct of the perpetrator, the personal circumstances and his behaviour after committing the criminal offence. The punishment shall finally be proportionate to the gravity of the offence and the conduct and circumstances of the offender.
Generally, the Court of Appeals, in reviewing the sentences, is limited by the factual situation established in the judgment and by the evaluation of the legal rules applicable to determination of punishment by the Basic Court. The Panel is not bound by the specific weight given by the Basic Court to each aggravating and mitigating circumstances. Other conjectural facts in favour

or to the detriment of the defendants but not established by the Basic Court cannot be considered to determine the punishment.

L. D. was found guilty of the criminal offence of Trafficking in Persons in violation of Article 139 paragraph 1 of the PCCK, committed in co-perpetration pursuant to Article 23 of the PCCK (Count 1) and he was found guilty of committing the criminal offence of Organized Crime, in violation of Article 274, paragraph 3 of the PCCK (Count 2). He was sentenced to imprisonment of 8 (eight) years and a fine of 10,000 (ten thousand) Euros for both criminal offences in conjunction. The prohibition from exercising the profession of urologist for the period of 2 (two) years once the judgment becomes final was imposed as accessory punishment.

A. D. was found guilty of committing the criminal offence of Trafficking in Persons in violation of Article 139 of the PCCK, committed in co-perpetration pursuant to Article 23 of the PCCK (Count 1) and he was found guilty of committing the criminal offence of Organized Crime, in violation of Article 274, paragraph 1 (Count 3). He was sentenced to imprisonment of 7 (seven) years and 3 (three) months and a fine of 2,500 (two thousand five hundred) Euros for both criminal offences in conjunction.

S. H. was found guilty of committing the criminal offence of Grievous Bodily Harm in violation of Article 154, paragraph 1, subparagraph 2 of the PCCK (Count 7) and was sentenced to imprisonment for 3 (three) years. The prohibition from exercising a profession of anaesthesiologist for the period of 1 (one) year once the judgment becomes final was imposed as accessory punishment.

With regard to the defendant L. D. the Court of Appeals finds that the Basic Court duly considered all mitigating and aggravating circumstances. The Panel found as mitigating circumstances his past conduct as head of his family and his respectful status in society providing needed medical services to the inhabitants of Kosovo, and his lack of a criminal record. As aggravating circumstances the court took into consideration his selfish motives, namely generating illegal income. He used his highly regarded and respected position as a source of illegally accrued financial income. His unacceptable actions brought Kosovo to the attention of the international community as the place where kidney transplantations took place, creating a widespread perception of Kosovo as the country where the law is not observed. Vulnerable persons were injured and their lives exposed to a potentially life threatening situation, leaving them with real danger that life conditions could suddenly deteriorate and they could end up as patients in urology wards waiting for dialysis or transplants. An additional aggravating factor was the professional method of setting the clinic up on an international scale. Overall, the defendant played an active part in an internationally organized group and was – at least for the area of Kosovo – the key figure that trafficked poverty stricken human beings from their homes to his operating theatre in a medical clinic in Pristina that he co-owned. Without the participation of L. D. none of these events would have taken place. He is the man who employed Y. S. to come to Kosovo. He is the man who sought and then paid for S. H. to act as anesthesiologist in the kidney transplant surgeries in the Medicus Clinic and he is the man who bears the highest degree of responsibility for these events. The Court of Appeals fully concurs with the calculation

of punishment the Basic Court made and remarks that all mitigating and aggravating circumstances have correctly been taken into consideration.

As concluded above, the defendants L. D. and A. D. are found guilty of the criminal offence of Organized Crime in connection with Trafficking in Persons. The Basic Court in the impugned judgment already imposed one punishment for both criminal offences. The Panel therefore finds no need to modify the punishment in this specific regard.

The Court of Appeals affirms the punishment for the accused L. D. as it finds an aggregated punishment of eight (8) years fair and proportionate based on the grounds as elaborated on above.

With regard to the defendant A. D., the Appellate Panel principally follows the argumentation of the prosecution and deems a punishment of 7 (seven) years and 3 (three) months too lenient. The Basic Court found as aggravating circumstance that the defendant acted propelled by desire to acquire substantial material benefit at the expense of innocent and vulnerable people. He held the position of main administrator of the illegal criminal organization in Kosovo, being responsible for all administrative and factual arrangements, and without him this criminal enterprise would not have succeeded. The Panel further opines that A. D. played an equally important role in the group as the defendant L. D.. Together with his father he was one of the key figures for organizing the kidney transplantations in Kosovo. Therefore, the Court of Appeals considers a punishment of 8 (eight) years as fair and proportionate to the gravity of the offence and the conduct and circumstances of the defendant. Regarding the imposed fine of 2,500 (two thousand five hundred) Euros the Panel affirms the impugned judgment as this decision was not appealed by the prosecution.

With regard to the defendant S. H. the Court of Appeal now finds the defendant guilty of Trafficking in Persons, in violation of Article 139 of the PCCK, committed in co-perpetration pursuant to Article 23 of the PCCK. The Panel finds that a punishment of 5 (five) years and a fine of 2,500 (two thousand five hundred) Euros is appropriate and notes that this punishment reflects the level of criminal responsibility of the defendant and takes into account the number of acts giving rise to the conviction and the manner in which the criminal offence was committed. As mitigating circumstance the court took into consideration that he was not convicted previously. As aggravating circumstances the Panel considered that this defendant held an important position as a senior anesthesiologist working in the clinic. He very actively participated in most operations. However, the defendant does not deserve the same punishment as the defendants L. D. and A. D.. He was less a key figure for the criminal group but more an important "human tool" who provided his "hands" to L. D. and A. D.. Taking the criminal offences and the above elaborated circumstances into account the Court of Appeals, after careful consideration, finds that an imprisonment of 5 (five) years and a fine of 2,500 (two thousand five hundred) Euros is appropriate and necessary to serve all purposes of punishment.

Pursuant to Article 57, paragraph 1 and 2 of the PCPCK, the Basic Court imposed accessory punishments, namely prohibition from exercising profession as urologist and anesthesiologist for L. D. and S. H. starting from the day the judgment becomes final. According to the court, the

criminal offenses committed by these two doctors represent a great danger to public safety as they exposed patients in particular donors to unprecedented danger. These doctors were persons of public trust, and as such should have presented a high level of moral integrity. That behavior should be strongly condemned by this accessory punishment. The Panel therefore modifies the impugned judgment so that the prohibition from exercising the profession shall start **after** the defendants have served the imposed sentence of imprisonment. That means the prohibition of practice will not simultaneously start to run with the imprisonment i.e. when the judgment becomes final but when the defendants are released from prison. The Basic Court judgment is modified in this accordingly. The Panel however finds no grounds to expand the accessory punishment beyond the specific profession of the defendants. The motion of the prosecutor to expand the accessory punishment to all of the fields of medical profession is therefore rejected.

Seeing as the Panel comes to different qualifications of the committed criminal offences as compared to the Basic Court, the sentences have also been imposed according to the new qualifications. Thus any omissions of the Basic Court to first pronounce the punishment for each act and then impose an aggregate punishment for all of the acts, pursuant to Article 396, paragraph 5, have consequently been amended by the newly imposed punishments in this judgment.

N. Partial Compensation

With regard to the submission of the prosecution that the amount ordered for the psychological and physical damages sustained during kidney transplantations by the victims is too low, the Panel finds that the amount of 15.000 Euro's determined by the Basic Court is adequate. The Panel takes into consideration with this, that the injured parties also violated the law in Kosovo. That is why they should not benefit from their illegal action and should not be awarded a higher compensation.

VI. CONFISCATION

A. SUBMISSIONS OF THE PARTIES

a. The appeal of the SPRK

The SPRK submits that although the prosecution concurs with the decision rendered by the Basic Court and the legal arguments thereof, the ruling contains a serious and implacable omission pro forma, namely an incomprehensible enacting clause. It is admitted that the absence of a comprehensible enacting clause is likely to be the result of human error. However, such error must be corrected for reasons of clarity and legality.

The SPRK requests the Court of Appeals to modify the ruling with respect to the enacting clause, by clearly stating that the court decides to close and confiscate the Medicus Clinic.

b. The appeal of F. I. on behalf of the economic entity Medical Center LLC

F. I., the now owner of the Medical Center LLC, submits that it is unclear from the enacting clause what the decision is.

Additionally, as owner of the property, F. I. is directly damaged by the court. He bought the property legally and the Medical Center is properly registered. There is no illegal activity ongoing in the Medical Center. There is therefore no ground for confiscation and closure of the property.

c. The appeal of Linn Slattengren on behalf of L. D. and the companies Klinika Kardiokirkurgjike Medikus and Ordinanca Urologjike Medicus

It is submitted that the ruling has no enacting clause, at least it is incomprehensible. Additionally, there is no possible basis for a confiscation. The reference to Article 489 CPCK is without merit. Furthermore, there is no substantive justification for the confiscation. All in all, the ruling is procedurally flawed, factually ungrounded, based on nonexistent law, and constitutes an illegal attempt to confiscate private property in violation of Article 1 protocol 1 of the European Convention on Human Rights. It is requested that ruling be modified in order to deny the motion of the prosecution for confiscation.

d. The motion of the appellate prosecution

The Appellate Prosecutor concurs with the challenged ruling that legal conditions for closure and confiscation of the premises of the then Medicus Clinic are met. The prosecutor observes that the challenged ruling needs to be amended with respect to the enacting clause.

B. FINDINGS OF THE PANEL

The Panel agrees with the submissions of the parties that the enacting clause of the Basic Court ruling is incomprehensible. The enacting clause merely specifies the object of the confiscation issue without issuing a decision whether or not the object is to be closed and confiscated. However, it is unambiguously clear from the reasoning of the ruling that the Medicus Clinic premises is to be closed and confiscated, namely paragraph 17 of the impugned ruling. The Panel shall therefore assess if the ruling of the Basic Court to close and confiscate the Medicus Clinic premises is in accordance with the law.

The Basic Court based their ruling upon Article 6 of UNMIK/REG/2001/4, which stipulates:

> Confiscation of Property and Closure of Establishments
> 6.1 Property used in or resulting from the commission of trafficking in persons or other criminal acts under the present regulation may be confiscated in accordance with the applicable law. The personal property of the victims of trafficking shall not be

confiscated wherever it can be immediately identified by the law enforcement officer as such.

6.2 Where there are grounds for suspicion that an establishment, operating legally or illegally, is involved in, or is knowingly associated with trafficking in persons or other criminal acts under the present regulation, an investigating judge may, upon the recommendation of the public prosecutor, issue an order for the closing of such establishment.

6.3 A reparation fund for victims of trafficking shall be established by administrative direction and shall be authorised to receive funds from, inter alia, the confiscation of property pursuant to section 6.1.

in conjunction with Article 489 of the Provisional Criminal Procedure Code of Kosovo, which stipulates:

(1) Objects which in accordance with the Provisional Criminal Code have to be confiscated shall be confiscated even when criminal proceedings do not end in a judgment in which the accused is declared guilty if there is a danger that they might be used for a criminal offence or where so required by the interests of public safety or by moral considerations.

(2) A separate ruling thereon shall be rendered at the time when proceedings have been completed or were terminated by the competent authority before which proceedings are conducted.

(3) The court shall render the ruling on the confiscation of objects under paragraph 1 of the present article also where a decision to that effect is not contained in the judgment by which the accused is declared guilty.

(4) A certified copy of the decision on the confiscation of objects shall be served on the owner if his or her identity is known.

(5) The owner of the objects shall be entitled to appeal against the decision under paragraphs 2 and 3 of the present article if he or she considers that there are no legal grounds for confiscation. If the ruling under paragraph 2 of the present article was not rendered by a court, the appeal shall be heard by the three-judge panel of the court which would have had the jurisdiction to adjudicate at first instance.

The in this case applicable code however is the Provisional Criminal Code of Kosovo which came into force on 6 April 2004. More in particular, Article 60 PCCK:

Article 60

(1) Objects used or destined for use in the commission of a criminal offence or objects derived from the commission of a criminal offence may be confiscated if they are property of the perpetrator.

(2) Objects provided for in paragraph 1 of the present article may be confiscated even if they are not the property of the perpetrator if this is necessary for the interests of general security, but such confiscation does not adversely affect the rights of third parties to obtain compensation from the perpetrator for any damage.
(3) The law may provide for the mandatory confiscation of an object.

The Provisional Criminal Code of Kosovo supersedes UNMIK/REG/2001/4 as per Article 354 PCCK:

Article 354
(1) Provisions in UNMIK Regulations and Administrative Directions covering matters addressed in the present Code shall cease to have effect upon the entry into force of the present Code unless otherwise expressly determined in the present Code or in an UNMIK Regulation.
2) Provisions in the applicable Criminal Codes shall cease to have effect upon the entry into force of the present Code.

Whether or not the Medicus Clinic premises should be closed and confiscated should therefore be assessed on the basis of Article 60 PCCK in conjunction with Article 489 PCPCK.

With the facts as they are presented now, the Panel finds no grounds to question the transfer of the Medicus Clinic premises from L. D. to company Graniti Com, represented by F. I.. All the legal documents have been provided and the Panel ascertains that F. I. is now the owner of the Medicus Clinic premises.

Paragraph 1 of Article 60 PCCK therefore does not apply since the Medicus Clinic premises no longer is the property of L. D., the perpetrator.
With regards to paragraph 2 of Article 60 PCCK, namely whether or not the confiscation of the Medicus Clinic premises is necessary for the interests of general security the Panel finds the following. Although the criminal offences that have taken place in the Medicus Clinic premises are grave and appalling, there is no concrete evidence to suggest that such activities have taken place in the Medicus Clinic premises since the search of the premises on 4 November 2008, nor are there concrete indications that such activities will be undertaken in the Medicus Clinic premises in the future. The mere fact that the defendant L. D. still performs his profession at the Medicus Clinic premises does not constitute sufficient indication. The Panel therefore finds it is not necessary for the interests of general security to confiscate the Medicus Clinic premises.

The Prosecutor's Application for confiscation of the Medicus Clinic establishment dated 29 April 2013 is therefore to be rejected, seeing as there are currently no known grounds for the

closure and confiscation of the Medicus Clinic premises. The Court of Appeals modifies the ruling of the Basic Court of Pristina P 309/10 & 340/10 dated 25 November 2013 accordingly.

The appeal of the defence is granted and the appeal of the SPRK is rejected as unfounded.

C. Closing Remarks

With regard to the impugned judgment of the Basic Court, the Court of Appeals for reasons elaborated above:

> partially grants the appeal of the SPRK insofar as the defendant S. H. is convicted for Count 1, Trafficking in Persons, insofar as the defendant A. D. is sentenced to a higher punishment, and insofar as the accessory punishments shall start after the defendants have served the imposed sentence of imprisonment and modifies the enacting clause accordingly;
> grants the appeals on behalf of the defendants I. B. and S. D. insofar as the defendants I. B. and S. D. are acquitted of Count 7, and modifies the enacting clause accordingly;
> rejects the appeals on behalf of the defendants L. D., A. D. and S. H. as unfounded; and
> affirms the remainder of the impugned judgment accordingly;

With regard to the impugned ruling of the Basic Court, the Court of Appeals for reasons elaborated above:

> grants the appeal of F. I. on behalf of the economic entity Graniti Com and the appeal of Linn Slattengren on behalf of L. D. and the companies Klinika Kardiokirkurgjike Medikus and Ordinanca Urologjike Medicus, insofar as there is no ground to close and confiscate the Medicus Clinic premises and modifies the enacting clause accordingly; and
> rejects the appeal of the SPRK.

Reasoned written judgment completed on 22 January 2016.

Presiding Judge

Radostin Petrov
EULEX Judge

Panel member	Panel member
Mejreme Memaj Kosovo Judge	Dariusz Sielicki EULEX Judge

Recording Officers

Alan Vasak EULEX Legal Officer	Bernd Franke EULEX Legal Officer

LEGAL REMEDY: The defendant S. H. may file an appeal against this judgment with the Supreme Court of Kosovo, in accordance with Article 430, paragraph 1, item 3 PCPCK. The appeal may be filed within 15 days from the day the copy of this judgment has been served.

Court of Appeals
Pristina

PAKR 52/14

6 November 2015

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.

[1] Pages 26 - 28

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

[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 **MLI** 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 OI 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 OI 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 **OI** 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

---

[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 OI 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 **DD**'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. Competence of the Panel of the Basic Court

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 OI. 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.

---

[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

[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

[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

[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 **OI** 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**

[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

_____

Radostin Petrov
EULEX Judge

Panel member

Driton Muharremi
Kosovo Court of Appeals Judge

Panel member

Anna Bednarek
EULEX Judge

Recording Officer

_____

Noora Aarnio
EULEX Legal Officer

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

COURT OF APPEALS

Case number: **PAKr 603/15**

Date: **20 May 2016**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Radostin Petrov as presiding and reporting Judge, EULEX Judge Hajnalka Veronika Karpati and Kosovo Court of Appeals Judge Dritom Muharremi as panel members, with the participation of EULEX Legal Adviser Vjollca Kroçi-Gërxhaliu acting as recording officer, in the criminal proceeding against:

1. **N.K.**, son of xxx and xxx, Kosovo xxx, born on xxx in xxx, Municipality of xxx, xxx, graduated in xxx, currently employed as xxx, declared average financial status, with present residence at xxx, holder of the ID. card no. xxx;

2. **A.Z.**, son of xxx and xxx, Kosovo xxx, born on xxx in xxx, Municipality of xxx, xxx graduated in xxx, currently xxx, declared good financial status, with present residence in the xxx, Municipality of xxx, holder of the ID. card no. xxx;

3. **S.H.**, son of xxx and xxx, Kosovo xxx, born on xxx in xxx, Municipality of xxx, xxx graduated in xxx, currently xxx, declared good financial status, with present residence at xxx, holder of the ID. card no. xxx;

4. **S.F.**, son of xxx and xxx, Kosovo xxx, born on xxx in xxx, Municipality of xxx, xxx, graduated in xxx, currently xxx, declared average financial status, with present residence at xxx, holder of the ID. card no. xxx.

All initially charged by an Indictment PPS no.30/10 dated 5 November 2012, and by the amendment to the Indictment dated 28 March 2013 and now charged with the following criminal offences (as per the amended indictment and withdrawal of prosecution during the closing statements from the charges of Fraud in Office, in violation of Article 341 (1) and (3) in conjunction with Article 23 of the Criminal Code of Kosovo in force until 31 December 2012):

1. N.K.:

- (count one) Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1), read with Article 31 of CCK;

- (count two) Accepting bribes contrary to Article 343(1) pursuant to the Criminal Code of Kosovo in force until 31 December 2012;

- (count three) Entering into harmful contracts contrary to Article 237 (1) (2) pursuant to the Criminal Code of Kosovo in force until 31 December 2012;

2. A.Z.:

- (count one) Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1), read with Article 31 of CCK;

3. S.H.:

- (count one) Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1), read with Article 31 of CCK, and

- (count two) Accepting bribes contrary to Article 343(1) pursuant to the Criminal Code of Kosovo in force until 31 December 2012;

4. S.F.:

- (count one) Abusing official position or authority, committed in co-perpetration contrary to Articles 422 (1), read with Article 31 of CCK, and

- (count two) Accepting bribes contrary to Article 343(1) pursuant to the Criminal Code of Kosovo in force until 31 December 2012;

5. H.B.:

- (in relation to count two) Giving bribes contrary to Article 429 of CCK and
- (in relation to count one) Misuse of economic authorizations contrary to Article 236, (1.2) and (2) pursuant to the Criminal Code of Kosovo in force until 31 December 2012;

Adjudicated in the first instance by the Basic Court of Prishtina with Judgment PKR 144/13, dated 21 September 2015, by which:

The defendants **N.K.** as xxx at .M.T.I. (hereinafter: MTI), **A.Z.** as xxx at M.T.I, **S.F.** as xxx at M.T.I, and **S.H.** as xxx at MTI, were found guilty (for count one of the Indictment) for the criminal offence of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1), read with Article 31 of CCK because it has been proven that they abused their official position and damaged the budget of the Ministry of Trade and Industry in excess of 2.500 Euros and the said payment results in a material benefit exceeding 5.000 Euros to "xxx" company. Following an internal audit in the Ministry of Trade and Industry conducted in 2007 by the now defendant **A.Z.**, the economic operator "xxx", owned by **H.B.**, was requested to return the above mentioned amount of 50,000 Euros – out of which only 5.000 Euros were returned by the defendant **H.B.**, on 10/04/2007. The defendants at the time held official positions

in the Ministry of Trade and Industry and through their joint acts, actions and omissions, they violated their duties and substantially contributed to the commission of the criminal offence. At the time the defendants behaved in the way described above, they were able to understand and control their acts, which they desired, knowing that their acts were forbidden and punishable by law.

In relation to count one, and in accordance with the said legal provisions, but read together with Articles 359, 360 (2), 361 and 363(3) of CPC, the court found that the defendant **H.B.** committed part of the acts he had been charged with. Therefore, for the lack of one of the elements of the constituent offence of Misuse of economic authorizations, the court of the first instance, pursuant to Article 360 (2) of CPC, requalified, the acts committed by the defendant **H.B.** to the criminal offence of Falsifying documents – pursuant to Article 332 (1) of the Criminal Code of Kosovo in force until 31 December 2012; Pursuant to Article 90 (1) 6) of the Criminal Code of Kosovo in force until 31 December 2012. the first instance court established that the term to the statutory limitation is 2 years and the absolute bar on prosecution of the criminal offence of falsifying documents is 4 years, as per Article 91(6) of the Criminal Code of Kosovo in force until 31 December 2012 and such term of 4 years has already elapsed on 21/07/2010 as the last document of the above mentioned case is dated 21/07/2006. According to the first instance court the said term had elapsed even before the date on which the prosecutor issued a ruling to initiate investigations, 10/12/2011. Therefore, accordingly, pursuant to Article 363 (1.3) of CPC, the court rejected this charge.

For count two of the charge, the defendants **N.K., S.H.** and **S.F.,** were found not guilty for the criminal offence of Accepting bribes, contrary to Article 343(1) of the Criminal Code of Kosovo in force until 31 December 2012 because it has not been proven beyond reasonable doubt that the following accused have committed the acts with which they have been charged for;

In relation to count 3, the court found the defendant **N.K.** guilty after requalifying the criminal offence of Entering into harmful contracts contrary to Article 237 (1) and (2) of Criminal Code of Kosovo in force until 31 December 2012; as the established facts did not match all essential elements of this criminal offence but were constituent of the more lenient criminal offence Abusing official position or authority, committed in co-perpetration contrary to Article 422 CCK.

By the Judgment PKR 144/13, dated 21 September 2015 the defendants **N.K., A.Z., S.H.** and **S.F.** were sentenced as following:

For the charge under count 1: Criminal offence of Abuse of official position as per Article 422 of CCK, read together with Article 3 (2) and Article 31 of CCK in conjunction with Articles 41, 45 and 73 of CCK:

a) The defendant **N.K.** was sentenced with 12 months of imprisonment;

b) The defendant **A.Z.** was sentenced with 10 months of imprisonment;
c) The defendant **S.H.** was sentenced with 8 months of imprisonment, and
d) The defendant **S.F.** was sentenced with 7 months of imprisonment.

For the charge under count 3: Criminal offence of Abusing official position or authority contrary to articles 422 (1) and (2. 1) of CCK, the defendant **N.K.** was sentenced with 18 months of imprisonment. The aggregate punishment for the defendant **N.K.** was set in 26 months of imprisonment for the commission of two criminal offences of Abuse of official position.

In relation to the defendants **A.Z., S.H., S.F.,** the first instance court set that the punishments shall not be executed if the convicted persons do not commit other criminal offences during the verification time of two years.

The first instance court rejected the property claim filed by the Ministry of Trade and Industry since the requested amount was object of the civil claim that had been already adjudicated by a final Judgment;

Therefore, Court of Appeals (hereinafter: CoA), acts upon the following appeals filed against the Judgment of the Basic Court of Pristina PKR 144 /13 dated 21 September 2015:

1. The appeal of the defense counsel Bajram Tmava on behalf of the defendant **N.K.** dated 20 October 2015 and stamped by the Basic Court of Pristina on 22 October 2016;
2. The individual appeal of the defendant **N.K.** dated 23 October 2015 and stamped by the Basic Court of Pristina on 23 October 2015;
3. The appeal of the defense counsel Hasim Loshi on behalf of the defendant **A.Z.** dated 26 October 2015 and stamped by the Basic Court of Pristina on 29 October 2015;
4. The appeal of the defense counsel Sadri Godanci on behalf of the defendant **S.H.** dated 23 October 2015 and stamped by the Basic Court of Pristina on 26 October 2016;
5. The supplement appeal by the defense counsel Sadri Godanci and defendant **S. H.** dated on 13 November 2015 and stamped by the Basic Court of Pristina on 13 November 2015;
6. The appeal of the defense counsel Destan Rukiqi on behalf of the defendant **S.F.** dated 23 October 2015 and stamped by the Basic Court of Pristina on 26 October 2016;
7. The individual appeal of the defendant **S.F.** (not dated) stamped by the Basic Court of Pristina on 26 October 2016.

Having considered the Appellate Prosecutor's motion PPA/I. no. 573/15 dated 18 December 2015;

Having held the public panel session on 18 May 2016 in accordance with Articles 389, 390, 394, 398 of the Criminal Procedure Code of Kosovo (CPC);

Having deliberated and voted on 20 May 2016;

Pursuant to Articles 401 and 403 of CPC;

Renders the following:

JUDGEMENT

I. **The appeal of the defense counsel Bajram Tmava filed on behalf of the defendant N.K. and the individual appeal of the defendant N.K. against the Judgment of the Basic Court of Pristina PKR 144/13 dated 21 September 2015 are partially granted.**

II. **The Judgment of the Basic Court of Pristina PKR 144/13 dated 21 September 2015 concerning the defendant N.K. is modified in relation to the charges and in relation to the sentencing to be read as follows:**

The defendant N.K. is found guilty for the criminal offence of Abusing official position or authority in continuation with unindicted co-perpetrators as per Article 422 of CCK read together with Articles 81, 41, 45, 73, and 31 of CCK.

The court imposes the punishment of 1 (one) year and 6 (six) months of imprisonment. The punishment shall not be executed as per Article 51 of CCK if the defendant does not commit criminal offence for the verification time of two years starting from the date the judgment becomes final.

The remaining part of the Judgment of the Basic Court of Pristina PKR 144/13 dated 21 September 2015 in relation to the defendant N.K. is confirmed;

III. **The appeal of the defense counsel Hasim Loshi on behalf of the defendant A.Z., the appeal of defense counsel Sadri Godanci on behalf of the defendant S.H., the appeal of the defense counsel Destan Rukiqi on behalf of the defendant S.F. and the individual appeal of the defendant S.F. are granted.**

IV. **The Judgment of the Basic Court of Pristina PKR 144/13 dated 21 September 2015, in relation to the defendants A.Z., S.H. and S.F. is hereby modified as follows:**

1. **Pursuant to Article 364 of CPC, the defendants A.Z., S.H. and S.F. are ACQUITTED of all charges for committing the criminal acts of Abusing**

official position or authority, committed in co-perpetration (contrary to articles 422, par.1, read with art. 31 C.C.K.);

2. **The defendants A.Z., S.H. and S.F. are released from obligation to pay the costs of the proceeding imposed by the Judgment of the Basic Court of Pristina PKR 144/13 dated 21 September 2015.**

REASONING

I. PROCEDURAL BACKGROUND

The investigation against the defendants began on 05/04/2008, when the Anti-Corruption Agency of Kosovo submitted to the SPRK information concerning possible corruptive behavior against suspects B. D., B. Z. and **N.K.**.

On 15/11/2008 the Kosovo Police submitted to the Prosecution Office a criminal report, "2011-XI-248", against the defendants **N.K., A.Z., S.H., S.F.** and H.B., for the grounded suspicion that they committed the criminal offences.

On 10/12/2011 [1] the Prosecutor Besim Kelmendi issued a ruling to initiate the investigations against the above mentioned defendants, **N.K., A.Z., S.F., S.H.** and H.B., for the criminal offences of Abusing Official Position or Authority as per Article 339 (3) read with Article 23 of the PCCK in force until 31 December 2012 , Misappropriation in Office, Article 340 (3) read with Article 23 of the PCCK in force until 31 December 2012 , Fraud in office as per Article 341(1) (3) read with Article 23 of the PCCK in force until 31 December 2012 , whereas on 21/05/2012 the SPRK issued a ruling to expand the investigations against the defendants **N.K.** and **S.F.** to include the criminal offence of Accepting Bribes, from Article 343 (1) of the PCCK in force until 31 December 2012 and against H.B. to include the criminal offence of Giving Bribes from Article 344 (1) of the CCK. On 20/07/2012 another ruling was issued to expand investigations against **N.K.**, for criminal offence of Entering into a Harmful Contract from article 237 (2) read with (1) of the PCCK in force until 31 December 2012 and against H.B. for misuse of economic authorization, from Article 236 (1) 2) and (2) of PCCK in force until 31 December 2012 .

The defendants were accused initially by Indictment PPS no. 30/10 dated 05/11/2012 by the SPRK. On 28/03/2013, the said Indictment was amended in relation to the relevant provisions of the criminal code that had entered into force on 01/01/2013, as SPRK was of the opinion that some of the new provisions would be more favorable to the defendants.

[1] Not 2012, as stated by mistake in the reasoning of the indictment.

The initial hearing took place on 28/03/2013 and on 18/06/2013 – on which day the pleas of the defendants were taken and all pleaded not guilty to every charge.

The main trial hearings, open to the public, were held on 14 April 2014, 13, 14, 27 and 28 May 2014, 04 and 05 June 2014, 16, 17 and 18 July 2014, 12, 26 and 30 September 2014/, 04 November 2014, 12 December 2014, 05 and 23 January 2015, 16 February 2015, 17 April 2015, 22 June 2015, 24 June 2015, 31 August 2015 and 17 September 2015.

The Judgment in the first instance court, namely Pristina Basic Court, was announced orally on 21 September 2015 in accordance with the provisions set in Article 366 of CPC in the presence of the SPRK, the defendants and their defense counsels.

Against the Judgment of the Basic Court of Pristina PKR 144 /13 dated 21 September 2015, the respective defense counsel filed the appeals on behalf of the defendants. In addition, the defendants **N.K.** and **S.F.** filed individual appeals.

The SPRK with the motion dated 25 November 2015 acknowledged that she would not file the response on the appeals filed on behalf of the defendants[2].

The Appellate Prosecutor filed the motion PPA/I. no. 573/15 on 18 December 2015.

On 18 May 2016 the public panel session was held at the Court of Appeals in the presence of the defendants, their respective defense counsel, with the absence of the prosecutor. Deliberation of the Appellate Panel was held on 20 May 2016.

II. SUBMISSIONS OF THE PARTIES

Against the above mentioned Judgment, the appeals have been filed as follows:

1. <u>The appeal of the defense counsel Bajram Tmava on behalf of the defendant N.K.</u>

The defense counsel in his appeal alleges that the first instance court, neither in the enacting clause nor in the reasoning of the judgment has provided sufficient evidence in accordance with the legal provisions. The first instance court has wrongly interpreted the provisions of the law which regulate the financial issues and the Law on Procurement. He further states that, pursuant to the Law on Management of Public Finances and the Law on Public Procurement (2003/17) his client does not bear any liability concerning the payment procedure. The defense counsel further submits that the MTI has not suffered any damage. In relation to the violation of the criminal law, the defense counsel states that the first instance court has violated the law on the detriment of his client since the court has found **N.K.** guilty twice for abusing the official position or authority. He states that since the Judgment contains the erroneous and incomplete factual

[2] Court Binder: Judgment and Appeals

situation, it has violated the criminal law to the detriment of the accused and any sentence imposed in such circumstances cannot be accepted as legally grounded. Therefore he proposes to the Court of Appeals to approve his appeal, to annul the impugned Judgment and return the case for the retrial or modify the impugned Judgment in a way of acquitting the defendant **N.K.**.

2. The individual appeal of the defendant N.K.

The defendant in his appeal submits that the enacting clause of the Judgment is contradictory in itself and with the reasoning of the Judgment. He submits that there is a contradiction regarding the critical facts between what appears in the reasoning of the Judgment with the statements given in the procedure. This contributed on rendering the unlawful verdict. The rights of the defense were violated. He further alleges that the court has violated the Article 7 of CPC by not including the relevant facts which are a favor of the defendant, namely, the prosecutor has removed the sketch of witnesses rendered in by the investigator Y.H. in Kosovo Police. The court has violated the Article 6 of the European Convention on Human rights, violation of Article 30 and 31 of the Constitution of the Republic of Kosovo since the trial panel of the first instance court did not perform an objective and professional expertise. The defendant **N.K.** in his appeal further states that the court has violated the provision of the criminal code since the sentence for the criminal offence of Abuse of official position as per article 422 of CCK was once imposed for 12 months of imprisonment then another sentence for the same criminal offence with additional 18 months of imprisonment. He submits that the intent for purpose of obtaining the material benefit or harming of another person as an element of the criminal offence of Abuse of official position as per article 422 of CCK has not been proven during the trial nor were argued in the impugned Judgment.

In relation to the erroneous determination of the factual situation, the defendant in his appeal states that the court has made mistakes on assessment of the evidence and conclusion since the statement of the witness is different from what was stated in the impugned Judgment.

The defendant alleges that the Indictment is lacking an explanation of the grounds for filing the indictment on the basis of the results of the investigation. He states that the indictment stipulates that there is no direct evidence. Even during the main trial the prosecutor has not achieved to prove the existence of any of the criminal offences that were presented in the Indictment PPS no. 30/2010. The defendant further states that the prosecutor during the main trial has several times emphasized that the defendant is using his right to defend in silence while in his closing argument he stated that the defendant did not deny his statement given on the pre-trial stage. In relation to this, the court was not supposed to interpret the silence as a weakness nor as culpability. In relation to the amount of 50 thousands Euros, the defendant states that it should have not been explained in the way prosecutor did because this amount of money was to be returned to the MTI budget and not to obtain any benefit.

3. The appeal of the defense counsel Hashim Loshi on behalf of the defendant A.Z.

The defense counsel of the defendant **A.Z.** in his appeal challenged the Judgment on the grounds of erroneous and incomplete determination of factual situation and on the decision on punishment. In his appeal, the defense counsel submits that the defendant at all stages of the criminal procedure stated that he did not commit the criminal offence he is charged for. He never signed the contested invoice no. 39/06. He claims that somebody else used his facsimile and signed the contested invoice. He further states that his client did not benefit from anyone. The defense counsel in his appeal submits that since the defendant **A.Z.** did not commit any crime, he should have not been sentenced. Therefore he proposes to the Court of Appeals to approve the appeals and acquit the defendant or return the case to the Basic Court on retrial.

Along with the appeal, the defense counsel submitted the closing remarks of the defendant **A.Z.** addressed to the Presiding Judge of the first instance court.

4. The appeal of the defense counsel Sadri Godanci on behalf of the defendant S.H.

The defense counsel of the defendant **S.H.** in his appeal challenges the Judgment on the grounds of essential violations of CPC, violations of criminal code, erroneous and incomplete determination of factual situation and on the decision on punishment[3]. He submits that his client did not co-operate with other defendants as Judgment alleges. He performed his duties pursuant to his authorization. The defense counsel further submits that the grounded suspicion was not established by the court. He states that his client signed the payment order after the Permanent Secretary signed it. The appealed Judgment is ungrounded because it contains substantial violations of provisions of CPC. Enacting clause is unclear and contradictory with the reasoning. The defense counsel proposes to the second instance court to acquit the defendant **S.H.** or send the case back for retrial.

5. The individual appeal of the defendant S.H.

The defendant in his appeal stated that he signed only the second payment which included only completed works and that he had acted in accordance with the contract rather than violating it. He states that he signed it as it appeared to be a payment for completed work and not as an advance payment. He further states that testimonies of the witnesses show that his actions were not intentional. He proposes to the second instance court to analyze and review the case and acquit him.

[3] The original Albanian version of the appeal field by the defence counsel contains the allegations on all grounds, while the translated English version does not contain the allegation of the defence counsel in relation to the appeal on punishment.

6. The appeal of the defense counsel Destan Rukiqi on behalf of the defendant S.F.

The defense counsel in his appeal submits that the impugned Judgment is ungrounded and legally unsustainable due to the essential violation of CPC, violations of criminal code in detriment of the defendant, erroneous and incomplete determination of factual situation. In his appeal he appeals the decision on criminal sanction as well.

In relation to the essential violation of CPC, namely the violation of Article 384 (1) 1.12, para (2) 2.1) of CPC[4] the defense counsel states that the impugned Judgment is not drafted in accordance with Article 370 (4) and (7) related to Article 365 (1) 1.1) of CPC meaning that the enacting clause of the Judgment is incomprehensible and contradictory within itself. The Judgment does not contain sufficient reasons related to the crucial facts to decide the case. The enacting clause of the impugned Judgment lacs the factual description of the actions which constitute the figure of the criminal offence of Abuse of official position as per article 422 of CCK. First instance court made a violation of Article 384 (2) 2.1) when did not consider as evidence the statements of the defendants who remained silent given in a pre-trial stage. The defendant **S.F.** was one of the defendants that remained silent.

In relation to the erroneous and incomplete determination of factual situation, the defense counsel submits that the first instance court did not confirm fully and correctly the facts since the administrated evidence during the main trial were not evaluated one by one nor the concrete facts were proven as obliged by the Article 361 (2) of CPC. There is no evidence to show that **S.F.** was in charge to supervise the project for construction of the Industrial Park in Drenas nor he ever signed any document for payment.

In relation to the violations of criminal code in detriment of the defendant, defense counsel provides that the requirements of the criminal offence of Abuse of official position as per article 422 of CCK are not fulfilled, thus any criminal sanction imposed on the defendant **S.F.**, would be illegal. He proposes to the Court of Appeals to approve his appeal, amend the impugned Judgment acquitting the defendant **S.F.** or at least to annul the impugned Judgment and return the case to the first instance Court for retrial and decision.

7. The individual appeal of the defendant S.F.

The defendant in his appeal states that the impugned Judgment is illegal, unjust and ungrounded since it has ignored all exculpatory evidence and has fabricated incriminating scenario without any legal basis, thus the first instance court has violated his legal and constitutional rights for equality in front of the law. In relation to this, the defendant argues that the contract between him and MTI dated 07/06/2004 to which the Judgment refers is not presented as evidence in any stage of the criminal proceedings. This piece of evidence was in a favor of the defense and was not included in the case file nor was obtained during the main trial. In relation to the

[4] The English version refers wrongly to CCK .

implementation of the payments to company 'xxx', the defendant refers to the statements of the prosecution witnesses which exclude his responsibility. He asks the Court of Appeals to acquit him based on his appeal and the evidence.

8. **The Motion of the Appellate Prosecutor**

The Appellate Prosecutor in his motion states that he finds the appeals as unfounded since the allegations of the defense are unsupported by evidence. In their appeals, the alleged violations are merely prescribed and referred in a rather abstract and general way without any evidence, testimony, reasoning or any concrete and justifiable argumentation. He further argues that the challenged judgment does not contain essential violations of provisions of the criminal procedure; its enacting clause is comprehensible, clear and not contradictory with its reasoning part or with the judgment contents as the appeals allege. The decisive facts are not in contradiction with the administered evidence; the factual situation in the challenged judgment was correctly and fully determined. Therefore, based on such correctly determined factual situation, the first instance court has correctly applied the criminal law when finding that acts of the accused do contain essential elements of the criminal offence, for which the accused were found guilty and convicted. The court considered the mitigating and aggravating circumstances when imposed the punishment. The Appellate Prosecutor proposed to the Court of Appeals to reject the appeals of the defendants as unsustainable.

III FINDINGS OF THE COURT OF APPEALS

Court Competency and the Composition of the Panel

Pursuant to Article 472 (1) of CPC the Panel has reviewed its competence and since no objections were raised by the parties, the Panel will suffice with the following: In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, 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 one Kosovo judge and two EULEX judges.

Admissibility of the Appeals and of the Response

The CoA finds the appeals were submitted timely by the authorized persons in accordance with Article 380 and Article 381 (1) of CPC and are therefore all admissible.

Merits of the Case

The Panel of the CoA will address points of the enacting clause by the order as stated above.

The CoA findings in relation to the defendant N.K.

The appeal filed on behalf of the defendant **N.K.** alleges the erroneous and incomplete establishment of the facts, violation of the criminal law and decision on criminal sanction.

The alleged erroneous and incomplete establishment of the facts

In relation to the erroneous and incomplete establishment of the facts, the defense counsel states that the evidentiary material was wrongfully evaluated.

The Appellate Panel reminds that when the law defines the terms "erroneous determination of the factual situation" and "incomplete determination of the factual situation", it is referring to errors or omissions related to "material facts" that are critical to the verdict reached.[5] Only if the Basic Court committed a fundamental mistake while assessing the evidence and determining the facts will the Court of Appeals overturn the judgment.

As a general principle the evaluation of evidence should rely on a direct and immediate examination of oral testimonies and statements by a panel of judges. The reading of the record of the evidence examined in the trial, however faithful and accurate it may be, is always a less reliable instrument for evaluation of evidence. Even the examination of documents and other material evidence is in general more accurate in the trial because often those pieces of evidence have to be supported and consisted with other elements and subject to oral explanations by witnesses or parties. Therefore, as affirmed by this court in other occasions[6], "*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*". This is in line with the standard applied by the Supreme Court "*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*".[7]

With this in mind the Panel has carefully analyzed the evidence in this criminal proceeding along with the reasoning of the Basic Court in the impugned judgment. Although the impugned Judgment is not drafted in full accordance with the standards, the Panel of the CoA finds it comprehensive and sufficiently reasoned. Read together with other evidence in the case file, it creates the clear picture of the events thus supporting the CoA's findings.

---

[5] B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366, para. 3.
[6] PAKR 1121/12, judgment dated 25/09/2012.
[7] Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, paragraph 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, paragraph 30.

The Panel further has carefully reviewed the arguments presented in the appeal and the motion of the Appellate Prosecutor.

The Panel thoroughly examined the factual findings in the impugned judgment (English version), and concurs entirely with the findings. The Basic Court in the impugned judgment in detail analyzed the evidence administered during the main trial in relation to the defendant N.K.. In the view of the Panel, the first instance Court comes to logical conclusions in its assessment of the evidence.

Namely, the panel of the CoA finds that there is sufficient evidence to prove beyond reasonable doubt that the defendant N.K. has committed the criminal offence of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK. At the time, the defendant N.K. held the position of xxx at the MTI. From the evidence administered in the first instance court, it has been established beyond reasonable doubt that the defendant has abused his official position intentionally by approving the payment of 135.278,20 Euros on 25/07/2006 to 'xxx' company that won tender for the projection and construction of infrastructure in the industrial park in Drenas. In this amount, the sum of 50.000 euros was not deducted as it was previously payed to 'xxx' company as an advanced payment on 07.06.2006 as part of the total amount of 140.689,62 euros as per the document as 'Situacioni I Pare' dated 31.05.2006 despite the fact that the base Contract between MTI and 'xxx' company states 0% advanced payment.

It has been also established beyond reasonable doubt that the defendant N.K., following the announcement of the tender on 22/07/2005 for the "Projection and Construction of the Infrastructure of the Industrial Park in Drenas" where "xxx" company was selected, on 07/10/2005 signed the contract for the project on behalf of the MTI and "xxx Company", represented by H.B., in the amount of 144.000 Euros / price per unit 69.825,25 Euros.

The said contract was changed by the first annex contract dated 20/07/2006, between "xxx Company" and the Ministry of Trade and Industry, signed by the defendant N.K. on behalf of the Ministry, whereby parties agree to mutually change the condition of payment thus the total value of the contract shall be 1.730.000 Euros (...)". After this change to the contract through the said annex contract dated 20/07/2006, another annex contract was made between the Ministry of Trade and Industry, signed again by the defendant N.K., and "xxx Company", represented by its owner, H.B., on 28/09/2006, stating: "Considering that the parties listed above have made a contract for carrying on works in the project Industrial Park Drenas based on the works carried out which came after the approval of the request on negotiated procedure before the announcement of the contract with the PPA, hereby we enter this annex contract (...) Article 1: The original contract dated 07/10/2005 as mutual agreement between parties the total value of which is 1.730.000 Euros (...) Article 2 The total value of the annex contract shall be 14.580,00 Euros (...)". Despite the amount of the initial contract dated 07/10/2005 was changed only with

the first annex contract (article 4 of such annex), dated 20/07/2006, one month early, on the 20/06/2006 the defendant N.K. had already submitted to the Public Procurement Agency, pursuant to section 34, par. 3 (amongst others), of the Law on Procurement 2003/17, a Request To Use Limited or Negotiated Procedures for additional work stating: "approximate value of contract: 1.700.000 Euros, foreseen value: value of additional works: 14.580 Euros", when at that time (on 20/06/2006) the amount of the contract dated 07/10/2005 (the only contract existing) was 144.000 Euros / price per unit 69.825,25 Euros, not 1.700.000 Euros. By acting as described, the panel of the CoA holds the defendant N.K. criminally liable. The above mentioned incriminating actions carried out by the defendant demonstrate the substantive elements of the criminal offence of abuse of the official position which is fully supported by evidence administered during the main trial.

The Panel of the CoA concurs entirely with finding of the Basic Court that the defendant was able to understand and control his acts, which he desired, knowing that his acts were forbidden and punishable by law. There is no doubt that the defendant N.K. has committed the criminal offence of the Abuse of Official position intentionally considering the fact that, as described above, he has several times taken unlawful actions by signing the Agreement on behalf of MTI as well as documents for the payment to 'xxx' company.

Therefore the Panel finds that the judgment does not contain an incomplete or erroneous determination of the factual situation. Furthermore, the Basic Court correctly comes to a logical conclusion in the assessment of each piece of evidence hence presenting the overall culpability of the defendant. The appeal of the defense is therefore rejected as unfounded on this ground.

The alleged Violation of the Criminal Law

Defense counsel of the defendant N.K. in his appeal opposes the decision in the impugned Judgment to find the defendant guilty for two criminal offences of Abuse of Official Position and Authority.

The Panel of the CoA agrees with the appeal of the defense counsel in this regard since from the actions of the defendant it can be concluded that the defendant has committed the criminal act of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK. Namely, from the incriminating actions of the defendant, it can be determined that the defendant N.K. has incriminatory acted in continuation sufficiently to meet all requirements of Article 81 of CCK. Therefore, Panel of the CoA grants the appeal on behalf of the defendant in this regard to consider that the defendant N.K. committed the criminal offence as stated above to include Article 81 of CPC. The defendant committed only one criminal offence of Abusing official position or authority in continuation with unindicted co-perpetrators - Article 422 (1) read with Article 81 and Article 31 of CCK.

Decision on criminal sanction

Defense counsel in his appeal states that since the judgment is based on erroneous established factual state, the sentence imposed by the first instance Court is unlawful.

The Panel of the CoA has to reject these allegations, since the factual situation is rightfully and justifiably established; therefore the sentence has to be imposed. However, following the fact that the Panel of the CoA establishes the legal qualification of the criminal offence of Abusing official position or authority as the criminal offence in continuation as per Article 81 of CPC, it has to point out that it affects itself the sentence imposed by the first instance court. Therefore the sentence has been modified by sentencing the defendant N.K. with 1 (one) year and 6 (six) months of imprisonment. Considering the degree of criminal liability, the past behavior of the perpetrator, his clear criminal record, the Court of Appeals finds that by a suspended sentence the purpose of punishments as per Article 41 CCK will be reached. Therefore the Court of Appeals imposes suspended sentence to the defendant N.K., which shall not be executed as per Article 51 of CCK if the defendant does not commit criminal offence for the verification time of two years starting for from the date the judgment becomes final.

The CoA findings in relation to the defendant A.Z.

By the impugned Judgment, the defendant A.Z. was found guilty for the criminal offence of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK.

The defense counsel of the defendant A.Z. in his appeal challenged the Judgment on the grounds of erroneous and incomplete determination of factual situation and on the decision on punishment.

The Panel of the CoA finds the allegations in the appeal grounded.

It is acknowledged that the case was initiated by Anti-Corruption Agency with the Report dated 15 April 2008 based on information given to this authority. Based on this information the Anti-Corruption Agency filed the criminal report with the Prosecution office that consequently filed the Indictment. The Panel of the CoA finds that the indictment does not specify the incriminating actions of A.Z.; it rather describes it with short sentences. There is no specific page dedicated to A.Z. in the indictment to describe his criminal actions.

When reading the impugned Judgment and the evidence presented during the main trial, it can easily be concluded that the first instance court has erred in interpreting the evidence and testimonies presented during the main trial regarding the involvement of A.Z. in this criminal offence. Namely, during the session of 26 September 2014, Z. clearly explained the procedure which was supposed to be followed for completing the payment. He states that in a chain of persons who should have allowed the payment, he was somehow skipped as a xxx. It is known

that A.Z. was acting xxx from 18 May 2006 until 26 November 2006 which covers the period of irregularities in payment to 'xxx' company. After him, in position of xxx was selected B.Z.. After ending the mandate of acting xxx, A.Z. went back to the xxx position to work according to the working plan and one of the checkpoints was the work of industrial park in Drenas. Carrying the internal audit on 2008, A.Z. noticed the irregularities in the invoice 39/2006 dated 21 July 2006 that contained 50.000 euros as advanced payment and his forged signature in this invoice. The case file for audit was brought to him by H.K., at that time in the position of xxx. After detecting the irregularities and forged signature, he informed the Minister and several meetings were held and N.K., the xxx admitted that the mistake occurred with this payment.

A.Z. explains that the signature that appears in the document that committed the funds for the project is not disputable. He expresses his concern about the signature in the invoice 39/06 dated 21 July 2006 stating that in the original invoice without a date, his signature does not appear, while later on the invoice no. 39/06 dated 21 July 2006 contained his forged signature. He convincingly denies that he has ever signed that invoice since he had refused to sign said payment when presented to him while in a position of Acting xxx. He refused to sign it as the payment was against the law, as stated in the Anti-Corruption Agency report.

The disputable invoice no. 39/06 dated 21 July 2006 in total sum of 135,278.20 euro includes the disputed 50.000 euro that was supposed to be returned to the budget of MTI. At the time while acting as xxx at MTI, he had an accident in Macedonia and his right arm was injured and could not sign any document. In order to not stop the flow of work at the MTI, he had made the facsimile with his signature. He compellingly claims that the facsimile was forged and used in contested invoice. This is again stated by him during the main trial session on 26 September 2014 that his signature was used without his knowledge or was forged.

In addition to the persuasive statement of A.Z., none of the witnesses stated that he has signed the disputable invoice 39/2006 with the intent to acquire any benefit for himself or another person or to cause damage to another person or to seriously violate the rights of another person. In this regard, the prosecutor failed to prove the intent. The prosecution did not bring any witness or any convincing evidence to confirm that the defendant A.Z. has signed the invoice 39/06 intentionally with the intent to acquire any benefit for himself or another person or to cause damage to another person or to seriously violate the rights of another person. The Panel of the CoA finds that the court of the first instance has not established beyond reasonable doubt that A.Z. has committed the criminal offence he has been found guilty for. The criminal offence Abusing official position or Authority can be done only intentionally, and the lack of intent means lack of the elements of the criminal offence. Therefore, the Panel grants the appeal filed on behalf of the defendant A.Z. and acquits him.

The CoA findings in relation to the defendant S.H.

Defendant S.H. was found guilty for the criminal offence of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK since, according it the impugned Judgment, he, in a capacity of certifying officer approved the payment of 135,278.20 euro to 'xxx' company, the sum that contained 50.000 euros as advanced payment.

His defense counsel in the appeal challenges the Judgment on the grounds of essential violations of CPC, violations of criminal code, erroneous and incomplete determination of factual situation and on the decision on punishment·

In relation to S.H., Panel of the CoA notes that at the time the criminal offence occurred, S.H. was holding the position of xxx at MTI. At the time when the amount of 50.000 euros was allowed to be payed as a payment for advanced work included in the invoice of 135,278.20 euro, S.H. was replacing by authorization the certifying officer B. S.. He was acting and replacing B. S. also by the authorization of his chief M. B.. In relation to the acts of S.H., B. S. testified in the capacity of the witness in the trial session on 4 June 2014. She was asked to explain the procedure of the payment, and the witness clearly stated that since the documents of the project payment were all initially signed by all needed authorities, she would also certify the payment. Just like S.H. did. Panel finds that his acts cannot be classified even to be carried out by negligence. He acted so because first of all he was replacing the certifying officer B.S., second: the invoice and other documents seemed to be all as it should be and the invoice was signed by the xxx, unknown of forgery fact at that time.

The panel notes that the first instance court did not clearly state on what proven evidence is grounded the charge of Abusing official position or authority, committed in co-perpetration by this defendant. There is neither direct evidence nor witness statement to point at S.H. confirming that he was the one that consciously signed and approved the irregular invoice with excessed amount and fake signature intentionally. Therefore, the Panel grants the appeal filed on behalf of the defendant S.H. and acquits him.

The CoA findings in relation to the defendant S.F.

Defendant S.F. was charged by the first instance court for the criminal offence of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK. Against the guilty Judgment of the first instance court, the defense counsel filed an appeal on behalf of the defendant on the grounds of essential violation of CPC, violations of criminal code in detriment of the defendant, erroneous and incomplete determination of factual situation and on decision on the sentence.

After a thorough assessment of the case file, the Panel of the CoA finds the appeal as grounded on all grounds. The Panel notes that the defendant S.F., at the time when the criminal offence

occurred, was in a position of xxx at MTI. The Judgment of the Basic Court finds him guilty because *'he failed to oversee the process and works related to the industrial park in Drenas [...] that he did not stop or report about, hence allowing it, as he was also tasked with the supervision of the project'*, referring to the payment of 135,278.20 euros that includes 50.000 euros of advanced payment that were not supposed to be paid.

From the case file and evidence administered in the main trail, S.F. does not appear to be responsible person to supervise the works of Industrial park in Drenas. It is true that S.F. has signed the Request for commitment of the funds for the project that was addressed to M. B., but this did not give him the authority to supervise the work. This fact was confirmed several times by the witnesses during the main trail and the Panel of CoA gives full credibility to these statements. It must be referred to the statements of the witnesses A. P., N.G. and H. K.: it clearly appears that the body to supervise the work of Industrial Park in Drenas conducted by 'xxx' company was 'xxx' company contracted by MTI. Namely, the work of 'xxx' company at Industrial Park in Drenas was firstly supervised by the construction engineer H. B. and from May 2006 and 'xxx' company took over the supervision of the work. Moreover, S.F. was only a xxx within the umbrella of Department for Politics of the Development of the Private Sector with the director, N.G..

According to the impugned Judgment, the responsibility of S.F. stems from his Employment Contract signed with MTI. By checking the minutes of the main trial sessions and the case file the Panel established that the Employment Contract of S.F. had never been part of the evidence in the main trail nor had it been administered at any stage of the criminal proceedings of this case.

In relation to this, the Article 361 (1) of CPC stipulates:

> *"The court shall base its judgment solely on the facts and evidence considered at the main trial"/Art. 361 (1) CPC*

And, Article 8 of CPC specifies that:

> *"The court renders its decision on the basis of the evidence examined and verified in the main trial "Article 8 (2), CPC*

The Panel of the CoA, without any doubt establishes that the first instance court, by grounding its guilty judgment on the evidence that was not presented nor administered in the main trial, has gravely breached the abovementioned provisions of CPC.

Revolving to the qualification of the criminal offence, the Panel of the CoA finds that action or more precisely the omission of S.F., as documented in the case file and administered in the main trial, do not constitute the elements of the criminal offence he has been found guilty of, nor

triggers the criminal responsibility at all. As correctly pointed out by defense counsel, none of the requirements of the criminal offence of Abusing official position or authority as per articles 422 of CCK corresponds with the role of S.F. More precisely, he did not exceed his authority nor has failed to perform his official duty or had caused any damage to others, and above all, there was no intent at all since he had no knowledge about the developments and about the contested amount of money. Everything happened away from his sight and knowledge.

The Panel of the CoA finds that it has not been established that S.F. has committed the criminal offence of Abusing official position or authority individually or in co-perpetration.

Therefore, the Panel grants the appeal filed on behalf of the defendant S.F. and his individual appeal and acquits him.

F. Other issues

Silence of the defendants.

The Basic Court decided not to give probative value to the statement of the defendants who remained silent in the main trial. The Court of Appeals finds as it is correctly stated in Destan Rukiqi's appeal, that the statements of the defendant S.F. given during the pre-trial procedure should be considered during the main trial. The Court of Appeals opines that this omission does not affect the final outcome and the second instance court's finding that S.F. did not commit the criminal offence of Abusing official position or authority in co-perpetration with others. Therefore the Court of Appeals will not go in details about the omission of the Basic Court. However the Court of Appeals emphasizes that the statement of the defendant given in the pre-trial stage in accordance with the provisions of the law (proper warning) has to be read out as evidence during the main trial in case the defendant decides to remain silent.

Conclusion

The Panel finds that there is sufficient evidence to prove beyond reasonable doubt that the defendant N.K. committed the criminal act of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK. The Panel of the CoA confirms that Article 422 (1) should be read with Article 31 CCK, because the manner the criminal offence is committed, there are grounds that the perpetrator N. K. acted with persons who were not indicted.

The Court of Appeals modifies the impugned judgment in relation to the defendant N.K. as in the enacting clause by imposing the punishment pursuant to Article 51 of CCK.

The Panel finds that there is insufficient evidence to proof that the defendants A.Z., S.H. and S.F. have committed the criminal act of Abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK. Therefore the Panel of the CoA, pursuant to Article 364 (1.3.) of CPC acquits the defendants A.Z., S.H. and S.F. and releases them from the obligation to pay the costs of the proceeding imposed by the Judgment of the Basic Court of Pristina PKR 144/13 dated 21 September 2015.

As stated above, pursuant to Article 401 of CPC and Article 403 of CPC the Court of Appeals decided as in the enacting clause.

Reasoned written judgment completed on 13 June 2016.

The Judgment drafted in English language.

Presiding Judge

Radostin Petrov, EULEX Judge

Panel Members

Hajnallka Veronika Karpati, EULEX Judge

Driton Muharremi, Kosovo CoA Judge

Recording Officer

Vjollca Gërxhaliu-Kroçi, EULEX Legal Advisor