COURT OF APPEALS
PRISTINA

IN THE NAME OF THE PEOPLE

Case number: **PAKR 158/15**
Date: **5 April 2016**

Basic Court: **Prizren, P.nr. 272/13**

Original: **English**

The Court of Appeals, in a Panel composed of EULEX Court of Appeals judge Radostin Petrov, as presiding and reporting judge, Kosovo Court of Appeals judge Xhevdet Abazi and EULEX Court of Appeals judge Roman Raab as panel members, assisted by Alan Vasak, EULEX legal officer, acting in the capacity of a recording officer,

in the case concerning the defendant:

N.U.;

O.J.;

S.M.;

S.S.;

T.M.;

E.A.;

F.B.;

R.R.;

H.B.;

G.G.;

Charged under the indictment of the Special Prosecution Office of the Republic of Kosovo (hereinafter "SPRK") PPS. No: 253/09 dated 19 July 2012 and the amended indictment dated 22 January 2014 with the criminal offences of:

> Issuing of Unlawful Judicial Decision in violation of Article 346 of the Provisional Criminal Code of Kosovo (hereinafter "PCCK")
> *in relation to O.J., E.A., F.B., S.M., S.S., T.M. and R.R.;*
>
> Assistance in Issuing of Unlawful Judicial Decision in violation of Article 346 of the PCCK read in conjunction with Article 25 of the PCCK
> *in relation to H.B. and G.G.;*
>
> Inciting Another Person to Issue Unlawful Judicial Decision in violation of Article 346 of the PCCK read in conjunction with Article 24 of the PCCK
> *in relation to N.U.;*

adjudicated in first instance by the Basic Court of Prizren with judgment P.nr. 272/13, dated 9 September 2014, by which:

> The defendant N.U. was found guilty of committing the requalified criminal offence of Issuing of Unlawful Judicial Decision in co-perpetration in violation of Article 346 PCCK in conjunction with Article 23 PCCK. The defendant N.U. was sentenced to a suspended term of imprisonment of 2 (two) years, which shall not be executed if the defendant does not commit another criminal offence in the time period of 2 (two) years, and the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty for a period of three (3) years.
>
> The defendant O.J. was found guilty of committing the criminal offence of Issuing of Unlawful Judicial Decision in violation of Article 346 PCCK. The defendant O.J. was sentenced to a suspended term of imprisonment of 18 (eighteen) months, which shall not be executed if the defendant does not commit another criminal offence in the time period of 2 (two) years, and the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty for a period of two (2) years.
>
> The defendant S.M. was found guilty of committing the criminal offence of Issuing of Unlawful Judicial Decision in violation of Article 346 PCCK. The defendant S.M. was sentenced to a suspended term of imprisonment of 6 (six) months, which shall not be executed if the defendant does not commit another criminal offence in the time period of 2 (two) years, and the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty for a period of two (2) years.
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> The defendant S.S. was found guilty of committing the criminal offence of Issuing of Unlawful Judicial Decision in violation of Article 346 PCCK. The defendant S.S. was sentenced to a suspended term of imprisonment of 8 (eight) months, which shall not be executed if the defendant does not commit another criminal offence in the time period of

2 (two) years, and the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty for a period of two (2) years.

The defendant T.M. was found guilty of committing the criminal offence of Issuing of Unlawful Judicial Decision in violation of Article 346 PCCK. The defendant T.M. was sentenced to a suspended term of imprisonment of 1 (one) year, which shall not be executed if the defendant does not commit another criminal offence in the time period of 2 (two) years, and the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty for a period of two (2) years.

The defendants E.A., F.B. and R.R. were found guilty of committing the criminal offence of Issuing of Unlawful Judicial Decision in violation of Article 346 PCCK. The defendants E.A., F.B. and R.R. were sentenced to a suspended term of imprisonment of 9 (nine) months, which shall not be executed if the defendants do not commit another criminal offence in the time period of 2 (two) years, and the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty for a period of two (2) years.

The defendant H.B. was found guilty of committing the criminal offence of Assistance in Issuing of Unlawful Judicial Decision in violation of Article 346 PCCK read in conjunction with Article 25 PCCK. The defendant H.B. was sentenced to a suspended term of imprisonment of 1 (one) year, which shall not be executed if the defendant does not commit another criminal offence in the time period of 2 (two) years, and the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty for a period of two (2) years.

The defendant G.G. was found guilty of committing the requalified criminal offence of Falsifying Documents in violation of Article 332 PCCK. The defendant G.G. was sentenced to a suspended term of imprisonment of 6 (six) months, which shall not be executed if the defendant does not commit another criminal offence in the time period of 2 (two) years, and the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty for a period of two (2) years;

seised of the appeals filed by

the SPRK,

defence counsel Tahir Rrecaj for the defendant N.U.,
the defendant O.J.,
defence counsel Zivojin Jokanovic for the defendant O.J.,
defence counsel Visar Vehapi for the defendant S.M.,
the defendant S.S.,
the defendant T.M.,
the defendants E.A. and F.B.,
defence counsel Shefki Sylaj for the defendant R.R.,
defence counsel Musa Dragusha for the defendant H.B.,
defence counsel Qerim Metaj for the defendant G.G.,

having considered the responses to the appeals,
having considered the motion of the appellate state prosecutor,

after having held a public session of the Court of Appeals on 30 and 31 March 2016,

having deliberated and voted on 5 April 2016,

acting pursuant to Articles 389, 390, 394, 398 of the Criminal Procedure Code of Kosovo (hereinafter "CPC"),

by majority of votes renders the following:

JUDGMENT

The appeal of defence counsel Zivojin Jokanovic for the defendant O.J. and the appeal of the defendant O.J. herself against the judgment of the Basic Court of Prizren P.nr. 272/13, dated 9 September 2014, are partially granted, insofar as the intent of the defendant to obtain unlawful material benefit cannot be proven beyond a reasonable doubt and the imposed accessory punishment is too vague. The remainder of the appeals is rejected as unfounded and the conviction of the defendant is upheld.

The appeal of defence counsel Visar Vehapi for the defendant S.M. against the judgment of the Basic Court of Prizren P.nr. 272/13, dated 9 September 2014, is partially granted, insofar as the intent of the defendant to obtain unlawful material benefit cannot be proven beyond a reasonable doubt and the imposed accessory punishment is too vague. The remainder of the appeal is rejected as unfounded and the conviction of the defendant is upheld.

The appeal of the defendant S.S. against the judgment of the Basic Court of Prizren P.nr. 272/13, dated 9 September 2014, is partially granted, insofar as the intent of the defendant to obtain unlawful material benefit cannot be proven beyond a reasonable doubt and the imposed accessory punishment is too vague. The remainder of the appeal is rejected as unfounded and the conviction of the defendant is upheld.

The appeal of the defendant T.M. against the judgment of the Basic Court of Prizren P.nr. 272/13, dated 9 September 2014, is partially granted, insofar as the intent of the defendant to obtain unlawful material benefit cannot be proven beyond a reasonable doubt and the imposed accessory punishment is too vague. The remainder of the appeal is rejected as unfounded and the conviction of the defendant is upheld.

The appeal of defence counsel Musa Dragusha for the defendant H.B. against the judgment of the Basic Court of Prizren P.nr. 272/13, dated 9 September 2014, is partially granted, insofar as the imposed accessory punishment is too vague. The remainder of the appeal is rejected as unfounded and the conviction of the defendant is upheld.

The appeal of the defendants E.A. and F.B. against the judgment of the Basic Court of Prizren P.nr. 272/13, dated 9 September 2014, is granted, insofar as the defendants E.A. and F.B. are acquitted of Count 1, namely Issuing of Unlawful Judicial Decision.

The appeal of defence counsel Shefki Syla for the defendant R.R. against the judgment of the Basic Court of Prizren P.nr. 272/13, dated 9 September 2014, is granted, insofar as the defendant R.R. is acquitted of Count 1, namely Issuing of Unlawful Judicial Decision.

The appeal of defence counsel Tahir Rrecaj for the defendant N.U. against the judgment of the Basic Court of Prizren P.nr. 272/13, dated 9 September 2014, is granted, insofar as the defendant N.U. is acquitted of Count 3, namely Inciting Another Person to Issue Unlawful Judicial Decision, requalified by the Basic Court to Issuing of Unlawful Judicial Decision in co-perpetration.

The appeal of defence counsel Qerim Metaj for the defendant G.G. against the judgment of the Basic Court of Prizren P.nr. 272/13, dated 9 September 2014, is granted, insofar as the defendant G.G. is acquitted of Count 2, namely Assistance in Issuing of Unlawful Judicial Decision requalified by the Basic Court to Falsifying Documents.

The appeal of the Special Prosecution Office of the Republic of Kosovo against the judgment of the Basic Court of Prizren P.nr. 272/13, dated 9 September 2014, is partially granted, insofar as the imposed accessory punishment is too vague. The remainder of the appeal is rejected as unfounded.

The judgment of the Basic Court of Prizren P.nr. 272/13, dated 9 September 2014, is modified as follows:

With regard to the acquittal of the defendants N.U., E.A., F.B., R.R. and G.G.

Pursuant to Article 364, paragraph 3, CPC the defendant N.U. is acquitted of Count 3, Inciting Another Person to Issue Unlawful Judicial Decision, because it has not been proven beyond a reasonable doubt that the defendant committed the criminal offence with which he has been charged.

Pursuant to Article 364, paragraph 3, CPC the defendants E.A., F.B. and R.R. are acquitted of Count 1, Issuing of Unlawful Judicial Decision, because it has not been proven beyond a reasonable doubt that the defendants committed the criminal offence with which they have been charged.

Pursuant to Article 364, paragraph 3, CPC the defendant G.G. is acquitted of Count 2, Assistance in Issuing of Unlawful Judicial Decision, because it has not been

proven beyond a reasonable doubt that the defendant committed the criminal offence with which he has been charged.

With regard to the conviction of the defendants O.J., S.M., S.S. and T.M.

The defendants O.J., S.M., S.S. and T.M. committed the criminal offence of Issuing of Unlawful Judicial Decision with the intent to cause damage to another person.

With regard to the accessory punishment against the defendants O.J., S.M., S.S., T.M. and H.B.

Pursuant to Article 57, paragraph 1 and 2, PCCK the defendants O.J., S.M., S.S., T.M. and H.B. are prohibited from exercising a judicial profession, activity or duty for the period of 2 (two) years, starting from the day the judgment becomes final.

The remainder of the impugned judgment is affirmed.

REASONING

I. RELEVANT PROCEDURAL BACKGROUND

On 27 July 2012 the SPRK filed indictment PPS 253/09 dated 19 July 2012.

Confirmation hearing sessions were held on 30 August 2012, 24 September 2012, 18 October 2012 and 2 November 2012. On 24 September 2012 the defendants F.B. and T.M. were severed from these proceedings. However proceedings in relation to T.M. were re-joined on 18 October 2012.

The indictment was dismissed pursuant to a ruling issued by the pre-trial judge dated 27 December 2012. The proceedings against all defendants (excluding the severed party F.B.) were thereby terminated.

The ruling dismissing the indictment was appealed by the special prosecutor. In a ruling dated 17 April 2013, the Court of Appeal partially granted the special prosecutor's appeal and ruled that the indictment remained in force, subject to amendments. The indictment for all defendants was dismissed in so far as it referred to the legal qualification of Abuse of Official Position.

On 22 August 2013 the then presiding Judge, upon request of the special prosecutor, re-joined the case of the defendant F.B. to the other 9 defendants charged in indictment PPS. 253/09. The

indictment was confirmed against him by a ruling by the presiding judge dated 5 December 2013, which was confirmed by the Court of Appeals.

An amended indictment was filed on 22 January 2014.

Main trial sessions were held on 21 and 23 January 2014, 5, 18, 20, 24, 25, 26 February 2014, 12 March 2014, 7 April 2014, 19 May 2014, 18 and 20 June 2014, 29, 30 and 31 July 2014, 3 and 4 September 2014.

The enacting clause of the impugned judgment was announced on 9 September 2014.

The written judgment was served on the SPRK on 15 December 2014. The SPRK on 24 December 2014 filed an appeal against the impugned judgment.

The written judgment was served on the defendant N.U. on 17 December 2014 and on his defence counsel Tahir Rrecaj on 15 December 2014. The defendant, through his defence counsel, on 30 December 2014 filed an appeal against the impugned judgment.

The written judgment was served on the defendant O.J. on 23 January 2015 and on her defence counsel Zivojin Jokanovic on 16 December 2014. The defence counsel Zivojin Jokanovic, on behalf of the defendant, on 30 December 2014 filed an appeal against the impugned judgment. The defendant herself also filed an appeal against the impugned judgment on 30 December 2014.

The written judgment was served on the defendant S.M. on 18 December 2014 and on her defence counsel Visar Vehapi on 15 December 2014. The defendant, through her defence counsel, on 29 December 2014 filed an appeal against the impugned judgment.

The written judgment was served on the defendant S.S. on 17 December 2014. The defendant on 24 December 2014 filed an appeal against the impugned judgment.

The written judgment was served on the defendant T.M. on 17 December 2014. The defendant on 5 January 2015 filed an appeal against the impugned judgment.

The written judgment was served on the defendant F.B. on 17 December 2014 and on the defendant E.A. on 19 December 2014. The defendants E.A. and F.B. on 5 January 2015 filed an appeal against the impugned judgment.

The written judgment was served on the defendant R.R. on 17 December 2014 and on his defence counsel Shefki Sylaj on 18 December 2014. The defendant, through his defence counsel, on 5 January 2015 filed an appeal against the impugned judgment.

The written judgment was served on the defendant H.B. on 18 December 2014 and on her defence counsel Musa Dragusha on 15 December 2014. The defendant, through his defence counsel, on 26 December 2014 filed an appeal against the impugned judgment.

The written judgment was served on the defendant G.G. on 17 December 2014 and on his defence counsel Qerim Metaj on 15 December 2014. The defendant, through his defence counsel, on 5 January 2015 filed an appeal against the impugned judgment.

Defence counsel Visar Vehapi for the defendant S.M., the defendant S.S. and the defendant G.G. filed a response to the appeal of the prosecution

The prosecution did not file a response to the appeal.

The case was transferred to the Court of Appeals for a decision on the appeal on 30 March 2015.

On 7 July 2015 the appellate state prosecutor filed a motion.

The sessions of the Court of Appeals Panel was held on 30 and 31 March 2016 in the presence of the defendants N.U., O.J., E.A., S.S., R.R., T.M., H.B. and G.G., defence counsel Tahir Rrecaj (present only on 30 March 2016), Zivojin Jokanovic, Visar Vehapi (present only on 30 March 2016), Musa Dragusha and Qerim Metaj, the representation of the injured party A.H. and the appellate state prosecutor Lars Agren.

The Panel deliberated and voted on 5 April 2016.

II. PRELIMINARY MATTERS

A. Applicable Law in the Case

a. Procedure Law

On 1 January 2013 a new procedural law entered into force in Kosovo – the Criminal Procedure Code, law no. 04/L-123. This Code repealed the previous Provisional Criminal Procedure Code of Kosovo. Article 541 of the current Criminal Procedure Code stipulates that criminal proceedings in which the indictment has been filed but was not confirmed before the entry into force of the present Code, shall not be confirmed according to provisions of the code that was in force at the time when the indictment was filed, but will be processed based on provisions of the present Code. The indictment in this case was confirmed after the entry into force of the present Code. As correctly established by the Basic Court, the applicable procedural law thus is the present Criminal Procedure Code. The Court of Appeals accordingly conducts the proceedings pursuant to the present Criminal Procedure Code.

b. Substantive Law

In accordance with Article 3, paragraph 1, of the current Criminal Code, Law 04/L-082 of 2012 (which entered into force on l January 2013) the law in effect at the time a criminal offence was committed shall be applied to the perpetrator. Pursuant to paragraph 2 of the aforementioned article, in the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply. Considering the foregoing, the Basic Court correctly applied the previous criminal code, the Provisional Criminal Code of the Republic of Kosovo, and the Panel shall thus also apply this version of the criminal code.

B. Competence

The Panel has reviewed its competence and since no formal objections were raised by the parties the Panel will suffice with the following. In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, the Panel concludes that EULEX has jurisdiction over the case and that the Panel is competent to decide the respective case in the composition of one Kosovo judge and two EULEX judges.

C. Admissibility of the appeals

All the appeals are admissible. The appeals were filed by authorized persons and contain all other relevant information pursuant to Article 382 CPC. The appeals are all filed within the 15-day deadline pursuant to Article 380 (1) CPC.

III. SUBMISSIONS OF THE PARTIES

A. The appeal of the SPRK

The SPRK on 24 December 2014 filed an appeal with the Basic Court and requests the Court of Appeals to reverse the impugned judgment in part as follows:

> Review the sentences imposed upon each of the defendants and impose sentences of immediate imprisonment (Article 383 paragraph 1, subparagraph l.4, and Article 387, paragraph 1, CPC);
> Find that the acquittal of G.G. for the offence of Assistance in Issuing Unlawful Judicial Decisions in violation of Articles 346 and 25 CCK was an erroneous and incomplete determination of the factual situation and to rule that the count is proven against the defendant and rule that material (covert measures) declared inadmissible during the Main Trial be admissible against the defendant G.G. (Article 383 paragraph 1, subparagraph l .3 and Article 386, paragraph 1, CPC);

Rule that the finding of guilt against the defendant G.G. for the offence of Falsifying Documents in violation of Article 332 CCK was a violation of criminal law (Article 383 paragraph 1, subparagraph l .2 and Article 385, paragraph 1.3, CPC).

With regard to the decision on criminal sanctions and accessory punishments the SPRK submits the following. The Basic Court failed to determine the punishment or judicial admonition correctly, having regard to all the relevant circumstances. The sentences imposed are too lenient and do not properly reflect the gravity of the offending behavior, and the aggravating and mitigating circumstances.
It is submitted that the defendants who were more heavily involved in repeat offending should have been sentenced to immediate custodial terms of imprisonment of sufficient length so as to punish the offenders, to mark the seriousness of the offending of such high profile defendants and to act as a deterrent to all potential future offenders who might be prepared to act in a similar way.

With regard to the determination of the factual situation the SPRK submits that the Basic Court made a number of determinations that are erroneous and incomplete with regard to the defendant G.G. There is ample evidence that the defendant G.G. had criminal intent to commit the offence of Assistance in Issuing Unlawful Judicial Decisions in violation of Articles 346 and 25 CCK.
Furthermore, the SPRK submits that the evidence presented during main trial regarding a covert conversation that took place on 20 September 2013 between G.G. and K.U. was erroneously declared inadmissible by the Basic Court.

With regard to the criminal offence of Falsifying Documents the SPRK submits that the statutory limitation on criminal prosecution for this offence has already elapsed pursuant to Article 90, paragraph 1 and 6 CCK.

B. <u>The appeal of defence counsel Tahir Rrecaj for the defendant N.U.</u>

Defence counsel Tahir Rrecaj on behalf of defendant N.U. filed an appeal on 30 December 2014 on the grounds of:

Essential violation of the provisions of criminal procedure (Article 381, paragraph 1, subparagraph 1.11, read with Article 370, paragraph 6 and 7 and paragraph 2, subparagraph 1 and 2, CPC);
Violation of criminal law (Article 385, paragraph 1, subparagraph 1 CPC);
Erroneous and incomplete determination of the factual situation (Article 386, paragraph 2 and 3, CPC).

The defence proposes the Court of Appeals to grant the appeal as grounded and modify the impugned judgment so the defendant N.U. is acquitted from all charges or to annul the impugned judgment and send the case back to the Basic Court for retrial.

The defence submits that the Basic Court violated the rights of the defendant for a trial within a reasonable time period and this represents the violation of Article 369, paragraph 1, read with Article 185, paragraph 2, CPC and the violation of a right for a proper adjudication, unbiased,

and within a reasonable deadline guaranteed by Article 5, paragraph 1, CPC and Article 6.1 ECHR and Article 31, paragraph 2, of the Constitution of the Republic of Kosovo. The impugned judgment was announced on 9 September 2014 whereas the written judgment was delivered to the defence counsel on 15 December 2014, more than 3 (three) months after its announcement.

The defence furthermore argues that the enacting clause of the impugned judgment is incomprehensible and contradictory with regard to the content and the reasoning of the judgment. There is no clear reasoning provided for the decisive facts, whereas the reasons that are given are unclear and contradictory. Regarding the decisive facts there are also contradictions between the reasoning, the case file and the minutes for the statements provided in the procedure and the minutes itself.
Also the reasoning part of the judgment does not address properly the arguments of the defence presented during the closing speech. The Basic Court failed to assess accurately the contradictory evidences and failed to provide the clear reasons concerning the assessment of evidence.

Further, the defence submits that the defendant has a constitutional right for a justifiable decision in a coherent manner. The defence also submits that the enacting clause and the reasoning part of the judgment failed to describe which incriminating actions the defendant undertook to be considered as a co-perpetrator.

Furthermore, since the defendant was not qualified as a Judge, Lay Judge or Minor Court Judge, which is an element of Article 346 CCK, he cannot be convicted for Article 346 CCK.

Also, the Basic Court failed to establish what the material benefit was and how this was supposed to be obtained.

Furthermore, the defendant had no involvement at all in any criminal offence involving SOE KBI "Kosovo Export" and KTA.

The Basic Court erroneously and incompletely determined the factual situation. The mere fact that the defendant allocated certain cases does not constitute intent for a criminal offence. He merely acted as he was supposed to in his capacity as President of the Municipal Court in Pristina. With regard to the Serbian cases, these cases were merely allocated to Serbian Judges in order avoid logistic problems with translators. With regard to other cases, these were sometimes allocated with consideration of the backlog and overload of certain judges. All allocations however where in full accordance with the procedures of the court system.

The defence submits that the Basic Court *prima facia* assessed the evidences in a selective and partial manner, only considering incriminating evidence and thus violating the right of equality of parties.

Furthermore, the defence submits that the defendant continuously respected the independence of all judges and their decision making. The defendant therefore was not involved in any of the judgment the other judges issued and he could also not tell them what to decide. All the judges

were aware of UNMIK Regulation 2002/12 and 2002/13 and the defendant therefore carries no responsibility for any possible wrong interpretation of these regulations by other judges.

The defence submits that the Basic Court failed to assess multiple KTA letters which confirm the innocence of the defendant.

The defence argues that the Basis Court selectively and erroneously assessed certain witness statements to the detriment of the defendant.

With regard to the correction of Judgment C. no. 2333/05 dated 15 May 2007, the defence argues that this was merely a technical correction and not a substantial modification due to the absence of the judge. Such corrections occur very often and do not constitute a legal violation.

The defence argues that the violation of legal provisions regarding the Court's competence cannot be considered as an element of a criminal offence, as this violation can be corrected with legal remedies.

Even in the event the defendant violated certain case allocation procedures, this would merely be a matter of disciplinary measures and certainly cannot constitute a criminal offence. Furthermore, the KJC regularly reviewed the work of the judges and no violation was ever found. Even the Disciplinary Inspection did not find any violations.

Supplement
The defence on 24 December 2015 filed a supplement to the appeal with new evidence.

The defendant submitted an example of a ruling on assigning duties and tasks to the judges and assisting personnel of the Court, AGJ. No. 50/2005 dated 31 January 2005 and the Response of the Basic Court of Pristina, GJA No. 1040/15 dated 15 December 2005 along with 2 tabulars of case allocation to the judges at Civil Branch in 2003. This demonstrates the procedure related to the manner of case allocation performed by the President of the Municipal Court of Pristina, the defendant N.U., is in accordance with the Decision of the Assembly of Judges of the respective court.

C. <u>The appeal of defence counsel Zivojin Jokanovic for the defendant O.J.</u>

Defence counsel Zivojin Jokanovic on behalf of the defendant O.J. filed an appeal on 30 December 2014 with the Basic Court of Pristina on the grounds of:

Essential violation of the provisions of criminal procedure (Article 384 CPC);
Violation of criminal law (Article 385 CPC);
Erroneous and incomplete determination of the factual situation (Article 386 CPC);
Decision on criminal sanction, additional punishment (Article 387 CPC).

The defence proposes the Court of Appeals to grant the appeal as grounded and modify the impugned judgment so the defendant O.J. is acquitted from all charges or to annul the impugned judgment and send the case back to the Basic Court for retrial.

The defence submits that the enacting clause of the judgment is unclear, contradictory to the reasoning and factual situation and does not contain sufficient reasons about the decisive facts. Also the reasoning part of the judgment is contradictory and the evidence was erroneously assessed. The Basic Court made incorrect conclusions, based on inadmissible evidence. The scope of the damage and the scope of the material benefit were also not explained by any evidence, nor was it substantiated.
The impugned judgment is furthermore unclear, as the defendant N.U. was convicted of co-perpetration, while, however, the defendant O.J. was not convicted of co-perpetration.
The defence further submits that the prosecution of the defendant impedes on the impartiality and independence of judges as a whole.

The Basic Court did not evaluate all the evidence properly and furthermore wrongfully emphasized inculpatory evidence, while as a whole there is no sufficient evidence to proof that the defendant is guilty beyond a reasonable doubt. The defence also argues that the actions conducted by the defendant do not constitute a criminal offence. The defendant did not issue unlawful judicial decisions, nor was any intent for material benefit proven. Also no proof was presented for any inflicted damage with regard to the allocation of the land. The defence furthermore submits that the singling out of the defendants in this case is arbitrary, as other judges have done the exact same thing, yet none were prosecuted.

The defence submits that the factual situation was erroneously and incompletely determined. The witness statements confirm the position of the defendant that no illegal activity was going on, also with regard to the allocation of cases regarding Serbian nationals.
Also it is clear from Article 14 of UNMIK Regulation 2000/59 that any type of use of land that was confiscated from its owners after the regulation came into force, is null and void.

With regard to the decision on the punishment the defence submits that no punishment can be imposed as the defendant is innocent. Furthermore, the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty is too general and not specified.

D. <u>The appeal of the defendant O.J.</u>

The defendant O.J. filed an appeal on 30 December 2014 with the Basic Court of Pristina on the grounds of:

Substantial violation of the provisions of criminal procedure;
Erroneous and incomplete determination of the factual situation;
Decision on criminal sanction.

The defendant O.J. proposes the Court of Appeals to grant the appeal as grounded and modify the impugned judgment so the defendant is acquitted from all charges or to annul the impugned judgment and send the case back to the Basic Court for retrial.

The defendant submits that by continuing and concluding the trial without the presence of the defendant F.B. and by announcing the judgment alone and taking statements from the defendant N.U., the Presiding Judge violated the provisions of criminal procedure.

The defendant furthermore submits that direct evidence of any element of the criminal offence of Issuing of Unlawful Judicial Decision is missing. The judgment of the Basic Court is unjustified and unlawful, as it is illogical and contradictory and based on presumptions, not evidence. The Basic Court in the impugned judgment even states there is no direct evidence. The Basic Court furthermore deliberately disregarded all exculpatory evidence.

The defendant also submits that she correctly applied UNMIK Regulation 2002/13 and that she applied the law the same way in all her cases.

E. The appeal of the defendants E.A. and F.B.

The defendants E.A. and F.B. filed an appeal on 5 January 2015 with the Basic Court of Pristina on the grounds of:

Essential violation of the provisions of the criminal procedure;
Erroneous and incomplete conclusion of the factual state;
Violation of the Criminal Code of Kosovo.

The defendants propose the Court of Appeals to modify the impugned judgment so the defendants are acquitted from all charges or to annul the impugned judgment and send the case back to the Basic Court for retrial.

The defendants submit that by continuing and concluding the trial without the presence of the defendant F.B. the Presiding Judge violated the provisions of criminal procedure.

The defendants further submit that the enacting clause exceeds the indictment, as certain proven facts in the enacting clause where not included in the indictment.

The impugned judgment lacks clear and complete reasoning regarding the decisive facts for the establishment of the criminal offence and the criminal responsibility for the criminal offence. The reasoning that is present is furthermore contradictory with other evidence presented in the case file.

There is no direct evidence that material benefit was obtained and the judgment even states that there is no direct evidence that the defendants intentionally rendered an illegal decision. The circumstantial evidence is furthermore based on assumptions and wrongfully interpreted evidence.

Furthermore, the Basic Court based its reasoning on unproven assumptions regarding disputed court decision.

With regard to the determination of the factual situation the defendants submit that no direct or circumstantial evidence confirms the existence of a criminal offence committed by the defendants. There is no evidence confirming the essential elements. Neither is there any evidence that any material benefit would be obtained with the rendered court decisions, or that any favors would be achieved. Any harmful effects of the court decisions were also not proven.
Furthermore the rendered court decisions became final and the KTA appeals were dismissed.

With regard to the violations of the criminal code, the defendants submit that the intent of the defendants to obtain material benefit was not proven and therefore a guilty verdict could not have been reached. Neither was it proven that someone was caused harmed or that anybody gained a favor.

Furthermore, the defendants, as judges, are entitled to immunity from criminal prosecution, based on the Constitution of the Republic of Kosovo, for the rendered court decisions.

The defendants also argue that the regulations which were supposed to be enforced were incomprehensible. Considering the confusing legal situation, with three types of legislation being applied, and a lack of adequate training, it is fully understandable that even the best judges could have unintentionally made mistakes regarding the interpretation and enforcement of the many regulations.

Furthermore, the defendants did not erroneously enforce the provisions of the LOR. With the appeal they submit Ruling of the SCSC SCA-08-0035 dated 28.06.2013.

F. <u>The appeal of defence counsel Visar Vehapi for the defendant S.M.</u>

Defence counsel Visar Vehapi on behalf of the defendant S.M. filed an appeal on 29 December 2014 with the Basic Court of Pristina on the grounds of:

Substantial violation of the provisions of criminal procedure (Article 384 CPC);
Violation of criminal law (Article 346 CPC);
Erroneous and incomplete determination of the factual situation (Article 386 CPC).

The defence proposes the Court of Appeals to grant the appeal as grounded and modify the impugned judgment so the defendant S.M. is acquitted from all charges or to annul the impugned judgment and send the case back to the Basic Court for retrial.

The defence submits that the enacting clause of the judgment is unclear, contradictory to the reasoning and factual situation and does not contain sufficient reasons about the decisive facts. Also the reasoning part of the judgment is contradictory and the evidence was erroneously assessed.
The impugned judgment is furthermore unclear, as the defendant N.U. was convicted of co-perpetration, while, however, the defendant S.M. was not convicted of co-perpetration.

Contrary to the enacting clause, the defendant only had to deal with one case related to SOE KBI Kosovo Export, and not two, as was wrongfully established by the Basic Court.

The Basic Court furthermore misinterpreted the LOT and the defendant did not act contrary to the LOT.

There is no direct evidence that material benefit was obtained and the judgment even states this. The circumstantial evidence is furthermore based on false assumptions and this is completely insufficient.

By continuing and concluding the trial without the presence of the defendant F.B. the Presiding Judge violated the provisions of criminal procedure.

Furthermore, the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty is too general and not specified.

With regard to the violation of criminal law the defence submits that the Basic Court with no sole evidence could establish that in the activities of the defendant there are elements of a criminal offence. The objective and subjective criteria for establishing the criminal offence have not been met and the defendant was therefore wrongfully convicted.

Furthermore, the defendants, as judges, are entitled to immunity from criminal prosecution, based on the Constitution of the Republic of Kosovo, for the rendered court decisions.

With regard to the factual situation, the defence submits that considering the confusing legal situation, with three types of legislation being applied, the defendant's interpretation and enforcement of the many regulations was to the best of his abilities. It is the Basic Court who interpreted the UNMIK regulations and issued court decisions wrongly in its impugned judgment.

There is no evidence that any material benefit was or would be obtained with the rendered court decisions. Any harmful effects of the court decisions were also not proven. There is also no evidence that the defendant acted with the intent to render an illegal court decision.

Furthermore, the rendered court decisions of the defendant are still to be reviewed by the Special Chamber of the Kosovo Supreme Court and it is only within the exclusive competence of this court that the rendered court decisions of the defendant can be reviewed.

G. <u>The appeal of the defendant S.S.</u>

The defendant S.S. filed an appeal dated 24 December 2014 with the Basic Court of Pristina on the grounds of:

Substantial violation of the provisions of criminal procedure;
Erroneous determination of the factual situation;
Violation of the criminal law;
Erroneous decision on criminal sanction.

The defendant S.S. proposes the Court of Appeals to grant the appeal as grounded and modify the impugned judgment so the defendant is acquitted from all charges or to annul the impugned judgment and send the case back to the Basic Court for retrial.

The defendant argues that as judge she is entitled to immunity from criminal prosecution, based on the Constitution of the Republic of Kosovo, for the rendered court decisions.

The defendant furthermore submits that the enacting clause of the impugned judgment is unclear and incomprehensible. There is no specification on how the criminal offence was committed. There is no mention of to whom the land was given and who was damaged by the rendered decision. Furthermore, it is not proven that the defendant gained any material benefit nor is it specified that others have gained a benefit from the rendered court decisions of the defendant.

With regard to the violation of criminal procedure the defendant submits that she did not sign the ruling that altered her initial ruling. It was the defendant N.U. who rendered that ruling. The defendant can therefore not be held responsible for that ruling.

Even if the defendant has erred in the rendered court decisions, it is up to a higher instance to provide guidance and correct any eventual mistakes. The decision is certainly not subject to criminal proceedings.

The defendant furthermore argues that there is no specific reasoning incorporated in the impugned judgment regarding the acts of the defendant, but merely acts of the defendant N.U.

With regard to the factual situation the defendant argues that there is no mention of to whom the land was given. Furthermore, the defendant did not sign the ruling that altered her initial ruling. It was the defendant N.U. who rendered that ruling. The defendant therefore cannot be held responsible for the action of N.U. Also, the impugned judgment is unclear, as the defendant N.U. was convicted of co-perpetration, when, however, the defendant S.S. was not convicted of co-perpetration.

Furthermore, the Basic Court wrongfully found that the LCT was to be applied, as that law was not in force at the time of the rendered court decision, it was the old Law on Obligations that was in force.

The rendered decision was only of a declarative nature and no detriment was caused to anybody. The rendered decision was furthermore confirmed by the second instance.

With regard to the violation of the criminal code the defendant argues that there is no direct evidence that material benefit was obtained or that any harm was caused. There also is no direct evidence that the defendant intentionally rendered an illegal decision.

With regard to the punishment, the defendant foremost argues that no punishment can be imposed as there is no evidence that the defendant committed a criminal offence. Additionally, the imposed punishment on the defendant is not proportional to the punishment imposed on the co-defendants as they rendered more decisions. Lastly, the accessory punishment is too severe.

She submits an excerpt of Law on Obligational Relationship No. 04/L-077.

Supplement
The defendant on 26 January 2016 filed a supplement to her appeal with new evidence.

The defendant submitted the judgment of the Municipal Court in Prizren C.nr. 101/107 dated 4 June 2008, which became final on 2 March 2009. This means that also the Prizren Municipal Court issued a judgment without referral to the Special Chamber of the Supreme Court of Kosovo, while this judgment was even binding. The judgment issued by the defendant was however not binding, but merely declarative. She submits also judgement in case C.nr. 2333/2005.

H. The appeal of defence counsel Shefki Syla for the defendant R.R.

Defence counsel Shefki Syla on behalf of the defendant R.R. filed an appeal on 5 January 2015 with the Basic Court of Pristina on the grounds of:

Essential violation of the provisions of criminal procedure (Article 384 CPC);
Erroneous and incomplete determination of the factual situation (Article 386 CPC);
Violation of criminal law (Article 346 CPC).

The defence proposes the Court of Appeals to grant the appeal as grounded and modify the impugned judgment so the defendant R.R. is acquitted from all charges or to annul the impugned judgment and send the case back to the Basic Court for retrial.

The defence submits that the enacting clause of the judgment is unclear, contradictory to the reasoning and factual situation and does not contain sufficient reasons about the decisive facts. Also the reasoning part of the judgment is contradictory and the evidence was erroneously assessed. The Basic Court made incorrect conclusions, based on assumptions. The scope of the damage and the scope of the material benefit were also not explained by any evidence, nor was it substantiated.

As a judge the defendant is entitled to immunity from criminal prosecution, based on the Constitution of the Republic of Kosovo, for the rendered court decisions.

With regard to the factual situation, the Basic Court wrongfully interpreted the law in relations to the rendered decisions. The defendant correctly enforced the law that was in force at the time and the rendered decisions were lawful.

The criminal law was violated due the guilty verdict of the defendant despite the fact the defendant did not commit any criminal offence.

Furthermore, it is up to a higher instance to review and correct any eventual mistakes of the rendered decisions by the defendant. The decisions are certainly not subject to criminal proceedings.

I. The appeal of the defendant T.M.

The defendant T.M. filed an appeal on 5 January 2015 with the Basic Court of Pristina on the grounds of:

Essential violation of the provisions of criminal procedure;
Violation of the criminal code;
Erroneous and incomplete determination of the factual situation;
Decision on criminal sanction.

The defendant T.M. proposes the Court of Appeals to grant the appeal as grounded and modify the impugned judgment so the defendant is acquitted from all charges or to annul the impugned judgment and send the case back to the Basic Court for retrial.

The defendant submits that by continuing and concluding the trial without the presence of the defendant F.B. and by announcing the judgment alone without the rest of the panel and taking statements from the defendant N.U., the Presiding Judge violated the provisions of criminal procedure.

The violation of the criminal code occurred when the Basic Court convicted the defendant, despite the fact that there are no elements of a criminal offence in the activities of the defendant.

With regard to the factual situation the defendant submits that the Basic Court interpreted the relevant legislation wrongfully. Even though the defendant failed to invoke the Law on Sales of Immovable Property, he was acting in good faith and not doing anything unlawful or with any intention to acquire for himself or others illegal material benefit or cause damage to anyone. Also, the only court competent to review the decisions of the defendant is the Special Chamber of the Supreme Court and not the criminal courts.
Furthermore, the defendant did not act differently than other judges and the mentioned judgments by the Basic Court were made 4 or more years after the decisions of the defendant which are subject of the indictment.

There is no direct evidence that the defendant acted in a premeditated manner and the judgment even states that there is no direct evidence that the defendant intentionally rendered an illegal decision. The circumstantial evidence is furthermore based on assumptions and wrongfully interpreted evidence.

The Basic Court also neglected that the defendant declared himself incompetent after Kosovo-Export was placed under direct control of the Kosovo Trust Agency.

Lastly, the conviction of the defendant is based on public opinion and not on judicial grounds.

J. The appeal of defence counsel Musa Dragusha for the defendant H.B.

Defence counsel Musa Dragusha on behalf of the defendant H.B. filed an appeal on 26 December 2014 with the Basic Court of Pristina on the grounds of:

Essential violation of the provisions of criminal procedure;
Violation of criminal law;
Erroneous and incomplete determination of the factual situation;
Decision on criminal sanction.

The defence proposes the Court of Appeals to grant the appeal as grounded and modify the impugned judgment so the defendant H.B. is acquitted from all charges.

The Basic Court erroneously established that the employment contract of the defendant as a WCJW lawyer of SOE KBI "Kosovo-Export" was terminated by SOE KBI or KTA, as the contract was never terminated. The Basic Court also erroneously established that SOE KBI dispersed and ceased to exist in 1997. The Basic Court furthermore failed to establish that the defendant provided assistance on behalf of KBI regarding the cases of the judgments which are subject of the indictment. However, the defendant did not receive any training from KBI regarding the specific Regulations and competency of the Special Chamber of the Supreme Court and as a consequence she didn't have the necessary knowledge concerning the Regulations.

The defendant did not have any intent to commit a criminal offence, as she was not aware that by her action or non-action a harmful offence could occur and she certainly did not want to cause an illegal consequence.

The defence argues that the defendant was obliged to refer the appeals of the District Court as a first instance court to the Municipal Court, but she did however also challenge the issue of competence of the Municipal Court to decide on these cases.

The Basic Court did not sufficiently proof that the defendant had an intent to assist the judges in rendering any unlawful decisions and not notifying the KTA regarding the procedures which were ongoing against KBI.

With regard to the punishment the defence submits that the Basic Court failed to take into account that the defendant has no prior criminal record, comes from a good family, needs to take care of her sick husband and unemployed children and was acting under orders of the director of KBI.

K. <u>The appeal of defence counsel Qerim Metaj for the defendant G.G.</u>

Defence counsel Qerim Metaj on behalf of the defendant G.G. filed an appeal on 5 January 2015 with the Basic Court of Pristina on the grounds of:

Essential violation of the provisions of criminal procedure (Article 384 CPC);
Erroneous and incomplete determination of the factual situation (Article 386 CPC);
Violation of criminal law (Article 385 CPC);
Decision on criminal sanction and alternative punishment.

The defence proposes the Court of Appeals to grant the appeal as grounded and modify the impugned judgment so the defendant G.G. is acquitted from all charges or to annul the impugned judgment and send the case back to the Basic Court for retrial.

The defence submits that the criminal offence of which the defendant was found guilty of was not included in the indictment and thus the Basic Court violated the provisions of criminal procedure when convicting the defendant.

The defence furthermore argues that the enacting clause of the impugned judgment is incomprehensible and contradictory with regard to the content and the reasoning of the judgment.

There is insufficient evidence to proof that the defendant intentionally assisted the judges with any eventual criminal offence and the Basic Court also did not present any facts to substantiate this. The defendant was acquitted from the original charge only to be wrongfully convicted of a charge that the defendant also did not commit.

It is also important to note that the defendant was the only lawyer indicted, while several other lawyers also represented clients in the indicted cases.

The offence the defendant is being charged with is not a criminal offence and therefore a guilty verdict is unlawful and a punishment also cannot be imposed.

Supplement
The defence on 31 December 2015 filed a supplement to the appeal with new evidence.

The defendce submitted rulings of the Special Chamber of the Supreme Court of Kosovo: AC - I - 13-0120 dated 6 July 2015, AC - I - 13-0124 - A001 and A0002 dated 15 July 2015 and AC - I - 13-0126 - A001 dated 15 July 2015. This means that the issue at hand is a matter of on-going contested procedure and not a matter of a final judgment by which damage could have been caused.

This means that also the Prizren Municipal Court issued a judgment without referral to the Special Chamber of the Supreme Court of Kosovo, whilst this judgment was even binding. The judgment issued by the defendant was however not binding, but merely declarative.

L. Responses to the Appeals

Defence counsel Visar Vehapi for the defendant S.M.
In response to the appeal filed by the SPRK the defence submits that there is no grounded suspicion for the existence of a criminal offence. The defence stands behind its own appeal.

The defendant S.S.
In response to the appeal filed by the SPRK the defendant submits that it is not clear what the SPRK means with the expression "reverse the challenged judgment", and that the criminal code does not foresee the punishment of "immediate imprisonment".

The defendant G.G.
In response to the appeal filed by the SPRK the defendant submits that the Basic Court correctly acquitted him from the charge of Assistance in Issuing Unlawful Decision, but erred when convicting him of Falsification of Official Documents, seeing as the defendant was not charged for this. Furthermore the statutory limitation has expired regarding this offence. There is also is insufficient proof for any co-perpetration scheme.

M. The motion of the appellate prosecution

The appellate prosecutor on 7 July 2015 filed a motion moving the Court of Appeals to grant the appeal of the SPRK and to reject the appeals of the defence counsel.

The appellate prosecutor elaborates in detail on the appeals and responses of the SPRK and the defence counsel and defendants. In short the appellate prosecutor finds most issues of the appeals submitted by the defence counsel and defendants without merit. However with regard to the accessory punishment the appellate prosecutor moves the Court of Appeal to assess whether the accessory punishments were correctly imposed in a sufficiently determined manner.

IV. FINDINGS OF THE PANEL

A. Substantial violation of the provisions of criminal procedure

a. Absence of the defendant F.B.

The defence submits that a substantial violation of the provisions of criminal procedure occurred when the presiding judge of the first instance panel continued the session on 3 September 2014, even though the defendant F.B. had to leave the session due to medical issues and could not return.

This ground of appeal is rejected as unfounded.

From the record of the minutes of the session on 3 September 2014 it cannot be derived that the defendant F.B. left the courtroom during the session. Therefore the claim of the defence is unsubstantiated.

b. Enacting clause

The defence submits that the enacting clause is incomprehensible and in contradiction with itself as well as with the evidence in the case file.

This ground of appeal is rejected as unfounded.

The enacting clause is clear, logical and does not contradict itself or the reasoning. The enacting clause provides a coherent and comprehensive description of the decisive facts and contains all the necessary data prescribed by Article 370, paragraph 3 and 4, CPC in conjunction with Article 365 CPC. The enacting clause is fully coherent with the reasoning of the impugned judgment and reflects the findings elaborated therein. The Basic Court presented grounds for each individual point of its decision, as required by Article 370, paragraph 6, CPC. The enacting clause read together with the detailed reasoning of the impugned judgment provides a comprehensive assessment of the evidence and of the facts the Basic Court considered proven and not proven. In accordance with Article 370, paragraph 7, CPC the Basic Court also made a detailed assessment of the credibility of conflicting evidence and the reasons guiding the Basic Court in settling points of fact and law.

c. Evidence examination

The defence alleges that the Basic Court failed to evaluate the evidence separately and jointly.

The Panel finds no violation of these provisions in this case.

It is clear from the elaborate analysis contained in the reasoning of the impugned judgment, that the Basic Court has performed a careful and meticulous analysis of the evidence in the case. Whilst the defence may disagree with the conclusions the Basic Court drew after completing its analysis of the evidence; that disagreement amounts to a separate challenge. The defence however cannot reasonably claim that the Basic Court did not fulfil its duty to carefully examine the evidence with maximum professional devotion.

The trial panel conducted the trial impartially and gave careful consideration to motions for evidence from the defence and prosecution alike and has carefully weighed the evidence and arguments of both parties. This is clear from the impugned judgment and the reasoning given by the trial panel therein. Again, the Panel reiterates that whether the conclusions of the Basic Court on determination of facts were correct and complete is a separate issue and this will be assessed in the next section of this judgment.

B. <u>New evidence during the appellate procedure</u>

During the appellate procedure the defence submitted certain judgments rendered by SCSC to be included in the case file as new evidence. The prosecution objected to including these judgments as new evidence, as this has to be done during an official hearing before the Court of Appeals.

The Panel finds that seeing as all the submitted judgments by the defence are judgments that are accessible for the public and belong to the public domain, there is no need to conduct a hearing to take new evidence as per Article 392 CPC. The submitted judgments will be included in the case file as new evidence. The objection of the prosecution is discarded.

All other documents presented with the appeals, supplements and during the session are not accepted as new evidence. All this evidence existed at the time when the main trial was held and

could be presented there. The court decided that there is no need to open a hearing because this evidence, even if accepted, could not change the factual findings and the final outcome.

C. Determination of the Factual Situation

The defence submits that the Basic Court did not properly evaluate the evidence administered during the main trial and consequently came to wrong conclusions regarding the criminal offences and the role of the defendants.

The prosecution also submits that the Basic Court came to wrong conclusions regarding the determination of criminal offence committed by the defendant G.G.

Before assessing the merits of the arguments presented by the defence on the alleged erroneous or incomplete determination of facts, the Panel reiterates the standard of review regarding the factual findings made by the trial panel.

It is clear from Article 386 CPC that it is not sufficient for the appellant to demonstrate only an alleged error of fact or incomplete determination of fact by the trial panel. Rather, as the criminal procedure code requires that the erroneous or incomplete determination of the factual situation relates to a "material fact", the appellant must also establish that the erroneous or incomplete determination of the factual situation indeed relates to a material fact, i.e. is critical to the verdict reached.[1] Furthermore, it is a general principle of appellate proceedings that the Court of Appeals must give a margin of deference to the finding of fact reached by the trial panel because it is the trial panel which is best placed to assess the evidence. The Supreme Court of Kosovo has frequently held that it must "*defer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so.*" The standard which the Supreme Court applied was "*to not disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous*".[2]

With the above in mind, the Panel has reviewed the assessment of the Basic Court with regard to the administered evidence and the factual situation.

a. Admissibility of the evidence

The Panel evaluated the evidence presented during the course of the main trial, as set out by the Basic Court in paragraphs 19 to 24 of the impugned judgment. The Panel also examined the proposed evidence consisting of an audio recording/transcript of a conversation between the defendant G.G. and K.U., as referred to by the Basic Court in paragraphs 26 to 28 of the impugned judgment. The Panel furthermore reviewed the admissibility of the witness statement of F.T. and the UNMIK Internal Memorandum Ref: DOJ/JDD/08/bf02335 dated 9 June 2008.

[1] See also B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366, para. I. 3.

[2] Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, para. 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, para. 30.

In the view of the Panel, the Basic Court came to logical conclusions in its assessment regarding the admissibility of the evidence. The Panel finds the evidence as mentioned in paragraphs 19 to 24 of the impugned judgment admissible. The Panel furthermore finds the witness statement of F.T. and the UNMIK Internal Memorandum Ref: DOJ/JDD/08/bf02335 dated 9 June 2008 admissible and adopts the analysis of the Basic Court in this regard in its entirety. With regard to the proposed evidence consisting of an audio recording/transcript of a conversation between the defendant G.G. and K.U., the Panel also fully subscribes to the reasoning of the Basic Court, as set out in paragraph 28 of the impugned judgment and the ruling issued by the presiding judge on 28 January 2014, and finds the evidence inadmissible.

The appeals of the defence and the appeal of the prosecution in this regard are therefore rejected as unfounded.

b. Facts established

The Panel examined the thorough analysis of the Basic Court regarding the decisions issued during 2006 and 2007 by the defendants O.J., S.M., S.S. and T.M., judges at the Municipal Court in Pristina, and R.R., E.A. and F.B., judges at the District Court of Pristina, in 15 cases concerning socially owned land. The defendant N.U. was the President of the Municipal court of Pristina during that time. The defendants H.B. and G.G. were two jurists who participated in certain proceedings as representatives of the parties.

In the view of the Panel, the Basic Court comes to logical conclusions in its assessment of the evidence, as elaborated on in paragraph 36 to 216 of the impugned judgment. The Panel finds no reason to doubt a material fact was not established correctly. Nor does the Panel find that the Basic Court incorrectly interpreted any evidence.

The Panel fully adopts and affirms the analysis of the Basic Court that:

> 15 cases were issued by judges at the Municipal Court of Pristina without any referral by the SCSC, in contravention of UNMIK Regulation 2002/13.
>
> In all but one of the cases, no notice of the claim was given to the KTA prior to the decision being issued, in breach of Regulation 2002/12.
>
> 1 case was issued by the District Court of Pristina, whereby the judges decided on an appeal without jurisdiction, in contravention of Regulation 2002/13.
>
> Each claim was grounded on the Law on Obligations, Official Gazette of SFRY 29/78, which was not the correct law to be applied.
>
> During the proceedings, the judges failed to obtain evidence and facts in order to establish that the claimants were the rightful owners of the claimed properties, and failed to confirm the authenticity of the contracts for sale, on which the claims were based. The judges failed to confirm the authenticity of death certificates which were submitted to the court as proof that the claimants were the historical owners of the land.

Replacement land was awarded, which was not a remedy provided for by Regulation 2002/13 or any other applicable law.

Land was awarded as compensation, which was not a remedy provided for by Regulation 2002/13 or any other applicable law.

The Appellate Panel finds the claim of the defendant S.M. that she dealt with only one case involving KBI "Kosovo Export" ungrounded. From the case file it is obvious that KBI "Kosovo Export" was respondent in both cases – C. no 1698/05 and C. no 251/04.

Concluding, the Panel finds that the Basic Court correctly and completely determined the factual situation regarding the 15 cases. There are no grounds that undermine the correctness or reliability of the determination of a material fact. Article 386 CPC was thus not violated and the Panel rejects the appeals of the defence and prosecution in this regard.

D. Issuing of Unlawful Judicial Decision by the defendants O.J., S.M., S.S. and T.M.

Article 346 CCK reads as follows:

Issuing Unlawful Judicial Decisions
A judge or a lay judge or a minor offence court judge who, with the intent to obtain an unlawful material benefit for himself, herself or another person or cause damage to another person, issues an unlawful decision shall be punished by imprisonment of six months to five years.

It is clear from the wording of Article 346 PCCK that not only must the decision be issued unlawful; the judge also must have the intent to obtain an unlawful material benefit for himself, herself or another person or cause damage to another person.

Article 15 PCCK reads as follows:

Intent
(1) A criminal offence may be committed with direct or eventual intent.
(2) A person acts with direct intent when he or she is aware of his or her act and desires its commission.
(3) A person acts with eventual intent when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its occurrence.

It is not contested that the defendants O.J., S.M., S.S. and T.M. issued the decision in their respective cases 1314/07, 1698/05, 53/06, 429/05, 3/06, 1849/06, 1147/06, 3521/04, 1415/2005, 1738/07, 1908/3, 342/06, 1918/06, 251/04 and 2333/05. The defence does however contest that the issuing of the decisions constitutes the criminal offence of Issuing of Unlawful Judicial Decision.

a. Unlawful

The Panel affirms the assessment of the Basic Court that the procedural law was violated by the issuing of the respective decisions. The cases were adjudicated upon by the Municipal Court Judges without a referral from the SCSC, as required by UNMIK Regulation 2002/13 and in the majority of cases, the KTA (now KPA) was not notified of the claim against the SOE KBI, as required per UNMIK Regulation 2002/12. It was further established that there were violations of substantial law as well. The claims and decisions were grounded on the Law on Obligations, which was not applicable for contractual obligations which were established prior to the Law on Obligations' entry into force. A further violation of substantive law also occurred when replacement lots of land were awarded. Furthermore, the judges failed to obtain evidence and facts in order to establish that the claimants were the rightful owners of the claimed properties, and failed to confirm the authenticity of the contracts for sale, on which the claims were based. The judges also failed to confirm the authenticity of death certificates which were submitted to the court as proof that the claimants were the historical owners of the land.
The Panel considers these violations, individually and especially combined, to be of such a nature that they substantially affected the outcome of the respective cases and thus are obviously wrong and clearly illegal.

Considering all of the above, the Panel thus fully concurs with the assessment of the Basic Court that the issued decisions by the defendants O.J., S.M., S.S. and T.M. in their respective cases 1314/07, 1698/05, 53/06, 429/05, 3/06, 1849/06, 1147/06, 3521/04, 1415/2005, 1738/07, 1908/3, 342/06, 1918/06, 251/04 and 2333/05 were unlawful decisions in the sense of Article 346 CCK.

b. Intent
As noted by the Basic Court, it is of paramount importance that a distinction is made between a decision which is rendered by a judge who believes the law has been applied correctly, but which decision is subsequently found to be incorrect by a second instance court, as opposed to a decision which is rendered by a judge who intentionally applies the law incorrectly.

Unlawful decision
With regard to the intent of the defendant O.J. to issue unlawful decisions the Panel fully adopts the reasoning of the Basic Court, as set out in paragraph 260 – 269 and 271 – 279 of the impugned judgment. In summary the Panel finds that, seeing as the defendant was duly informed about the applicable laws and attended seminars about the subject matter, other colleague judges and staff members of the Municipal Court of Pristina applied the law correctly, the defendant also applied the law correctly in other cases and the sheer number of irregularities and omissions regarding the allocation of the cases in question and the applied procedural and substantive law, the defendant O.J. intentionally issued unlawful decisions.

With regard to the intent of the defendant S.M. to issue unlawful decisions the Panel again fully adopts the reasoning of the Basic Court, as set out in paragraph 296 – 300 and 303 – 306 of the impugned judgment. In summary the Panel finds that, seeing as the defendant was duly informed about the applicable laws, other colleague judges and staff members of the Municipal Court of Pristina applied the law correctly, the defendant also applied the law correctly in other cases and the sheer number of irregularities and omissions regarding the allocation of the cases in question and the applied procedural and substantive law, the defendant S.M. intentionally issued unlawful decisions.

With regard to the intent of the defendant S.S. to issue an unlawful decision the Panel again fully adopts the reasoning of the Basic Court, as set out in paragraph 310 – 315 of the impugned judgment. In summary the Panel finds that, seeing as the defendant was duly informed about the applicable laws, other colleague judges and staff members of the Municipal Court of Pristina applied the law correctly, the defendant also applied the law correctly in other cases and the statement of the defendant that she knew the case had to be referred to the Special Chamber, the defendant S.M. intentionally issued an unlawful decision.
With regard to the statement of the defendant that she was threatened or forced to issue the decision, the Panel finds there is insufficient evidence to substantiate the assertion.

With regard to the intent of the defendant T.M. to issue unlawful decisions the Panel fully adopts the reasoning of the Basic Court, as set out in paragraph 319 – 322 and 324 – 327 of the impugned judgment. In summary the Panel finds that, seeing as the defendant was duly informed about the applicable laws, other colleague judges and staff members of the Municipal Court of Pristina applied the law correctly and the sheer number of irregularities and omissions regarding the allocation of the cases in question and the applied procedural and substantive law, the defendant T.M. intentionally issued unlawful decisions.

Material benefit or damage
With regard to the intent of the defendants O.J., S.M., S.S. and T.M. to issue unlawful decisions to obtain an unlawful material benefit for themselves or another person or to cause damage to another person, the Panel does not subscribe to the assessment of the Basic Court. The Panel agrees with the defence that there is insufficient evidence to proof beyond a reasonable doubt that the defendants acted the way they did with the intent to obtain material benefit. The prosecution failed to present any evidence that adequately demonstrates the intent of the defendants to obtain material benefit.
However, the Panel does find that there is sufficient evidence to proof beyond a reasonable doubt that the unlawful decisions were issued with intent to cause damage to another person. Considering all of the previously mentioned with regard to the obviously wrong and clearly illegal decisions and the circumstances surrounding the issuing of these decisions, the defendants were aware that by intentionally issuing the unlawful decisions, they would cause damage to *inter alia* the KPA (prior KTA) and Kosovo, and therewith the citizens of Kosovo.

The Panel therefore shall modify the enacting clause of the impugned judgment insofar as the unlawful decisions by the defendants O.J., S.M., S.S. and T.M. were issued with the intent to cause damage to another person.

The Panel again emphasizes that in the case at hand a distinction has been made between a decision which is rendered by a judge who intentionally applies the law incorrectly as opposed to a decision which is rendered by a judge who believes the law has been applied correctly, but which decision is subsequently found to be incorrect by a second instance court. The Panel therefore also rejects the argument of the defence that by prosecuting the defendants, the impartially and independence of a judge has been violated, and also the Constitution of Kosovo has been violated. A judge cannot hide behind the principles of impartially and independence in

order to commit criminal offences. The Constitution grants immunity to the judges safe for the criminal offences committed by them.

The appeals of the defence in this regard are rejected as unfounded.

E. Assistance in Issuing of Unlawful Judicial Decision by the defendant H.B.

As established above, the defendants O.J., S.M., S.S. and T.M. are found guilty of the criminal offence of Issuing Unlawful Judicial Decisions.

Article 25 CCK reads as follows:

> *Assistance*
> (1) Whoever intentionally assists another person in the commission of a criminal offence shall be punished as provided for in Article 65(2) of the present Code.
> (2) Assistance in committing a criminal offence includes giving advice or instruction on how to commit a criminal offence, making available for the perpetrator the means to commit a criminal offence, removing the impediments to the commission of a criminal offence, or promising in advance to conceal evidence of the commission of a criminal offence, the identity of the perpetrator, the means used for the commission of a criminal offence, or the profits which result from the commission of a criminal offence.

The defendant H.B. participated in the cases as a party, seeing as she presented herself as the legal representative of SOE KBI during the court proceedings. The defendant failed to notify the KTA (now KPA) of the claim against the SOE and she failed to object the jurisdiction of the Municipal Court, thus circumventing the KTA (now KPA) and the SCSC. The Panel fully agrees with the Basic Court that by these actions and omissions, the defendant H.B. directly assisted in the commission of the criminal offence of issuing unlawful judicial decisions. It was her obligation to protect the assets and interests of SOE KBI, yet she failed to do so.

With regard to the intent of the defendant H.B. to assist in the issuing of the unlawful decisions, the Panel upholds the reasoning of the Basic Court, as set out in paragraph 337 - 341 of the impugned judgment. The Panel however does not adopt the reasoning with regard to the intent of the defendant to obtain material benefit, as the intent of the defendant merely has to be established with regard to the assistance of the criminal offence and not the criminal offence itself. Therefore whether or not the defendant H.B. had the intent to obtain material benefit or cause damage is irrelevant for the criminal offence of Assistance in Issuing of Unlawful Judicial Decision.
In summary the Panel finds that, seeing as the defendant was not entitled to represent SOE KBI yet took active steps to appear she was entitled anyway, the defendant should have been aware of the correct applicable procedures and the defendant admitted to knowingly violating the applicable laws, the defendant H.B. intentionally assisted in the issuing of the unlawful decisions.

The appeal of the defence in this regard is rejected as unfounded.

F. Assistance in Issuing of Unlawful Judicial Decision by the defendant G.G.

With the Basic Court the Panel finds that there is insufficient evidence to proof beyond a reasonable doubt that the defendant G.G. intentionally assisted in the issuing of the unlawful decisions. Even if the interception evidence was to be declared admissible, there is insufficient evidence to proof that the defendant acted with the intent to assist in the issuing of the unlawful decisions, rather than acting with the intent of obtaining the most beneficial outcome for his clients. Contrary to the assertion of the prosecution, there is no automatic legal obligation on all lawyers to notify the court if the applicable law is not being applied correctly. In this case, the defendant merely had to represent his clients and do so to the best of his capabilities. It is not up to the lawyer to apply the law correctly, it is up to the courts to apply the law correctly. The judges could have easily disregarded the submissions of the defendant and therefore his actions did not play a crucial role in the issuing of the unlawful decisions. The Panel affirms the assessment of the Basic Court as set out in paragraph 349 – 350 of the impugned judgment.
The Panel however does not affirm the conviction with regard to the requalified offence of Falsifying Documents. As noted by the defence and the prosecution, the absolute bar on criminal prosecution for the offence of Falsifying Documents expires four years from the commission of the criminal offence, as per Article 90, paragraph 6, and Article 91, paragraph 6, in conjunction with Article 332, paragraph 1, CCK. Seeing as the alleged criminal offence occurred during 2006 and 2007, the absolute bar has long expired. Criminal prosecution for this criminal offence is thus prohibited.

Concluding, the Panel acquits the defendant G.G. of Count 2.

The appeal of the defence is granted and the appeal of the prosecution is rejected as unfounded.

G. Issuing of Unlawful Judicial Decision by the defendants E.A., F.B. and R.R.

It is not contested that the defendants E.A., F.B. and R.R. issued the decision in case 604/2003. The defence does however contest that the issuing of the decision constitutes the criminal offence of Issuing of Unlawful Judicial Decision.

a. Unlawful
The Panel affirms the assessment of the Basic Court that the procedural law was violated by the issuing of the respective decisions. The case was adjudicated upon by the District Court Judges without a referral from the SCSC and the case had also not been referred by the SCSC to the Municipal Court in the first instance. Thus there was no legal ground for the District Court to accept jurisdiction and to decide on the appeal. Furthermore there was a violation of substantial law as well as the appeal upheld a decision which was grounded on the Law on Obligations and land was awarded as compensation. The Panel fully concurs with the assessment of the Basic Court that the issued decisions by the defendants E.A., F.B. and R.R. in case 604/2003 was an unlawful decision in the sense of Article 346 CCK.

b. Intent
As noted by the Basic Court, it is of paramount importance that a distinction is made between a decision which is rendered by a judge who believes the law has been applied correctly, but which

decision is subsequently found to be incorrect by a second instance court, as opposed to a decision which is rendered by a judge who intentionally applies the law incorrectly.

In this case the Panel finds that although there are certain suspicions, there is insufficient evidence to proof beyond a reasonable doubt that the defendants intentionally issued the unlawful decision. The defendants merely handled one case and the appeal was already directed to them. There is not sufficient evidence that they acted with intent to obtain an unlawful material benefit or cause damage to another person.

Concluding, the Panel acquits the defendants E.A., F.B. and R.R. of Count 1.

The appeal of the defence is granted.

H. Inciting Another Person to Issue Unlawful Judicial Decision by the defendant N.U.

The Basic Court requalified the original charge of Inciting Another Person to Issue Unlawful Judicial Decision to the criminal offence of Issuing of Unlawful Judicial Decision in co-perpetration and convicted the defendant N.U. for this requalified offence.

The Panel however finds there is insufficient evidence to proof beyond a reasonable doubt that the defendant N.U. had a significant contribution in the issuing of the unlawful decision by the defendants O.J., S.M., S.S. and T.M.. Although there are suspicious irregularities regarding the allocation of the cases, the prosecution failed to present concrete evidence that the irregularities were caused by the defendant N.U., and even if they were caused by the defendant N.U., that this was done with the intent to enable the defendants O.J., S.M., S.S. and T.M. to issue unlawful judicial decisions. Most notably, the prosecution failed to present any evidence linking the defendant N.U., other than his formal and general role as President of the Municipal Court of Pristina, to the defendants O.J., S.M., S.S. and T.M. and more specifically to the issued decisions in question. The mere obligation as President of the Municipal Court of Pristina to take measures to maintain a proper administration and justice system does not automatically entail criminal liability for the actions of other judges, who are furthermore independent in their decision making. Without the presence of evidence linking the defendant N.U. with the defendants O.J., S.M., S.S. and T.M., the Panel must come to the conclusion that the defendant N.U. is not guilty of either Inciting Another Person to Issue Unlawful Judicial Decision or Issuing of Unlawful Judicial Decision in co-perpetration.

Concluding, the Panel acquits the defendant N.U. of Count 3.

The appeal of the defence is granted.

I. Decision on the criminal sanction

The defence challenges the determination of punishments, considering it unfair and unlawful. The prosecution considers the imposed punishments to be too lenient.

Pursuant to Article 370, paragraph 8, CPC the Basic Court considered all the relevant factors needed to determine an adequate punishment in paragraphs 386 – 406, 410 – 411, 416 – 421, 424 – 425, 428 – 429 and 432 of the impugned judgment. The Panel fully concurs with this analysis. The Basic Court appropriately assessed and weighed all the mitigating and aggravating circumstances and came to proportional sentences. Neither the defence, nor the prosecution brought forth any new circumstances that have not already been considered by the Basic Court. The Panel therefore rejects the submissions of the defence and prosecution.

However, as submitted by the defence and the prosecution, the Panel has noted that the imposed accessory punishment by the Basic Court is defined too vague and subsequently the Panel modifies this punishment insofar as the accessory punishment of Prohibition on Exercising a Judicial Profession, Activity or Duty for a period of two (2) years is imposed against the defendants O.J., S.M., S.S., T.M. and H.B., starting from the day the judgment becomes final.

The appeals of the defence and the prosecution are partially granted in this regard.

J. Closing remarks

The Court of Appeals decided unanimously with regard to the acquittal of the defendants N.U., E.A., F.B., R.R. and G.G., and by majority of votes regarding the conviction and punishment of the defendants H.B., O.J., S.M., S.S. and T.M.

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Reasoned written judgment completed on 16 May 2016.

Presiding Judge

_____

Radostin Petrov
EULEX Judge

Panel member

_____

Xhevdet Abazi
Kosovo Judge

Panel member

_____

Roman Raab
EULEX Judge

Recording Officer

_____

Alan Vasak
EULEX Legal Officer

Court of Appeals
Pristina

PAKR 158/15

5 April 2016