SUPREME COURT OF KOSOVO
Ap-Kz no. 61/2012
2 October 2012

THE SUPREME COURT OF KOSOVO, in a panel composed of Judge Horst Proetel as Presiding and Reporting Judge, and Judges Valdete Daka, Marije Ademi, Martti Harsia and Avdi Dinaj as members of the panel, in the presence of Chiara Rojek, Legal Officer, acting in capacity of recording clerk,

In the criminal proceeding against
S.A., father's name , mother's name , born on in , Municipality of , last residence in , of Kosovo citizenship,
F.P., father's name , mother's name , born on in , Municipality of , last residence in , of Kosovo citizenship,
I.K., nickname , father's name , mother's name , born on in , Municipality of , last residence , , Municipality of , of Kosovo citizenship,
X.H., father's name , mother's name , born on in , Municipality of , last residence in , neighbourhood of , of Kosovo citizenship,
S.S., father's name Ismail, mother's name , born on in , Municipality of , last residence in , Municipality of , of Kosovo citizenship,
A.H., father's name , born on in , Municipality of , last residence in , of Kosovo citizenship,
B.A., father's name , mother's name , born on in , Municipality of , last residence in , of Kosovo citizenship,

Convicted in first instance by Judgment P no. 244/2010 of the District court of Prishtinë/Priština dated 17 June 2011 by which **A.H.** and **S.A.** were found guilty of the criminal offence of Organized Crime contrary to Article 274 Paragraph 4 of the Criminal Code of Kosovo (CCK) and of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 read with Article 23 of the CCK, and sentenced to an aggregated punishment of seventeen (17) years of imprisonment and 200.000 Euro fine (**S.A.**), and to an aggregated punishment of nineteen (19) years of imprisonment and 250.000 Euro fine (**A.H.**), **F.P.** and **X.H.** were found guilty of the criminal offence of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 read with Article 23 of the CCK, and sentenced to an aggregated punishment of seven (7) years of imprisonment (**F.P.**) and to a suspended punishment of two (2) years of imprisonment (**X.H.**), and acquitted of the criminal offence of Organized Crime contrary to Article 274 Paragraph 4 of the CCK, **I.K.** and **S.S.** were found guilty of the criminal offence of Organized Crime contrary to Article 274 Paragraph 2 of the CCK and sentenced to eight (8) years of imprisonment each, and acquitted of the criminal offence of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 read with Article 23 of the CCK, and **B.A.** was found guilty of the criminal offence of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 read with Article 23 of the CCK, and sentenced to an aggregated punishment of five (5) years of imprisonment, and acquitted of the criminal offence of Organized Crime contrary to Article 274 Paragraph 4 of the CCK,

Acting upon the Appeals filed by Defendant S.A., his Defence Counsel Florin Vertopi, by Defence Counsel Shemsedin Piraj on behalf of Defendant F.P. , by Defence Counsel Qerim Zogaj on behalf of Defendant I.K., by Defence Counsel Hilmi Zhitija on behalf of Defendant X.H., by Defence Counsel Ndue Thaqi on behalf of Defendant S.S., by Defence Counsel

Bajram Tmava on behalf of Defendant A.H. and by Defence Counsel Gezim Kollcaku on behalf of Defendant B.A., all against the Judgment P no. 244/2010 of the District Court of Prishtinë/Priština dated 17 June 2011, and considering the Opinion and Motion of the Office of the State Prosecutor of Kosovo (OSPK) filed on 5 April 2012,

After having held a public session on 2 October 2012 in the presence of Defendant S.A. and his Defence Counsel Florin Vertopi, Defendant F.P. and his Defence Counsel Shemsedin Piraj, Defendant I.K. and his Defence Counsel Qerim Zogaj, Defendant X.H. and his Defence Counsel Hilmi Zhitija, Defendant S.S. and his Defence Counsel Ndue Thaqi, Defendant A.H. and his Defence Counsel Bajram Tmava, Defendant B.A. and his Defence Counsel Gezim Kollcaku, and having deliberated and voted on 2 October 2012,

Pursuant to Articles 420 and following of the Kosovo Code of Criminal Procedure (KCCP), issues the following

JUDGMENT

1. All the Appeals filed by the Defence against the Judgment P no. 244/2010 of the District Court of Prishtinë/Priština dated 17 June 2011 are hereby **REJECTED.** The Defendants stay sentenced to the same extent as pronounced by the District Court of Prishtinë/Priština. The First Instance Judgment is **MODIFIED** *ex officio* in respect to the legal designation of the offences, as follows:

"A.H. and **S.A.** are

FOUND GUILTY

of the criminal offence of Organized Crime, contrary to Article 274, paragraph 4 of the CCK ***in conjunction with the offence of Smuggling of Migrants contrary to Article 138 Paragraph 6 read with Paragraph 1 of the CCK****, because throughout the year 2009, until October 2009, in the territory of Kosovo, actively participated in the criminal activities of an organized group composed of themselves, A. G., I. R., a person with the nickname J., I.K., S.S. and other people yet to be identified. The main activity of the organized group was the illegal smuggling of migrants from Kosovo to other countries of Europe (mainly France, Germany, Switzerland, and Austria) thus gaining enormous material profits from the above activity. The organization could count on a well organized structure which, under the lead of A. G., in exchange of an amount of money varying from 3000 to 1500 Euros per migrant, collected and transported the migrants from Kosovo to Serbia (for this part of the criminal activity mainly A.H., I. R., S.A., I.K. and S.S. were involved) then through Serbia (for this part of the criminal activity J. was mainly responsible) and then from Serbia to Hungary (for this part of the criminal activity A. G. was in charge) and then from there to the above indicated destinations. The activities of the organized group resulted, on 14 October 2009, in the death of the following migrants:*
E.J., I.A., B.K., F.A., E.A, A.A., F.A., L.K., A.K., A.K. 2, R.M., V.M., D.M., D.M. 2 and A.M..

I.K. and **S.S.** are

FOUND GUILTY

of the criminal offence of Organized Crime, contrary to Article 274, paragraph 2 of the CCK, ***in conjunction with the offence of Smuggling of Migrants contrary to Article 138 Paragraph 6 read with Paragraph 1 of the CCK,*** *thus reclassified the original charge, because from June until September 2009, in the territory of Kosovo, actively participated in the criminal activities of an organized group composed of themselves, A.G., I.R., a person with the nickname J., A.H., S.A. and other people yet to be identified. The main activity of the organized group was the illegal smuggling of migrants from Kosovo to the other countries of Europe (mainly France, Germany, Switzerland and Austria) thus gaining enormous material profits from the above activity. The organization could count on a well organized structure which, under the lead of A.G, in exchange of an amount of money varying from 3000 to 1500 Euros per migrant, collected and transported the migrants from Kosovo to Serbia (for this part of the criminal activity mainly A.H., S.A., I.R., I.K. and S.S. were involved) then through Serbia (for this part of the criminal activity J. was mainly responsible) and then from Serbia to Hungary (for this part of the criminal activity A.G. was in charge) and then from there to the above indicated destinations.*

F.P. and **X.H.** are

FOUND GUILTY

of the criminal offence of Smuggling of Migrants, contrary to Article 138, paragraph 6 ***in conjunction with Paragraph 1 of the CCK*** *because on 14 October 2010, in the territory of Kosovo, in a manner that endangered the lives and safety of the migrants, engaged in the smuggling of the migrants R.M., V.M., D.M., D.M. 2 and A.M. from Kosovo to France; in particular F.P. made the arrangements for the price of the smuggling and for the transport outside Kosovo of the migrants and was supposed to receive 8500 Euros from X.H., who was acting as a guarantor for R.M., once the migrants had reached their final destination;*

B.A. is

FOUND GUILTY

of the criminal offence of Smuggling of Migrants, contrary to Article 138, paragraph 6 ***in conjunction with Paragraph 1 of the CCK*** *because on 14 October 2010, in the territory of Kosovo and in the territory of Switzerland, in a manner that endangered the lives and safety of the migrants, engaged in the smuggling of the migrants I.A., L.K., A.K., A.K. 2 from Kosovo to Switzerland; in particular B.A. made the arrangements for the price of the smuggling, put in contact the migrants with A.G. and was supposed to receive part of the price of the smuggling (which was 3000 Euros for I.A. and 10.000 Swiss Francs for the K. family) once the migrants had reached their final destination;*

THEREFORE, the Accused are

SENTENCED

S.A.

To ***seventeen (17)*** *years of imprisonment and 200.000 Euros of fine as to the criminal offence of Organized Crime, contrary to Article 274, paragraph 4 of the CCK* ***in conjunction with***

the offence of Smuggling of migrants contrary to Article 138 Paragraph 6 read with Paragraph 1 of the CCK

A.H.

*To **nineteen (19)** years of imprisonment and 250.000 Euros of fine as to the criminal offence of Organized Crime, contrary to Article 274, paragraph 4 of the CCK **in conjunction with the offence of smuggling of migrants contrary to Article 138 Paragraph 6 read with Paragraph 1 of the CCK***

I.K. and **S.S.**

*To **eight (8)** years of imprisonment each for the criminal offence of Organized Crime, contrary to Article 274, paragraph 2 of the CCK, **in conjunction with the offence of Smuggling of Migrants contrary to Article 138 Paragraph 6 read with Paragraph 1 of the CCK***

F.P.

*To **seven (7) years** of imprisonment as to the criminal offence of Smuggling of Migrants, contrary to Article 138, paragraph 6 **in conjunction with Paragraph 1 of the CCK***

X.H.

*To **one (1) year and six (6) months** of imprisonment as to the criminal offence of Smuggling of Migrants, contrary to Article 138, paragraph 6 **in conjunction with Paragraph 1 of the CCK***
Pursuant to Articles 41, 42, 43 and 44 of the CCK the sentence against X.H. is suspended and therefore the punishment shall not be executed if the convicted person does not commit another criminal offence for a period of 3 years.

And B.A.

*To **five (5) years** of imprisonment for the criminal offence of Smuggling of Migrants, contrary to Article 138, paragraph 6 **in conjunction with Paragraph 1 of the CCK**.*"

2. The Motions to terminate the detention on remand filed by Defence Counsel Shemsedin Piraj on behalf of Defendant F.P. and by Defence Counsel Qerim Zocaj on behalf of Defendant I.K. are **REJECTED** as ungrounded.

REASONING

I. Procedural history of the case

1. The event can be summarized as follows: On the night of 14 October 2009, a group of people crossed the border between Serbia and Hungary with a boat through the river Tisza near Subotica (Serbia). The boat capsized, resulting in the death of fifteen persons of Kosovo citizenship. Three persons survived.

2. On 13 September 2010, the Indictment PPS no. 422/2009 was filed by the Special Prosecutor charging the Defendants S.A., F.P., I.K., X.H., S.S., A.H. and R.A., with the criminal offences of Organized Crime contrary to Article 274 Paragraph 4 read with Article 23 of the CCK, and of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 read with Article 23 of the CCK. On 21 January 2011 an Indictment was filed against B.A. charging him with the same criminal offences.

3. By Ruling KA no. 216/2010, the Indictment was confirmed in its entirety.

4. The main trial started in January 2011 and was completed in June 2011. On 20 January 2011, the Trial Panel joined the proceedings against the seven mentioned Defendants and B.A.. Several witnesses and the Defendants were heard in court. Numerous statements, police and expertise reports as well documentary evidence were administered as evidence.[1]

5. On 17 June 2011, the District court of Prishtinë/Priština issued the Judgment P no. 244/2010 by which

- A.H. and S.A. were found guilty of Organized Crime contrary to Article 274 Paragraph 4 of the CCK,[2] and of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 read with Article 23 of the CCK.[3] S.A. was sentenced to fourteen (14) years of imprisonment and 200.000 Euros of fine for the offence of Organized Crime contrary to Article 274 Paragraph 4 of the CCK; and to two (2) years of imprisonment for each migrant smuggled as to the criminal offences of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 and Article 23 of the CCK. An aggregated punishment of seventeen (17) years of imprisonment and 200.000 Euro fine was imposed

[1] See District Court of Prishtinë/Priština, P no. 244/2010, First Instance Judgment, 17 June 2011, pages 9-10

[2] "because throughout the year 2009, until October 2009, in the territory of Kosovo, actively participated in the criminal activities of an organized group composed of themselves, A.G., I.R., a person with the nickname J., I.K., S.S. and other people yet to be identified. The main activity of the organized group was the illegal smuggling of migrants from Kosovo to other countries of Europe (mainly France, Germany, Switzerland, and Austria) thus gaining enormous material profits from the above activity. The organization could count on a well-organized structure which, under the lead of A.G., in exchange of an amount of money varying from 3000 to 1500 Euros per migrant, collected and transported the migrants from Kosovo to Serbia (for this part of the criminal activity mainly A.H., I.R., S.A., I.K. and S.S. were involved) then through Serbia (for this part of the criminal activity J. was mainly responsible) and then from Serbia to Hungary (for this part of the criminal activity A.G. was in charge) and then from there to the above indicated destinations. The activities of the organized group resulted, on 14 October 2009, in the death of the following migrants: E.J., I.A., B.K., F.A., E.A, A.A., F.A., L.K., A.K., A.K. 2, R.M., V.M., D.M., D.M. 2 and A.M.."

[3] For S.A.: "because on 14 October 2009, in the territory of Kosovo, acting as a member of a criminal group and in co-perpetration with A.G. and others, in a manner that endangered the lives and safety of the migrants, engaged in the smuggling of the migrants I.A., L.K., A.K., A.K. 2 from Kosovo to Switzerland, B. K. from Kosovo to Germany; in particular S.A. transported the above migrants to Gjilan where they were picked up by other drivers in order to be conducted illegally outside Kosovo and was supposed to receive part of the price of the smuggling (which was 3000 Euros each for I.A. and B. K. and 10000 Swiss Francs for the K. family) once the migrants had reached their final destination;"; For A.H.: "because on 14 October 2009, in the territory of Kosovo, acting as a member of a criminal group and in co-perpetration with A.G. and others, in a manner that endangered the lives and safety of the migrants, engaged in the smuggling of the migrants B.R., E.J. and their two children, F.A., E.A., A.A., F.A. from Kosovo to Austria; in particular A.H. made the arrangements for the price of the smuggling and for the transport outside Kosovo of the migrants and was supposed to receive the price for the smuggling (which was 6.500 Euros for the R. family and 6900 for the A. family) once the migrants had reached their final destination;"

onto him. A.H. was sentenced to an aggregated punishment of nineteen (19) years of imprisonment and 250.000 Euros of fine.[4]

- F.P. and X.H. were found guilty of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 read with Article 23 of the CCK.[5] F.P. was sentenced to the aggregated punishment of seven (7) years of imprisonment[6] and X.H. was sentenced to a suspended punishment of two (2) years of imprisonment.[7]
- I.K. and S.S. were found guilty of Organized Crime contrary to Article 274 Paragraph 2 of the CCK[8] and sentenced to eight (8) years of imprisonment.
- B.A. was found guilty of the criminal offence of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 read with Article 23 of the CCK.[9] An aggregated punishment of five (5) years of imprisonment was imposed onto him.[10]
- Finally, some of the Defendants were acquitted of the remaining charges. F.P., X.H. and B.A. were acquitted of the criminal offence of Organized Crime. S.S. and I.K. were acquitted of the criminal offence of Smuggling of Migrants in co-perpetration. Defendant R.A. was acquitted of the offence of Organized Crime and of Smuggling of Migrants in co-perpetration.

6. The Trial Panel ordered that the time spent in detention on remand and house detention by the Accused be credited. In addition, the First Instance Court ordered the Accused to reimburse jointly and severally the costs of criminal proceedings pursuant to Article 102 Paragraph 1 of the KCCP for an amount of 2.330 Euros.

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[4] A.H. was sentenced to sixteen (16) years of imprisonment and 250.000 Euros of fine as to the criminal offence of Organized Crime contrary to Article 274 Paragraph 4 of the CCK, and to two (2) years of imprisonment for each migrant smuggled as to the criminal offences of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 read with Article 23 of the CCK

[5] "because on 14 October 2010, in the territory of Kosovo, acting as a member of a criminal group and in co-perpetration with people yet to be identified, in a manner that endangered the lives and safety of the migrants, engaged in the smuggling of the migrants R.M., V.M., D.M., D.M. 2 and A.M. from Kosovo to France; in particular F.P. made the arrangements for the price of the smuggling and for the transport outside Kosovo of the migrants and was supposed to receive 8500 Euros from X.H., who was acting as a guarantor for R.M., once the migrants had reached their final destination;"

[6] F.P. was sentenced to two (2) years of imprisonment for each migrant smuggled as to the criminal offence of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 and Article 23 of the CCK

[7] X.H. was sentenced to one (1) year and six (6) months of imprisonment for each migrant smuggled as to the criminal offence of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 and Article 23 of the CCK

[8] "because from June until September 2009, in the territory of Kosovo, actively participated in the criminal activities of an organized group composed of themselves, A.G., I. R., a person with the nickname J., A.H., S.A. and other people yet to be identified. The main activity of the organized group was the illegal smuggling of migrants from Kosovo to the other countries of Europe (mainly France, Germany, Switzerland and Austria) thus gaining enormous material profits from the above activity. The organization could count on a well-organized structure which, under the lead of A.G., in exchange of an amount of money varying from 3000 to 1500 Euros per migrant, collected and transported the migrants from Kosovo to Serbia (for this part of the criminal activity mainly A.H., S.A., I.R., I.K. and S.S. were involved) then through Serbia (for this part of the criminal activity J. was mainly responsible) and then from Serbia to Hungary (for this part of the criminal activity A.G. was in charge) and then from there to the above indicated destinations."

[9] "because on 14 October 2010, in the territory of Kosovo and in the territory of Switzerland, acting as a member of a criminal group and in and in co-perpetration with A.G., S.A. and others, in a manner that endangered the lives and safety of the migrants, engaged in the smuggling of the migrants I.A., L.K., A.K., A.K. 2 from Kosovo to Switzerland; in particular B.A. made the arrangements for the price of the smuggling, put in contact the migrants with A.G. and was supposed to receive part of the price of the smuggling (which was 3000 Euros for I.A. and 10.000 Swiss Francs for the K. family) once the migrants had reached their final destination;"

[10] B.A. was sentenced to two (2) years of imprisonment for each migrant smuggled as to the criminal offence of Smuggling of Migrants in co-perpetration contrary to Article 138 Paragraph 6 and Article 23 of the CCK

II. Findings of the Supreme court of Kosovo

II. A. Competence of the Supreme Court of Kosovo

7. The Supreme Court has competence to decide on this Appeal pursuant to Article 26 Paragraph 1 and Articles 398 and following of the KCCP. The Supreme Court Panel has been constituted in accordance with Article 36 of the KCCP, the Law no. 03/L-053 on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo dated 13 March 2008, and the guidelines on case allocation system at the Supreme Court level.

II. B. Admissibility of the Appeals and Replies to the Appeals

8. The contested Judgment was announced on 17 June 2011.

- All the Defendants who were detained in Dubrava prison at the time of the delivery signed the receipt without date. The correctional officers wrote the 24 October 2011 as date of receipt. The Supreme Court can only assume that the six Defendants received the Judgment after the 24 October.
- Defence Counsel Florin Vertopi of S.A. received the challenged Judgment on 21 October. His appeal was registered with the court Registry on 31 October.
- Defence Counsel Qerim Zogaj of I.K. received the challenged Judgment on 21 October. His appeal was registered on 1 November.
- Defence Counsel Ndue Thaqi of S.S. received the challenged Judgment on 21 October. His appeal was registered on 1 November.
- Defence counsel Bajram Tmava of A.H. received the challenged Judgment on 21 October. His appeal was registered on 2 November.
- Defence counsel Gezim Kollcaku of B.A. received the challenged Judgment on 25 October. His appeal was registered on 10 November.
- Defence counsel Shemsedin Piraj of F.P. received the challenged Judgment on 24 October. His appeal was registered on 1 November.

Defence Counsel Hilmi Zhitija received the challenged Judgment on 21 October. There is no delivery slip in the case file to confirm the date of receipt of the judgement by Defendant X.H.. The appeal was registered with the Court on 1 November.

9. The Supreme Court of Kosovo holds the Appeals are considered admissible as timely filed by an authorized person pursuant to Article 398 Paragraph 1 and Article 399 Paragraph 1 of the KCCP.

II. C. Merits of the submissions of the parties

10. All the Defence counsels as well as the Defendant S.A. file their appeals on the grounds of substantial violations of the provisions of criminal procedure under Article 403 of the KCCP, violations of the criminal law under Article 404 of the KCCP, an erroneous and/or incomplete determination of the factual situation under Article 405 of the KCCP, and on the account of a decision on criminal sanctions and the costs of the criminal proceeding. The Defence proposes to the Supreme Court of Kosovo to modify the challenged Judgment so to acquit the Defendants, or alternatively to annul it and send back the case for retrial.

11. More specifically, Defence Counsel Florin Vertopi of Defendant S.A. proposes to the Supreme Court of Kosovo to annul the Judgment and return the case for retrial pursuant to

Article 420 Paragraph 1 item 3 of the KCCP, or to acquit him of the offence of Organized crime and sentence him only for Smuggling of migrants pursuant to Article 420 Paragraph 1 item 4 and Article 426 Paragraph 1 of the KCCP, or to impose a more lenient punishment pursuant to Article 420 Paragraph 1 item 4 and Article 406 Paragraph 1 of the KCCP. In his Appeal, the Defendant S.A. admits his liability for the offence of Smuggling of migrants in co-perpetration, and expresses his repentance. He, however, objects to the charge of Organized crime in conjunction with the offence of smuggling of migrants. The Defence of B.A. proposes to change the form of criminal liability, i.e. attempt, and to impose a more lenient punishment.

12. At last, Defence Counsel Shemsedin Piraj of Defendant F.P. and Defence Counsel Qerim Zocaj of Defendant I.K. request to the Supreme Court to terminate the detention on remand of F.P. and I.K.

II. C. 1. Allegations of substantial violations of the provisions of criminal procedure under Article 403 of the KCCP

Allegations of substantial violations of the provisions of criminal procedure under Article 403 Paragraph 1 sub-Paragraph 8 of the KCCP

13. The Defence alleges a violation of the procedural law under Articles 153, 154, 156 and 259 of the KCCP read with Article 403 Paragraph 1 sub-Paragraph 8 of the KCCP because the Judgment is based on inadmissible evidence. In the Defence's view, the First Instance Court admitted as evidence the testimony of witness M.R. given to the police although the Defence has not had the opportunity to challenge it. Moreover, the appealed Judgment is based on evidence obtained in contravention with Articles 153 and 154 of the KCCP, because the November 2009 Order for interception of telecommunications issued by the Special Prosecutor was retroactively implemented which is contrary to Articles 258 and 259 of the KCCP and Articles 5 and 6 of the European Convention of Human Rights (ECHR).[11]

14. Furthermore, the Defence Counsels of Defendants S.S. and I.K. aver that the messages and phone calls allegedly made by the Accused originate from the phones used in a restaurant by all the employees.

15. The State Prosecutor puts forward that the procedural rules entitle the Court to read out a statement if the witness is out of reach under Article 368 Paragraph 1 of the KCCP and that Article 156 of the KCCP is only applicable if the witness is reachable. In addition, the State Prosecutor considers the allegation regarding the retroactivity of the interception of telecommunications without merit, as the law does not prevent the administration of evidence according to a certain time period.

16. The Supreme Court rejects as unfounded the Defence's allegations in this respect. It is observed that the witness hearings were held without the presence of the Accused or their defence counsels, and the Defence has not had an opportunity later on to adequately and

[11] European Convention for Human Rights for the Protection of Human Rights and Fundamental Freedoms dated 4 November 1950

effectively challenge these pieces of evidence.[12] To justify the admissibility of M.R.'s statements, the First Instance Court ruled "[a]s to the statements given by M.R., they were acquired without the consent of the parties pursuant to Article 368 par. 1, item 1 of the KCCP."[13]

17. As rightfully raised by the Defence, the admissibility of such witness statements is also determined by the compliance of the procedure with Article 156 Paragraph 2 of the KCCP: "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." This ensures the respect of the principle of directness of the evidence and of the standards of fair trial, notably the Defence's rights. This Article, however, does not constitute an absolute ban to the admissibility of every pieces of evidence presented by the prosecution or used *ex officio* by the court for the establishment of the truth. Though some elements of the common law system were incorporated into the KCCP, that rests that the predominant role of the judicial organs in the civil law system to which the Kosovo judicial system belongs, is to establish the truth (the principle of inquisition). This is expressed in Article 46 Paragraph 3 of the KCCP stating that the Public Prosecutor has the duty to consider the exculpatory evidence and facts during the investigation of criminal offences and to ensure that the investigation is carried out with full respect for the rights of the Defendant. It is also underlined by Article 386 Paragraph 2 of the KCCP.[14]

18. The procedural Code contains another provision rationalizing the rule of Article 156: Article 368 Paragraph 1 sub-Paragraph 1 of the KCCP which foresees that "(1) [e]xcept in cases provided for in the present Code, records containing the testimony of witnesses, the co-accused or participants who have already been convicted of the criminal offence as well as records and other documents regarding the findings and opinions of expert witnesses may be read according to a decision of the trial panel only in the following cases: 1) If the persons who have been examined have died, become afflicted with mental disorder or disability or cannot be found, or if their appearance before the court is impossible or involves considerable difficulties due to old age, illness or other important reasons; […]"

19. The Trial Panel, although provided a concise reasoning on this issue, made a clear reference to this provision and to its 14 April 2011 Ruling.[15] The District Court Panel attempted to contact the witness, however the latter was not reachable.[16] The Trial Panel has hence based on Article 386 of the Code, its decision to read out the records of witness hearing of M.R. because all the attempts to bring him to court were unsuccessful. This circumstance justifies the use of the witness statements as an exemption to the general principle of Article 156 of the Code, that the Supreme Court deems reasonable to establish the truth.

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[12] See Blue binder case TISA for the judge binder I OCHTBs, witness statement of M.R. dated 10 November 2009 given to the police; Blue binder case TISA binder I - witness statements - indictment OCTHBs I, witness statement of M.R. dated 14 May 2010 given to the Prosecutor

[13] District Court of Prishtinë/Priština, P no. 244/2010, First Instance Judgment, 17 June 2011, page 10

[14] Article 386 Paragraph 2 of the KCCP: "The court shall not be bound by the motions of the prosecutor regarding the legal classification of the act."

[15] District Court of Prishtinë/Priština, case P no. 244/2010, First Instance Judgment, 17 June 2011, page 10, footnote 1

[16] District Court of Prishtinë/Priština, case P no. 244/2010, minutes of main trial, 14 April 2011, pages 3-4: "in the last hearing the parties were provided with a statement stating that the court could not contact M.R., who is currently residing in Switzerland and does not have a known address there…."

20. The Supreme Court Panel, moreover, finds unmeritorious the assertion of the Defence regarding the admissibility of the interception of telecommunications extracted upon the order of the Special Prosecutor.

21. It is indeed observed that several orders for covert measures in the form of interceptions of telecommunications and of metering of phone calls were issued, either by the Prosecutor or by the pre-trial Judge.[17] It is further noted that most of the orders of metering of phone calls were 'covered' by the subsequent orders of interception of telecommunications issued by the pre-trial Judge. In the panel's view, it seems that confusion arises between the metering of phone calls and the interception of telecommunications. While the metering of phone calls dealing with the data of phone calls, e.g. the phone numbers used, the date and length of the phone calls, is ordered by the Prosecutor, covert measures in the form of interception of telecommunications, more invasive, may only be implemented upon the pre-trial Judge's order pursuant to Article 258 Paragraphs 1 and 2 of the KCCP. An analysis of the results of the implementation of these covert measures ascertains that both judicial authorities, the Prosecutor and the pre-trial Judge, issued orders in accordance with the law.

22. The Code, in its Article 259 Paragraph 1 sub-Paragraph 4 specifies that the implementation of an order for covert measures shall be implemented with 60 days upon the receipt of the Order. It appears that the orders issued by the Special Prosecutor were implemented within this timeline, as ascertained by the receipts of PTK and IPKO data.[18] The KCCP does not contain any provision prohibiting a retroactive implementation of an order for covert measures. The Supreme Court Panel shares the reasoning of the First Instance Court that Article 258 of the KCCP does not make any difference between telecommunications which are ongoing and those which already have taken place. Conceptually, the telephone calls can only be intercepted afterwards. The results of these measures are therefore not inadmissible evidence due to the retroactivity of the measures. The Supreme Court of Kosovo has not identified any violation of Articles 258 and 259 of the Code and/or of Articles 5 and 6 of the ECHR, and considers the law and practice of the Kosovo judiciary in compliance with the European standards.[19]

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[17] See *inter alia* Binder DC Pristina, EULEX PPS no 422/09, GJPP no 297/09 TISA CASE charges, Pre-trial binder I, initiation of investigation 23/10/2009: Order of the pre-trial judge GJPP no 297/2009 dated 24 November 2009 to intercept the sms messages of the phone number 049 743 543 belonging to S.A. from 01.08.2009 and 16.11.2009; Blue binder PPS no 422/09 case TISA binder I DC pristina orders, II, OCTHBs: Order of the pre-trial judge GJPP no. 297/2009 dated 24 August 2010 for interception of records and telephone calls 044 260 626 and 044 117 924 belonging to S.S. and I.K. for a 60 day period; Green binder, office line, S. P.: Order of the SPRK dated 5 November 2009 for covert measures (metering of phone calls on the phone numbers 044 137 206 and 044 661 892) belonging to S.A. for the phone calls made from 01.08 2009 until 23.10.2009; Binder EULEX DC Pristina GJPP 297/09 Tizsa IV from 07/06/2010: Order of the pre-trial judge GPJJ no. 297/2009 dated 24 August 2010 of interception of telecommunications (phone calls and sms messages) against S.S. and I.K. (044 260 626 and 044 117 924) from 01.06 until 16.11 2009

[18] See *inter alia* PTK letter reference no. PTK-ZKL no. 1015/09 dated 6 November 2009 for the phone numbers 044 137 206 and 044 661 892

[19] See *inter alia* case law of the European Court of Human Rights (ECtHR) on the interception of telecommunications and the right to respect for private and family life under Article 8 of the ECHR: "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."; see ECtHR, case Kennedy v. the United Kingdom, Application no. 26839/05, Judgment, 18 May 2010: "151. The requirement that any interference must be "in accordance with the law" under Article 8 § 2 will only be met where three conditions are satisfied. First, the impugned measure must have some basis in domestic law. Second, the domestic law must be compatible with

23. The Supreme Court of Kosovo considers likewise without merit the claim of the Defence Counsel of S.A. regarding the rejection of the 7 April 2011 Motion. Out of the trial records, it is noted that the Trial Panel rejected the Defence's motion to declare inadmissible extracts of sms messages, and the police reports pertaining to them as they were acquired following the issuance of the Special Prosecutor's orders.[20] Again, the Supreme Court Panel is of the opinion that the law does not prohibit such covert measures and refers to the findings of the First Instance Court in this respect.[21]

24. The Supreme Court Panel finds ungrounded the contention of the Defence that the phones allegedly belonging to S.S. and I.K. on which extraction of messages and phone calls was done, were used in a restaurant by persons other than the Defendants. This account of the facts does not stand as rightly pointed out in the first instance court's reasoning on the belonging of these mobile phones.[22] The analysis of the data extracted shows that the Defendants had an active role in the criminal organization. It is noteworthy that the District Court Panel also used this evidence to acquit the Defendants of the offence of Smuggling of migrants.

Allegations of substantial violations of the provisions of criminal procedure under Article 403 Paragraph 1 sub-Paragraph 10 of the KCCP

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the rule of law and accessible to the person concerned. Third, the person affected must be able to foresee the consequences of the domestic law for him (see, among many other authorities, *Rotaru v. Romania*, cited above, § 52; *Liberty and Others*, cited above, § 59; and *Iordachi and Others*, cited above, § 37)." 152. The Court has held on several occasions that the reference to "foreseeability" in the context of interception of communications cannot be the same as in many other fields (see *Malone*, cited above, § 67; *Leander v. Sweden*, 26 March 1987, § 51, Series A no. 116; *Association for European Integration*, cited above, § 79; and *Al-Nashif*, cited above, § 121). In its admissibility decision in *Weber and Saravia*, cited above, §§ 93 to 95, the Court summarised its case-law on the requirement of legal "foreseeability" in this field: "93. ... foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly (see, *inter alia*, *Leander* [*v. Sweden*, judgment of 26 August 1987, Series A no. 116], p. 23, § 51). However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident (see, *inter alia*, *Malone*, cited above, p. 32, § 67; *Huvig*, cited above, pp. 54-55, § 29; and *Rotaru*). […]. The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see *Malone*, ibid.; *Kopp*, cited above, p. 541, § 64; *Huvig*, cited above, pp. 54-55, § 29; and *Valenzuela Contreras*, ibid.).

[20] District Court of Prishtinë/Priština, case P no. 244/2010, minutes of main trial, 7 April 2010, page 24

[21] District Court of Prishtinë/Priština, case P no. 244/2010, First Instance Judgment, 17 June 2011, pages 63-64

[22] Ibid, page 50 for Defendant S.S.: "S.S. admitted that the number 044 260 626 was his telephone number and that, even though his mobile was also available during the working hours for the employees of the company he ran together with I.K., the above telephone number was utilized mostly by him. And that S.S. was the person utilizing the above number most of the time is also proved by the fact that in some messages he is called by name (S.); furthermore it is worth noticing that many of the messages were exchanged late in the evening, after the working hours, and therefore when the employees of the companies could not use the mobile."; see pages 54-55 for Defendant I.K.: "I.K. admitted that the number 044 117 924 was his telephone number, even though he alleged that also the people working in the company he ran used to utilize it, since he used to leave the mobile in the premises of his company. It is worth noticing that the above version given by Ismail appears implausible and not reliable. In fact, since he was an entrepreneur he obviously needed to be reachable (he did not have another number): it is therefore highly unlikely that, apart from some rare occasions, he did not take the mobile with himself when he left his working place. Furthermore..."

25. The Defence claims that a violation of Article 386 Paragraph 1 of the KCCP[23] read with Article 403 Paragraph 1 sub-Paragraph 10 of the KCCP was committed as the First Instance Judgment exceeds the scope of the Indictment. In the Defence's view, the Trial Panel has failed to preserve the identity of the factual description of the Indictment.

26. It is noted that the Indictment PPS no. 422/09 filed on 13 September 2010 provides the following factual description:

> "as of unknown date until the night between 14th and 15th October 2009, acting in the structured group, with the purpose to gain financial material benefit, by endangering the life and security of migrants, in complicity with the defendant B.A., A.G. – K. and I.R. who are at large, smuggled citizens of the Republic of Kosovo, by finding the migrants who were interested to go to the different places in Europe, after agreed the price the migrant would have to pay in the amount of 3000 E per person, or the amount of 6300 E to 8000 e for a family, then by illegal means, through different persons in Serbia they sent these migrants over the river TISA which is located on the border of Serbia and Hungary, near the town of Subotica in Serbia, to the different places in Europe, but at the night between 14th and 15th October 2009 a part of smuggled migrants were placed on the bout in order to cross the river Tisa, and the bout with 18 migrants sank and out of 18 migrants 15 of them found death: E.J., I.A., B.K., F.A., E.A, A.A., F.A., L.K., A.K., A.K. 2, R.M., V.M., D.M., D.M. 2 and A.M., while three migrants B.R., R. J. and E. J. manage to escape the death, while the damaged party M.R. with his family before they arrived to the border of Serbia and Hungary with another group of approximately 20 migrants, changed his mind and returned back the Kosovo with his family."

27. The Supreme Court Panel holds that far from expanding the scope of the Indictment, the enacting clause contains a factual description more accurate and precise than the one mentioned in the Indictment. The Trial Panel, indeed, provides in the enacting clause additional details on the timeline of commission of the criminal offences,[24] on the geographical scope of the acts committed,[25] and on the means of commission of the criminal acts.[26] The District Court Panel also individualizes the factual state of the enacting clause for each of the Defendants. The facts remain in substance the same as the ones in the Indictment. The identity of the factual description was therefore preserved by the Trial Panel, without going beyond the letter of Article 386 Paragraph 1 of the KCCP.

28. The Supreme Court of Kosovo finds without merit the allegation of the Defence with regard to the change of legal designation of Organized crime under Article 274 as for the

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[23] Article 386 Paragraph 1 of the KCCP: "(1) The judgment may relate only to the accused and only to an act which is the subject of a charge contained in the indictment as initially filed or as modified or extended in the main trial."; Compare with Article 376 Paragraph 1 of the KCCP on the amendments and extension of the Indictment which prescribes the Prosecutor to file an amended indictment if the evidence indicates that the factual situation as described in the indictment has changed

[24] See District Court of Prishtinë/Priština, case P no. 244/2010, First Instance Judgment, 17 June 2011, page 3: *"throughout the year 2009, until October 2009";* pages 3 and 4: "*"on 14 October 2009";* Page 4: "*from June until September 2009".*

[25] Ibid, pages 3 and 4: "*in the territory of Kosovo,"; "in the territory of Kosovo and in the territory of Switzerland,"*

[26] Ibid, on the composition and activities of the organized criminal group (criminal offence of Organized crime): page 3 "*an organized group composed of themselves, A.G., I.R., a person with the nickname J., I.K., S.S. and other people yet to be identified."; "The main activity of the organized group was the illegal smuggling of migrants from Kosovo to other countries of Europe […] collected and transported the migrants from Kosovo to Serbia … then through Serbia … and then from Serbia to Hungary… and then from there to the above indicated destinations.";* on the means of smuggling of migrants, page 3: *"from Kosovo to Switzerland, B.K. from Kosovo to Germany..";* page 4: *"from Kosovo to Austria;"; page 5 "from Kosovo to France";* on the material benefit obtained by the Defendants, page 3*: "in exchange of an amount of money varying from 3000 to 1500 Euros per migrant";* page 4 : "*to receive part of the price of the smuggling (which was 3000 Euros each for I.A. and B.K. and 10000 Swiss Francs for the K. family)"*

Defendants I.K. and S.S.. The First Instance Court indeed proceeded to a change of legal classification from Paragraph 4 of Article 274 to Paragraph 2 of the CCK.

29. A trial panel, when proceeding to a re-classification under Article 386 of the CCK, must guarantee that the Accused be informed of such amendment in a timely manner, as part of the right to be informed promptly of the nature and cause of the accusation against him, and to have "adequate time and facilities for the preparation of his defence". Those rights are enshrined in several provisions of the Code, in the Constitution of the Republic of Kosovo and in the ECHR.[27] The ECtHR has developed a set of the minimum guarantees of fair trial under Article 6 of the ECHR.[28]

30. The District Court Panel provides a very concise reasoning on this point.[29] The undersigned Panel, nonetheless, notes that Paragraph 4 relates to aggravating circumstances in case of commission of the criminal act under Paragraph 2 of the CCK. The Supreme Court, evaluating the fairness of the proceedings as a whole, reaches the conclusion that the Defendants I.K. and S.S. had adequate time to prepare their defence as the legal designations under these provisions are very similar, let alone the aggravating circumstance under Paragraph 4. Moreover, it is observed that Paragraph 2 is more favourable to the Defendants. The change of legal designation was hence done in accordance with Article 386 Paragraph 2 of the KCCP. This ground of appeal is therefore rejected as unfounded by the Supreme Court Panel.

31. Finally, the Supreme Court does not see how a violation under Article 403, Paragraph 1 sub-Paragraph 11 read with Article 417 of the KCCP could have been committed at the trial stage, and consequently rejects this ground of appeal.

Allegations of substantial violations of the provisions of criminal procedure under Article 403 Paragraph 1 sub-Paragraph 12 of the KCCP

32. The Defence alleges a breach under Article 403 Paragraph 1 sub-Paragraph 12 of the KCCP because the enacting clause is incomprehensible and internally inconsistent: it lacks of specificity on the timeframe of the commission of the offences,[30] the number of the migrants smuggled and the modalities of smuggling. In addition, the First Instance Court failed to provide a detailed analysis of the decisive facts and of the elements of crimes. Especially, the Defence counsel of X.H. alleges that the District Court Panel committed a violation of Article 1 of the KCCP and failed to mention in the enacting clause the incriminating acts the Defendant has committed.

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[27] See *inter alia* Articles 12, 30, 214 and Article 231 of the KCCP; Article 30 of the Constitution of Kosovo; Article 6.3 of the ECHR

[28] Case ECtHR, Pelissier and Sassi v. France, Application no. 25444/94, Judgment dated 25th March 1999, para 51 al fine: "Article 6 § 3 (a) of the Convention affords the Defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterization given to those acts."; Supreme Court of Kosovo, Pkl - Kzz no. 61/2011, Judgment on Request for Protection of Legality, 10th October 2011, pages 5 and 6

[29] See District Court of Prishtinë/Priština, case P no. 244/2010, First Instance Judgment, 17 June 2011, page 62: "Thus, as to I.K. and S.S., the classification made by the prosecutor does not appear to be correct and the criminal charge must be reclassified from Art. 274, par. 4 of the CCK to Art. 274, par. 2 of the CCK. Once reclassified the charge, the evidence presented against the above two defendant's shows undeniably the existence of the *actus reus* and of the *mens rea* in relation to the above criminal offence."

[30] The scope of the factual description which was originally 'from 14 until 15 October 2009' in the indictment was extended in the enacting clause 'from June until September 2009'

33. The Defence in addition, alleges that in regard to the material facts, there is a considerable discrepancy between the statement of grounds relating to the content of the minutes on one hand, and the minutes themselves on the other hand. Principally, Defence Counsel Bajram Tmava claims contradictions on the role of A.H. as the key person in the organized group. Lawyer Shemsedin Piraj alleges that the Judgment does not contain any element on the existence of co-perpetration between F.P. and X.H.. The Defence also puts forward that the First Instance Court failed to stipulate the specific intent of the Defendants to commit the offence of Smuggling of migrants as required under Article 138 Paragraph 6 of the CCK.

34. The State prosecutor puts forward that the allegation of a violation of the provisions of the criminal procedure under Article 403 Paragraph 1 sub-Paragraph 12 of the KCCP does not stand.

35. The Supreme Court of Kosovo considers unfounded the allegation that the enacting clause is incomprehensible. The enacting clause provides a clear and comprehensive description of the decisive facts.[31] The challenged Judgement incorporated all the content of the records from the case file which does not leave any suspicion regarding the criminal liability of the Defendants. The Supreme Court is of the opinion that there are no discrepancies between the statement of facts in the enacting clause and the content of witness statements. The enacting clause read together with the detailed reasoning of the First Instance Judgment provides a comprehensive assessment of the evidence and an accurate determination of the factual situation. In the Supreme Court's view, all the elements of the criminal offence of Organized crime and of Smuggling of migrants and of the criminal liability of each Defendant have been established, notably the decisive facts.[32]

36. The Supreme Court of Kosovo also rejects the submission presented in regard to Defendant X.H., as the enacting clause clearly mentions the act committed by the Defendant and his role 'acting as a guarantor for R.M., the form of liability and the means of commission. The enacting clause and the reasoning of the challenged Judgment even include the statements of the Defendant.[33] The undersigned Panel does not see any violation of Article 1 of the KCCP.

37. As to the allegation on the failure of the District Court Panel to mention the specific intent of the Defendants to commit the offence of Smuggling of migrants, the Supreme Court tends to concur with the Defence's submissions. Article 138 of the CCK, in its paragraph 7 item 1, provides a definition of "smuggling of migrants" which reads follows: "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into Kosovo, where such person is not a resident of Kosovo, or into a State of which such person is not a national or a permanent resident." This provision clearly requires as an element of crime, that the act be committed "in order to obtain, directly or indirectly, a financial or other material benefit".

[31] See *inter alia* Reasoning of the Supreme Court of Kosovo under Allegation of substantial violations of the provisions of criminal procedure under Article 403 Paragraph 1 sub-Paragraph 10 of the KCCP, paras 25 and following

[32] District Court of Prishtinë/Priština, case P no. 244/2010, First Instance Judgment, 17 June 2011, Part 2.5. The existence of an organized group dealing with the smuggling of migrants, pages 39 and following

[33] Ibid, Part 2.2.6. The smuggling of the M. family, pages 31 and following, and Part 3. Legal qualification pages 60 and following

38. It is noted that mention is made in the first instance enacting clause, of the price of the smuggling per migrant and of the modalities of payment. The formulation used is as follows: for example, "[he] was supposed to receive part of the price of the smuggling (which was 3000 Euros for I.A. and 10.000 Swiss Francs for the K. family) once the migrants had reached their final destination;". The Supreme Court Panel, therefore, concedes that the specific intent should have been expressed more clearly in the enacting clause.

39. What is of serious concern of the Supreme Court of Kosovo lies with the reasoning of the First Instance Court on the specific intent: *"*It is a general principle that, even though the crime requires a special intent (*dolus specialis*), and the crime foreseen by Art. 138 of the CCK requires the special intent of smuggling migrants in order to obtain a material benefit (therefore a specific goal that goes beyond the result of the conduct of the agent), it is enough that at least one of the participants in the criminal offence (if of course the crime was committed in co-perpetration) has the required special intent, whereas the others can only have the generic intent to give their mindful contribution to the commission of the crime."[34]

40. In the Supreme Court's opinion, the subjective element, the intent to commit a criminal offence is a fundamental requirement of a criminal offence, together with the *actus reus* and the legal element. The criminal law provides that certain criminal offences require an additional intent. Going through the relevant provisions, the intent of the legislator was evidently to include the *dolus specialis* as one of the requirements of the offence of Smuggling of migrants. This is in full compliance with the international legal framework.[35] The Supreme Court holds that the intent in general, and the *dolus specialis* in particular, is an element required to ascertain the criminal liability of each of the Accused. The intent is intrinsic to the perpetrator and cannot be 'transferred' from one defendant to another. The conclusions of the First Instance Court that evidence that one of the defendants had the *dolus specialis* suffice to show the intent of the others are consequently erroneous. However, this Panel considers that reading the enacting clause together with the reasoning of the Judgment,[36] it is clear that all the Defendants convicted for Smuggling of Migrants, namely S.A., A.H., F.P., X.H. and B.A. acted with this specific intent to gain material benefit. They committed the said criminal offence and earned money out of it or were about to gain benefit out of it. This ground of appeal is therefore rejected as unfounded.

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[34] See *inter alia* Ibid, pages 60-61

[35] See *inter alia* Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime adopted on 15 November 2000, Article 3: "For the purposes of this Protocol: (a) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident; […]"; see Legislative guides for the implementation of the United Nations Convention against transnational organized crime and the Protocols thereto, United Nations Office on Drugs and Crime, Division for Treaty Affairs, New York 2004, Part Three, II. Specific obligations of the Protocol, A. Definition and criminalization of the smuggling of migrants, page 342: "35. As noted above, the general standard of the Convention and Protocols for offences is that they must have been committed intentionally. Applied to the smuggling offence, this actually entails two requirements: there must have been some primary intention to procure illegal entry and there must have been a second intention, that of obtaining a financial or other material benefit."

[36] See *inter alia* District Court of Prishtinë/Priština, case P no. 244/2010, First Instance Judgment, 17 June 2011, page 39: "This organized criminal group could count on a solid structure based mainly in Kosovo and in Serbia (but not only in these two countries) which for the correspondent of an amount of money varying from 3000 to 1500 Euros per migrant, collected and transported the migrants from Kosovo to Serbia, then through Serbia to Hungary and then from there to the above indicated countries." ; pages 44 and following: "The above figures are shocking and give an idea of the dimension of the smuggling, if we think that the prize per migrant smuggled was 3000 Euros for each adult and 1.500 for each child minor than 12"; pages 59 and following on legal qualification

Allegations of substantial violations of the provisions of criminal procedure under Article 403 Paragraph 2 of the KCCP

41. Defence Counsel Bajram Tmava of Defendant A.H. alleges an essential violation of the criminal procedure foreseen under Article 403 Paragraph 2 sub-Paragraphs 1 and 2 read with Article 7 Paragraph 1 and Article 2 Paragraph 2 of the KCCP committed by the Prosecutor and the Trial Panel, because the First Instance Court admitted pieces of evidence at the commencement of the main trial. He also contends the lack of objectivity of the Trial Panel given the Presiding Judge was intervening while the witnesses were being questioned by the Prosecution or by the Defence, in contradiction with Article 165 Paragraph 2 of the KCCP. In reply to this contention, the State Prosecutor submits that in the sense of Article 360 Paragraph 5 of the KCCP, the Trial Panel have the right to review the evidence that considers necessary for the right and complete verification of the case.

42. The Supreme Court of Kosovo has not identified any violation of the procedural law because the First Instance Panel admitted evidence at the very beginning of the main trial. Assuming that the Defence refers to the statements of Witness M.R. and to the records of sms messages, this Panel then refers to its findings under Part II.B.1.[37] From a more general point of view, as rightly pointed out by the State Prosecutor, the Trial Panel is entitled "to collect evidence that it considers necessary for the fair and complete determination of the case" in addition to the evidence proposed by the parties and the injured party under Article 360 Paragraph 5 of the KCCP. This prerogative of the judge is in full compliance with Articles 386 and 387 of the Code. As a matter of fact, several provisions allow the Court to gather evidence if necessary, to enable the Trial Panel "to assess conscientiously each item of evidence separately and in relation to other items of evidence" and to "base its judgment solely on the facts and evidence considered at the main trial", in short for the Trial Panel to take any necessary steps to establish the truth. It is also noteworthy that the Defence has had ample opportunity to challenge these pieces of evidence at the main trial.

43. As to the allegation of violation of the principle *in dubio pro reo* and truthfulness of establishment of facts under Articles 3 and 7 of the KCCP, the Supreme Court Panel agrees that a person cannot be convicted on the basis of suspicion, and that the judicial authorities have the duty to explore carefully the facts of the case and, as formulated in Article 7 Paragraph 2 of the KCCP, "with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in his or her favour […]". In democratic states, a person is considered innocent until his or her final conviction, which occurs if the guilt is established beyond reasonable doubts. The court establishing the facts will consider the case as a whole as well as all relevant circumstances. The evidence presented during criminal proceedings has to be solid and convincing, as established by the First Instance Court.

44. According to Article 372 of the KCCP, the Presiding Judge examines the witnesses only when the parties have no further questions. But it does not necessarily mean that the Presiding Judge has to stay silent up to the completion of questioning by the parties. The prerogatives of the Presiding Judge to intervene during the interrogation of a witness result from his or her duty to instruct the witnesses, to warn them if suspicion arises they are not telling the truth, and mainly by his role to conduct the criminal proceeding as stipulated in

[37] Reasoning of the Supreme Court of Kosovo under Allegation of substantial violations of the provisions of criminal procedure under Article 403 of the KCCP, paras 13 and following

Article 333 Paragraph 1 of the KCCP. The frequency and intensity of the interruptions made by the Presiding Judge depends on the importance of the witness' statement, his behaviour and the parties' as well as the circumstances of the proceeding. Unless a grave breach of the Defence's rights occurred, which was not the case in the instance, the Presiding Judge is left with a margin of manoeuvre to conduct the main trial.

Ex officio: substantial violations of the provisions of criminal procedure under Article 403 Paragraph 1 sub-Paragraphs 10 and 12 of the KCCP and violation of the criminal law under Article 404 of the KCCP

45. As to the allegations under Article 386 Paragraph 1 of the KCCP read with Article 403 Paragraph 1 sub-Paragraphs 10 and 12 of the KCCP, the Defence claims that the District Court failed to mention in the enacting clause the core provision criminalizing the Defendants' behaviour and that, although the First Instance Court convicted S.A., A. H., F.P., X.H. and B.A. for one count of Smuggling of migrants, a sentence 'per migrant smuggled' was imposed onto them. Moreover, the Defence Counsel of S.A. submits that the offence of Smuggling of migrants under Article 138 Paragraph 6 should be read with Article 26 on criminal association, and therefore punished under Article 65 Paragraph 2 of the CCK.

46. The Supreme Court of Kosovo finds grounded the allegations of the Defence that the enacting clause does not contain the core provision mentioning the actual criminal act of Smuggling of migrants committed by several Defendants under Article 138 of the CCK. According to the enacting clause, S.A., A.H., F.P., X.H. and B.A. were found guilty of Smuggling of migrants under Article 138 Paragraph 6 of the CCK in co-perpetration. This provision states "When the offence provided for in paragraph 1, 2 or 3 of the present article is committed by a perpetrator acting as a member of a group or in a manner that endangers, or is likely to endanger, the lives or safety of the migrants concerned or that entails inhuman or degrading treatment, including exploitation, of such migrants, the perpetrator shall be punished by imprisonment of two to ten years." It provides for an aggravating circumstance.[38] Yet, it does not mention the incriminating act itself which is stipulated in Paragraphs 1, 2 or 3. The enacting clause may therefore be rendered incomprehensible as the provision criminalizing the acts committed was left out. However, this omission does not amount the threshold to fall under the category of substantial violation of the provisions of criminal procedure under Article 403 Paragraph 1 sub-paragraph 12 of the KCCP. The Supreme Court of Kosovo, acting *ex officio* pursuant to Article 315 Paragraph 1 sub-Paragraph 1 of the KCCP, rather modifies the enacting clause, adding a reference to Paragraph 1 of Article 138 of the KCCP.

47. Moreover, the Supreme Court of Kosovo concurs with the Defence to the extent that there are no elements in the case file that attest F.P., X.H. and B.A. committed the criminal acts in co-perpetration under Article 23 of the CCK. The mere fact that Defendant X.H. put

[38] See Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime adopted on 15 November 2000, Article 6.3: "3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances: (a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or (b) That entail inhuman or degrading treatment, including for exploitation, of such migrants."; see also Legislative guides for the implementation of the United Nations Convention against transnational organized crime and the Protocols thereto, United Nations Office on Drugs and Crime, Division for Treaty Affairs, New York 2004, Part Three, pages 346-374

into contact the M. family with Defendant F.P. does not suffice to determine that the criminal offence was committed "jointly" by the two individuals or that the latters substantially contribute to it. The same findings apply for B.A.. The Supreme Court Panel, therefore, amends the enacting clause of the challenged Judgment to correct this erroneous evaluation of the First Instance Court.

48. The Supreme Court Panel, moreover, holds that the Defendants A.H., S.A., I.K. and S.S were wrongfully convicted for both criminal offences: Organized Crime contrary to Article 274 Paragraph 4 and Smuggling of migrants under Article 138 Paragraph 6 of the CCK. The offence of Organized crime requires to be completed the commission of an 'underlying' offence, in addition to the offence of Organized crime under Article 274 of the CCK. The formulation used throughout Article 274 of the 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. This situation might amount a breach of the prohibition to impose a double punishment for one single offence. In the case at hand, the offence of Organized crime to some extent subsumes the one of Smuggling of migrants. Therefore, the Supreme Court of Kosovo finds that the Defendants A.H., S.A., I.K. and S.S. are guilty of having committed the offence of Organized crime contrary to Article 274 Paragraph 4 'in conjunction with the offence of Smuggling of Migrants contrary to Article 138 Paragraph 6 read with Paragraph 1 of the CCK'.

49. This is also the Supreme Court's stance that only the facts presented in the indictment determine the scope of the charge, not the legal assessment of the prosecution or the form of criminal liability. This is clearly regulated by Article 386 Paragraph 2 of the KCCP stating that the court is not bound by the motions of the prosecutor regarding the legal designation of the act. Considering the discretionary power the Supreme Court of Kosovo is awarded with, as second instance court, the legal designation of the criminal offences and the form of liability (from co-perpetration to perpetration) are amended accordingly.

50. The Supreme Court Panel consequently need not to answer to the argument of Defence Counsel Florin Vertopi regarding the application of Article 26 of the CCK on criminal association.

51. As a consequence of the above, the undersigned Panel considers that the First Instance Court wrongfully sentenced the Defendants to two punishments, one for Organized crime and one for Smuggling of migrants.

52. In the Supreme Court Panel's opinion, the First Instance Court erroneously imposed one sentence 'per migrant smuggled' under the offence of Smuggling of Migrants. S.A., A.H., F.P. and B.A. were convicted to "2 years of imprisonment for each migrant smuggled as to the criminal offences of Smuggling of Migrants in co-perpetration, contrary to Article 138, paragraph 6 and Article 23 of the CCK…" As for X.H., he was sentenced to one year and six months of imprisonment for each migrant smuggled. The First Instance Court has not provided any justification as to the imposition of multiple punishments apart from "the smuggling of each migrant entails the commission of one criminal offence contrary to Art. 138 paragraph 6 of the CCK, therefore the above defendant has committed five criminal

offences contrary to Art. 138, 6 of the CCK".[39] The Supreme Court of Kosovo observes that the Defendants were found guilty of only one criminal offence of Smuggling of migrants, as clearly stipulated in the enacting clause (and also in the indictment), but sentenced to five separate criminal offences. Article 138 of the CCK does not foresee such particular rules on the calculation of punishment to be imposed for the offence of Smuggling of migrants. This sort of calculation is not provided under the Chapter III on punishments of the Code, either. Imposing several terms of imprisonment without legal basis could lead to grave breaches of the general rules on calculation of punishments and weakens the principle of foreseeability of the criminal law.

53. Therefore, the Supreme Court of Kosovo *ex officio* modifies accordingly the enacting clause to impose one single sentence to each Defendant for the offence of Smuggling of migrants under Article 138 Paragraph 6 read with Paragraph 1 of the CCK.

III. C. 2. Allegations of violation of the criminal law under Article 404 of the KCCP

54. The Defence alleges that the First Instance Court has committed a violation of the criminal law under Articles 11 Paragraph 1, 14, 15 and 71 of the CCK as a consequence of substantial violation of the procedural law and of an erroneous determination of the factual situation. Moreover, the Defence claims that the District Court Panel violated the notion of 'joinder of criminal offences' which can be envisaged only when one criminal offence is considered to be committed even though multiple acts are committed. This can be done only in case of a complex criminal offence, continuous criminal offence or collective offence.

55. The Defence, notably the Defence Counsel of Defendant F.P. and the Defence Counsel of Defendant X.H., claims a violation of the criminal law under Article 138 Paragraph 1 of the CCK, given the elements of the offence of Smuggling of migrants, e.g. a direct or indirect material gain and a direct intent, are not met in the case at hand. The Defence also alleges that Article 274 of the CCK on Organized crime requires the commission of an initial criminal offence, as requirement of the offence of Organized crime. In the instance, the Trial Panel has not established this constitutive element of the criminal offence.

56. The State Prosecutor submits that no violation of the criminal law under Article 404 of the KCCP was committed by the Trial Panel, because the administered evidence suffices to confirm the commission of the criminal offences and the Accused's liability.

57. The Supreme Court of Kosovo rejects as ungrounded, and even superfluous, the argument related to an alleged violation of Article 11 Paragraph 1, Articles 14 and 15 of the CCK. The undersigned Panel wonders if the Defence expects the enacting clause to encompass all the articles referenced in the Code regarding the criminal responsibility of the Accused, its form, the existence of a causal link. That will render the enacting clause lengthy and complex, thus incomprehensible. The only mandatory elements of the enacting clause are articulated in Article 391 read with Article 396 Paragraph 3 of the KCCP. In respect to the other grounds, this Panel refers to its findings under the Part II.B.1 on the allegations of

[39] See District Court of Prishtinë/Priština, case P no. 244/2010, First Instance Judgment, 17 June 2011, pages 5 to 7 of the enacting clause on sentencing; see also Part V. Determination of punishment, pages 65-67 and following

violations under Article 403 Paragraph 1 sub-Paragraphs 10 and 12 and Article 404 of the KCCP.

58. It is clear from the enacting clause and the reasoning of the Judgment that the First Instance Court has come to the result that the Defendant X.H. contributed to the smuggling, and thus in a manner that endangered the lives of people. The fact that the Defendant only admitted having taken money from the M. family does not mean that his activity did not aim at gaining material benefit. He, in addition, prepared the transportation of the migrants by contacting Defendant F.P.. Finally, the Supreme Court of Kosovo finds no contradiction between the acquittal of the Defendant of the charge of Organized crime and his conviction for the offence of Smuggling of migrants.

II. C. 3. Allegations of an erroneous and/or wrongful determination of the factual situation under Article 405 of the KCCP

59. The Defence contends the first instance findings on the factual situation, notably on the incriminating time period, the concrete and individual acts committed by each accused, the means of commission of the criminal offences, as well as the role of each suspect in the organized criminal group. Lawyer Bajram Tmava mentions that Defendant A.H. denied having received any compensation for the transportation of migrants and knowing the co-defendants. He, in addition, contends the testimonies of several witnesses (B.R., E.R., M.J., A.A., B.J., B.M., B.H. and D.V.) and the statements of the co-Defendants. Defence Counsel Florin Vertopi on behalf of Defendant S.A., citing articles of scholars and the commentaries under the old law, provides an interpretation of the elements of the offence of Organized crime; of the notions of causal link under Article 14 and of intent under Article 15 of the CCK to claim that no evidence ascertains a causal connection between S.A. and the events.[40]

60. The Defence Counsel of F.P. contests the factual findings of the First Instance Court, challenging the accurateness of the statements of the witnesses H.C., Z.M-K., and R.Z. and the credibility of Defendant X.H. Lawyer Hilmi Zhitija of Defendant X.H. alleges that the Trial Panel erroneously mentioned he was a member of the criminal group and he acted in co-perpetration with other individuals. He also puts forward that the intent of X.H. to gain material benefit was not established to convict him for Smuggling of migrants.

61. Defence counsels Qerim Zocaj and Ndue Thaqi aver that the phone conversations and messages extractions do not contain any incriminating element against the Defendants. If S.S. and I.K. were to be found guilty of Organized crime, they should be guilty for the initial criminal offence of Smuggling of migrants from which the offence of Organized crime derives. The Defence contends the findings of the First Instance Court that both Defendants were at the head of contacts with migrants. The Defence counsel of B.A. avers that the District Court Panel failed to properly assess the statement of the witnesses S.A. 2 and I. K. and did not take into account the opportunity to call Lavdim Thaqi in court. Moreover, he claims that since B.A. was in Switzerland at the time of the criminal offence, he could not commit the incriminating acts.

[40] The Defence Counsel Florin Vertopi alleges that there is no evidence against S.A. to ascertain the existence of the eight requirements of the offence of Organized crime: long-term association, large profit, organizational structure, planned action, flexibility to perform illegal acts, technology and methods to commit the offences, internationalization and compulsory mobility, and connection of organized crime with state and political leadership.

62. The State Prosecutor disagrees with the contentions of substantial violation of the procedural law under Article 403 Paragraph 1 sub-Paragraph 12 of the KCCP, and of erroneous and incomplete determination of the factual situation under Article 405 of the KCCP. In her Opinion, the correctness of the factual findings at the first instance is confirmed by the trial records, the messages sent to the Defendants and their whereabouts.

63. Most of the allegations of the Defence as to the erroneous determination of the factual situation, e.g. the liability of the Defendants as co-perpetrators, and for each of the criminal offences, existence of causal link and intent, are already addressed under Part II.B.3. of the present Judgment.

64. Contrary to the opinion of the Defence, the District Court Panel has thoroughly established the relevant factual state for all the Defendants. For this purpose the Supreme Court of Kosovo refers to the reasoning of the Judgment in its establishment of facts[41] and of the liability for each of the Defendants.[42] There are no indications that the District Court did not truthfully explore the circumstances of the case and handled the proceeding in a fair and objective manner. The Supreme Court concedes that some formulations used by the Trial Panel may seem a bit dubious.[43] However, the findings of the Trial Panel are not based on assumptions. The First Instance Court has indeed well-reasoned its evaluation of the evidence, including the credibility of witnesses S.A. 2 and I. K. and the weight of their statements, to reach a decision of guilt.[44] The District Court also lengthy analysed the statement of the Defendant B.A. and provides a detailed reasoning on its assessment.[45]

II. C. 4. Allegations concerning the decision on criminal sanctions under Article 406 of the KCCP

65. The Defence Counsels allege that the decision on punishment has no legal grounds as the elements of the criminal offences of Organized crime and Smuggling of migrants do not exist in the case at hand. The Defence contests the punishment imposed onto the Defendants as too harsh. Furthermore, the First Instance Court has failed to individualize it. Lawyer Florin Vertopi on behalf of Defendant S.A. puts forward the following mitigating circumstances: the past conduct of the Defendant; his good behaviour of the defendant after the commission of the criminal offence and during the main trial; his guilty plea and remorse; and his poor financial status. He, therefore, requests the Supreme Court Panel to apply Article 66 of the CCK on the particularly mitigating circumstances. Defence Counsel Hilmi Zhitija suggests that given his poor financial state, X.H. must be excluded from paying the costs.

[41] See District Court of Prishtinë/Priština, case P no. 244/2010, First Instance Judgment, 17 June 2011, Part 2. Factual reconstruction of the events and evaluation of the presented evidence, pages 10 and following
[42] Ibid, Part 2 and Part 3. Legal qualification, pages 58 and following
[43] Ibid, page 61: "It is just the case to add that the same conclusion would be also valid for the other defendants (S.S., I.K., B.A.), in the (frankly implausible) case that somebody might consider not proven beyond any reasonable doubt that they had a material benefit. In fact, the undeniable circumstance that they were aware of cooperating in a criminal activity, which was surely making other people gain a material benefit, establishes firmly their culpability on the basis of the principle above explained."
[44] Ibid *inter alia* Part 2.2.3. The smuggling of I. A., pages 18 and following; 2.2.4. The smuggling of L.K., A.K. and A.K.2, pages 24 and following
[45] Ibid, pages 41 and following

66. In the State Prosecutor's view, the imposed punishments reflect the seriousness of the criminal offences, their social dangerousness, and the means of commission. They coincide with the purpose of the punishment foreseen in Article 34 of the CCK.

67. As stated above, the Supreme Court of Kosovo is of the opinion that regarding the offence of Smuggling of migrants, the District Court Panel erroneously imposed several punishments in lieu of one single punishment.

68. It is otherwise noted that the Trial Panel took into consideration the general purpose of the punishment, as well as the mitigating and aggravating circumstances for each Defendant, like stipulated under Articles 34, 42, 43, 54 and Article 64 and following of the KCCP. The Trial Panel considered the following aggravating factors: extreme seriousness of the criminal offences committed intentionally to gain material benefit; denial of the commission by the Accused S.A., A.H., I.K., S.S. and F.P.; and the past behaviour of the Defendants (previous conviction of Defendant F.P.). The District Court Panel, additionally, took into account the mitigating circumstances: the fact that B.A. voluntarily surrendered to the police, that he waived his right to a confirmation hearing, and that he provided the Court with information on the role and structure of the criminal organization; that Defendants S.A., B.A., A.H., I.K., S.S. and X.H. did not have any previous convictions.

69. As for S.A. who 'confessed' his deeds in his Appeal, the Supreme Court of Kosovo is of the opinion that the punishment awarded in first instance is justified by the light of the circumstances of the case.

70. The Supreme Court of Kosovo also finds that the First Instance Court properly applied the provisions on particularly mitigating circumstances to Defendant X.H., "his sincere behaviour held throughout the entire trial and the low degree of his criminal liability".

71. The Supreme Court of Kosovo, therefore, rejects as unmeritorious the Defence's contentions in this regard.

72. The motions of the Defence counsels to have the detention on remand of Defendants I.K. and F.P. terminated are rejected as ungrounded.

73. It has been therefore decided as per in the enacting clause.

Presiding Judge	**Member of the panel**
Horst Proetel, EULEX Judge	Valdete Daka, Supreme Court Judge
Member of the panel	**Member of the panel**
Marije Ademi, Supreme Court Judge	Avdi Dinaj, Supreme Court Judge
Member of the panel	**Recording clerk**
Martti Harsia, EULEX Judge	Chiara Rojek, Legal Officer

SUPREME COURT OF KOSOVO
Ap-Kz no. 61/2012
2 October 2012
Prishtinë/Priština