SUPREME COURT

Prishtinë/Priština

Case number: **PAII-KŽII-2/2016**
(P. 309/10 and P. 340/10 Basic Court of Prishtinë/Priština)
(PAKR 52/14 Court of Appeals)

Date: **20 September 2016**

IN THE NAME OF PEOPLE

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Jorge Martins Ribeiro (Presiding and Reporting), EULEX Judge Anders Cedhagen and Supreme Court Judge Avdi Dinaj as Panel members, and EULEX Legal Officer Sandra Gudaityte as the Recording Officer, in the criminal case against, among others, the defendant

S[redacted] H[redacted], [redacted] currently not in detention;

convicted of the criminal offence of **organised crime**, contrary to article 274(1) Provisional Criminal Code of Kosovo (hereinafter "PCCK") in connection with **trafficking in persons** contrary to article 139(1) PCCK, committed in co-perpetration in accordance to article 23 of the PCCK, and pursuant to articles 6, 11, 15(1), 274(1), 39(1) and (2) and 57(1) and (2) he was sentenced to the imprisonment of 5 (five) years, a fine of 2500 (two thousand five hundred) Euros which has to be paid no latter that 6 (six) months after the judgment is final, and prohibited from exercising a profession of anaesthesiologist for the period of 1 (one) year starting from the day the sentence of imprisonment is fully served.

REPUBLIKA E KOSOVËS · GJYKATA SUPREME E KOSOVËS-PRISHTINË · VRHOVNI SUD KOSOVA - PRIŠTINA · REPUBLIKA KOSOVA

acting upon the appeals against the Judgment PAKR 52/14 of the Court of Appeals dated 6 November 2015 filed by defence counsel R[redacted] G[redacted] on behalf of defendant S[redacted] H[redacted] on 7 March 2016, and by defendant S[redacted] H[redacted] on 11 March 2016;

having considered the response to the appeal of the Office of the Chief State Prosecutor (hereinafter "Prosecution") filed on 5 April 2016;

having held a public session on 11 August 2016;

having deliberated and voted on 20 September 2016;

pursuant to articles 411, 420 (1.4) and 422 read together with Article 430(2) of the Provisional Criminal Procedure Code (hereinafter "PCPC")

renders the following

JUDGMENT

The appeals against the Judgment PAKR 52/14 of the Court of Appeals dated 6 November 2015 filed by defence counsel R[redacted] G[redacted] on behalf of defendant S[redacted] H[redacted] on 7 March 2016 and by defendant S[redacted] H[redacted] on 11 March 2016 are partially granted insofar that the Court of Appeals did not establish and prove all elements of the criminal offence of organised crime committed in connection with the criminal offence of trafficking in persons.

The judgments of the Basic Court and the Court of Appeals are modified as follows:

Count 1

The criminal charge against S[redacted] H[redacted] as described in Count 1 is re-qu[redacted] criminal offence of negligent facilitation of the offence of trafficking in pe[redacted] in violation

of article 139(4) PCCK, committed in co-perpetration in accordance to article 23 PCCK (as in the first instance), because S[redacted] H[redacted] in his capacity of chief anaesthesiologist at Medicus Clinic knowingly participated in medical procedures which were unlawful under the laws of Kosovo, namely in at least 7 (seven) removal of organs (kidneys) for transplantations, which inflicted grievous bodily harm upon the donor victims by permanently and substantially weakening a vital organ, and under the circumstances and based on personal characteristics, he ought to have been aware, and should have been aware, that he was engaging in trafficking.

This charge is subsequently rejected based on article 2(2) and (3) PCCK, in conjunction with article 389(4) PCPC, as currently the criminal offence as laid down in article 171 of the Criminal Code of the Republic of Kosovo (hereinafter "CCRK") (read together with articles 3 (2) and (3), and 17(2) CCRK) does not comprise any longer acts committed by negligence.

Count 3

S[redacted] H[redacted] is acquitted of the criminal charge of organised crime, in violation of article 274(1) PCCK, because pursuant to article 390(3) PCPC it was not proven that he has committed the act with which he has been charged.

The judgment of the Court of Appeals is therefore modified in relation to the conclusion that S[redacted] H[redacted] was a co-perpetrator ("co-inspirator") and member of an organised criminal group as the required facts showing the intent, and the others facts necessary to meet the constituent elements of the criminal offence, were not established by the Court of Appeals. The facts established by the Basic Court in this regards were actually kept unchanged by the Court of Appeals, including facts pertaining to the guilt.

Count 7

The criminal charge against S[redacted] H[redacted] as described in Count 7 is re-qualified to the criminal offence of grievous bodily harm which resulted in destroying or [redacted]

substantially weakening an organ or a part of body of the person, in violation of article 154(1.2) PCCK, not article 154(2.4) PCCK as per the indictment.

S[redacted] H[redacted] is found guilty of the criminal offence of grievous bodily harm which resulted in destroying or permanently and substantially weakening an organ or a part of body of the person, in violation of article 154(1.2) PCCK, because it was proven beyond reasonable doubt that:

From at least 15 May 2008 until 31 October 2008, at Medicus Clinic, S[redacted] H[redacted] in his capacity as chief anaesthesiologist knowingly participated in the at least 7 (seven) surgeries of removal of organs (kidneys) for the purpose of transplantation, which were unlawful under the Kosovo Health Law. The illegal removal of kidneys inflicted grievous bodily harm upon the donor victims, namely permanently and substantially weakening their vital organ.

The judgment of the Court of Appeals is modified in relation to the fact that "he also (...) at the very least should have known that kidney transplant operations were illegal in Kosovo" as the Panel fully concurs with the Basic Court that "(...) Dr. S[redacted] H[redacted] in his capacity of chief anaesthesiologist (...), knowingly participated in medical procedures which were unlawful under the laws of Kosovo, namely the removal of organs (kidneys) for transplantations. These illegal kidney removals inflicted grievous bodily harm upon the donor victims namely permanently and substantially weakening a vital organ". The defendant was aware of his acts, that they were illegal and punishable by law, and willingly committed them.

It has been proven that S[redacted] H[redacted] participated in the surgeries of at least 7 (seven) persons who suffered grievous bodily harm by having permanently and substantially weakened vital organs, by the removal of one of their kidneys for transplantation:

(1) Protected Witness W2 of the [redacted] nationality;

(2) Protected Witness W1 of the [redacted] nationality;

(3) Protected Witness W3 of the [redacted] nationality;

(4) **Protected Witness PM of the [redacted] nationality;**

(5) **Protected Witness DS of the [redacted] nationality;**

(6) **Protected Witness AK of the [redacted] nationality;**

(7) **Y[redacted] A[redacted] of the [redacted] nationality.**

The punishment:

Pursuant to articles 6, 11, 15(2), 154(1.2) PCCK, S[redacted] H[redacted] is sentenced to the imprisonment of 3 (three) years for the criminal offence of grievous bodily harm which resulted in destroying or permanently and substantially weakening an organ or a part of the body of the person, in violation of article 154(1.2) PCCK.

Pursuant to articles 57(1) and (2), and 63(2) PCCK, S[redacted] H[redacted] is prohibited from exercising the profession of anaesthesiologist for the period of 1 (one) year starting from the day the sentence of imprisonment has been fully served.

The remainder of the judgment of the Court of Appeals not modified by this judgment remains unchanged.

The remaining parts of the appeals are rejected as unfounded.

REASONING

I. Composition of the Panel

1. The Panel established that this case was assigned to EULEX Judges before 15 April 2014, and is therefore considered as an "ongoing case" in accordance to Article 1A (1.4) and 3(1) of the Law on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in Kosovo (hereinafter "Law No. 05/L-103") *inter alia* modifying Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (hereinafter "Law on Jurisdiction").

2. The Panel in the present case was composed prior to the entry into force of the Law No. 05/L-103, in accordance to Law 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in Kosovo, approved on 23 April 2014 and entered into force on 30 May 2014 (hereinafter "Law 04/L-273") *inter alia* modifying the Law on Jurisdiction, and Agreement on the relevant aspects of the activity and cooperation of EULEX Judges with the Kosovo Judges working in the local courts[1], signed between the Head of EULEX Kosovo and Kosovo Judicial Council on 18 June 2014 (hereinafter "Agreement"). In accordance to article 1.A of the Law 04/L-273, and Point 2 of the Agreement, the Panel was composed of the majority of EULEX judges with EULEX judge presiding.

3. The Panel members agreed that the Supreme Court of Kosovo has competent jurisdiction and that no further proceedings are required.

II. Procedural Background

4. On 15 October 2010, the Special Prosecution Office of the Republic of Kosovo (hereinafter "SPRK") filed Indictment PPS No. 02/09 against S[redacted] H[redacted] and other defendants. On 21 October 2010, Indictment PPS No. 107/10 was filed, charging other individuals with certain related criminal offences. The two indictments were joined into a single indictment on 29 November 2010. The joinder was confirmed by a three judge panel on 27 April 2011. The single indictment was subsequently amended and expanded on 22 March 2013 and 17 April 2013.

5. Defendant S[redacted] H[redacted] was charged with: Count 1 – trafficking in persons, in violation of article 139 PCCK, committed in co-perpetration in accordance to article 23 PCCK; Count 3 – organised crime, in violation of article 274(1) PCCK; Count 4 – unlawful exercise of medical activity, in violation of article 221(1) PCCK; and Count 7 – grievous bodily harm, in violation of article 154(2.4), or alternatively article 154(5), or article 154(1.4) PCCK, committed in co-perpetration in accordance to article 23 of the PCCK.

[1] This reference only by majority of the panel members.

6. The trial was held before the Basic Court of Prishtinë/Priština which rendered its Judgment P 309/10 and P 340/10 on 29 April 2013. The criminal offence of trafficking in persons (Count 1) in violation of article 139 PCCK, committed in co-perpetration, was re-qualified to negligent facilitation of the criminal offence of trafficking in violation of article 139(4) PCCK, and rejected pursuant to article 2(2) PCCK as the new criminal provision of trafficking in persons did not criminalise the negligent facilitation.[2] Further, the criminal offence of unlawful exercise of medical activity (Count 4) in violation of article 221(1) PCCK, committed in co-perpetration, was rejected. S[redacted] H[redacted] was acquitted from the criminal offence of organised crime (Count 3) in violation of article 274(1) PCCK. The Basic Court further re-qualified Count 7 in relation to S[redacted] H[redacted] to the criminal offence of grievous bodily harm in violation of article 154(1.2) PCCK. S[redacted] H[redacted] was found guilty for the criminal offence of grievous bodily harm in violation of article 154(1.2) PCCK, not article 154(2.4) PCCK as per the indictment. S[redacted] H[redacted] was subsequently sentenced to 3 (three) years of imprisonment and prohibited from exercising the profession of anaesthesiologist for the period of 1 (one) year starting from the day the judgment becomes final.

7. The defence counsel of S[redacted] H[redacted] and of other defendants, as well as the SPRK, filed their appeals against Judgment P 309/10 and P 340/10 of the Basic Court of Prishtinë/Priština, dated 29 April 2013, on 19 November 2013, 26 November 2013, 4 December 2013 and 10 December 2013 – the latter was filed by the SPRK to which some of the defendants' defence counsel responded on 9 and 10 of January 2014. The defence counsel of S[redacted] H[redacted] filed the appeal on 26 November 2013.

8. On 6 November 2015, the Court of Appeals rendered its Judgment PAKR 52/14. The Court of Appeals partially granted the appeal submitted by the defence counsel on behalf of S[redacted] H[redacted] in regards to the determination of the factual situation, establishing that the number of proven kidney transplants that took place at Medicus Clinic in which the criminal organisation was involved are 7 (seven) instead of 24 (twenty-four). However, the Court of Appeals included defendant S[redacted] H[redacted] in the said criminal organisation. Accordingly, the

[2] As per article 171 CCRK read together with articles 3(2) and (3), and 17(2) CCRK (corresponding to articles 2(2) and (3), and 11(3) PCCK).

Judgment of the Basic Court was modified in relation to S[redacted] H[redacted] as follows: S[redacted] H[redacted] was found guilty of committing the criminal offence of organised crime in violation of article 274(1) PCCK in connection with trafficking in persons in violation of article 139 PCCK, committed in co-perpetration[3] in accordance to article 23 PCCK (Counts 1, 2 and 3). S[redacted] H[redacted] was sentenced to 5 (five) years of imprisonment, a fine of 2 500 (two thousand five hundred) Euros which has to be paid no latter that 6 (six) months after the judgment is final, and prohibited from exercising the profession of anaesthesiologist for the period of 1 (one) year starting from the day the sentence of imprisonment is fully served.

9. On 7 March 2016, defence counsel R[redacted] G[redacted] on behalf of defendant S[redacted] H[redacted] filed the appeal against Judgment PAKR 52/14 of the Court of Appeals dated 6 November 2015, in which the defence counsel requests to annul the judgments of the Basic Court and the Court of Appeals and send the case for re-trial, or to amend both judgments and acquit S[redacted] H[redacted] of all criminal charges.

10. On 11 March 2016, defendant S[redacted] H[redacted] filed the appeal against Judgment PAKR 52/14 of the Court of Appeals, dated 6 November 2015, in which he moves the Supreme Court to annul the judgment of the Basic Court and send the case for re-trial, or to acquit him of all charges.

11. On 5 April 2016, the Prosecution filed its response to the appeals submitted by defendant L[redacted] D[redacted] defendant S[redacted] H[redacted] and the defence counsel on behalf of S[redacted] H[redacted] The Prosecution moves the Supreme Court to reject the appeals as not permitted pursuant to articles 422 and 430(2) PCPC, or in case the Supreme Court considers the appeals are admissible, to reject the appeals as ungrounded pursuant to articles 423 and 430(2) PCPC.

12. On 11 September 2016, the Supreme Court held a session pursuant article 411 PCPC *ex vi* articles 410 and 430(1.3) PCPC.

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[3] Although the Court of Appeals uses term "co-conspirator" in the enacting clause of its judgement, this is a mistake easily justifiable by the length and complexity of this case. It is clear that the Court of Appeals uses co-perpetrator, as we are talking about one co-perpetrator being defendant in the case which is explained by the Court of Appeals in the penultimate paragraph on page 62 of its judgment.

III. Submissions of the parties

- **Submissions of the defence counsel on behalf of S[redacted] H[redacted]**

13. The defence counsel claims that Judgment of the Court of Appeals PAKR 52/12 dated 6 November 2015 contains substantial violations of the provisions of criminal proceedings, violations of the criminal law, and erroneous and incomplete determination of the factual state. Additionally, the defence counsel challenges the judgment of the Court of Appeals in relation to the decision on punishment and on the prohibition to exercise the profession of anaesthesiologist for the period of 1 (one) year. Therefore, the defence counsel moves the Supreme Court to annul the judgments of the Basic Court and of the Court of Appeals and send the case for re-trial, or to amend both judgments and acquit S[redacted] H[redacted] of all criminal charges. The defence counsel moves the Supreme Court to annul the decision on the prohibition to exercise the profession of anaesthesiologist for the period of one year. The defence counsel claims that the appeal is filed in accordance to Article 430 PCPC.

14. The defence counsel claims that the judgment of the Court of Appeals contains substantial violations of the provisions of criminal proceedings indicated in article 384(1.8), (1.12), and (2.2) of the Criminal Procedure Code of Kosovo (hereinafter "CPC"). He claims the evidence administered and received by the Basic Court in relation to defendant S[redacted] H[redacted] are inadmissible. The defence counsel claims that the evidence evaluated by the Basic Court, including the evidence given by 7 (seven) victims and other persons listed in the enacting clause, does not prove that S[redacted] H[redacted] committed any criminal acts. S[redacted] H[redacted] did not remove any kidney from human body himself. He had a contract only for the services of anaesthesiologist. Therefore, the findings in pages 10 to 12 of the Judgment of the Court of Appeals that S[redacted] H[redacted] performed surgeries to remove the kidneys are in contradiction with the nature of the profession of anaesthesiologist.

15. Moreover, the defence counsel contends that the judgment of the Court of Appeals was not drawn up in accordance with article 370(6), (7), and (8) CPC. The Judgment [illegible]

any justification of confirmed facts, and it does not explain why the evidence presented by the defence counsel and the defendant in the main trial were not taken into consideration. The judgment further does not explain the circumstances for the aggravated punishment. Such judgment violates the rights of the defence as indicated in article 384(2.2) CPC.

16. The defence counsel further claims that the enacting clause of the judgment of the Court of Appeals is contradictory to itself and to the reasoning of the judgment. The enacting clause is in contradiction with the evidence presented in the main trial.

17. The defence counsel asserts that the judgment of the Court of Appeals contains violations of criminal law as it is indicated in article 385 CPC, and erroneous and incomplete determination of the factual situation as defined in article 386 CPC. The judgment did not take into account the nature of the profession of anaesthesiologist and erroneously concluded that S[redacted] H[redacted] committed criminal offences of organised crime, trafficking in persons and grievous bodily harm.

18. Specifically, the defence counsel stresses that the defendant worked only as an anaesthesiologist. The position of the anaesthesiologist merely involves the defendant participating in the surgeries once they are scheduled and taking care of the patient's welfare during surgeries. To support his claim, the defence counsel provides a list of duties of an anaesthesiologist from several internet websites. The defendant was not involved into the scheduling of the surgeries or the removal of kidneys. Additionally, the defendant was not involved in the preparation and organization of the transplantations. To this end, he did not participate in finding donors or persons who would receive the kidneys. In relation to the alleged donors, he did not organise their arrival, reception, or stay in the Clinic. Additionally, the defendant was not involved in issues related to payments and the recruitment of persons for the removal and transplantation of kidneys. Therefore, the courts did not prove the elements of the criminal offences of organised crime and trafficking in persons.

19. The defence further states that S[redacted] H[redacted]s actions as anaesthesiologist were erroneously considered as those causing grievous bodily harm. The defendant did not meet the patients'

and did not ask whether they consented to have their kidneys removed. The courts erroneously concluded that the defendant himself removed the kidneys from the donors for transplantation. Thus, the courts incorrectly concluded that S[redacted] H[redacted] should have known that the surgeries were unlawful.

20. Further, the defence counsel alleges that the Court of Appeals erroneously concluded that the defendant violated the provisions of the Law on Health and the Law on Private Health. Contrary, the defendant was working with a contract as an anaesthesiologist and therefore he did not have any legal obligation to deal with licensing, registration or activities of the Clinic.

21. As a consequence of violation of criminal law, and erroneous and incomplete evaluation of the factual situation, the sentence of imprisonment and the prohibition to exercise the profession as anaesthesiologist for one year is unlawful.

- **Submissions of S[redacted] H[redacted]**

22. The defendant claims that Judgment of the Court of Appeals PAKR 52/12 dated 6 November 2015 contains substantial violations of the provisions of criminal proceedings, violations of the criminal law, erroneous and incomplete determination of the factual state, and erroneous decision on punishment. Therefore, the defendant moves the Supreme Court to annul the judgment of the Court of Appeals and send the case for re-trial, or to acquit the defendant of all charges.

23. The defendant claims that he participated in the surgeries in Medicus Clinic only in the capacity of anaesthesiologist and was paid based on the amount of work he would do in the Clinic. He has never taken part in the trafficking of people, did not bring people to Kosovo who needed the surgeries, was not involved in the arranging of their transportation or accommodation. The defendant did not know that the Clinic did not have a licence; he presumed the Clinic had a licence because it was run by an internationally recognised physician and university professor.

24. Finally, the defendant alleges that the Court of Appeals failed to administer the evidence in open sessions, and therefore found the defendant guilty of the criminal offence of organised crime and trafficking in persons based only on 1 (one) session while the Basic Court had 106 (hundred and six) sessions.

- **Submissions of the Prosecution**

25. The Prosecution in its reply moves the Supreme Court to reject the appeals as not permitted pursuant to articles 422 and 430(2) PCPC, or in case the Supreme Court considers the appeals admissible, to reject them as ungrounded, pursuant to articles 423 and 430(2) PCPC.

26. The Prosecution submits that when the modification of the factual situation done the Court of Appeal would entail "different determination of the factual situation", this would allow filling the appeal against the judgment of the Court of Appeal, in accordance to Article 430(2) PCPC. However, the Prosecution submits that the third instance appeal is permissible only when the Court of Appeal modifies the factual situation in a hearing, pursuant to article 411 PCPC. In the present case, the Court of Appeals held only a session, pursuant to article 410 PCPC.

27. The Prosecution further submits that the Court of Appeals modified the judgment of the Basic Court based on article 426(1) PCPC, which means that the Court of Appeals determined that the material facts were properly determined in the Basic Court judgment, but gave a different qualification to those facts. In this regard, the Prosecution contends that it cannot be considered that the court established a different state of facts if it only completed and formulated more accurately the description of the criminal act.

28. Finally, the Prosecution contends that in case the Supreme Court considers the defendant's appeal admissible, the Prosecution's observations in the opinion filed by the Appellate Prosecution Office on 19 February 2014 shall be considered as an integral part of the present response. In the response of 19 February 2014, the Appellant Prosecution Office claimed that the defendant was aware that he was participating, in his capacity as anaesthesiologist, the

illegal procedures of removal of kidneys for transplantation, and as such substantially contributed to permanent and substantial weakening of a vital organ of the donors. The elements proving the defendant's substantial contribution are as follows: the defendant was the lead anaesthesiologist in virtually all kidney transplant operations that took place in Medicus Clinic during the relevant time; he interviewed all the prospective foreign donors and recipients about allergic reactions and similar matters prior to surgeries; as a practicing physician he should have been aware that kidney transplants were illegal in Kosovo and that Medicus Clinic was not licensed or authorized to conduct transplants; and that a possible consent to kidney removal by the donors was invalid as it was a consent to an illegal medical procedure. The Appellate Prosecutor further indicated that the Basic Court correctly evaluated the circumstances and imposed the accessory punishment of prohibition to exercise the profession of anaesthesiologist.

IV. Applicable Procedural Law

29. The Panel unanimously decided that these proceedings are governed by the PCPC in accordance with articles 540 and 541, both *a contrario*, and article 545(1) CPC. The same conclusion would result from the Legal Opinion of the Supreme Court of Kosovo no. 43/2013, dated 7 January 2013.

V. Admissibility

30. In accordance to article 430(1) PCPC, an appeal against a judgment of a court of the second instance can be submitted only if certain conditions are met. Article 430(1.3) PCPC specifies that the appeal can be submitted if a court of the second instance has modified a judgment of acquittal by the court of the first instance and instead rendered a judgment of conviction. In the present case, the Basic Court acquitted S[redacted] H[redacted] from the criminal offence of organised crime (Count 3) in violation of article 274(1) PCCK, committed in co-perpetration in accordance to article 23 PCCK. The Court of Appeals modified the Basic Court judgment and found S[redacted] H[redacted] guilty of committing the criminal offence of organised crime in violation of article 274(1) PCCK in connection with trafficking in persons in [redacted]

article 139 PCCK, committed in co-perpetration in accordance to article 23 PCCK. Therefore, the Panel concludes that the appeals submitted by the defence counsel on behalf of S[redacted] H[redacted] and by S[redacted] H[redacted] himself are permitted as the Court of Appeals has modified the judgment of acquittal and rendered the judgment of conviction. In this regard, the Panel stresses that the conditions for the appeal against the judgment of the second instance court set in article 430(1.3) PCPC do not require the second instance court to hold a hearing nor to modify the factual state of the case. Mere modification of the judgment from acquittal to conviction is sufficient to consider the appeals admissible. This is in line with the Commentary of Article 391 of the Law on Criminal Procedure of 1982, which states that the third instance appeals are permitted "*because a decision had been adopted at a session of a panel, in the procedure that, in its essence, is not contradictory, and because totally opposite verdicts of the first instance court and the second instance court had been adopted to the detriment of the accused (acquittal versus guilty verdict)*". The third instance appeal in this situation is necessary to ensure the defendant's right to a judicial review enshrined in article 102(5) of the Constitution of Kosovo.

31. The remedy provided to the defendant in the impugned judgment is correct. This ground for appeal is independent from the one laid down in article 430(1.2) PCPC to which the Prosecution addresses. Regardless if there were any changes in the established factual situation, what matters the most is that the defendant was convicted for criminal offences he had been acquitted, specifically, organised crime in conjunction with trafficking in persons.

32. However, the issue raised by the Prosecution is worth a few explanations. Pursuant to article 420(1.4) PCPC, "*the court of second instance may in a session of the panel or on the basis of a hearing (...) modify the judgment of the court of first instance*". Also, article 424(1) PCPC, *in fine*, clarifies that in relation to the factual situation, only if necessary, a new main trial before the court of the first instance can be determined – which was not the assessment of the Court of Appeals. Article 424(4) PCPC again emphasises that when the Court of Appeals deems that there is an erroneous determination of the factual state of affairs and where all that is required for a correct determination is a different assessment of already determined

facts, and not the collection of new evidence or the repetition of previously produced evidence, the Court of Appeals can take an action.

33. The logics behind this leads to the conclusion that as long as the evidence already produced enables the court to alter the facts, it should be done as long as the core of the material facts remains – the Prosecution itself contends the very same understanding. Only in case of erroneous or incomplete determination of the factual situation it is absolutely necessary to take new evidence or to repeat the evidence already taken (*see* article 412(1) PCPC). Otherwise, if the purpose of the legislator was to address only the legal classification of the facts, then the law would clearly state that. This conclusion is also justified by the different solution set in article 424(3) PCPC: the judgment of the court of the first instance is annulled when serious doubts arise about the accuracy of the material facts which were determined in the judgment. Actually, it would be detrimental to the defendant to have a re-trial aiming at a non-substantial modification of the established facts when the evidence already produced enables the second instance court to do so.

34. Another point worth being addressed in terms of the interpretation of law, is the situation when the judgement that rejected the charges is modified to the guilty judgement - the provision of article 430(1.3) PCPC does not (explicitly) mention the case. In the present case, the first instance court rejected one charge (trafficking in persons), acquitted the defendant of another charge (organised crime), and convicted the defendant only for the grievous bodily harm, whereas the second instance court convicted the defendant for organised crime in conjunction with trafficking in persons. Therefore, in the second instance the defendant was convicted when before he had been acquitted of one charge and the other charge had been rejected.

35. As a conclusion, one might also say that the norm set in articles 430(1.2) and 424 PCPC **poses at least an issue of interpretation** when reference is made to a hearing, not to a session; however, as said, there is no difference in the two situations, **as the rationale of the latter norm is to enable the defendant with a second level of jurisdiction**, to provide the defendant with an instrument to challenge the decision where the factual [illegible]

somehow, changed. A different understanding would deprive the defendant of a second level of jurisdiction only because of a formal aspect: whether the change was held in a session or in a hearing. This would lead to the violation of the constitutional principle set in article 32 of the Constitution (Right to Legal Remedies). Finally, if the issue is not crystal clear enough to give room to this kind of question, then it could also be said that the issue is to be answered with the principle set in article 3(2) PCPC, *"(...) doubts regarding the implementation of a certain criminal law provision shall be interpreted in favour of the defendant and his or her rights under the present code"*.

36. Having said this, the appeals are admissible.

VI. Findings of the Panel

- **On *ex-officio* review**

37. The Panel will address the arguments raised by the defence counsel and the defendant, though not necessarily with the same level of thoroughness with regards to all the assertions made, as actually the Panel is not obliged to address each assertion[4].

38. The Panel *ex vi* article 430(2) PCPC, has to assess the main issues raised by the parties pertaining the merits of the appeal and, *ex officio*, the violations listed in article 415(1) PCPC. It is clear that the violations listed in article 415(1.2) and (1.3) PCPC, did not take

[4] We quote here the article on the Right to a Fair Trial by the European Court of Human Rights (Art. 6 E.C.H.R. - http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf, p. 21): "'Reasoning of judicial decisions' – According to established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based (Papon v. France). Reasoned decisions serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case (Ruiz Torija v. Spain, § 29). While courts are not obliged to give a detailed answer to every argument raised (Van de Hurk v. the Netherlands, § 61), it must be clear from the decision that the essential issues of the case have been addressed (see Boldea v. Romania, § 30). National courts should indicate with sufficient clarity the grounds on which they base their decision so as to allow a litigant usefully to exercise any available right of appeal (Hadji... Greece; and Boldea v. Romania)".

place, neither the ones listed in article 415(1.1) PCPC[5] - though it is worth mentioning that subparagraph 1.2 is intrinsically connected with the core of the appeal and therefore will be addressed in the reasoning of this judgment. Finally, article 415(1.4) PCPC was not violated as well, this pertaining to the violation of the criminal law to the detriment of the accused in the cases foreseen in article 404 PCPC[6].

- **The core principal of *Reformatio in Pejus* and the scope of this judgment**

39. Pursuant to article 417 PCPC "*where only an appeal in favour of the accused has been filed, the judgment may not be modified to the detriment of the accused with respect to the legal classification of the offence and the criminal sanction imposed*". Therefore, this will be the limit governing this judgment and the Panel will refrain, to the possible extent, from addressing the legal classification done by both instance courts, where multiple criminal offences of grievous bodily harm (24 (twenty-four) at the Basic Court, and 7 (seven) at the Court of Appeals) were considered to be only 1 (one) criminal offence. The protected juridical value by the criminal offence of grievous bodily harm is of personal nature (health and bodily integrity) and, therefore, the number of criminal offences must correspond to the

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[5] The following substantial violations of the criminal procedure are to be considered: article 403 (1) subparagraphs 1 ("the court was not properly constituted or the participants in the rendering of the judgment included a judge or a lay judge who did not attend the main trial or was excluded from adjudication under a final decision"), 2 ("a judge or a lay judge who should be excluded from participation in the main trial participated therein"), 6 ("the judgment was rendered by a court which lacked subject matter jurisdiction to hear the case, or a court erroneously rejected the charge on the ground of lack of jurisdiction"), 8 ("the judgment was based on inadmissible evidence"), 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"), 10 ("the judgment exceeded the scope of the charge"), 11 ("the judgment was rendered in violation of Article 417 of the present Code" –related to the prohibition of *reformatio in pejus*, as also SPRK had appealed") and 12 ("the enacting clause of the judgment was incomprehensible or internally inconsistent or inconsistent with the grounds for the judgment; the judgment lacked any grounds; there was no statement of grounds relating to material facts; the statement of grounds was wholly unclear or inconsistent in a large part; or in regard to material facts there was a considerable discrepancy between the statement of grounds relating to the content of documents or records of testimony given in the proceedings on the one hand and these documents or records themselves on the other hand").

[6] Article 404 PCPC reads as follows: "There is a violation of the criminal law if the criminal law is violated with respect to the following issues: 1) Whether the act for which the accused is prosecuted is a criminal offence; 2) Whether circumstances exist which preclude criminal liability; 3) Whether circumstances exist which preclude criminal prosecution and, in particular, whether criminal prosecution is prohibited by the period of statutory limitation or precluded due to an amnesty or pardon, or prior adjudication by a final judgment; 4) Whether an inapplicable law was applied to the criminal offence which is the subject-matter of the charge; 5) Whether in rendering a decision on punishment, alternative punishment or judicial admonition, or in ordering a measure of mandatory rehabilitation treatment or the confiscation of material benefit acquired by the commission of a criminal offence, the court exceeded its authority under the law; or 6) Whether provisions were violated in [illegible] crediting the period of detention on remand and an earlier served sentence".

number of victims, but this will be addressed later. The Panel is bound by the set of facts or "acts" comprised in the charge (the principle of subjective identity and the object of the judgment over the indictment). At the same time, the principle set in article 386(2) PCCK or in article 360(2) CCRK indicates that "*the court shall not be bound by the motions of the state prosecutor regarding the legal classification of the act*". It would be the case of homogeneous and real concurrency (as from a naturalistic point of view the acts of the same kind took place in different moments in time, or over the time) of the criminal offences, as per article 71 PCCK or article 80 CCRK[7], leading to the determination of an aggregate punishment comprehending all the different criminal offences committed, though of the same kind. The situation in the case at hand is not one of apparent or legal concurrency, as it was treated in both instances. As this would lead to a higher punishment, the Panel cannot effectively address this matter given the above mentioned principle.

- **The (in)admissibility of the evidence obtained during the search of the Medicus Clinic premises**

40. The Basic Court found that the search conducted in the premises of Medicus Clinic which started on 4 November 2008 and continued until 11 November 2008 was indeed conducted in violation of the provisions of the PCPC. Specifically, the Basic Court determined that the police and the public prosecutor had ample time to contact a judge for a written or at least a verbal search order, as required in article 242(1) PCPC, and that the exceptions described in articles 242(4), 245(1.4), and 245(3) PCPC were not met in the present case. Further, the Basic Court concluded that the search was concluded in violation of article 243(2) PCPC, because there were no persons present as witnesses, and the exception established in article 254(4) PCPC did not apply in the present case. The Basic Court concluded that these flaws would normally make evidence obtained during the search inadmissible, pursuant to article 246 PCPC. However, the involvement of the health inspectors makes the evidence seized at

[7] CCRK has introduced a new provision regulating the punishment of the criminal offences in continuation in article 81; however, and despite in the case at hand subparagraphs 1.1.4 and 1.1.5 of the said article are [illegible] subparagraph 1.1.1 is not met (as there are 7 victims), but also paragraph 2 clearly stipulates that [illegible] could not be applied in a case like this.

the Clinic admissible because their activities were in line with the legal provisions of Kosovo Health Law 2004/4, Law on Private Practices in Health, and Law on Health Inspectorate[8].

41. The Court of Appeals fully subscribed to the analysis presented in Ruling PPS No. 02/2009 of the Basic Court of Prishtinë/Priština dated 31 January 2011[9]. The Court of Appeals concurred with the Basic Court that the search in the premised of Medicus Clinic was carried out without the order of pre-trial judge, and the necessary persons were not present. However, the Court of Appeals disagreed that the cooperation with the health inspectors makes the search legal. Even though the search was carried out based on the suspicion of illegal activities conducted in the Clinic, the presence of the health inspectors cannot be used to legitimize the search carried out in violation of the provisions of the criminal procedure. Therefore, the Court of Appeals declared the evidence seized during the search as inadmissible[10].

42. The Panel fully subscribes to the analysis of the Basic Court and the Court of Appeals in relation to the violation of article 242(1) and (2) PCPC. The evidence presented in the case, namely the statements of the witnesses, clearly proves that the search in the Medicus Clinic premises was conducted without any written or oral court order, and there were no witnesses present during the search. These flaws constitute a violation of article 246(1) and (5) PCPC, and is an absolute ground to declare the evidence obtained during this search as inadmissible.

43. Further, the Panel concurs with the Ruling PPS No. 02/2009 of the Basic Court of Prishtinë/Priština dated 31 January 2011 that the presence of the health inspectorates during the criminal search does not make the violations of the PCPC acceptable, as the core reasons of the search are different. The health inspection does not replace legal conformity of searches conducted in the criminal investigations. While the search of private premises normally interferes with the individual's right to private life, the reasons adduced to justify such measures must be relevant, sufficient and not disproportionate to the aim pursued, this being the reason to the legal requirements to lawfully conduct a search.

[8] The conclusion of the Basic Court can be found on page 45 of Judgment of the Basic Court P 309/10 and P 340/10.

[9] *See* pages 45-49 of the Judgment of the Court of Appeals PAKR 52/12.

[10] The inadmissible evidence was listed on page 49 of Judgment of the Court of Appeals PAKR

44. In this regards, the Panel quotes the Judgment of the Court of Appeals: *"(...) this is the only possible interpretation according to article 36 paragraph 2 of the Constitution of Kosovo, according to which 'searches of any private dwelling or establishment that are deemed necessary for the investigation of a crime may be conducted only to the extent necessary and only after approval by a court after a showing of the reasons why such a search is necessary. Derogation from this rule is permitted if it is necessary, if it is necessary for a lawful arrest, to collect evidence which might be in danger of loss or to avoid direct and serious risk to humans and property as defined by law (...)'.*[11] *'However, it is worthy to bear in mind the search at stake was not motivated by health reasons as defined by articles 2 and 6 of the referred law but «kidney transplantation is suspected to have taken place after a* [redacted] *person who was apprehended by the Kosovo Police stated that he had sold a kidney at the hospital», instead, as it is specifically stated on Z[redacted] K[redacted] report (...). It was clearly a criminal search, motivated by criminal reasons (...)'*[12]". The court must be satisfied that the legal requirements were followed to afford individuals an adequate and effective safeguard against any possible abuse. In the present case, the search was initiated by the police officers with the primary purpose of investigating criminal activities in the Clinic. The police officers involved the health inspectors to provide their expertise and support in the search, considering the nature of the premises as a medical clinic. The police officers were responsible for leading the search and taking all necessary actions. Therefore, the Panel considers that the Basic Court erroneously concluded that the evidence was obtained by the health inspectors in cooperation with the police. The search was concluded as part of the police criminal investigative action which has to comply with the provisions of the PCPC. The European Court of Human Rights has determined that judicial authorisation of searches is an essential requirement in conducting searches[13]. The presence of the representatives of other institutions who have their own internal rules cannot be held as a legitimate excuse not to seek for judicial authorisation to conduct a search.

[11] *See*, the first paragraph of page 46 of the Judgment of the Court of Appeals PAKR 52/12.
[12] *See*, the last paragraph of page 48 of the Judgment of the Court of Appeals PAKR 52/12.
[13] *See*, for instance, *Chappell v. the United Kingdom*, judgment of 30 March 1989, and *Funke v.* [redacted] judgment of 25 February, 1993.

45. Consequently, the Panel concludes that the Court of Appeals correctly determined that the search was conducted in violation of article 246(1) and (5) PCPC and article 36 of the Constitution of Kosovo. Therefore, the evidence seized during this illegal search shall be considered as inadmissible. The evidence collected or analysed in violation of requirements of criminal procedure or the defendant's constitutional rights is inadmissible for a criminal prosecution in a court of law. The Court of Appeals correctly declared the evidence seized during the search as inadmissible[14].

- **Number of proven transplants**

46. The Panel concurs with the findings of the Court of Appeals that there is sufficient evidence to prove that 7 (seven) kidney transplants took place in Medicus Clinic. The evidence related to these seven transplants is based on the testimonies of 7 (seven) witnesses: W2, W1, W3, PM, DS, AK and Y[redacted] A[redacted] (he testified in an Extraordinary Investigative Hearing in front of the pre-trial judge). The testimonies of these witnesses were addressed in great detail by the Basic Court (*see* pages 53-69 of Judgment P 309/10 and P 340/10 of the Basic Court of Prishtinë/Priština), and affirmed by the Court of Appeals[15]. The Panel fully subscribes to the conclusion of the Court of Appeals in this regards.

47. The Panel further agrees with the Court of Appeals that there is insufficient admissible evidence to prove that other 17 (seventeen) transplants took place in Medicus Clinic. The evidence used by the Basic Court to support these transplants was declared as inadmissible by the Court of Appeals[16], and confirmed by this Panel. Further, there is no any other admissible evidence in the case file to prove these 17 (seventeen) transplants. However, it is worth pointing out that the establishment of a fact does not correspond to the statement that non-established facts did not take place. The Court of Appeals (namely on page 53 of Judgment of the Court of Appeals PAKR 52/12) does not state that only 7 (seven) transplants took place, but establishes that the admissible evidence allows the court to conclude that 7

[14] As already mentioned, the inadmissible evidence was listed on page 49 of the Judgment of the Court of Appeals PAKR 52/12.

[15] *See* page 52 of Judgment of the Court of Appeals PAKR 52/12.

[16] *See* pages 45-49, page 52, and the first paragraph of page 53 of Judgment of the Court of Appeals PAKR 52/12.

(seven) transplants took place as the other remaining 17 (seventeen) cannot be established based on the admissible evidence.

48. Therefore, the Panel considers that only 7 (seven) kidney transplantations were proven to take place in Medicus Clinic. Consequently, from the logic perspective, if only 7 (seven) transplants were proven; the timeframe of the established facts has to be considered as from 15 May 2008 to 31 October 2008 (as per the established facts by the Court of Appeals on pages 10 to 12). The Panel notes, in this regards, that the mere change of the dates does not imply any legal consequence in relation to the statutory limitation, the constituent elements of criminal offences, or the (co-)defendants. Not having changed the dates in a consistent way with the number of established transplants may be considered as a *de minus* error done by the Court of Appeals without any legal consequences.

- **Substantive violation of criminal procedure**

49. The Panel notes that the Basic Court found S[redacted] H[redacted] guilty for the criminal offence of grievous bodily harm in violation of article 154(1.2) PCCK. However, the Court of Appeals modified the judgment of the Basic Court and found S[redacted] H[redacted] guilty of the criminal offence of organised crime contrary to article 274(3) PCCK in conjunction with trafficking in persons contrary to article 139(1) PCCK, committed in co-perpetration in accordance to article 23 PCCK.

50. In this regard, the Panel notes that the judgment of the Court of Appeals is ambiguous because, neither the enacting clause, nor the reasoning clearly indicates whether S[redacted] H[redacted] was acquitted of the criminal offence of grievous bodily harm in violation of article 154(1.2) PCCK.

51. According to Article 396(3) PCPC, the enacting clause of the judgment shall include the personal data of the accused, and the decision by which the accused is pronounced guilty of, the act of which he or she is accused or by which he or she is acquitted of, the charge for that act or by which the charge is rejected. Article 396(4) PCPC specifies that in case the defendant was acquitted or the charge was rejected, the enacting clause shall [illegible]

description of the act which he or she was charged with. In the present case, the Court of Appeals merely indicated that the judgment of the Basic Court is modified pursuant to article 426(1) PCPC insofar as the defendant is found guilty of the criminal offence of organised crime in connection with trafficking in persons (as stated in the enacting clause, penultimate and last paragraphs of page 8 of Judgment of the Court of Appeals PAKR 52/12) and of trafficking in persons (as stated in the enacting clause, penultimate paragraph of page 9, and second paragraph of page 14 of Judgment of the Court of Appeals PAKR 52/12). Neither the reasoning nor the enacting clause of the judgment mentions whether S[redacted] H[redacted] was acquitted of the criminal offence of grievous bodily harm in violation of Article 154(1.2) PCCK.

52. According the principle of the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. In the present case, the Panel considers that lack of clarity in the enacting clause and the reasoning of the judgment creates uncertainty as to which crimes the defendant was convicted for and acquitted of. Therefore, the Panel considers that the judgment of the Court of Appeals contains substantial violations of the provisions of the criminal procedure as described in article 403(1.12) PCPC. Despite the absence of any reference in the enacting clause to an issue raised in the appeal filed by the prosecution, it can be read in the reasoning (in the second paragraph of page 61 of Judgment of the Court of Appeals PAKR 52/12) that the Court of Appeals agreed with the decision of the Basic Court: "*the defendant cannot be convicted for the same criminal act twice*". The Court of Appeals followed the same logics as the Basic Court in relation to defendant L[redacted] D[redacted] In other words, it was deemed by the Court of Appeals that grievous bodily harm is a "part" of the criminal offence of trafficking[17]. Despite the Prosecution has not filed an appeal against the decision of the Court of Appeals, considering that this matter had been raised in the Prosecution´s allegations when appealing the judgment of the Basic Court, at a latter moment this issue will be addressed again, as with all due respect for different opinion, this Panel does not agree that the criminal offence of grievous bodily harm constitutes an element of trafficking

[17] *See*, for example, page 15 of Judgment of the Basic Court P 309/10 and P 340/10 and page 61 of J[redacted] the Court of Appeals PAKR 52/12.

in persons or that it would be punishing twice for the same act. However, considering the decision of this instance the said violation is then declared to have happened but will have no juridical consequence considering this Judgment.

- **Charges[18] related to the criminal offence of trafficking in persons**

53. In relation to S[redacted] H[redacted] the Basic Court requalified Count 1 of the criminal offence of trafficking in persons in violation of article 139 PCCK, committed in co-perpetration in accordance to Article 23 of the PCCK, to the negligent facilitation of the criminal offence of trafficking in persons, in violation of article 139(4) PCCK, and rejected the charge pursuant to article 2(2) and (3) PCCK or 3(2) and (3) CCRK (to be read together with articles 11(3) PCCK or 17(2) CCRK, respectively) as the new criminal provision of trafficking in persons, article 171 CCRK, did not foresee any longer the negligent facilitation. The Court of Appeals modified the judgment of the Basic Court pursuant to article 426(1) PCPC, and found S[redacted] H[redacted] guilty of committing the criminal offence of organised crime, in violation of article 274(1) PCCK in connection with trafficking in persons, in violation of article 139 PCCK, committed in co-perpetration in accordance to article 23 PCCK.

54. In order to assess whether the finding of the Basic Court and the Court of Appeals are done in line with the factual situation, and in accordance with the requirement of the criminal law and procedure, the Panel will start by assessing the criminal charges related to the underlying criminal offence of trafficking in persons. The Panel will continue by assessing the elements of the criminal offences of organised crime and grievous bodily harm.

55. The criminal offence described in Article 139 PCCK, entitled "trafficking in persons", aims at protecting the juridical values of the human dignity and protection from exploitation, regardless any state of initial vulnerability or even consent. The criminal offence of trafficking in persons, human trafficking can include, but does not require, movement: an individual may be considered a victim of trafficking regardless of whether was moved from

[18] As the one related to organised crime necessarily is connected to the criminal charge of trafficking in persons.

one place to another, born into a state of servitude, previously consented[19] to work for a trafficker, or participated in a crime[20] as a direct result of being subjected to trafficking. At the heart of this phenomenon is the traffickers' goal of exploiting and enslaving their victims and the myriad coercive and deceptive practices they use to do so – as in the case at hand it also happened, as some of the promised payments did not even take place. Trafficking in human beings is the slavery of our times. Victims are often recruited, transported or harboured by force, coercion or fraud in exploitative conditions, including sexual exploitation, forced labour or services, begging, criminal activities, or the removal of organs. It is a severe violation of individual freedom and dignity and a serious form of crime that often has implications which individual countries cannot effectively address on their own[21].

56. Article 139 PCCK[22] established three required elements of the criminal offence of trafficking in persons: 1) the recruitment, transportation, transfer, harbouring or receipt of persons; 2) by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and 3) for the purpose of exploitation. Exploitation is defined as "*the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*". The expression used by the legislator in article 139 (8.2) PCCK or 171(6.2) CCRK, when giving examples of exploitation, "but not limited to" shows that there are other forms. Some legal systems do not even provide examples of exploitation in the case of the criminal offence of trafficking, and leave it up to the court to simple determine if it exists; other legal systems even have different criminal offences (or "articles") for different situations depending on the form of exploitation: for instance, trafficking for sexual exploitation, trafficking for organ harvesting, trafficking for slavery work, etc.

[19] As the law and the applicable international instruments stipulate that any consent of the victim is always invalid.

[20] For instance, being a prostitute or begging in a country where prostitution or begging is illegal.

[21] *See,* https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/eu_strategy_towards_the_[illegible]trafficking_in_human_beings_2012-2016_1.pdf

[22] In this regards there are no significant changes in article 171 CCRK.

57. These three distinct elements form *actus reus* and *mens rea* of the criminal offence of trafficking in persons. The first two parts are considered as objective elements of the criminal offence. While whichever aspect or element of the *actus reus* is alleged, it must be proved that the action was done either for the specific purpose of exploiting another person(s) or for the specific purpose of facilitating their exploitation[23] by another. The subjective element (or *mens rea*) "for the purpose of exploitation" constitutes what is called a specific intent (not only direct intent, it must be specifically aiming to the specific act), and requires a subjective state of mind directed to the prohibited consequence - either an intention to have the prohibited consequence come about, or knowledge that its occurrence was a virtual certainty. Therefore, in order to establish the mental element of the criminal offence of trafficking in persons, it is necessary to prove that the person did have the purpose of exploiting another person(s) or facilitating the exploitation by another.

58. The defence counsel and the defendant challenges the judgments of the Basic Court and the Court of Appeals because they failed to establish objective elements of the criminal offence of trafficking in persons and failed to take into account that the defendant did not remove kidneys himself, and did not participate in the preparation and organization of the transplantations. In the present case, both courts found that the objective elements of the criminal offence of trafficking in persons are established[24]. The courts concluded that S[redacted] H[redacted] acted as a co-perpetrator (although with different legal classification in the two instances). Co-perpetration is a form of perpetration where several persons, each of them fulfilling required elements for a perpetrator, knowingly and wilfully commit certain criminal acts. The concept encompassed in article 23 PCCK, or article 31 CCRK is very complex and broad, subject to different doctrinal approaches. In the most obvious, clear form of co-perpetration, there must be a previous and true agreement, whereas on the other forms this "agreement" can be only implied but, in both cases, "participating" or "substantially contributing" still has to lead to an objectively joint contribution to the commission of the

[23] In contrast to smuggling of migrants, in the criminal offence of trafficking in persons the consent of the victim is often absent (whereas in the smuggling is always present) and the exploitation lasts as long as necessary to create the profit to the trafficker (whereas in the smuggling it ends once the destination envisaged by the migrant is reached).

[24] *See* pages 117 and 118 of the Judgment P 309/10 and P 340/10 of the Basic Court of Pris[redacted] pages 54 to 56 of Judgment of the Court of Appeals PAKR 52/12.

same criminal offence. In the present case, S[redacted] H[redacted] acted as co-perpetrator to the limit of his knowledge and intent [acts related to illegal transplantations, grievous bodily harm, this in line with article 27(1) PCCK or article 36(1) CCRK, "a co-perpetrator is criminally liable within the limits of his or her intent or negligence"]. He acted with those who had direct and specific intent in relation to trafficking in persons, but to extend their intent to defendant S[redacted] H[redacted] it would have been necessary to establish the facts necessary to fulfil all the constituent elements of the criminal offence, namely his specific intent, which was not established.

59. In relation to the argument that it was not proved that the defendant S[redacted] H[redacted] was involved into the arranging of transportation, or accommodation of the donors and client, or that he removed the kidneys himself, the Panel notes that in co-perpetration it is not needed to show that all co-perpetrators commit the same material acts along the *iter criminis* (most of the times it is even materially impossible). There is evidence to prove that S[redacted] H[redacted] as an anaesthesiologist substantially contributed to the illegal kidney transplantations. These professional medical actions as anaesthesiologist were an essential contribution to the verification of the objective elements of the criminal offence. Therefore, the Panel rejects the allegation of the defence counsel and of S[redacted] H[redacted] that he did not participate in the commission of the criminal offence of trafficking in persons, being therefore an unfounded allegation.

60. The first and the second instance courts, however, came to a different conclusion in relation to the mental element (*mens rea*) of the criminal offence, particularly, in relation to the guilt, negligence or intent. The Basic Court concluded and the Court of Appeals confirmed that the evidence presented allowed to establish that S[redacted] H[redacted] participated in a number of surgeries, directly interacted with all patients before the surgery and knew that they were foreign nationals and that his name was mentioned in an e-mail conversation between Y[redacted] S[redacted] and L[redacted] D[redacted]. Additionally, he was a lead anaesthesiologist who hired Dr. I[redacted] B[redacted] and Dr. S[redacted] D[redacted] and was responsible for the distribution of their work. The Basic Court concluded that this evidence was not enough to establish direct or eventual intent with regards the criminal offence of trafficking in persons; however,

established that under the circumstances and based on personal characteristics, S[redacted] H[redacted] ought to have been aware, and should have been aware, that he was engaging in trafficking. On the other hand, the Court of Appeals established that the proven facts were enough to conclude that the defendant's actions show at least eventual intent to engage in trafficking in persons. This Panel cannot agree with the Court of Appeals in this regards.

61. There are basic differences between modes of liability, namely intent and negligence. The law is clear in defining these concepts. The intent is defined as follows: "*1. A criminal offense may be committed with direct or eventual intent. 2. A person acts with direct intent when he or she is aware of his or her act and desires its commission. 3. A person acts with eventual intent when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its occurrence*", whereas the definitions of the different types of negligence are: "*1. A criminal offense may be committed by conscious or unconscious negligence. 2. A person acts with conscious negligence when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission but recklessly thinks that it will not occur or that he or she will be able to prevent it from occurring*" (*see*, respectively, articles 15 and 16 PCCK, and articles 21 and 23 CCRK). In relation to the definition of unconscious negligence there are minor differences in the wording in both codes: "*A person acts with unconscious negligence when he or she is unaware that a prohibited consequence can occur as a result of his or her act or omission, although under the circumstances and according to his or her personal characteristics he or she ought and could have been aware of such a possibility*" (article 16(3) PCCK), and "*A person acts with unconscious negligence when he or she is unaware that a prohibited consequence can occur as a result of his or her act or omission, although under the circumstances and according to his or her personal characteristics he or she should or could have been aware of such a possibility*" (article 23(3) CCRK).

62. Having these notions in mind, and the decisions mentioned (the Basic Court assessing as unconscious negligence and the Court of Appeals as eventual intent) we can assert that: the eventual intent as it is defined in article 15(3) PCCK applies in situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result [illegible]

her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it. This involves cognition of a risk by a person, who nonetheless goes ahead and takes the action. While unconscious negligence as defined in article 16(3)[25] PCCK relates to a situation in which a person who commits a criminal offence is unaware of the potential consequences of his or her conduct in a situation where he or she should have been aware. Therefore, the main difference between the two standards is whether the person was aware of the possible consequences of the actions.

60. In the present case, the Basic Court and the Court of Appeals concluded that based on the subjective circumstances known to S[redacted] H[redacted] had to be aware that the operations in Medicus Clinic involved kidney transplantation. This conclusion is supported by the evidence presented in the case. Namely, the defendant's position of lead anaesthesiologist, and that he was involved into a number of surgeries [24 (twenty four) in the first instance, 7 (seven) in the second]. Additionally, according to forensic Medical Expert Dr. C[redacted] B[redacted], when a healthy kidney is collected from a healthy person, the sole purpose of this surgery is to transplant it to another person[26]. Therefore, the Panel concurs with the first and the second instance courts that S[redacted] H[redacted] knew that he was participating in illegal kidney transplantations.

61. However, the Panel disagrees with the Court of Appeals that the knowledge of kidney transplantations proves the defendant's eventual intent to engage to the criminal offence of trafficking in persons. The mental element of trafficking in persons requires proving that the defendant committed one of the constituent acts, employing one of the listed means for the purpose or, put another way, with the intention that the individual be exploited. Specifically, in the present case, it was necessary to prove that the defendant was, if not part, at least aware of the system of exploitation and, nonetheless; continues with his actions as anaesthesiologist which was essential for the successful surgeries.

62. The Panel is of opinion that the mere knowledge that the surgeries were related to kidney transplantations, and knowing that they were illegal, does not prove that the defendant was

[25] The Basic Court used the provisional code on unconscious negligence; article 16(3) PCCK – *see*, the end of the second paragraph of page 12 of Judgment P 309/10 and P 340/10 of the Basic Court of Prishtinë/Priš[redacted]

[26] *See* page 89 of Judgment P 309/10 and P 340/10 of the Basic Court of Prishtinë/Priština.

aware of the exploitation, and consequently of trafficking in persons[27]. The intent with regards a criminal offence cannot be extrapolated into the intent of another – but this, of course, would imply that the Court of Appeals had a different understanding in relation to the concurrency of the criminal offences of grievous bodily harm and trafficking in persons. The Court of Appeals deems that the criminal offence of grievous bodily harm (removal of an organ for transplantation) is not a criminal offence autonomous from the criminal offence of trafficking in persons; on the contrary, it is part of it (this issue will be addressed at a latter moment). There is no evidence to prove that the defendant was aware of the recruitment, transportation, transfer, harbouring or receipt of the kidney donors or recipients, or that he had knowledge about the possible payments to the donors and the abuse of their vulnerable position. Even the e-mail exchange between Y[redacted] S[redacted] and L[redacted] D[redacted] shows only that S[redacted] H[redacted] was giving an advice which equipment is necessary during surgeries for the anaesthesia. Also, the fact that the defendant knew that the donors and clients were foreign nationals, does not prove that he was aware of the trafficking. The evidence only proves the defendant's knowledge (and intent) about illegal kidney transplantations, but not the awareness that he was engaged to trafficking. Therefore, the *mens rea* related to the criminal offence of human trafficking is not established. However, the Panel concurs with the Basic Court that given the position of the defendant and his participation in kidney transplantation, which he knew to be illegal, leads to the conclusion that he committed a criminal offence of negligently facilitating trafficking in persons.

63. While there is not enough evidence to prove beyond reasonable doubt that the defendant had intent, much less the required specific (direct) intent to commit the criminal offence of trafficking in persons, the evidence clearly establishes that based on the circumstances and personal characteristics he ought to have been aware, and should have been aware that he was engaging in trafficking. Therefore, the Panel agrees with the conclusion of the Basic Court that there is sufficient evidence to find S[redacted] H[redacted] guilty of negligent facilitation

[27] As one thing not necessarily comes with the other, as an illegal transplantation can take pl[redacted] context of trafficking in persons.

of trafficking in persons. But before moving on, it is important to emphasise also two issues more have to be mentioned.

64. Firstly, given that the Court of Appeals changed the established facts in relation to the number of transplants, the same Court also could have changed other facts, namely, to establish a new fact related to the guilt of defendant S[redacted] in terms of intent if there was proof. Contrary, the Court of Appeals did not change that. As already stated in the beginning of this judgment (in the enacting clause), the Court of Appeals did not establish any new fact related to the intent. With regards "*the level of guilt (...) related to the conviction of the defendant for organised crime in connection with trafficking human beings*", the Court of Appeals stated that "*S[redacted] H[redacted] as the lead anaesthesiologist at the Medicus Clinic, personally interacted with most if not all of the donors and recipients involved in the 7 kidney transplant operations in preparation for surgery, and therefore knew that they were all foreign nationals. **This striking fact should have, at the very least, aroused his suspicion that the Clinic was engaged in trafficking***"[28] (emphasis added). This assertion of the Court of Appeals corresponds to a partial quotation of the judgment of the Basic Court[29]– where the described facts were considered as negligent facilitation of trafficking. This cannot be considered as the description of the *mens rea* element as the eventual intent (***"This striking fact should have, at the very least, aroused his suspicion that the Clinic was engaged in trafficking"***), when clearly it is the definition of unconscious negligence. The Court of Appeals considered this as eventual intent[30], although it corresponded to unconscious negligence, as established by the Basic Court.

65. The second issue is as follows: even if the Court of Appeals had properly established a fact (and, of course, reasoned it) corresponding to the eventual intent, the criminal offences which are comprised by a specific intent (for instance, in the criminal offence of smuggling of migrants aiming at material benefit, in the criminal offence of trafficking in person

[28] *See* penultimate paragraph of page 9 of Judgment of the Court of Appeals PAKR 52/12.
[29] *See* second paragraph of page 12 of Judgment P 309/10 and P 340/10 of the Basic Court of Prishtinë/Priština.
[30] Which can be attributed to a mistake due to the length and complexity of the case, as the intent was properly established in relation to other defendants, as for example on page 9 Judgment of the Court of Appeals PAKR 52/12 at the end of the third paragraph related to A. D[redacted]: "all these activities were carried out with the [redacted] (...)".

aiming at exploiting, the criminal offence of organised crime aiming at obtaining, directly or indirectly, a financial or other material benefit, etc.) can be committed only with direct intent. The eventual intent is not compatible with the specific intent (if provided for by the incriminating provision, facilitation by negligence may also be a mode of perpetration).

66. There is a presumption in the criminal law that offences are committed intentionally; therefore, if a person is liable for negligent commission of the criminal offence, this must be specified in the legislation. Articles 11(3) PCCK and 17(2) CCRK establish that "*a person is criminally liable for the negligent commission of a criminal offense only when this has been explicitly provided for by law*". In case of trafficking in persons, the Basic Court correctly concluded that negligent commission of trafficking in persons was at the time of the actions criminalised in article 139(4) PCCK as "negligent facilitation of trafficking", which is not the case in article 171 CCRK, in force as of 1 January 2013. As the evidence presented in the case is not sufficient to prove that the defendant's direct (or even eventual – in the understanding of the Court of Appeals) intent to engage in trafficking, the Basic Court correctly re-qualified Count 1 in relation to S[redacted] H[redacted] from the criminal offence of trafficking in persons in violation of Article 139(1) PCCK, to trafficking in persons by negligent facilitation in violation of Article 139(4) PCCK, committed in co-perpetration.

67. The Panel further concurs with the Basic Court that in case the law applicable to a given case prior to a final decision is changed, the law that is the most favourable to the perpetrator shall apply [article 2(2) and (3) PCCK or now article 3(2) and (3) CCRK]. Therefore, in accordance to article 3(3) CCRK read together with article 17(2) CCRK, the negligent perpetration was de-criminalised in article 171 CCRK. Therefore, the Panel finds that the Basic Court correctly applied this principle and rejected Count 1 in relation to S[redacted] H[redacted], because Article 171 CCRK does not criminalise the negligent facilitation of the commission of trafficking in persons.

- **Charges related to the criminal offence of organised crime in connection with trafficking in persons**

68. In relation to the criminal offence of organised crime in violation of Article 274(1) PCCK (Count 3), the Basic Court acquitted S[redacted] H[redacted] of this charge because [redacted]

sufficient evidence to prove beyond reasonable doubt neither his knowledge of, or participation in and organised and structure group nor of any possible financial benefit. The Court of Appeals concluded that because of his role as lead anaesthesiologist and his involvement into the kidney transplantations, S[redacted] H[redacted] had substantial and crucial role in organised criminal group, and therefore found him guilty of the criminal offence of organised crime in violation of Article 274(1) PCCK. However, this Panel emphasises that in relation to the conviction of the defendant for organised crime in connection with trafficking in persons, and regarding the level of guilty (negligence, not intent), the Court of Appeals, did not change the facts established by the first instance: "*S[redacted] H[redacted] as the lead anaesthesiologist at the Medicus Clinic, personally interacted with most if not all of the donors and recipients involved in the 7 kidney transplant operations in preparation for surgery, and therefore knew that they were all foreign nationals. This striking fact* ***should have, at the very least, aroused his suspicion that the Clinic was engaged in trafficking***"[31] (emphasis added).

69. The criminal offence of organised crime was defined in article 274(1) PCCK as follows: "*whoever commits a serious crime as part of organised criminal group shall be punished by a fine of up to 250.000 Euro and by imprisonment of at least 7 (seven) years*". The elements of the criminal offence of organised crime require the proof of the commission of the serious crime, that it was committed by a structured group in order to obtain, directly or indirectly, a financial or other material benefit.

70. The elements of each criminal offence are unique and when assessing whether there is an effective concurrency of criminal offences (not legal concurrency), especially in cases as the one at hand, where the court gave a different legal classification to the facts, it is imperative to check whether the established facts are sufficient to come to the conclusion that all constituent elements of the criminal offence of organised crime are present, including the *mens rea*. As per the indictment, the defendant was charged with organised

[31] *See* penultimate paragraph of page 9 of Judgment of the Court of Appeals PAKR 52/12. This assertion of the Court of Appeals corresponds to a partial quotation of the judgment of the Basic Court (see second paragraph of page 12 of Judgment P 309/10 and P 340/10 of the Basic Court of Prishtinë/Priština – where the described facts were considered as negligent facilitation of trafficking).

crime according to article 274 PCCK[32], but the criminal offence was subject to some changes in the new criminal code of the Republic of Kosovo, and now the criminal offence is set in article 283 CCRK[33]. The main differences between the two versions are related to the structure and legislative technique used in the description of the criminal offence[34], as

[32] Article 274 PCCK reads as follows: (1) 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. (2) Whoever actively participates in the criminal or other activities of an organized criminal group, knowing that his or her participation will contribute to the commission of serious crimes by the organized criminal group, shall be punished by imprisonment of at least five years. (3) Whoever organizes, establishes, supervises, manages or directs the activities of an organized criminal group shall be punished by a fine of up to 500.000 EUR and by imprisonment of seven to twenty years. (4) Whoever commits the offence provided for in paragraph 2 of the present article shall be punished by a fine of up to 500.000 EUR and by imprisonment of at least ten years or by long-term imprisonment if the activities of the organized criminal group result in death. (5) The court may waive the punishment of a perpetrator who commits the offence provided for in paragraph 2 or 3 of the present article if, before the group has committed a crime, such person reports to the police or public prosecutor the existence, formation and information of the organized criminal group in detail to allow the police to arrest or the prosecutor to prosecute the group. (6) Whoever is punished by the accessory punishment provided for in Article 57 of the resent Code for the commission of a criminal offence provided for in the present Article and violates the terms of such accessory punishment shall be punished by imprisonment of up to one year. (7) For the purposes of the present article: 1) The term "organized crime" means a serious crime committed by a structured group 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.

[33] Article 283 CCRK reads as follows: (1) Whoever, with the intent and with knowledge of either the aim and general activity of the organized criminal group or its intention to commit one or more criminal offenses which are punishable by imprisonment of at least four (4) years, actively takes part in the group's criminal activities knowing that such participation will contribute to the achievement of the group's criminal activities, shall be punished by a fine of up to two hundred fifty thousand (250,000) EUR and imprisonment of at least seven (7) years. (2) Whoever organizes, establishes, supervises, manages or directs the activities of an organized criminal group shall be punished by a fine of up to five hundred thousand (500,000) EUR and by imprisonment of at least ten (10) years. (3) When the activities of the organized criminal group provided for in paragraph 1 or 2 of this Article result in death, the perpetrator shall be punished by a fine of up to five hundred thousand (500,000) EUR and by imprisonment of at least ten (10) years or life-long imprisonment. (4) The court may reduce the punishment of a member of an organized criminal group who, before the organized criminal group has committed a criminal offense reports to the police or prosecutor the existence, formation and information of the organized criminal group in sufficient detail to allow the arrest or the prosecution of such group. (5) For the purposes of Article, "actively takes part" includes, but is not limited to, the provision of information or material means, the recruitment of new members and all forms of financing of the group's activities.

[34] Hence, the former paragraph 7, related to definitions, has disappeared, as now in the CCRK, the previous paragraph 7.1 (that was a kind of a summary of the elements constituent of the criminal offence) has no correspondence in the new article, in the previous paragraph 7.2 the term "structured group" was replaced by "structured association" now defined in article 120, paragraph 14, CCRK, the previous definition of "serious crime" contained in the previous paragraph 7.3 is now included in the1st paragraph of the article 283 CCRK. In relation to the previous paragraph 7.4 the term "group" is now defined autonomously as "group of people" in article 120, paragraph 12, CCRK as "three or more persons", it is no longer defined in the criminal offence, as the previous term "structured group" is equivalent to the current definition of "structured association", meaning that it is one that is not randomly formed for the immediate commission of a criminal offence, but it does not need to have formally defined roles for its members, continuity of its membership, or a developed structure. Other difference has got

well as to the more demanding *mens rea* mentioned now in article 283(1) CCRK, as now the legislator clarified that the perpetrator must act "***with the intent and the knowledge of either the aim and general activity of the organised criminal group or its intention to commit one or more criminal offences which are punishable by imprisonment***"(emphasis added).

71. However, in both versions, there is no room for doubt on the need of a direct intent, as eventual does not suffice (it is not compatible with the structure and nature of the criminal offence) to commit this criminal offence. As defined in articles 14(2) and (3) PCCK and 21 (2) and (3) CCRK, "*a person acts with direct intent when he or she is aware of his or her act and desires the commission*" and "*a person acts with eventual intent when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its occurrence*", respectively. In the criminal offence of organised crime, the perpetrator can be any person, being therefore a common criminal offence – as there are no specific requirements that must be met by the agent[35]. In relation to the juridical value protected by this criminal offence, it is dominant in the doctrine the idea that it is the "public peace", "internal security" and order – the Rule of Law Statehood[36] aims at avoiding the social danger. The Panel agrees with the doctrinal approach that it is only

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reunion of "committing" (previous paragraph 1) with "actively taking part" (previous paragraph 2), as previously these criminal actions were described in different paragraphs without a logic reason for such, as both actions are still within the concept of commission. However, the punishment that was foreseen in paragraph 2 for "actively taking part" (instead of "committing") was more lenient, as the minimum term of imprisonment was 5 years, therefore most favourable, as now such limit is 7 years. The previous paragraph 3 ("whoever organizes, establishes, supervises, manages or directs the activities of an organized criminal group shall be punished by a fine of up to 500.000 EUR and by imprisonment of seven to twenty years") corresponds to an aggravating circumstance now foreseen in paragraph 2, with the same fine but with a higher minimum of imprisonment, as now it is 10 years and therefore it is not more favourable. Former paragraph 4 corresponds now to paragraph 3, the new version correctly makes reference to the 2 forms of perpetration that were previously mentioned in paragraphs 1 and 2, as before the aggravating circumstance mentioned only paragraph 2, not 1, which was not understandable. Apart from this, the minimum of imprisonment foreseen nowadays is higher, as it is 10 years of imprisonment. Current paragraph 4 corresponds to previous paragraph 3 and is not more favourable as well, as now the court may only reduce the punishment whereas before might waive it. Finally, there is no equivalent to previous paragraph 6 and nowadays paragraph 5 is the definition of the expression "actively takes part".

[35] "That the offense under paragraph 1 of this Article may be committed by any person" - see point 6 under paragraph 1 of the Commentary to Article 283 ("Kodi Penal I Republikës Së Kosovës", Komentar, Botimi I", by Deutsche Gesellshaft für Internationale Zusammenarbeit (GIZ) GmbH, Bonn and Eschborn, Germany).

[36] We agree with Santos Cabette (Criminal Law Professor at the Law School of the University of São Paulo, USP, Brazil) that this criminal offence protects an abstract danger (see http://jus.com.br/artigos/31419/[illegible] tutelado-nos-crimes-de-organizacao-ou-associacao-criminosa).

possible to speak of organised crime when the encounter of the members' wills generates an autonomous entity, different and above of those inherent to the members themselves.

72. In order to analyse the elements of the criminal offence of organised crime, the Panel first turns to the issue of committing an underlying criminal offence as a requirement of the criminal offence of organised crime. The Supreme Court in its previous decisions stressed that the criminal offence of organised crime requires the commission of an underlying offence, in addition to the criminal offence of organised crime itself.[37]

73. In the present case, the Panel analysed the underlying criminal offence of trafficking in persons earlier in the judgment. Regarding defendant S[redacted] H[redacted], the charge of the criminal offence of trafficking in persons in violation of article 139 PCCK, committed in co-perpetration in accordance to article 23 PCCK is (again) requalified to the negligent facilitation of the criminal offence of trafficking in persons in violation of article 139(4) PCCK, and subsequently rejected, due to article 2(2) and (3) PCCK or article 3 (2) and (3) CCRK and to the new wording of the criminal offence, as per article 171 CCRK, where negligence is no longer foreseen (with the consequences set in articles 11(3) PCCK or 17(2) CCRK). Therefore, the Panel concludes that the criminal offence of organised crime was not perpetrated by the defendant as in the first place, the essential requirement of having committed an underlying criminal offence is missing. As already explained, each co-perpetrator is liable only to the limits of its own guilt, within the limits of his or her own intent or negligence. Moreover, even if it could be considered that the hon-application of a punishment to a criminal offence is different from having committed it or not (as a requirement of another) still the remaining constituent elements of the criminal offence were not established, much less reasoned, by any of the courts in relation to him. In this regards, the lack of facts leading to the necessary specific (direct) intent was already pointed out, when addressing the lack[38] of facts related to the intent in the criminal offence of trafficking in persons, applicable here *mutatis mutandis*. Consequently, S[redacted] H[redacted] is acquitted of the criminal offence of organised crime in violation of article 274(1) PCCK.

[37] *See* Supreme Court, Judgment No. Ap-KZ 61/2012 dated 2 October 2012, paragraph 48; Supreme Court, Judgment No. PAKR 2015/2014, dated 14 May 2015.

[38] *See* not new established facts but conclusions in relation to S[redacted] H[redacted] on page 52, paragraphs 2 [illegible] pages 57 to 59 of Judgment of the Court of Appeals PAKR 52/12.

- **Criminal offence of grievous bodily harm**

74. The Panel now turns to the criminal offence of grievous bodily harm in violation of article 154(1.2) PCCK. The bodily harm in its basic form is foreseen in article 153 PCCK. This criminal offence is considered as an offence against the life and body of a person and aims at protecting human health and bodily integrity as one of the fundamental values in the democratic society. The term "health" is defined by the World Health Organisation as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"[39]. In terms of *mens rea* (the "subjective element" in the continental doctrine) it can be perpetrated with direct or eventual intent. The objective elements ("bodily harm" and, in the case of the grievous form, also "impair the health") require the injury to be "really serious", but not necessarily permanent, long lasting or life threatening.

75. The grievous bodily harm is foreseen in article 154 PCCK, it is an aggravated form of perpetration (and in terms of *mens rea* comprises negligence in the cases mentioned in paragraph 5), due to a higher level of guilt or intensity in the violation of criminally protected juridical values. The article clearly defines the ways how grievous bodily harm can be caused to a person (descriptive objective elements): it either has to endanger person's life, destroy or weaken an organ or weakening a vital organ of another person, impairing a person's capacity to work or impairing the health of another person. All these acts seriously impair a person's health. Whether an injury amounts to grievous bodily harm is to be determined by the court on a case by case basis. The defendant was aware[40] of his acts, that they were illegal and punishable by law and willingly committed them[41].

76. The Panel finds that the Basic Court correctly re-qualified the criminal offence as a violation of article 154(1.2) PCCK – permanently and substantially weakening an organ of another person – based on the evidence presented in the case, and the statement of the forensic

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[39] On http://www.who.int/about/definition/en/print.html.

[40] "A perpetrator of a criminal offense is criminally liable if he or she is mentally competent and has committed the criminal offense intentionally or negligently" [article 17(1) CCRK], as the mental competency is also a requirement of criminal liability and must always be explicitly mentioned in the judgment.

[41] As "knowledge, intention, negligence or purpose required as an element of a criminal offense [illegible] from factual circumstances" and must always be explicitly mentioned in the judgment (article 22 [illegible]).

doctor C[redacted] B[redacted] Thus, the Panel fully subscribes to the analysis of the function of kidneys in human body, and the consequences of the removal of a kidney from the body of a healthy person done by the Basic Court in pages 122 and 123 of Judgment P 309/10 and P 340/10 of the Basic Court of Prishtinë/Priština. The Panel considers that the objective elements of grievous bodily harm in violation of article 154(1.2) PCCK, are fully established. The Panel will follow the principle that the provision in force at the time the criminal offence is committed are applicable [article 2(1) PCCK or 3(1) CCRK] given that there is no room for any exception, there is no the most favourable law to apply [article 2(2) PCCK or 3(2) CCRK], as article 189 (1.2) and (1.3) CCRK does not change the elements constituent of the criminal offence or the applicable sanctions.

77. The Basic Court and the Court of Appeals established that kidney transplantations carried out in Medicus Clinic were in violation of section 46 of the Kosovo Health Law, Law No.2004/4. Further, kidney transplantations were carried out without any licence or authorisation[42]. Therefore, the Panel considers that the facts and evidence related to the illegality of the kidney transplantation are fully established by the Basic Court and correctly affirmed by the Court of Appeals. The Panel also makes a reference to the professional duties of the defendant, and stresses that before being an anaesthesiologist he is a medical doctor; therefore is bound by the *lege artis*. He cannot simply say that he does not run or have any administrative functions in the Clinic.

78. The Panel agrees with the assessment of the Basic Court that the illegality of the medical procedure is what creates the crime of grievous bodily harm. The defence counsel claims that S[redacted] H[redacted] did not have an obligation to follow the provisions of the Kosovo Health Law. In this regard, the Panel notes that the principle of *ignorantia juris non excusat* means that a person who is unaware of a law may not escape liability for violating that law merely because he or she was unaware of its content. Again, the *lege artis* applies to him as a medical doctor. Therefore, the alleged lack of knowledge of the provisions of the Kosovo Health Law cannot be used as defence in the present case. The defendant actively engaged in

[42] *See* pages 45 to 52 of Judgment P 309/10 and P 340/10 of the Basic Court of Prishtinë/Priština and [redacted] to 54 of Judgment of the Court of Appeals PAKR 52/12.

the kidney transplantations, had communication with the patients before the surgeries, and kept record of all the surgeries he participated in. The Panel concurs with the Basic Court that there is enough evidence to establish that S[redacted] H[redacted] acted with direct intent and, as already said, this judgment rejects the argument of the defence counsel that the defendant did not have an obligation to follow the provisions of the Kosovo Health Law.

79. The Panel notes the argument of the defendant and his defence counsel that S[redacted] H[redacted] acted only as an anaesthesiologist and did not remove any kidney. The Panel agrees with this statement as it stems from the factual situation as a whole. However, the Panel stresses that the form of commission of this criminal offence is co-perpetration with other co-defendants, and as said before not all co-perpetrators have to commit the same acts. Each defendant is liable only within the limits of his or her intent or negligence.

80. As mentioned earlier *en passant*, the Panel concurs with the argument made by the Prosecution during the appeals state at the Court of Appeals[43] that there is concurrency of criminal offences between bodily harm (grievous, in the case at hand) and trafficking in persons. The Panel does not agree with the assertion that "it is to punish twice for the same criminal act"[44]. It is about punishing for two different criminal offences as two different juridical values were violated through the same act (from a naturalistic point of view, which is ideal concurrency): if it is true that no-one can be punished twice for the **same** criminal act (*ne bis in idem*), this cannot be mistaken for ideal concurrency of criminal offences, not even when it is an homogeneous concurrency (distinct criminal offences violating the same juridical value), much less when it is heterogeneous concurrency (distinct criminal offences violating different juridical values). Indeed, the juridical values protected by these criminal offences are different. Trafficking in persons protects the human dignity from exploitation, and (grievous) bodily harm protects the health, the integrity of an individual as a whole.

81. The Panel already pointed out that the reference in the criminal offence of trafficking to "removal of organs" [article 139 (8.2) PCCK and 171(6.2) CCRK] is made as a mere example of what the constituent element "exploitation" can be. The expression "but not

[43] *See* page 37 of Judgment of the Court of Appeals PAKR 52/12.
[44] *See* second paragraph of page 61 of Judgment of the Court of Appeals PAKR 52/12.

limited to" was even used by the legislator. In contrast to the understanding of the Basic Court and the Court of Appeals, one criminal offence is not an element of another criminal offence. This can happen in the situation of the same criminal offence but in different modes of perpetration, for instance, simple and aggravated forms (legal concurrency of crimes), as in the case of murder and aggravated murder, bodily harm and grievous bodily harm, etc. In these situations, if the individual is punished for the aggravated form, he or she cannot be punished also for the basic form. What we have in the criminal offence of trafficking is examples of the element "exploitation" (though not limited to those referred thereto, "but not limited to"). The reference to "removal of organs" is only as an example. The element "removal of organs" is not an "element or a criminal offence" part of the offence of trafficking in persons. As a clear example of the concurrency between these two criminal offences, there different types of this criminal offence: trafficking for prostitution (both in countries where prostitution is legal and in countries where it is illegal), trafficking for slavery work (unpaid, without working hours, food, and living or sanitary conditions, etc.) and for many other purposes. One of them implies to inflict a grievous bodily harm – removal of organs for the purpose of transplantations. It is apparent that one individual can be a victim of trafficking without suffering a grievous bodily harm.

82. Again, to finish the reference to the concurrency of criminal offences[45], the Panel is or would be bound by the prohibition *reformatio in pejus*, because there is no identity of defendants affected (as in this appeal we are addressing only defendant S[redacted] H[redacted]).

83. Therefore, the Panel concludes that the Basic Court correctly determined the factual (exceptions made to the previous issues already addressed along this judgment) and evidentiary situation, and fully established the elements of the criminal offence of grievous bodily harm in violation of article 154(1.2) PCCK. Consequently, S[redacted] H[redacted] is found guilty of grievous bodily harm in violation of article 154(1.2) PCCK.

[45] Since it is not a subject of this appeal, this judgment will not address the identical problem but in relation to the absence of concurrency between the criminal offences of organised crime and the underlying criminal offences in the sense subscribed and defended by the Basic Court and by the Court of Appeals in pages 60 [illegible] Judgment of the Court of Appeals PAKR 52/12.

- **Sentencing**

84. Pursuant to article 64(1) PCCK, the court shall determine the punishment within the limits provided for by the law for such criminal offence, taking into consideration the purpose of the punishment, mitigating and aggravating circumstances and, in particular, the degree of criminal liability, motives, intensity of danger to the protected juridical value, circumstances in which the act was committed, the past conduct of the perpetrator, the entering of a guilty plea or plea-agreement, the personal circumstances of the perpetrator and his or her behaviour after committing the criminal offence. Additionally, the punishment has to be proportionate.

85. In the present case, the Basic Court considered as mitigating circumstance the fact that the defendant was not convicted previously, and as aggravating circumstances the fact that the defendant held an important position as a lead anaesthesiologist who actively participated in the majority of the surgeries, and aimed to collect the money. He further took an opportunistic approach not to ask about the circumstances of the surgeries. After having evaluated these circumstances, the Basic Court considered that 3 (three) years of imprisonment for the criminal offence of grievous bodily harm was appropriate and necessary to serve the purposes of the punishment. Additionally, given that the criminal offence poses a great danger to public safety, the Basic Court pursuant to article 57(1) and (2) PCCK imposed the accessory punishment of prohibition from exercising the profession of anaesthesiologist for the period of 1 (one) year starting from the day the judgment becomes final.

86. The Court of Appeals modified the sentence imposed by the Basic Court and indicated that as the defendant was found guilty for the criminal offence of trafficking in persons (of organised crime in conjunction with trafficking in person), in violation of article 139 PCCK, committed in co-perpetration pursuant to article 23 of the PCCK, the sentence of 5 (five) years of imprisonment and a fine of 2 500 (two thousand five hundred) Euros is appropriate to reflect the level of the criminal responsibility. The Court of Appeals considered the same mitigating and aggravating circumstances as the Basic Court. However, the Court of Appeals modified the accessory sentence imposed by the Basic Court. The Court of Appeals

concluded that the accessory punishment of the prohibition from exercising the profession shall start after the defendant has served the imprisonment to ensure that the accessory punishment will not start to run at the same time as the punishment of imprisonment.

87. The Panel takes into consideration that in the present judgment the criminal offence of trafficking in persons is re-qualified (again) to the criminal offence of negligent facilitation of the offence of trafficking in violation of article 139(4) PCCK, committed in co-perpetration in accordance to article 23 of the PCCK, and rejected due to article 2(2) and article 11(3) PCCK or articles 3(3) and 17(2) CCRK and the new wording of the criminal offence as per article 171 CCRK.; S[redacted]H[redacted] is being acquitted of the criminal charge of organised crime (in conjunction with trafficking in persons), in violation of article 274(1) PCCK; and that S[redacted] H[redacted] was found guilty of the criminal offence of grievous bodily harm, which resulted in "destroying or permanently and substantially weakening an organ or a part of body of the person", in violation of article 154(1.2) PCCK. Therefore, the Panel considers that the sentence of 5 (five) years of imprisonment and a fine of 2 500 (two thousand five hundred) Euros imposed by the Court of Appeals shall not be applicable in the present case.

88. This Panel concurs with the assertions made by the Court of Appeals on the manner and criteria on how to determine the punishment[46] and will follow them in its own assessment. The Panel also takes into account the circumstance that at least[47] 7 (seven) transplants and not 24 (twenty four) are established will not affect the final punishment. Even though the number of proven transplants is now lesser (which is indeed connected with the intensity of danger to the protected juridical value), the Panel is of the opinion that the duration of the criminal offence is of essential nature. The defendant acted during a considerable period of time (we are not talking of a week, rather 5 and a half months - he acted from 15 May 2008 until 31 October 2008, which was a considerable period of time to change his mind). Therefore, while assessing the criterion "circumstances in which the act was committed", the

[46] *See* middle paragraphs of page 63 of Judgment of the Court of Appeals PAKR 52/12.

[47] "At least" as all instances established that 7 transplants took place, it was never established that others did not take place, and from a juridical point of view it does not conflict with the principle of the presumption of innocence as one thing is to say "at least 7" and a different thing would be to say "more than 7"; apart from the fact that wording, it has no juridical consequences to the criminal liability or punishment.

first instance court overlooked the long period of time along which the act took place as well as the intense level of violation of the *lege artis*. Moreover, is it important to notice other aggravating circumstances particularly that as lead anaesthesiologist he had a key role in the surgeries taking place (without overlapping the concept of "co-perpetration" itself). Thus, the Panel is of the opinion that the first instance was lenient in assessing the balance between mitigating and aggravating circumstances, namely because the Panel further concurs with the Basic Court and the Court of Appeals that the criminal offence committed by the defendant poses danger to public safety. For all these reasons (and because of the principle of prohibition of *reformatio in pejus* – which limits the court to imprisonment of up to 3 years) the Panel considers that the punishment of 3 years of imprisonment is appropriate. Therefore, the Panel imposes defendant S[redacted] H[redacted] the sentence of 3 (three) years of imprisonment for the criminal offence of grievous bodily harm in violation of article 154 (1.2) PCPC.

89. Finally, the Panel considers that the Court of Appeals correctly determined that in case the accessory punishment ["prohibition on exercising a profession, activity or duty", foreseen in articles 54(2.4) and 57 PCCK] starts running together with the imposed punishment of imprisonment, it would lose its purpose. Therefore, the Basic Court judgment is modified so that the prohibition from exercising the profession shall start after the defendants have served the imprisonment to ensure that the accessory punishment will not start to run at the same time as the punishment of imprisonment. Additionally, article 63 (2) PCCK indicates that "*the execution of the accessory punishments provided for in sub-paragraphs 2, 3, 4 , 5, 6 and 9 of Article 54(2) Present Code shall commence after the term of imprisonment has been served*". Finally, as articles 66(2) and 72(2) CCRK are not more favourable in any way, the Panel will follow the principle the the law in force at the time is applicable, unless a new more favourable law enters into force [article 2 (2) and (3) PCCK or article 3(1) and (2) CCRK], and that the law governing the principal punishment is the one governing the accessory punishment.

For the above it has been decided as in the enacting clause.

Presiding Judge

Jorge Martins Ribeiro
EULEX Judge

Recording Officer

Sandra Gudaityte
EULEX Legal Officer

Panel members

Anders Cedhagen
EULEX Judge

Avdi Dinaj
Supreme Court Judge