BASIC COURT OF PRISHTINE/PRISHTINA

Case no.: P 8/13 (PPS 425/09)

Date: 1 July 2013

RULING

ON OBJECTIONS TO EVIDENCE

AND REQUESTS TO DISMISS THE INDICTMENT

EULEX Judge Anna Adamska - Gallant, acting as the Presiding Trial Judge, in the criminal case against the defendants:

1. F. L.
2. Fl. L.
3. D.L.
4. E.L.
5. N. K
6. F. Z.
7. G. Z.

charged with the following criminal offences:

1. F. L., Fl. L., D.L., E.L. and N. K. with organized crime in violation of Article 274 paragraph 3 of the old Criminal Code of Kosovo, in force until 31 December 2012 ("old CCK"), as read by

paragraph 1 of the old CCK and punishable by a fine of up to 500.000 euros and by imprisonment of seven to twenty years, read in conjunction with Article 23 of the old CCK (co-perpetration);

2. F. L. and N. K. with misappropriation in office in violation of Article 340 paragraphs 1 and 3 old CCK and punishable by imprisonment of one to ten years, read in conjunction with Article 23 old CCK (co-perpetration);

3. F. L., N. K., E.L. and F. Z. with entering into harmful contracts in violation of Article 237 paragraphs 1 and 2 old CCK, punishable by imprisonment of one to ten years, where the perpetrators of the offence cause damages exceeding 100.000 EUR, read in conjunction with Article 23 old CCK (co-perpetration) and with Article 25 old CCK (assistance) as to E.L. and F. Z.,

4. F. L., N. K. and E.L. with abusing official position or authority in violation of Article 339 paragraphs 1 and 3 old CCK, punishable by imprisonment of one to eight years; read in conjunction with Article 23 old CCK (co-perpetration) as to F. L. and N. K. and read in conjunction with Article 25 old CCK (assistance) as to E.L.; and additionally read in conjunction with Section 117.1 a and d of the Law on Public Procurement;

5. F. L., N. K. and E.L. with accepting bribes in violation of Article 343 paragraph 1 old CCK, punishable by imprisonment of six months to five years; read in conjunction with Article 23 old CCK (co-perpetration) and additionally read in conjunction with Section 117.1 a and d of the Law on Public Procurement;

6. F. Z. with giving bribes in violation of Article 344 paragraph 1 old CCK, punishable by imprisonment of six months to five years;

7. F. Z. with misuse of economic authorization in violation of Article 236 paragraph 1 subparagraph 5 and paragraph 2 old CCK, punishable by imprisonment of one to eight years;

8. F. L., Fl. L. and D.L. with money laundering in violation of Article 10 paragraph 2 point b of the UNMIK Regulation no 2004/02 as amended On the Deterrence of Money Laundering and Related Criminal Offences and punishable by imprisonment up to ten years a fine up to three times the value of the property which is the subject of the criminal offence;

9. G. Z. with obstruction in evidence in violation of 309 paragraph 2 old CCK, punishable by imprisonment up to three years, read in conjunction with Article 25 old CCK (co-assistance);

10. G. Z. with destroying or concealing archive materials in violation of 324 old CCK, punishable by imprisonment up to three years;

11. F. L. with unauthorized ownership, control, possession or use of weapon in violation of 328 paragraphs 2 and 4 old CCK, punishable by a fine up to 7.500 EUR or by imprisonment of one to eight years;

12. F. L. with non – declaration of received campaign money in violation of UNMIK Regulation No. 2004/02 as amended On the Deterrence of Money Laundering and Related Criminal Offences, Section 10.8 and Section 10.5 read in conjunction with Sections 5.1 and 5.6, and punishable by imprisonment up to five years and a fine up to 100.000 EUR;

having reviewed the Objections to Evidence filed by the Defense Counsels of F. L., D.L., E.L., N. K., F. Z. and G. Z.;

having reviewed the Requests to Dismiss the Indictment filed by the Defense Counsels of F. L., Fl. L., D.L., E.L., N. K., F. Z. and G. Z.;

taking into consideration the responses filed by the Prosecution;

and having conducted the Initial Hearing on the 8th and 10th April 2013 and the Second Hearing on the 17th May 2013 and the 10th June 2013;

pursuant to Articles 249, 250, 253 and 254 of the Criminal Procedure Code, Criminal Law No. 04/L-123 ("CPC");

issues the following

RULING

I. The Objections to Evidence filed by Defence Counsels for F. L. on the 30th April 3013, by Defence Counsel for Fl. L. on the 18th April 2013, by Defence Counsel for E.L. on the 30th April 2013 and by Defence Counsel for G. Z. on the 26th April 2013 are partially grounded and the following evidence is considered inadmissible and shall be excluded from the files and sealed:

- the evidence obtained during the search of the house of F. L. in C. conducted on the 28th April 2010;

- the statement of the defendant Fl. L. given to the Special Prosecutor on the 4th September 2012;
- the statement of the following witnesses: B. P., held on the 8th November 2011, R. E., held on the 9 November 2011, V. O., held on the 3rd April 2012 and A. I., held on the 11th November 2011;
- the statements (and transcripts) of M. S. before the Kosovo Anti-Corruption Agency;
- the evidence obtained during the search conducted at the server room of the Kosovo Assembly building on the 28th April 2010;

II. The Objections to Evidence filed by Defence Counsel for F. Z., by Defence Counsel for N. K. and by Defence Counsel for D.L., all filed on the 30th April 2013, are rejected as ungrounded.

III. The objections filed by Defence Counsels of D.L. and F. Z., filed on the 30th April 2013, claiming non-compliance of the Indictment with Article 241 of the Criminal Procedure Code are dismissed as inadmissible.

IV. The Presiding Trial Judge, acting *ex officio,* declares the evidence obtained by the Financial Intelligence Centre (reports dated 21 June 2011, 30 January and 29 March 2012) inadmissible and it shall be excluded from the files and sealed.

V. The Request to Dismiss the Indictment filed by Defence Counsel for G. Z. on the 26th April 2013 is granted and criminal proceedings against the Defendant for the charges of Obstruction of Evidence and Destroying or Concealing Archive Materials (count 9 and 10) are terminated.

VI. The Request to Dismiss the Indictment filed by Defence Counsels for F. L. on the 30th April 2013, by Defence Counsel for Fl. L. on the 18th April 2013, by Defence Counsel for F. Z. on the 30th April 2013, by Defence Counsel for E.L. on the 30th April 2013, and by Defence Counsel for D.L. on the 30th April 2013 are partially granted. The following counts of the indictment are dismissed and the criminal proceedings for the respective charge is terminated :

- Organized Crime against Fl. L. and D.L. (count 1),
- Misappropriation in Office against F. L. and N. K. (count 2);
- Entering into Harmful Contracts against F. L., N. K., E.L. and F. Z. (count 3);
- Money Laundering against F. L., Fl. L. and D.L. (count 7);

- Unauthorized Ownership, Possession or Use of Weapon against F. L. (count 11).

REASONING

I. Procedural Background

1) On the 16th November 2012, Indictment PPS no. 425/09 was filed by the Special Prosecution Office of Kosovo ("SPRK") with the District Court of Pristina. The Special Prosecutor provided the Defence with an electronic copy of the entire case file and submitted the original files to the Court.

2) On the 3rd December 2012, the EULEX Confirmation Judge returned the Indictment to the Prosecutor pursuant to Article 306 (2) of the Provisional Criminal Procedure Code of Kosovo ("KCPC") and requested the Prosecutor to supplement the Indictment**.**

3) On the 7th December 2012, the Prosecutor filed an amended version of the original Indictment and partly appealed the Request of the Confirmation Judge, which the Appeals Panel of the District Court of Pristina by a Ruling dated the 18th December 2012 subsequently annulled.

4) On the 28th December 2012, the Criminal Procedure Code ("CPC"), Code No. 04/L-123 was published in the Official Gazette of Kosovo (nr 37/28, December 2012). Pursuant to Article 547 of CPC, the new procedural code entered into force on the 1st January 2013.

5) The Presiding Trial Judge held the Initial Hearing on the 8th and 10th April 2013 and the Second Hearing on the 17th May 2013 and the 10th June 2013.

6) During the Initial Hearing the Special Prosecutor read the Indictment out. All the defendants were fully aware of the content of the Indictment and pleaded not guilty on all counts of the Indictment.

7) In accordance with Article 245 of the CPC the Presiding Trial Judge scheduled the Second Hearing. Additionally the Defence Counsels were required to adhere to the filing of motions by a set date.

8) All the Defence Counsels in accordance with the date set by the Presiding Trial Judge filed requests to dismiss the Indictment and some of them also filed objections to evidence proposed by the Prosecutor. They also disclosed the evidence they wanted to present during the main trial.

9) The SPRK Prosecutor was served with the submissions of the Defence and responded to them within the period prescribed by the Law (Article 251 (3) of the CPC).

II. Applicable Substantive and Procedural Law

10) As in the course of the criminal proceedings against the defendants the substantive and procedural law was subject to fundamental changes with the Presiding Trial Judge deeming it necessary to outline the applicable law as a preliminary matter before entering into the merits of the case.

11) In accordance with Article 3 (1) of the Criminal Code, Law 04/L- 082 of 2012 (which entered into force on the 1st January 2013) the law in effect at the time a criminal offence was committed shall be applied to the perpetrator. In the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply, which is provided in paragraph 2 of the mentioned provision.

12) With the new Criminal Procedure Code ("CPC"), Law 04/L-123 of 2012 in force since the 1st January 2013, the procedural law has fundamentally changed. Under the Provisional UNMIK Criminal Procedure Code 2004 (KCPC) the procedure was more continental law oriented, whereas the new code introduced more adversarial aspects to the proceedings. For the case in hand the essential questions regarding applicable law are whether the proceedings before the Court (the indictment and plea stage, the main trial and the legal remedy stage) will be governed by the CPC or by the KCPC. It is also crucial to determine which provisions should be applied by the Court to assess the admissibility of the evidence obtained during the investigation conducted under the previous Code. To answer these questions it is necessary to refer to the transitional provisions contained in the Chapter XXXVIII of the CPC**.**

13) In accordance with Article 540 of the CPC, for any criminal proceedings initiated prior to the entry into force of the present Code but without an indictment filed, the provisions of the present code shall be applied *mutatis mutandis*.

14) Article 541 (1) of the CPC reads as follows:

Criminal proceedings in which indictment has been filed but was not confirmed before the entry into force of the present code, shall not be confirmed according to the provisions of the code that was in force at the time when the indictment was filed, but will be processed based on provisions of the present Code.

15) In the present case the Indictment was filed on the 21st November 2012, a time when the KCPC was still applicable. The Indictment had not been confirmed until the new Criminal Procedure Code entered into force. Therefore, as the legal requirements of Article 541 (1) of the CPC are met, the case before the Court is processed based on the provisions of the new law.

16) By applying the CPC to the present case, no confirmation hearing was needed as this procedural phase was eliminated under the new code. As such, the Initial and Second Hearings were conducted pursuant to Articles 26 and 240 *et seq.* of the CPC.

17) During this initial stage of the proceedings before the Court under the new Code, the Presiding Trial Judge is obliged to rule on objections filed by the Defence against the evidence collected by the Prosecutor during the investigation and to decide on potential requests to dismiss the Indictment.

18) In order to determine which procedural law should be applied to assess the admissibility of evidence, the Presiding Trial Judge makes reference to Article 545 (1) of the CPC which provides in pertinent parts:

"Acts which took place prior to the entry of force of the present code shall be subject to the present Code if the criminal proceeding investigating and prosecuting that act was initiated after the entry into force of this code."

19) Pursuant to this transitional provision, offences committed prior to the entry into force of the CPC should be subject to this Code only if the criminal proceeding investigating and prosecuting these offences was initiated after the entry into force of this code. Obviously, this is not the case here as the investigation was initiated in 2009 and the Indictment was filed in 2012.

20) To support this reasoning it is worth citing the ruling of the Court of Appeals in the case PN/KR 93/2013 where *obiter dictum* the issue for which procedural law should be applied after the new Code had entered into force was addressed. The Court stated that "*There are situations when*

the KCPC will need to be taken into consideration even with the new CPC being applicable; for example assessing evidence collected under the KCPC; Article 540 mutatis mutandis".[1]

21) Having considered what was mentioned above the Presiding Trial Judge takes the position that the proceedings before the Court in the case in hand should be conducted in accordance with the provisions of the CPC while in relation to assessing the admissibility of the evidence collected during the investigation the old Code will be applied[2]. It must be underlined that the Prosecutor in the course of the investigation conducted under the previous Code could not have expected that the law would be subject to substantial changes and could not have foreseen different regulations to become applicable to the evidence collected.

22) All the provisions of the former and present criminal procedure codes must be interpreted in accordance with the Constitution of the Republic of Kosovo which establishes general principles of criminal procedure, including the right to a fair trial, presumption of innocence and the right to privacy which all may be subjected to interference by the public authorities in strictly determined circumstances. Such approach is additionally supported by Article 249 (5) of the CPC (applicable to this stage of the proceedings) which stipulates that all evidence where no objection has been filed shall be admissible at the main trial, unless the court *ex officio* determines that the admission of the evidence would violate rights guaranteed to the defendant under the Constitution of the Republic of Kosovo.

23) In accordance with Article 22 of the Constitution of the Republic of Kosovo human rights and fundamental freedoms guaranteed by international agreements and instruments are guaranteed by this act, are directly applicable and, in the case of conflict, have priority over provisions of laws and other acts of public institutions. In reference to criminal proceedings the following documents are particularly important: Universal Declaration of Human Rights and European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols together with jurisprudence of international tribunals based on them.

[1] Court of Appeals, PN/KR 93/2013, Ruling on Appeal, 28.01.2013, p. 2.
[2] See also *Basic Court of Mitrovica, Indictment Ruling and Ruling on Extension of Detention, P 14/13, 12.04.13.*

III. Objections to Evidence

1. General remarks

24) The purpose of the initial and second hearings provided by the CPC is to eliminate truly unmeritorious cases and to protect the defendants from unjustified and potentially long exposure to the trial. The court is no longer entitled to fully assess the Indictment and the admissibility of evidence acting *ex officio*. Objections against the evidence and/or requests to dismiss the Indictment have to be filed by the Defence pursuant to Articles 249 and 250 of the CPC. The Prosecutor has the opportunity to respond to these objections and/or requests as provided for by Article 251. The arguments raised by both parties are considered by the Presiding Trial Judge in order to make the respective assessments.

25) In accordance with Article 249 (1) of the CPC the defendant may file objections to the evidence listed in the Indictment, based upon the following grounds:

- the evidence was not lawfully obtained by the police, state prosecutor, or other government entity;
- the evidence violates the rules in Chapter XVI of the present Code;
- there is an articulable ground for the court to find the evidence intrinsically unreliable.

26) Pursuant to Article 249 (5) of the CPC, the only remaining *ex officio* competence of the court under the CPC is to determine if the admission of evidence would violate rights guaranteed to the defendant under the Constitution of Kosovo (also Article 97 (4) of the CPC).

27) Both criminal procedure codes, provisional and present ones, establish generally the same rule in reference to the admissibility of the evidence. In accordance with Article 257 (2) of the CPC evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or other provisions of the law expressly so prescribe. This rule is developed in paragraph 3 of this Article stating that the Court cannot base a decision on inadmissible evidence. Exactly the same provisions were included in Article 153 of the KCPC.

28) It must be stressed that the Defence Counsels in their submissions often apply interchangeable provisions of both the KCPC and the CPC without specification, with their submissions being more concentrated on the aim they wish to achieve. Such a solution may lead to confusion.

Therefore to assess the objections the Court will not always refer strictly to the Articles referenced by the Defence, but will rather look to the principle that has been alleged to be breached. As it has been mentioned above, the conduct of investigation and the collecting the evidence must be assessed on the grounds of its accordance with the law applicable at the time the investigation was conducted.

2. Defence's Submission in relation to Right to a Fair Trial and Right to Inspection of Case File

i. Submission of the Parties

29) The Defence of F. L. submits that participation in the investigative actions was unlawfully denied by the Prosecution who also had failed to disclose or grant access to the evidence obtained during the investigation. The Defence raised the point that the Prosecutor conducting the investigation had breached the following principles of the criminal procedure: right to a fair trial, principle of equality of parties and the right to access to investigative actions and disclosure of evidence. (Articles 5 (1), 7 (1), 9, 131, 213, 244 (3) of the CPC).

30) The Prosecution asserts that it has complied with the applicable law and the Pre-Trial Judge's Order dated the 2nd November 2012. It is also submitted that the concerns raised by the Defence appear to have been addressed already in the year 2010.

ii. Applicable Law

31) Article 5 (1) of the CPC establishes the right of a person charged with a criminal offence to a fair and impartial trial within a reasonable time. The Court shall be bound to carry out proceedings without delay and to prevent any abuse of the rights of the participants in the proceedings (paragraph 2). The same provisions were incorporated in the KCPC (Article 5).

32) Both Codes in their Articles 7 provide that the Court, the state prosecutor and the police participating in criminal proceedings, must truthfully and completely establish the facts that are important to rendering a lawful decision.

33) The Codes also establish the general principle of the equality of parties (Article 10 of the KCPC, Article 9 of the CPC).

34) Article 142 (1) of the KCPC provides the defendant the right to access the evidence collected during the investigation, directly connected with him, such as records of his examination, material obtained from him or belonging to him, materials concerning such investigative actions to which the defence counsel has been or should have been admitted, or expert analysis.

35) In addition to the rights enjoyed by the defence under paragraph 1 of the Article 142, the defence shall be permitted by the public prosecutor to inspect, copy or photograph any records, books, documents, photographs and other tangible objects in the possession, custody or control of the public prosecutor which are material to the preparation of the defence or are intended for use by the public prosecutor as evidence for the purposes of the confirmation hearing or at main trial, as the case may be, or were obtained from or belonged to the defendant. The public prosecutor may refuse to allow the defence to use this right if there is a sound probability that the inspection, copying or photographing may endanger the purpose of the investigation or the lives or health of people.

iii. Findings of the Court

36) It is a fundamental aspect of the right to a fair trial that criminal proceedings, including elements which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.[3] In considering whether the proceedings as a whole were fair, the nature of the evidence admitted and the way in which it was taken are relevant. In a criminal case in particular, respect for the rights of the defence requires that in principle all evidence must be produced in the presence of the accused at a public hearing where it can be challenged by way of adversarial procedure.[4] This also involves an opportunity to question witnesses and to comment on their evidence in argument.[5]

[3] the Brandstetter v. Austria judgment of the EHCR, 28 August 1991, Series A no. 211,
[4] Barbera, Messegue and Jabardo v Spain judgment of the EHCR, 6 December 1988, 10590/83
[5] Bricmont v Belgium judgment of the EHCR, 07 July 1989, 10857/84

37) In the context of criminal cases the right to an adversarial trial means that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.[6]

38) The principle of equality of arms, in the sense of a fair balance between the parties, is a central feature of the right to a fair trial and is an inherent aspect of the right to adversarial proceedings. In essence it requires that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage visà - vis his opponent. In other words, the principle of equality of arms essentially means procedural equality between the parties.[7] The principle of equality of arms also generally means that the opposing party must not be given additional opportunities to promote their view, in the absence of the accused, or the litigant.

39) A minor inequality which does not affect the fairness of the proceedings as a whole will not, however, infringe the principle of a fair trial established in the Article 6 (1) of the *European Convention for The Protection of Human Rights and Fundamental Freedoms*. This principle does not have an exhaustive definition of procedural rules. Precisely what is required will depend to some extent on the nature of the case, including the nature and importance of what is at issue between the parties. There must be adequate procedural safeguards appropriate to the nature of the case. These include, where appropriate, adequate opportunity to adduce evidence, to challenge hostile evidence, and to present argument on the matters at issue. [8]

40) The analysis of the course of investigative proceedings shows that the Prosecutor was not inclined to enable the Defence Counsels access to the case file. Therefore on the 15th October 2010 they applied to the Pre-Trial Judge with an appropriate request. In response to it the Court issued a Ruling on the 2nd November 2010 in which the Prosecutor was ordered to allow the Defence to solely inspect the items stipulated in Article 142 (1) of the KCPC (records of the examination of the defendant, material obtained from or belonging to the defendant, material concerning such investigative actions to which defence counsel has been or should have been admitted or expert analyses). The Pre-Trial Judge refused the access by the defence to other materials (specific records, books, documents, photographs and other tangible objects in

[6] Rowe and Davis v United Kingdom judgment of the EHCR, 16 February 2000, 28901/95.
[7] Neumeister v Austria judgment of the EHCR, 27 June 1968, 1936/63.
[8] H. v Belgium judgment of the EHCR, 30 November 1987, 8950/80.

possession, custody or control of the Prosecutor) because of a sound probability that it might endanger the purpose of the investigation.

41) On the grounds of the decision of the Pre-Trial Judge, the Defence of F. L. had access to the documents mentioned above.

42) It must be stressed that such limitation imposed on the right to access to the files at the investigative stage is fully in line with the principles enshrined by the jurisprudence of the European Court on Human Rights. There must be a fair balance between rights of the defendant on one side and the necessity not to hinder or endanger complex investigations.

43) The right of the defendant to access the evidence collected by the Prosecutor generally may be limited only during the investigation stage. As it is provided in Article 142 (3) of the KCPC, upon completion of the investigation the defence shall be entitled to inspect, copy or photograph all records and physical evidence available to the Court. Additionally, Article 307 (1) of the KCPC requires the Prosecutor to provide the Defence counsel with the following materials or copies thereof which are in his or her possession, control or custody, if these materials have not already been given to the defence counsel during the investigation:

- records of statements or confessions, signed or unsigned, by the defendant;
- names of witnesses whom the prosecutor intends to call to testify and any prior statements made by those witnesses;
- information identifying any persons whom the prosecutor knows to have admissible and exculpatory evidence or information about the case and any records of statements, signed or unsigned, by such persons about the case;
- results of physical or mental examinations, scientific tests or experiments made in connection with the case;
- criminal reports and police reports; and
- a summary of, or reference to, tangible evidence obtained in the investigation.

44) The Defence in their submission also raised the issue that the Prosecutor did not respect Article 77 (3) of the KCPC which constituted a breach of the defendant's right to a fair trial. This provision stipulates that the Defence counsel has the right to be notified in advance of the

venue and time for undertaking any investigative actions and to participate in them and to inspect the records and evidence of the case in accordance with the provisions of the present Code. This regulation has been repeated in the new Code (Article 61 (3) of the CPC).

45) In the opinion of the Court this objection is ungrounded as it is clear that the provisions quoted above only give the Defence Counsel the right to be notified in advance of the venue and time for undertaking any investigative actions and to participate in them and to inspect the records and evidence of the case. As it is stipulated in Article 77 (3) of the KCPC this right should be performed in accordance with the provisions of this Code.

46) Under the KCPC there is no general presumption that the defendant and/or his defense counsel had the right to participate in all the actions taken by the prosecutor during the investigative stage of the proceedings. The Code stipulates precisely the specific situations in which presence of the defence counsel is mandatory. These are as follows: all examinations by the police of an arrested person (Article 218), extraordinary investigative opportunity (Article 238) and hearing on detention on remand (Article 282).

47) The Defence also raised the argument that the Prosecutor did not allow them to participate in the interviews of witnesses during the investigation and thus argued that this should lead the Court to conclude that this evidence is inadmissible. To support this point of view the Defence referred to Article 131 (2), this time of the present Code, which stipulates:

> *"The state prosecutor may permit the defense attorney, victim or victim advocate to participate in the pre – trial interview*."

48) In principle a similar solution was predicted in the previous Code. Article 237 (4) of the KCPC stipulates that the public prosecutor (during the investigation) may decide to invite the defendant, his or her defence counsel and the injured party to be present during the examination of the witness or expert witness.

49) The interpretation of both articles of the new and old Codes does not raise any doubts. It is the discretion of the Prosecutor whether he wishes to invite the defence counsels to participate in the interrogation of witnesses during the investigation. He is allowed to do it, but he is not obliged.

50) The Court deems it necessary to stress again that the Prosecutor did not violate the provisions of the Code when using his discretion to prohibit the Defence to participate in the investigative actions. None of the situations provided in Articles 218, 238 and 282 of the KCPC were present in this case to render the presence of the Defence mandatory in these investigative activities and as such the evidence collected in the course of these investigative actions is not deemed to be inadmissible.

51) The provisions mentioned above are elements of the principle of equality of parties in criminal proceedings, stipulated in the Article 10 of the KCPC (and Article 9 of CPC). It must be stressed that in both Codes the principle of equality of the parties is guaranteed unless otherwise provided for. This is a reasonable approach which guarantees the Prosecutor the possibility to run an effective investigation in the interests of public that he represents. The participation of the Defence in the investigative stages of the proceedings must be limited, otherwise the Prosecutor would not be able to effectively verify whether there are grounded suspicions that the defendant has committed a crime.

52) Taking into account that the access of the Defendants to the investigative actions conducted by the Prosecutor is limited, the right to a fair trial must be fully guaranteed at some stage before the Court. The Defendants and their lawyers will be given the opportunity to challenge the evidence during the main trial which is one of the crucial components of the rights to the defense.

3. Admissibility of interrogations and interviews of defendants and witnesses conducted by the SPRK Legal Officer

i. Submission of the Parties

53) The Defence of F. L. and Fl. L. assert that the interrogation of the defendants, as well as the interviews of some of the witnesses are inadmissible pursuant to Article 156 (1) of the KCPC because these investigative actions were not conducted by the Prosecutor as required under Article 231 (1), 237 (1) of the KCPC. It is submitted that SPRK Legal Officer B. K. played an unlawful active role by asking questions to the defendant and witnesses which he was not allowed to do under the applicable procedure code.

54) The Prosecutor submits that all interrogations and interviews were undertaken in full compliance with Kosovo law. In response to the submission of the Defence Counsel of Fl. L. the Prosecutor underlined that he "asked his International Legal Officer to put explanations to the defendant in the presence of the Prosecutor who stayed in the room and maintained full control of the whole situation while explanation was given". The Prosecutor emphasized that the Defendant decided to remain silent.

55) To support his point of view that an International Legal Officer may be active in a pre – trial interrogation the SPRK Prosecutor referred to the previous judgment of the Municipal Court of Pristhina in the case PPS 10/11, citing proper paragraphs of the reasoning. Having decided on the admissibility of the testimony of one of the defendants the Court stated that:

> *Mr (…) argued that because some questions were asked by (…), the SPRK legal officer, the suspect interview was conducted in violation of Article 231 of the KCPC. The court does not agree. Article 231 provides that "the examination of the defendant shall be conducted by the public prosecutor". The examination of Mr (…), held on April 4, was conducted by Special Prosecutor (…), she was clearly responsible for the manner and direction of the interview and was merely assisted, on occasions, by the legal officer.*

ii. Applicable Law

56) One of the elements of rule of law is the principle that all public authorities are allowed to act only on the basis of law and within limits imposed by it. This component of the principle of rule of law is included in the Constitution of the Republic of Kosovo in Article 3 (1) which stipulates that the state is governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.

57) Article 109 of the Constitution defines the position of the state prosecutor. Paragraph 1 stipulates that the state prosecutor is an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law. In accordance with paragraph 2 of this Article the State Prosecutor is an impartial institution and acts in accordance with the Constitution and the law.

58) As the Constitution obviously contains only general rules referring to all state authorities, including prosecutors, the role of the State Prosecutor must be further assessed under the *Law*

on State Prosecutor (Law No. 03/L-225 of 30 September 2010), the *Law on the Special Prosecution Office of the Republic of Kosovo*, (Law No. 2008/03-L052) and the Criminal Procedure Code, determining the competences and position of the Prosecutor in criminal proceedings.

59) Article 1.1 of *the Law on State Prosecutor* defines a State Prosecutor as the independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law.

60) Pursuant to Article 4.1 of *the Law on State Prosecutor*, prosecutorial functions are exercised only by competent and duly authorized state prosecutors and the Special Prosecutors provided for by the separate *Law on the Special Prosecution Office of the Republic of Kosovo*. As it is specified in the paragraph 2 of this Article, a duly appointed state prosecutor is authorized to initiate a criminal investigation, file an indictment or summary indictment, conduct a prosecution, or perform other duties and function that are in accordance with the Constitution and applicable laws.

61) Article 7 of *the Law on State Prosecutor* specifies the duties and competences of the prosecutors, which include:

- to exercise prosecutorial functions in an independent, fair, objective and impartial manner and to ensure that all persons are treated equally before the law (1.1.);
- to exercise the highest standards of care during the performance of official functions (1.2.);
- to conduct himself or herself honorably and professionally in personal and professional life and pursuant to applicable law and the code of professional ethics (1.3.);
- to maintain the honor and dignity of the State Prosecutor (1.4.);
- to protect the legal rights of victims, witnesses, suspects, accused and convicted persons (1.5.);
- to undertake the necessary legal actions for the detection of criminal offences and discovery of perpetrators, and the investigation and prosecution of criminal offences in a timely manner (1.6.);
- to make decisions on the initiation, continuation or termination of criminal proceedings against persons suspected or accused of committing criminal offences (1.7.);

- to file indictments and represent them before the court (1.8.);
- to exercise regular and extraordinary legal remedies against court decisions (1.9.);
- to cooperate with police, courts, and other institutions (1.10.);
- to undertake all other actions specified by law (1.11.).

62) The position of EULEX prosecutors is regulated by the *Law on the Special Prosecution Office of the Republic of Kosovo* (Law no. 03/L-052). Article 2 of it includes the definition of the EULEX Prosecutor as a prosecutor belonging to EULEX KOSOVO, who has been selected and appointed by the competent authority to work in Kosovo in this specific position.

63) In accordance with Article 3.5 of the cited law above, Special Prosecutors have the authority and responsibility to perform the functions of their office, including the authority and responsibility to conduct criminal investigations and prosecute crimes falling under their exclusive and subsidiary competence of the SPRK, throughout all of the offices of the prosecutors and throughout all of the courts operating in Kosovo.

64) *The Law on the Special Prosecution Office of the Republic of Kosovo* is very strict and precise with regards to the possibility to delegate the undertaking of specific activities and actions of the criminal proceeding or the undertaking of specific investigation or prosecution of cases to any prosecutor working in Kosovo. In accordance with Article 3.8 of the Law, such decision requires the authorization of the Head of the SPRK. Additionally, a prosecutor authorized by the SPRK prosecutor is obliged to report immediately to the Head of the SPRK after the activity or action has been undertaken and to transmit to the Special Prosecutor in charge of the investigation or prosecution all relevant information, documents and files gathered from the delegated activity or action. He has also a duty to inform the Special Prosecutor in charge of the investigation or prosecution about the relevant developments related to the proceedings (Art. 3.11).

65) The Criminal Procedure Code repeats the general presumption that all institutions responsible for criminal proceedings must act in accordance with the law. This principle results from Article 1 (2) of the previous Code which reads as follows:

"The present Code sets forth the rules which are to guarantee that no innocent person shall be convicted, and that a punishment or any other criminal sanction shall only be imposed on

a person who commits a criminal offence under the conditions provided for by the Provisional Criminal Code and other laws of Kosovo which provide for criminal offences and on the basis of a procedure conducted lawfully and fairly."

The same principle is included in Article 1 (2) of the CPC.

66) In accordance with Article 51 (1) of the KCPC the public prosecutor shall undertake all actions in criminal proceedings which he or she is authorized by law to undertake either by himself or herself or through persons authorized by the Law on the Public Prosecutor's Office to represent him or her in criminal proceedings. In accordance with paragraph 2 of this Article the public prosecutor shall undertake investigative actions him or herself or through the judicial police.

67) The competence to interrogate the defendant is determined in the Article 231 (1) of the KCPC which states that:

"The examination of the defendant shall be conducted by the public prosecutor. He may entrust the examination to the judicial police or, in exceptional cases, to the regular police."

68) With regards to the inadmissibility of statements by defendants, Article 156 of the KCPC provides that a statement by the defendant given to the police or the public prosecutor may be admissible evidence in court only when taken in accordance with the provisions of Articles 229 through 236 of the present Code. Such statements can be used to challenge the testimony of the defendant in court (Article 372 paragraph 2 of the present Code).

69) Somehow conflicting with this, the wording of Article 235 of the KCPC provides as follows:

"If the examination of the defendant was conducted in violation of the provisions of Article 155 paragraph 1, Article 231 paragraph 2 and 3 or Article 234 paragraph 2 of the present Code, the statements of the defendant shall be inadmissible."

70) Thus, whereas Article 156 (1) of the KCPC also covers the requirements prescribed in Article 231 (1) of the KCPC, Article 235 does not. The Presiding Trial Judge finds the only reasonable way of reading Article 235 of the KCPC as a provision serving only the purpose of clarification of the four situations mentioned. As all these situations are also covered by Article 156 (1) of the KCPC, Article 235 has no particular substantial meaning.

71) The inadmissibility of witness statements is governed by Article 161 of the KCPC which does not contain a corresponding paragraph to Article 156 (1) of the KCPC. Nevertheless, the competence rules contained in the laws regulating the position of prosecutors shall be applied. As it was mentioned above only a duly authorized prosecutor has the competence to conduct investigative actions. Furthermore, the Defence in accordance with Article 249 (1.1) of the CPC may raise the objection that the evidence was not lawfully obtained by the police, state prosecutor, or other government entity.

72) The Code does not specify the meaning of the notion "lawfully", nevertheless it is obvious that it shall be interpreted as "in accordance with the law" or "based on the law". What is more important is that there is no provision in the Code which determines the consequences of a situation where the evidence was obtained "unlawfully". The Code clearly states that evidence is only inadmissible under provisions specified in the Code. Nevertheless, the Court is of the opinion that the lack of precise provisions does not prohibit the Court from treating the evidence obtained unlawfully as admissible. First of all, from reading Article 249 as a whole it can be presumed or implied that evidence found to be obtained "unlawfully" as per Article 249 (1.1) will be considered to be inadmissible. Articles 249 (3) and (4) – which flow from Article 249(1) - provide that the Judge can "permit or exclude the evidence" and that "inadmissible evidence shall be excluded from the file and sealed" and will "not be examined or used in the criminal proceedings". Secondly, treating admissible evidence as obtained unlawfully would not only be illogical but more importantly it would constitute a breach of constitutional principles of the right to a fair trial and would be contrary to the rule of law.

iii. Findings of the Court

73) All provisions quoted above confirm that the position of the Prosecutor is an individual one and he is allowed to delegate his competences to other prosecutors, police, or judicial police only when it is strictly prescribed by law. The applicable law does not provide the possibility to entrust investigative actions to legal officers, whose professional role and position is not regulated by law but can generally be described as to support a judge or a prosecutor "comparable to an observer or adviser".[9] None of the provisions of mentioned laws provide any competences for legal officers in criminal proceedings.

[9] Supreme Court, Ap.-Kz. No. 527/2012 ("Klecka"), Ruling, 11 December 2012, para. 28.

74) The Court concurs with the opinion of the Municipal Court in case KA 44/12, cited by the Prosecutor in his response to the submissions of the Defence of F. L. and Fl. L., that the participation of the legal officer in the examination of the defendant and witnesses does not in principle constitute a breach of Article 231 of KCPC but only if it is conducted by the Prosecutor who is clearly responsible for the manner and the direction of the interview.

75) From the object and purpose of Article 231 (1) of the KCPC, which is to avoid examination of a defendant by unauthorized persons, it is clear that the term "conduct" must be understood as the Prosecutor must have control in steering the examination. Thus, active participation of a legal officer or legal adviser in the examination of a defendant is of no concern as long as the interrogation is clearly led by the competent prosecutor. This does not only require permanent presence of the prosecutor during the examination but also exercise of his overall authority in posing questions and directing the substantial aspects of the examination.

76) Generally, the authorized Prosecutor in this case conducted most of the interviews of witnesses and defendants at the pre – trial stage. He was present during these investigative actions and the interrogations were conducted under his control, although he not always asked questions by himself but rather used his legal officer. This applies to interviews of the defendant F. L. and the witnesses B. R. and V. K. which were the subject of objection by the Defence of F. L..

77) Nevertheless, in the present case there were also examinations in which the role of the Legal Officer went far beyond the standard presented above as he was fully independent and acted without not only control during the three examinations but without the very presence of the Prosecutor.

78) During the Hearing of the defendant Fl. L. which took place on the 4th September 2012 the SPRK Prosecutor Johannes Pickert and his Legal Officer B. K. were present. Having formally commenced the Hearing, the Prosecutor asked the Legal Officer to present the charges to Fl. L.. The Defence Counsel opposed to such a course of action saying:

"I am not here to teach anyone let alone yourself I am here to respect the legal provisions and article 239 (should be 231) in which you mentioned were on the first provision it states that the defendant is questioned by a Public Prosecutor and in this case I only recognize a Public Prosecutor and no one else. Any other actions or interferences by anyone else

I consider the minutes as unlawful. The Court does not recognize that the Legal Officer has the right to question. Let us not go into further debate, you could authorize the police to question him, whereas the KCPC does not recognize the right that You give the authorization to a legal assistant to be involved in the questioning of my client as this is unlawful and is not recognized by the law and we only ask to respect the law and nothing more". [10]

79) With regards to this statement the Prosecutor himself did not react but instead his Legal Officer B. K. responded:

"Thank You for the statement, for the minutes I introduce myself. I am Bernard Kuschnik and I am an international legal Officer holding both German state exams in law, whilst qualifying me under German law to serve as a German Prosecutor, Attorney at Law and Judge. I also hold a PhD in international criminal law and masters of law in business law. So regarding your statement I think I am qualified to ask questions during a suspect hearing". [11]

80) In the opinion of the Court B. K. having introduced himself this way clearly admitted that he played an independent role in the examination of the defendant. He derived his competence to interrogate Fl. L. not from the law but from his qualifications and expertise obtained during the course of his education.

81) The analysis of the records of interrogation of some of witnesses also leads to the conclusion that the Legal Officer played an unlawful proactive role in them, especially as they were conducted without presence of the Prosecutor. The independent position to be taken by the Legal Officer is apparent in the following investigative actions:

- the interrogation of B. P., held on the 8th November 2011[12], of R. E., held on the 9th November 2011[13] and V. O., held on 3 April 2012[14]. All three witnesses' hearings were conducted by the Legal Officer and the Kosovo Police Investigator without the presence of the Prosecutor. Most of the questions were asked by the Legal Officer. The first two interrogations were commenced by him, which additionally proves that he took a substantially active role in the investigation.

[10] Binder 20C, page 203.
[11] Binder 20C, page 203 – 204.
[12] Binder 19b, pages 256 – 263.
[13] Binder 19b, pages 274 – 278.
[14] Binder 19b, pages 382 – 402.

- the interrogation of A. I., held on the 11th November 2011[15] was fully conducted by the Legal Officer, without the presence of the Prosecutor. The Kosovo Police Investigation Officer did not ask a single question.

82) The analysis of the course of the examinations stipulated above leads to the conclusion that the Legal Officer played a crucial role in them. It cannot be said that he only asked sporadically questions to the defendant and the witnesses, but indeed he conducted the interrogations. Having received the answer to the question(s) he followed up and posed the next question(s) to the person being interrogated. There is visible causal nexus between the questions which were asked to the witnesses and their responses. The Legal Officer did not only ask questions prepared in advance but he reacted and followed up on the received information and adapted questions according to the interviewees' responses given during the interrogation. The absence of the Prosecutor during interrogations produced the above points that he did not control the conduct of these investigative activities. The fact that police investigators participated in them (or were present) does not validate these actions.

83) The practice that a legal officer, whose role is important but only supportive, conducts examination of witnesses without *de facto* control of the prosecutor is unacceptable and unlawful as contrary to the applicable law.

84) Having considered the law and the facts presented above, the Court concludes that the statement of the defendant Fl. L. is inadmissible evidence as it was not taken in accordance with the provisions of Articles 229 through 236 of the KCPC (Article 156 of the KCPC). The statements of witnesses B. P., R. E., V. O. and A. I. are also inadmissible as they were obtained unlawfully (Article 249 (1.1) of the CPC) because they were led by a person not authorized under the law to conduct investigative actions and without control of the Prosecutor responsible for the case.

4. Admissibility of evidence obtained by the search and seizure conducted in F. L.'s house in C. and in the Assembly on the 28th April 2010.

i. Factual background

[15] Binder 19b, pages 285 – 295.

85) On the 23rd April 2010, the competent Prosecutor filed a written application to the Pre-Trial Judge to grant search orders against the premises of F. L. and N. K.[16]. With regard to F. L., the Prosecutor requested search orders to be issued for the premises at Goloshit / Rexhep Luci Street, B. M. (the amendment) and MTPT offices. The written order was issued by the Pre – Trial Judge on the 28th April 2010 at 10.00 hours.[17] As it is apparent from the case files, on the same day at around 12.00 a.m. the Head of the Special Prosecution Office of Kosovo (SPRK) was informed that there was probably one additional place (C.) that should be searched as it was alleged to belong to F. L.. [18]

86) On the 28th April 2010, the searches based on the written search order issued by the Pre-Trial Judge were conducted in the MTPT offices and premises belonging to F. L. at Goloshit / Rexhep Luci Street. Furthermore the judicial police in the presence of the Prosecutor searched the premises of F. L. located in C. although this property was not included in the written search order. All the searches were commenced about 15.00 hours. The premises in B. M. were searched only just on the 29th April 2010[19].

87) The police obtained the verbal permission from the competent Pre-Trial Judge to search premises in C.. It is undisputed that the report required by Article 245 (6) of the KCPC was not sent within twelve hours after the search was conducted. Only on the 5th May 2010, the Prosecutor received a report about the search in C. and it was never sent to the Pre-Trial Judge although he was already assigned to the case. During the search the record of this action was not kept (what is required by the article 86 (1) of the KCPC).

88) The factual background of the search conducted in the Assembly building on the 28th April 2010 is described in the Indictment and in the police reports dated the 28th April and the 11th May 2010. From these records it is shown that the investigators were informed during the conduct of the search that the IT-servers for the Ministry were located in the Assembly building in rooms 206 and 305. The Prosecutor on the scene contacted the competent Pre-Trial Judge by telephone and obtained a verbal permission to search these servers. Based on this verbal permission, OCIU IT-Investigators together with SPRK Prosecutor Joachim Stollberg entered the Assembly building at 18:30 hours and located the rooms, both which were locked. It is

[16] Binder 3, pages 1 – 7, 8 – 15.
[17] Binder 3, pages 27 – 30, 31 – 34.
[18] Binder 7, pages 82 – 83.
[19] Binder 4a, pages 74 – 78, 85 - 91

undisputed that neither the Permanent Secretary of the Ministry of Public Administration or the Head of the Assembly were informed of the search and invited to be present.

89) The investigators identified defendant G. Z. as the keyholder for the rooms in question and instructed him at 19:40 hours to come to the Assembly building to open the doors. At 20:15 hours defendant G. Z. arrived at the scene and demanded from the Prosecutor to see a written search order. The Prosecutor explained to G. Z. that the Pre-Trial Judge gave verbal permission to conduct the search, despite of it he still rejected to hand over the keys. After Prosecutor Stollberg telephoned the competent Pre-Trial Judge and again received confirmation to conduct the search, at approximately 20:49 hours G. Z. agreed to open the door to room 206. The investigators spent one hour identifying which servers were present.

90) When it became apparent that none of the servers in room 206 were the domain controller, G. Z. was asked to open room 305. As he again refused, OCIU investigators, after having been instructed by the SPRK Prosecutor, took the keys from G. Z. and entered room 305. Upon entering room 305 the investigators located the file server for MTPT. G. Z. was instructed to log in with administrator rights and immediately after the investigators checked the computer management console to identify if there were any remote sessions active. The investigators noticed that in four separate instances the server was remotely accessed and saw on the desktop an icon for a program named Secure Eraser, a product for the wiping and deleting of data in a secure way. The MTPT share folder only included four *pdf* files unrelated to the search. The investigators concluded that the folder was either removed to another location or deleted. The server was not confiscated due to the fact that it serves the entire Kosovo Government's IT backbone, and would have severely impacted the operations of the Kosovo Government.

On the 29th April and the 11th May 2010, IT Forensic Investigators T. W. and H. E. submitted a "Report of Urgency and Verbal Court Order" and a "Detailed report concerning server room at Kosovo Assembly on April 28, 2010" to the competent Prosecutor and Pre-Trial Judge.[20] No written approval of the search of the server rooms of the Assembly was issued by the Pre-Trial Judge.

ii. Submission of the Parties

[20] Court pre-trial binder 1, tab 3.

91) The Defence Counsels of F. L. and E.L. submit that the search at F. L.'s house in C. on the 28th April 2010 was in violation of Article 110 CPC wherefore the evidence obtained by the search is inadmissible by virtue of it being unlawfully obtained as provided by Article 111 CPC. The Defence argues that even if the CPC is not applicable for the assessment of the admissibility of evidence in the present case, Article 246 (1) and Article 245 (6) of the KCPC also render the obtained evidence inadmissible.

92) The Defence asserts that the search cannot be based solely on a verbal court order without written judicial approval afterwards. It is submitted that Article 246 (1) of the KCPC clearly provides that a search executed without an order from a Pre-Trial Judge is in breach of the Code and Article 245 (6) of the KCPC as it requires that a search conducted without a written order is to be reported to the Pre-Trial Judge within 12 hours.

93) Further, it is submitted that Article 36.2 of the Constitution of the Republic of Kosovo requires the retroactive approval of the search by a Pre-Trial Judge which can logically mean a judicial order issued retroactively. It is argued by the Defence that no proof has been adduced by the Prosecution or revealed in the disclosures confirming that a report on a search conducted without a written judicial order was carried out at F. L.'s house in C. was sent to a competent Judge no later than 12 hours after the search was done. It is submitted that the OCIU report 12/20100428 dated 5 May 2010 cannot serve as a report based on Article 245 (6) of the KCPC because the search took place on 28 April 2010 whereas the report was filed almost one week later.

94) The Prosecution submits that the objection raised by the Defence is without merit. In the opinion of the Prosecution it is the KCPC and not the CPC which is applicable for determining whether a violation of the law occurred when collecting evidence on the basis that the assessment should be grounded upon the law as it existed when the investigative action was conducted. It is argued by the Prosecution that the search at the house of F. L. was conducted in accordance with Article 245 (3) of the KCPC based on a verbal search order by EULEX Pre-Trial Judge Ferdinando Buatier de Mongeot.

95) The Prosecution asserts further that whether Article 245 (6) of the KCPC had been complied with by OCIU is irrelevant for the issue of admissibility of evidence because Article 246 (6) of the KCPC does not reference Article 245 (1) of the KCPC. Further, a verbal search order by the judge

does not need to be "perpetuated" by a written judicial order afterwards as the KCPC did not require it. Finally, the Prosecution submits that the Judge's verbal order only extended the written decision merely to another property of F. L.. The arguments of the Defence appear to be artificial because the reasoning in the Prosecutor's application as well as in the Judges' decision of 28 April 2010 equally applies to F. L.'s house in C..

96) With regard to the search conducted in the Assembly building, the Defence of G. Z. alleges that there was a violation of Article 245 (3) and (4) of the KCPC because exigent and exceptional circumstances did not exist which would have justified a search based only on verbal permission of a pre-trial judge and in the absence of witnesses. It is submitted that the Prosecution did not demonstrate the existence of a substantial risk of delay which could have resulted in the loss of evidence. The Defence argues that the submission of the Prosecution in paragraph 121 of the Indictment is ill-founded because the actual conduct of the search establishes that there was no such risk of delay. Not only did the investigators unnecessarily wait thirty minutes for the defendant G. Z. to arrive at the scene, the investigator also consented to G. Z.'s request to wait for the permission from the defendant's supervisors to hand over the key to the server room. If the matter would have been extremely urgent, the investigators would have immediately used physical force to enter the room. In addition, it is submitted that the search was conducted in violation of Article 243 (6) of the KCPC because neither the Permanent Secretary of the Ministry of Public Administration or the Head of Assembly were informed about the search and invited to be present. Thus, the Defence submits that the evidence obtained is inadmissible both, under Article 111 of the CPC and Article 246 of the KCPC.

97) The Prosecution, in its substantial response dated 7 May 2013, argues that the search at the Assembly building was conducted lawfully and none of the situations described in Article 246 of the KCPC occurred. It is submitted that during the search the investigators not only acted entirely appropriately and with the necessary speed, but the urgency of the situation has also been properly assessed by the EULEX Pre-Trial Judge and can be further demonstrated by the fact that evidence has been deleted while the search was being conducted. The delay of two hours until the execution of the oral search order is due to the fact that the investigators did not know where the server was located. The immediate use of physical force as well as a disconnection of all the servers of the entire Kosovo government would have been excessive in such circumstances.

98) As to the issue of the head of a public entity not being present during the search, the Prosecutor submits that his presence was not obligatory because he is neither mentioned in Article 243 (1) or (2) of the KCPC. In regard to the question if a search can be conducted only on a verbal court order, the Prosecution submits the same arguments as it did in regard to the search in C..

iii. Applicable Law

99) One of the fundamental constitutional rights is the right to inviolability of one's residence which is guaranteed by the Article 36 of the Constitution of the Republic of Kosovo:

> *Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication.*

In accordance with paragraph 2 of the same Article:

> *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 for a lawful arrest, to collect evidence which might be in danger of loss or to avoid direct and serious risk to humans and property as defined by law. A court must retroactively approve such actions.*

100) The Court notes that the Constitution of the Republic of Kosovo in its Article 16 predicts supremacy of this act over other laws and legal acts which shall be in accordance with it. The supremacy position of the Constitutions in the legal system also requires that all legal acts of lower rank must be interpreted in accordance with the provisions of this act and in light of the jurisprudence of the Constitutional Court. Additionally, as it was already outlined above, the Constitution provides direct applicability of international conventions protecting human rights and liberties (Article 22). What is important is that in the case of conflict, the international laws have priority over provisions of laws and other acts of public institutions.

101) The right to respect for private and family life is one of the most important human rights guaranteed by the *European Convention on Protection of Human Rights and Fundamental Freedoms (ECHR)*, regulated in its Article 8 which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

102) The expression "in accordance with the law", within the meaning of Article 8 § 2 of the Convention requires firstly that the impugned measure should have some basis in domestic law. Second, the domestic law must be accessible to the person concerned. Third, the person affected must be able, if need be with appropriate legal advice, to foresee the consequences of the domestic law for him, and fourth, the domestic law must be compatible with the rule of law.[21]

103) The first three elements of the accordance with the law are quite clear and there is no doubt that Kosovo law fulfills these requirements, however it is worth explaining the meaning of the law "being compatible with the rule of law". In the context of search and seizure, the domestic law must provide some protection to the individual against arbitrary interference with the rights foreseen in Article 8 of the ECHR. This law must be particularly vigilant where, as in the present case, the authorities are empowered under national law to order and effect searches without a judicial warrant. If individuals are to be protected from arbitrary interference by the authorities with the rights guaranteed under Article 8 of the ECHR, a legal framework and very strict limits on such powers are called for. [22]

104) From Article 36 of the Constitution of the Republic of Kosovo it is apparent that a highly preferred method of conducting a search of a private residence is by virtue of a judicial order. Departure from this rule is permitted only in a limited number of circumstances as defined by law, in which event the actions must be retroactively approved by a court.

[21] Rotaru v. Romania [GC], no. 28341/95, § 52, ECHR 2000 V; Liberty and Others v. the United Kingdom, no. 58243/00, § 59, 1 July 2008; and Kennedy v. the United Kingdom, no. 26839/05, § 151., EHCR 2010.
[22] *Camenzind v. Switzerland*, 16 December 1997, § 45, *Reports of Judgments and Decisions* 1997-VIII.

105) In keeping with the overriding importance of maintaining the inviolability of one's residence and the importance of judicial involvement and oversight of searches, the KCPC has established a detailed substantive procedural framework for the issuance of judicial search orders of a house. The KCPC requires a search order to be issued by a pre-trial judge in writing upon a written application of the prosecutor (Article 240 (3) the KCPC). The judge must be satisfied that there is a grounded suspicion that the person has committed a criminal offense, and that there is a sound probability that the search will result in discovery and confiscation of important evidence. In addition, the written order shall contain detailed information such as identification of the person and the criminal offense, an explanation of the basis for grounded suspicion and sound probability, a description of the objects sought, and a separate description of the premises to be searched.

106) The KCPC defines certain situations where a search is allowed without a judicial order, including exigent circumstances, as defined by Article 245 (4) of the KCPC as follows:

> *"Exceptionally, in exigent circumstances, if a written order for a search cannot be obtained in time and there is a substantial risk of delay which could result in the loss of evidence or of danger to the lives or health of people, the judicial police may begin the search pursuant to the verbal permission of a pre-trial judge."*

107) If a search was conducted without a written judicial order, Article 245 (6) of the KCPC requires from the police to send a report to that effect to the public prosecutor and the pre-trial judge, no later than twelve hours after the search. It is undisputed that in the present case no such report was sent to the Prosecutor or the Pre-Trial Judge. The Prosecutor received the report only on the 5th May 2010, which is one week later after the search had been conducted. [23]

108) The Court asserts that Article 245 (6) of the KCPC must be interpreted in accordance with Article 36 (2) of the Constitution of the Republic of Kosovo. The application of this constitutional principle to searches conducted during the criminal proceedings leads to the conclusion that in a case when a search was conducted without a written order issued by a competent judge under the previous Code, even then it must have been retrospectively approved by a court. The fact that Article 245 (6) of the KCPC does not require a retroactive approval of the court has no legal

[23] Binder 4 A, pages 108 – 109.

effect as this provision must be interpreted in a way that is consistent with the Constitution, as the highest law of Kosovo.

109) The analysis of the law applicable to searches leads to the conclusion that under the previous Criminal Procedure Code the approval of the search conducted without a written judicial order could have be granted in an implied way, *per facta concludentia*. What is crucial is that the judge must have the opportunity to verify whether the search was conducted in accordance with the law which means that he must receive the report to the search pursuant to Article 245 (6) of the KCPC. If he does not find any violation it is not necessary under the previous code to issue any ruling. Such interpretation is in accordance with the provision of Article 36.2 of the Constitution of the Republic of Kosovo and international standards. Furthermore, it is reasonable because otherwise the duty to send the report on a search would be artificial, without any meaning if a judge in a case of a serious violation of the law would not be allowed to react to it.

110) The Court emphasizes that the measures of a search and seizure represent a serious interference with Article 8 rights and must accordingly be based on a law that is precise. It is essential to have clear, detailed rules in this area, setting out safeguards against possible abuse or arbitrariness. The absence of a prior judicial warrant may be counterbalanced by the availability of an *ex post factum* judicial review. The right to respect private property in the case of no prior judicial warrant requires the possibility to obtain an effective judicial review *a posteriori* of either the decision to order the search or the manner in which it was conducted.

111) The new Criminal Procedure Code is more strict and precise in reference to requirements on how to conduct a search without a written order of a judge. In accordance with Article 110 (6) of the CPC in such a case the police are obliged to send a report to this effect to the prosecutor and pre-trial judge if assigned to the case, no later than twelve hours after the search, in order to obtain retroactive approval of the search in compliance with Constitutional provisions. If the search is not approved retroactively by the court the evidence obtained by a search shall be inadmissible (Article 111 (1.1) of the CPC).

112) The applicable criminal procedure also requires the presence of witnesses during the search. This requirement is explicitly stipulated in Article 243 (2) of the KCPC:

"During a search of a person, a house or other premises, two adult persons shall be required to be present as witnesses. Before the begins the witnesses shall be warned to observe closely how the search is conducted, and shall be informed of their right to make objections, if any, to the contents of the record of the search before it is signed."

113) For a search conducted on the premises of a public entity, the KCPC requires in Article 243 (6) that the head of the public entity shall be invited to attend it.

114) An exception for the requirement of the presence of witnesses is enshrined in Article 245 (4) of the KCPC which reads:

"Exceptionally, a search may be conducted without witnesses being present if their presence cannot be secured immediately and it would be dangerous to delay the beginning of the search. The reasons for conducting the search without the presence of witnesses shall be noted in the record."

115) The inadmissibility of evidence obtained by a search is explicitly regulated by Article 246 of the KCPC:

"Evidence obtained by a search shall be inadmissible if:

1) *The search was executed without an order from a pre-trial judge in breach of the provisions of the present Code;*
2) *The order of the pre-trial judge was in breach of the requirements of the present Code;*
3) *The search was implemented in breach of an order of the pre-trial judge;*
4) *Persons whose presence is obligatory were not present during the search (Article 243 paragraphs 1 and 2 of the present Code); or*
5) *The search was conducted in breach of Article 245 paragraph 1, 3, 4, and 5 of the present Code."*

iv. Findings of the Court

116) The Court finds that the evidence obtained by the search of the house of F. L. in C. as well as of the Assembly building to be inadmissible pursuant to Article 246 (2) and (6) of the KCPC. The searches of the premises were conducted pursuant to the verbal permission of the Pre-Trial

Judge without retroactive approval as required by Article 246 (6) of the KCPC and Article 36 (2) of the Constitution of the Republic of Kosovo. Furthermore, the searches were conducted in breach of Article 245 (3) of the KCPC because there were no exigent circumstances present which would have permitted the Prosecution to begin and conduct the searches without a written court order. In addition, the search of the server rooms in the Assembly building was conducted in violation of Article 243 (2) read in conjunction with Article 245 (4) of the KCPC which renders the evidence obtained inadmissible pursuant to Articles 246 (5) and (6) of the KCPC.

a. The evidence obtained by the search in C. is inadmissible because the search was executed without an order from a pre-trial judge in breach of the provisions of the KCPC (Article 246 (1) of the KCPC)

117) As already outlined above, the procedural law requires the pre-trial judge to issue a search order in writing upon a written application of the prosecutor. An exception of this general rule is provide in Article 245 of the KCPC which entitles a search without a written court order, based on the verbal permission of the pre- trial judge. In event of the latter, however, a retroactive approval is not only required by Article 245 (6) of the KCPC but also mandatory by operation of Article 36 (2) of the Constitution of Kosovo.

118) The requirement to issue a search order in writing is particularly important to inform the person affected adequately about the reasons for the investigative measure and thereby enabling him or her to properly seek legal remedy. The argument presented by the Prosecution that the Defense's objection is "artificial" as the defendant was informed about the reasons due to the searches of the other premises which were based on the written court order, is not only contrary to the applicable law but also undermines the very core of the right to inviolability of one's residence. The law requires a search order to be issued not only against a specific person but also against specific premises which must be duly described in the search order. The aim of a written search order is to protect any person against unjustified, arbitrary and unlawful intervention into his or her home.

119) With regard to the search conducted in C. the report to this effect was not sent to the Pre – Trial Judge as it was only received by the Prosecutor. The Judge had no possibility to verify whether

the search was conducted in accordance with the law and his verbal permission. The defendant was deprived of judicial control over the search.

120) The situation of a search conducted based on a verbal court order without retroactive approval of a judge (even *per facta concludentia)* constitutes a violation which is covered by Article 246 (2) of the KCPC. The reason why a breach of the requirements stipulated in Article 245 (6) of the KCPC is not mentioned in Article 245 (6) of the KCPC, as the Prosecution rightly points out, is not because the lawmaker did not find this breach to be not serious enough for rendering evidence inadmissible but simply because the situation is already covered by Article 246 (2) of the KCPC.

121) At first sight, it might seem that Article 246 (2) is supposed to cover only substantive procedural requirements and not formal procedural requirements like a written form. However, in the opinion of the Court, the only substantive procedural requirement related to house searches under the KCPC is that the order has to be issued by a competent pre-trial judge. If Article 264 (2) of the KCPC is meant to cover only the latter, the provision would be superfluous because the case that evidence was obtained by a search order not issued by a pre-trial judge is already covered by Article 246 (1) of the KCPC. Furthermore, the situations described in Article 245 (1) or (3) of the KCPC are already covered by Article 246 (1) and (6) of the KCPC. Thus, it is reasonable to conclude that Article 246 (2) is indeed covering the procedural requirement stipulated in Article 240 (4) of the KCPC, which is the written form of a search order, either prior to the conduct of the search or by a retroactive approval.

b. The searches in C. and in the Assembly were conducted in breach of Article 245 (3) of the KCPC (Article 246 (6) of the KCPC)

122) The Court is of the opinion that no exigent circumstances existed which would have justified the judicial police to conduct the searches in C. and the Assembly building based only on the verbal permission of the Pre-Trial Judge.

123) The Court notes that the report in regard to the search in C. which was sent to the Prosecutor does not contain any explanation why the search was conducted without a written order. There is only an indication that it was based on verbal permission of the Pre – Trial Judge. No explanation was given with regards to the existence of exigent circumstances which would have justified such course of action.

124) In the opinion of the Court the exigent circumstances which would justify such a conduct did not exist. To justify such reasoning it must be underlined that the search of the premises in B. M., which was included in the written search order issued on the 28th April 2010, was conducted only on the 29th April 2010, which is one day after the search in C.. If there would be a real substantial risk of delay which could have resulted in the loss of evidence, the searches of all premises allegedly belonging to F. L. would have been conducted simultaneously, i.e. in a concerted action and at the same time, in order to prevent the defendant or any other persons to take any steps aimed to destroy items of potential relevance for the case. F. L. was informed about the searches conducted on the 28th April 2010 in the MTPT offices, in his house in C. and in his flat at Rexhep Luci Str. Therefore he could have expected that also his premises at B. M. would be searched which took place on the 29th April 2010. Thus, if defendant F. L. had found it necessary to destroy or hide any potentially incriminating evidence kept in B. M., he would have had enough time to do so.

125) The lack of coordination of the searches conducted in April 2010 in the premises of F. L. leads the Court to the conclusion that there were no exceptional exigent circumstances which would have allowed judicial police to begin the search only with the verbal permission of the Pre-Trial Judge.

126) Furthermore, the Court is of the opinion that the Prosecutor could have obtained a written search order for C. in time. The Prosecution Office received information about the address of this premises on the 28th April 2010 about 12.00 a.m., two hours after the Pre-Trial Judge issued the written order and three hours before the searches began. There was no reason to desist from filing an urgent request for a search order for this property, especially because the reasoning of the motion would have been almost the same as the ones referring to the other premises of F. L.. In addition, it was the middle of the working day wherefore it would have been no problem whatsoever to contact the competent Pre-Trial Judge who would not have needed much time to consider the request as he was familiar with the case and had already issued search orders on the basis of the same evidence and grounds as it would have been able to apply to justify the search in C..

127) Also in relation to the search conducted at the server rooms of the Assembly no exigent circumstances did exist. According to the "Report of Urgency and Verbal Court Order", the urgency derives from the fact that "*anyone who had a network or internet connection could*

remotely access these servers and delete, or alter the evidence stored on them"[24]. However, the Court finds this submission to be misconceived and concurs with the arguments presented by the Defence that no such urgency was present. As it is particularly apparent from the police report dated the 11th May 2010, more than two hours passed from the time the Prosecutor and the investigators arrived at the location of the locked server rooms in the Assembly building to the actual beginning of examination of servers. The lack of urgency can be perceived by the fact that the Prosecutor at the scene as well as the investigators who followed his instructions were willing to accept substantial delay in the conduct of the search for no further reasons. If the matter would have been really urgent, the investigators would not have been reluctant to use physical force in order to get access to the locked server rooms. In addition, as the Prosecutor was several times in direct contact via telephone with the responsible Pre-Trial Judge, coordination for a written court order could have easily taken place. Thus, the Court opines that a written search order could have been obtained in time without causing substantial risk of delay which could have resulted in the loss of evidence.

c. The search of the server rooms in the Assembly building was conducted in breach of Article 243 (2) read in conjunction with Article 245 (4) of the KCPC (Article 246 (5) and (6) of the KCPC)

128) The Court finds that the search in the Assembly building was conducted in violation of Article 243 (2) of the KCPC. In addition, the requirements of Article 245 (4) of the KCPC have not been satisfied as the absence of two adult witnesses was not justified under the circumstances of the case.

129) It is undisputed that the Prosecution did not comply with Article 243 (6) of the KCPC during the search of the Assembly building. The Court concurs with the finding of the Prosecution that this procedural violation does not render the evidence inadmissible under the KCPC because Article 246 (3) clearly does only reference Article 243 (1) and (2). However, regarding the requirement stipulated in Article 243 (2) of the KCPC, the Court does not see any evidence in the record that the search was conducted in the presence of two adult witnesses. In addition, the Court finds that neither the substantive nor the formal requirements of Article 245 (4) of the KCPC had been fulfilled.

[24] Binder 3, pages 35 -38.

130) Under Article 245 (4) of the KCPC it must first be decided whether the presence of the witnesses could not be secured immediately. The police reports do not make any statements in this regard. While it may have been inconvenient given the hour the search was conducted, it is the Court's opinion that there was still an obligation to make at least some effort. The fact that a search takes place after official working hours is not unusual and cannot *per se* render a situation exceptional. In relation to the determination whether it would have been dangerous to delay the beginning of the search, reference is made to the Court's assessment of exigent circumstances already outlined above.

131) The Court opines that from the actual course of the search in the Assembly it does not appear that there was any urgency which would not have allowed inviting the head of the public entity and particularly to secure the presence of search witnesses. The Court finds that the records of the search contain no notes as to the reasons why there were no witnesses present. Such a record is mandatory under Article 245 (4) of the KCPC ("shall"). Thus, the Court concludes that the requirement for two adult witnesses was simply ignored or forgotten. Compliance with this requirement is very important not only to verify the actions of the police but also to ensure that the police do not engage in arbitrary or unlawful actions.

5. Whether the statements taken as evidence by the Prosecutor after the 23 April 2012 are inadmissible because the investigative actions in obtaining that evidence were conducted after the expiry of the two years deadline to complete investigations

i. Submission of the Parties

132) The Defence Counsels of F. L., D.L. and N. K. submit that pursuant to Article 159 of the CPC, investigations must be completed within two years. Where no indictment is filed within the two year period or a suspension is not entered under Article 157 of the CPC, investigations shall automatically be terminated. It is argued that in the present case the two year period for completing the investigation expired for defendants F. L. and N. K. on 23 April 2012 and no expansion of the investigation initially undertaken or any new investigation was initiated by the Prosecutor. In addition, the Defence submits that the Prosecution violated the procedural law by filing an Indictment after the elapse of the two year time period.

133) The Defence further argues that the legal explanations made by the Prosecutor in the Indictment for supporting his course of action are misconceived because Article 225 of the KCPC does not entitle the expansion of the investigation separately for each defendant and for each criminal action. It is submitted by the Defence that the interpretation favoured by the Prosecutor would amount to an unwarranted and impermissible licence to the Prosecutor to continue never ending investigations whereby he could obtain additional time by the device of simply adding individuals at will, so as to render redundant the entire objection and purpose of Article 159 of the CPC.

134) It is further submitted that the Prosecution erred in its reliance on the ruling of the Supreme Court dated 6 April 2012 as the Court has not decided on whether the legal deadline of expanding investigations shall be evaluated separately for every criminal action and for every defendant because it has not ruled on the merits.

135) In addition to this general objection made by the Defence, the Defence of D.L. submits that the Prosecutor had no right to expand the investigation against defendant D.L. because the investigation against defendants F. L. and Nexaht Krasniqi had already expired.

136) The Prosecution in its response submits that the KCPC and not the CPC should be applicable for assessing the issue because it was the law in force when the action was actually undertaken. The Prosecution further relies on the legal arguments already submitted with the Indictment where it was outlined why the investigative actions conducted after the 23 April 2012 remain admissible for all suspects and counts except for the ones which expired on that date. It is submitted by the Prosecution that the time limitation of 23 April 2012 only applied to F. L. and Nexhat Kransiqi for five counts of money laundering until the year 2010, organized crime, misappropriation in office, fraud in office and accepting bribes. The investigation against F. L. for the counts of money laundering until the year 2012, abusing official position or authority, entering into harmful contracts and non-declaration of received campaign money was continued by SPRK on a legal basis.

137) The Prosecutor submits that when determining the time limits as specified in Article 225 (2) of the KCPC, the Supreme Court with the rulings dated 19 August 2011 and 6 April 2012 clarified that (1) the legal rules guiding extensions of investigations and expansions of investigations are to be seen as separate and independent from each other; and (2) extension of the investigation

must be assessed individually for each defendant and each respective charge. The Prosecution claims that in the present case it has strictly complied with these two principles when continuing the investigation. As to the Defence argument that the Indictment must have filed within a two-year time limit, the Prosecution submits that the objection is ungrounded because the filing of an Indictment cannot be regarded as an "investigative action" pursuant to Article 225 of the KCPC.

ii. Applicable Law

138) The Court is of the opinion that the applicable law for assessing the Defence's objection is the KCPC and not the CPC because the KCPC was the law applicable at the time of conduct of the investigation. To apply the new provisions of the CPC would not only be unreasonable but also unfair to the Prosecution because the law governing the review, suspension, termination and time limits for criminal investigations was subject to changes under the new procedural code which the Prosecutor could have not predicted during the time the investigation was conducted. The law regarding the time period for conducting an investigation under the KCPC reads, in pertinent parts, as follows:

Article 220 (1)

The public prosecutor shall initiate an investigation against a specified person, on the basis of a criminal report or other sources, if there is a reasonable suspicion that that person has committed a criminal offence which is prosecuted ex officio.

Article 221 (1)

The investigation shall be initiated by a ruling of the public prosecutor. The ruling shall specify the person against whom an investigation will be conducted, the time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, and evidence and information already collected. A stamped copy of the ruling on the investigation shall be sent without delay to the pre-trial judge.

Article 222 (1) (2)

The investigation shall be conducted only in relation to the criminal offence and the defendant specified in the ruling on the initiation of the investigation.

If it appears in the course of the investigation that the proceedings should be expanded to another criminal offence or against another person, the public prosecutor shall initiate a new investigation or expand the existing one. All this shall be noted in the record of the investigation, and the public prosecutor shall inform the pre-trial judge about this.

Article 225 (1) (2)

If the investigation is not completed within a period of six months, the public prosecutor shall submit to the pre-trial judge a written application supported by reasoning for an extension of the investigation.

The pre-trial judge may authorize an extension of the investigation for up to six months if this is justified by the complexity of the case. The pre-trial judge may authorize another extension for up to six months for criminal offences punishable by at least five years of imprisonment. In exceptional cases the Supreme Court may authorize a further extension of up to six months.

139) It is clear from these provisions that a criminal investigation can only be initiated against a specific person if there is a reasonable suspicion that this person has committed a criminal offence which is prosecuted *ex officio*. The scope of the investigation has to be set out by the competent Prosecutor in a ruling on initiation of investigation which must specify the defendant and the criminal offence. The Prosecutor is entitled to expand an existing investigation to another criminal offence or against another person. The KCPC permits the conduction an investigation for a maximum period of 24 months. Contrary to Articles 158 (3) and 159 (1) of the CPC, the KCPC does not specify the legal consequences of expiration of the investigation period.

iii. Findings of the Court

140) The applications of Article 222 of the KCPC and the time-periods provided in Article 225 of the KCPC have been subject to conflicting practices by prosecutors and judges throughout Kosovo. Specifically, some judges interpreted Article 225 as applying on a “whole case” basis, namely, that the total period of 24 months applies to the investigation as a whole starting from the issuance of the Ruling on Initiation of Investigation. By way of this interpretation, the

investigation has to be extended for all suspects at the same time, irrespective of the time upon which they were added as a suspect through a ruling on expansion of the investigation.

141) The second evolving practice entitles judges to grant an extension of the investigation on a "per suspect" basis, meaning that the time-limit for an investigation against an individual only starts to run from the date of the respective ruling on expansion of the investigation. Therefore, the time limit for suspects from the very beginning (the initial ruling on initiation of investigation under Article 221 (1) of the KCPC) is different from the time limit applicable to suspects who were joined to the case later by a ruling on expansion under Article 222 (2) of the KCPC. Each suspect or group of suspects are subject to different six month periods, so in case a suspect is only added to an investigation at a later stage, the prosecutor continues to have a potential period of 24 months for investigation - even if the investigation expired with regard to the initial suspect(s).

142) Recent practice of the courts, particularly the Supreme Court of Kosovo as well as the Basic Court of Pristina and the Basic Court of Peja, interpreted Article 222 and 225 of the KCPC in a way that the respective timeframes of extension and expansion of the investigation have to be calculated independently. In addition, it was held that the Courts have to assess the possibility for extension of investigation separately for each defendant and criminal offences. (cf. *Supreme Court of Kosovo, PN-KR 440/11 ("Land case"), 17 August 2011, p. 8; Supreme Court of Kosovo ("Klecka"), Pn-Kr 406/2011, 19 August 2011; Supreme Court of Kosovo, Pns.-Krs. No 1/2012 ("MTPT"), 6 April 2012, p. 3; Basic Court of Pristina, GJPP242/12, 4 January 2013, p. 6; Basic Court of Peja, Ruling on Prosecutor's Motion for Clarification, 6 February 2013, p. 5*). In the Ruling of the Supreme Court in case number PN-KR 440/11, dated 17 August 2011, it was held (page 8, paragraph 4):

> *"If an investigation has been initiated against one suspect, and is later expanded to another suspect, the expiry date of the investigation for the first suspect would be earlier than the expiry date for the second suspect."*

Accordingly, the Supreme Court separated the suspects by the different dates upon which they were added to the case by the initial ruling on initiation of investigation or subsequent expansions.

143) The same approach was presented by the Supreme Court in the case in hand in the reasoning of the ruling issued on 13 April 2012 in which the Prosecutor's request to extend the investigation was recognized.[25]

144) In the present case, the Prosecutor initiated the investigation on the 23rd April 2010 with issuing the Ruling on Initiation of Investigation against defendants F. L. and N. K. for the criminal offences of money laundering, organized crime, misappropriation in office, fraud in office and soliciting bribes. The investigation was extended and expanded in relation to different charges and additional defendants several times. When applying the first approach as outlined above, the investigation would have indeed expired for all defendants on 23 April 2012 and evidence obtained after that day would not be covered by an effective criminal investigation as the Defence submits. The Presiding Judge is of the opinion that the objection filed by the Defence is ill-founded because by taking the established firm jurisprudence into consideration, investigative actions which were conducted by the Prosecution in the present case after the 23 April 2013 remain admissible for all suspects and counts except for the ones which expired on 23 April 2012.

145) The Court finds it reasonable to interpret Article 222 and 225 of the KCPC in a way as to consider an expansion of an investigation and extension of investigation independently. Also the legal approach to assess the extension of the investigation individually for each defendant and each respective charge is in the opinion of the Presiding Judge rational because otherwise the awkward situation might occur that in reference to a suspect who is only added to a case by an expansion a few days before the total period of 24 months expires, the initial time-limit would apply equally to him or her which might hamper a proper investigation.

146) In order to avoid unwarranted and impermissible license to the Prosecutor for never ending investigations, a risk the Defence rightly points out, this approach must have its natural limits in misuse, e.g. if the prosecution is trying to achieve virtually unlimited investigative periods by way of artificially splitting the initiation or expansion of the investigation. In the case at hand, however, the Court does not find any indication that the Prosecution exceeded its competence by misusing the investigation process. To the contrary, in this regard it fully complied with the

[25] Binder 2, pages 139 – 142, 143 – 148.

applicable legal framework as it was established by the KCPC and the jurisprudence of the Supreme Court of Kosovo.

147) The Court finds that the objection made by the Defence that the indictment would be time-barred because it was filed after the two year time-limit cannot be based on Article 249 of the CPC because the filing of an indictment as such is not an objection against the evidence listed in the Indictment but rather a request to dismiss the Indictment. However, The Presiding Judge does not have to decide if such a request can be based on one of the grounds enshrined in Article 250 (1) of the CPC and if the issue should have been already addressed by the Defence to the Confirmation Judge immediately after the filing of the indictment because, in any event, the arguments submitted by the Defence are ill-founded under the applicable law. It is not described by the KCPC what legal impact the expiration of the investigatory period might have on the case. Whereas the CPC clearly reads "an investigation shall terminate automatically upon its expiration" (Articles 159 (3); 159 (1) of the CPC), the KCPC is silent in this regard. The time-limits foreseen in Article 225 of the KCPC are clearly related to the collection of evidence and not the filing of the indictment which is not an investigation action *sensu stricto*.

148) The Court follows the legal approach taken by the Supreme Court of Kosovo which held that the expiration of the investigation term does not mark the termination of the investigation, but the case remains pending and the Prosecutor may file an Indictment at any time, with the only limit of the statutory limitation (*cf. Supreme Court of Kosovo, Ap-Kz 465/08 (Idriz Gashi), 2 June 2009, p. 5; District Court of Pristina, GJPP 125/10 ("PTK"), Ruling on Confirmation of Indictment, para. 13); Basic Court of Peja, Basic Court of Peja, Ruling on Prosecutor's Motion for Clarification, 6 February 2013, p. 6*).

6. Admissibility of the statements and letters of the witness M. S.

i. Submission of the Parties

149) The Defence of F. L. submits that the evidence of the deceased key-witness M. S. must be found inadmissible because it is unreliable, not credible and not challenged by the Defence at any stage of the criminal proceedings. In regard to the statement which M. S. made to the Anti-Corruption Agency ("KACA") and the statement he made before EULEX, it is argued by the Defence that these statements are inadmissible pursuant to Article 262 (1) of the CPC (or Article

156 (2) of the KCPC) because the Defence did not have and will not have an opportunity to challenge these statements.

150) The Defence stresses that the general right of an accused to confront the witness against him in a criminal case is a fundamental right not only recognized by various human rights instruments including the ECHR but also under the constitutional guarantees of Kosovo. The Defence makes reference to Article 61 (3) and 132 (6) of the CPC under which the Defence must be given notice of the date, time and location of the pre-trial testimony. The failure of the Prosecution to allow the Defence to participate in its investigative actions it undertook is both, a violation of the procedural and constitutional rights, inter alia under Article 31 (4) of the CPC.

151) It is further submitted that the argument presented by the Prosecution in the Indictment with regards to the legal interrelation between Article 156 (2) and Article 157 (1) and (2) of the KCPC is misconceived because in order for the provision of Article 157 (1) and (2) of the KCPC to apply, the provision of Article 156 (2) of the KCPC must first be satisfied, which is not the case in the present proceedings.

152) Concerning the letters written by M. S. to the state government bodies of Kosovo, the Defence submits that they cannot be considered as documentary evidence because, again, these letters have not been tested by cross-examination of the witness and the right to confrontation has not been satisfied. Further, it is submitted that the said letters were not made under oath, and the credibility and reliability of M. S. has not been tested.

153) The Defence challenges the reference and reliance by the Prosecution in the Indictment on the confirmation ruling in case GJPP 125/10 because the cases are distinguishable on the facts. Whereas in case GJPP 125/12 the witness is alive but has not been called to testify in the investigative phase, witness M. S. is deceased and the Defence has not had the opportunity to question him and will not have such opportunity in the future.

154) The Prosecution already submits in the Indictment under part E 3. that all evidence from the deceased witness M. S. is admissible. The evidence obtained did not become inadmissible by the sudden death of the witness. In relation to M. S.'s letter to the state government of Kosovo, the Prosecution asserts, by making reference to the confirmation ruling in case GJPP 125/12, that it is documentary evidence which does not fall under the limitation of Article 156 (2) of the KCPC.

It is further submitted by the Prosecution that the argument of the Defence concerning the interplay between Article 156 and 157 of the KCPC is ill-founded as Article 157 (2) of the KCPC only cross-references Article 156 (1) of the KCPC and not also Article 156 (2) of the KCPC. Contrary to the submission of the Defence, the Prosecution claims that the decision of the confirmation judge in GJPP 125/12 is applicable to the present case because it is irrelevant whether the witness cannot be confronted by the Defence because he passed away or is simply unreachable. Regarding the statement M. S. made before the KACA the Prosecution argues that Article 156 (2) of the KCPC is not applicable because the statement was not given to the police or the public prosecution but before another institution. In addition, it is argued by the Prosecution that the testimony is admissible on the basis that it is not the decisive piece of evidence to determine the guilt of the defendant in accordance with Article 157 (1) of the KCPC. Lastly, the Prosecution submits that the statement of witness M. S. before EULEX can be read out and is admissible as evidentiary procedural evidence for the purpose of "triggering valid material evidence".

ii. Applicable Law

155) Conditions to declare a statement of a person who has been examined as a witness inadmissible are specified in Article 161 (1) of the KCPC as follows:

1) *the person may not be examined as a witness (Article 159 of the present Code);*
2) *the person is exempted from the duty to testify (Article 160 of the present Code),but he or she has not been instructed about that right or has not explicitly waived that right, or the instruction and the waiver were not entered in the record;*
3) *the person is a child who could not understand the meaning of his or her right to refuse to testify;*
4) *the testimony was extorted by force, threat or a similar prohibited means (Article 155 of the present Code).*

156) Pursuant to Article 156 (2) of the KCPC a statement of a witness given to the police or the public prosecutor may be admissible evidence in court only when the defendant or defence counsel has been given the opportunity to challenge it by questioning that witness during some stage of the criminal proceedings. Additionally, Article 157 (1) of the KCPC provides that the court shall

not find the accused guilty based solely, or to a decisive extent, on testimony or other evidence which could not be challenged by the defendant or defence counsel through questioning during some stage of the criminal proceedings.

157) The new Code provides in Article 262 that the Court shall not find the accused guilty based solely, or to a decisive extent, on testimony or other evidence which could not be challenged by the defendant or defence counsel through questioning during some stage of the criminal proceedings.

158) The interpretation of the provisions mentioned above leads to conclusion that statements of a witness given to the police or the prosecutor can be admissible evidence in the court even if the defence had no possibility to challenge it through questioning. They only cannot be sole or decisive evidence of guilt. Such approach is also accepted by the European Court of Human Rights. The fact that a witness died after making a statement that enables the defence to challenge it by questioning cannot lead to inadmissibility of such evidence.

159) Article 6 § 3(d) of the ECHR enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. It requires not only that a defendant should know the identity of witnesses testifying against him so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings.

160) Having regard to the ECHR case-law, there are two requirements which follow from the above general principle. First, there must be a good reason for the non-attendance of a witness. Second, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine, whether during the

investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called “sole or decisive rule”).

161) The requirement that there be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. Even where the evidence of an absent witness has not been sole or decisive, the European Court of Human Rights has still found a violation of Article 6 § 1 and 3 (d) when no good reason has been shown for the failure to have the witness examined. This is because as a general rule witnesses should give evidence during the trial and that all reasonable efforts will be made to secure their attendance. Thus, when witnesses do not attend to give live evidence, there is a duty to enquire whether that absence is justified. It is obvious that, where a witness died, in order for his or her evidence to be taken into account, it will be necessary to adduce his or her witness statement.

162) The meaning of the sole or decisive rule is to be found in *the Unterpertinger v. Austria (EHCR Judgment,* 24 November 1986, § 33) which also provides the rationale for the test to be applied: if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted.

163) As it was stated in the judgment in the case of *Al – Khawaja and Tahery v. UK (ECHR Judgment, 15 December 2011)* in reference to the meaning of this rule the word “sole”, in the sense of the only evidence against an accused does not appear to have given rise to difficulties, the principal criticism being directed to the word “decisive”. “Decisive” in this context means more than “probative”. It further means more than that, without the evidence, the chances of a conviction would recede and the chances of an acquittal advance. The word “decisive” should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive.

164) The relevant provisions of the both criminal procedure codes regulating participation of the defence in the interrogation of witnesses on the investigation stage are as follows:

Article 237 (4) of the KCPC

The public prosecutor might decide to invite the defendant, his or her defence counsel and the injured party to be present during the examination of the witness or expert witness.

Article 131 (2) of the CPC

The state prosecutor may permit the defense attorney, victim or victim advocate to participate in the pre – trial interview.

165) The interpretation of both articles mentioned above does not raise any doubts that it is the discretion of the Prosecutor whether to invite the defence counsels to participate in the interrogation of witnesses during the investigation. He is allowed to do it, but not obliged.

iii. Findings of the Court

166) The proceedings in this case were commenced as a result of statements made by M. S. before the KACA in 2009. He was later examined by the EULEX Police which took place on the 12th January 2010. In February 2010, M. S. died in a car accident. The investigation against first two defendants (F. L. and N. K.) was initiated only on the 28th April 2010.

a. Statements before the Kosovo Anti-Corruption Agency (KACA)

167) As results from the *Information Regarding alleged corruption,* received by the SPRK on the 20th October 2009 M. S. on the 06th May 2009 made a request to the Kosovo Anti – Corruption Agency for initiation of investigative proceedings against F. L. – Minister of Transport and Telecommunication and N. K. – Procurement Manager at the MTPT[26]. Acting upon the report obtained from M. S. the Kosovo Anti – Corruption Agency (KACA) commenced the preliminary investigation to verify the information about alleged corruption within the Ministry of Transport and Telecommunication connected with the tenders for road construction. M. S. was contacted several times by KACA and made statements in which he described examples of alleged corruption.

168) Having completed this stage of the proceedings KACA ascertained that there were sufficient data and reasonable suspects that a criminal offence could have been committed and submitted

[26] Binder 19 A, pp. 1 – 7.

the case to the SPRK office. KACA attached to this submission the letter sent by M. S. "to State Government Bodies of Kosovo"[27], CD with record of M. S.'s statement and transcripts of them[28].

169) The analysis of the CD records and transcripts of them which were sent by KACA to the SPRK leads to a conclusion that they cannot be treated as a witness statement. M. S. was not interviewed in this capacity by a prosecutor or an authorized police officer, he was not instructed that he was obliged to tell the truth and about right not to incriminate himself. Additionally, it is not clear if it was really M. S. who made statements as there is no record of this action and he did not sign any document. His identity was not verified in any way, e.g. through presenting his ID card. It must be underlined that it is also not clear who took statements from M. S. as persons acting on behalf of KACA did not introduce themselves, their names did not appear in the records and transcripts. Further, the place and the date of making the statements are not known as there is no indication in the records.

170) All these circumstances lead to the Court to the conclusion that statements attached to the information from KACA are intrinsically unreliable as the origin of this evidence is unknown and was not supported by notice of corroboration. Therefore the records and its transcripts must be declared inadmissible in accordance with Article 259 (2) of the CPC.

171) The Court opines that these statements could have been used only for intelligence purpose and they must have been converted into admissible evidence via interrogation of M. S. in capacity of a witness in full compliance with the principles established by the Criminal Procedure Code.

b. Statements before EULEX Police

172) M. S. was interrogated in capacity of a witness by EULEX Police after the case was submitted to the SPRK by the Kosovo KACA. The interview took place on the 12th January 2010 and was additionally audio-recorded.[29] M. S. died in a car accident on the 21st February 2010. At this stage of the proceedings investigation was not initiated against any person so there were no defendants and consequently no defence counsels (investigation was initiated against the first defendants, F. L. and N. K., on the 23rd April 2010).

[27] Binder 19a, pp. 21 – 27 (English translation pp. 8 -14).
[28] Binder 19a, p. 27.
[29] Binder 19a, p. 58 – 92 a (including Albanian version).

173) The statement of M. S. made in the capacity of a witness is admissible evidence despite the fact that the defendants have had no possibility to challenge it. It cannot be the sole and decisive evidence in the case of conviction. Such reasoning is supported by jurisprudence of the European Court of Human Rights as outlined above.

c. Letter of M. S.

174) In May 2009 M. S. sent a letter to authorities of Kosovo about alleged corruption in the Ministry of Transport and Telecommunication. KACA received the letter on the 06th May 2009 and attached it later to the submission sent to the SPRK.

175) The Court finds that the letter is documentary evidence wherefore its admissibility cannot be assessed by applying the legal requirements for the statements of witnesses. The letter for its very nature cannot be challenged by examination and cannot be written under oath. There are also no indications that it was obtained unlawfully. A similar approach was taken by the Supreme Court of Kosovo in regard to a diary written by a witness.[30]

176) Thus, there are no grounds to declare the letter of M. S. as inadmissible evidence.

7. Admissibility of SMS evidence relied on by the Prosecution

177) Although the Court has found all the evidence obtained by the search conducted in C. as inadmissible because of violations of procedural law, it still deems it necessary to respond to all the objections raised by the party.

a. Whether the SMS evidence is fabricated

i. Submission of the parties

178) The Defence Counsels of F. Z. and E.L. submit that the SMS text messages relied upon in the Indictment are inadmissible on the grounds that they were not lawfully obtained and that they are intrinsically unreliable. It is argued by the Defence that these SMS text messages are intentional fabrications and that the pertinent SMS communications could not be found in the

[30] Supreme Court of Kosovo, Ap.-Kz. No. 527/2012, Judgement, 11 December 2012, para. 70.

official PTK printout when requested by the Prosecution in 2012. Further, the Prosecution has not proved or made any attempt to verify if the SMS were genuinely sent/received by defendants E.L. and F. Z. on the dates and at the times mentioned in the Indictment and that the content of each SMS evidence is true and accurate.

179) The defendant F. L. during his interview on the 20th April 2012 to the Prosecution stated that the hard copy printouts of these SMS texts, which were seized during the search of his house in C., were anonymously handed over to Prime Minister Hashim Thaci by way of an "anonymous letter", who subsequently forwarded the letter to the respective Minister, defendant F. L.. Defendant F. L. stated in his interview that he took the matter seriously and confronted the chief of cabinet, defendant E.L., with the same and asked for explanation. E.L., who had denied ever sending or receiving such SMS text messages, obtained a copy of his telephone bills and SMS text messages for the respective time period from PTK.

180) The Defence of E.L. submits as exhibit to its objection to evidence an invoice of PTK-VALA for the telecommunication services provided by PTK to E.L. which includes a document listing the communications made by the defendant during the relevant time. In addition, the Defence of E.L. submits as exhibit to its objection to evidence a document received from the General Police Directorate of the Republic of Kosovo stating that defendant E.L. was not under investigation and no covert measures was applied against him in the years 2008-2010.

181) The defendant F. L. during his statement given to the Prosecutor on the 20th April 2012 argued that from a comparison with the official received listing from PTK, it can be revealed that the hard copy printouts of the SMS text messages were fictitious and fabricated. The Defence of F. L. and E.L. in their objections to evidence submit that the Prosecution – despite being informed about these circumstances – committed a fatal investigative failure by not carrying out a proper preliminary investigation into the SMS text messages to determine their veracity, reliability and authenticity.

182) Also the Defence of F. Z. claims that the SMS messages presented in the Indictment are a falsification and therefore inadmissible evidence. In order to corroborate this claim the Defence submits as exhibit to the objection to evidence an invoice of PTK-VALA for the telecommunication services provided to Flroim Z.. The invoice also lists details of calls in relation to the telephone number used by F. Z. in March 2009. The Defence of F. Z. argues that by

comparing the PTK-Vala list with the hard copy printouts of the SMS text messages seized during the search in C., it can be noticed that the SMS messages missing in the list attached to the invoice are the incriminating SMS the Prosecution relies on. In addition, the list sent by PTK-VALA to F. Z. contains an official logo of VALA whereas the hard copy printouts of the SMS text messages seized during the search are missing the same.

183) The Prosecution in its response to the Defense's objection submits that the Defence has come up with a "conspiracy story" about alleged fabrications of SMS for the sole purpose of having declared the evidence unreliable and that the court should not take such unproved and ungrounded allegations into consideration. It is asserted by the Prosecution that the Defence did not present any credible explanation about who supposedly fabricated the SMS communications, how the fabrications took place and what the overall motive of the fabrication would have been. The Prosecution submits further that the evidence should be deemed reliable and discussed during the main trial *inter alia* because the contested SMS messages are interconnected with the contents of other SMS that subsequently could be found on the PTK printouts. In response to the Defence claim that the Prosecution did not make any attempt to verify whether the contested SMS messages were actually sent/received by the defendants E.L./F. Z., the Prosecution submits it was only during their interrogation in 2012 that the defendants proactively presented the issue despite knowing about it since 2009.

ii. Findings of the Court

184) The issue raised by the Defence Counsels in their objections refers to the reliability and credibility of evidence presented by the Prosecutor. This may be duly assessed only in the course of the main trial when the parties shall present evidence to support their stance. Exclusively during this stage of proceedings the Court will have the opportunity to assess the documentary evidence attached by the Defence Counsels of the defendants to their submissions. The evidence cannot be presented at the second hearing which results from Article 254 (7) of the CPC.

b. Whether the hard copy printout of SMS text messages seized during the search in C. is inadmissible evidence because it was not obtained by a court order for interception of telecommunications

i. Submission of the parties

185) The Defence of F. Z. submits that the hard copy printout of SMS text messages seized during the search in C. is inadmissible evidence because it was not obtained by a court order for interception of telecommunications. It is argued by the Defence that the hard copy print out of the SMS contains information covered by the right to privacy wherefore this information can only be obtained by respecting the legal provisions of the procedure code dealing with covert and technical measures. At the time when the Prosecution secured the messages there was no such measure ordered by the competent Pre-Trial Judge in accordance with Article 91 (2) of the CPC. To obtain content of SMS messages through unlawful channels renders the information inadmissible.

186) Also the Defence of E. S. objects to the evidence on the ground that the hard copy print out of the SMS were taken contrary to Article 258 of the KCPC, respectively Article 91 of the CPC and Article 36 (1) of the Constitution of the Republic of Kosovo. Thus, it is argued that the evidence must be considered as inadmissible pursuant to Article 246 (1) of the KCPC, respectively Article 97 (1) of the CPC.

187) The Prosecution submits that the Court should refrain from declaring the evidence as inadmissible, because it allegedly was obtained without a court order. The way in which defendant F. L. obtained these SMS messages remains unclear; neither is it verified that these SMS were secured through unlawful channels as the Defence argues. The Prosecution submits further that it has not seen any verification that the document containing the SMS messages has a causal connection to other investigations, cases and search orders.

ii. Findings of the Court

188) The Court notes that this piece of evidence cannot be treated as transcripts of messages obtained as a result of interception of telecommunication as it this was never ordered by the Prosecutor or the Court. This printout is a document found during the search. The evidential value of it shall be assessed during the main trial when its authenticity, credibility and reliability will be verified.

8. Admissibility of the statements of witnesses where no warning was issued in accordance with Article 125 of the CPC

i. Submission of the parties

189) The Defence of F. L. requests the Court to reject as inadmissible "statements of witnesses where no warning was issued in accordance with Article 125 CPC".

190) The Prosecution did not file a response to this objection.

ii. Findings of the Court

191) The Court underlines that the Defence did not provide necessary and specific details in order to enable the Court to adequately assess the merits of this objection. Neither names of witnesses nor dates of the interviews when the procedural violation allegedly took place were submitted by the Defence. Despite this, the Court analyzed thoroughly the files to decide properly on this objection and having done so has come to conclusion that all the witnesses were properly instructed of their rights and duties.

192) In any event, the omission of a legal warning to a witness prior to his or her interview does not *per se* render the statement inadmissible under the KCPC, which was the law applicable at the time the witness interviews were conducted. Pursuant to Article 161 (2) read in conjunction with Article 160 (1) and (3) of the KCPC, only statements of a privileged witness who is exempted from the duty to testify and who was not instructed about that right shall be inadmissible. In the case in hand no privileged witnesses were interrogated.

9. Whether the Indictment does not comply with the formal requirements stipulated in Article 241 of the CPC

i. Submission of the parties

193) The Defence of F. Z. as well as the Defence of D.L. submits that the Indictment does not comply with Article 241 of the CPC because it does not contain the necessary elements to determine the time and the manner of the commission of the criminal offenses and other circumstances

according to the law in order to accurately determine the criminal offences with sufficient precision.

194) The Prosecution submits that the issue as to the formal requirements of the Indictment has already been dealt with and decided by the (then) District Court of Pristina. It is argued that the Indictment is specific in terms of presentation of the facts and evidence.

ii. Findings of the Court

195) The Court rejects the objection raised by the Defence as inadmissible. The Indictment in the present case was filed on the 16th November 2012, thus at a time the KCPC was still in force. The case was subsequently assigned to a EULEX Confirmation Judge who analyzed the Indictment pursuant to Article 306 (2) of the KCPC and requested the Special Prosecutor to provide amendments. The appeal filed by the Prosecution against the Decision of the Confirmation Judge was granted and the Appeals Panel of the District Court of Pristina, with Ruling dated the 18th December 2012, annulled the Decision of the Confirmation Judge and considered the Indictment as fulfilling the formal requirements as stipulated by law.

196) On this procedural background, the Court is of the opinion that the matter of the formal content of the Indictment PPS 425/09 has been conclusively clarified by the Court wherefore the legal principle of *res iudicata* hinders the Defence to raise this issue at this stage of the proceedings. This finding is not contrary to the recent Ruling of the Court of Appeal in case PN 372/13 where it was held as follows:

> *Although the new CPC eliminated this explicit obligation* [review of the indictment pursuant to Article 306 (2) KCPC]*, it can still be inferred from the general provision of Article 442 of the CPC that the Presiding Trial Judge should ex-officio assess the comprehensibleness and compliance of the indictment with the requirements stipulated in Article 241 of the CPC. This assessment should be conducted prior to scheduling the initial hearing.*

10. Whether the evidence related to defendant G. Z. it is intrinsically unreliable

i. Submission of the parties

197) The Defence submits that the paragraphs of the Indictment containing the charges against the defendant G. Z. are full of intrinsically inherently unreliable evidence that should be deemed

inadmissible and excluded from the file pursuant to Article 249 (1.3), (4) read in conjunction with Article 259 (2) of the CPC. It is argued that various statements included in the indictment are only conclusions based on mere assumptions, not any observed facts. Further, the Defence claims that the Prosecution completely failed to specify in detail the evidence or information being relied upon.

198) The Prosecution replies that the question whether evidence is intrinsically unreliable is connected to the question whether the evidence is relevant. The evidence in question includes documentary evidence as well as testimonial evidence which is directly related to the alleged criminal behavior of defendant G. Z. and clearly establishes a well-grounded suspicion. Whether that evidence is sufficiently credible to establish the commission of the offences without reasonable doubt is to be established during the main trial.

ii. Findings of the Court

199) The Court finds that the submission by the Prosecution that the question of unreliability of evidence is interconnected with the relevance of the evidence is mistaken. Article 259 of the CPC clearly distinguishes between "manifestly irrelevant" and "intrinsically unreliable" evidence. Evidence is manifestly irrelevant if it is simply unrelated to proving the elements of the criminal offence whereas in order to be intrinsically unreliable the origin of the evidence or information has to be unknown, it has to be based upon a rumor, or on its face the evidence or information must be impossible or inconceivable (Article 19 (1.29) of the KCPC).

200) On the other hand, the objection raised by the Defence is also ill-founded because the evidence disclosed by the Prosecution in order to demonstrate the charges against defendant G. Z. simply does not fall into one of the three categories defined in Article 19 (1.29) of the CPC. The CPC contains a very high threshold in order to consider evidence "intrinsically unreliable". The Prosecutor intends to prove the commitment of the crimes as specified in the Indictment via witness statements of police officers who participated in the search of the Kosovo Assembly on 28 April 2010 and they are expected to testify on facts they observed during this action.

11. **Whether the expert's opinion on road quality testing is inadmissible because it is intrinsically unreliable**

i. Submission of the parties

201) The Defence of F. Z. submits that the findings of the expert's opinion that the road Ponesh Zhegovac was not constructed properly is intrinsically unreliable evidence and as such should be deemed inadmissible and excluded from the file, pursuant to Article 249 (1.3), (4) read in conjunction with Article 259 (2) of the CPC. It is argued that the expert conducted their analysis without case file documents and technical specification.

202) The Prosecution replies that the experts were provided with the necessary documentation and technical specification. The Prosecution also underlines that the expert has great knowledge about road construction and that his findings are easily transferable to the Kosovo context.

ii. Findings of the Court

203) The Court finds the expert's opinion on road quality testing as admissible evidence which should be assessed during the main trial. Evidence is intrinsically unreliable if the origin of the evidence or information is unknown, it is based upon a rumor, or on its face the evidence or information must be impossible or inconceivable (Article 19 (1.29) of the KCPC). In the opinion of the Court, none of these requirements are fulfilled.

IV. Ex officio review by the Presiding Trial Judge

i. General remarks

204) As it has been already mentioned above, contrary to the legal framework which governed the confirmation of Indictment procedure under the KCPC, under the CPC the Court is no longer entitled to fully assess the admissibility of evidence *ex officio*. Objections against evidence have to be filed by the Defence pursuant to Articles 249 of the CPC in order to enable the Court to make a respective assessment. The only remaining *ex officio* competence for the Court is pursuant to Article 249 (5) "*to determine if the admission of evidence would violate rights guaranteed to the defendant under the Constitution of Kosovo*". Likewise, Article 97 (4) CPC provides - as a provision *lex specialis* – that:

"At *any time prior to the final judgment, the Presiding Trial Judge may review the admissibility of material collected under Article 88 of this Code ex officio for violations of the defendant's constitutional rights if there is an indication that the materials were collected unlawfully*."

205) In a recent decision the Court of Appeal considered the scope of the *ex officio* competence as follows:

The court is still vested with a very broad competence because admitting evidence obtained by unlawful investigative measures usually violates constitutional rights of the defendant (e.g. Article 36 read in conjunction with Article 31 of the Constitution of the Republic of Kosovo in case of an unlawful house search or interception of telecommunication).

206) Having reviewed the case file thoroughly, the Court considers it necessary to address *ex-officio* the evidence obtained by the Financial Intelligence Centre/Unit in which it reports the financial transfers between the defendants and members of their families. The Court notes that the protection of one's personal financial affairs against compulsory public disclosure is an aspect falling under the zone of privacy which is protected by the Constitution of the Republic of Kosovo.

ii. Factual Background

207) On the 15th August 2011, the Prosecution filed a request[31] to the Director of the Financial Intelligence Centre/Unit (FIU)[32] requesting bank account information including analysis of bank account activities, foreign money transfers, and transactions through money transmitters for the bank accounts held by the L. Family and the Krasniqi Family. The request did not state the reasons for a suspicion of possible money laundering but merely made reference to "the nature of the crimes" the defendants are suspected of having committed.

208) The FIC, as the central independent national institution responsible for requesting, analyzing and disseminating to the competent authorities, disclosure of information which concern potential money laundering and terrorist financing, provided the Prosecution with three reports,

[31] Binder 6, p. 225.
[32] The Financial Intelligence Centre of Kosovo (FIC) finished transition period into the newly created Financial Intelligence Unit of the Republic of Kosovo (FIU).

dated the 21st June 2011[33], the 30th January[34] and the 29th March 2012[35]. The report dated the 21st June 2011, which was disclosed by FIU "for further actions as may be required" contains detailed information on the financial data of the defendants F. L. and D.L. on which the Prosecution relies in the indictment with regard to the charges for money laundering and non-declaration of received campaign money.[36] Both reports are also mentioned in the list of recommended evidence in the Indictment.

209) On the 20th April 2012, the Prosecution filed an application[37] for covert measure of disclosure of financial data which was granted by the District Court with the order[38] dated the 30th July 2012. In its application the Prosecution relied on the information provided by FIU. The information received upon the execution of the court orders dated 30th July 2012 was of less substance as those received from the reports by FIU.

iii. Findings of the Court

210) The duties and competencies of the FIU are governed by the *Law on the Prevention of Money Laundering and Terrorist Financing* (Law No. 03/L-196). Article 15 of the law regulates the disclosure and dissemination of information and records by FIU to other bodies and institutions in and outside Kosovo:

> *"The FIU may only disclose the following information, or records containing such information in accordance with paragraph 2 of this Article:*
>
> *(1.1.) any data concerning a person or entity which is a subject of a report held by the FIU that would directly or indirectly identify the person or entity, including but limited to a name or address;*
>
> *(1.2.) any identifying data concerning a transaction, including but not limited to the date, location, amount or type of property, account number, or transaction number; and*

[33] Binder 6, page 211; it is assumed by the Presiding Trial Judge that the date of issuance of the FIC Report is not 21 June 2011 as mentioned on the document but 21 September 2011 because the Report is referring to the SPRK Request dated 15 August 2011. Also the fact that SPRK received the Report on 20 September 2011, as it can be seen from the SPRK stamp on the document, militates in favour of 21 September 2011 as the actual date of issuance.
[34] Binder 6, page 229.
[35] Binder 6, page 233.
[36] See paragraphs 127 et seq. and paragraphs 154 et seq. of the amended Indictment.
[37] Binder 5 pages 175 and 255.
[38] Binder 5 page 266.

(1.3.) any data concerning a person or entity which has provided information or records to the FIU that would directly or indirectly identify the person or entity.

(2) The information referred to in paragraph 1 of this Article may be disclosed by the FIU under the following circumstances:

(2.1.) to the appropriate unit of the police, the Financial Investigation Unit, the Kosovo Intelligence Agency, the competent prosecutor, the Kosovo Customs, the Tax Administration Department of the Ministry of Economy and Finance or KFOR, if the information would be relevant to investigations within its competence, or to a body outside Kosovo with similar functions to the FIU;

(2.2.) to a public or governmental body of the Republic of Kosovo if such disclosure of information is necessary for the FIU;

(2.3.) to bodies responsible for law enforcement, or performing a similar role to the FIU, outside Kosovo, if such disclosure is necessary or of assistance to the FIU in performing its functions;

(3) All the data, information and records are disclosed by the FIU for intelligence purposes only, in order to provide a ground basis for investigations. They cannot be utilized as evidence before a Court unless the prior written approval of the Director, who will authorize such disclosure only in case there are no other possibilities for the law enforcement bodies to obtain the relevant evidences elsewhere and/or in another way."

211) In the case in hand, the reports prepared by FIU were disclosed to the Prosecution pursuant to Article 15 (2.1). From Article 15 (3) of the above mentioned law it is apparent that the disclosure of information is restricted for intelligence purposes only and can be only used in order to provide a ground basis for investigation. The use of the disclosed information in court proceedings is dependent on prior written approval of the Director of the FIU.

212) The reports disclosed by FIU contained in the case files are clearly marked as strictly confidential, together with the following written instruction given on the first page:

"The data considered in this document is to be used only for intelligence purposes and is not to be disseminated or disclosed, in whole or in part, to any person, agency or organization,

or used in any judicial or administrative proceedings, without the prior written consent of the Financial Intelligence Center."

213) The Court is of the opinion that no prior written consent of the Director of the FIU was given in the present case as it is not in the files received from the Prosecutor. There is also no written request from the Prosecutor to obtain such consent.

214) A written approval for utilization of the reports as evidence in Court cannot be inferred from the statement in the first paragraph of the reports where it is written "[*i]n accordance with Law No. 03/L-196 we are disclosing this report for further actions as may be required*". In the opinion of the Court, a written approval of the Director of FIU must be detailed and directed. It must not only make reference to the particular investigative proceedings but also specify in detail the evidence which is approved for use in Court. In addition, an approval must also outline why the Prosecutor considers the subsidiary element to be fulfilled, i.e. why there are no other possibilities for the law enforcement bodies to obtain the relevant evidences elsewhere and/or in another way. A general approval as included in the present reports does not fulfill these requirements and runs contrary to the object and purpose of Article 15 (3) which is to establish a safeguard mechanism against bypassing the strict legal requirements for investigative measures foreseen in the CPC. Furthermore, the evidence used by the Prosecution in the present case can neither be considered as admissible because of a hypothetical possibility of a written approval by FIU nor can the use of evidence before court be approved retroactively.

215) Having considered the above the Court finds the FIU reports dated the 21st June 2011, the 30th January and the 29th March 2012 inadmissible evidence because the FIU Director did not issue a written approval as required by Article 15 (3) of the Law on the Prevention of Money Laundering and Terrorist Financing.

Summary

216) The following evidence is inadmissible and shall be excluded from the files and sealed:

- the evidence obtained during the search of the house in C. conducted on the 28th April 2010;
- the evidence obtained during the search conducted at the server room of the Kosovo Assembly building on 28 April 2010,

- the statement of the defendant Fl. L.,
- the statement of the witnesses: B. P., held on the 8th November 2011[39], R. E., held on the 9th November 2011[40], V. O., held on 3 April 2012[41] and A. I., held on the 11th November 2011[42],
- the statements (and their transcripts) of M. S. before the Kosovo Anti – Corruption Agency (KACA),
- evidence obtained by the Financial Intelligence Centre/Unit (reports dated 21 June 2011, 30 January and 29 March 2012).

V. Requests to dismiss the indictment

1. *Applicable standard of review*

217) The motion to dismiss the Indictment is provided by Article 250 of the CPC which allows the defendant to request its dismissal if there is not sufficient evidence to support a well-grounded suspicion that he committed the criminal offence with which he is charged.

218) As to the requests to dismiss the Indictment, the CPC provides unambiguous criteria that have to be considered. Article 250 (1) reads as follows:

> *Prior to the second hearing, the defendant may file a request to dismiss the indictment, based upon the following grounds:*
>
> *1.1. the act charged is not a criminal offence;*
>
> *1.2. circumstances exist which exclude criminal liability;*

[39] Binder 19b, pages 256 – 263.
[40] Binder 19b, pages 274 – 278.
[41] Binder 19b, pages 382 – 402.
[42] Binder 19b, pages 285 – 295.

1.3. the period of statutory limitation has expired, a pardon covers the act, or other circumstances exist which bar prosecution; or

1.4. there is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment.

219) In accordance with Article 253 (1) CPC:

For every request to dismiss the indictment under Article 250 of the present Code, the single trial judge or presiding trial judge shall render a ruling to dismiss the indictment and to terminate the criminal proceedings if he or she determines that:

1) *the act charged is not a criminal offence;*
2) *circumstances exist which exclude criminal liability;*
3) *the period of statutory limitation has expired, an amnesty or pardon covers*
4) *the act, or other circumstances exist which bar prosecution; or*
5) *there is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment.*

220) A well-grounded suspicion is defined in Article 19 (1.12) of the CPC as "possession of admissible evidence that would satisfy an objective observer that a criminal offence has occurred and the defendant has committed the offence". The "objective observer" standard requires evidence which would convince most people that a crime was committed by the defendant.

221) Article 241 of the CPC requires that the Indictment must determine the alleged criminal offense with precision by stating the time and place of the commission of criminal offence, the object upon which and the instrument by which the criminal offence was committed and other necessary circumstances. Under Article 1 (3) of the CPC definitions of crime must be strictly construed, interpretation by analogy is not permitted, and if there is an ambiguity, the definition of the crime shall be interpreted in favor of the person being prosecuted.

222) The Defence Counsels of all the Defendants have filed requests to dismiss the Indictment on the ground prescribed in Article 250 (1.4) of the CPC which provides that a dismissal can be granted

if there is found to be a lack of sufficient evidence to support a well-grounded suspicion that their clients committed the criminal offences they are indicted.

223) The Prosecutor responded in writing to the requests of Defence Counsels. He sustained his opinion that every charge against the defendants is supported by sufficient evidence for a well-grounded suspicion that the defendants committed the criminal offences with which they are charged.

224) It must be stressed that in the course of the criminal proceedings against the defendants the substantive law was subject to fundamental changes. In accordance with Article 3 (1) of the Criminal Code, Law 04/L- 082 of 2012 (which entered into force on the 1st January 2013) the law in effect at the time a criminal offence was committed shall be applied to the perpetrator. In the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply. Therefore in the case of each charge the Court will compare the appropriate provisions of the previous and present Criminal Codes in order to determine which law is more favorable for the defendants.

2. Count 1 against F. L., Fl. L., D.L., E.L. and N. K.

225) F. L., Fl. L., D.L., E.L. and N. K. are charged with the criminal offence of organized crime in violation of Article 274 paragraph 3 as read by paragraph 1 of the old CCK and punishable by a fine of up to 500.000 euros and by imprisonment of seven to twenty years, read in conjunction with Article 23 of the old CCK.

226) As it is alleged by the Prosecutor from 2008 to 2010, and as to money laundering until 2012 in Kosovo, the defendants acted as members of an organized criminal group which committed serious crimes as specified (misappropriation in office, entering into harmful contracts, abusing official position, accepting bribes, money laundering). The target of the group was to award lucrative road construction, respectively road maintenance tenders to road construction companies that promised the payment of respective bribes in the amount of 20% up to the overall value of the contracts. The criminal group was alleged to be structured and its members acted in concert for a significant period of time. The members were linked by family or friendship relations with F. L. who served as a head of the group.

227) As it is stated in the Indictment D.L. assisted F. L. by laundering the bribe money as he gave private loans in the amount of at least 50.000 EUR and made substantial payments for the legal expenses of F. L. exceeding 400.000 EUR.

228) Fl. L. was to launder bribe money for F. L. by issuing cash deposits for the medical treatment of F. L.'s late wife in 2009 and 2010 in the amount of at least of 15.779,31 EUR.

i. Applicable Law

229) Article 274 paragraphs 1 and 3 of the old CCK (applied by the Prosecutor in the Indictment) stipulates 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.*
>
> *(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.*

The necessary legal definitions are contained in paragraph 7 of this Article which reads as follows:

> *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.*

230) The offence of organized crime requires the commission of an 'underlying' offence to be completed in addition to the offence of organized crime under Article 274 of the old CCK. The formulation used throughout Article 274 of the old CCK clearly stipulates that the commission of a basic offence is a constitutive element to this offence. Otherwise, an individual could be found guilty for the same act, forming part of both criminal offences, of organized crime and of the underlying offence.[43]

231) With regard to the criminal offence of organized crime, the new Criminal Code is not more favorable for the Defendants than the Provisional Criminal Code. Therefore, in accordance with the principle established in Article 3 (1) of the CCK, Article 274 of the old CCK as the law in effect at the time the alleged criminal offence was committed shall be applied.

ii. Findings of the Court

232) There is no sufficient evidence for a well-grounded suspicion that D.L. and Fl. L. committed the criminal offence of organized crime with which they are charged.

233) The Court concurs with the submission of the Defence that the very fact that D.L. and Fl. L. are brothers of the defendant F. L. is not sufficient to conclude that they are members of the alleged organized group conducted by him. To assess properly the relations between these three defendants it is necessary to take into account characteristics of Kosovo society based on family relations, where support between family members is one of the most important principles. For these reasons it is difficult to find criminal elements in financial support of F. L. by D.L. for medical treatment of his late wife when she was staying in the hospital in Vienna. Furthermore, the fact that Fl. L. paid for the defence of F. L. when his case was tried before the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague does not raise doubts that it was natural behavior of brothers in Kosovo Albanian society.

234) Despite of these family relations between F. L., D.L. and Fl. L. it must be underlined that the precondition to state that the offence of organized crime exists is the commitment of an underlying crime. As it will be presented in further part of the reasoning there is no well-grounded suspicion that Fl. L. and Durim Lima have committed the second offence they are charged with, that is money laundering. This situation additionally supports the decision of the

[43] Supreme Court of Kosovo, Ap-Kz no. 61/2012, Judgment of 2 October 2012.

Court to dismiss the charge of participation of Fl. L. and Durim Lima in the criminal offence of organized crime and to terminate the proceedings against them.

235) With regard to F. L., N. K. and E.L. the Court considers it necessary to examine during the main trial whether they committed the offence of organized crime. The analysis of the evidence collected by the Prosecutor during the investigation justifies the existence of a well-grounded suspicion for this charge. This conclusion is supported by admissible evidence presented by the Prosecutor such as the statement of M. S., results of interception and metering of telecommunication, the analysis of the items obtained during the searches conducted in premises belonging to the defendants and offices used by them, as well as the MTPT documents from the procurement procedure. Additionally, international procurement law experts found many violations of the Law on Public Procurement for the tender proceedings conducted by the MTPT. The experts assessed that number and character of violations may lead to the conclusion that the proceedings were intentionally violated. The analysis of statements of M. S. in conjunction with content of messages sent by the Defendants to each other and the character of their relations also support a well-grounded suspicion that they committed the offence with which they are charged.

3. Count 2 against Fatmir Lima and N. K.

236) F. L. and N. K. are charged with the offence of misappropriation in office in violation of Article 340 paragraph 1 and 3 of the old CCK and punishable by imprisonment of one to ten years, read in conjunction with Article 23 of the old CCK.

237) The Prosecutor alleges that in the years 2008 and 2010 in Kosovo, F. L. and N. K. in their official positions as the MTPT Minister and the MTPT Chief of Procurement administered the usage of the MTPT budget. Whereas F. L. bore ultimate budget responsibility, N. K. made use of the assigned budget by signing legally binding contracts with the companies *T.* and *M.* for the tenders upon instruction of F. L.. The conclusion of the contracts created legally binding civil claims against the MTPT budget and lead to the execution of the claims and payouts by the Ministry of Finance.

238) The Prosecutor further claims that the defendants misappropriated the MTPT financial budget while performing their duties as they dishonestly applied the budget to their own use by awarding the tenders to *T.* and *M. Company* in a preselected and manipulated process in exchange of bribe money. They received money benefit – the bribes – which turned out to be at least 250.000 EUR and as such exceeded well the 5.000.000 EUR limit as foreseen by Article 340 paragraph 3 old CCK.

i. Applicable Law

239) Article 340 of the old CCK, applied in the Indictment by the Prosecutor, reads as follows:

> *(1) An official person who, with the intent to obtain an unlawful material benefit for himself, herself or another person, appropriates money, securities or other movable property entrusted to him or her because of his or her duty or position within a public entity or a legal person shall be punished by imprisonment of six months to five years.*
>
> *(3) When the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5.000 EUR, that perpetrator shall be punished by imprisonment of one to ten years.*

240) "To appropriate" means to take possession of or make use of exclusively for oneself, often without permission. The property is entrusted to somebody if is given over to for care, protection, or performance.

241) To assess properly the grounds of the charge it is necessary to refer to the scope of duties and competences of the defendants as the Minister of Transport and Telecommunication (F. L.) and the Chief of Procurement (N. K.) in reference to budget.

242) Position of ministers are determined in general by the Constitution of the Republic of Kosovo, *the Regulation No. 2001/19 on the Executive Branch of the Provisional Institutions of Self-Government in Kosovo* (in force until October 2010) and the *Law No.03/L –189 on the State Administration of the Republic of Kosovo (*in force since October 2010).

243) Under section 1.3 of *the Regulation on the Executive Branch of the Provisional Institutions of Self-Government in Kosovo* each Minister shall, in accordance with policies set by the Government:

(a) lead and represent his or her Ministry;

(b) be accountable to the Assembly for matters concerning his or her Ministry;

(c) set the political direction for the work of the Ministry;

(d) issue decisions and administrative instructions in order to regulate the activities of the Ministry in general or its particular fields of activity;

(e) carry out other tasks within the framework of the Ministry's responsibilities as determined by legislation; and

(f) report to the Assembly on a periodic basis, as well as at the request of the Assembly, on the activities of the Ministry, including the use of all funds received.

244) As it is provided by Section 1.7 b of the Regulation, in carrying out their responsibilities and functions, Ministers shall ensure that their respective Ministries ensure the most appropriate, cost-effective, transparent and accountable allocation of funds received from the Budget for the Provisional Institutions of Self-Government and other sources.

245) The position of the Minister of Transport and Telecommunication was further regulated in the Annex VIII of the Regulation, and its provision (ix) provides that he shall:

"in the specific sector of road infrastructure, develop public road maintenance and construction programs, secure funding and organize the award of concessions, as appropriate; oversee the provision and management of the road infrastructure, including the performance of technical, organizational and developmental tasks related to the construction, maintenance and protection of public roads, control of the state of the roads, and maintenance of documentation on public roads and road traffic."

246) The most significant law in Kosovo affecting public internal financial control is the *Law on Public Financial Management and Accountability* (Law No. 03/L-048). This law covers the arrangements for the development of the budget and the processes for its approval, including parliamentary processes, as well as the arrangements for transfers and for reporting on budget outcomes. The law also defines "public money", the organisation of the Ministry of Finance and Economy and appointment of key officials, capital and operating expenditure, financial management, accounting, budget accountability, and financial reporting systems for public authorities and

public undertakings in Kosovo; it prescribes the powers and duties of the Minister of Finance and Economy and other public authorities concerned with these matters.

247) The law in Article 1.1 defines "budget organization" as any public authority or public undertaking that directly receives under an Appropriations Law an appropriation that is not a component of a larger aggregate appropriation provided to another public authority or public undertaking. It also prescribes the administrative structure that budget organizations of all types are to establish to ensure appropriate financial management arrangements. This structure includes a chief administrative officer (who is the chief official), an internal auditor, a chief financial officer, a procurement officer, and a certifying officer. The law also specifies the arrangements for the receipt and expenditure of public money for accounts within the Kosovo Consolidated Fund. Part VIII of the law sets out the requirements for reporting, accounting, auditing and financial control, including a requirement for the Ministry of Finance and Economy to prepare a budget classification system and chart of accounts using applicable standards prepared by the International Federation of Accountants (IFAC).

248) The position of a chief administrative officer is regulated in Article 10 which stipulates:

10.1

A Chief Administrative Officer shall have principal legal responsibility for ensuring that his/her budget organization, (…), and its personnel, thoroughly and adequately comply with, observe and implement all applicable provisions of the present law and the FMC Rules.

10.2

A Chief Administrative Officer shall, inter alia, be specifically responsible for

a) *establishing internal financial controls within the budget organization, autonomous executive agency or public undertaking in accordance with the FMC Rules,*

b) *delegating functions associated with the collection and expenditure of public money in accordance with the FMC Rules,*

c) *establishing an accountability framework for assessing and managing the performance of any personnel who are delegated such functions,*

d) establishing and applying internal disciplinary measures to remedy situations where personnel with such delegated functions are not performing such functions adequately or properly, and

e) notifying the Auditor General of any circumstances giving rise to a reasonable belief that there has been a violation – by any person or undertaking - of the present law, the FMC Rules or any other law.

249) As it is provided in Article 12 (1) of the Law each budget organization shall have a Chief Financial Officer. His duties and competences are further developed in paragraphs 4 and 5 (relevant for the case) which read as follows:

(4) Every CFO shall be responsible for the proper and lawful financial operations of the concerned budget organization, autonomous executive agency or public undertaking.

(5) In the case of the CFO of a budget organization or a autonomous executive agency, such CFO shall have the authority and responsibility for:

(i) developing the proposed budget and appropriations request of the budget organization or autonomous executive agency;

(ii) ensuring that all transactions are accurately recorded in the Treasury Accounting Record;

(iii) ensuring that all legitimate invoices received are promptly submitted for payment through the Treasury system;

(iv) overseeing and supervising all aspects of budget reporting; and

(v) any function delegated to the CFO in accordance with the FMC Rules. All work of the CFO must strictly comply with the FMC Rules.

250) In accordance with Article 13.1 each budget organization, autonomous executive agency and public undertaking shall have a Procurement Officer, who shall be responsible for conducting the budget organization's procurement activities in accordance with the Law on Public Procurement.

251) As results from Article 34.1 the Chief Financial Officer of a budget organization shall inform the General Director of Treasury of

(i) *any contract entered into by the budget organization and any modification to a contract previously entered into by the budget organization if the contract obligates the budget organization to make payments from public money in the current fiscal year or in future fiscal years, and*

(ii) *any non-contractual payment obligation of the budget organization as described in paragraph 3 of this Article.*

252) Rules of payment are prescribed in Article 38 and 39 of the Law:

"38.1 No money shall be released from the Kosovo Consolidated Fund for the purpose of making a payment in the absence of a currently effective allocated funds notice authorizing the use of such money to make such payment.

38.2 The process to be complied with for the making of payments authorized by an allocated funds notice shall be established by the FMC Rules.

39.1 The CFO of a budget organization shall be responsible for ensuring that every valid invoice and demand for payment for goods, services and/or works supplied to the budget organization is paid within thirty (30) calendar days after the budget organization receives such an invoice or demand for payment.

39.2 Where any person has issued such an invoice or demand for payment to a budget organization, and the concerned amount is more than sixty (60) days overdue, the person may submit a copy of the concerned invoice or demand for payment to the Treasury. Upon receipt of a copy of such an invoice or demand for payment, the General Director of the Treasury shall, within the next thirty (30) days, make an inquiry to the budget organization to ensure (i) that the invoice or the demand for payment is valid and that the concerned goods, services and/or works have been supplied, and (ii) that the concerned amount has not been paid and is more than sixty (60) days overdue. If the result of such inquiry is positive, the Treasury shall pay the concerned amount and shall not be required to obtain the prior approval of the concerned budget organization. In such event, the Treasury shall have the authority to execute a delegated expenditure notice without the prior approval of the concerned budget organization."

ii. Findings of the Court

253) The facts presented by the Prosecutor to justify the charge of misappropriation in office do not constitute the criminal offence stipulated in Article 340 old CCK as they do not contain all the necessary elements of a criminal offence.

254) The analysis of the circumstances of the case leads to the conclusion that F. L. and N. K. did not appropriate money from the budget of the Ministry of Transport and Telecommunication as they did not take possession of it and did not make use of it exclusively for themselves. F. L. as the Minister was indeed responsible for proper use and due spending of funds which were appropriated to the budget organization he was head of, however, there is no evidence that he used the money for himself. The Prosecutor did not claim that the spending described in the Indictment was not performed in accordance with the *Law on Public Financial Management and Accountability* and within the organizational framework provided by it. As to the contrary, the spending was based on legally binding contracts concluded between the Ministry of Transport and Telecommunication and companies who won tenders for specific road constructions as a result of procurement procedure.

255) The Prosecutor seems not to notice that the money spent from the budget of the Ministry of Transport and Telecommunication was appropriated for road construction and this work was performed by contracting companies.

256) With regard to N. K., it must be also underlined that he was the Head of Procurement Department in the Ministry of Transport and as such was responsible for proper conduct of procurement proceedings. He was not entrusted with any funds of the MTPT, therefore he also could not have appropriated them.

257) Therefore the Court dismisses the charge of misappropriation in office against F. L. and N. K..

258) The alleged violations during the procurement procedures which were won by the Companies T. andM.(included in the indictment) fall within Count 4 which is not dismissed and will be explained in a further part of the reasoning.

4. Count 3 against F. L., N. K., E.L. and F. Z.

259) F. L., N. K., E.L. and F. Z. are charged with entering into harmful contracts in violation of Article 237 paragraphs 1 and 2 of the old CCK, punishable by imprisonment of one to ten years, where

the perpetrators of the offence cause damages exceeding 100.000 euros, read in conjunction with Article 23 of the old CCK (co-perpetration) as to F. L. and N. K. and Article 25 of the old CCK (assistance) as to E.L. and F. Z..

260) The Prosecutor alleges that N. K. upon the instructions of F. L. concluded the contracts for the public tenders with the companies *T.* and *M.* with the intention to receive a personal benefit (bribe money) in return. In the case of the tender summer maintenance 2009, Gjilan region, the winning company *T.* through the intermediary E.L. paid a bribe in the amount of 250.000 EUR to F. L. and his close associates.

261) The concluded contracts were harmful because there were cheaper companies fulfilling the formal criteria in the respective tender bidding process that able to properly execute the work. The caused damage in the opinion of the Prosecutor amounts at least to the overall value of the tenders as specified in Count 1 which is 2.476.607,50 EUR.

i. Applicable Law

262) As in the course of the criminal proceedings against the defendants the substantive law has changed, the Court has to verify which law is more favorable for the perpetrator. The comparison of the elements of a criminal offence of entering into harmful contracts in both Criminal Codes leads to conclusion that the more favorable law for the defendants is the new one.

263) Article 237 of the old CCK reads as follows:

> *(1) A representative or an authorized person of a business organization or legal person which engages in an economic activity who enters into a contract that he or she knows to be harmful for the business organization or legal person, or enters into a contract contrary to his or her authorization and thereby causes damage to the business organization or legal person shall be punished by imprisonment of three months to three years.*
>
> (2) When the perpetrator of the offence provided for in paragraph 1 of the present article accepts a bribe or causes damage exceeding 100.000 EUR, the perpetrator shall be punished by imprisonment of one to ten years.

The CCK in force since the 1st January 2013 provides in Article 291 as follows:

> *(1) A responsible person who engages in an economic activity, enters into a contract that he or she knows to be harmful for the business organization, or enters into a contract contrary to his or her authorizations and thereby causes damage to the business organization shall be punished by imprisonment of three (3) month to three (3) years.*
>
> (2) *When the perpetrator of the offense provided for in paragraph 1 of this Article accepts a bribe or causes damage exceeding one hundred thousand (100,000) EUR,the perpetrator shall be punished by imprisonment of on (1) to ten (10) years*.

264) In accordance with Article 291 of the CCK, the criminal offence of entering into harmful contracts may be committed only by a responsible person who engages in an economic activity and through his/ her activities causes damage to the business organization.

265) Article 120 (7) of the CCK defines business organization as any natural or legal person or group of such persons who are engaged in economic activity and defined and regulated by the Law on Business Organizations (LAW No. 02/L-123). In accordance with Article 2 (2.1) *"Kosovo business organization"* is a general term which means and includes any of the business organization types established in Kosovo under the present Law: a personal business enterprise, a general partnership, a limited partnership, a limited liability company and a joint stock company.

266) The old CCK in Article 237 paragraph 1 provides a different definition of the criminal offence of entering into harmful contracts providing that the offence could be committed not only by a representative or an authorized person of a business organization but also by a representative or an authorized person of a legal person. The result of the acts taken by these persons should be a damage caused not only to a business organization but also to a legal person.

267) In the opinion of the Court, the definition of the offence of entering into harmful contracts provided in the new Criminal Code is more favorable for the defendants as the category of subjects able to commit such offence and of potential injured parties is definitely narrower.

ii. *Findings of the Court*

268) The Court finds that the alleged acts of F. L., N. K. and E.L. do not fulfill the element of "causing damage to the business organization" as required for by Article 291 of the CCK. The MTPT does not constitute a "business organization" within the meaning and definition of the Law on Business Organizations.

269) The only defendant who could commit this criminal offence is F. Z. who is a responsible person acting for *T. Company.* However, there is no reason to believe that by concluding contracts with the MTPT he caused any damage to this business organization. Quite the opposite, for *T. Company* the contracts for road construction were profitable.

270) Therefore, the Court dismisses the charge of entering into harmful contracts against F. L., N. K., E.L. and F. Z..

5. Count 4 against F. L., N. K. and E.L.

271) F. L., N. K. and E.L. are charged with abusing official position or authority in violation of Article 339 paragraphs 1 and 3 of the old CCK, punishable by imprisonment of one to eight years, in conjunction with Article 25 of the old CCK (assistance) for E.L. Article 23 of the old CCK (co-perpetration) as to F. L. and N. K., additionally read in conjunction with section 117.1 a. and d. of *the Law on Public Procurement* and additionally as read in conjunction with the following crime of accepting bribes as specified in Count 5.

272) The Prosecutor alleges that F. L., N. K. and E.L. abused their official position by negotiating, promising, respectively awarding the construction companies *T.* and *I.-E.* road construction tenders in return of requesting bribes. The tenders were awarded by circumventing and manipulating the legal procurement rules under violation of Section 6.2. of *the Law on Public Procurement,* which forbids the favoring of one company over the other at any stage of the procurement procedure.

i. Applicable Law

273) Article 339 of the old CCK as applied by the Prosecutor in the Indictment reads, in pertinent parts, as follows:

(1) An official person who, with the intent to obtain an unlawful material benefit for himself, herself or another person or a business organization or to cause any damage to another

person or business organization, abuses his or her official position, exceeds the limits of his or her authorisations or does not execute his or her official duties shall be punished by imprisonment of up to one year.

(3) When the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5.000 EUR, the perpetrator shall be punished by imprisonment of one to eight years.

274) The CCK which entered into force on 1 January 2013 provides for a slightly different definition of this criminal offence, and there is also a difference in the punishment that can be imposed.

Article 422 of this Code provides:

1. An official person, who, by taking advantage of his office or official authority, exceeds the limits of his or her authorizations or does not execute his or her official duties with the intent to acquire any benefit for himself or another person or to cause damage to another person or to seriously violates the rights of another person, shall be punished by imprisonment of six (6) months to five (5) years.

2. For purposes of this Article, the abuse of official position includes, but is not limited to:

2.1. intentionally or knowingly violating a law relating to the official's office, duties or employment;

2.2. intentionally failing to perform any mandatory duty as required by law;

2.3. accepting any gift, fee or advantage of any kind as a result of the performance of an official duty unless the acceptance of the gift, fee or advantage is permitted by law;

2.4. misusing government property, services, personnel, or any other thing of value belonging to the government that has come into the official's custody or possession by virtue of the official's office or employment;

2.5. intentionally subjecting another person to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful; or

2.6. intentionally denying or impeding another in the exercise or enjoyment of any legal right, privilege, power, or immunity.

From a comparison of the degree of punishment provided for in the provisions mentioned above the Court concludes that in the present case, where the defendants are charged with the

qualification of the criminal offence as provided for in Article 339 (3) of the old CCK, the new Code is more favorable to the Defendants as the possible punishment is lower. Therefore, in accordance with Article 3 (1) of the old CCK, the new Code shall be applied.

ii. Findings of the Court

275) The Court finds it necessary to verify during the main trial the Prosecutor's allegation whether F. L., N. K. and E.L. committed the offence of the abusing official position or authority. The analysis of the evidence collected by the Prosecutor during the investigation leads to the conclusion that there is sufficient evidence to justify a well-grounded suspicion for this charge against the defendants. This reasoning results mainly from the analysis of the documents from the procurement procedure, opinions presented by experts on procurement law (indicating manipulations and violations of the *Law on Public Procurement*) and the items obtained during the searches conducted in premises belonging to the defendants and offices used by them. Additionally it is supported by the statements of the witness M. S.. All this evidence will be thoroughly examined during the main trial when parties will present their stances.

6. Count 5 against F. L., E.L. and N. K. and count 6 against F. Z.

276) F. L., N. K. and E.L. are charged with accepting bribes in violation of Article 343 paragraph 2 of the old CCK, punishable by imprisonment of six months to five years, in conjunction with Article 23 of the old CCK (co-perpetration), additionally read in conjunction with section 117.1 a. and d. of the Law on Public Procurement.

277) F. Z. is charged with giving bribes in violation of Article 344 paragraph 1 of the old CCK, punishable by imprisonment of six months to five years in conjunction with section 117.1 a. and d. of the Law on Public Procurement.

278) There is a visible inconsistency in the Indictment between the charges and its descriptions as the Prosecutor justifying the charge against F. L., N. K. and E.L. does not state that they accepted bribes, but only limits his allegations to accepting promises of bribes what is substantially different. He alleges that between 2007 and 2010 F. L., N. K. and E.L. accepted promises of bribe payments in exchange of awarding a road construction tender to *T. Company*. F. Z. as the owner

of *T. Company* offered a bribe to get his tender documents fixed and to be awarded with MTPT tenders.

i. Applicable Law

279) In accordance with Article 3 (1) of the new CCK the old CCK shall be applied to all Defendants of the count in question as it is more favorable. The new code provides much higher punishment for convicted persons for the criminal offences of accepting or giving bribes.

ii. Findings of the Court

280) The Court opines that there is sufficient evidence to support a well-grounded suspicion that F. L., N. K. and E.L. committed the offence of accepting the promises of bribes. There is also sufficient evidence to justify a well-grounded suspicion that F. Z. committed the criminal offence of offering bribes.

281) The conclusion of the Court results mainly from the analysis of the documents from the procurement procedure, opinions presented by experts on procurement law and the items obtained during the searches conducted in premises belonging to the defendants and offices used by them. Additionally, it is supported by the statements of the witness M. S. and results of metering of phone calls and messages obtained by the Prosecutor on the basis of the orders for interception and metering issued by the competent Judge. It is necessary to verify all the evidence during the main trial.

7. Count 7 Misuse of Economic Authorization in violation of Article 236 paragraph 1 subparagraph 5 and paragraph 2 of the Criminal Code of Kosovo against F. Z.

282) F. Z. is charged with a criminal offence of misuse of economic authorization in violation of Article 236 paragraph 1 subparagraph 5 and paragraph 2 old CCK, punishable by imprisonment of one to eight years.

283) The charge is based on allegations that between the 21st March 2008 to the 17th April 2008, F. Z., in the capacity of the owner of *T.* Company, seriously violated the rules of business activity by conducting, respectively tolerating a price fixing agreement with *Z. C.* Company (tender for the construction of the road Ponesh – Zhegovac in Gjilan), owned by his brother N. Z., without disclosing that both companies will work together, thus constituting a violation of Section 66.2

of the *Law on Public Procurement.* The offers which were given by *T.* and *Z. C.* contain identical prices in the required positions for which the offers needed to be specified. F. Z. thereby manipulated, respectively tolerated the manipulation of the bidding procedure, which is supposed to be partial.

284) The same way of conduct was applied by F. Z., in the capacity of *T.* company in reference to tender *Summer Maintenance for the Regional Roads, Gjilan for the year 2008 (*between the 11th February and 24 April 2008) when he entered into price fixing agreement with company *E.* which is owned by I. S.. The tender was won by another company – *M..*

285) Additionally with regard to this charge, the Prosecutor states that F. Z. constructed the road Ponesh – Zhegovac defectively despite knowing that such defects would not be officially accepted by the MTPT. He thereby requested E.L. for help who told him to continue and that he would not be fined.

i. Applicable Law

286) In accordance with Article 236 paragraph 1 and subparagraph 5 of the old CCK, a responsible person within a business organization or legal person who engages in an economic activity shall be punished by imprisonment of six months to five years if he or she in any other way (*than that stipulated in subparagraphs 1 – 4*) seriously violates the law or the rules of business activity which relate to the disposal, use or management of property with the intent to obtain an unlawful material benefit for the business organization or legal person where he or she is employed or for another business organization or legal person. The same provision is included in Article 290 (1) of the new Criminal Code wherefore the Court will apply the old CCK as the law in force when the alleged criminal offence was committed.

ii. Findings of the Court

287) Price fixing is a conspiracy between business competitors to set their prices to buy or sell goods or services at a certain price point. This benefits all businesses or individuals that are on the same side of the market and involved in the conspiracy, as prices are either set high, stabilized, discounted, or fixed. Price fixing violates competition law because it controls the market price or the supply and demand of a good or service. This prohibits other businesses from being able to

compete against the businesses in the price fixing agreement, which prevents the public from being able to expect the benefits of free competition.

288) The Court assesses that there is sufficient evidence for a well-grounded suspicion that F. Z. committed the criminal offence with which he is charged. This is supported by the documentary evidence such as tenders filed by the companies *T., M.* and *Z. C.*, expert's analysis of them and official documents produced during the procurement proceedings. Only during the main trial will it be possible to verify whether the charge is justified.

8. Count 8 against F. L., D.L. and Fl. L.

289) F. L., D.L. and Fl. L. are charged with money laundering in violation of Article 10 paragraph 2 point b of the UNMIK Regulation no 2004/02 as amended *On the Deterrence of Money Laundering and Related Criminal Offences* and punishable by imprisonment up to ten years a fine up to three times the value of the property which is the subject of the criminal offence.

290) The Prosecutor alleges that D.L. invested the bribe money received by L. family by granting at least three private loans in the amounts of 20.000 EUR, 20.000 EUR and 9.950 EUR. He was furthermore involved in the payment of F. L.'s legal expenses. In November 2011 he sold an undeclared land to A. D. for the amount of 500.000 EUR. On 6 December D.L. transferred 316.900 EUR and on 24 January 2012 120.000 EUR to the account of F. L.'s lawyer.

291) Fl. L. deposited from the bribe money that the L. family received in cash on 23 April 2009 9.220 EUR, on 11 February 2010 5.436,20 EUR and on 29 April 2010 another 1.123 EUR to the bank account of the hospital in Vienna.

292) The Prosecutor alleges that D.L. and Fl. L. enjoyed a lifestyle that they cannot afford with their officially declared earnings, thus demonstrating that they are in possession of undeclared funds.

i. Applicable Law

293) In accordance with Article 3 (1) of the CCK the UNMIK Regulation no 2004/02 as amended *On the Deterrence of Money Laundering and Related Criminal Offences* shall be applied to all the Defendants. The new Law on Money Laundering provides exactly the same regulations to this criminal offence.

294) Article 10.2 of the Regulation stipulates as follows:

> *Whoever, knowing or having cause to know that certain property is proceeds of some form of criminal activity, and which property is in fact proceeds of crime, or whoever, believing that certain property is proceeds of some form of criminal activity based on representations made as part of an undercover investigation conducted pursuant to UNMIK Regulation No. 2002/6 of 18 March 2002 on Covert and Technical Measures of Surveillance and Investigation:*
>
> *(b) Converts or transfers, or attempts to convert or transfer, the property for the purpose of assisting any person who is involved in, or purportedly involved in, the commission of the criminal offence that produced the property to evade the legal consequences, or apparent legal consequences, of his or her actions.*

295) "Proceeds of crime" are defined in Article 2 (1.29) of this Law as "*any property derived directly or indirectly from a predicate criminal offence. Property derived indirectly from a predicate criminal offence includes property into which any property directly derived from the predicate criminal offence was later converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property at any time since the commission of the criminal offence*".

ii. Findings of the Court

296) The precondition to find that a person has committed a criminal offence of money laundering is to establish that there was a predicate criminal offence and property to be an object of money laundering which derives directly or indirectly from it. The Indictment is absolutely ambiguous and not precise from which criminal offence the money alleged to be proceeds of crime are to come from. The Prosecutor limits himself only to the statement that there was "bribe money" received by L. family without indication any details of these undue gifts or advantages. It is not a role of the Court to guess what the Prosecutor meant while levied this charge.

297) Even if it is presumed that the Prosecutor connects the charge of money laundering with the bribes covered by the Indictment in its Charge 6, it is worth to mention again the lack of consistency as the Prosecutor uses interchangeably "accepting bribes" and "accepting promises

of bribes". As stipulated in the Indictment, F. L. is charged only with accepting the promises of bribes as and as such there is no indication that he received any money.

9. Count 9 and 10 against G. Z.

298) G. Z. is charged with obstruction of evidence in violation of 309 paragraph 2 of the old CCK, punishable by imprisonment up to three years, read in conjunction with Article 25 of the old CCK (co-assistance) and with destroying or concealing archive materials in violation of 324 of the old CCK, punishable by imprisonment up to three years.

299) There are the same factual circumstances of both charges against G. Z. which is admitted by the Prosecutor. It seems that the new charge was levied against him because of the need to extend the investigation against him and justify collecting new evidence.

300) The Prosecutor alleges that the Defendant on 28 April 2010 as a key holder of the Assembly Building in co-perpetration with others who are still unidentified, destroyed archive materials located in the IT server by repeatedly refusing to hand over the key for the server room to EULEX Prosecutor Joachim Stollberg and EULEX OCIU investigators while the MTPT premises were searched by them. Despite being informed about the urgency of the situation as anyone with administrator rights could delete the files and traces of remote entry to the files and despite being told that no written order was needed, G. Z. demanded to see a written search order before opening the room. Almost two hours after being called for assistance G. Z. agreed to open the door to room 206. Before having done he told the investigators that all MTPT servers were in this room.

301) On entry to the room 206 G. Z. was asked to point out the domain controller which he did. Nevertheless the server was not a domain controller and as such the server in question was not found. Then G. Z. pointed to another server as the domain controller but again it was not the one that investigators were looking for. The investigators then searched all the servers in room 206 but none of them was the one they were looking for. G. Z. told them that the MTPT servers were located in other building but finally it was located at room 306 of the Assembly building.

302) When the investigators found the server in question they found only four files of the MTPT and a file wiping icon.

i. Applicable Law

303) Article 309 (2) of the Provisional Criminal Code provides as follows:

> *Whoever, with the intent to prevent or hamper the collection of evidence in court proceedings, minor offences proceedings, administrative proceedings, proceedings before a notary public or disciplinary proceedings, conceals, destroys, damages or renders unserviceable, in whole or in part, the property of another person or documents that may be used as evidence, shall be punished by a fine or by imprisonment of up to three years.*

304) The same provision is contained in Article 394 (2) of the new Criminal Code. Therefore in accordance with Article 3.1 of the new Criminal Code the old one shall be applied to the Defendant.

305) Article 324 of the Provisional Criminal Code reads:

> *Whoever destroys, hides or renders unusable archive materials or removes such materials from Kosovo without the prior permission of a competent authority shall be punished by a fine or by imprisonment of up to three years.*

Article 416 of the new Criminal Code provides:

> *Whoever unlawfully destroys, hides or renders unusable archive materials or removes such materials out of the country shall be punished by a fine or by imprisonment of up to three (3) years.*

306) There is a visible difference between the two Codes as to the formulation of elements of a criminal offence of destroying archive materials. The Court concludes that the old Code shall apply to the alleged criminal conduct of the Defendant as it is more favorable to him. This conclusion results from the fact that the notion "unlawfully" is wider in scope than "without the prior permission of a competent authority". It is possible that somebody would destroy archive materials acting in breach of law in the case where there would not be a competent body to permit such action which would constitute a criminal offence under the new Code, but not under the old one. On the other hand, when somebody destroys archive materials without being authorized to do so by a competent body is also acting unlawfully as competences must have their source in the law.

ii. Findings of the Court

307) Both charges against G. Z. are based on the same factual circumstances – his behavior during the search conducted in the Assembly building on 28 April 2010. The first investigation against the Defendant was initiated on 2010 because of a grounded suspicion that he intentionally destroyed the evidence that could have been used in criminal proceedings (Article 309 (2) of the old CCK), then after the two-year period for the investigation expired a new charge was presented to him of destroying archive materials under Article 324 (1) of the old CCK.

308) It is clear from the Indictment and the reasoning of the ruling on initiation of investigation against G. Z. that the only reason to present the second charge to him was to obtain an additional two years for continuing to search for evidence against him. The Court does not accept such practice as it is purported to circumvent the law which lays out strict provisions that must be followed in relation to the permitted length of the investigation. Additionally, it is artificial to multiply charges based on the same circumstances. Such a solution is contrary to the principle that nobody shall be punished twice for the same criminal offence.

309) Additionally, the Court underlines that the legal designation of the criminal offence as set forth by the Prosecutor is not binding. The Court is competent to assess the behavior of a defendant independently and as such is not bound to follow the approach suggested by the Prosecutor. The only limits the Court is bound by is in relation to the scope of the Indictment which contains the defendant and specifies the time and place of the commission of the criminal offence, the object upon which the offence relates and the instrument by which the criminal offence was committed, and other circumstances necessary to determine the details of the criminal offence with precision.

310) The charges against G. Z. are based on the report prepared by two police officers who took part in the search in the Assembly Building who are proposed by the Prosecutor to be interrogated in the capacity of witnesses. These witnesses presented their assessment of the behavior of the Defendant which was interpreted by the Prosecution as intentionally obstructing the collection of evidence. The Court agrees with the Defence that all the circumstances of the Defendant's behavior were interpreted by the Prosecutor against the Defendant, and as such the Prosecution did not take into consideration any exculpatory facts which he is obliged to do in accordance with Article 46 (7) of the KCCP.

311) The Prosecutor did not consider at all the difficult situation in which the Defendant was acting. First of all he was a low-level employee of the Ministry of Administration (described by the Prosecutor as a "key- holder") who suddenly was summoned to appear in the office to support the EULEX investigators in conducting their search. It is obvious that he wanted to be presented with the court order which would authorize the search. There is nothing strange in relation to his act to want to contact his superiors in order to seek authority as to whether he should open the doors of the server rooms. He could have been afraid of the consequences of allowing the investigators to enter the server rooms. It must be underlined that these were servers of the Kosovo government which additionally must have increased his fears due to the consequences he and his country may face for allowing other people the access to the servers.

312) The Court finds there is no sufficient evidence to support a well-grounded suspicion that G. Z. committed the criminal offences with which he is charged. As already explained above, the evidence which was collected during the search of the server rooms on 28 April 2010 is considered inadmissible. Additionally, with possible statements of the investigators during the main trial reporting G. Z.'s statements and describing his conduct during the search on 28 April 2010, the Prosecution will not be able to provide sufficient evidence against G. Z. for the criminal offences with which he is charged. This is because the Prosecution has not presented any evidence whatsoever that the defendant has committed the *actus reus* regarding both criminal offences, Destroying or Concealing Archive Materials as well as Obstruction of Evidence, which is the destruction of documents. The fact that there might have been remote sessions and a wiping icon placed on the desktop as stated by the investigators who were present at the scene, does not necessarily lead to the conclusion that documents located on the MTPT server were destroyed at that time. The police investigators reported that there was no date or time stamp applied by windows which would have made it possible to track when the remote session were completed. In addition, the later examination of the server did not provide any evidence that documents were destroyed at that time.

313) Also in relation to the *mens rea* element, the very fact that the defendant G. Z. was reluctant to enable the EULEX investigators access to the servers of the Kosovo government does not suffice to conclude that he acted with intent to obstruct evidence or any archive materials.

10. Count 11 against F. L.

314) F. L. is charged with the criminal offence of unauthorized ownership, control, possession or use of weapon in violation of 328 paragraphs 2 and 4 of the old CCK, punishable by a fine up to 7.500 EUR or by imprisonment of one to eight years.

315) The Prosecutor alleges that F. L. from October / November 2009 onwards until 28 April 2010 and from unspecified date until 28 April 2010 owned, respectively controlled and possessed a pistol 9 mm, including magazine and 10 corresponding bullets, weapon number 10005 and a revolver NAA Model 22 LR Mini, weapon number L0046. He did not have duly authorizations to possess these. The weapons were found during the search of his house in C..

i. Applicable Law

316) The Article 328 (2) of the old CCK reads as follows:

> *Whoever owns, controls, possesses or uses a weapon without a valid Weapon Authorisation Card for that weapon shall be punished by a fine of up to 7.500 EUR or by imprisonment of one to eight years*.

The new Criminal Code in Article 374 (1) provides:

> *Whoever owns, controls or possesses a weapon in violation of the applicable law relating to such weapon shall be punished by a fine of up to seven thousand and five hundred (7,500) EUR or by imprisonment of up to five (5) years.*

317) Having considered the above and taking into account Article 3(1) of the new Criminal Code, the Court finds that the new law is more favourable to the Defendant and as such this new law shall be applied.

ii. Findings of the Court

318) The Court finds that there is no sufficient evidence to support grounded suspicion that F. L. committed criminal offence of unauthorized ownership, control, possession or use of weapon in violation of 328 paragraphs 2 and 4 of the old CCK. This conclusion results from the fact that the only evidence to support this offence was declared to be inadmissible as it was found during the search conducted on 28 April 2010 in the house in C.. The Prosecutor did not propose any other evidence to support his allegations.

11. **Count 12 against F. L.**

319) F. L. is charged with non-declaration of received campaign money in violation of UNMIK Regulation No. 2004/02 as amended *On the Deterrence of Money Laundering and Related Criminal Offences*, Section 10.8 and Section 10.5 read in conjunction with Sections 5.1 and 5.6, and punishable by imprisonment up to five years and a fine up to 100.000 EUR.

320) On 18th October 2007 F. L. received 5000 EUR as a political campaign contribution from I. M. for his election campaign for the mayor of Pristina. F. L. did not declare to have received this amount of money.

i. Applicable Law

321) UNMIK Regulation No. 2004/02 as amended *On the Deterrence of Money Laundering and Related Criminal Offences* imposes obligations on registered candidates connected with financial support of their political activities.

322) In accordance with Section 5.1 of the Regulation registered candidates shall not accept any contribution in currency in excess of € one thousand (1,000) from a single source in a single day. Additionally, Provision 6 of this section requires a candidate to certify in his/her candidate registration form submitted to the Central Election Commission that he/she shall comply with the requirement as mentioned above.

323) Section 10 of the Regulation provides for the criminal liability of acts and omissions violating the law. In accordance with Provision 2, whoever, in providing any information, or in making reports, certifications or declarations pursuant to (…) paragraphs 4 to 7 of Article 24, of this Law, knowingly makes any materially false statement or willfully omits to disclose material information commits a criminal offence punishable by imprisonment of up to five (5) years and a fine of up to one hundred thousand (100.000) euros.

324) The UNMIK Regulation No. 2004/02 as amended *On the Deterrence of Money Laundering and Related Criminal Offences* has been replaced by the *Law on the Prevention of Money Laundering and Terrorist Financing* which entered into force in October 2010. The new law provides the

same criminal offences and punishment for them as the UNMIK Regulation. Therefore under Article 3 (1) of the CCK the previous law shall be applied.

ii. *Findings* of the Court

325) The interpretation of the provision of the UNMIK Regulation is clear. Not only a head of political party but also a single registered candidate is obliged to disclose in proper form information about financial support received for political activities. Breaching this duty may lead to criminal liability if all elements of the criminal offence as provided by the law are fulfilled.

326) As there is sufficient evidence (data from bank accounts, testimony of a person who had given the contribution) to support a well-grounded suspicion that F. L. committed a criminal offence of non-declaration of received campaign money, the charge should be assessed by the Court during main trial.

Summary

327) As there is no sufficient evidence to support the grounded suspicion that criminal offences were committed, the following charges of the indictment are dismissed:

- organized crime against Fl. L. and D.L. (charge 1),
- misappropriation in office against F. L. and N. K. (charge 2),
- entering into harmful contracts against F. L., N. K., E.L. and F. Z. (charge 3),
- money laundering against F. L., Fl. L. and D.L. (charge 8),
- obstruction of evidence and destroying or concealing archive materials against G. Z. (charges 9 and 10),
- unauthorized ownership, possession or use of weapon against F. L. (charge 11)

328) The following charges of the Indictment are not dismissed as the requests to do so are not grounded:

- against F. L., E.L. and N. K. organized crime in violation of Article 274 paragraph 3 of the old CCK as read by paragraph 1 of the old CCK and punishable by a fine of up to 500.000 EUR and by imprisonment of seven to twenty years, read in conjunction with Article 23 of the old CCK (co-perpetration);
- against F. L., N. K. and E.L. abusing official position or authority in violation of Article 442 of the new CCK, punishable by imprisonment of one to eight years; read in conjunction with Article 23 old CCK (co-perpetration) as to F. L. and N. K. and read in conjunction with Article 25 old CCK (assistance) as to E.L.; and additionally read in conjunction with Section 117.1 a and d of the Law on Public Procurement;
- against F. L., N. K. and E.L. accepting bribes in violation of Article 343 paragraph 1 old CCK, punishable by imprisonment of six months to five years; read in conjunction with Article 23 old CCK (co-perpetration) and additionally read in conjunction with Section 117.1 a and d of the Law on Public Procurement;
- against F. Z. giving bribes in violation of Article 344 paragraph 1 old CCK, punishable by imprisonment of six months to five years;
- against F. Z. misuse of economic authorization in violation of Article 236 paragraph 1 subparagraph 5 and paragraph 2 old CCK, punishable by imprisonment of one to eight years,
- against F. L. non – declaration of received campaign money in violation of UNMIK Regulation No. 2004/02 as amended *On the Deterrence of Money Laundering and Related Criminal Offences*, Section 10.8 and Section 10.5 read in conjunction with Sections 5.1 and 5.6, and punishable by imprisonment up to five years and a fine up to 100.000 euros.

Pristina, 1st July 2013.

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Anna Adamska-Gallant,

Presiding Trial Judge

LEGAL REMEDY: An Appeal against this Ruling might be filed to the Court of Appeals through the Basic Court of Pristina. The Appeal must be filed within five (5) days of the receipt of the written decision (Articles 249 (6), 250 (4) of the CPC).