

DISSENTING OPINION

I.

1. In the case at hand the Undersigned disagrees with the decision of the majority of the Panel to conclude the main trial according to Article 357(1) CPC, as with the preceding decision to conclude the evidentiary proceedings according to Article 348 CPC. At the moment the main trial was concluded there was reason to clarify the case and to supplement the proceedings and obtain clarification according to Article 359(1) CPC. Independently from the evidence presented by the parties, the Kosovar Criminal Procedure Code clearly allows for the Court to initiate and conduct evidentiary proceedings *ex officio*, so that the Court would have been in a position to hear further witnesses, examine documentary evidence, engage and hear experts and/or join the proceedings with previous or ongoing proceedings against the same defendants. This does not only flow from the above mentioned provisions, but is clearly stated in Article 329(4) CPC. As additionally explicitly required by the Article 7 of the CPC, it would have been not only the right but also the obligation of the Panel to collect evidence for a complete determination of the case by truthfully and completely establishing the facts, including of course both inculpatory and exculpatory facts. In the case at hand, without the attempt to clarify the case beyond what was presented in the Indictments, there would not have been a justification to conduct proceedings over the course of many years.
2. At the same time, the Court would have been in the position to prevent taking unnecessary or irrelevant evidence as per Article 258(2) CPC and focus on decisive evidence in a much earlier stage of proceedings, as explicitly permitted by Article 300 of the CPC.
3. The Undersigned further disagrees with the decision to reject the Defence's motion of 20 October 2017 to grant an adequate period time to prepare their cases, which resulted in the defendants' decision to not give any testimony in the main trial. This way, the defendants were practically deprived of the opportunity to state their cases and to shed light on the allegations against them. As a result, at the end of these lengthy proceedings the accusations against the defendants stand as unclarified as they did in the beginning of the main trial. Consequently the Panel found for most of the charges that it was not proven beyond reasonable doubt that the defendants committed the acts they have been charged with, but the Panel was not able to establish facts and therewith an accurate record of what actually happened and what not—both in regards to the alleged offences and in regards to the criminal investigations.

II.

4. The Undersigned disagrees with the finding of the majority of the Panel that the acts with which the defendants are charged under I. do not constitute the criminal offence of Organised Crime as *per* 364(1.1) CPC, which is based on the assumption that the criminal offence of organized crime requires an underlying criminal offence which is punishable with a minimum punishment of imprisonment of at least four years.

5. The notion of *serious crime* in Articles 283 CCK and 274 PCCK refers to any criminal offence for which a punishment of four or more years may be imposed – that means to any offence with a maximum punishment of at least four years. Firstly, the grammatical interpretation of “punishable by at least four years” not only in English but also in Albanian and Serbian supports such interpretation. Punishable refers to the *possibility of imposing* a sentence of four or more years of imprisonment.
6. Further, it was clearly the intention of the legislator to include as underlying offences for organized crime those criminal offences which carry a *maximum punishment* of four or more years. By introducing the organized crime provisions, the Kosovar law maker pursued adoption of European and international standards in a field of transnational relevance. Both the “EU Joint Action on making it a criminal offence to participate in a criminal organization” of 21 December 1998 and the “UN Convention against Transnational Organized Crime” of 15 November 2000 define the underlying serious crime in the scope of organized crime as *any criminal offence which can be punished by imprisonment of four years or more*. Even though the wording in the English version of the CCK/PCCK is slightly different, there is no reason to assume that the Kosovar legislator intended to drastically deviate from these European and international standards – and thereby practically exclude all those criminal offences from the liability as organized crimes that constitute the most common phenomena in the sector of organized crime.
7. It can be further noted, that the interpretation of the four years as a requirement for the maximum punishment is also jurisprudence in Kosovo. The above mentioned (majority) decision of the Basic Court Prizren was an exception, while in many cases the courts found that any criminal offence with a maximum punishment of at least four years can be a serious crime in the scope of Articles 283 CCK or 274 PCCK.¹ Consequently, also during the initial proceedings in the two cases at hand, the Presiding Trial Judge as well as the Court of Appeals Panel Judges confirmed the charges and did not raise doubts that the acts the defendants are charged with were criminal offences and in particular that underlying criminal offences of these charges are *serious crimes* in the meaning of organized crime charges.

Panel Member
Jennifer Seel

Court Recorder
Alexandra Popova

¹ e.g. Judgement of the Supreme Court of Kosovo dated 19 December 2016, No Plm. Kzz. 178/2016; Judgement of the Supreme Court of Kosovo dated 2 October 2012, No. Ap-Kz no. 61/2012; Judgment of the Supreme Court of Kosovo dated 18 January 2012, Ap-Kz no. 255/2011; Judgement of the Supreme Court of Kosovo dated 14 August 2012, Pkl-Kzz no. 109/2012; Judgement of the Court of Appeals dated 14 May 2015, No. PAKR 215/14; Judgement of the Court of Appeals no PAKR 1282/12 dated 28 May 2014; Judgement of the Court of Appeals dated 6 November 2015, PAKR 52/14; Judgement of the Basic Court of Prishtina dated 6 January 2015, No PKr 18/14; Judgement of the Basic Court of Prizren dated 6 September 2013, No P 123/13; Judgement of the District Court of Prishtina dated 17 June 2011, No 244/2010.