THE BASIC COURT OF PRISTINA

[The judgments published may not be final and may be subject to an appeal according to the applicable law.]

Case No.: PKR 965/13
PPS 29/11 & 47/12

IN THE NAME OF THE PEOPLE

29 July 2016

EULEX Judge Katrien Gabriël Witteman, acting as Presiding Trial Judge, and EULEX Judge Franciska Fišer and Kosovo Judge Vesel Ismajli as panel members,

In the criminal case against the accused:

1.

First name and surname:	B. M.
Father's name	XXX
Mother's name and maiden name	XXX
Personal Identification Number	XXX
Nationality	Albanian
Citizenship	Kosovar
Date of birth	XXX
Place of birth	XXX
Place of residence	XXX

2.

First name and surname:	L.Q.
Father's name	XXX
Mother's name and maiden name	XXX
Personal Identification Number	XXX

Nationality	Albanian
Citizenship	Kosovar
Date of birth	XXX
Place of birth	XXX
Place of residence	XXX

3.

First name and surname:	B.S.
Father’s name	XXX
Mother’s name and maiden name	XXX
Personal Identification Number	XXX
Nationality	Albanian
Citizenship	Kosovar
Date of birth	XXX
Place of birth	XXX
Place of residence	XXX

4.

First name and surname:	F.S.
Father’s name	XXX
Mother’s name and maiden name	XXX
Personal Identification Number	XXX
Nationality	Albanian
Citizenship	Kosovar
Date of birth	XXX
Place of birth	XXX
Place of residence	XXX

5.

First name and surname:	A.D.
Father’s name	XXX
Mother’s name and maiden name	XXX
Personal Identification Number	XXX

Nationality	Kosovo
Citizenship	Albanian
Date of birth	XXX
Place of birth	XXX
Place of residence	XXX

6.

First name and surname:	A.Da.
Father's name	XXX
Mother's name and maiden name	XXX
Personal Identification Number	XXX
Nationality	Albanian
Citizenship	Kosovar
Date of birth	XXX
Place of birth	XXX
Place of residence	XXX

7.

First name and surname:	M.M.
Father's name	XXX
Mother's name and maiden name	XXX
Personal Identification Number	XXX
Nationality	Albanian
Citizenship	Kosovar
Date of birth	XXX
Place of birth	XXX
Place of residence	XXX

Who were accused through the (adapted) Indictment of Maria Bamieh, EULEX Prosecutor in the Special Prosecution Office of the Republic of Kosovo (SPRK) dated 22 August 2014[1] with the criminal offence of:

[1] For legibility's sake, in this judgment typo's and minor grammatical errors in the indictment have been corrected. The meaning has not been altered in any way.

Count 1

Aggravated Murder pursuant to Articles 23 and 147, paragraphs 4, 9, and 11, of the CCK because: B.M, L.Q., B.S., F.S., A.Da. and M.M. (in co-perpetration with each other and also in co-perpetration with B.H., S.Q. (both already convicted for the same criminal offence), also with the assistance of A.D. contrary to Article 33 of the CCK for unscrupulous revenge or other base motives, and by intentionally endangering the life of one or more persons, deprived N.M. and P.S. of their lives by placing and detonating an improvised explosive device on the ground floor of a building located in Pristina, Bill Clinton Avenue; in Pristina, on 24 September 2007.

Because

Following a long history of violence between the police in FERIZAJ, the ROSU police officers and E.S., and following the murder of Police officer T.R. believed to have been ordered by E.S., the FERIZAJ police together with the ROSU officers planned revenge against E.S. by bombing his restaurant in Pristina. The XXX bar is located in the Bill Clinton Boulevard which is a busy residential area which was full of bars and restaurants. The bomb was placed on the 24th September which was during the Ramadan period of that year and all the bars and restaurants were busy open for people celebrating Syfyr. The size of the bomb and location of its placement and timing meant the suspects intended to kill;

Count 2

Attempted Aggravated Murder, pursuant to Articles 20, 23 and 147, paragraphs 4, 9, and 11, of the CCK because: B.M, L.Q., B.S., F.S., A.Da. and M.M. in co-perpetration with each other and also in co-perpetration with B.H. and S.Q. (both already convicted for the same criminal offence), also with the assistance of A.D., contrary to Article 33 of the CCK, for unscrupulous revenge or other base motives, and by intentionally endangering the life of one or more persons, took immediate action towards depriving X.S., V.Z., L.N., G.S., E.N., N.H., F.B., L.K., S.S., M.K. and T.K. of their lives, by placing and detonating an improvised explosive device on the ground floor of a building located in Pristina, Bill Clinton Avenue, which resulted in the serious wounding of the above mentioned individuals; in Pristina, on 24 September 2007;

Because

Following a long history of violence between the police in FERIZAJ and the ROSU police officers and E.S., and following the murder of Police officer T.R. believed to have been ordered by E.S., the FERIZAJ police together with the ROSU officers planned revenge against E.S. by bombing his restaurant in

Pristina. XXX bar is located in the Bill Clinton Boulevard which is a busy residential area which was full of bars and restaurants. The bomb was placed on the 24th September at 2:10 am. This was the Ramadan period that year and all the bars and restaurants were busy open for people celebrating Syfyr. The size of the bomb, location of its placement and the timing meant the suspects intended to, and did kill, in that N.M. and P.S. were killed, and by this action they attempted to kill X.S., V.Z., L.N., G.S., E.N., N.H., F.B., L.K., S.S. M.K. and T.K. of their lives, by placing and detonating an improvised explosive device on the ground floor of the building where the XXX bar is located in Pristina, which resulted in the serious wounding of the above mentioned individuals; in Pristina, on 24 September 2007;

Count 3

Causing General Danger, pursuant to Articles 23 and 291, paragraphs 1 and 5 of the CCK, because: B.M, L.Q., B.S., F.S., A.D. and M.M. in co-perpetration with each other and also in co-perpetration with B.H. and S.Q. (both already convicted for the same criminal offence), and with the assistance of A.D. caused great danger to human life by detonating an improvised explosive device planted on the ground floor of a building at Bill Clinton Avenue in Pristina, resulting in the death of two persons (N.M. and P.S.), serious bodily injury to eleven persons (X.S., V.Z., L.N., G.S., E.N., N.H., F.B., L.K., S.S., M.K. and T.K.), and substantial material damage to property of several business activities (Ciko, Besa, Uran Shped, Oslo, Pasazh, Noti, Kojota, Fitness Club and XXX); in Pristina, on 24 September 2007;

Because

Following a long history of violence between the FERIZAJ police, the ROSU police officers and E.S., and following the murder of Police officer T.R. believed to have been ordered by E.S., the FERIZAJ police together with the ROSU officers planned revenge against E.S.. They executed a plan and met at the Sheep farm in Rakaj on the 23rd September at around 10 pm. From Rakaj, two persons were sent to get the explosive device, an anti-tank mine and weapons, namely two MP5 weapons. The plan was to bomb the XXX restaurant in Pristina. Upon their return, a bomb was set up, the explosive device namely the Anti-Tank mine, with explosives and fuses. A.Da., B.M and M.M. were instructed what to do. A.D. then left the police to execute the plan and waited for them in EUROPA 92 bar in Kacanik. The two police cars were provided by B.S. and F.S.; the number plates were concealed by B.M. The group then got into the vehicles and went to Pristina to execute their plan. The XXX bar is located in the Bill Clinton Boulevard which is a busy residential area which was full of bars and restaurants. The bomb was placed on the 24th September at around 2:10 am. This was the Ramadan period that year and all the bars and restaurants were busy open for people celebrating Syfyr. The size of the bomb, location of its placement

and the timing meant the suspects intended to kill and to cause danger to persons and property. The consequence of their criminal acts were that N.M. and P.S. were killed, and by this criminal act they attempted to kill X.S., V.Z., L.N., G.S., E.N., N.H., F.B., L.K., S.S., M.K. and T.K., by placing and detonating an improvised explosive device on the ground floor of a building located in Pristina, Bill Clinton Avenue, which resulted in the serious wounding of the above mentioned individuals, and substantial material damage to property of several business activities (Ciko, Besa, Uran Shped, Oslo, Pasazh, Noti, Kojota, Fitness Club and XXX); in Pristina, on 24 September 2007,

After conclusion of the main trial, which was initially held before a trial panel composed of EULEX judge Anna Adamska-Gallant, presiding trial judge and EULEX Judge Malcolm Simmons and Kosovo Judge Vesel Ismajli, panel members, in trial sessions on 11 July, 25, 26 and 27 August 2014, 2, 3, 4, 23, 24 and 25 September, 7, 13, 14 October, 14 and 25 November 2014 (all open to public) and hearings pursuant to Article 291 Par. 2 of the CPC on 16 December 2014, 30 January, 27 February 2015 and 20 October 2015; on which sessions both a Prosecutor and the defendants with their defence counsel were present, and after the main trial started from the beginning pursuant to Article 311 Paragraph 3 of the Criminal Procedure Code of the Republic of Kosovo[2] (CPC) before the current trial panel in public trial sessions on 14 April 2016 and 6, 22, 28 and 29 July 2016, equally in the presence of the Prosecutor, defendants and defence counsel;

Having deliberated and voted pursuant to Article 357 of the CPC on 28 July 2016,

Pursuant to Article 362, 363, 366, 450, 454 and 463 of the CPC,

Issues the following

[2] Code No. 04/L-123

JUDGMENT

Pursuant to Article 363 Paragraph 1 Subparagraph 1.3 of the CPC

1. **The SPRK Prosecutor's charges under Count 1, 2 and 3 of aggravated murder, attempted aggravated murder and causing general danger against the defendant B.M are rejected**
2. **The SPRK Prosecutor's charges under Count 1, 2 and 3 of aggravated murder, attempted aggravated murder and causing general danger against the defendant L.Q. are rejected**
3. **The SPRK Prosecutor's charges under Count 1, 2 and 3 of aggravated murder, attempted aggravated murder and causing general danger against the defendant B.S. are rejected**
4. **The SPRK Prosecutor's charges under Count 1, 2 and 3 of aggravated murder, attempted aggravated murder and causing general danger against the defendant F.S. are rejected**
5. **The SPRK Prosecutor's charges under Count 1, 2 and 3 of aggravated murder, attempted aggravated murder and causing general danger against the defendant A.Da. are rejected**
6. **The SPRK Prosecutor's charges under Count 1, 2 and 3 of aggravated murder, attempted aggravated murder and causing general danger against the defendant M.M. are rejected**
7. **The SPRK Prosecutor's charges under Count 1, 2 and 3 of assistance in aggravated murder, attempted aggravated murder and causing general danger against the defendant A.D. are rejected**
8. **The injured parties are instructed that they may pursue their property claim in civil litigation;**
9. **The costs of proceedings shall be paid from budgetary resources.**

REASONING

Procedural background

1. In the early morning of 24 September 2007, a bomb exploded in the 'XXX' premises at the Bill Clinton Boulevard in Pristina. As a result, two people were killed and several others were injured.

The Bill Clinton Bombing 1 case[3] *(hereinafter: BCB1)*

2. All suspects listed in the indictment that led to the current proceedings were investigated in 2007, as police had a grounded suspicion that they were all involved in the bombing.[4] On 8 October 2007, EULEX Prosecutor Ms. Maria Bamieh (hereinafter: Prosecutor Bamieh) issued a ruling on initiation of investigation against the then suspects **L.Q.**, **B.S.**, B.H., A.B., B.Sh. and S.H.. On 28 January 2008, she issued a ruling initiating investigations against S.Q. and N.C.. On 14 March 2008, she issued another ruling on initiation of investigation against F.H., **B.M**, A.A. and **F.S.**, followed on 9 June 2008 by a ruling on initiation of investigation against A.Al..[5]

3. On 12 August 2008, Prosecutor Bamieh filed an indictment against B.H., S.Q. and N.C. in which she charged them with crimes related to the bombing. The other suspects mentioned above under 2 were not charged 'as there was not sufficient evidence'[6]. The prosecutor did not issue any formal decision terminating the investigation against them.[7]

4. During the main trial of the BCB1 case, all three defendants pleaded not guilty. By judgment dated 22 September 2009, N.C. was acquitted and two other defendants were convicted and sentenced to 25 years imprisonment. This judgment was upheld by the Supreme Court as a second instance in its judgment of 25 May 2012, and the defendants' appeals were finally rejected by a judgment of the Supreme Court as a third instance dated 16 January 2013. A request for the protection of legality with the same Supreme Court by the defence counsel of B.H., supported by the SPRK Prosecutor's opinion, was rejected by judgment dated 5 February 2014.

The Bill Clinton Bombing 2 case (hereinafter: BCB2)

[3] Case P No. 488/08
[4] Indictment dated 22 August 2014, page 5, under A.1
[5] Prosecution Binder 39, tabs 4, 3, 2 and 1 respectively
[6] Indictment dated 22 August 2014, page 5, under A.3
[7] Ruling of the Presiding Trial Judge on Objections to Evidence and Requests to Dismiss the Indictment dated 21 March 2014, par. 85

5. On 7 February 2011, M.Q., the brother of S.Q., presented himself to the prosecutor Bamieh, stating that he had relevant information regarding the bombing.[8]

6. The witness statement of M.Q. triggered new investigations, formally initiated by a ruling on initiation of investigation dated 30 March 2011 (with case number PPS 29/11) against the suspects B.M, F.S. and B.S., expanded on 10 May 2012 to include the defendants L.Q., **A.Da.** and **M.M.**.[9]

7. On 30 June 2011, Prosecutor Bamieh interrogated S.Q. as a witness. The record of the witness hearing contains the following:

> *"[S.Q.]: before we start, before I give the statement I am here to co-operate, all that I am about to say will be proven by the evidence you have here. Another thing is that for the moment I am sharing a cell with [B.H.]. His lawyer is very interested to have my statement but I would like it to stay a secret until the Judge makes his decision about myself as a co-operative Witness. We can start."*[10]

   Subsequently, S.Q. and B.H. gave several witness statements before prosecutor Bamieh and/or the EULEX Police Organized Crime Investigation Unit (OCIU) investigators, in which they admitted to have participated in the bomb attack, and pointed at the now defendants as their co-perpetrators.

8. On 13 April 2012, Prosecutor Bamieh filed with the Court an application to declare S.Q. a Cooperative Witness.[11] Shortly after, on 23 April 2012, she withdrew the application.[12]

9. On 14 May 2012, Prosecutor Bamieh issued a ruling on initiation of investigation (with PPS number 47/12) for the offence of organized crime against the defendants mentioned under 6., based on the same facts as the other charges under investigation.[13] After several extensions, both investigations 29/11 and 47/12 were to expire on 30 September 2013.

10. On 10 July 2013, Prosecutor Bamieh issued a ruling on expansion of investigation, to include N.C. and **A.D.** as defendants. In the reasoning she mentioned that "In the instant case, the well-grounded suspicion against all the defendants arises mainly from the declarations of the witness S.Q. and B.H. together with corroborating metering, SMS and cell site."[14]

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[8] CD verbatim, Annex 13 to the letter of State Prosecutors Wendorf and Hamiti dated 8 April 2015, p. 15 ff.
[9] Prosecution binder 1, p. 17-19
[10] Record of the witness hearing in an investigation dated 30 June 2011, Prosecution binder 13, page 1
[11] Prosecution binder 1, p. 40-44
[12] Prosecution binder 1, p. 44/1
[13] Prosecution binder 1, p. 67-80
[14] Prosecutor's ruling on expansion of investigation dated 10 July 2013, page 2 of 15

11. Two separate indictments were filed with the Court on 30 September 2013 (against the defendants N.C., A.D., B.M, L.Q., B.S. and F.S.) and on 13 December 2013 (against the defendants M.M. and A.Da.) respectively. With a ruling of the Presiding Trial Judge dated 20 February 2014, the cases were joined.

12. In a ruling dated 21 March 2014, the then Presiding Trial Judge dismissed the indictment against the defendant N.C. She also dismissed the counts of organized crime and criminal association against the remaining defendants, and causing general danger against A.D., upholding the charges of aggravated murder, attempted aggravated murder and causing general danger against the defendants with the exception of A.D. and assistance in criminal offence against the latter. The Presiding Trial Judge rejected the objections against the evidence and the motions with regard to the indictment as ungrounded. The ruling was upheld by the Court of Appeals in its ruling dated 22 May 2014.

13. On 11 July 2014, a first hearing was held. All defendants pleaded not guilty to the charges.

14. On 22 August 2014, Prosecutor Bamieh submitted an indictment adapted to the decision of the Supreme Court. On the credibility of S.Q. and B.H.'s story in general, the indictment states the following.

> *[B.H.] and [S.Q.] were in two different wings at Dubrava and had no contact with each other, as up to the time when [B.H.] made his statement.*

15. In October 2014, Prosecutor Bamieh left the mission. The case BCB2 was transferred to prosecutor Kent Mortimore, whereas two special Prosecutors, EULEX Prosecutor Heikki Wendorf and Kosovo State Prosecutor Armend Hamiti, were assigned to (further) investigate on allegations of bribery raised by the H. and Q. family in their interviews with Prosecutor Bamieh and the OCIU. These investigations were later given PPS No. 24/2015 and named 'Hermes' (hereinafter: the Hermes case).

16. On 25 November 2014, during the main trial, EULEX Prosecutor Kent Mortimore told the Court the following.

> *"As the court knows I was assigned [to] this case roughly around two weeks ago. Since that time I have been reviewing files and made preparations to continue this trial and perhaps more importantly - to ensure that full disclosure has been made to the defendants. As I will describe in the next two minutes it has become apparent to me that full disclosure had not been made. (…)*
>
> *In early November I discovered two binders of material bearing this case number. These files were found in the office of the person who was formerly prosecuting this case. Mr.*

Hardaway and I have carefully reviewed those materials. They were in binders with the word 'Ghost' written on them. They included interviews with potential witnesses in this case, interviews with actual named witnesses in this case and materials that suggested possible motives of witnesses to provide false testimonies. Late last week we confirmed that these materials have not been provided to the defendants. I immediately directed that these materials be translated in Albanian. As soon as that occurs I will disclose these materials to the Court and to the defendants' defence counsels. Additionally, I discovered videos describing the reconstruction of crime scene by Mr. [Q.] and Mr. [H.]. These were presented as witness statements and they were not disclosed to the defence counsels. This is the material we know about.

I strongly believe that additional relevant material exists which has not been disclosed either to this Court or to the defendants' defence counsels. Here is the basis of my strong belief: I have determined that the prior prosecutor and another prosecutor were using this case as a vehicle to investigate allegations of bribery and corruption. That investigation was absolutely related to this case. I believe that documents connected to that part of investigations are in the possession of another EULEX prosecutor and a local prosecutor. I have not seen those documents and neither has Mr. Hardaway. I have asked for those documents through a letter from the prosecutor.

(…)

[A]fter review of Ghost files, we are of the view that those documents strongly suggest the existence of additional recorded material and there is likelihood to have investigative reports. Based on what I have described, it is clear that full disclosure has not been made to the defendants in this case (…). Unfortunately we are not in the position to report on the existence or non-existence of other documents meaning that I cannot tell the court the scope of the materials that have not been disclosed. We are actively conducting an investigation to answer those questions. But we believe it would be manifestly unfair to continue with this trial until that investigation is concluded."[15]

17. On 27 February 2015, because his own attempts had failed, Prosecutor Mortimer submitted an (undated) application[16] asking the Court to issue an order granting him access to all material to determine whether it contained 'relevant and/or exculpatory evidence in the context of the BCB2 case'. The prosecutor also requested permission to examine the content of Ms. Bamieh's official e-mail box and to recover any deleted files. The application mentions the following.

"On November 12, 2014, the undersigned prosecutor met with Prosecutor Wendorf in his office. During that meeting, Mr. Wendorf confirmed the following facts. He used the ruling on initiation of investigation in the BCB-II case as his authority for conducting other

[15] Minutes of the main trial dated 25 November 2014
[16] Minutes of the main trial dated 27 February 2015

investigations through at least March of 2014. (…) He had only recently obtained case numbers not related to BCB- II. (…)"[17]

18. On 31 March 2015, the Court issued an order by which the Prosecutor's request was partially granted. The SPRK Prosecutors Wendorf and Hamiti were ordered to produce all documentary or other material in their custody, control or possession relevant to or in any way connected to case numbers PPS 29/11 and 47/12, including such documentary or other material relating to any of the defendants in this case and all other material under their custody, control or possession that contain information related to the two Bill Clinton Bombing cases.

19. On 8 April 2015, in reply to the court order, Prosecutors Wendorf and Hamiti submitted a letter with 13 annexes, including a CD-Rom. In their accompanying letter can be read the following.

> *"We are surprised to observe that the applicant, SPRK EULEX Prosecutor Mr. Kent Mortimore, has misled the court by suggesting that our letter to him dated 20.11.2014 was untruthful and claiming that we had refused to hand-over exculpatory evidence for his case." (…) "We have no evidence whatsoever, neither inculpatory nor exculpatory, in respect of the following defendants: [M.M.], [B.M.], [B.S.], [F.S.], [A.Da.] and [L.Q.]. Actually these names do not appear at all in our evidentiary materials. The name [A.D.] does appear in nine interviews conducted in the framework of our investigation (…), but again that evidence is neither inculpatory nor exculpatory vis-à-vis the bomb explosion that occurred on 24.09.2007. (…) Finally, we are herewith informing the court that neither of us, EULEX Prosecutor Heikki WENDORF and/or Kosovo State Prosecutor Armend HAMITI, have undertaken any investigative action using the authority of the existing case known as "Clinton Bombing II". We can confirm that we have in our possession copies of evidentiary materials bearing the case numbers PPS 29/11 & 47/12 and PPN 29/2011; to the best of our knowledge that evidence was collected by the former SPRK EULEX Prosecutor Maria BAMIEH, or by police officers authorized by her, and only later on shared with us. Normally the applicant should have had those evidentiary materials in his possession. However, we are now sending back copies of our copies to be reintroduced in the applicant's case file. Please note that we have never had in our possession the original version of the evidentiary materials marked as PPN 29/11, PPS 29/11 & 47/12 and we do not know where the original materials are."*

Although it cannot be ascertained, the Court assumes that the CD-Rom contains the electronic version of the 'two binders with the word 'Ghost' written on them' mentioned by prosecutor Mortimore. The pdf file on the CD-Rom counts 435 pages and consists of witness statements, apparently gathered by Prosecutor Bamieh during her investigations under PPS numbers 29/11 and 47/12. The letter dated 8 April 2015, including its annexes, was shared with the defence. However, the documents on the CD-Rom are all (with the exception of two) in the English

[17] Page 4-5 of the SPRK Prosecutor's motion received on 27 February 2015

language and were - to the Court's knowledge - never translated into Albanian. The witness statements, most of them by S.Q., B.H. and their close relatives, date from 7 February 2011 through to 21 August 2013. In their statements, the witnesses make reference to bribery, allegedly involving *inter alios* the presiding trial judge and one of the panel members of the BCB1 trial.[18]

20. In the course of 2015, Prosecutor Wendorf left the mission for reasons unknown to the court.

21. During the main trial on 20 October 2015, the trial panel informed the parties that the order was not properly executed by the SPRK Prosecutor, and gave Prosecutor Flynn "final 21 days" to comply with the order.[19]

22. On 24 November 2015, EULEX SPRK Prosecutors Andrew Hughes and SPRK Prosecutor Haki Gecaj submitted a CD-Rom containing a copy of the case file PPS 24/2015 (Hermes case), and of 'all evidentiary materials bearing the case numbers PPS 29/11 & 47/12 and PPN 29/2011 in our possession'. In their accompanying letter, the Prosecutors ask the Court 'to consider the possibility of reviewing the content of each piece of evidence before the decision to disclose it to the defendants, and **then to disclose to the defence only those materials that are deemed to be relevant to the case PPS 29/2011**'. The CD-Rom was not shared with the defence. It consists of 18 folders, labelled 'binder 1' to 'binder 18'. In the folder 'binder 15' can be found an interview dated 2 July 2014 (doc 004 and 005) with [A], the brother of S.Q., who states (doc 005, p. 2/63):

> *"Q: Beside the information provided by [X] do you know who else collected money for the bribers from where who and how the money was collected?*
>
> *A: I cannot provide to you, I didn't know anybody else besides [X] collecting the money, I don't know how much is relevant that a police officer in Ferizaj, and I understand this is more a fraud that he went to one of [S.]'s friend and I think he managed to take from this guy 5,000 Euro claiming that this money was needed for the defence counsels, in fact we had no need for money for the defence counsels because I personally dealt with the payment of defence counsels, but this I understood that he took this money and left, this occurred earlier and I don't think this is relevant, and should the guy that was deceived think he can come and file the report, name of the police officer is [Z]."*

Z is one of the defendants in the current case.

Binder 15 further contains a witness interview with a former Legal Officer within the SPRK Office, dated 7 October 2014 (Doc. 009, p. 7/12), where the witness states:

> *"I also went to Dubrava prison with two OCIU investigators to discuss the cell siting evidence in Clinton Bombing with [S.Q.], which Maria [Bamieh] had already given him".*

[18] CD verbatim, Annex 13 to the letter of State Prosecutors Wendorf and Hamiti dated 8 April 2015
[19] Minutes of the main trial dated 27 February 2015

Also in Binder 15 (document 005 and 006), is to be found an interview dated 17 September 2014 with former prosecutor Bamieh as a witness. On page 13 of this interview, she states the following:

> *"Q: You mentioned that during the investigation of Bill Clinton 2 the investigators (…) started to cooperate with [B.H.] and also with the relatives of [Q.] and [H.] family. First of all can you recall when approximately this cooperation started?*
>
> *A: It is difficult, I had one witness, some cell antenna evidence, and honestly though[t] that the case was never going to see indictment and the indictment was filed on the 30 September 2013 and [B.H.] started to cooperate may-be one or two months before the indictment, and I believe it was June or July when I got a cooperative witness statement from him (…)".*

23. By order dated 17 December 2015, the then Presiding Trial Judge ordered 'the SPRK prosecutor assigned to the case' (a) to analyse the materials of the case PPS 24/2015-CD-Rom, filed with the court on 24 November 2015 and (b) 'to identify all the material under their control or in their possession which have been collected as a result of investigative action in the case number PPS 29/11 and PPS 47/12 that contains information related to the two Clinton Bombing Cases'.

24. On 14 April 2016, a first hearing was held before a new trial panel, which pursuant to Article 313 Paragraph 3 of the CPC started the main trial from the beginning. The parties agreed however to consider all documents submitted since the beginning of the main trial in 2014 as resubmitted, and to have the minutes of the previous hearings added to the case file. The defendants pleaded again not-guilty to the charges. During the hearing, Prosecutor Kucharski orally replied to the order of 17 December 2015 as follows.

> *[F]rom 22 December 2015 onwards, the prosecution checked this CD with the materials on it, and discovered that it contains NO exculpatory evidence against the defendants in this courtroom. (…) The prosecution considered both inculpatory and exculpatory evidence including also those submitted on 24 November 2015 with the CD mentioned earlier, and could not find ANY exculpatory evidence that would set free any of the defendants from their criminal responsibility. (…) We do not know why the submission of 25 November 2014 has been made by the previous prosecutor. May be because it was a sort of accusatory strategy. After examining the material, we concluded that there is no exculpatory evidence, no tangible evidence showing that the charges presented and the acts described in the indictment read today have not been committed by these defendants. Thus we fulfilled the order of the court on 17 December 2015 (…).*[20]

25. On 15 April 2016, the now Presiding Trial Judge wrote a letter to the Pre-Trial Judge assigned to the Hermes case, asking him to inform her on the expected date of conclusion (or termination) of

[20] Minutes of the main trial dated 14 April 2016

investigations. The acting Pre-Trial Judge answered by letter dated 18 April 2016, informing the Court that according to the Prosecutor of the case the anticipated termination of investigation was November 2016, and that the Prosecutor might need until December 2016 to complete the investigation.

26. On 19 April 2016, the Presiding Trial Judge sent a letter to the Prosecutor on the Hermes case directly, asking him to comment on the following options: (A) a full disclosure to the defendants of the CD-ROM now; (B) a disclosure of a redacted version of the CD-Rom now; (C) a full disclosure after the conclusion/termination of the investigations; (D) a disclosure of a redacted version of the CD-Rom after the conclusion/termination of the investigations.

27. On 21 April 2016, the Prosecutors on the Hermes case replied to the letter, stating that 'given the complexity and sensitivity of the Hermes case, including ongoing covert investigative measures, there is a sound probability that the disclosure of these evidentiary materials will endanger the purpose of the investigation and even lives or health of people'.

28. On 28 April 2016, the Presiding Trial Judge sent a letter to the Prosecutor in the current case, giving him an ultimate deadline of 14 days, counted from the day of delivery of the letter, to execute the court ruling dated 17 December 2015.

29. The Prosecutor answered by letter dated 12 May 2016, reiterating that he had analysed the CD-Rom and had found no material (namely exculpatory evidence) relevant to the case.

Findings of the Court

Legal framework

30. The panel shall evaluate if the events mentioned above under 'procedural background' add up to circumstances which stand in the way of continuing the proceedings and entering the evidentiary stage.

31. According to Article 363 Paragraph 1 of the CPC[21] the Court shall render a judgment rejecting the charge, if (…) 1.3. the period of statutory limitation has expired, an amnesty or pardon covers the act, or there are other circumstances which bar prosecution.

32. Article 7 (General Duty to Establish a Full and Accurate Record) Paragraph 2 of the CPC reads:

[21] NB: no Paragraph 2 exists

Subject to the provisions contained in the present Code, the court, the state prosecutor and the police participating in the criminal proceedings have a duty to examine carefully and with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in his or her favor, and to make available to the defense all the facts and pieces of evidence which are in favor of the defendant, before the beginning of and during the proceedings.

33. Article 9 Paragraph 1 (Equality of Parties) of the CPC reads:

    The defendant and the state prosecutor shall have the status of equal parties in criminal proceedings, unless otherwise provided for by the present Code.

34. Article 244 Paragraph 1 Subparagraph 1.3 of the CPC obliges the Prosecutor to, no later than at the filing of the indictment, provide the defence with information identifying any persons whom the state 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.

35. To fully understand the importance of the Articles in the CPC mentioned above, and more specifically Article 244 of the CPC, these Articles must be understood in their constitutional and human rights context. The fair trial principle is laid down in Article 31 of the Constitution of the Republic of Kosovo. Moreover, through Article 22 and 53 of the Constitution, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) directly applies, and shall be interpreted consistent with the court decisions of the European Court of Human Rights (ECtHR).

36. The principles applicable to the duty to disclose evidence to the defence in criminal proceedings, as codified under Article 244 of the CPC, were set out by the Grand Chamber of the ECtHR in three judgments issued on 16 February 2000.

    In the case *Rowe and Davis* v. *United Kingdom*[22], the Strasbourg Court finds a violation of Article 6 § 1, considering as follows:

    "60. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings 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 (...) In addition Article 6 § 1 requires (...) that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (...)

[22] *Rowe and Davis* v. *UK*, ECtHR [GC] 16 February 2000, Appl. No. 28901/95

61. However, (...) the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused ... In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 ... Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (...)

62. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them ... Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.

63. [A] procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1."

The European Court concludes in Par. 66:

"In conclusion, therefore, the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial."

37. In the case *Jasper* v. *United Kingdom* and *Fitt* v. *United Kingdom* on the other hand, the Strasbourg Court finds no violation of Article 6 § 1. In these cases,

"[t]he Court is satisfied that the defence were kept informed and permitted to make submissions and participate in the (...) decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds. The fact that the need for disclosure was at all times under assessment by the trial judge provided a further important safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld."[23]

38. In *Al-Khawaja and Tahery* v. *the United Kingdom*[24], the Grand Chamber examines under Article 6 the admission into evidence of statements of absent witnesses which were the "sole or decisive"

[23] *Jasper* v. *The United Kingdom*, ECtHR [GC] 16 February 2000, Appl. No. 27052/95, Par. 55-56 and *Fitt* v. *United Kingdom*, ECtHR [GC] 16 February 2000, Appl. No. 29777/96, 48-49

[24] *Al-Khawaja and Tahery* v. *the United Kingdom*, ECtHR [GC] 15 December 2011, Appl. No. 26766/05 and *22228*/06, Par. 144-145

evidence against the accused, and gives some instructions as to the understanding of the 'counterbalancing factors':

> *"144. Traditionally, when examining complaints under Article 6 § 1, the Court has carried out its examination of the overall fairness of the proceedings by having regard to such factors as the way in which statutory safeguards have been applied, the extent to which procedural opportunities were afforded to the defence to counter handicaps that it laboured under and the manner in which the proceedings as a whole have been conducted by the trial judge (...).*
>
> *145. Also, in cases concerning the withholding of evidence from the defence in order to protect police sources, the Court has left it to the domestic courts to decide whether the rights of the defence should cede to the public interest and has confined itself to verifying whether the procedures followed by the judicial authorities sufficiently counterbalance the limitations on the defence with appropriate safeguards. The fact that certain evidence was not made available to the defence was not considered automatically to lead to a violation of Article 6 § 1 (...).*
>
> *147. (...) The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case."*

39. Although in *Al-Khawaja and Tahery* v. *the United Kingdom* it is not mentioned explicitly, it is accepted in the recent case *Donohoe* v. *Ireland*[25] that the 'sole or decisive' rule equally applies in cases of non-disclosure. The Chamber of the Court (fifth section) finds as follows.

> *"78. The Court notes that the present case does not involve the evidence of an absent or an anonymous witness. Unlike Al-Khawaja and Tahery, the non-disclosed material in issue here did not, in itself, form part of the prosecution's case. (...) Nevertheless, the Court considers that in view of the potential unfairness caused to the defence by the domestic courts' upholding of the claim of privilege in respect of Chief Superintendent PK's sources, it should be guided by the general principles articulated by the Court in Al-Khawaja and Tahery in its consideration of the applicant's complaints.*
>
> *79. Accordingly, the questions to be addressed by the Court are threefold: (i) whether it was necessary to uphold the claim of privilege asserted by Chief Superintendent PK as regards the source of his belief; (ii) if so, whether Chief Superintendent PK's evidence was the sole or decisive basis for the applicant's conviction; and, (iii) if it was, whether there were sufficient counterbalancing factors, including the existence of strong procedural safeguards, in place to ensure that the proceedings, when judged in their entirety, were fair within the meaning of Article 6 of the Convention.*

[25] *Donohoe* v. *Ireland*, ECtHR 12 December 2013, Appl. No. 19165/08

Application of the ECHR criteria in the current case

40. In the current case, the information that relevant material, including 'interviews with potential witnesses in this case, interviews with actual named witnesses in this case and materials that suggested possible motives of witnesses to provide false testimonies', was kept from the defence came from the side of the Prosecution. For this reason, the Court has found that it could not rely on the statements of subsequent Prosecutors in this case, who simply denied, without further reasoning, the relevance of the non-disclosed material. The Court, by issuing several orders, has attempted to obtain all relevant material in the Prosecution's possession. These efforts have led to the submission by the Prosecution of the CD-ROM's mentioned above under 19 and 22 respectively. The CD-Rom containing the 'Ghost'-files has been disclosed to the defence, but it can be deduced from the material itself that it is incomplete: reference is made by the witnesses to documents which are not included. The other CD-Rom, containing material gathered during the ongoing investigations in the Hermes case up to the date the CD-Rom was submitted to the Court, namely 24 November 2015, was never shared with the defence. Scrutiny by the Presiding Trial Judge of both CD-Rom's has shown that the Ghost/Hermes investigations as a whole are of considerable interest for the case at hand, as they directly involve the reliability of statements of the then suspects now key witnesses B.H. and S.Q. regarding the integrity of the Court's proceedings in *inter alia* BCB1. Moreover, some statements, cited (in redacted form[26]) above under 22, are particularly interesting, since they could give the defence reasons to argue that the witnesses by testifying were serving their own interests, and were receiving instructions from the Prosecutor. It follows that the refusal of the Prosecutor to share this material with the defence causes a potential unfairness, as they are denied the possibility to use it to impeach the witnesses. As a consequence, they are put in a position comparable to that of the defence in the case *Donohue* v. *Ireland* cited above, who could not properly challenge the evidence given by the Chief Superintendent PK through his sources of belief.

41. Therefore, in accordance with the jurisprudence of the ECtHR mentioned above and the system proposed by its fifth section in the Donohoe case, the Court will answer the following questions: (i) is it necessary to respect the decision of the Prosecutor not to disclose evidence relevant for the impeachment of the witnesses B.H. and S.Q.; (ii) if so, is the evidence (to be) given by the witnesses B.H. and S.Q. expected to be the sole or decisive basis for the defendants' conviction and (iii) if it is, can the Court offer sufficient counterbalancing factors, including measures that permit a fair and proper assessment of the reliability of that evidence, to ensure that the

[26] In view of the risk alluded to by the Prosecutor.

proceedings, when judged in their entirety, are fair within the meaning of Article 6 of the European Convention.

i Necessity to respect the decision of non-disclosure

42. As was considered before under 40, in the view of the Court a full disclosure would undoubtedly be in the interest of the defence. However, according to the Prosecutors' letter dated 21 April 2016, quoted above under 27, there is a sound probability that the disclosure of these evidentiary materials will endanger the purpose of the investigation and even lives or health of people. Although the danger alluded to is not obvious at first sight, the Court cannot and will not take the risk that disclosure would indeed endanger the health or lives of people involved in the Hermes investigations. The decision of non-disclosure in this case must therefore be taken as a *fait accompli*, and not as the result of a balancing of interests by the Court.

ii Sole or decisive

43. It is explicitly mentioned by Prosecutor Bamieh in her ruling on expansion of investigation cited above under 10, and was in fact never questioned by the successive Prosecutors, that the suspicion against the defendants arises 'mainly' from the statements of B.H. and S.Q.. Their statements may, as stressed in the indictment, not only corroborate one another but also both be corroborated by material evidence, but in this context it is important to realize that according to S.Q.'s statement[27] (but contrary to what is mentioned in the indictment![28]) the witnesses B.H. and S.Q. have shared the same prison cell as early as 2011, and had access to, and detailed knowledge of the case file (as became clear from their testimonies during main trial before the previous trial panel[29]), which gave them ample opportunity to fine-tune their testimonies and adapt them to the existing evidentiary material. There is no doubt that an eventual conviction of the defendants would be based, at least to a decisive extent, on the testimonies (to be) given by these two witnesses. This leads the Court to the conclusion that their testimonies are to be considered as 'sole or decisive' evidence within the meaning of the jurisprudence of the ECtHR.

iii Counterbalancing factors

44. For the fact that the defence is not provided with all the evidence resulting from the investigations in Ghost/Hermes case, the Court cannot offer any counterbalancing factors. The Hermes case file as it was submitted to the Court might have been complete at the time of its submission, but investigations are ongoing, and no new material has been submitted, and in view of the stance of

[27] Statement of S.Q. dated 30 June 2011, cited above under 7.
[28] Indictment dated 22 August 2014, par. 90, cited above under 14.
[29] Minutes of the main trial dated 26 and 27 August, 2, 3, 4 and 23, 24 and 25 September 2014.

the current Prosecutor that there is *no* material to be disclosed, it is unlikely that new material will be submitted. The denial by the present Prosecutor of the existence of any exculpatory evidence, or material relevant for the assessment of the credibility of the witnesses, combined with the message of the Prosecutor in the Hermes case that a full or redacted disclosure would endanger the health or lives of people involved, has brought the Court in a position that it cannot provide the defence with any counterbalancing factors. Certainly, B.H. and S.Q. could be heard, and indeed have been questioned during main trial before the former trial panel about their remarkably cooperative attitude. However, the answers were evasive, and by lack of material with which to confront them, possible underlying reasons remain unknown. The Court concludes that there are no counterbalancing factors, including strong procedural safeguards, in place to ensure that the trial, judged as a whole, can ever be fair within the meaning of Article 6 of the Convention.

Conclusion

45. As set out above, the Prosecutor has not provided the defence with all exculpatory material. Thus, he has not complied with his obligation laid down in Article 244 of the CPC, understood in its constitutional and human rights context. If these proceedings were to continue without the undisclosed material, this non-compliance would inevitably lead to a breach of the adversarial principle and equality of arms implied in Article 6 § 1 of the European Convention, because (i) the Court must take as a fact the decision of the Prosecutor not to disclose the material of the Hermes file, relevant for the impeachment of witnesses (ii) whose statements would be the *sole or decisive* evidence for an eventual conviction of the defendants, and (iii) the Court cannot provide counterbalancing factors, including the existence of strong procedural safeguards, to ensure that the trial in its entirety would nonetheless be fair within the meaning of Article 6 of the European Convention.

46. The fact that a continuation of this trial can only lead to a violation of the fair trial principle, is no doubt a ‘circumstance which bars prosecution’ within the meaning of Article 363 Paragraph 1 Subparagraph 1.3 of the CPC, entailing the rejection of the charges as in the enacting clause.

Presiding Trial Judge	Court Recorder
EULEX Judge Katrien Gabriël Witteman	Kushtrim Osmani

LEGAL REMEDY: Pursuant to Article 380 of the CPC, an appeal against this judgment may be filed within 15 days from the day the copy of the Judgment has been served to the parties. The appeal should be addressed to the Court of Appeals through the Basic Court of Pristina.