COURT OF APPEALS

Case number: **PAKR 1282/12**
(P 214/11, BC Peja)

Date: **28 MAY 2014**
(Judgment finalized 21 October 2014)

The Appellate Court of Kosovo, in a Panel composed of EULEX Judge Timo Vuojolahti, as the Presiding Judge, Kosovo Judge of the Appellate Court Tonka Berishaj as the Reporting Judge and EULEX Judge Annemarie Meister, as the Panel Member, assisted by EULEX Legal Officer Beti Hohler and EULEX Legal Adviser Vjollca Kroçi-Gërxhaliu as Recording Officers,

in the criminal proceedings against the following accused (defendants):

- **B. K**, born on _ in T. village, P. municipality, son of father N. and mother H. (nee B.), A., citizen of the Republic of Kosovo, completed secondary education, a plumber, of average economic status, sentenced to 27 (twenty seven) years of imprisonment with Judgment KP No. 412/2006 of the District Court of Peja, dated 19 September 2007, confirmed with Judgment AP No. 153/2008 of the Supreme Court of Kosovo, dated 12 January 2010 (appealed at third instance court), under detention on remand since 29 March 2012;

- **D. I**, born on _ in K. village, D. municipality, son of father S. and mother Sh. (nee B.), A, citizen of the Republic of Kosovo, of average economic status, sentenced to 5 (five) years of imprisonment with Judgment P. No. 329/2011 of the District Court of Peja, under detention on remand since 29 March 2012;

- **H.K**, born on _ in T. village, P. municipality, son of father N. and mother H. (nee B.), A, citizen of the Republic of Kosovo, a farmer, of average economic status, under detention on remand since 17 December 2010;

- **A. N**, born on __ in G. village, D. municipality, residing in __.Street, No. …, in P, son of father R and mother Gj. (nee U.), A, citizen of the Republic of Kosovo, a p. o., of average economic status, under detention on remand since 10 October 2010;

- **I. L**, born on 14 November 1980, in S. i U. village, D. municipality, son of father Z. and mother F. (nee K.), A, citizen of the Republic of Kosovo, completed secondary education, insurance agent, of average economic status, held under detention on remand from 10 October 2010 until 7 April 2011 and from 3 May 2012 until 15 May 2014;

- **H.K**, born on __, in P, son of father Z and mother N (nee Sh.), married, father of one child, A, citizen of the Republic of Kosovo, completed secondary education, driver, of average economic status, held in detention on remand from 15 October 2010 until 7 April 2011 and from 3 May 2012 onwards;

- **S. G**, born on __, in B. village, D. municipality, son of father R. and mother A. (nee K.), married, father of one child, A, citizen of the Republic of Kosovo, completed secondary education, of average economic status, held in detention on remand from 15 October 2010 until 7 April 2011 and from 3 May 2012 onwards;

charged by the Indictment of the Special Prosecution Office PPS. Nr. 102/2010 dated 31 March 2011, as amended on 24 April 2012, with the following counts of criminal offences:

- **Count 1;** against B. K, D.I., H.K., A.N., I.L., H.K. and S.G., committing in co-perpetration the criminal offence of Organized Crime contrary to Article 274 (1) in conjunction with the criminal offence of Kidnapping contrary to Article 159 (2) of the Criminal Code of Kosovo (CCK)[1];

- **Count 2.1;** against B.K., the criminal offence of Unauthorised Ownership, Control, Possession or Use of Weapons contrary to Article 328 (3) of the CCK;

- **Count 2.2**; against B.K., the criminal offence of Attacking an Official Person performing Official Duties contrary to Article 317 (1) of the CCK;

- **Count 3;** against D.I., the criminal offence of Unauthorized Ownership, Control, Possession or use of Weapons contrary to Article 328 (2) of the CCK;

- **Count 4;** against H.K., the criminal offence of Unauthorized Ownership, Control, Possession or use of Weapons contrary to Article 328 (1) and (2) of the CCK; and

- **Count 5;** against H.K., the criminal offence of Unauthorized Ownership, Control, Possession or use of Weapons contrary to Article 328 (2) of the CCK;

[1] Criminal Code in force from 6.04.2004 until 31.12.2012.

In the first instance court found guilty by the Judgment P. No. 214/11, dated 3 May 2012 of the District Court of Peja as follows:

- The defendant **B.K.** for the criminal offence under Count 1 and sentenced to fifteen (15) years of imprisonment and a fine of 200.000 Euros; for the criminal offence under Count 2.1 and sentenced to three (3) years of imprisonment, and acquitted for the criminal offence under Count 2.2; Sentenced with an aggregate punishment of seventeen (17) years of imprisonment and a fine of 200.000 Euros pursuant to Article 71 (1) and (2) 2) of CCK; with the accessory punishment of confiscation;

- The defendant **D.I.** for the criminal offence under Count 1 and sentenced to twelve (12) years of imprisonment and a fine of 180.000 Euros; for the criminal offence under Count 3 and sentenced to two (2) years of imprisonment; Sentenced with an aggregate punishment of thirteen (13) years of imprisonment and a fine of 180.000 Euros pursuant to Article 71 (1) and (2) 2) of CCK; with the accessory punishment of confiscation;

- The defendant **H.K.** for the criminal offence under Count 1 and sentenced to eleven (11) years of imprisonment and a fine of 150.000 Euros; for the criminal offence under Count 4 and sentenced to two years (2) of imprisonment; Sentenced with an aggregate punishment of twelve (12) years of imprisonment and a fine of 150.000 Euros pursuant to Article 71 paragraph 1 and 2 (2) of CCK;

- The defendant **A.N.** for the criminal offence under Count 1 and sentenced to fifteen (15) years of imprisonment and a fine of 150.000 euros; with the accessory punishment of confiscation;

- The defendant **H.K.** for the criminal offence under Count 1 and sentenced to ten (10) years of imprisonment and a fine of 150.000 Euros; for the criminal offence under Count 5 and sentenced to one (1) year of imprisonment; Sentenced with an aggregate punishment of ten (10) years and six (6) months of imprisonment and a fine of 150.000 Euros pursuant to Article 71 (1) and (2)2) of CCK; with the accessory punishment of confiscation;

- The defendant **S.G.** for the criminal offence under Count 1 and sentenced to ten (10) years of imprisonment and a fine of 150.000 Euros;

- The defendant **I.L.** for the criminal offence under Count 1 and sentenced to ten (10) years of imprisonment and a fine of 150.000 Euros;

Acting upon **the following appeals against the Judgment of the District Court of Peja, dated 3 May 2012 no P. 214/11 (hereinafter: Impugned Judgment):**

- Appeal of the Defence Counsel M.H. on behalf of the accused B.K, filed on 13.08.2011 and supplemented on 13.09.2013;
- Appeal of the Defence Counsel G.B.on behalf of the accused D.I., filed on 02.08.2012;
Appeal of the Defence Counsel O.B.on behalf of the accused H.K., filed on 02.08.2012;
- Appeal of the Defence Counsel H.Ç.on behalf of the accused A.N., filed on 07.08.2012;
- Appeal of the Defence Counsel Xh.R.on behalf of the accused I.L., filed on 10.08.2012;
- Appeal of the Defence Counsel Q.M.on behalf of the accused H.K., filed on 07.08.2012; and
- Appeal of the Defence Counsel G.K.on behalf of the accused S.G., filed on 06.08.2012;

having considered the response of the Appellate State Prosecution of Kosovo no. PAR/I. No. 485/14 dated 10 April 2014;

having held the panel session according to Article 410 of the Kosovo Code of Criminal Procedure (KCCP) on 20 February and 18 March 2014;

having deliberated and voted on 18 March 2014, 25 March 2014, 15 April 2014, 14 May 2014, 15 May 2014 and 28 May 2014;

pursuant to Articles 420 and the following of the KCCP,

renders the following

JUDGMENT

I. The appeals of the Defence of the accused B.K., D.I., H.K., A.N., H.K. and S.G., <u>are hereby partially accepted.</u> The Judgment of the District Court of Peja P. nr. 214/ 11 dated 03.05.2012 <u>is modified</u> with regard to legal qualification and the decision on punishment as follows:

1. <u>Under Count 1</u>: The accused B.K., D.I., H.K., A.N., H.K. and S.G., through the actions as described under Count I of the enacting clause of the Impugned Judgment, committed in co-perpetration the criminal offence of *Kidnapping* pursuant to Articles

159 (2) and 23 CCK. They are acquitted of charges of committing the criminal offence of Organized Crime pursuant to Article 274 (1) CCK.

2. Under Count 3: The accused D.I. is granted amnesty, in accordance with Article 2, Article 3 (1.2) 1.2.5), and Article 7 (1) 1.1) of the Law on Amnesty (04/L-209), for the criminal offence of Unauthorised Ownership, Control, Possession or Use of Weapons, pursuant to Article 328 (2) of the CCK. The charges under Count 3 are thus rejected pursuant to Article 389 (4) KCCP, and the punishment for the criminal offence in Count 3 is dismissed.

3. Under Count 5: The accused H.K. is granted amnesty, in accordance with Article 2, Article 3 (1.2) 1.2.5), and Article 7 (1) item 1.1 of the Law on Amnesty (04/L-209), for the criminal offence of Unauthorised Ownership, Control, Possession or Use of Weapons, pursuant to Article 328 (2) of the CCK. The charges under Count 5 are thus rejected pursuant to Article 389 (4) KCCP, and the punishment for the criminal offence in Count 5 is dismissed.

4. The following sentences are imposed on the defendants:

- The accused B.K. is sentenced under Count 1 to a punishment of 10 (ten) years of imprisonment for the criminal offence of Kidnapping pursuant to Article 159(2) CCK. Taking into consideration the sentence imposed by the First Instance Court under Count 2.1 for the criminal offence of Unauthorized Ownership, Control, Possession and Use of weapons in Article 328(3) CCK (three years of imprisonment), the defendant is pursuant to Article 71 CCK sentenced to an aggregate punishment of 12 (twelve) years of imprisonment. The time spent in detention on remand from 29.03 2012 until the Judgment is final shall be accredited towards the sentence.

- The accused D.I. is sentenced under Count 1 to a punishment of 8 (eight) years of imprisonment. The time spent in detention on remand from 29.03.2012 until the Judgment is final shall be accredited towards the sentence.

- The accused H.K. is sentenced under Count 1 to a punishment of 6 (six) years of imprisonment for the criminal offence of Kidnapping pursuant to Article 159(2) CCK. Taking into consideration the sentence imposed by the First Instance Court under Count 4 for the criminal offence of Unauthorized Ownership, Control, Possession and Use of Weapons in Article 328 (3) of the CCK (two years of imprisonment), the defendant is pursuant to Article 71 CCK sentenced to an aggregate punishment of 7 (seven) years of imprisonment. The time spent in detention on remand from 17.12.2010 until the Judgment is final shall be accredited towards the sentence.

- <u>The accused A.N.</u> is sentenced under Count 1 to a term of nine (9) years of imprisonment. The time spent in detention on remand from 10.10.2010 until the Judgment is final shall be accredited towards the sentence.

- <u>The accused H.K.</u> is sentenced under Count 1 to a term of 6 (six) years of imprisonment. The time spent in detention on remand from 15.10 2010 until 7.04.2011 and from 03.05.2012 until the Judgment is final shall be accredited towards the sentence.

- <u>The accused S.G.</u> is sentenced under Count 1 to 6 (six) years of imprisonment. The time spent in detention on remand from 15.10.2010 until 7.04.2011 and from 03.05.2012 until the Judgment is final shall be accredited towards the sentence.

II. The Appeal filed by Defence Counsel of the accused I.L. <u>is hereby accepted.</u> The Judgment P. No. 214/11, dated 3.05.2012, rendered by the District Court of Peja <u>is hereby modified as follows</u>:

1. Pursuant to Article 390 (1) of the KCCP the accused I.L. is ACQUITTED of all charges for committing, in co-perpetration with B.K., D.I., A.N., H.K., H.K. and S.G, the criminal offence of Organized Crime pursuant to Article 274 (1), and Kidnapping, pursuant to Article 159 (2) of the CCK;

2. The accused I.L. is released from the punishment imposed by the District Court.

3. Detention on remand against the accused I.L. is terminated with a separate Ruling.

4. The accused I.L. is released from the obligation to pay the costs of the proceedings. The costs of criminal proceedings for the Accused I.L. shall be covered by the court budget.

III. Insofar it has not been modified as stated above, the enacting clause of the Impugned Judgment remains unchanged and is hereby affirmed.

REASONING

I PROCEDURAL HISTORY

1. Procedure

The Special Prosecution Office of the Republic of Kosovo (hereinafter SPRK, Special Prosecutor) on 7 April 2011 filed with the District Court of Peja the Indictment PPS. 102/2010 dated 31.03.2011 against the defendants.

The Indictment was entirely confirmed with the Ruling of the Confirmation Judge KA no. 143/2011, dated 20 May 2011.

The main trial in the criminal case started on 8 September 2011. All the defendants pleaded not guilty. Each of them stated that he did not have any involvement with the kidnapping of the victim A.M.

At the court session of 24 April 2012, the Special Prosecutor in his final speech amended the indictment in relation to I.L. by stating:

> "… the administrated evidence in the court session have contributed to the accurate establishment of the factual situation so that on row 8 of page 2 of the Indictment of the Albanian version after the date 22 September 2010, the following words need to be added: '*After the shepherd realized that a person was being kept locked in a hut, the kidnapper who identified himself as Mto the Witness D1, asked him to show a place where he could make a phone call and then with the phone of Witness D1, 04….., at 11:31, he called the accused I.L. on his number 04/….. telling him to come and pick them up*.'"

The main trial was concluded on 3 May 2012. On the same day the District Court issued the Judgment P. Nr. 214/11. This Judgment was thereafter appealed by the defendants to the appellate instance.

The Panel of the Court of Appeals held a session in the case on 20 February and 18 March 2014; and held deliberations on 18 March 2014, 25 March 2014, 15 April 2014, 14 May 2014, 15 May 2014 and 28 May 2014.

At the deliberation session on 15 May 2014, the Panel unanimously decided that defendant I.L. is acquitted of all charges from the Indictment in this case. The defendant was

therefore immediately released from detention on remand, pursuant to a separate Ruling issued by the Panel on 15 May 2014.

2. The Impugned Judgment

The defendants were found guilty for committing the criminal offences as stated above.

In relation to the criminal offence of Organized Crime in conjunction with the criminal offence of Kidnapping (Count 1), the District Court found it proven beyond reasonable doubt, that on 21 September 2010 the defendants, acting as an organized criminal group, each with pre-assigned roles and with intent to obtain an unlawful material benefit, and by using force and the threat of force, armed with hand guns and with an AK47 automatic rifle, kidnapped the victim A.M.. They held the victim as a hostage and made a demand for payment of a ransom. The victim was released on 30 October 2010.

The defendants were sentenced as stated above. It was ordered that the respective periods of detention on remand be calculated in the sentence. Weapons and ammunitions held in possession illegally were confiscated. Toyota 4-runner vehicle, property of A.N., was confiscated. The defendants were ordered to cover the fees of the proceedings.

On 3 May 2012 the District Court of Peja issued a Ruling ordering detention on remand against the defendants I.L., H.K. and S.G. until the Judgment becomes final. The Court also extended the measure of detention on remand against the defendants B.K., D.I., H.K. and A.N. until the Judgment becomes final.

Against the Judgment of the District Court of Peja dated 3 May 2012 (P.Nr. 214/11), respective Defence Counsel filed appeals with the Supreme Court of Kosovo as the competent court of second instance at that time. Pursuant to Article 39 (1) of the Law on Courts (Law no. 03/L-199) the case was transferred to the Court of Appeals on 1.01.2013.

The Special Prosecutor did not file an appeal against the Judgment nor any reply to the appeals that were filed. On 19 December 2012 the Office of the Chief State Prosecutor filed the motion pursuant to the law (PPA.nr. 578/12), proposing to the court to reject the appeals as ungrounded and confirm the Impugned Judgment.

II SUBMISSIONS OF THE PARTIES

The Defence Counsel for the defendant **B.K.,** attorney M.H, challenges the Impugned Judgment due to essential violation of the criminal procedure provisions, wrongful and

incomplete establishment of the factual situation, violation of the criminal law and also challenges the decision on the sentencing. He proposes that the appellate court alters the first instance Judgment and finds that it had not been established that the defendant B.K. committed the criminal offence he is charged with and acquits him from the Indictment pursuant to Article 390 (3) of KCCP, or annuls the Judgment and sends the case back to the first instance court for retrial. In any event case, the Judgment should be amended in view of legal qualification so that the defendant should only be convicted for the criminal offence of Kidnapping from Article 159 (3) of CCK and a more lenient sentence should be rendered.

The Defence Counsel for the Defendant **D.I.**, attorney G.B., challenges the Impugned Judgment due to essential violation of the criminal procedure provisions, violations of the criminal law and wrongful and incomplete establishment of the factual situation. He proposes to the Court that the appealed Judgment is altered in order for the defendant D.I. to be acquitted from the charge or the appealed Judgment is annulled and the case is sent back for retrial.

The Defence Counsel of the Defendant **H.K.**, attorney O.B., challenges the Impugned Judgment due to essential violation of the provisions of criminal procedure, wrongful and incomplete establishment of the factual situation, violation of the criminal law and the decision regarding the sentence. He proposes to the Court to alter the appealed Judgment and, in the absence of evidence, acquits the defendant from the charge, or annuls the appealed Judgment in relation to this Defendant and returns the case back to the first instance court for retrial.

The Defence Counsel of the defendant **A.N.**, attorney H.Ç., challenges the Impugned Judgment on all grounds, i.e. essential violation of the provisions of criminal procedure, wrongful and incomplete establishment of the factual situation, violation of the criminal law and the decision on the sentence. He proposes the second instance Court grants the appeal and alters the appealed Judgment so that the defendant A.N. is acquitted from the charge in view of Article 390, (3) of KCCP or annuls it and returns the case back to the first instance court for retrial.

The Defence Counsel of the defendant **I.L.**, attorney Xh.R. challenges the Impugned Judgment due to wrongful and incomplete establishment of the factual situation, essential violation of the criminal procedure provisions and violation of the criminal law. He proposes the second instance court annuls the appealed Judgment in its entirety or modifies it so that the defendant I.L. is acquitted from the charge.

The Defence Counsel for the defendant **H.K.**, attorney Q.M., challenges the Impugned Judgment due to essential violation of the criminal procedure, wrongful and incomplete

establishment of the factual situation, violation of criminal law, and the verdict on the imprisonment sentence and the fine. He proposes that his appeal is granted as grounded, while the appealed Judgment is altered so that H.K. in accordance with the provision of Article 390 (1) 3) of KCCP is acquitted from the Indictment for the criminal offence of Organized Crime from Article 274 (1) in conjunction with the criminal offence of Kidnapping from Article 159 (2) of CCK, while for the criminal offence from Article 328 (2) of CCK – the Court should impose a more lenient sentence, or annul the present Judgment and return the matter to the first instance court for retrial.

The Defence Counsel of the defendant **S.G.**, attorney G. K, challenges the Impugned Judgment due to essential violations of the criminal procedure, wrongful and incomplete establishment of the factual situation, violation of the criminal law. He proposes that the second instance Court grants his appeal, annuls the appealed Judgment and returns the criminal matter to the first instance court for retrial or the appealed Judgment is altered so that the defendant S.G. is sentenced to a more lenient sentence.

The State Prosecutor of the **Chief State Prosecution Office**, by submission dated 19 December 2012, pursuant to Article 409 (2) of KCCP, proposes to the Court to reject as ungrounded the appeals of the Defence Counsel for the defendants B.K, D.I, H.K, A.N, I.L, H.K. and S.G, and to affirm the Judgment of the District Court of Peja P. No 214/2011 of 3 May 2012.

III FINDINGS OF THE COURT OF APPEALS

A. Preliminary procedural issues

A.1. Court Competency and the Composition of the Panel

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

The panel of the Court of Appeals is constituted in accordance with Article 19(1) of the Law on Courts and Article (3) of the Law on the Jurisdiction, Case Selection, and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law No. 03/L-053).

The panel concluded the deliberations on 28 May 2014.

A.2. Admissibility of the Appeals and of the Response

The appealed Judgment was rendered on 3 May 2012. The defendant B.K. was served with the Judgment on 26 July 2012. The service to defendant A.N. was attempted on 27 July 2012 at the Dubrava Detention Centre, however he refused to receive it. The defendants H.K., H.K., D.I., S.G. and I.L. all received the Impugned Judgment on 27 July 2012.

Defence Counsel M.H. received the Impugned Judgment on 26 July 2012. His appeal on behalf of defendant B.K. was registered on 13 August 2012. In the appeal, the Defence Counsel wrote that he shall supplement it on 13 September 2012. The Defence Counsel on that date indeed filed a further submission. The Court of Appeals, after having reviewed this submission, established that it elaborates on the appeal grounds raised in the initial appeal, filed on time on 26 July 2012. Because no new arguments are raised, but the appeal merely elaborates the previously raised arguments, the Panel considered the supplement to be admissible.

Defence Counsel H.Ç. and G.K. received the Judgment on 24 July 2012, while Defence Counsel Q.M., Defence Counsel O.B., Defence Counsel G.B. and Xh.R. received it on 23 July 2012. The appeals of Defence Counsel G.B. and O.B. were registered by the Court Registry on 2 August 2012, the appeal of Defence Counsel G.K. on 6 August 2012, appeal of Defence Counsel H.Ç. on 7 August 2012, and appeals of Defence Counsel Q.M. on 7 August 2012 and Defence Counsel Xh.R. on 10 August 2012.

The Court of Appeals of Kosovo finds the appeals were submitted timely by the authorized persons in accordance with Article 398 (1) and Article 399 (1) of KCCP and are therefore all admissible.

Further, it is worth pointing out that based on the authorization issued by V. G. on 5 October 2012, Defence Counsel M.D.is now representing the defendant S.G.

B. Alleged violations of the criminal procedure provisions

Defence Counsel of the defendants claim that the appealed Judgment involves essential violations of the criminal procedure provisions from Article 403 (1) 4) 8) 9) 10) 12) and (2), 1) of the KCCP, namely that the principle of publicity of the trial sessions safeguarded by KCCP has been violated; that the appealed Judgment is supported by inadmissible evidence (the identification procedure with witness A.M., house search record for the defendant B.K. and the voucher on the item seizure, evidence of telecommunications and mapping, statements of witnesses D1, F.Ç. and M.K.); that the appealed Judgment does not contain any reasoning as to the decisive facts, that reasons are contradictory and vague

to a considerable extent, that the appealed Judgment did not present clearly and fully as to what facts and for what reasons it considers them established or not, that the appealed Judgment did not provide reasons for granting the concrete proposals of the parties.

The Panel finds that such appeal claims of the Defence Counsel for the defendants B.K., D.I., H.K., A.N., H.K. and S.G. are not founded.

The Panel shall elaborate on the matters challenged by the appeals and the reasons why these challenges were rejected. In order to carry this out as logically and as clearly as possible, the raised issues on all the appeals shall be dealt with in the order provided by the law.

B.1. The Publicity of the Court Proceedings: Article 403 (1) 4) KCCP

Defence Counsel for the defendant H.K., attorney O.B., claims that the public has been excluded from the court proceedings in violation of the law, because the proceedings were held in the premises of Dubrava Prison, and the public was not allowed to appear when they wanted, to remain there as long as they wanted or leave whenever they wanted, as it is usually acted with the public in court.

By provision of Article 328 (1) of the KCCP, it is provided that the court proceedings are open to the public. Further, by provision of Article 320 (1) of KCCP, it is provided: "*Court proceedings are held in the court premises and in the court building",* whereas paragraph (2) of this provision provides that *"in cases the given premises of the court are not suitable to conduct the court proceedings or for other similar reasonable causes, the President of the Court may decide that the main trial is held in another building" and paragraph 3 of the same provision provides that the court session may be held at another location in the territory of the competent court, when based on the reasoned proposal of the President of the Court, is allowed by the President of a higher instance court."*

Analysing the minutes of the court session of 20 September 2011, it is confirmed that following the opening of the court session, the Presiding Judge observed that the court proceedings are public. In relation to the location of the court session it was clarified that for technical reasons the trial is held at Detention Center Dubrava, because the courtrooms in the District Court of Peja are too small to try such a number of defendants. Further on, the order on scheduling the court proceedings dated 4 July 2011 clarifies that the trial shall be open to the public and that the members of the public that want to attend the trial need to notify the court at least 48 hours prior to the date of the session.

From the above facts, the Court of Appeals holds that the rights of the parties have not been violated and the public has not been excluded from the trial in this case. There is thus no violation pursuant to Article 403 (1) 4) KCCP.

The number of defendants, the high level security concerns for the defendants[2] and unsuitable infrastructure of the District Court in Peja are all objective circumstances that dictated the change of venue for the trial. The only viable solution at the time was indeed holding the trial at Dubrava Detention Center. Due to technical reasons there were some restrictions to the public, however the public was not excluded and there has been no violation of procedural law in this regard. The objective of the publicity of trial is to ensure transparency and scrutiny of judicial proceedings and this objective was met here. The public was allowed and was invited to attend the trial, therefore the transparency and scrutiny was guaranteed. The technical arrangements requiring notice to attend and the public not being able to come and go as they please did not have an impact on the publicity of the trial in the meaning of Article 403 (1) 4) KCCP.

B.2. Admissibility of Evidence: Article 403 (1) 8) KCCP

B.2.1. Identification Procedure with Witness A.M.

In view of all Defence Counsel, the first instance court unlawfully admitted as admissible evidence the minutes of identification of persons by the injured party A.M.. The Defence argues the identification procedure was conducted in breach of the provision of Article 255 of KCCP, hence the evidence is inadmissible.

<u>The issue</u>

On 3 November 2010 A.M. was shown photographs of 20 persons (while being interviewed by the Prosecutor). There is no document that would clarify what photos were shown to him.

On 30 December 2010, A.M. attended an identification procedure. This procedure was documented by the Investigator (Officer H. see Impugned Judgment, page 28-33) and the record of that identification procedure was presented as evidence during the main trial (Impugned Judgment, page 22). According to Officer H. no photos were shown to A.M. prior to the start of the identification procedure, (Impugned Judgment, page 90, Albanian version). There were 25 persons in total in the identification procedure (line-up). A.M. did not provide any description of the suspects prior to the procedure. The defendants in the

[2] One of the defendants has previously escaped from detention.

line-up were handcuffed and some of them wore leg-restraints (Impugned Judgment, pages 30, 31-32).

On 5 January 2011 A.M. gave a statement before the Prosecutor in relation to the identification procedure.

The District Court ruled that the identification evidence is admissible.

Article 153 (1) of the KCCP states: "*Evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or provisions of the law expressly so prescribe."*

Article 255 of the KCCP prescribes the basic rules of identification procedure as follows:

- *The witness shall first be asked to provide a description of and indicate the distinctive features of the person;*
- *The witness shall then be shown the person with other persons unknown to the witness, or their photographs;*
- *The witness shall be instructed that he or she is under no obligation to select any person or photograph, and that it is just as important to state that he or she does not recognize a person or photograph as to state that he or she does.*

The Assesment

The Panel emphasizes that the issue of admissibility of evidence must not be confused with the issue of evidentiary value of that same evidence.These are two separate questions. The Panel also reiterates that the evidence can only be declared inadmissible *when the law expressly so prescribes.* In all other instances, the evidence will be admissible but the violations of the procedural provisions may impact on the probative value of the evidence.

The KCCP does not prescribe that evidence obtained in violation of provisions on the identification procedure would be inadmissible.

Identification is a form of evidence. Using this method we try to establish what the witness remembers; can he/she recognize a person who is (in some way) connected to the events. The rules described in Article 255 KCCP are meant to ensure the accuracy of the identification, to set out a minimum standard how to conduct the identification so that it may have some value. Besides the rules in Article 255 KCCP there are several other factors which should be taken into account to increase the evidentiary value of the identification; these depend very much on the circumstances of the case.

As a starting point, conducting an identification procedure violating the rules above does not mean the evidence collected by the identification is to be considered as inadmissible. Rather, an 'inappropriate procedure' means that the court may not give the same value to this evidence compared to a correct procedure – so this is a question of evidentiary value. However, depending on the circumstances, there may also be situations when the identification is not a free expression of what the witness remembers; in these situations (e.g. torture) the whole identification can be considered inadmissible evidence.

The Panel does not find reasons to consider the identification procedure (30 December 2010) as inadmissible evidence. However, the identification procedure was conducted in a manner that decreases the evidentiary value of the identification. These factors are:

- The suspects were handcuffed (and some wore leg restraints). It cannot be excluded that the witness saw the handcuffs thus he culd have assumed these are the suspects identified by the Police.
- The witness did not first provide a description of the suspects.
- The witness was not properly instructed.
- There are doubts that the 'fillers' did not resemble the suspects.
- The recording of the identification procedure cannot be considered as comprehensive (see Impugned Judgment, pages 91-92 English)

As a conclusion, the Panel finds that the identification procedure with witness A.M. has only a limited evidentiary value, although it is admissible as evidence. However, it is not the only evidence presented on the question who the perpetrators were.

The Court of Appeals considers the allegation made by the Defence in relation to this piece of evidence as ungrounded.

B.2.2. Search Record in the house of the Defendant B.K. and the certificates on the confiscation of items.

The Defense Counsel for the defendant B.K. claims that the search record in the house of the defendant B.K. along with the certificates on the confiscation of items are inadmissible evidence as they were obtained in violation of Articles 240-253 of KCCP resulting in the fact that the defendant did not see specifically or was not shown the confiscated items and signed the certificates without knowing that among them was the telephone that allegedly was used to contact witness B.M.

The Court of Appeals finds that such claims by the Defence Counsel for the defendant B.K. are ungrounded.

In reviewing the case file, particularly the certificates dated 17 December 2010 on the confiscation of items from B.K., and the testimonies given by officers A.N. and A.V, it is clear that the search was conducted by official persons based on the order issued by the Pre-Trial Judge (PP No 138/10 of 20 October 2010). Due to the circumstances that emerged in the search and the way the defendant B.K. acted by fleeing through the open window, in that case the legal officials acted pursuant to the provision of Article 245 (4) of KCCP providing that: *"Exceptionally, a search may be conducted without witnesses being present if their presence cannot be secured immediately and it would be dangerous to delay the beginning of the search. The reasons for conducting the search without the presence of witnesses shall be noted in the record."*

Further, in relation to the confiscation of items found when conducting the search, legal officials have acted in accordance with the provision of Article 243(7) of KCCP, providing: *".... When conducting a search, only the objects and documents related to the purpose of that particular search may be confiscated. The objects and documents confiscated shall be entered and accurately described in the record, and the same shall be indicated in the receipt, which shall be immediately given to the person whose objects or documents have been confiscated."*

In the current case, from the evidence of Lieutenant A.V., it is established that this witness has personally presented B.K. with the items confiscated during the search and denied to have pressured the defendant to sign the confiscation receipt, but the defendant B.K. in the presence of the Defence Counsel signed that document. There is no evidence or information that would support the claim the defendant is now making regarding this confiscation receipt.

Therefore, the Panel considers that in this regard (in relation to evidence on the search and confiscation of items), the first instance court, on the reasoning of the Impugned Judgment (page 46-50), provided clear and convincing reasons that this Court holds true as well, hence does not deem it necessary to provide any additional reasons for the referred claims.

B.2.3. Telecommunications and Mapping Evidence

Defence Counsel for the defendants object to the evidence of telecommunication records and mapping, claiming it was not established that their clients have used the phone numbers as it was found in the Impugned Judgment. In relation to the evidence of mapping they quote the opinion given by expert M.H. who does not exclude the possibility of error for up to 20 kilometres.

The Court of Appeals holds the Defence claims are ungrounded. From the review of the case file and the review of the appealed Judgment the Panel finds that covert measures to intercept phone conversations and telecommunications have been applied based on the procedure set out by the KCCP provisions and this Court does not find any violation of Articles 258-260 of KCCP. The evidence is therefore admissible.

In fact, the first instance court in the appealed Judgment presented in details all the facts in relation to the Mobile Telephone Evidence. The first instance court has gone through all the relevant questions in relation to the SIM cards, IMEI numbers, the correlation between mobile telephone numbers and IMEI numbers, sharing the handsets, the contacts made during the relevant dates, cell locations, telephone silence and metering records. There is nothing in the appeals which would challenge the admissibility of this evidence. The testimony of M.H. and the explanations this expert made in relation to the numbers of the message centre that are presented on the phone metering and mapping with particular emphasis on casting the phone signals between two stations and how they are displayed on mapping details, as well as the waves of the commercial antenna is convincing and based on this evidence the first instance court drew its conclusion in relation to the structure of movement based on the operation of the antennas and communication between the defendants. This Panel concurs with the findings of the first instance court.

Further, the first instance court has presented for each defendant individually what SIM-cards were held and used during the time in question, what IMEI numbers of phones, the content of metering for the time they have been used and when SMS reached them, their content and numbers used to communicate and exchange SMS. In relation to the Defence claims, the Court of Appeals refers also to the findings and conclusions of the first instance court and approves the reasoning presented in the Impugned Judgment as a whole and does not deem it necessary to reiterate it once again (Impugned Judgment, pages 119-159). There is no doubt this evidence is admissible. Moreover, it is credible key evidence in this case.

B.2.4. Statements of Witnesses D1/M1 and A.M.

Defence Counsel for the defendants B.K. and A.N. claim that the statements of Witness D1, given on 16 December 2010 and on 9 November 2010, interview of Witness M1, and the statement of the injured party A.M. on 5 January 2011 are inadmissible evidence because the defendants and their Defence Counsel were not given the opportunity to challenge the statements through questioning. The testimonies were given at the pre-trial stage at the police and prosecution without summoning the defendants and the Defence Counsel.

The Court of Appeals finds the Defence claims are ungrounded.

Firstly, there is no doubt that Witness D1 is the same person that at the police during the investigation procedure was interviewed as Witness M1. Denying Witness D1 in the court proceedings on the ground that he did not sign the minutes of Witness Interview by the mark M1 does not change the fact that M1 and D1 are one and the same person. As the first instance court found, Lieutenant L.K. during the trial clarified the circumstances in relation to the testimony of Witness D1 to the police, whereby he had testified that initially this Witness was assigned the code "Witness M1" and he confirmed that Witness M1 and D1 are the same person.

Second, the Court of Appeals Panel refers to the reasoning of the first instance court in relation to the proposal of the Defence Counsel of the defendants on assigning a graphology expert. Therefore, the conclusion of the first instance court that witness D1 willingly gave a statement before the Police on 9 November 2010 and before the Prosecutor on 16 December 2010, and that witness D1 signed the statement given to the Police and the minutes of the interview in the Prosecution, is correct and as such is approved by the Court of Appeals.

It is a fact that when Witness D1 (M1) was interviewed at the Police and by the Prosecutor, the defendants and their Defence Counsel were not summoned and they were not present. This means they were not given the opportunity to challenge such a testimony by questioning *at that stage*.

However, by the provision of Article 156 (2) of KCCP, it is provided: *"The statement of a witness given to the police or the public prosecutor may be admissible evidence in court only when the defendant or the defence counsel has been given the opportunity to challenge it by questioning that witness* ***during some stage of the criminal proceedings.****"*

The Court of Appeals has established that the Defence had the opportunity to question the witnesses during main trial, therefore there has been no violation pursuant to Article 156 KCCP.

From reviewing the record of the main trial, it is confirmed that the defendants and their Defence Counsel had the opportunity to pose questions, and they have done so, to witness D1 and to the injured party, witness A.M., in the court session in which both had testified.

Taking into consideration what is said above, it results that the record of witness M1 (D1) interview at the Police on 09.11.2010, the one in front of the EULEX Pre-Trial Judge on 08.12.2010 and the testimony in front of the Prosecutor on 16.12.2010, are admissible evidence because they were taken pursuant to the provisions of the criminal procedure on witness interrogation. The Defence has had an opportunity to challenge the statements

during the main trial. In the same way, the Defence has had the opportunity to challenge the statements of A.M. during the main trial.

The Panel concludes that the Judgement can be substantiated on these witness statements.

B.2.5. Statement of Witness F.Ç.

The Defence of B.K. also challenges the statement of witness F.Ç. without specifying what the violations of the Court supposedly were. Indeed, the reasoning of the appeal on this point is unclear.

Insofar the Defence attempts to challenge the admissibility of the evidence of this witness, such argument is unfounded. The Court of Appeals finds no violation that would render his testimony inadmissible.

Insofar the Defence takes issue with the credibility of this witness' evidence; the Panel finds the appellant's arguments in this regard unconvincing. Although this is a matter related to the challenges pertaining more to the findings on factual situation, the Panel finds it appropriate to discuss the credibility of this evidence already here.

Witness F.Ç. was heard in the capacity of a witness in the main trial hearing held on 11 October 2011. During his testimony, he indicated to the Court that he was alone in M. Mountains and had seen near the cabin of B. two or three men from a distance of 50 meters, whom he did not recognise and did not talk to them. He affirmed that he did not see weapons on them and described them as ordinary persons, not of a particular importance. He testified that he met N. K, the father of B. and H.K. in B. të P, because he had known him for 30 years, that he met Z.K. but not any of N.K. children, but later identified H.K. as the one who visited N.K. in B.

Furthermore, witnesses B.O. (P. O.) and L, L.K, in their testimonies given in the main trial described the meeting with F.Ç. and what this witness told them in relation to the event that occurred at the B. cabin in the M. Mountain. This conversation is described in detail in the reasoning of the Impugned Judgement and this Panel sees no purpose in repeating it (Impugned Judgment, pp. 39-41 and 56-67). F.Ç. told the officer that he no longer wished to be a witness because he had met in B. të P. with his friend N.K. who was with his two sons and then he recognised one of the sons, H , as the one he had seen at the cabin and described him as the cross-eyed man. For this reason, lieutenant K. compiled an official note-memorandum dated 05 November 2010 (which was administered as evidence in the main trial) which he addressed to SPRK and referred to the interview of F.Ç. dated 03 November 2010 and witness D1. He pointed out the fear expressed by F.Ç. and witness D1 for their personal safety and requested that others should not know what information they

have given to the Police. In relation to these facts, the first instance court confronted officer O. with F.Ç. From the reading of memorandum dated 05 November 2010 it can be established that its contents match entirely with the statement of witness D1 given in the pre-trial procedure, but also with evidence that from his cell phone No. 04….; through the B. antennae the phone call was made with I.L..

B.2.6. Statement of Witness M.K.

Defence Counsel of B.K. also objected to the statement of witness M.K. given in the investigative procedure.

The Panel finds no violations that would render the evidence of this witness inadmissible.

Witness M.K. was interviewed at the Police on 27 October 2010 whereby she identified the persons through photographs. She denied this statement in the main hearing session dated 05 October 2011 with the reasoning that the statement as well as the identification was imposed on her by the Police. Nevertheless, in relation to these circumstances she had not presented any concrete evidence nor reported to the Prosecutor or any other person, whereas it is not disputable that she signed the record in question without any remarks. From the reading of the record of the main trial, it ensues that this witness was not able to give explanations about the communications she had through SMS messages which were sent from her cell phone to the phone number of I.L. and B.K. Therefore, the Panel concludes that the first instance court acted correctly when concluding that her testimony in front of the Court was not convincing and decided to follow her statement given to the Police on 27 October 2010 as the more credible one.

The Court of Appeals assesses that the statement of M.K. given to the Police on 27 October 2010, is admissible evidence because it was not established that it was taken contrary to the provisions of the KCCP, and both the accused and the Defence had been given the opportunity to challenge the witness during the main trial.

B.3. Motions of the parties on admissibility of evidence and Rulings of the District Court on such motions: Article 403 (2) KCCP

Defence Counsel of the accused allege that from the beginning of the main trial they have requested that some of the evidence the Indictment is based upon should be declared inadmissible, but the first instance court did not rule on these motions until the end of the main trial.

Article 154 (1), (2) and (5) of the KCCP reads:

"(1) The court shall rule on the admissibility of evidence upon an application by a party or ex officio.

(2) A party may raise an issue relating to admissibility of evidence at the time when the evidence is submitted to the court and in particular in the proceedings on the confirmation of the indictment. Exceptionally it may be raised later, if the party did not know such issue at the time when the evidence was submitted or if there are other justifiable circumstances…

(5) At all stages of the proceedings, the court has a duty to ensure that no inadmissible evidence, or reference to or testimony of, such evidence is included in the file or presented at the main trial or at hearings before the main trial."

The first instance court in the main trial hearing on 29 February 2012 administered as evidence the following evidence: the record of identification of person by injured party A.M., record from the search of the residence of the accused B.K. and confirmation on confiscation of items during the search, telecommunications evidence and mapping, statements of Witness D-1/M-1 given to the Police, EULEX Pre-Trial Judge and in front of the Prosecutor, memorandum of lieutenant L.K.in relation to the statement of witness F. Ç, statement of witness M.K. given to the Police. Against this evidence the defence presented their remarks and objections. However, the first instance court administered them as evidence in the main trial and found that there is no inadmissible evidence at hand.

First, the provisions quoted above show that there is an obligation for the court to rule when an issue of the admissibility of evidence is raised or the court encounters it *ex officio*. However, there is no exact provision stating when such a ruling shall be made. As a basic rule, and this can be concluded from the provisions regulating the conduct of the main trial and especially evidentiary proceedings, the ruling should be made before the end of the evidentiary proceedings in order to give the parties an answer on what will be the legal evidentiary material which can be addressed in the closing statements and in the judgment. And this is what the first instance court did.

Second, all the evidence in question was already enumerated in the Indictment and the admissibility was earlier assessed by the confirmation judge. There is nothing that indicates that giving a ruling at a later stage would have in any way violated the rights of the defendants to a fair trial.

This Panel of the Court of Appeals finds, too, that the evidence mentioned above is admissible and there was no violation of the provisions of criminal procedure by the first instance court when ruling on the admissibility of this evidence.

B.4. Indictment and Amendment of the Indictment - I.L.

Defence Counsel of the accused I.L. makes two allegations in regard to the charge against the defendant. First, he states, the charge did not include any incriminating act, any description of a concrete action of the accused I.L., which would connect him to the alleged criminal offences. Second, this kind of a deficiency could not be rectified by the statement given by the Prosecutor during his closing speech. Based on Articles 376, 386 (1) and 403 (1) 10) KCCP the defendant I.L. should be acquitted.

The Defence Counsel is correct on both points.

Through the Indictment filed by the Special Prosecutor, dated 31 March 2011 the defendant I.L. was accused of committing the criminal offence of Organised Crime (Article 274 (1) of CCK) in conjunction with criminal offence of Kidnapping (Article 159 (2) of CCK) in co-perpetration with B.K., D.I., H.K., A.N., H.K. and S.G.. The indictment was confirmed by the Confirmation Judge on 20 May 2011 without any intervention from the SPRK for supplementing or amending it.

Article 305 (1) 4) KCCP reads:

> *The indictment shall contain:*
> *…*
> *4) 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;*

Article 386 (1) KCCP reads:

> *(1) The judgment may relate 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.*

Article 376 (1) KCCP reads:

> *If the prosecutor finds in the course of the main trial that the evidence presented indicates that the factual situation as described in the indictment has changed, he or she may modify the indictment orally during the main trial and may also make a motion to recess the main trial in order to prepare a new indictment.*

The significance of a precisely described indictment (Article 305 (1)4) KCCP) can be understood best when taking into consideration that the judgment can only relate to facts that are contained in the indictment (Article 386 (1) KCCP).

One of the cornerstones of fair trial is that the defendant has the right to be informed of the cause of the accusation, which means of the acts he/she is alleged to have committed and on which the accusation is based. In the present case it is clearly evident that the initial Indictment, the enacting clause, does not include any description of the alleged acts of the defendant I.L. which would allege that he somehow participated in the criminal offences. His name is only mentioned as a co-perpetrator in the beginning of the Indictment, without any further reference what was his alleged part in the commission of the criminal offence. This differs from what the Prosecutor states compared to other co-defendants.

The Defence Counsel of the defendant I.L. stated several times during the proceedings in front of the District Court that the Indictment lacked the concrete description of the actions the defendant was suspected of. The prosecutor did not take any actions prior his closing speech to improve, supplement or amend the indictment. The District Court also did not take this question under discussion.

The Panel considers that especially when it comes to charges related to several co-defendants, the factual situation has to be described in the Indictment in such a detailed way that it is possible for each defendant to understand what is the alleged conduct creating the link between him and the criminal offence. The Panel considers that all this is now missing when it comes to the defendant I.L. This means that the Indictment should not have been confirmed without requesting the Prosecutor to state what are the alleged facts in relation to the defendant I.L. The Panel finds there is a violation of Article 305 (1) 4) KCCP.

The Impugned Judgment indicates that the Prosecutor amended the Indictment when giving his final statement (see above). On the one hand it is true that the Indictment may be amended by the Prosecutor during the main trial. On the other hand, the right to be informed of the nature and cause of the Indictment must be considered in the light of the accused's right to prepare his defence. This means that when it comes to reasons for amending or supplementing the Indictment this has to be done without any delay and not to leave the amendment for the closing statement. Moreover, based on what is stated above, Article 376 KCCP and on the common principle that the trial shall be conducted in a clear way, if the Prosecutor wants to amend the indictment this has to be made in an explicit and clear way.

The Panel considers that what the Prosecutor stated in regards to the defendant I.L. during his closing speech was a vague expression which cannot be considered in any sense as a supplement or an amendment of the Indictment.

In conclusion, the Panel finds that the Prosecutor charged the defendant I.L. for committing the criminal offence of Organized Crime in conjunction with the criminal offence of Kidnapping without describing any incriminating act which would connect the defendant to the alleged criminal offence. Thus, the Panel considers that there is a constitutive lack in the elements of the criminal offence described in the enacting clause of the indictment. The statements given by the Prosecutor during his final speech cannot be considered as a legal and acceptable amendment of the Indictment.

Therefore, the act the defendant I.L. was charged with does not constitute any criminal offence. Pursuant to Article 390 (1) KCCP the defendant I.L. is acquitted of all charges in the filed indictment.

The Court of Appeals has, having reached this decision in the deliberation, also immediately terminated detention on remand against the defendant on 15 May 2014 (see Ruling of the Court of Appeals no. PAKR 1282/12 dated 15.05.2014).

The Panel also remarks that in light of the acquittal of this defendant, further appeal submissions of his Defence Counsel need not be addressed in any detail.

B.5. Examining the defendants before all evidence was presented: Article 403 (1) 9) KCCP

Defence Counsel of H.K. through his appeal alleges that in the main trial the defendants were examined before the presentation of evidence. Even though the Defence Counsel did not present any arguments in support of this allegation, the Court of Appeals, acting *ex officio,* reviewed the Impugned Judgement from this angle as well.

Article 360 (3) KCCP reads:

> *"(3) Evidence shall be presented in the sequence determined by the presiding judge. As a rule, evidence proposed by the prosecution shall be presented first, followed by evidence proposed by the defence counsel or the defendant and finally the evidence, which the trial panel has ordered to be collected ex officio…."*

Article 371 (1) KCCP reads:

"(1) After the examination of witnesses and expert witnesses and presentation of material evidence the examination of the accused who has pleaded not guilty,… shall take place. "

Article 403 (1) 9) KCCP reads:

"*There is a substantial violation of the provisions of criminal procedure if:*
…
9) The accused, when asked to enter his or her plea, pleaded not guilty on all or certain counts of the charge and was examined before the presentation of evidence was completed."

The review of the records of the main trial establishes that the defendants were examined on 10, 11 and 19 January 2012. After that, on 24 January, on 22, 28 and 29 February, on 12 March and on 24 April 2012 there were further witnesses heard and material evidence presented. The Court of Appeals finds the defendants were examined before all the witnesses were heard and before all the material evidence was presented.

The provisions quoted above reflect the idea that the defendant must be given a possibility to defend her/himself against all the evidence collected by the prosecution. The Kosovo lawmaker seems to have chosen a system where the opportunity to an effective defence is secured by the defendant being heard only after all the evidence is presented. However, there are other provisions in the KCCP which show that this rule is not an absolute and strict one.

Article 360 (4) KCCP states that the parties and the injured party may until the conclusion of the main trial move that new facts be looked into and that new evidence be collected. Article 374 (1) KCCP states that upon completion of the evidentiary proceedings, the presiding judge shall ask the parties and the injured party if they have any motions for supplementing the evidentiary proceedings. And finally, Article 383 (1) KCCP states that if after the closing statements of the parties the trial panel does not find a need for any further evidence, the presiding judge shall indicate that the main trial has been concluded.

These provisions are based on the principle expressed in Article 7 KCCP stating that the court, the public prosecutor and the police participating in criminal proceedings must truthfully and completely establish the facts which are important to rendering a lawful decision. The panel of the Court of Appeals considers that this principle together with the provisions discussed in the above section clearly show that it is possible to hear witnesses and take material evidence also after the defendant has been examined at the main trial. The rule in Article 403 (1) 9) KCCP must be interpreted taking into consideration the procedural circumstances of the case at hand and paying attention to the question of

whether the defendant's right to an effective defence has been violated. Especially, in extensive cases it is not uncommon that a need for further evidence or re-hearing some of the witnesses emerges after the defendant has been examined. It is completely clear that in these cases the defendant must be given a possibility to give her/his own statement and if needed to call new witnesses.

From the minutes of the main trial it can be established that there were no objections presented against this order of processing evidence. The Defence has had a possibility to state comments on the presented evidence and the defendants themselves have had an opportunity to state their opinions on the evidence after it was administered. There is no indication that the rights of the Defence have been violated in any way in regards to this question. Thus, the allegation in the appeal of Defence Counsel of H.K. is ungrounded and is rejected.

B.6. Record of the Main Trial: Article 403 (2) KCCP

Defence Counsel of H.K. alleges that the provisions of criminal procedure were violated because the Court omitted to apply the provision in Article 350 KCCP or applied it wrongly and this influenced or may have influenced the rendering of a lawful and proper judgment. The Defence Counsel alleges that the main trial record was never finalized after the session, it was not signed by the Presiding Judge and the Court Recorder, and the parties did not have a possibility to exercise their right to check the final record.

Article 350 (1) and (2) KCCP reads:

> *"(1) The record of the main trial … shall be finalized at the end of the session. It shall be signed by the presiding judge and the recording clerk.*
>
> *(2) The parties shall be entitled to check the finalized record and attachments, to make comments on the contents and to request corrections."*

The Panel of the Court of Appeals points out that neither this Defence Counsel nor others requested the viewing of the records after holding of the main trial and have not presented any remark, verbal or in written form, in relation to the contents of the records or their form. It must be noted that the main trial was conducted in English as an official language, and the records were translated into Albanian, which of course takes its time. The allegation of the Defence Counsel that the records were not signed by the Presiding Judge and Court Recorder as obliged by Article 350 (1) of KCCP is factually incorrect because

each record, the original English version, was signed by the Presiding Judge and the Court Recorder after the records were finalized. The records were thereafter translated into Albanian language.

Therefore, the Court of Appeals ascertains that the allegation of the Defence Counsel O.B. does not stand. It must be noted that the defence counsel does not state any reasons how this alleged violation could possibly have influenced the rendering of a lawful judgment. The allegation is entirely ungrounded. There is no substantial violation of the provisions of criminal procedure with regard to this question.

B.7. Allegation on Judgement exceeding the Indictment: Article 403 (1)10) KCCP

Defence Counsel of H.K. alleges that the appealed Judgement exceeded the Indictment in relation to his client because the enacting clause of the Impugned Judgement contains harsher expressions than those contained in the Indictment and that in last paragraph of page six of the appealed Judgement it states: “it is clear from telephone listings that B.M. was being observed by H.K. and S.G., when he went outside the house on 09.10.2010”.

Following the review of the appealed Judgement, the Court of Appeals finds that no significant change of relevant facts to the detriment of the Defendant was included in the enacting clause of the Judgement. Rather, the first-instance court, while providing a factual description of actions of the accused H.K. presented the circumstances pointed out during the final speech of the Prosecutor aiming to define as accurately as possible the criminal offence H.K. was charged with. When the Court described the act it included some details which were not contained in the Indictment to serve for a precise definition of the offence. The Court of Appeals considers that this was done within the framework of the relevant factual description of the elements of the criminal offence included in the indictment. So, in this case we are not dealing with the Judgment exceeding the Indictment, and thus, no substantial violation of the provisions of criminal procedure has taken place as alleged (Article 403 (1)10) of KCCP).

B.8. Contents of the enacting clause and the reasoning of the Judgment: Article 403 (1) 12) KCCP

Legal contents of a written Judgement are set out in Article 396 of KCCP. With regard to the formal structure, the appealed Judgement meets all legal requirements. It is a fact that the appealed Judgement is voluminous and it contains occasional repetitions of some points, but this does not make the Judgement incomprehensible. In fact, the enacting clause of the appealed Judgement in relation to the accused B.K., D.I., H.K., A.N., H.K. and S.G., is entirely clear and concrete, and the Judgment contains the proper reasons on all essential facts. Thus, the description given in the enacting clause is complete and

comprehensible, and there is nothing dubious in it. A proper description of incriminating actions was given for the accused B.K., D.I., H.K., A.N., H.K. and S.G. Essential features and facts of criminal offences were given for them altogether and for each of them separately. The reasoning of the Impugned Judgement contains the required factual and legal reasons, there has therefore been no violation in this regard.

The first instance court made an assessment and analysis of evidence administered during the main trial in compliance with the provision of Article 387 of KCCP and presented its conclusions in relation to those. Therefore, its position and assessment in relation to administered evidence was supported by presenting detailed reasons. Also the lines of defence of the accused were subject to assessment by the first instance court and each evidence presented by them was assessed in the same way as any other evidence in compliance with the provision of Article 387 of KCCP. The Court has clearly stated which facts it found proven and the grounds for this. From the reasoning of the Impugned Judgment it must be noted that the first instance court has done a comprehensive study and analysis of the presented evidence. Especially the analysis and assessment of telephone evidence (metering records, cartographic charts and cell identification) shows a detailed approach which has led to trustworthy findings and conclusions.

Therefore, the Panel concludes that the enacting clause is not in any way inconsistent with the grounds for the Impugned Judgment and that the conclusions drawn by the first instance court were properly reasoned. No procedural violation occurred in this regard.

The Panel however clarifies that the findings themselves and their accuracy will be analysed below under the appropriate headings relating to the alleged incomplete and incorrect determination of the factual situation and the application of criminal law.

C. Erroneous or Incomplete Determination of the Factual Situation: Article 402 (1) 3) KCCP

C.1. The positions of the parties

In their appeals the Defence Counsel for the accused state that in this criminal case the factual situation was determined erroneously and incompletely by expressing widely their opinions and interpretations in connection with the evidence in a manner that differs from the manner of the first instance court.

The Defence Counsel for the defendant **B.K.** objects to the assessment of the evidence: minutes of the identification of persons by the injured party A.M., the identification conducted by witness M.K., minutes of the search of the residence of the accused B.K., the certificate on the confiscation of items during the search, the defence of the accused and

the evidence in connection with his alibi, by giving his arguments in connection with the facts that the court of first instance assessed as determined or undetermined, the reasoning given in connection with this evidence and the conclusions issued especially in relation to the possession of mobile phones.

The Defence Counsel for the defendant **D.I.** claims that the court of first instance considered credible only the evidence in favor of the injured party, whereas the evidence that confirms the alibi of the accused was not taken as grounds even though this evidence proves that this accused was receiving medical treatment in Albania at the time in question, from 16/17.09.2010 until 04.10.2010.

The Defence counsel for the defendant **H.K.** claims that the court has not determined with any evidence the fact that H.K. took part in the kidnapping of A.M., and this circumstance suffices to reach the conclusion that the judgment contains an erroneous determination of the factual situation. That the factual situation was never determined fully in the Impugned Judgment, it is stated in the appeal that the court never determined that this accused was present in the "stan" (mountain hut) where it is alleged that the victim was held, that never during 40 days was he mentioned in any phone communication between the accused and the family of the injured party, or other persons, and it was not determined that a weapon existed, whereas the Defence continuously during the main trial requested that his alibi be confirmed.

The Defence Counsel for the defendant **A.N.** claims that the collection of evidence was not performed professionally and in the reasoning of the Impugned Judgment there is no material evidence to prove that A.N. is a potential perpetrator or co-perpetrator of the criminal offense he is being charged with, so that the factual description of the incriminating actions of A.N. isn't coherent in relation to the factual situation and the evidence in the case file. He raises questions about the credibility of the statements of witness D-1, the identification performed by A.M. and the statement of the police officer H. in connection with the identification procedure, the identification by witness D-1, the statements of witnesses – lieutenant L.K. and officer B.O. about their meeting with F.C. and the contradictions between these statements, for which the Defence continuously requested that they be declared inadmissible evidence, and the failure to assess the defence of the accused and the evidence in connection with his alibi.

The Defence Counsel for the defendant **H.K.** claims that all the substantial violations of the provisions of the criminal procedure (which are emphasized above in the chapter of the substantial violations of the criminal procedure) resulted in the erroneous and incomplete determination of the factual situation since no evidence determined (beyond reasonable doubt) that the accused H.K. was implicated in the critical event. So, he refers to the procedure of the identification of persons by A.M., the statements of the injured party

A.M. given to the prosecution on 03.11.2010 and 05.01.2011, then the defence of the accused about him knowing the accused B.K., A.N. and I.L., about the time when he stayed in the I. mountains, the possession of phone 04….. and the evidence about his alibi and the opinion of the cartography expert.

The Defence Counsel for the defendant **S.G.** claims that the most relevant facts presented by the Defence as material were assessed erroneously by the court. In the reasoning of this ground for appeal, he refers to the assessment of the material evidence such as the transcripts of the phone conversations, the listing of phone calls, minutes of the identification and the assessment of this evidence by the court, claiming that this assessment is completely erroneous and without arguments.

The Defence Counsel for the defendant **I.L.** also claims that the first instance court based its decision on an erroneous and incorrect factual situation.

The Appellate State Prosecutor replied by stating that the court correctly and fully determined the factual situation.

C.2. The assessment of the Panel

Before assessing the merits of the arguments presented by the parties, the Panel deems it necessary to clarify the standard of review on appeals regarding the factual findings made by the Trial Panel. Article 405 of the KCCP defines the terms "erroneous determination of the factual situation" and "incomplete determination of the factual situation". It is clear from these definitions that it is not sufficient for the appellant to demonstrate only an alleged error of fact or incomplete determination of fact by the Trial Panel. Rather, the criminal procedure code requires that the erroneous or incomplete determination of the factual situation relates to a "material fact", 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.[3] Consequently, only in such instances will the Appeals Court overturn a decision of the Trial Panel on factual grounds.[4]

As already discussed in Court of Appeals jurisprudence,[5] 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*

[3] See also B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366 (3).
[4] See for the same position also e.g. Judgment of the Court of Appeals no. PAKR 1122/12 dated 25.04.2013, para. 39.
[5] Ibid, para. 40.

person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so." The standard which the Supreme Court applied was "*to not disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous*" (*Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, para. 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012 30*). The approach taken by the Supreme Court reflects a principle of appellate proceedings which is applied – although with some variance – both in common law but also in civil law jurisdiction as well as in international criminal law proceedings (*see e.g. Supreme Court of Ireland, Hay v. O'Grady, [1992] IR 210; Federal Court of Justice Germany, BGHSt10, 208 (210); International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Kupreskić et al., IT-95-16-A, Appeals Judgment, para. 28 et seq.)*.

From the case file it results as undisputable that on 21 September 2010 at 06.05 hrs in the village G. Municipality of K. the injured party A.M. was kidnapped. From the statement of the injured party given during the investigative procedure, but also during the main trial, the trial panel determined the time, location and manner how the kidnapping occurred. In connection with this event, the injured party conducted the identification of the persons at the police, initially through photographs and then directly. This procedure (of identification) was mainly objected to by the Defence Counsel of the accused in their appeals. The Court of Appeals will not stop again at the issue of the identification of persons by the injured party A.M. because in connection with this procedure it gave detailed clarifications above and there is no need to repeat them. But, considering the low evidentiary value of this evidence (that is assessed as such also by the court of first instance – appealed judgment, p.age 177), it must be emphasized that this was not the sole evidence dealing with who was involved in this criminal offence. It is worth mentioning that all the accused denied to have been in any way involved in the kidnapping.

Regarding the accused B.K., other than being identified by the injured party A.M. as the person whom he saw on 22 September 2010 at the B. "stan" (mountain hut) in a caravan type vehicle and who had told him that he would ask for a payment for his release and who had asked him whether Tito had been a good man, the participation of this accused in the kidnapping of the injured party is based on other evidence assessed as well by the court of first instance in the Impugned Judgment. From the confiscated items in the residence of B.K. during the search, it was determined that this accused kept various SIM cards and a number of cell phones and that he changed SIM cards through various mobile phones (SIM cards with no. 04/…, 04../…, 04../…, 04../…, 04../…, 04../…, 04../…, 04../…, 04../… and 04../…). The testimony of witness M.K. during the investigative procedure

determined the connection of the accused B.K. and some of the phone numbers which is also determined by the listing obtained from the IPKO and Vala operators. In relation to the credibility of the statement of this witness and the identification, the Court of Appeals refers to the reasoning given earlier. From the telecommunications evidence the First Instance Court determined that this accused between 20 and 23 September 2010 was in regular phone communication with the other accused so that on 21 September 2010 he communicated with D.I., H.K. and S.G.. On 22 September 2010 he communicated with D.I., I.L., H.K. and S.G. and on 23 September 2010 he communicated with S.G.. On 20 September 2010 from 05.10 and 06.51, by using SIM card 04../…., B.K. was communicating with D.I. and this phone activated the antenna in the zone of the cellular code of Gj. On 21 September 2010, between 06.15 and 07.48 hrs, SIM card in the possession of B.K. activated antennae in D, K, D, G, L, B, S and D which determines that the accused B.K. at that time was travelling between G and D. The First Instance Court paid specific attention to the cell phone NOKIA 6300 with IMEI with number 1……..0, which held SIM card with no. 1……..5 and in it were re-recorded the numbers of the three brothers of B.K.. It is a fact that it was determined that with the same IMEI number there are many cloned cell phones, but from the evidence of telecommunication it was determined that the SIM card with no. 04…/ … had been placed in the phone with the same IMEI and that number was used to make the request for payment to the son of A.M. This is very convincing evidence. Also, the court of first instance refers to the telephone conversation between I.L. and A.M. (22.00 hrs. 10 December 2010) in which I.L. refers to the participation of B.K. in an armed conflict with the police the previous night. This telephone conversation corresponds to the event that occurred at 00.30 hrs. on 10 December 2010, when B.M. sent the ransom money to the location set by the kidnappers, but it was caught by the police and on this occasion there was an exchange of fire with the kidnappers. Based on the above facts, the court of first instance correctly rejected as ungrounded the defence of the accused in relation to his alibi, that at the disputed time he was not in Kosovo, that he was in Albania, that on 06 September 2010 he was at the house of witness A. K. to express condolences for the death of his brother and on 09 September 2010 he was present at the wake and the religious rites from 14.50 until 22.30 hrs and that until 03.00 he was together with witness J. (R.) K. The court of first instance in the reasoning of the Impugned Judgment doesn't exclude the possibility that this accused had left Kosovo around 15 September 2010, but from the above evidence it determined that on 09 September 2010 the accused B.K. was in possession of the cell phone no. 04../…., that from the cartography data it was determined that between 21.00 and 22.00 hrs on 09 September 2010 the person who held this phone was travelling north-south in a zone 10 km from T. and was in the same zone from 22.00 until 23.00 hrs. Whereas the data from the listing indicate that in the time between 21.00 and 22.00 hrs. on this date at least 20 SMS messages were exchanged between the person who held this phone and witness B.M. Therefore, the Court of Appeals also finds that the finding of the first instance court in relation to the assessment of testimonies of witnesses A. K, J.R. K. and D. R. are correct.

The Panel concurs with the trial panel that these witnesses testified with the aim to provide alibis for the accused and thus guarantee a defence for them; the Panel does not find them credible. The Panel also sees no need to question further witnesses regarding the alibi, this issue has been clarified already.

From the reasoning of the Impugned Judgment it results that the court of first instance determines the participation of the accused D.I. in the commission of this criminal offense from the identification made by the injured party A.M. who describes this accused as the person who on 04 October 2010 had video recorded him as a "sign that he is alive". But, other than this evidence the fact that D.I. was in Kosovo during the disputed time was also established by the phone listing. Initially, the court, from the testimony of witness Rr. I, established the fact that this witness possessed the phone with IMEI no. 3……6, which had been left at home by his brother D.I., whereas the telephone evidence prove that in the cell phone with this IMEI were used the SIM cards with number: 04../…., 04../ …., 04../…., which establishes the fact that this accused had communicated with B.K. on 20 September between 05.10-06.51 hrs. and that the phone in the possession of D.I. had activated antennae in D, P and B, which means that he was travelling. Also from the listings of phone calls no other early morning calls were re-registered, but his conversation with the accused B. on 21 September 2010 at 09.59 hrs. was re-registered and that they were in continuous communication with SMS messages when the antenna within the so-called triangle were activated (clarification given above). From the reasons stated above this Court found that the findings of the court of first instance in connection with the assessment of evidence and determination of facts that involve this accused in the commission of the concrete criminal offense are correct and grounded and as such are approved in their entirety.

From the case file and the reasoning of the appealed judgment it results that H.K. was identified by the injured party A.M. as one of the persons who had guarded him in the B "stan" and when he had left from there on 21 and 22 September 2010, as the person who held an automatic rifle. Also witness D-1 (his statements given in the investigative procedure) has identified this accused through photographs, as a person who was present at the B "stan". From the statement of the police officer B. O. and lieutenant L. K, respectively the memorandum written on 05 November 2010, facts presented by witness D-1 and witness F.Ç. were confirmed in connection with the accused H.K. and especially the fact that the latter rejected the cooperation with the police and prosecution when he made it known that the cross-eyed person is H.K., the son of the person whom he known for over 30 years (in connection with this statement see paragraph B.2.4 of this judgment). Witness D-1/M-1 in his interview given to the police on 09.11.2010 stated that at the B "stan" he saw three persons out of which one with an automatic weapon and after he describes the way he looked and was dressed as characteristic he describes the look "with a bit cross-eyed look", so that the conclusions of the court of first instance issued from the

comparison of these statements is correct and logical. So the claims of the Defence Counsel for this accused are ungrounded.

Also from the case file and the reasoning of the appealed judgment it results that the court of first instance determined beyond reasonable doubt that the accused A.N. was involved in the commission of the criminal offense of the kidnapping of A.M. So, A.M. identified him through photographs (with 70% certainty) that this is the person who at the B."stan" asked him about E.H. But, except for this evidence the court of first instance in the reasoning of the judgment also refers to the testimony of witness D-1 (given in the investigative procedure to the police and the prosecution), which testimony indisputably confirms that A.N. is the person whom this person saw on 22 September 2010 at the B. "stan" as the driver of the white Toyota 4 Runner vehicle with dark windows and to whom he had given his personal phone to make a call. These facts are also established with the testimonies of p. o. B.O. and l L. K. in connection with the circumstances to them by F.Ç. These facts are established by the data from the listing of phone calls made from the cellphone in the possession of witness D-1-04../…. Specifically, on 22 September 2010 at 11.31 hrs, I.L. number 04../…. (which he had in his possession), received a phone call from the phone of witness D-1, which fully establishes the statement of witness D-1 given during the investigative procedure and the statement of police officers in connection with what witness F.C. told them. Based on these facts the court of first instance concluded that the accused A.N. was involved in the commission of the criminal offense of kidnapping of the injured party A.M., whereas the evidence proposed by A.N. to establish the alibi was not believed. The conclusions made by the first instance court are approved by the Court of Appeals as correct and grounded.

In relation to the accused H.K., the court of first instance based its finding that this accused was involved in the commission of the criminal offense on the statement of A.M. who in his statement dated 30 December 2010 identified this accused as one of the people present during his recording and who was presented as A. from M. These facts are connected by the court of first instance with the data of the phone calls listing which establishes that on 04 October 2010 this accused didn't have any phone communication between 15.35 and 19.33 hrs. with any of the phones attributed to him and for which data was offered which is connected with the period of the silence of the phones attributed to D.I. From the statement of the accused H.K., it was established that he was in the possession and use of phone number 04../ ….. with which he contacted B.K. This call had activated the antenna close to the B. "stan" on 20 September 2010. Therefore it is logical as found by the court of first instance that this accused on this date was at the B. "stan" to prepare the placement of A.M. Also from the listing data of phone calls was established the regular communication of the accused H.K. with the accused B.K., but there was also later communication and the phone of the accused H. activated the antenna in the zone of the cellular code P. The court of first instance refers also to the communications of this

accused on 22 September 2010 with B. K. and S.G. and the cell phone silence in the possession and use of B.K., A.N. and I.L. and this silence corresponds with the time when A.M. was moved to the mountain. The court of first instance also evaluated the defence of the accused H. K. and it noticed the contradictions in his statements in connection with the time when he claims that he was in the I. and Z. mountains with J.K, I. and D, to build a "stan". In connection with this claim of the accused these persons were heard as witnesses. But, the credibility of the statement of the accused is devalued by comparing his claim (the accused H) that the work in the mountain included fixing the "stan" roof with the statement of his uncle that the work at the "stan" had to do with destroying an existing house and then the building of a new one. Also assessed was the photo documentation and video recording presented by the Defence Counsel of the accused to establish the credibility of the claim of the accused that he was in the mountain at the claimed time, and in this regard the court of first instance assessed correctly that considering the time and stage of investigations for this accused, those recordings were intentional to create an alibi for the accused. Therefore, based on the above facts, the Court of Appeals finds that the assessment and findings of the court of first instance are correct and grounded and it approves them in their entirety, whereas the appellant claims of the Defence Counsel for the accused are ungrounded.

In relation to the accused S.G., the court of first instance from the claim of the accused found that this accused possessed and used phone number 04../…. Based on the data presented in the listings of the phone calls the court found that the SIM card with number 04../…. was placed in the cell phone with IMEI no. 3……0. Even though this accused denied to have used phone number 049/146-305 from this evidence (in the listings of phone calls) it was determined that this SIM card was placed in the phone with the same IMEI number. Even though the accused S.G. had denied to have used phone numbers 049/…., the court of first instance determined that he also used this number because that card was also placed in the phone with IMEI 3……...0 and this was the same phone in which the cards with the above numbers were placed (04../…. and 04../….), and which he had used for only 10 days. The court of first instance from the phone communications determined that S.G. had regular communication with the accused B.K. on 21, 22 and 23 September 2010 and that his phone had activated the antennae in the cone of cellular code in G. Also from the data of phone listing it established that the phones in the possession of the accused B.K. and the cell phone in the possession of S.G. activated the antennae in L. (06.40, 06.41 and 06.43), in S. (06.58 and 06.59 and in D. (07.00 and 07.08) and from this evidence concluded that they travelled together and in the same direction. In the same manner the court of first instance referring to the data from the phone transcripts and the activation of respective antennae, specifically in G, found that on 09 October 2010 this accused and the accused H.K. were in G. and as a logical conclusion they were following and observing B.M. who had left to pay the ransom.

Therefore the Court of Appeals approves the first instance court's assessment and findings and based on all these facts finds that the appellant's claims are ungrounded.

In connection with the accused I.L, the Court of Appeals does not need to deal with the review of the facts assessed and established by the trial panel, because the Court of Appeals already found (see above) the defendant not guilty because the act the defendant I.L. was charged with did not constitute any criminal offence, and therefore the defendant I.L. was acquitted of all charges.

The Court of Appeals reviewed all the evidence analysed by the trial panel and carefully considered the trial panel's assessment in the appealed judgment. The objectivity of the 'telephone evidence' is at the very heart of this assessment. Concurring with the first instance court, also the Court of Appeals gives strong evidentiary value to this evidence and to the findings based upon this evidence.

As established by the first instance court, there are contradictions between the statements of some witnesses (D-1, M.K., F.Ç.) given at the investigation stage and at the main trial. As it happens frequently, the witnesses tend to deny their previous statements. This question was already addressed by the first instance court and the Court of Appeals finds no reason to deviate from that assessment. There has not appeared anything which would give reasons for the Court of Appeals to take new evidence or to repeat the evidence already taken. All the evidence presented during the main trial supports the logical and convincing conclusions about the critical events and circumstances reached by the first instance court. There is nothing in the appeals which can challenge the factual findings of the first instance court. Thus, the Court of Appeals fully agrees with the reasoning of the Impugned Judgment (with the exception of I.L. as stated above) when it comes to factual findings and concludes that there is no erroneous or incomplete determination of factual situation as alleged in the appeals.

C.3. Conclusion

From all the above circumstances it results that the accused B.K., D.I., H.K., A.N., H.K. and S.G. initially prepared for the kidnapping of A.M., that their aim was financial gain (ransom from family members of A.M.), that they had intent and the joint action to take the incriminating actions. So it is a correct conclusion that the accused are co-perpetrators, because the consequences of their incriminating actions are a fruit of their common intent. How much who of the accused acted – the quantum of incriminating actions may and should also have an impact on the sentencing.

D. Alleged violations of criminal law

D.1. Legal Qualification of the Criminal Offence

All Defence Counsel of the accused allege that the criminal law has been violated to the detriment of their clients by the very fact that the accused were found guilty of the criminal offence of Organized Crime under Article 274 (1) of the CCK, in conjunction with the criminal offense of Kidnapping under Article 159(2) of the CCK. Moreover, the Defence Counsel for the accused B.K. alleges that the provision of Article 274 (7) 3) of the CCK has also been violated because the qualifying element under Article 159 (2) of the CCK does not make the offence a serious crime, because of the minimum sentence prescribed by law for this offence. He also alleges that the criminal law was violated to the detriment of his client in violation of the principle *in dubio pro reo* because it was not proved that B.M. paid the money for the release of his father.

The Defence Counsel for the accused I.L. claims that by finding his client guilty the criminal law has been violated to I.L. disadvantage because no charges ever existed in respect of him in this case. The Defence is correct in this regard and the Panel has already discussed this issue and acquitted this accused. The Panel refers to its reasoning above.

The allegations on the part of the Defence Counsel for the accused B.K. D.I. H.K. A.N. H.K. and S.G. are partially grounded.

The Panel considers the doubts raised with regard to the legal qualification relevant. The Appellate Panel must analyse whether the factual situation as determined by the first instance court indeed allows for the qualification of Organized Crime, under Article 274 (1) CCK.

As a preliminary remark, the Panel observes that the reasoning with regard to the qualification in the Impugned Judgment is scarce and does not elaborate on the elements of the criminal offence in any detail (see. p. 188 of the Impugned Judgment).

Article 274 (1) of CCK states:

> *"Whoever commits a serious crime as part of an organized criminal group shall be punished by a fine of up to 250.000 EUR and by imprisonment of at least seven years."*

In addition, paragraph (7) of this Article elaborates on the constitutive elements of this offence stating that for the purposes of this Article:

"1) The term "organized crime" means a serious crime committed by a structured croup in order to obtain, directly or indirectly, a financial or other material benefit.

2) The term "organized criminal group" means a structured group existing for a period of time and acting in concert with the aim of committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit.

3) The term "serious crime" means an offence punishable by imprisonment of at least four years.

4) The term "structured group" means a group of three or more persons that is not randomly formed for the immediate commission of an offence and does not need to have formally defined roles for its members, continuity of its membership or a developed structure."

First, the Court of Appeals points out that the first instance court has found it proven that all the elements of the underlying criminal offence of Kidnapping were fulfilled for all defendants.

Regarding the criminal offense of Kidnapping, the Court of Appeals considers that the allegation in the appeal of the Defence Counsel for defendant B.K. that it was never proven that B.M. paid money prior to the release of his father is not crucial for the qualification. The information from the transcripts of telecommunications undoubtedly proved that the intent of the accused was material benefit. It is therefore irrelevant whether any money exchanged hands; this is not the requisite for this criminal offence to exist. It is sufficient to find that the perpetrator kidnapped a person in order to force another person to pay the money and this is exactly what happened in this case.

Moreover, the aggravated form of the criminal offence pursuant to Article 159 (2) CCK exists when the perpetrator commits the offence as a member of a group, which has also been established here.

The intent of the accused to get ransom paid for the injured party is proven by B.K.'s request of 26 September 2010, at 7:21 pm, over phone number 04.../…, using Nokia 6300 with IMEI number 1……..…0 (which was confiscated during the search of B.K. residence), to A.M.'s son, B.M., for a payment of ransom, having the following content: "...If you think we should come to an agreement, 3 million are needed to release your father. Every mistake will cost you..." and he introduced himself as "M". The communication between them for the payment of the ransom took place between

September 25, 2010 and October 9, 2010. Then, on October 9, 2010, at around 22:00, the hand-over of the money was attempted in accordance with the instructions given by phone (SMS) by the accused B.K.. B.M. acted according to those instructions and threw the bag of money at the specified place, but the moment the kidnappers attempted to pick up the bag, the police intervened in order to arrest the kidnappers, thus thwarting their attempt. The money was turned back to B.M.. It is a fact that at the main trial B.M. said nothing about giving money and his father's release. However, the Court of First Instance established that on October 30, 2010 B.M. withdrew the amount of 300.000 € from NLB Bank. On the same date, during the evening, A.M. was released. On October 1, 2010 B.M. returned the amount of 70.000 € to the same bank.

In this case, there is no dilemma that the accused, acting as members of a group, kidnapped A.M. with the intent to force his family members to pay an amount of money by threatening to kill the kidnapped person if the family failed to meet their demand. The Court of Appeals points out that the provision in Article 159 CCK does not set a requirement that the ransom must be paid. What is needed is the intent to force someone to do or abstain from doing an act or to acquiesce to an act. It follows therefrom that the factual situation has not remained doubtful in any respect and there is no room for the application of the *in dubio pro reo* principle. This principle applies when there is doubt about the facts, but in this case no such doubt existed.

Second, the Court of Appeals considers that in the present case, the punishment for the offense of Kidnapping (Article 159 (2) of the CCK) is imprisonment from 1 to 10 years. Thus, the Court of Appeals considers that the phrase “at least” should be interpreted in the sense that the punishment may be imposed for that period of time, and not as a minimum of the punishment prescribed. This is also in accordance with the jurisprudence of higher courts in Kosovo.

Third, the Court of Appeals considers that in the instant case the element “structured group” has not been established by the finding of facts in the appealed judgment. In fact, the court of first instance itself found that the group was formed in order to kidnap A.M. (p. 188 of the appealed Judgment). Although the defendants had defined roles in the kidnapping of A.M., those roles were limited to that offence and not in a group overall (thus not supporting the notion of a structured group). The Court of Appeals finds that there has been no evidence that would demonstrate that the offenders (defendants) formed a structured group in the meaning of Article 274 (7) 4) of the CCK, although the perpetrators acted as a group. In fact, there is no evidence to suggest that the group had any kind of formalized structure or that it was not formed randomly for the immediate commission of this one offence. However, although the accused did not act as a structured organized group, the factual findings of the first instance court and what is stated above lead to a conclusion that the defendants B.K, D.I, H.K, A.N, H.K. and S.G. jointly

committed the acts described in the enacting clause of the Impugned Judgment.

Based on this, the Court of Appeals considers that this criminal case does not contain the elements of the criminal offense of Organized Crime under Article 274 (l) of the CCK, as found by the court of first instance. However, the incriminating acts of the accused B.K., D.I., H.K., A.N., H.K. and S.G. contain all the essential elements of the criminal offense of Kidnapping under Article 159 (2) of the CCK, committed in co-perpetration.

Pursuant to Article 386 (2) of the CPCK *"[t]he court shall not be bound by the motions of the prosecutor regarding the legal classification of the act."*

In light of the facts presented above, the Court of Appeals finds that the law has been erroneously applied to the disadvantage of the accused, as rightfully highlighted by the Defence Counsel for the accused. The actions of the accused fulfill the elements of the criminal offence of Kidnapping pursuant to Article 159 (2) CCK.

Therefore, given that the factual situation has been correctly and fully determined, the Court of Appeals re-qualifies the acts of the accused B.K., D.I., H.K., A. N, H.K. and S.G. as constituting the criminal offence of Kidnapping, under Article 159 (2) of the CCK.

The Panel observes that the Criminal Code in force at the time the criminal offences were committed and applied above (the CCK) is no longer in force. On 1.01.2013 a new Criminal Code (Law no 04/L-082) entered into force in Kosovo. Article 3 of the said Criminal Code (previously Article 2 in the CCK) enshrines the basic criminal law principle of application of the most favorable law. The Panel has reviewed the provisions relevant for the accused in the respective case and has determined that the new Criminal Code in force since 1.01.2013 is not more favorable for the accused. Accordingly, the law in force at the time of the commission of the criminal offence applies - the CCK.

D.2. The criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons and the Law on Amnesty

Regarding the criminal offences under counts 2.1 and 4 of the appealed judgment the Court of Appeals finds that the court of first instance applied the criminal law correctly when it concluded that the actions of the defendant B.K. contain all the elements of the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons, under Article 328 (3) of the CCK, while the actions of the accused H.K. contain the elements of the criminal offense of Unauthorized Ownership, Control, Possession or Use of Weapons, under Article 328 (1) of the CCK.

During the session before the Court of Appeals, the Appellate Prosecutor withdrew the

indictment against accused D.I. (Count 3) and accused H.K. (Count 5) for the criminal offenses under Article 328 (2) of the CCK.

Articles 2.1 and 3 (1.2.5) of the Law on Amnesty exclude the criminal offence of Unauthorized ownership, control or possession of weapons under Article 328 (2) of the CCK from criminal prosecution. None of the exceptions in Article 4 of the Law on Amnesty is applicable. Therefore, counts 3 and 5 of the charge against D.I. and H.K. are rejected pursuant to Article 389 (4) of the KCCP.

The Panel notes that since the Prosecutor also withdrew these charges also conditions for rejection of the charge under Article 389 (1) KCCP are met. The result is the same – the charge for these counts must be rejected.

E. Decision on the Punishment

The Defence Counsel in their appeals also challenge the imposed criminal sanctions.

The Panel clarifies that since the legal qualification of the criminal offences has been changed, this consequently requires the imposition of punishment anew within the limits prescribed for this particular offence. The Court of Appeals, having re-qualified the acts of the relevant accused as the criminal offence of Kidnapping pursuant to Article 159(2) CCK, must also determine the appropriate sentence within the limits set by the law for this particular criminal offence.

The Panel in reaching this decision took into consideration also the appellants' arguments regarding mitigating and aggravating circumstances and the reasoning of the first instance court in this regard. The Panel will discuss these issues below in detail.

The Panel clarifies with regard to B.K. that no modification was made with regard to his finding of guilty and allocated punishment for the criminal offence under Article 328(3) CCK. The same goes for defendant H.K. and his finding of guilty and punishment for the criminal offence under Article 328(1) CCK. The Panel therefore considered these punishments as set when determining the aggregate punishment for both defendants in accordance with Article 71 CCK.

In terms of Article 64 of the CCK, the starting point for the determination of the criminal sanction is the legal limit prescribed for the specific crime. The court has a discretional authority to derogate, under the conditions provided for by Articles 66 and 67 of the CCK, from such an orientation, but only if certain conditions are met, as laid down in these provisions. With the individualization of a punishment – through the process of measuring a sentence, the severity of the criminal offence is relativized and in this case one should

take into consideration that the punishment according to the severity should satisfy the purposes of punishment, which, according to the legal guidelines, should manifest a fair balance between the requirement that the accused should be allowed to re-socialize through education *and* the public demand that the manner and length of the punishment should have a general preventive character that would deter him or her from committing criminal offenses (individual and general prevention).

Assessment of the first instance court (Impugned Judgment)

The court of first instance, when determining the sentence against the accused, considered the manner of the commission of the criminal offense, but also the kidnappers' conduct towards the victim, A.M., the threat that was made to him and his family to take A.M.'s life and destroy their family business, the demand for ransom and the fact that the accused have pleaded not guilty of the first offence, as aggravating circumstances (for all accused). In addition, the court of first instance specified the additional aggravating and mitigating circumstances also for each accused as follows:

With regard to the accused B.K, in addition to the circumstances mentioned above, the Court considered as additional aggravating circumstances also his leading role in the group and the fact that when he committed the criminal offences he was unlawfully at large.

With regard to the accused D.I., in addition to the circumstances mentioned above, the Court considered his contribution in the fulfillment of the demand for ransom, threats made against the injured party, and the fact that an arrest warrant had been issued against him at that time for another criminal offense, as an aggravating circumstance.

Likewise, with regard to the accused H.K., the first instance court considered the same aggravating circumstances as above, but also his contribution – guarding A.M. while the latter was being held and that he was armed. The court considered his young age and that, because of his age, he may have been under the influence of his brother B.K, as a mitigating circumstance.

With regard to the accused A.N., the first instance court considered, in addition to the circumstances outlined above, his very important logistic role in the kidnapping and the degree of his criminal responsibility, because at that time he was a police officer in the Kosovo Police, with responsibilities and enjoying the good faith of the community, as aggravating circumstances. The Court considered his family circumstances as mitigating circumstances.

With regard to the accused H.K., the first instance court considered the fact that he and

D.I. (by recording and putting pressure on the victim) contributed to the fulfillment of the demand for ransom, as an aggravating circumstance.

With regard to S.G., the first instance court considered his contribution in the transport of the injured party to the location where he was held during that time and his surveillance of B.M. on 9 October 2010 as aggravating factors.

Findings of the Court of Appeals

The Court of Appeals notes that the finding of the first instance court with regard to guilty plea for criminal offence under Article 328 (2) CCK for defendants D.I. and H.K. as a mitigating circumstance is no longer relevant since this charge was rejected by the Court of Appeals (see above).

With regard to the findings of the first instance court on aggravating and mitigating circumstances, the Court of Appeals emphasizes that the fact the defendant has not pleaded guilty is not an aggravating circumstance. The conclusion of the trial panel on this was incorrect.

Whilst a guilty plea early in the proceeding may be considered a mitigating circumstance, the absence of it is not an aggravating factor. It derives from the principle *nemo tenetur se ipsum accuasare* that neither an accused's refusal to actively cooperate with the state authorities during criminal investigation nor the manner in which the defendant conducts his defence can be considered an aggravating circumstance. It is for the accused to decide on his defence strategy as well as if and how he wants to exercise his right to defence. If the accused, like in the case at hand, decides to contest the charges entirely he will also not plead guilty. Hence, considering the latter as an aggravating circumstance would interfere with the accused's fundamental right to defence.[6]

Furthermore, in the opinion of the Court of Appeals, the threat made to the injured party with his death, and destruction of his business cannot be considered as aggravating circumstances because it already represents the qualifying element of the criminal offence of Kidnapping. Thus, Paragraph (2) of Article 159 of the CCK states: when the offence provided for in paragraph 1 of the present article is committed ... as a member of a group or the perpetrator threatens the kidnapped person with death or severe impairment to health, the perpetrator shall be punished.

The remaining conclusions of the first instance court are correct and are also considered

[6] See also the Judgment of the Court of Appeals, Pakr 1122/12 dated 25.04.2013, para. 59.

by the Court of Appeals when determining the sentences.

B.K., D.I., H.K., A.N. S.G. and H.K. are found guilty of Kidnapping pursuant to Article 159 (2) CCK, for which the prescribed punishment is imprisonment from one to ten years. The criminal acts were committed in co-perpetration.

The Defence Counsel for the accused has not highlighted in their appeals any special circumstances that would affect the length of punishment (reduction in the sentence).

The Court of Appeals considers that the punishments now imposed against the defendants are in harmony with the intensity of protected value, the degree of criminal responsibility of the accused as perpetrators of the criminal offenses, and that these sentences will serve the general prevention, the special prevention, they go towards the strengthening of society's moral, and citizens' responsibility and discipline, and they comply with the requirements for personal safety of the population of this area, and that these punishments will achieve their purpose as set out in Article 34 of the CCK.

The Panel imposed the sentences set out in the enacting clause with regard to B.K., D.I. and A.N. with a majority decision. The sentences decided for H.K., H. K. and S.G. were decided with a unanimous decision of the Panel.

The Panel sentenced defendant B.K. to an imprisonment term of 10 years for the criminal offence of Kidnapping pursuant to Article 159 (2) CCK. The Panel agreed with the first instance court for the punishment under Count 2.1 for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons under Article 328 (3) CCK (three years of imprisonment). The Panel considers that a fair aggregate punishment will be twelve (12) years of imprisonment.

The Panel sentenced defendant D.I. to an imprisonment term of 8 years for the criminal offence of Kidnapping pursuant to Article 159 (2) CCK.

The Panel sentenced defendant H.K. to an imprisonment term of 6 years for the criminal offence of Kidnapping pursuant to Article 159 (2) CCK. The Panel agreed with the first instance court for the punishment under Count 4 for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons under Article 328 (3) CCK (two years of imprisonment). The Panel considers that a fair aggregate punishment will be seven (7) years of imprisonment.

The Panel sentenced A.N. to an imprisonment term of 9 years for the criminal offence of Kidnapping pursuant to Article 159 (2) CCK.

The Panel sentenced H.K. to an imprisonment term of 6 years for the criminal offence of Kidnapping pursuant to Article 159(2) CCK.

The Panel sentenced S.G. to an imprisonment term of 6 years for the criminal offence of Kidnapping pursuant to Article 159 (2) CCK.

The periods spent in detention are accredited towards the sentence for all the above named accused.

With regards to the accused I.L., as stated above, he IS ACQUITTED OF THE CHARGES. The accused I.L.'s detention on remand was terminated by a separate ruling, issued on 15 May 2014.

F. Other issues

The costs of the criminal proceedings for the accused I.L. shall be paid from budgetary resources.

The acquittal part (Count 2.2 of the enacting clause of the Impugned Judgment) remains unchanged as do all other parts of the Impugned Judgments that were not modified.

Pursuant to Article 9 of the Law on Amnesty, No. 04/L-209, despite the applicability of amnesty for this criminal offense, the decision of the First Instance Court on the confiscation of weapons is confirmed, and although the accused has benefited from amnesty for this criminal offense he has no right to request the return of the confiscated weapons.

In addition, the decision of the First Instance Court on the confiscation of the Nokia 6300, IMEI number 1……0 (3……0), and confiscation of the Toyota 4-Runner car, chassis number K…l, 8……1, plate numbers ……., owned by A.N., is confirmed.

As stated above, pursuant to Article 426 of the KCCP, the Court of Appeals decided as in the enacting clause.

The Judgment drafted in Albanian language and finalized in English language. Reasoned Judgment completed on 21 October 2014.

Presiding Judge

_____

Timo Vuojolahti, EULEX Judge

Panel Members

_____

Tonka Berishaj, Kosovo Judge

_____

Annemarie Meister, EULEX Judge

Recording Officers

_____

Beti Hohler, EULEX Legal Officer, and

_____

Vjollca Gërxhaliu-Kroçi, EULEX Legal Advisor

KOSOVO COURT OF APPEALS
PAKR. No. 1282/2012
28 MAY 2014
(finalized on 21 October 2014)