ANNEX 1 to

Memorandum regarding Court of Appeals of Kosovo Judgment

Case number PAKR 1122/2012, dated 25 April 2013

PUBLIC

COURT OF APPEALS

Case number: **PAKR 1122/2012**

Date: **25 April 2013**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Annemarie Meister as Presiding and Reporting Judge, and Judges Tore Thomassen (EULEX) and Tonka Berisha as members of the Panel, with the participation of Clemens Mueller, EULEX Legal Officer,

in the criminal proceeding against

K. P., (...) lawyer by profession, of average financial situation, married, father of three children, Albanian, citizen of the Republic of Kosovo;

L. P., (...) lawyer by profession, of average financial situation, Albanian, citizen of the Republic of Kosovo;

B. B., (...) Doctor – Orthopaedist/Traumatologist, of average financial situation, Albanian, citizen of the Republic of Kosovo;

I. S., (...) lawyer by profession, of average financial situation, (...), Albanian, citizen of the Republic of Kosovo;

Charged in the Indictment PPS 120/10 of the Special Prosecution Office with the criminal offences of Organized Crime under Article 274 (1) and (2) of the Criminal Code of Kosovo (hereinafter "CCK") in relation to L. P., B. B. and I. S. and with Article 274 (1) and (3) of the CCK in relation to K. P., related to the criminal offences of Abuse of Official Position or Authority under Article 339 (1) and (3) of the CCK and Issuance of Unlawful Judicial Decisions under Article 346 of the CCK;

K. P., L. P. and B. B. were found guilty by Judgment P. nr. 477/11 dated 24 May 2012 of the District Court of Peja as follows:

> K. P. for the criminal offence of Abuse of Official Position or Authority under Article 339 (1) and (3) CCK; sentenced to a term of imprisonment of five (5) years and, pursuant to Article 54 (1) and (2) subparagraph 3 and Article 56 (2) of the CCK, the accessory punishment of Prohibition on Exercising Public Administration or Public Service Functions was imposed for a period of three years;

L. P. for the criminal offence of Fraud under Article 261 (1) and (2) of the CCK; sentenced to a term of imprisonment of three (3) years; and, pursuant to Article 54 (1) and (2) subparagraph 4 and Article 57 (1) and (2) of the CCK, the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty was imposed for a period of three years;

B. B. for the criminal offence of Fraud under Article 261 (1) and (2) of the CCK; sentenced to a term of imprisonment of six (6) months, which punishment shall not be executed if the defendant does not commit another criminal offence for a period of two (2) years; and, pursuant to Article 54 (1) and (2) subparagraph 4 and Article 57 (1) and (2) of the CCK, the accessory punishment of Prohibition on Exercising a Profession, Activity of Duty was imposed for period of three years;

I. S. was acquitted by Judgment P. nr. 477/11 dated 24 May 2012 of the District Court of Peja;

acting upon the following Appeals against the Judgment P 477/11, filed with the District Court of Peja:

- Appeal filed by Special Prosecutor Ali Rexha on 11 July 2012,
- Appeal of Defence Counsel Destan Rukiqi filed on behalf of defendant B. B. on 10 July 2012,
- Appeal of defendant L. P. filed on 12 July 2012,
- Appeal of Defence Counsel Rame Gashi filed on behalf of defendant L. P. on 12 July 2012,
- Appeal of defendant K. P. filed on 15 July 2012;

having considered the Response of the Appellate State Prosecutor of Kosovo no PPA 457/12 dated 24 October 2012;

after having held a public session on 25 April 2013 in the presence of the Defendants and the Defence Counsels Gezim Kollcaku, Rame Gashi, Destan Rukiqi, Merita Bajrajtari and the Appeallate State Prosecutor Xhevdet Beslimi;

having deliberated and voted on 25 April 2013,

pursuant to Articles 420 et seq. of the Kosovo Code of Criminal Procedure (KCCP)

renders the following

JUDGMENT

- **The Appeal of the Special Prosecutor against the Judgment of the District Court Peja (Case no. P 477/11, dated 24.05.2012) is hereby GRANTED and the Judgment ANNULLED in so far as the defendant I. S. is acquitted. The case is returned to the Basic Court of Peja for retrial against the defendant I. S..**

- **The Appeals of defendant L. P., defandant K. P., Defence Counsel Destan Rukiqi filed on behalf of defendant B. B., Defence Counsel Rame Gashi filed on behalf of defendant L. P., against the Judgment of the District Court Peja (P no. 477/11, dated 24.05.2012) are hereby REJECTED as unfounded. The defendants remain subject to the sentences pronounced by the District Court of Peja.**

- **The Court of Appeals, acting ex officio, hereby MODIFEIS the Judgment of the District Court Peja (Case no. P 477/11, dated 24.05.2012) in respect of the conviction of defendant K. P. for the criminal offence of Abusing Official Position or Authority as follows:**

  K. P. is

  FOUND GUILTY

  of the criminal offence of ***Issuance of Unlawful Judicial Decisions under Article 346 of the CCK*** *because between 12 September 2007 and 8 April 2008 in Klina, K. P. in the capacity of Judge of the Municipal Court of Klina and L. P., lawyer, with the intention of obtaining an unlawful material benefit for themselves, concocted a plan to bring a compensation claim in the Municipal Court of Klina in the name of F. G. against the Guarantee Fund of Kosovo for compensation for personal injuries allegedly suffered by the said F. G. in a road traffic accident that occurred between an uninsured truck driven by G. D. and an Audi motor vehicle driven by L. S. and an Audi motor vehicle driven by Q. G. on 13 September 2006 in the village of Radullovc, Klina Municipality. K. P. knew that F. G., being a passenger in the motor vehicle driven by Q. G., suffered only minor injuries. However, without the knowledge, authorization or consent of the said F. G., and with the collusion of K. P., on 12 September 2007 L. P. issued proceedings in the Municipal Court of Klina purportedly on behalf of the said F. G.. Those proceedings were registered under case number C.nr.271/07. K. P. knew F. G. had not suffered the injuries alleged in the claim. K. P. colluded with L. P. to prosecute that claim in the Municipal Court of Klina with K. P. sitting as presiding judge, thereby giving their plan the appearance of legitimacy.*

  K. P. appointed B. B. to write a medical report, purportedly on behalf of F. G.. K. P. told B. B. it was not necessary for him to examine F. G..

On 8 April 2008 K. P. presided in a hearing in the Municipal Court in Klina during which L. P. purportedly represented F. G. and at which the Guarantee Fund of Kosovo was represented by I. S.. L. P. told I. S. he would not accept an offer of less than16.000 Euros in settlement of the claim. That is what K. P. had agreed with L. P.. The medical report dated 6 February 2008 of B. B. and the financial report dated 3 March 2008 of A. B. were put in evidence. On behalf of the Guarantee Fund of Kosovo, I. S. proposed an offer in settlement in the amount of 16.000 Euros. L. P. purported to take instructions from F. G. and thereafter accepted that offer in settlement. As presiding judge K. P. approved settlement by issuing an unlawful judicial decision, namely a decision approving an agreement in settlement of a claim for compensation in the sum of 16.000 Euros plus cost of 800 Euros.

On 23 April 2008 L. P. received in his account in the ProCredit Bank a bank transfer from the Guarantee Fund of Kosovo in the total sum of 16.800 Euros in settlement of the agreed damages. On 25 April 2008 L. P. gave 16.000 Euros in cash to K. P.. L. P. retained the sum of 800 Euros.

Therefore, the accused K. P. is

SENTENCED

to five (5) years of imprisonment as to the criminal offence of Issuance of Unlawful Judicial Decisions, contrary to Article 346 of the CCK.

Pursuant to Article 391 (5) of the KCCP, the sentence includes the time the accused has already spent in pre-trial custody until his first instance imprisonment sentence and the determination of the appeal.

- **The motion to terminate detention on remand, filed by Defence Counsel Gezim Kollcaku on behalf of defendant K. P., is REJECTED as unfounded.**

REASONING

I. Procedural history of the case

1. The Special Prosecution Office of the Republic of Kosovo (hereinafter: SPRK, Special Prosecutor) filed with the (then) District Court of Peja the Indictment no. PPS 120/10 dated 10.08.2011 against the Defendants K. P., L. P., B. B. and I. S.. The Indictment alleged criminal

responsibility of the defendants for Organized Crime under Article 274 (1) and (2) of the CCK in relation to L. P., B. B. and I. S. and with Article 274 (1) and (3) of the CCK in relation to K. P., in conjunction with the criminal offences of Abuse of Official Position or Authority under Article 339 (1) and (3) of the CCK and Issuance of Unlawful Judicial Decisions under Article 346 of the CCK. In addition, K. P. and L. P. were charged for the criminal offence of Falsifying Documents under Article 333 (1) subparagraph 1 of the CCK in conjunction with Article 23 of the CCK. The Indictment also proposed the imposition of accessory punishment for the defendants K. P., L. P. and I. S..

2. The Indictment was confirmed with the Rulings of the Confirmation Judge no. KA 304/11, dated 23 September 2011 and 27 December 2011, in relation to the count of Organized Crime in conjunction with the criminal offences of Abuse of Official Position or Authority and Issuance of Unlawful Judicial Decisions. The Confirmation Judge dismissed the indictment in relation to the count of Falsifying Documents.

3. The main trial in the criminal case was held between 12 March and 24 May 2012 before the District Court of Peja.

4. On 24 May 2012 the Trial Panel issued the Judgment no. P 477/11 by which the accused K. P. was acquitted for the criminal offence of Organized Crime but found guilty of the criminal offence of Abuse of Official Position or Authority under Article 339 (1) and (3) CCK. He was sentenced to a term of imprisonment of five (5) years. The indictment in relation to the offence of Issuance of Unlawful Judicial Decisions under Article 346 of the CCK was rejected by the first instance court because the court found that this criminal offence is subsumed by the criminal offence of Abuse of Official Position or Authority under Article 339 (1) and (3) of the CCK. The defendants L. P. and B. B. were found guilty of the criminal offence of Fraud under Article 261 (1) and (2) of the CCK, re-classifying the original charge of Organized Crime. The defendant L. P. was sentenced to a term of imprisonment of three years and the defendant B. B. was sentenced to a suspended punishment of six months of imprisonment. In addition, accessory punishment of Prohibition on Exercising Public Administration or Public Service Functions was imposed against defendant K. P. and the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty was imposed on defendants L. P. and B. B.. The defendant I. S. was acquitted by the first instance court.

5. On 24 May 2012 the District Court ordered detention on remand against the accused K. P. until the judgment becomes final.

6. The Defence and the SPRK subsequently appealed Judgment P. 477/11. The case file was hereafter transmitted to the Supreme Court of Kosovo as the competent court of second instance at the time. Pursuant to Article 39 Paragraph (1) of the Law on Courts, Law no. 03/L-199, the case was on 1 January 2013 transferred to the Court of Appeals as the (new) competent appellate court.

II. Findings of the Court of Appeals

1. Competence of the Court of Appeals

7. The Court of Appeals is the competent court to decide on the Appeal pursuant to Article 17 and Article 18 of the Law on Courts (Law no. 03/L-199).

8. The Panel of the Court of Appeals is constituted in accordance with Article 19 Paragraph (1) of the Law on Courts and Article 3 of the Law on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo (Law no 03/L-053).

2. Applicable procedural law - *mutatis mutandis* Kosovo Code of Criminal Procedure as in force until 31.12.2012

9. The criminal procedural law applicable in the respective criminal case is the Kosovo Code of Criminal Procedure that remained in force until 31 December 2012.[1] The proper interpretation of the transitory provisions of the Criminal Procedure Code (CPC), in force since 1 January 2013, stipulates that in criminal proceedings initiated prior to the entering into force of the new Code, for which the trial already commenced but was not completed with a final decision, provisions of the KCCP will apply *mutatis mutandis* until the decision becomes final. Reference in this regard is made to the Legal opinion no. 56/2013 of the Supreme Court of Kosovo, adopted in its general session on 23 January 2013.

4. Findings on merits

4.1 Allegations of substantial violations of the provisions of criminal procedure

a. Allegation of substantial violation of the provisions of criminal procedure because of imposition of accessory punishment and re-qualification of the criminal offence of Organized Crime to Fraud

10. The Defence of defendant B. B. submits that the First Instance Court committed a substantial violation of the provisions of criminal procedure code under Article 403 (1) subparagraph 10 in conjunction with Article 386 (1) of the KCCP by imposing an accessory punishment which was neither proposed in the indictment nor proposed by the Prosecutor in the closing speech. In addition, it is submitted that the re-classification of the criminal offence from Organized Crime, as charged in the indictment, to Fraud constitutes a substantial violation of the provisions of criminal procedure.

11. The Court of Appeal finds without merit the allegation of the Defence regarding the imposition of the accessory punishment and the re-classification of charges.

Although the indictment does not propose imposition of an accessory punishment against the defendant B. B., the First Instance Court imposed the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty. Furthermore, the First Instance Court convicted the defendants B. B. and L. P. for the criminal offence of Fraud under Article 261 (1) and (2) CCK after re-classifying the original charge of Organized Crime under Article 274 (1) and (2) CCK.

[1] Kosovo Code of Criminal Procedure, in force from 06.04.2004 until 31.12.2012.

The First Instance Court did not notify the defendant B.B. about the possible imposition of accessory punishment nor were defendants B.B. and L.P. notified prior to their conviction about the possibility of a re-classification of the original charges of the indictment.

12. The Appeals Panel notes that pursuant to Article 386 (2) of the KCCP, the First Instance Court was not bound by the motions of the Prosecutor regarding the legal classification of the act. Thus, the legal re-classification of the original charge of Organized Crime to Fraud does not in itself constitute a substantial violation of the provisions of the criminal procedure as this possibility is clearly foreseen by the procedural code. However, it is established jurisprudence of the Supreme Court of Kosovo that when proceeding to a re-classification under Article 386 of the KCCP, the Trial Panel must ensure that the accused is notified of such re-classification in a timely manner (see *Supreme Court of Kosovo, Ap-Kz no. 61/2012, Judgment, 02.10.2012, para. 29; see also International Criminal Court, ICC-01/04-01/07-3319, 17.12.2012, para. 37*). Although such notification is not explicitly required by the provisions of the KCCP, it derives from the principle of fair trial as specified in Article 12 (1) of the KCCP, Article 31 of the Kosovo Constitution and Article 6 (3) of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") which inter alia guarantee the right of the accused "to have adequate time and facilities for the preparation of his or her defence". Further, the right to be informed of the nature, cause and content of the charges includes the right of the accused to be informed of the legal characterization of the facts upon which the charges were initially based. This interpretation is supported by the jurisprudence of the European Court of Human Rights which found a breach of Article 6 ECHR when the legal characterization of the facts was changed without affording the defence the possibility of filing observations (*ECtHR, Pelissier and Sassi v. France, Application no. 25444/94, Judgment, 25.03.199, para. 62; ECtHR, Vesque v. France, Application no. 3774/02, Judgment, 03.07.2001, paras 57 et seq.*). In the opinion of the Appeals Panel, the omission by the trial panel to notify the defendant of a possible legal re-classification of the charges is a relative ground of appeal which can be challenged by the parties based on Article 403 (2) subparagraph 2 of the KCCP and not, as it was done by the Appellants in the present case, based on Article 403 (1) subparagraph 12 of the KCCP. As a consequence, the Appellant has to establish in the appeals brief how the alleged violation of rights of the defence "influenced or might have influenced the rendering of a lawful and proper judgment".

13. The compliance of the right to a fair trial must be determined in light of the proceedings as a whole, including the appeal procedure (*see ECtHR, Sipavicius v. Lithuana, Application no. 49093/99, Judgment, 21.02.2002, para. 29; ECtHR, Dallos v. Hungary, Application no. 29082/95, Judgment, 01.03.2001, paras. 47 et seq.*) In the present case the appellants were entitled to contest the conviction in respect of all factual and legal aspects before the Court of Appeals, which also held an appeals session in the presence of the parties on 25 April 2013 at which it reviewed the appellants' complains about the re-classification of charges from both the procedural and the substantive point of view. Thus, the defendants B. B. and L. P. had the opportunity to argue their defence in respect to the re-classified charges before the Appeals Panel which, pursuant to Article 420 of the KCCP, is vested inter alia with the power to take a decision annulling or modifying the judgment. Therefore, it is the view of this Appeal Panel that the procedural violation caused by the First Instance Court by failing to notify the defendants B. B. and L. P. about a possible legal reclassification of the charges was rectified on the appeals stage as there was adequate time and opportunity to prepare for the legal qualification in the appeals procedure. Hence, this ground of appeal is rejected as unfounded.

14. As far as the defendant B. B. alleges a violation of Article 386 (1) of the KCCP by imposing an accessory punishment against him which was not proposed in the indictment, the Appeals Panel finds that this situation is not covered by Article 386 of the KCCP. Article 386 (1) of the KCCP is meant to ensure that the judgment does not exceed the scope of the charge by going beyond the factual description of the act specified in the charge of the indictment or by concerning other persons than the defendant(s) mentioned in the indictment. An accessory punishment may be imposed together with a principal or alternative punishment, thus the imposition of an accessory punishment neither affects the legal classification of a charge nor does it have an impact on the factual description of the act specified in the charge of the indictment. The omission to notify defendant B. B. of a possible imposition of an accessory punishment by the trial panel does not constitute a violation of minimum guarantees ensured by the right to a fair trial either. This is because an accessory punishment is connected to the imposition of a principal or alternative punishment as it is provided under Article 54 (1) of the CCK. A defendant charged for a criminal offence must be aware about the general possibility of imposition of an accessory punishment. Thus, there is no need to notify the defendant about this possibility already foreseen by the CCK.

b. Allegations of a substantial violation of criminal procedure because the enacting clause of the judgment is incomprehensible or internally inconsistent with the grounds for the judgment (Article 403 paragraph 12 of the KCCP).

15. The Appeal filed by defendant K. P. alleges a substantial violation of criminal procedure because the enacting clause of the judgment is incomprehensible or internally inconsistent with the grounds for the judgment. More precisely, the appeal filed by defendant L. P. claims a discrepancy between the enacting clauses in relation to defendants K. P. and L. P. with regard to which person proposed the settlement in amount of 16.000 EUR during the Municipal Court session on 8 April 2008.

16. The Appeals Panel finds that the enacting clause does not contradict the reasons provided in the judgment. The enacting clause providing the descriptions of the facts is overall a clear and comprehensive one giving the Appeals Panel no reason to modify or annul the judgment of the Trial Panel.

17. The Appeals Panel notes that the enacting clause needs not to contain every detail of the critical event. Article 396 (3) of the KCCP sets out the content of the enacting clause, referring to Article 391 of the KCCP. In terms of the description of the criminal offence, what the enacting clause must contain are "the facts and circumstances indicating the criminal nature of the act committed by the accused and the facts and circumstances on which the application of the pertinent provisions of criminal law depends". As to the weight that the Court of Appeals should give to small discrepancies between the enacting clause and the reasoning part of the judgment, and the impact they should have in the decisions of the Court of Appeals, the Panel finds that a *de minimis* rule should be applied, meaning that some minor deficiencies in the enacting clause do not justify the annulment of a judgment, provided that other parts of the judgment – seen as a whole -, render the decision of the trial panel clear.

18. The Appeals Panel agrees with the appeal filed by defendant L. P. that the enacting clause in relation to defendants K. P. and L. P. is inconsistent in regard to who proposed the settlement in amount of 16.000 EUR during the Municipal Court session on 8 April 2008. The enacting clause

concerning defendant K. P. reads, in pertinent part, as follows: "*[o]n behalf of the Guarantee Fund of Kosovo, I. S. proposed an offer in settlement in the amount of 16.000 EUR*"[2] whereas the enacting clause regarding defendant L. P. reads: "*[o]n 8 April 2008, L. P. proposed a settlement in the amount of 16.000 EUR*".[3]

19. The Appeals Panel finds that it is clear from the reasoning part of the Judgment that it was I. S. who proposed the final offer of 16.000 EUR during the Municipal Court hearing of April 2008. The First Instance Court correctly makes reference to the minutes of the Municipal Court hearing where it is recorded that the claimant representative asked for a break during the hearing to allegedly consult his client for the final compensation offer which was proposed by I. S. as the representative of the Kosovo Guarantee Fund.[4] The First Instance Court also correctly concluded that it was not Z. M., as mentioned in the minutes of the Municipal Court hearing, but indeed L. P. who represented F. G. during the hearing. Thus, the enacting clause regarding L. P. is formally inconsistent with the grounds for the judgment. However, the Appeals Panel asserts that from the reasoning part of the judgment it is clear who proposed the final offer. In any event, the Panel finds that the issue is not related to a decisive fact which would have had influenced the outcome of the trial. It rather amounts to a minor discrepancy which does not justify the annulment of the judgment.

4.2 Allegations of violations of criminal law because the act for which the accused is found guilty is not a criminal offence (Article 404 (1) of the KCCP)

20. The Appeal filed on behalf of defendant B. B. claims that from the evidence presented during the trial it cannot be established that he acted with the required intent to obtain an unlawful material benefit for F. G.. Similarly, the defendants L. P. and K. P. argue in their respective Appeals that the First Instance Court committed a violation of criminal law when it concluded that they had acted with the required *mens rea*.

21. The Appeal Panel finds these allegations without merit. The First Instance Court rightfully established the intent of the defendants.

22. The Appeals Panel notes that the subjective element, the intent to commit a criminal offence, is a fundamental requirement of a criminal offence necessary to ascertain the criminal liability of the accused (Articles 11 (1), 15 of the CCK). Apart from eventual intent (*dolus eventualis*) and direct intent (*dolus directus*), criminal law provides that certain criminal offences require special intent (*dolus specialis*). In case of the latter, for a finding of guilt the court must not only establish that the perpetrator had knowledge of the elements of the offence and the will to bring about its completion, but also that he acted with a second intention as defined by the respective criminal offence. The criminal offences for which the defendants were convicted all include *dolus specialis*: the criminal offence of Abusing Official Position or Authority requires the perpetrator to act with the "intent to obtain an unlawful material benefit for himself, herself or another person or a business organization or to cause any damage to another person or business

[2] See District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, page 4 (English version).
[3] Ibid. page 5
[4] Prosecution binder, tab C.

organization"; the criminal offence of Fraud requires "intent to obtain a material benefit for himself, herself or another person".

23. The First Instance Court correctly concluded that the defendant K. P. acted with the required intent. The enacting clause and the reasoning part of the Judgment are sound and leave no doubt in this regard. The Trial Panel also considered the special intent and acceptably found that the defendant K. P. not only acted with the intent to obtain a material benefit for himself and L. P. but also to cause damage to the Guarantee Fund of Kosovo.[5]

24. Regarding the accused B. B., the Court of Appeals notes its concerns with the reasoning provided by the Trial Panel in relation to the accused's intent. What is of particular concern is the Trial Panel's statement that the accused "*probably believed F. G. would receive the compensation*".[6] As already outlined above, the criminal offence of Fraud requires the proof of a special intent that the perpetrator acted with the intention to obtain a material benefit for himself, herself or another person. If a Trial Panel has doubts about the existence of the subjective elements of a criminal offence it must acquit the defendant on the basis of the principle *in dubio pro reo*. The First Instance Court assessed that B. B. neither knew of the scheme contrived by K. P. and L. P. to defraud the Guarantee Fund of Kosovo for their own material benefit nor that Bakalli received more than 200 EUR for the drafting of his medical report. It found that the only motive for the accused was "*to exaggerate the injuries allegedly suffered by F. G. thereby unjustly inflating the quantum of compensation claim that was presented on his behalf*".[7] Thus, although the First Instance Court should have elaborated with more precision the *mens rea* of defendant B. B., it is the Appeals Panels view that it is clear from these factual findings that the Trial Panel was fully convinced that the accused acted with the required special intent. This is also expressed in the enacting clause of the Judgment.

25. Also in regard to the accused L. P., the First Instance Court correctly concluded that the defendant acted with the required intent. Again the subjective elements of the criminal offence of fraud were not explicitly assessed in detail in the reasoning part of the judgment. Nevertheless, the Court of Appeals finds that it clearly derives from several factual circumstances as established by the Trial Panel that the accused acted with the required *mens rea*. The First Instance Court rightfully rejected the argument presented by the accused that he was not aware of the fraudulent scheme by making reference to the hearing at the Municipal Court on 8 April 2008 during which he requested an adjournment in order to purportedly take instructions from his client. In addition, the Trial Panel correctly assessed the accused's statement that he gave the sum of 16.000 EUR to K. P. as evidence against L. P.. The evaluation of the presented evidence is reasonable and it illustrates that the Trial Panel – as clearly stated in the enacting clause of the Judgment – was convinced that the accused acted with the subjective elements for the criminal offence of Fraud. Further, the defendant's knowledge about F. G. not having suffered the injuries alleged in the claim can be also established from the statement of witness P. J. who mentioned during his testimony in court a meeting between L. P., himself and F.G. where F.G. asserted to the defendant L.P. that he has sustained no injuries apart from a scratch on his nose.[8]

[5] District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, page 46 (English version).
[6] District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, p. 50 (English version).
[7] District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, p. 54 (English version).
[8] Record of the Main Trial, P. nr. 477/11, 4 April 2012, p. 6 (English version).

4.3 Ex-officio assessment of violation of the criminal law to the detriment of the accused (Articles 404, 415 subparagraph 4 of the KCCP)

26. The First Instance Court rejected the charge against K. P. for the criminal offence of Issuance of Unlawful Judicial Decisions and instead convicted the defendant for the criminal offence of Abuse of Official Position or Authority by holding that the criminal offence of Issuance of Unlawful Judicial Decisions "*is subsumed*" by the criminal offence of Abuse of Official Position or Authority. Further, the Trial Panel held that "*issuing an unlawful judicial decision in this case also constituted an abuse of official position or authority. The essential elements of the second offence were the same as the essential elements of the first offence. Therefore, the panel finds it would have been unjust and an abusive process to convict the defendant K. P. of both offences.*"[9]

27. The Appeals Panel finds that the legal assessment provided by the First Instance Court constitutes a violation of criminal law detrimental to the accused. The First Instance Court disregarded fundamental criminal law theory by concluding that the criminal offence of Issuance of Unlawful Judicial Decisions is subsumed by the criminal offence of Abuse of Official Position or Authority.

28. The issue at stake concerns the concept of *concursus delictorum,* i.e. the theory concerning concurrence or the adjudication of multiple offences against one accused with respect to the same set of factual circumstances. The CCK does not directly express *concursus delictorum* nor provides for specific rules or doctrinal theory for determining concurrence of offences but merely recognizes the existence of concurrent criminal offences and regulates their punishment in Article 71. By making reference to general principles of law common to all major national legal systems, international criminal tribunals held that where the same factual conduct meets the definitions of multiple statutory offences, a Court may enter cumulative convictions with respect to those offences only where the crimes are considered sufficiently distinct or possess "a materially distinct element" not found in the other. In case two crimes do not each have materially distinct elements, the crime with the materially distinct element as the more specific crime subsumes the other and only one conviction is entered. This determination involves comparing legal elements of the relevant statutory provisions; the specific facts of the case play no role. (*see International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Delalic, Mucic, Delic and Landžo ("Celebici"), IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001, paras. 412-413; Extraordinary Chambers in the Court of Cambodia, Prosecutor v. Kaing Gung Eva (Dutch), Case no. 001/18-07-2007-ECCC/SC, Appeals Judgment, 3 February 2012, paras. 285 et seq.; Special Court for Sierra Leone, Prosecutor v. Sesay et al., Case no. SCSL-04-15-A, Appeals Judgment, 26 October 2010, para 1190*). The Appeals Panel follows this legal approach.

29. In the opinion of the Appeals Panel, contrary to the findings of the First Instance Court, a comparison of the legal elements of the criminal offences of Abusing Official Position or Authority and Issuing Unlawful Judicial Decisions leads to the conclusion that the latter is the more specific crime which subsumes the criminal offence of Abusing Official Position or

[9] District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, p. 2 and 54 (English version).

Authority by application of the principle *lex specialis derogate lex generali* (*see already Court of Appeals, PN 240/2013, Ruling on Appeal, 17 April 2013, para. 58*). Chapter XXIX of the CCK contains "criminal offences against official duties" among which are the criminal offences discussed. For both criminal offences the protected value is the same, namely the confidence in the administration of public service. Further, the criminal offence of Abusing Official Position or Authority does not have a materially distinct element not contained in the criminal offence of Issuing Unlawful Judicial Decisions. Though both criminal offences include the same material elements, i.e. an abuse of an official position, Issuing Unlawful Judicial Decisions can only be committed by Judges through a specific act. Thus, the latter does require a materially distinct element which requires proof of a fact not required by the criminal offence of Abusing Official Position or Authority. Therefore, the First Instance Court committed a violation of criminal law by concluding that the criminal offence of Issuance of Unlawful Judicial Decision is subsumed by the criminal offence of Abuse of Official Position or Authority.

30. This misapplication of criminal law by the Trial Panel is detrimental to the accused because it might have influenced the determination of punishment as both criminal provisions provide for different punishments: the criminal offence of Abusing Official Position or Authority foresees a punishment of imprisonment of one to eight years whereas the criminal offence of Issuance of Unlawful Judicial Decisions foresees a punishment of six month to five years.

31. For these reasons, the Appeals Panel modifies the Judgment of the District Court of Peja and convicts the accused K. P. for the criminal offence of Issuing Unlawful Judicial Decisions.

32. The Appeals Panel notes the entering into force of a new Criminal Code (Code no. 04/L-082) on 01.01.2013 but finds in the concrete case the new law is not more favorable for the defendant.

33. The Appeals Panel recognizes that, in general, the court will not necessarily have to explain its decision why it finds the new law not to be more favorable. Only if the court applies the new law as being more favorable, the circumstances relevant for the assessment need to be explained in the reasoning part of the decision. In the following, however, the Appeals Panel will outline the general approach which it finds applicable to the issue of temporal conflicts of law.

33. The Appeals Panel restates that the assessment of the applicability of successive criminal laws is governed by the principles of *tempus regit actum* and *lex mitior,* codified in Article 3 of the (new) CCK and Article 33 of the Constitution of the Republic of Kosovo. It follows from the referenced legal provisions that, in principle, the law which was in effect at the time of the commission of the offence shall be applied to the perpetrator (*tempus regit actum*). However, a retroactive application of the criminal law and a derivation from the principle stipulated in Article 3 (1) of the (new) CCK is possible in the interest of the defendant in case the law has been amended upon the commission of the offence so as to be more favorable to the perpetrator (*lex mitior*). Both principles are cornerstones of criminal justice and international human rights law (see *ECtHR, Scoppola v. Italy (no.2), App. No. 10249/03, Judgment, Grand Chamber, 17.09.2009; ECtHR, Maktouf and Damakanovic v. Bosnia and Herzegovina, App. No. 2312/08 and 24179/08, Judgment, Grand Chamber, 18.07.2013, Concurring Opinion of Judge Pinto de Albuquerque, joined by Judge Vucinic*).

34. The issue of application of the *lex mitior*, i.e. the determination of the most favorable law for the defendant, needs to be addressed only "*in the event of a change in the law applicable to a given case prior to a final decision*". It is generally accepted in judicial practice and supported by the clear wording of Article 3 (2) of the (new) CCK ("*final decision*") that the rule on the application of the more lenient law also applies to the procedure under regular legal remedies, particularly at the appeals procedure where the legality of the first instance court decision is assessed (*see L. Lazarevic, Commentary of the Criminal Code of FRY, 1999, Article 4, para 3*). As in the case at hand the (new) Criminal Code (Code no. 04/L-082) entered into force on 01.01.2013, a time the Judgment P 477/11 dated 24.05.20012 has not become final due to the appeals filed (Article 398 of the KCCP), the Appeals Panel needs to assess which of the two Criminal Codes is more favorable for the defendant.

35. In general, this determination cannot be decided *in abstracto* by an objective comparison of the laws in question. The court must assess *in concreto*, by comparison of the laws applicable in the specific case and in relation to the perpetrator, which law is more favorable for the respective defendant. Apart from the situation where the new law decriminalizes something which was a criminal offence under the old law, the assessment of the most favorable law is usually complex and requires the court to establish all of the circumstances, primarily related to the provisions on sentencing and meting out or reducing the sentence , measures of warning, possible accessory punishments, new measures that substitute the punishment, security measures, legal consequences of the conviction, as well as the provisions pertaining to the criminal prosecution, whether it was conditioned by an approval (see *Court of Bosnia and Herzegovina, Appeals Panel, Case against Stupar et al., Judgment, 09.09.2009, para. 497; Dannecker, Leipziger Kommentar zum StGB, 2007, Section 2, para. 106; L. Lazarevic, supra).*

36. Further, it is established judicial practice that the court must apply one law in its entirety and cannot combine two different laws (principle of "strict alternatives of the law" or "global method of comparison"). Hence, it is not possible to apply provisions only partially from one and the other law in question. This is not only because the court cannot apply a combined law that does not exist but also because each punitive regime has its own rationale, and the judge cannot upset that rationale by mixing different successive criminal laws. (see *L. Lazarevic, supra; Commentary on the BiH Criminal Code, Council of Europe/European Commission, 2005, p. 67; German Federal Supreme Court, BGHSt 20, 22; ECtHR, Maktouf and Damakanovic v. Bosnia and Herzegovina, supra, Concurring Opinion of Judge Pinto de Albuquerque, p. 45).*

37. In regard to the defendant K.P., the Appeals Panel finds the new CCK not more favorable for the defendant. The punishment foreseen for the criminal offence of Issuing Unlawful Judicial Decisions is under both Criminal Codes the same as both provisions are entirely identical. However, the accessory punishment of prohibition on exercising public administration or public service function, as imposed by the First Instance Court, is mandatory under the old CCK only by a punishment of "*imprisonment of at least ten years*" (Article 56 (1) of the CCK) and left to the discretion of the Trial Panel in case of a punishment of "*imprisonment of up to ten years*" (Article 56 (2) of the CCK). Given the fact that Article 56 of the old CCK is clearly more favorable for the defendant than the parallel provision of Article 65 new CCK – where the imposition of the accessory punishment is already mandatory if the defendant has been punished

by imprisonment – the Appeals Panel considers the old CCK under the specific circumstances *lex mitior*.

4.4 Allegations of erroneous and/or incomplete determination of the factual situation (Article 405 of the KCCP)

38. The Defence and the Prosecution allege that the First Instance Court had erroneously and/or incompletely established the factual situation.

The accused K. P. claims that
- the statement which the accused B. B. made in court regarding the necessity of the physical examination of F. G. was not duly taken into account by the Trial Panel;
- the testimony of the witness F. G. in relation to the accused K. P. was not correctly evaluated by the Trial Panel;
- the Trial Panel has erroneously assessed the statement of witness Dr. J. regarding the conversation which he had with the accused K.P..

The accused B. B. argues that the Trial Panel erroneously determined the fact that he has exceedingly exaggerated the bodily injuries for F. G..

The accused L. P. alleges that the Trial Panel erred by determining that the release with epicrisis form was a forgery.

The SPRK, supported by the submission of the Appellate Prosecutor, submits that the First Instance Court acquitted the defendant I. S. on the basis of erroneous and incomplete factual findings. It is particularly argued that it was sufficiently established during trial that the defendant I. S. committed the criminal offence of Abusing Official Position or Authority which inter alia can be inferred from the factual circumstance that the defendant did not provide a proper and qualitative representation of the Guarantee Fund of Kosovo.

39. Before assessing the merits of the arguments presented by the parties, the Appeals Panel deems it necessary to clarify the standard of review on appeals regarding the factual findings made by the Trial Panel. Article 405 of the KCCP defines the terms "erroneous determination of the factual situation" and "incomplete determination of the factual situation". It is clear from these definitions 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.[10] Consequently, only in such instances will the Appeals Panel overturn a decision of the Trial Panel.

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

40. 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*" (*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*). The approach taken by the Supreme Court reflects a principle of appellate proceedings which is applied – although with some variance – both in common law but also in civil law jurisdiction as well as in international criminal law proceedings (*see e.g. Supreme Court of Ireland, Hay v. O'Grady, [1992] IR 210; Federal Court of Justice Germany, BGHSt10, 208 (210); International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Kupreskić et al., IT-95-16-A, Appeals Judgment, para. 28 et seq.).*

41. Regarding the Appeal filed by the defendant K. P., the Appeals Panel finds that the Trial Panel correctly and completely established the factual situation on the basis of careful analysis of evidence. The Trial Panel considered the evidence separately and jointly and thoroughly assessed the discrepancies in evidence. In relation to the first issue raised by the Appellant, the Trial Panel found that it was K. P. who told B. B. that it was not necessary for him to examine F. G.. This determination of fact was based on the statement given by the accused Bakalli during his examination by the Prosecutor on 24 January 2011.[11] Contrary to the submission of the Appellant, the Trial Panel took into consideration the statement of the accused B. B. given at trial where he stated that it was the accused L. P. who said it was not necessary to conduct a physical examination of F. G.. However, the Trial Panel was simply not convinced of the truthfulness of this statement and concluded that it was the statement given before the Prosecution which was "clear and unequivocal". The Appeals Panel is not in a position to interfere with this evaluation of the Trial Panel because it is neither wholly erroneous nor unacceptable by any reasonable tribunal of fact. On the contrary, the conclusion was based on the sound reasoning that "*the evidence given to the Prosecutor was given more than one year before his testimony to the court*".[12] In any event, the Appellant has not demonstrated in his Appeal how this alleged erroneous determination of fact might relate to a material fact critical to the verdict reached.

42. The defendant K. P. further asserts in his Appeal that the Trial Panel wrongly evaluated the testimony of witness F. G. in relation to him. He particularly claims that, contrary to the factual findings of the Trial Panel, he never received the alleged amount of 16.000 EUR, which in his opinion is also confirmed by the statements of the accused L.P.. The Appeals Panel finds this assertion without merit. The Trial Panel has well-reasoned its evaluation of the evidence, including the credibility of the statement of witness F. G. which is discussed in length in the reasoning part of the Judgment. For the determination of the fact that the accused K. P. on 25 April 2008 received the amount of 16.000 EUR in cash from L. P., the Trial Panel has not only

[11] Prosecution Binder, tab G, p. 4.
[12] District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, p. 27 (English version).

correctly addressed the contradictions in the statement given by this witness before the Court in relation to the question if the accused K.P. had actually received the money[13], but also correctly assessed the statement which F. G. gave to the Police on 18 August 2008[14], the testimony of the accused L. P. before the Trial Panel[15] as well as the documentary evidence related to the money transfer[16].

43. The Appeals Panel further rejects the Appellant's submission that the Trial Panel has wrongly assessed the statement of witness Dr. J., in relation to the telephone conversation which he had with the defendant K. P., regarding his signature on the release with epicrisis report. Although it is true that the witness during his testimony to the Prosecutor stated that K. P. told him that he shouldn't worry if it's not his signature as the issue will be verified by an expert, contrary to the submission of the Appellant, the witness indeed during his testimony in court did state that K. P. told him "*Doctor this is not your signature*".[17] In addition, after being confronted with this possible discrepancy, the witness declared that he stands by this statement given in court. Hence, the Appeals Panel does not see how the Trial Panel could have erred by following this witness and concluding that from his testimony in court it is clear that he believed that K. P. knew the signature was not his.[18]

44. The accused B. B. submits in his Appeal that the Trial Panel's finding that the defendant in his medical report has "*intentionally and grossly exaggerated the injuries*" he believed F. G. had sustained, is a presumptive and prejudiced conclusion not based on any material evidence adduced during the main trial. The Appeals Panel, after having assessed relevant evidence as well as the Trial Panel's reasoning, rejects this ground of appeal as unfounded. The First Instance Court rightfully concluded that the medical report written by defendant B. B. contained numerous false representations regarding the type and extent of injuries allegedly suffered by F. G..[19] The fact that F. G. did not suffer the injuries to which reference is made in the medical report drafted by defendant B. B. can be inferred from F. G.'s testimony. The Appellant's submission asserting that his medical report was fully based on the release with epicrisis report cannot be followed. The Trial Panel correctly found that nowhere in the release with epicrisis report is any reference to F. G. having high intensity fear, having a reduction in his physical abilities of 25-30%, suffering any permanent body deformity, or being disabled for 100% for the first 12 month related to all duties and responsibilities. The Appeals Panel fully supports the finding of the Trial Panel that these conclusions were "pure fiction". The Trial Panel also rightfully found that these conclusions could have by no means been based on the defendant's knowledge and experience acquired over many years having dealt with numerous similar cases. Hence, the Appeals Panel does not see any reasons to interfere with these factual determinations by the Trial Panel.

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[13] Record of the Main Trial, P 477/11, 23 March 2012, p. 9 and 14; District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, p. 40 (English version).
[14] District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, p. 39 (English version).
[15] District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, p. 25, 45 (English version).
[16] Prosecution Binder, tab C.
[17] Record of the Main Trial, P. nr. 477/11, 3 April 2012, p. 4 (English version).
[18] District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, p. 18, 22, 36, 44 (English version).
[19] District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, p. 49, 50 (English version).

45. The Appeals Panel finds also without merit the Appellant's submission that the Trial Panel erred when determining that the release with epicrisis form was a forgery. The fact that the discharge sheet was a forgery can clearly be inferred from the statements given by the witness Dr. J.i in court as well as the Report of Expertise prepared by N. I..[20] The Trial Panel correctly took this evidence into account.[21]

46. Regarding the Appeal filed by the SPRK, the Court of Appeals concurs with the submission and arguments presented by the Prosecution and finds that the acquittal of defendant I. S. is based on erroneous or incomplete factual determinations by the First Instance Court wherefore it returns the case to the Basic Court of Peja for retrial in regard to this defendant.

47. The Trial Panel decided to acquit defendant I. S. because it could not find sufficient evidence that he was part of a scheme to defraud the Guarantee Fund of Kosovo. This conclusion was drawn from the defendant's testimony that he fully relied upon the medical report of B. B. and the report of A. B., from the fact that the defendant might have believed the release with epicrisis report was genuine, and the possible defendant's perception that the settlement of the claim for compensation in the sum of 16.000 EUR was a good result in light of the previous agreed apportionment of damages.

48. The Appeals Panel notes that the reasoning part of the judgment also raises several arguments for the defendant's involvement in the crime scheme but fails to specify in detail the evidence it accepted and the evidence it rejected in reaching its determination on this specific issue. E.g. it was found by the Trial Panel that the fact that proceedings were only issued against the Guarantee Fund of Kosovo might suggest I. S. was a party to any fraud.[22] Also the Trial Panel summarizes other factual findings in relation to the defendant I. S. but neither provides an evaluation of those nor assesses these in the overall context of its findings.

49. The Appeals Panel agrees with the submission of the SPRK that the Trial Panel failed to adequately address and evaluate the failures and omissions of the defendant I. S. during the Municipal Court proceedings. It is of relevance considering the defendant's statement that he had long working experience in representing the Guarantee Fund of Kosovo at Kosovo courts.

50. The Trial Panel particularly should have sought clarification of the following issues:

- Why did defendant I. S. not seek leave to join Sigma Insurance in the proceedings before the Municipal Court, especially in light of the fact that he knew about the decision of the Commission for Treating Damages which apportioned the damages on a 60/40 basis between the Guarantee Fund of Kosovo and Sigma insurance?
- Why did defendant I. S. not question the medical report of B. B. and the report of A. B. although he was in possession of the release with epicrisis report as well as the police report which both did not mention the type or extent of the injuries included in the medical report of B. B.?

[20] Record of the Main Trial, P. nr. 477/11, 3 April 2012, p. 3 (English version); Directorate of Forensic Laboratory – Pristina, Unit for Documents, Photographs and Voice Analyses, The Report of Expertise, 5 April 2011.
[21] District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, p. 35 (English version).
[22] District Court of Peja, Judgment, P. nr. 477/11, dated 24 May 2012, p. 32, 51 (English version).

- Why did defendant I. S. not requested for the presence of the injured party F. G. during the hearing at the Municipal Court?

51. In light of these circumstances, the Appeals Panel concludes that the Trial Panel should address these questions during retrial and revisit its previous findings regarding defendant I. S..

4.5 Allegation of incorrect determination of punishment (Article 406 paragraph 1 of the KCCP) and new determination of punishment by the Appeals Panel in regard to defendant K. P.

52. The Appeal filed on behalf of defendant L. P. alleges that the Trial Panel imposed a harsh, legally unsustainable sentence wherefore the Court of Appeals should modify the decision. Also the Appeal filed by defendant K. P. alleges that the Trial Panel acted excessively in imposing an extremely severe punishment against him, particularly as a result of incorrectly weighing mitigating and aggravating circumstances.

53. The applicable KCCP entitles the Appeals Panel to review the determination of punishment by the First Instance Courts. However, the Appeals Panel acknowledges that the determination of punishment is first and foremost the task of the Trial Panel which generally has to be respected by the Appeals Panel. The Judges of the Trial Panel are vested with broad discretion in determining an appropriate sentence due to their obligation to individualize the penalties to fit the circumstances of the accused and the gravity of the crime. The scope of review for the Court of Appeals is therefore limited wherefore this Appeals Panel is of the opinion that it should only interfere with the findings of the Trial Panel in case the Trial Panel in rendering a decision on punishment exceeded its authority under the law (Article 404 paragraph 5 of the KCCP), failed to determine the punishment correctly (Article 406 paragraph 1 of the KCCP) or imposed a punishment which by no means can be considered as just; the latter being the case if the punishment, in light of the possible range of sentences available, is unjustifiable high or low.

54. The Appeals Panel finds the sentence imposed on the accused L. P. fair and reasonable in light of the totality of the circumstances. The Trial Panel correctly assessed the mitigating and aggravating circumstances and rendered a proportionate decision which is neither excessive nor outside the scope of a reasonable level of punishment.

55. Although the Appeals Panel will have to render a decision on punishment against defendant K. P. because of a violation of criminal law by the Trial Panel already outlined above under 4.3, it still deems it necessary to respond to the Appeal filed by defendant K. P. in respect to the determination of punishment in order to clarify this matter of law.

56. The Trial Panel inter alia took into consideration the following aggravating circumstances when determining the punishment for the accused K. P.: (1) that the accused was a Judge and as such an official person and a public servant who held a position of trust; the accused abused his position for his own material gain; (2) the accused did not show remorse.

57. The Appeal Panel agrees with the submission of defendant K. P. that the sentence imposed by the Trial Panel against him is based on circumstances which were wrongly interpreted by the Court as aggravating.

58. The fact that the defendant was an official person who abused his position for his own material gain cannot be taken into consideration for the determination of punishment in the present case. These circumstances are already elements of the criminal offence for which the defendant was found guilty. Hence, these circumstances are exhausted when it comes to the determination of punishment because the elements of a crime are already reflected in the range of punishment of the criminal offence. It is a general rule and a legal consequence of the principle *ne bis in idem* or double-jeopardy that circumstances which constitute elements of a criminal offence for which the accused is found guilty cannot additionally be considered for the determination of punishment at the sentencing stage. The Trial Panel impermissibly double-counted the same circumstances.

59. The Trial Panel also wrongly assessed the fact that the defendant did not show remorse as an aggravating circumstance. Remorse is generally accepted as a mitigating factor if the expressed remorse is real and sincere. However, lack of remorse is not a circumstance which can be considered aggravating itself but might relativize the mitigating effect of a guilty plea. It derives from the principle *nemo tenetur se ipsum accuasare* that neither an accused's refusal to actively cooperate with the state authorities during criminal investigation or the manner in which the defendant conducts his defence can be considered as an aggravating circumstance. It is for the accused to decide on his defence strategy as well as if and how he wants to exercise his right to defence. If the accused, like in the case at hand, decides to contest the charges entirely he will also refuse to show remorse. Hence, considering the latter as an aggravating circumstance would interfere with the accused's fundamental right to defence.

60. The Panel will now turn to determine the punishment against the accused K. P. for the criminal offence of Issuing Unlawful Judicial Decisions.

61. The criminal offence of Issuing Unlawful Judicial Decisions foresees a punishment of six month to five years imprisonment. After having made recourse to the general rules mentioned in Article 64 of the CCK for calculating punishments, the Appeals Panel considers that the appropriate punishment to be imposed on the accused is five years of imprisonment. The time the accused spent in detention on remand is accredited towards his sentence.

62. The fact that the accused K. P. had no previous convictions at the time when the District Court Peja issued its Judgment is clearly outweighed by the following aggravating circumstances: the criminal action resulted in a high material damage of 16.800 EUR for the Guarantee Trust Fund; the specific set-up of the crime, particularly the involvement of other persons and the elaborated scheme which was used to defraud the Guarantee Fund of Kosovo; the accused's position of influence over co-defendant L. P., a former trainee-lawyer under his supervision, which defendant K. P. used to his advantage.

63. The Appeals Panel considers further that the need to impose the maximum punishment is particularly important in order to fulfill the purpose of the punishment, which – besides the

rehabilitation of the perpetrator – is the general and individual prevention (Article 34 of the CCK). The Republic of Kosovo is severely damaged by ongoing corruptive practices among state entities, including the judiciary. The fight against corruption requires not only to send strong signals to the perpetrators but also to Kosovo society in order to demonstrate that these crimes will be pursued and the offenders will face justice in strongest terms.

64. The Appeals Panel rejects the argument submitted by defendant K. P. that the Trial Panel exceeded its authority by finding that the occupation of a judge constitutes "performing functions in the public administration or in the public service" pursuant to Article 56 CCK. The Appeals Panel is of the opinion that "performing functions in public service" has to be interpreted broadly, also covering the judiciary. However, as already outlined above, the Appeals Panel has decided to apply the old Criminal Code, the law in force at the time of commission of the criminal offence. Hence, the accessory punishment of prohibition on exercising public administration or public service function cannot be imposed in the present case because under the old CCK the criminal offence of Issuing Unlawful Judicial Decisions does not include the possibility of punishment with imprisonment of "up to ten years".

66. The motion of Defence Counsel Gezim Kollcaku to have the detention on remand of defendant K. P. terminated is rejected as unfounded.

67. It has therefore be decided as per in the enacting clause.

Prepared in English, and authorized language. Reasoned Judgment completed and signed on November 2013.

Presiding Judge

Annemarie Meister

Panel Member

Tore Thomassen

Panel Member

Tonka Berisha

EULEX Legal Officer

Clemens Mueller

COURT OF APPEALS OF KOSOVO
PAKR 1122/2012
25 April 2013