DISTRICT COURT OF PRISHTINË/PRIŠTINA

KA 278/10, P 309/10
KA 309/10, P 340/10
Date: 2nd March 2011

The EULEX Judge Vitor Hugo Pardal, acting as judge appointed to conduct the proceedings to confirm the indictment filed on this court on the criminal case above-referred, against

Lufti DERVISHI, son of Hamit and Elfije Mehat, medical doctor urologist and associate professor, PHD in medicine, born on 06thApr55 in Gradice village, Gllogovc, Kosovo Albanian, Personal ID number 1004105717, married, two children, and residing in Prishtina;

Arben DERVISHI, son of Lufti and Vjlloca Syliqi, economist, pursuing masters in economics, born on 03rdDec83 in Prishtina, Kosovo Albanian, Personal ID number 03271061, married, one child and residing in Prishtina;

Driton JILTA, son of Ibrahim and Arife Kurti, medical surgeon doctor, born on 21stAug62 in Prishtina, Kosovo Turk, Personal ID number 02494253, married, two children and residing in Prishtina;

Ilir RRECAJ, son of Nezir and Hava Avdijaj, medical doctor, masters degree in medicine, born on 14thApr63 in LLuashe village, Skenderaj, Kosovo Albanian, Personal ID number 02571105, married, two children and residing in Prishtina;

Sokol HAJDINI, son of Ragip and Stanica Stojiljkovic, medical doctor, specialist in anesthesiology with reanimation, born on 03rdNov54 in Prishtina, Kosovo Albanian, Personal ID number 02430359, married, three children and residing in Prishtina;

Islam BYTYQI, son of Ilaz and Remzije Abdullahu, medical doctor, specialist in anesthesiology and intensive care, born on 17Apr70 in Qylage, Lipjan, Kosovo Albanian, Personal ID number 025656368, married, four children and residing in Prishtina;

Suleiman DULLA, nickname Syle, son of Bajram and Hana Matoshi, medical doctor, specialist in anesthesiology and intensive care, born on 14thJun65 in Magure village, Lipjan, Kosovo Albanian, Personal ID number 02537828, married, three children and residing in Prishtina;

accused in the indictment PPS No. 41/09 filed on the 15th0ct2010 and in the indictment PPS No. 107/10 filed on the 20th0ct2010, both by the Special Public Prosecutor, Mr. Jonathan Ratel, for the following charges:

Count 1 - Trafficking in persons CCK 139.1 and 23 - defendants: LUFTI DERVISHI, ARBAN DERVISHI, DRITON JILTA and SOKOL HAJDINI

Count 2 - Organized crime CCK 274.3 and 23 - defendant: LUFTI DERVISHI

Count 3 - Organized crime CCK 274.1 - defendants: ARBEN DERVISHI, DRITON JILTA and SOKOL HAJDINI

Count 4 - Unlawful exercise of medical activity CCK 221.1 and 23 - defendants: LUFTI DERVISHI, DRITON JILTA and SOKOL HAJDINI;

Count 5 - Abusing official position CCK 339.3 - defendants: DRITON JILTA and ILIR RRECAJ

Count 6 (joined) - Unlawful exercise of medical activity CCK 221.1 and 23 - defendants: ISLAM BYTYQI and SULEJMAN DULLA;

Because,

Count 1: Between the 1st of January 2008 and 4th November 2008, Lufti DERVISH, Driton JILTA and Sokol HAIDINI committed the offence of trafficking in persons by participating in the removal of

human organs for transplant to other persons for the purpose of exploitation, in or near Pristina, Kosovo; and between the 1st of January 2008 and the 4th of November 2008, Arben DERVISHI committed the offence of trafficking in persons by substantially contributing to the commission of the offence, including the recruitment, transportation, transfer, harbouring or receipt of persons for the purpose of exploitation, in or near Pristina, Kosovo.

Count 2: Between the 1st of January 2006 and the 4th of November 2008, Lufti DERVISHI did organize, establish, supervise, manage or direct the activities of an organized criminal group, together with Yusuf SONMEZ and Moshe HAREL, unindicted co-conspirators, in or near Pristina, Kosovo.

Count 3: Between the 1st of January 2008 and the 4th of November 2008, Arben DERVISHI, Driton JILTA and Sokol HADINI committed the offence of organized crime by committing serious crimes, including, trafficking in persons, within a structured group in order to obtain, directly or indirectly, a financial or other material benefit, in or near Pristina, Kosovo.

Count 4: Between the 1st of January 2008 and the 4th of November 2008, Lufti DEVISHI, Driton JILTA and Sokol HAJDINI committed the offence of carrying out medical treatment or engaging in any other medical activity for which specific qualifications are required by law, without possessing professional qualifications or legal authorization, in or near Pristina, Kosovo.

Count 5: Between the 1st of January 2008 and the 4th of November 2008, Driton JILTA committed the offence of abusing his official position or authority, exceeding the limits of his authorization or failing to execute his official duties, as medical doctor for the Organization for Security and Co-operation in Europe (OSCE) resulting in material benefit exceeding 5000 euro, in or near Pristina, Kosovo; and between the 1st of January 2008 and the 4th of November 2008, Ilir RRECAJ committed the offence of abusing his official position, exceeding the limits of his authorization or failing to execute his official duties, as past Permanent Secretary for the Ministry of Health, Republic of Kosovo, resulting in material benefit exceeding 5000 euro, in or near Pristina, Kosovo.

Count 6 (joined): Between the 1st of January 2008 and the 4th of November 2008, Islam BYTYQI and Sulejman DULLA committed the offence of carrying out medical treatment or engaging in other medical activity for which specific qualifications are required by law, without possessing professional qualifications or legal authorization, in or near Pristina, Kosovo, in co-perpetration with Lufti DERVISHI, Driton JILTA and Sokol HAJDINI.

After the confirmation hearings held on 14th December 2010 and 6th January 2011, in the presence of all defendants and their respective defence counsels, as well as of the Special Public Prosecutor, Jonathan Ratel (no representative of the injured party was present on all sessions),

A separate ruling on inadmissibility of evidence was issued on 31st January 2011, which was appealed and annulled by a ruling on appeal dated 1st March 2011 rendered by the competent three-judge panel.

Pursuant to articles 316, paragraph 1 to 4 of KCCP, and as instructed by the above mentioned ruling, issues the following

RULING

1. The Indictment PPS. 41/09 filed on the 150ct2010 contains the information required by and therefore satisfies the requirements of Article 305, paragraph 1, subparagraphs 1 through 7 of KCCP.

2. The Public Prosecution has fulfilled the obligation related to the disclosure of evidence, as provided by Articles 307 and 308 of KCCP.

3. All the evidence that is in the Court file or to which reference is made in documents that have

been filed with the Court was considered as admissible by the appeal panel and duly assessed as so instructed.

4. THE INDICTMENT PPS. 41/09, filed on the 150ct2010, IS CONFIRMED in its following Counts and regarding the following defendants:
   - Count 4, concerning the defendants LUFTI DERVISHI, DRITON JILTA and SOKOL HAJDINI;
   - Count 5, concerning the defendant ILIR RRECAJ.

5. THE INDICTMENT PPS. 41/09, filed on the 150ct2010, IS DISMISSED in its following Counts and the CRIMINAL PROCEEDINGS ARE TERMINATED regarding the following defendants:
   - Count 1, regarding the defendants LUFTI DERVISHI, ARBAN DERVISHI, DRITON JILTA and SOKOL HAJDINI;
   - Count 2, regarding the defendant LUFTI DERVISHI;
   - Count 3, regarding the defendants: ARBEN DERVISHI, DRITON JILTA and SOKOL HAJDINI;
   - Count 5, regarding the defendant DRITON JILTA;

6. THE INDICTMENT PPS. 107/10, filed on the 200ct2010 is RETURNED BACK to Prosecution to in order to amend the indictment, describing the facts with precision within 3 days, according to the instructions provided by article 305, paragraph 4 KCCP, as per article 306, paragraph 2 KCCP, here analogically applicable.

7. After the indictment PPS. 41/09, filed on the 150ct2010 becomes final, the same and the case record shall immediately be sent to the presiding judge for the main trial, who will decide upon eventual need for severance of proceedings.

8. Decision on seized objects and closed premises will be taken after this ruling becomes final.

REASONING

1. Competence of the Court

The undersigned judge granted his jurisdiction and competence for conducting the above referenced proceedings through the specific appointment by OPEJ by a decision issued on 27th November 2010. This case falls under the exclusive competence of EULEX judges pursuant article 5, paragraph 1 of Law 03/L-052 and article 3, paragraph 1 of Law 03/L-53.

2. Findings of the court

a. Preliminary procedural findings

During the confirmation hearing, some of the defense counsels (Bajram Tmava, Mexhid Syla, Aqif Tuhina and Fazli Balaj) raised the issue of eventual breaching of article 305, paragraph 1 KCCP. According to them the indictment filed against their respective defendants does not comply with the procedure requirements as foreseen by the mentioned article and paragraph "The issue of "*in Pristina or near Pristina*" was specifically raised as a sufficient/insufficient description of the place where criminal offenses were supposedly committed. The issue of "*between 1st January and 4th November 2008*" was also raised as sufficient/insufficient temporal description of the alleged facts, as well as not being well described enough as for *what* was done, *how* it was done (manner), and other factual elements and circumstances legally demanded for describing those specific criminal offenses (v.g. which serious criminal serious offenses, which threat, factual basis to ground a needed control over other person, etc.).

As directly foreseen by article 305, paragraph 1 KCCP, "*the indictment shall contain:*

> *1) The first name and surname of the defendant and his or her personal data (Article 245 of the present Code);*
> *2) An indication as to whether and for how long detention on remand or other measures under Chapter XXX of the present Code were ordered against the defendant, whether he or she is at liberty and, if he or she was released prior to the filing of the indictment, how long he or she was held in detention on remand;*
> *3) The legal name of the criminal offence with a citation of the provisions of the Provisional Criminal Code;*
> *4) The time and place of commission of the criminal offence, the object upon which and the instrument by which the criminal offence was committed, and other circumstances necessary to determine the criminal offense with precision;*
> *5) An explanation of the grounds for filing the indictment on the basis of the results of the investigation and the evidence which establishes the key facts;*
> *6) An indication of the main court before which the trial is to be held; and*
> *7) A recommendation as to evidence that should be presented at the main trial along with the names of witnesses and expert witnesses, documents to be read and objects to be produced as evidence."*

As it may be easily seen, the above-mentioned article does not provide a restrictive list of all factual elements that must be sorted in a certain structured way. Regarding the objected issues – subparagraph 4 - the only legal criteria must be: the indictment must contain the circumstances deemed "*as necessary to determine the criminal offense with precision*", although time and place are specifically named. It is not mentioned anywhere if those circumstances must be part of a certain chapter named "*charges*", "*explanation*", "*description*" or whatever. Even though it is understandable that a certain logic of structured indictments might be more familiar to some of the parties, according to the so-called "*continental system*", the KCCP does not close the door to a "*common law's*" structure. The only legal requirement to be met is the following one: it must result from the whole indictment that the criminal offense can be determined with precision.

It is out of question the importance of place and time as hugely important circumstances regarding description of the facts with precision. Moreover, on most of the criminal offenses, those and some other circumstances are essential to determine the criminal offense itself.

However, going through the indictment PPS No. 41/09 as a whole, there is not a single fact in which doubts may arise: all facts are sufficiently described, dated and placed, even listed within a grid, regarding each of the defendants, each of the actions, under chapter "*II. Reasoning*" onwards. The level of precision is acceptable as understandable and, specially, there is not a single (key) fact leading to any misunderstanding or any other difficulties to eventually prevent an effective defense from any of the charges by any of the accused. Not only the charges but all the indictment as a whole instead must be legally considered, thus the undersigned judge considers that this indictment satisfies the requirements of Article 305, paragraph 1, subparagraphs 1 through 7 of KCCP.

Regarding the indictment PPS No. 107/10, although as previous issue, it will be analyzed as below, together regarding the so-called Count 6.

b. Factual and legal framing

Within the following legal framework all charges will be analyzed, as below.

I. Regarding Counts 1 to 3:

The following evidence was considered relevant to these counts as documented within case file:

- Surveillance report – Binder V, pg. 56
- List of metered phone calls – Binder V, pg. 59 to 61, 63 to 65, 69, 70 and 76
- Police reports– Binder V, pg. 92, pg. 110, pg. 117 and pg. 140
- Stamped passport of Moshe Harel – Binder V, pg. 165
- Information from Turkish airlines – Binder VI, pg. 427
- Tax information– Binder VII, pg. 867
- Information on Vehicle registration – Binder VII, pg. 921
- Cadastral information – Binder VIII, pg. 1045
- Information regarding movements on bank account owned by Moshe Harel – Binder VIII, pg. 1092 to 1094 and Binder XI, pg. 648 to 856

- Statement of M.S. on 9th November 2008 – Binder VIII, pg. 1107
- Statement of Y.A. on 5th November 2008 – Binder VIII, pg. 1113
- Statement of I.A. on 4th November 2008 - Binder VIII, pg 1119 and Binder XIII, pg. 285
- List of people invited/guaranteed to/by Medicus clinic - Binder VIII, pg. 1122
- Interview with R.F. and R.F., through ILA in Canada – Binder X, pg. 493 and XXII, pg. 957
- Statement of T.B. - Binder XII, pg. 1
- Statement of B.G. - Binder XII, pg. 22
- Statement of S.M. - Binder XII, pg. 165
- Statement of E.P. - Binder XII, pg. 203
- Statement of N.S. – Binder XII, pg. 228
- Statement of B.S. on 8th November 2008 – Binder XII, pg. 228
- Statement of E.S. on 10th November 2008 - Binder XII, pg. 246
- Statement of M.S. on 9th November 2008 - Binder XII, pg. 260
- Statement of A.A. - Binder XIII, pg. 282
- Statement of Y.A. on 5th November 2008 - Binder XIII, pg 289
- Statement of Y.A. on 8th November 2008 - Binder XIII, pg. 300
- Statement of Y.A. on 11th November 2008 - Binder XIII, pg. 308
- Statement of I.B. - Binder XIII, pg. 317
- Statement of S.D. on 23th Jun 2008 and 8th July 2008 - Binder XIII, pg. 368 and 421
- Statement of M.H. - Binder XIII, pg. 454
- Statement of S.H. - Binder XIII, pg. 459
- Statement of Y.S. under extraordinary investigative hearing - Binder XIV, pg. 4
- Statement of Driton Jilta - Binder XIII, pg. 122
- Statement of T.P. - Binder XIII, pg. 220
- Statement of T.P. - Binder XIII, pg. 237
- Statement of E.S. - Binder XIII, pg. 272
- Statement of M.S. - Binder XIII, pg. 278
- Statement of Moshe Harel - Binder XIII, pg. 282
- Statements of B.S. - Binder XIII, pg. 298 and Binder XIII, pg. 316
- Statement of E.S. - Binder XIII, pg. 336
- Statements of Lufti Dervishi on 6th November 2008 and 15th June 2010 - Binder XIV, pg. 398 and Binder XIV, pg. 416
- Written statement from Lufti Dervishi - Binder XIV, pg. 411
- Statements of S.D. on 18th October 2010 and 8th July 2010 - Binder XIV, pg. 595

- Expert report regarding financial situation including cadastral and vehicle registration - Binders XX e XXI
- Clinic books and other documents confiscated during the search (Binder IV, pg 6 to 150);
- Pictures taken during and after the search (Binder V, pg 80);
- Report on expert examination on confiscated objects (Binder V, pg 140) dated 20Jan2009
- Rewiew of evidence: comparison of protocol book as seized evidence (Binder VII, pg. 647), dated 9Jul09;
- Reporting on expertise regarding evidence seized during the search, dated 9Jun09, and 4Aug10 (Binder VIII, pg 1086, 1140 and 1144)
- Results of the analysis of the Medicus clinic records, dated 24th November 2010 (Binder Post indictment evidences, pg 75 to 80)
- Evidences listed as result of confiscation during the search (Binder post-indictment evidences, pg 45)
- Pictures taken during the search (Binders A and B);

The analysis of the evidence listed above permits the conclusion that grounded suspicion exists that, at least 20 surgeries were conducted in Medicus clinic during the period mentioned within the indictment; it also permits to conclude that well-grounded suspicion exists that, at least 2 of them were transplants of human kidneys (F./? and B./A. as recipient/donor respectively). It is also undeniable that transplants of human organs - as private health activity - are illegal within Kosovo according to applicable law at the time of the facts, as per Section 46, item d) of Kosovo Health law 2004/4 from 19th February 2004. According to the same evidence, there is a well-grounded suspicion that within the mentioned period of time an organized activity was operating aimed to conduct surgeries including unlawful kidney transplantation with the same *modus operandi* and intervening the same acting people (including non indicted suspects), recurring systematically to foreigner donors and recipients, and involving trade payments.

However, for a further analysis of the above-mentioned charges, it is now worthy to transcript the criminal offense of trafficking in persons by which the defendants Lufti Dervishi, Arben Dervishi, Driton Jilta and Sokol Hajdini were indicted. It is the following:

Article 139 CCK – Trafficking in persons

(1) Whoever engages in trafficking in persons shall be punished by imprisonment of two to twelve years.
(3) Whoever organizes a group of persons to commit the offence in paragraph 1 of the present article shall be punished by a fine of up to 500.000 EUR and by imprisonment of seven to twenty years.
(...)
(8) For the purposes of the present article (...)
1) The term "trafficking in persons" means the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
2) The term "exploitation" as used in subparagraph 1 of the present paragraph shall include, but not be limited to, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.
3) The consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant where any of the means set forth in subparagraph (1) of the present paragraph have been used against such victim.

Analyzed the content of the legal definition of trafficking in persons – article 139, paragraph 8, subparagraph 1, the factual elements to be verified are as follows:

a) Recruitment, transportation, transfer, harboring or receipt of persons,

b) By any of the following means:

   i. threat

   ii. use of force

   iii. other forms of coercion

   iv. abduction

v. fraud

vi. deception

vii. abuse of power or of a position of vulnerability

viii. Receiving payments or benefits to achieve the consent of a person having control over another person,

c) For the purpose of exploitation (which includes the removal of organs, according to article 139, paragraph 8, sub paragraph 2 CCK).

Regarding the current case, even though the recruitment, transportation, transfer, harboring and receipt of persons - (a - as well as the purpose of exploitation - c) - are easily verified from the above mentioned list of evidence presented by the prosecution, when it comes to any of the means listed above on b) there is not even a single line of evidence within all 34 case binders (*rectius*, there is only one single sentence in one single statement of Y.A., which will be later referred and below analyzed). In fact, there is no gathered evidence at all regarding the means used to perform such actions, namely: eventual threat, eventual use of force, eventual other forms of coercion, eventual abduction, eventual fraud, eventual deception, eventual abuse of power or of a position of vulnerability, or eventual achievement of consent of a person who has any control over another.

Referring to the indictment, it was there mentioned under dot 67 a list of 20 transplants and under dot 58., *"the victims were recruited due to their acute vulnerability and through the use of coercive offers of cash payments in order to gain their consent to the removal of their organs. The fraudulent promise of cash payments acted as the singular inducement for gaining consent for the removal of organs due to the extreme poverty or acute financial distress of the victims. Accordingly, the victims*

were highly vulnerable to recruitment for the purposes of trafficking in persons and exploitation through their removal of organs, contrary to Articles 139 (1) and (8) of the CCK."

Later, under *"C. ANALYSIS OF THE PROSECUTOR"* it is written: *"Between the 1st of January 2008 and the 4th of November 2008, at least 15 – 20 people were trafficked into Kosovo for the purpose of removal of their kidney at the MEDICUS clinic. These victims were recruited in other countries, then transported and received at Pristina Airport through the false promise of payments for the removal of their kidneys. They were "exploited" within the definition set out in the CCK because removal of organs is enumerated within the definition of exploitation. Their consent in the removal of organs and travelling to Kosovo for this purpose is irrelevant due to the exploitation, as prescribed by Article 139(8) of the CCK".*

Now having the whole gathered evidence into consideration, it is worthy to mention that apart from Y.A. as a donor and B.S. and R.F. as recipients, not even one of all other 20 victims, as listed, has been traced and localized, despite all efforts on ILA requests.

Considering the importance of the concrete mean used by the perpetrator in order to conclude for an effective criminal offense as legally defined, it is quite unlikely to define and evaluate whether there has been *"fraudulent promises of cash payments"* without considering the concrete statements of the direct intervenient, detailing their negotiation (or some other valid evidence which could reasonably replace them). *"Similar fact evidence"*, as referred on pg. 13 of the indictment, may be considered as sufficient for a grounded suspicion to be further investigated, but never for a well-grounded suspicion in order to confirm a probable conviction of anyone of the charged defendants at the main trial.

Therefore, regarding these alleged victims specifically, there is no evidence gathered to conclude, as under dot 58. of the indictment, *"the victims were recruited due to their acute vulnerability and through the use of coercive offers of cash payments in order to gain their consent to the removal of*

their organs. The fraudulent promise of cash payments acted as the singular inducement for gaining consent for the removal of organs due to the extreme poverty or acute financial distress of the victims. Accordingly, the victims were highly vulnerable to recruitment for the purposes of trafficking in persons and exploitation through their removal of organs, contrary to Articles 139 (1) and (8) of the CCK." Or that *"(...) at least 15 – 20 people were trafficked into Kosovo for the purpose of removal of their kidney at the MEDICUS clinic. These victims were recruited in other countries, then transported and received at Pristina Airport through the false promise of payments for the removal of their kidneys. They were "exploited" within the definition set out in the CCK because removal of organs is enumerated within the definition of exploitation."*

If the law expressly requires at least one of the means listed under paragraph 8 of article 139 KCC as used, hence it cannot be permitted as enough a generic presumption or conclusion like, for instance, *"The fraudulent promise of cash payments acted as the singular inducement for gaining consent for the removal of organs due to the extreme poverty or acute financial distress of the victims"*, without concrete and individual factual grounds and respective evidence. Otherwise those means wouldn't be listed and a generic provision would be used instead. Nevertheless, evidence regarding this concrete legal element in all case binders is simply inexistent.

Regarding the relevant evidence concerning this specific issue we must now consider the statements provided by Y.A. as the only localized donor, by the localized recipients B.S. and R.F., and their family members, E. and M.S. and R.F.. Even though concerning this criminal offense the victim is clearly considered the person from whom the organ was removed (and not the recipient), the details on trading might be somehow relevant and not despicable in order to define the *modus operandi*, at least regarding those two cases.

However, considering all statements of E., B., M., R. or R. it is not possible to conclude that any promise in cash was not fulfilled in order to conclude by a fraudulent promise as referred in the indictment. All members of S. family refer to their relatives – M.R. and R.N., who were never interviewed; both F. refer to an effective payment made to Moshe Harel corresponding to a service effectively provided, despite his unknown unlawfulness in Kosovo. No one has ever referred himself as victim of a fraudulent promise. Moshe Harel provided a statement by which any of those searched details were not confirmed. All of them produced thus useless evidence regarding the details of the trade with the victims.

Regarding the only donor who provided several statements – Y.A. – he is the only one in this case who could narrate all the trade details in which he was directly involved. Considering all of them - on 5th November 2008 (Binder VIII, pg. 113 and Binder XIII, pg. 289), on 8th November 2008 (Binder XIII, pg. 300) and on 11th November 2008 (Binder XIII, pg. 308) - a promise in cash of 20000 USD was made by a certain Ismail, for the purpose of trading his kidney. However, Y.A. stated on 5th November 2008: "*I needed the money, had a lot of depts and thought of a better life*" referring to the reasons why he accepted the proposal. However, he has never said that Ismail was aware of these thoughts, reasons or of his personal and financial situation; he never mentioned that Ismail used any pressure or any of the means mentioned on article 139, paragraph 8 KCC (he was never been questioned about it either).

Y.A. also stated that he would receive his money as soon as he would arrive at Istanbul airport after the surgery. He also added, "*Because I was caught by the police I lost money that I was promised to get and the kidney*". It is not possible thus to conclude for a fraudulent promise not fulfilled by Ismail or by anyone else.

And finally the single sentence above referred that could be considered as evidence in order to prove a criminal mean, as foreseen by article 139, paragraph 8 KCC, as stated by Y.A. during the extraordinary investigative hearing (Binder XIV, pg. 4) is the following: "*Ismail told me it was not legal in Turkey but it was legal in Kosovo*".

Even though this single sentence could be considered as a mean of deception it cannot be relevant enough for several reasons: 1) the concept of "*illegal activity*" is not necessarily similar to "*criminal activity*" so it is not clear the meaning of such expression; 2) this is the only statement regarding this issue which is not confirmed by any other evidence – Ismail is not identified or presented as evidence for the main trial – and quite likely no other evidence might confirm this statement, which was not repeated by the victim, not even once during his other statements, having into consideration article 157, paragraph 3 KCCP; 3) Even though "*In rendering a ruling under the present article, the judge shall not be bound by the legal designation of the criminal offense as set forth by the prosecutor in the indictment (...)*" – article 316, paragraph 6 KCCP – he is however bound by the facts mentioned on the indictment. Nowhere in the indictment is a fact referred or alleged that might be considered as a deception in order to meet the requirement of article 139, paragraph 8, subparagraph 1 KCC. Fraudulent promises are always referred instead.

All evidence gathered by the conducted search don't add anything relevant regarding the missing legal element: they may add further evidence concerning to the transplants which had been performed but regarding the missing element nothing new is brought.

For all the above mentioned reasons – and specially because an unlawful activity is not necessarily the same as a criminal offense if not materialized in all legally defined elements (v.g. one of the listed means) – reflecting the lack of evidence, it is decided as in the enacting clause that the level of well-grounded suspicion regarding the first count is not met, and thus it shall be dismissed.

Regarding counts 2 and 3, Organized crime was charged based on article 274, paragraphs 1 and 3 CCK regarding respectively Arben Dervishi, Driton Jilta and Sokol Hajdini and Lufti Dervishi. Both charges refer specifically to trafficking in persons by participating in the removal of organs for transplant to other persons for the purpose of exploitation (or substantially contributing for the commission of the offense, or by organizing, establishing, supervising, managing or directing the activities of the organized criminal group together with Yusuf Sonmez and Moshe Harel, unindicted co-conspirators).

Having into consideration the criminal offense as foreseen by article 274, paragraphs 1 and 3 CCK and all above referred regarding the lack of well-grounded suspicions that a criminal offense of trafficking in persons has been committed, the obligatory and logical consequence will be the extension of the same lack of evidence also to this criminal offense. In the criminal offense of Organized crime as foreseen by article 274 CCK, at least a serious crime is demanded to exist. Lacking this serious crime – the one charged in the indictment – also the necessary level of well-grounded suspicion regarding this criminal offense is not met either, and thus it shall be dismissed as well, without further considerations deemed as necessary.

2. Regarding Counts 4 and 6 (joined):

As announced above, regarding now specifically count 6, in a joined procedure a different indictment - PPS No. 107/10 - is now to be considered regarding a previous procedural issue.

If in the indictment PPS No. 41/09 filed on the 15Oct2010 a detailed list of acts was sufficiently described, regarding PPS No. 107/10 it is only mentioned that the "*defendants Suleiman Dulla and*

Islam Bytyqi were involved respectively in at least 17 and 21 organ removal or transplant operations at Medicus in 2008" (Binder XVII, pg. 732). The referred detailed list cannot be considered within this specific indictment, because it is not part of it - although joined proceeding was ordered – and thus, the acts alleged as criminal offenses are not sufficiently described with precision in order to allow the defendants a proper and effective defense against the charge.

Although not bound by legal designation – article 316, paragraph 6 KCCP – the confirmation judge is bound by the facts the way they are alleged by the prosecution in the indictment. Even though the judicial evaluation whether the facts are sufficiently described with precision or not is not directly foreseen after the confirmation hearing has been held, the consequence cannot be the simple dismissal of the indictment. Article 306, paragraph 2 KCCP must be so analogically applied and this indictment shall be returned to the prosecution in order to facts to be accordingly amended with sufficient precision, within 3 days. Considering so, the raised issue of relative statutory limitation upon this count 6 must be decided one stage further.

Regarding specifically count 4, regarding the defendants Lufti Dervishi, Sokol Hajdini and Driton Jilta, the raised issue of eventual statutory limitation must be now duly assessed and decided.

Now follows the criminal offense as legally defined:

Article 221.1 CCK - Unlawful exercise of medical activity

(1) Whoever, without possessing professional qualifications or legal authorization, carries out medical treatment or engages in some other medical activity for which specific qualifications are required by law shall be punished by a fine or by imprisonment of up to one year.

As per article 90, paragraph 1, subparagraph 6 CCK, "*unless otherwise provided for by the present code, prosecution may not be commenced after (...) periods have elapsed: two years from the commission of a criminal offense punishable by imprisonment up to one year (...)*"

Regarding this specific criminal offense, the ruling on expansion of investigations was issued on last 7th October 2010 (Binder XVII, pg. 610), which means, prosecution has not commenced before 7th October 2010 regarding the criminal offense at stake. The undersigned judge considers that no expansion of investigations regarding other criminal offenses or joined proceedings may allow overtaking the mandatory rules of statutory limitation as an absolute guarantee of the defense. Considering so, all criminal offenses cannot be considered if committed before 8th October 2008.
However it is not clear what must be considered as "*commission of a criminal offense*" from the applicable law. On the other hand, the indictment was filed considering all 30 surgical acts solely as one criminal offense in co-perpetration, considering a single charge. It is clear that according to the Prosecution the unlawful exercise of medicine was conducted during a certain period of time and must be considered as finished only whilst the last act was performed. Taking the fact that this specific criminal offense also protects the public health rather than only individual victims into consideration, it cannot be considered at the present moment that a continuous crime was not accordingly conducted, without evaluating evidence as it must be produced at the main trial, specifically the necessary "*mens rea*". Considering so, the eventual statutory limitation must be assessed in a later stage.

Another juridical issue raised during the confirmation hearing must be now decided: the nature of this criminal offense and its juridical sphere of protection. It is clear that article 221 CCK defines a criminal offense against the public health. On the other hand, "*without possessing professional*

qualifications" is defined as alternative to "*without the legal authorization*". This means necessarily that the presence of one of those elements is enough to fulfill the provision and thus, the criminal offense may be committed by who may be in possession of professional specific qualifications, if legal authorization is also needed, however not obtained.

Considering so, the presented evidence must be now evaluated, regarding Count 4. - defendants Lufti Dervishi, Sokol Hajdini and Driton Jilta.

Relevant to this charge are the following evidence as documented within case file:

- Statement of Y.A. from 5th November - Binder VIII, pg. 1113
- Statement of I.A. - Binder VIII, pg. 1119
- Statement of R.F. on ILA from Canada - Binder X, pg. 493
- Statement of T.B. - Binder XII, pg. 1
- Statement of B.G. - Binder XII pg 22
- Statement of S.M. - Binder XII, pg. 165
- Statement of N.S. - Binder XII, pg. 220
- Statement of E.S. - Binder XII, pg. 246
- Statement of I.B. - Binder XIII, pg. 317
- Statement of S.D. - Binder XIII, pg. 421
- Statement of M.H. - Binder XIII, pg. 454
- Statements of R.F. and R.F. - Binder XXII, pg. 957
- Statement of Driton Jilta - Binder XIII, pg. 122
- Statement of M.S. - Binder XIII, pg. 278
- Statement of Lufti Dervishi - Binder XIV, pg. 398
- Written statement of Lufti Dervishi - Binder XIV, pg. 411
- Statement of Lufti Dervishi - Binder XIV, pg. 416
- Police report - Binder V, pg. 169
- Statement of A.K. - Binder XII, pg. 125
- Statement of Ilir Rrecaj - Binder XIV, pg. 613:
- License for cardiology signed Ilir Rrecaj - Binder I, pg. 126

- Medicus clinic report dated 4th August 2008, signed Lufti Dervishi - Binder Post-indictment, pg. 187
- Letter dated 2nd June 2008, signed Arben Dervishi – Binder Post-indictment, pg. 181;
- Letter dated 21st August 2008 - Binder Post-indictment, pg. 199.
- Clinic books and other documents confiscated during the search (Binder IV, pg 6 to 150);
- Pictures taken during and after the search (Binder V, pg 80);
- Report on expert examination on confiscated objects (Binder V, pg 140) dated 20Jan2009
- Rewiew of evidence: comparison of protocol book as seized evidence (Binder VII, pg. 647), dated 9Jul09;
- Reporting on expertise regarding evidence seized during the search, dated 9Jun09, and 4Aug10 (Binder VIII, pg 1086, 1140 and 1144)
- Results of the analysis of the Medicus clinic records, dated 24th November 2010 (Binder Post indictment evidences, pg 75 to 80)
- Evidences listed as result of confiscation during the search (Binder post-indictment evidences, pg 45)
- Pictures taken during the search (Binders A and B);

The analysis of the evidence listed above leads to the conclusion that it is more probable that all the mentioned defendants have committed the criminal offence they have been charged with than not having committed it.

The factual situation presented in the indictment is logical, clear and complete with supporting evidence.

Regarding the defendant Lufti Dervishi, Y.A. identifies him at the surgery room (Binder VIII, pg. 1113); I.I. refers to some surgeries performed at least by him (Binder VIII, pg. 1119); R.F. named him as having provided him with digital photographs, medical records, one medical report and one document from Ministry of Health allowing the surgery (Binder X, pg. 493); B.G. refers to 4 or 3 cases of kidney transplantations within the last 2 months as well as to the case of B.S. (Binder XII, pgs. 32 and 36); S.M. pointed him as almost always present on 20 to 30 cases of kidney transplants, where she was also personally present, including the transplant conducted on B.S. (Binder XII, pg. 165); E.S.

remembers him at the clinic before the transplant (Binder XII, pg. 246); M.H. pointed him as member of the medical team for surgeries (Binder XIII, pg. 454); M.S. pointed him as having performed the surgery on B.S. (Binder XIII, pg. 278). This defendant had raised some doubts regarding who was the team leader on those transplants but never denied to have participated on them (Binder XIV, pg. 398, Binder XIV, pg. 411 and Binder XIV, pg. 416). When this defendant settles his defense on his firm conviction that transplants of human organs in Medicus clinic were authorized by the Minister of Health, according to the letter he received from Ilir Rrecaj, dated 12th May 2008 it might be consistent with the fact that he had informed the recipients of the content of this letter. However it does not explain why on 4th August 2008 the Medicus report addressed to the Ministry of Health and signed by this defendant still refers to the need of authorization for such surgeries and still the need to obtain it and, as mentioned on the reply dated 21st August 2008, as confirmed by Ilir Rrecaj, further procedures to obtain it. As well as it is not explained in the letter dated 2nd June 2008 by Arben Dervishi as the manager of the clinic and the difference of certification document between the cardiology and urology hospital, of which he was plenty aware, as anyone else, according to the statement of A.K. (Binder XII, pg. 125).

Regarding the defendants Sokol Hajdini and Driton Jilta, evidence regarding the participation of both of them in the transplants can be easily found: for instance, T.B. and N.S. pointed Sokol Hajdini as working in urology and usually being part of the medical team on surgeries (Binder XII, pg. 1 and Binder XII, pg. 220, respectively); S.M. refers Sokol Hajdini as anesthesiologist and usually responsible for filling the anesthesiologist forms (Binder XII, pg. 165); I.B. stated that he had worked under his directions (Binder XIII, pg. 317); M.H. pointed him as a member of the medical team of Lufti Dervishi (Binder XIII, pg. 454). His "mens rea" as subjective element by nature may be extracted from the material evidence to be produced in the main trial. For the moment, the evidence presented in

conjunction with the statement of A.K. as above referred is enough to fulfill the level of well-grounded suspicion even regarding the knowledge of unlawfulness of human transplants in Kosovo.

On the other hand, S.M. pointed Driton Jilta as present during the surgeries not only the one on B.S. (Binder XII, pg. 165); I.B. pointed him as arriving with Yusuf for B.'s transplant (Binder XIII, pg. 317) and S.D. pointed him as present during the same transplant (Binder XIII, pg. 421). This defendant does not deny his presence on that transplant (Binder XIII, pg. 122) but he does not refer to other transplants, and he doesn't provide any reasonable version for his presence. The facts he alleges are not supported by any element of evidence, not even in a regular common sense, as easily may be seen from his statement.

The final credibility of the above mentioned evidence will depend on several factors to be verified within the main trial. So far, the defense hasn't presented any line of defense capable of inverting the evidential strength of all evidence presented by the prosecution. All the statement of the defendant followed a line of material defense based on evidences not presented by the prosecution and not admissible at this procedural stage.

Indeed there are no substantial inconsistencies in relevant details between the statements of witnesses confronted with all documentary evidences analyzed. Thus, regarding the standard of proof at this stage of the proceedings, in their aggregate, the presented evidence is sufficient to justify the existence of a well-grounded suspicion these defendants have committed the criminal offence of Unlawful exercise of medical activity (article 221, paragraph 1 CCK) as in the indictment.

However, regarding the standard of proof at this stage of the proceedings as well as the provision of Article 376 KCCP, the Court considers this to be an issue for the main trial.

3. Regarding Count 5:

The defendant Ilir RRecaj was charged because, between 1st January 2008 and 4th November 2008, Ilir RRECAJ committed the offence of abusing of official position or authority by abusing his official position, exceeding the limits if his authorization or failing to execute his official duties, as past Permanent Secretary for the Ministry of Health, Republic of Kosovo, resulting in material benefit exceeding 5000 euro, in or near Pristina, Kosovo. Paragraphs 69., 70., 74., in fine, 75 (pg. 17), 86., 87. (pg. 19) and "*Analysis of the prosecutor*", (pg. 35) directly refer all the facts needed for an indictment to be considered as sufficiently completed in a detailed way. It is also included the "*material benefit exceeding 5000 euro*" under any of those paragraphs, but it is however expressly referred under paragraphs 33. (pg. 11) and 46. (pg. 12). The conclusion, the charge, the facts and the name of the criminal offense are clear enough to allow an effective defense, thus any objection regarding this issue must be rejected as ungrounded.

Considering so, the evidence must be analyzed.

Relevant to this charge is the following evidence as documented within case file:

- Police report referring to frequent change of SMS between the defendants Lufti Dervishi and Ilir Rrecaj - Binder V, pg. 169;
- Written information from H.K., acting permanent secretary of HoJ on 19Aug09 – Binder VII, pg. 747.
- Statement of A.G. – Binder XII, pg. 69;
- Statement of Z.K. – Binder XII, pg.92;
- Statement of A.K. - Binder XII, pg. 125;
- Statement of expert witness N.H. - Binder XII, pg. 515;
- Examination of defendant Ilir RRecaj on 6th November 2008 - Binder XIV, pg. 608;
- Examination of defendant Ilir Rrecaj on 22nd June 2010 - Binder XIV, pg. 613;
- License for cardiology, dated 7th May 2008 - Binder I, pg. 126;

- Letter dated 12th May 2008 – Binder, I pg. 132 and Binder Post-indictment, pg. 206;
- Letter dated 2nd June 2008, signed Arben Dervishi – Binder Post-indictment, pg. 181;
- Medicus clinic report dated 4th August 2008, signed Lufti Dervishi - Binder Post-indictment, pg. 187;
- Letter dated 21st August 2008 - Binder Post-indictment, pg 199.

Article 339.3 CCK - Abusing official position

> *(1) An official person who, with the intent to obtain an unlawful material benefit for himself, herself or another person or a business organization or to cause any damage to another person or business organization, abuses his or her official position, exceeds the limits of his or her authorizations or does not execute his or her official duties shall be punished by imprisonment of up to one year.*
> *(2) (...)*
> *(3) When the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5.000 EUR, the perpetrator shall be punished by imprisonment of one to eight years.*

As used in the Kosovo Code of Criminal Procedure (KCCP), the term "*well-grounded suspicion*" refers to the quantum and quality of evidence that exists in a given case to support a reasonable, objective belief or "suspicion" that a particular individual has committed the offence(s) for which that person has been indicted. See, for example, Article 316(1), item 4 of the KCCP, which informs the Confirmation Judge that an indictment is to be dismissed unless there is "*sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment.*"

"*The code is not very clear as to the standard of "sufficient evidence" referred to in Article 316 paragraph 1 item 4 PCPCK. The interpretation should be based on the role of the confirmation judge, who decides after the completion of the investigation, but must not prejudice the adjudication of the matters which will be considered in the main trial (Article 317 paragraph 1 PCPCK). Thus, the standard must be such evidence that – if accepted – may lead to a conclusion that it is more*

probable that a specific offence was committed than not. In this regard, the evidence submitted by the prosecution should be able to suggest that all elements of the offence have been committed." – KSC, 25th October 2004.

The analysis of the evidence listed above leads to the conclusion that it is more probable than not that the defendant Ilir Rrecaj has committed the criminal offence he had been charged with.

There is clear evidence that the defendant Ilir Rrecaj acted as official person, as defined by article 107, paragraph 1, subparagraph 1, in conjunction with subparagraph 16 CCK.

Having the statements of both kidney recipients and respective relatives within this file into consideration, and also referring to bank transfers to Moshe Harel also documented within this file, a benefit exceeding 5000 Euro must be considered as well-grounded, whoever had benefit from it. R.F. stated (Binder X, pg. 500) that the defendant Lufti Dervishi used a document issued by the Ministry of Health of Kosovo to demonstrate him that a kidney transplant would be legal in Kosovo. All this must be considered as enough to show the link between the letter of 12th May 2008 signed by the defendant Ilir Rrecaj, the subsequent surgery and its payment, exceeding 5000 Euro, as an unlawful material benefit coming from an unlawful surgery; regardless whoever really had benefit from it.

It is also plenty documented as evidence that a license for performing transplants of organs was never officially granted according to the regular proceedings. However the letter dated 12th May 2008 was issued by the defendant Ilir Rrecaj without any recommendation from the board (A.G.) or passing through the Minister's office, as non-registered document without protocol number but with an official stamp, as a very unusual procedure (A.K.) and even irregular (N.H.). Both witnesses could not explain both the reason and the procedure then used by this defendant.

Taking the title and the specific content of the above-mentioned letter into consideration the alternative reason remains inexplicable - as alleged by the defendant and his defense counsel during the confirmation hearing. This letter was addressed in an official way (on behalf of a board, the letter

always refers "*we checked, we approved, we notify you*") which it is denied by other members of the same official board and its title expressly refers "*confirmation of approval for license for urological services*". The defendant alleged a "*technical mistake*" or "*suggestion and clarification of procedures*" as a reason for this letter. However, the sequence, the complexity of the taken actions, the abusive use of an official stamp without registration or passing through the protocol are too many acts out of the bounds of the regular and usual procedure to be considered as a simple technical mistake.

The explanation advanced during the confirmation hearing by this defendant, according to whom "*it was a policy from the minister not to interrupt the initiatives, not to reject the initiatives*" as a reason for the letter dated 12th May 2008, even though accompanied by the content of letters from the 2nd of June 2008, the Medicus clinic report dated 4th August 2008, signed Lufti Dervishi and the letter dated 21st August 2008 are not enough to invert the above-mentioned reasoning. In fact, this last letter, strictly following the protocol directly refers to a previous letter of Arben Dervishi and the Medicus report from 4th August 2008 and utterly omits any previous application and specially the so-alleged mistaken letter from 4th May 2008. On the other hand, the letter from the 12th of May does not clarify or suggest anything further but that the license was approved. The suspicions on abuse of official position are well-grounded thus.

Regarding the inner intent to benefit other person as a specific "*dolus*"*(mens rea)*, beyond the generic subjective intent, as demanded by article 339 CCK, as well as any other intent, may be only extracted from the surrounding material facts - as the innermost part it is by nature. Considering there is no other reasonable explanation for this concrete material action the way it was conducted and having the police report into consideration referring to frequent change of telephone SMS messages between Lufti Dervishi and this defendant – Binder V, pg. 169 – the well-grounded suspicion also includes this subjective element defined on this criminal offense.

Naturally this well-grounded suspicion shall be verified and evaluated within the main trial.

Thus, regarding the standard of proof at this stage of the proceedings, in their aggregate, the presented evidence is sufficient to justify the existence of a well-grounded suspicion that the defendant has committed the criminal offence of Abusing official position (article 339.3 CCK).

Regarding the defendant Driton Jilta, there is no evidence within the case file that "*he failed to report to relevant authorities an unlawful surgery as part of his duties as a medical doctor for the OSCE*", as expressly written in the indictment (pg. 35), except his own statement dated 6th and 7th June 2010, when examined as defendant. This essential element of this criminal offense – "*failure to report*" – is not confirmed by any other piece of evidence. Also the concrete duty and the concrete authority to which the unlawful activity should be reported are not even mentioned in the indictment. On the one hand, considering article 157, paragraph 2 KCCP, the level of well-grounded suspicion on this particular element is not met; on the other hand, the uncertainty regarding the content of the failed duty and the lack of reference to the relevant authority in the indictment do not allow an effective defense against these "*facts*", as blurred and not enough precise at their description, and thus unacceptable, according to article 305, paragraph 1, subparagraph 4 KCCP.
For the first of the above two mentioned reasons, dismissal of this charge against the defendant Driton Jilta shall be the consequence.

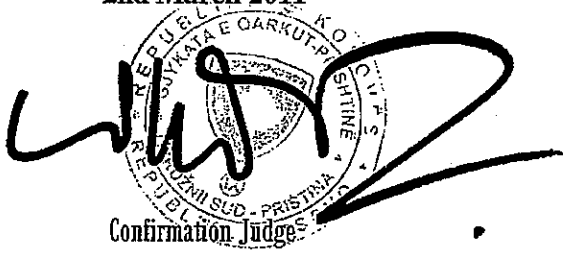
Considering all above, it has been decided as in the enacting clause of this ruling.

LEGAL REMEDY: As per articles 432, paragraph 2 and 434, paragraph 2 KCCP, the current ruling can be challenged by a separate appeal to a three-judge panel within forty-eight hours of the receipt of the same by the parties and persons whose rights have been violated.

The parties shall be served on the content of this ruling duly translated to Albanian and Serbian (defendant Jilta).

This ruling was issued on 29 pages in English language.

PRISHTINË/PRIŠTINA
2nd March 2011



Confirmation Judge
Vítor Hugo Pardal