

Pristina, 19 November 2015

PPS: No. 35/2014

## **RULING ON TERMINATION OF THE INVESTIGATION**

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Having reviewed the police reports and other materials contained in the case file and pursuant to Article 158 paragraph 1 of the Criminal Procedure CPC), I **Danilo Ceccarelli**, EULEX SPRK Prosecutor issue the following:

### **RULING ON TERMINATION OF THE INVESTIGATION**

With respect to the following persons:

1.

<b>Name</b>	<b>Naser</b>
<b>Surname</b>	<b>Osmani</b>
<b>Father's name</b>	
<b>Date of Birth</b>	
<b>Place of Birth</b>	
<b>Gender</b>	Male
<b>Address</b>	
<b>Nationality</b>	Albanian
<b>Citizenship</b>	Kosovar
<b>Identification number</b>	

2.

<b>Name</b>	<b>Bahri</b>
<b>Surname</b>	<b>Shabani</b>
<b>Father's name</b>	
<b>Date of Birth</b>	
<b>Place of Birth</b>	
<b>Gender</b>	Male
<b>Address</b>	
<b>Nationality</b>	Albanian
<b>Citizenship</b>	Kosovar
<b>Identification number</b>	

3.

<b>Name</b>	<b>Haxhi</b>
<b>Surname</b>	<b>Arifi</b>
<b>Father's name</b>	
<b>Date of Birth</b>	

**Place of Birth**  
**Gender** Male  
**Address**  
**Nationality** Albanian  
**Citizenship** Kosovar  
**Identification number**

4.  
**Name** **Slobodan**  
**Surname** **Petrovi**  
**Father's name**  
**Date of Birth**  
**Place of Birth**  
**Gender** Male  
**Address**  
**Nationality** Serbian  
**Citizenship** Kosovo  
**Identification number**

5.  
**Name** **Naim**  
**Surname** **Avdiu**  
**Father's name**  
**Date of Birth** 25 December 1959  
**Place of Birth**  
**Gender** Male  
**Address**  
**Nationality** Albanian  
**Citizenship** Kosovar  
**Identification number** 1004429792

6.  
**Name** **Mrika**  
**Surname** **Tahiri**  
**Father's name**  
**Date of Birth** 24 April 1978  
**Place of Birth**  
**Gender** Female  
**Address**  
**Nationality** Albanian  
**Citizenship** Kosovar  
**Identification number** 1014559732

7.  
**Name** **Arben**

**Surname** Zeqiri  
**Father's name**  
**Date of Birth** 18 December 1978  
**Place of Birth** Mitrovicë/Mitrovica  
**Gender** Male  
**Address**  
**Nationality** Albanian  
**Citizenship** Kosovar  
**Identification number** 1003941376

8.

**Name** Lluka  
**Surname** Shkelzen  
**Father's name**  
**Date of Birth**  
**Place of Birth**  
**Gender** Male  
**Address**  
**Nationality** Serbian  
**Citizenship** Kosovo  
**Identification number**

#### **IN RESPECT OF THE FOLLOWING CRIMINAL OFFENCES:**

1. **“Organized Crime”** contrary to Article 274 paragraphs 1 and 2 of the Criminal Code of Kosovo of 2004 (CCK), foreseen in the new CCK of 2013 (new CCK) as a criminal offence of **“Participation in or organization of an organized criminal group”**, Article 283 paragraphs 1 and 2 (all defendants).
2. **“Abusing official position or authority”**, in violation of Article 339 of the CCK (CCK 2004), foreseen also as a criminal offence under Article 422 of the new CCK applicable from 01 January 2013 (new CCK) (All defendants, except the defendant Arben Zeqiri).

#### **REASONING**

#### **PROCEDURAL HISTORY**

1. On 3<sup>rd</sup> February 2014, SPRK Prosecutor issued a Letter of Entrustment to EULEX OCIU, entrusting them to conduct preliminary investigations, and specifically to request the PAK Headquarters in Pristina to provide the police and the prosecution with the following information and documents:
  - a. All documents related to the expropriation of the land (parcels) of the Socially Owned Enterprise (hereafter ‘SOE’) Kosovo Export in Hajvalia village, Pristina municipality for the benefit of the American University in Kosovo (hereafter ‘AUK’);
  - b. Valuation submitted by Aurelian Capital-Kosovo L.L.C. in relation to the evaluation of the assets of the above SOE, Kosovo-Export;

- c. To obtain from the Municipality of Pristina the plans for the construction of AUK in Hajvalia village.
2. Following the Police Report, on 7<sup>th</sup> April 2014, SPRK Prosecutor issued a Ruling on Initiation of Investigation against the abovementioned defendants (except Lluka Shkelzen) in respect of the criminal offences of Organized Crime and Abusing Official Position. All the defendants are Directors or Managers at Kosovo Privatisation Agency (hereafter 'PAK'), except Arben Zeqiri who is the Director of the company LLC Aurelian, which valued the land.
3. The description of the acts which constituted the elements of the criminal offences, and the circumstances and facts warranting the reasonable suspicion that the criminal offences had been committed, made clear that the case is related to the expropriation of the land parcels of the SOE Kosovo Export in Hajvalia village, Pristina municipality for the benefit of the American University in Kosovo (AUK).
4. On 20<sup>th</sup> May 2014, the SPRK prosecutor issued a Ruling on the Expansion of Investigation against the same defendants, for the same criminal offences, with regards to [*a second case, which is omitted here*]. No investigative actions were undertaken.
5. On 15<sup>th</sup> August 2014, the SPRK prosecutor issued a Ruling on the Expansion of Investigation against the same defendants, with the addition of [*a person, whose name is omitted here*], for the same criminal offences, with regards to [*a third case, which is omitted here*]. No investigative actions were undertaken.
6. It is noted that there is no strict connection between these three matters which warranted these cases being investigated collectively.
7. On 4<sup>th</sup> September 2014, the undersigned prosecutor issued a Letter of Entrustment to Kosovo Police entrusting them to fully investigate the AUK case and to gather several relevant documents. Kosovo Police filed the report on 12<sup>th</sup> February 2015.
8. In the meantime, the witness Andrea Capussela gave a pre-trial interview on 30<sup>th</sup> January 2015, during which he provided the undersigned prosecutor with relevant documents and information as regards the AUK case.
9. On 25<sup>th</sup> February 2015, the undersigned prosecutor issued a Letter of Entrustment to Kosovo Police entrusting them to verify if the land parcels of the SOE "Kosovo Export", located in Hajvalia, Cadastral Zone Prishtina, no. 257, 259, 260, 261 and 382, are still registered at the Cadastral Directorate of Pristina in name of Kosovo Privatisation Agency. KP filed a report on 2<sup>nd</sup> March 2015.
10. The defendant Shkelzen Lluka was interviewed on 14<sup>th</sup> September 2015. The defendant Naim Avdiu was interviewed on 29<sup>th</sup> September 2015.

## THE INDIVIDUAL CASES

### 1. AMERICAN UNIVERSITY IN KOSOVO (AUK)

#### FACTUAL BACKGROUND

11. Based on the documents obtained and the information provided during interview by the witness Dr. Capussela, the following chronology of facts has been established.
12. On 16<sup>th</sup> June 2010, following a meeting held on the same day, the Government of Kosovo took Decision no. 04/130, which approved the expropriation for public interest of land parcels no. 257, 259, 260, 261 and 382 which were under the administration of the PAK and located in the cadastral zone of Hajvalia. The Decision expressly mentioned that the land parcels “are impacted by the construction of the Campus of the American University of Kosova,” which strongly suggested that construction was already underway at that time of the decision being taken.
13. The Minutes of the Meeting of the Government of Kosovo on that day reads as follows: “4. *Various ... - Minister Hoxhaj (Enver Hoxhaj, Minister of Education, Science and Technology (“MEST”)): A second request which as well is addressed to the Prime Minister was sent by the **Steering Board of the American University of Kosovo**. Prishtina Municipality in 2002 has allocated a location in Hajvalia which covers the surfaces of cadastral parcels 257, 259, 260, 261 and 382. The Steering Board of American University in Kosovo few weeks ago took a decision to move to a new campus in Hajvalia, as a long-term vision of decennial development of American University in Kosovo. **Last week in the offices of Minister Shala, at the Ministry of Economy and Finances we met with the representatives of the American Embassy, American University in Kosovo, Privatization Agency of Kosovo, Prishtina Municipality and Ministry of Education. We agreed to make all preparations, and undertake all necessary actions to offer this area to the American University, so that this area be declared a public interest area for the American University in order for it to be used as a new campus by this University in its future decennial development plan.** Honourable Mr. Prime Minister, dear deputy prime ministers, colleagues/ ministers, you have all the documents in front of you. We only raised this opportunity for the proposal-decision to declare public interest. It is clear that as a Minister I stand at your disposal, to provide additional information and details if needed, in the name of Prishtina Municipality and American University. - **Prime Minister:** Thank you, Mr. Hoxhaj. I believe that everyone agrees on creating this opportunity and approve your proposal. OK. We propose, and municipality takes respective decisions. So, who is in favor? Thank you. No votes against, no abstaining. Thank you very much for participating in the meeting.”*
14. Therefore, it is abundantly clear that the decision to expropriate the aforementioned land parcels in the “public interest”, and to give it to a private non-governmental organisation<sup>1</sup>,

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<sup>1</sup> See Kosovo Police Report No: 06/3-56/2015 of 12 February 2015: the American University in Kosovo was registered as a non-governmental organisation with an NGO Registration Certificate dated 05.01.2009 and Registry

was taken at political level, by two Kosovo Ministries (of Economy and Finances, Ahmet Shala, and of Education, Enver Hoxhaj), the American Ambassador, the representative of the AUK, PAK and Pristina Municipality. The Decision was somehow “ratified” unanimously by Kosovo Government.

15. In July 2010, a report was prepared by LLC Aurelian Capital<sup>2</sup> which valued the land at EUR 3,408,911. An undated memorandum, sent from the PAK to the Ministry for Economy and Finance (hereafter ‘MEF’), refers to a meeting on 8<sup>th</sup> July 2010 and attaches a copy of the evaluation report prepared by LLC Aurelian Capital.
16. On 9<sup>th</sup> September 2010, a memorandum was sent from the MEF to the Director of Central Budget confirming that the evaluation of the land has been completed with a market value, as at 6<sup>th</sup> September 2010, of EUR 3,408,911, to be provided from Government funds. On 14<sup>th</sup> September 2010, another memorandum was sent from the Government to AUK, stating that the land had been evaluated and that the MEF “*will submit your request*” for financial support regarding the expropriation of the land.
17. It was only after these steps were taken that PAK become fully involved. In fact, in order to complete the procedure, it was necessary that the PAK Board of Directors approved the expropriation.
18. The matter was put before the Board of Directors of the PAK at its meeting on 23 and 24 September 2010 (meeting number 26). The Chairman, Dino Asanaj<sup>3</sup> (now deceased), recommended approving the motion. He noted the importance of supporting higher education institutions. Papers on the matter were distributed to board directors earlier that day, contrary to the procedural rules which require five (5) days’ notice be given to directors of matters for determination at board meetings. The Secretary pointed this out but the Chairman brought the matter to a vote regardless. Dr. Andrea Capussela, one of the international Directors on the Board, disagreed, stating that the law on expropriation does not apply to SOEs, and requested a legal opinion. Reshat Fetahu, Director of the Legal Department at PAK, referred to a need to amend the law in order for this matter to proceed. He informed the board that they had two options: 1) wait until the law is amended, which was in progress at that time, or, 2) approve the Government’s request in principle and wait until the next meeting of the Board to reconfirm the decision after legal advice. Bahri Shabani (Director) supported the request. The request of the Government was “*approved in principle pending legal advice to be provided to the Board at the next meeting,*” with six members in favour, and two abstentions.

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Number 5300499-7 in the field of education and the Decision whereby its status as an NGO for public benefit is acknowledged with registration no. 5300499-7 registered on 05.01.2009.

<sup>2</sup> It is totally obscure who appointed the LLC Aurelian Capital to value the land, on which legal basis, what are its qualifications, where the company operates.

<sup>3</sup> Dino Asanaj, a strong supporter of the expropriation project and highest representative of PAK at that time, was responsible for the construction of the ‘International Village’ on land adjacent to the land which is the subject of this case.

19. The Director of the Legal Department of the PAK, Reshat Fetahu, prepared a memorandum of legal advice, dated 18 October 2010, which may be summarised as follows:
- Articles 3 and 4 of Law 03/L-139 on Expropriation of Immovable Property do not foresee SOE property to be the subject of expropriation.
  - Article 44(2) of the same law is vague and ambiguous. There are two ways to interpret it:
    - a. The law shall not apply to PAK and its actions
    - b. The legitimacy of public purpose is re-affirmed i.e. the expropriation of SO property is not prohibited where the public purpose outweighs other interests.
  - The requirements for expropriation are set out under Article 4.
  - The Expropriation Authority is the Government or Municipality.
  - Part of the procedure is the valuation of the land. The ‘procedure of valuation of the asset is important for the purpose of determination of the validity and legitimacy of the expropriation.’ The valuation should be carried out by the Office for Immovable Property Valuation (hereafter ‘IMV Office’), part of the MEF, pursuant to Articles 8(6) and 21. The PAK is unaware whether such a valuation has been performed.
  - The public interest of privatization of SO property is an aim of the Constitution and of PAK law.
  - The Constitution states that expropriation can only take place on the basis of the law.

The conclusion was that there is no clear authorization for the expropriation of socially owned property in the legal framework; the Government must submit a formal request for the expropriation; the valuation must be done by the IMV Office, and the Directors must consider Article 4(1) of Law 03/L-139 on Expropriation of Immovable Property.

20. On 28<sup>th</sup> October 2010, the matter came back before the PAK Board of Directors (in meeting number 27). Reshat Fetahu presented a legal opinion at the meeting to the effect that the law is “*ambiguous*” as to whether it applied to SOE property, but that this ambiguity was expected to be addressed by new legislation which was pending at the Assembly. Bahri Shabani again supported the request. Dr. Capussela stated that the expropriation of SOE land is legally questionable and that there is further issue: whether this expropriation can be said to be in the public interest where the transfer is made in favour of a private entity. Furthermore, the compensation is unacceptable because it is only 1/5 or 1/6 of the true market value. The Chairman Dino Asanaj pointed out that according to the Constitution, anyone who is unhappy with a decision can address it at court. The request was approved: four members voting in favour, one against and two abstentions.
21. Consequently, the procedure for expropriating the aforementioned land parcels was pushed forward.
22. On 11<sup>th</sup> November 2010, Dino Asanaj notified Prime Minister Thaçi of PAK’s decision. The Government took a preliminary Decision on 25<sup>th</sup> May 2011. One year later, on 9<sup>th</sup> November 2011, the Government of Kosovo took the final decision No. 10/47. The Official Gazette of the Republic of Kosovo No. 27 dated 30<sup>th</sup> November 2011, published the Decision and a table with the number of parcels in the cadastral zone of Hajvalia.

23. Surprisingly, after the final decision, the expropriation procedure was *de facto* suspended. Indeed, no further actions were undertaken until late 2014.
24. Pending the expropriation procedure, the investigation developed through the aforementioned Letters of Entrustment. In order to implement point 5 of the Letter of Entrustment received on 4 September 2014, KP filed a request with the Ministry of Education, Science and Technology on 18<sup>th</sup> September 2014, and addressed a request to the Government of Kosovo/Office of the Prime Minister on 24<sup>th</sup> September 2014..
25. Just a few days later, on 2<sup>nd</sup> October 2014, ref. no. 2-6615, MEST initiated the procedure for the Annulment of the Final Decision of the Government of Kosovo No. 10/47 dated 9<sup>th</sup> November 2011 and the decisions that preceded it. The procedure was initiated through the Minister of EST for the MESP Permanent Secretary. MEST noted that:
- *Regardless of preliminary Decisions (Government Decision no. 04/130 dated 16.06.2010 and Preliminary Decision no. 07/16, dated 25.05.2011), expropriation of real property determined by Final Decision no. 10/47 dated 09.11.2011 is not done in favor of the Foundation of American University in Kosovo, but like it was mentioned in item 2 of this Decision – Quote: “Expropriation is done for legal public purpose for construction, extension or location of public facilities necessary for education purposes by respective Ministry of Education as central public authority”*
  - *that means for payment of this expropriation have not been committed and have not been planned in Midterm Framework for Expenses*
  - *that property mentioned in the Final Decision no. 10/47 dated 09.11.2011 is not registered yet in the Directorate of Property, Geodesy and Cadaster in Prishtina Municipality in the name of Republic of Kosovo*
26. The day after, on 3<sup>rd</sup> October 2014, the MESP Permanent Secretary, with ref. no. ZSP-/2014 asked the Permanent Secretary of the Office of the Prime Minister (hereafter ‘OPM’) to include the annulment of the previous decisions of the Government of Kosovo in relation to the expropriation of immovable property as a point of agenda, proposing to take a decision “for revocation and annulment”.
27. On 8<sup>th</sup> October 2014, following the “199<sup>th</sup> meeting of the Government of the Republic of Kosovo”, the Government took the Decision No. 94/199 on abrogation and nullification of Government decisions referred to above.
28. Kosovo Police filed a report dated 2<sup>nd</sup> March 2015 informing SPRK that the land parcels no. 257, 259, 260, 261 and 382 located in cadastral zone of Hajvalia are currently registered under the ownership of P.Sh. K.B.I Kosova Export, following the application no. 011-007-26176 from Privatization Agency of Kosovo no. 444 dated 26<sup>th</sup> January 2015, which required the return to previous status of parcel plots in cadastral zone of Hajvalia. Essentially the ownership of these land parcels reverted to its former position, before the described process began.



## LEGAL ANALYSIS

29. The expropriation of the land (parcels) of the SOE Kosovo Export in Hajvalia village, Pristina municipality for the benefit of the American University in Kosovo (AUK) was entirely unlawful from the very beginning.
30. Firstly, the legal framework clearly prohibited the expropriation of socially owned property. Articles 3 and 4 of the Law 03/L-139 on Expropriation of Immovable Property (hereafter ‘the Law’) allowed only and exclusively the expropriation of private ownership or other private rights, or of a Municipality or a Municipal Public Authority. Furthermore, Article 44 explicitly excluded the SOE from the expropriation, stating that “*this law shall not apply to the Law on the Privatization Agency of Kosovo or any actions taken by the Privatization Agency of Kosovo*”. This issue was clearly raised by the International PAK Director Board Member, Dr. Andrea Capussela, and, albeit ambiguously, by the Director of the Legal Department of the PAK, Reshat Fetahu. Only on 17<sup>th</sup> November 2010, after the PAK had finally approved the expropriation proposal, the Law was amended and Socially Owned Property was included amongst the properties suitable for expropriation (Law 03/L-205 on Amending and Supplementing Law No. 03/L-139 on Expropriation of Immovable Property – 28<sup>th</sup> October 2010 – promulgated by the Decree of the President of the Republic of Kosovo No. DL-075-2010, Date 17<sup>th</sup> November 2010).
31. Secondly, and, it is submitted, most importantly, the expropriation was in violation of Article 4(1) of the Law because it was not directly related to the accomplishment of a legitimate public purpose within its competence as specified in paragraph 2 or 3. In fact, as regards the “education institutions”, the relevant sub-paragraph of Article 4 (2.4.3.2) only permits expropriation when “*clearly and directly related to the accomplishment of ... the construction, enlargement, establishment or placement of ... **public facilities** needed for the provision of public education*”. AUK, although it is not registered as a business organisation, is undoubtedly a private organisation, and therefore its “new campus to be constructed in its future decennial development plan”, can never be included amongst the “public facilities”. Therefore, the essential scope and requirement of the Law – i.e. the Legitimate Public Purpose - is lacking here.
32. Moreover, there are several essential procedural violations. The most evident is the lack of proper and reliable assessment of the property’s market value. Firstly, there is no valuation by the Office for Immovable Property Valuation (hereafter ‘IMV Office’), part of the MEF, pursuant to Articles 8(6) and 21 of the Law. Secondly, the valuation rendered by LLC Aurelian Capital is highly unreliable: it valued the property at a fraction of the market value. The valuation was calculated based on EUR 11/m<sup>2</sup> whereas the real value was said to be EUR 50 or 60/m<sup>2</sup>, since banks were making calculations using this figure<sup>4</sup>. Finally, at the PAK meetings on 23<sup>rd</sup> and 24<sup>th</sup> September 2010, papers on the matter were distributed to the board directors earlier that day, contrary to the procedural rules which require five (5) days’

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<sup>4</sup> This information was provided to PAK BoD by Dr. Andrea Capussela, and confirmed by the latter in his interview. Furthermore, a financial expertise rendered in a different case (PPS 36/2014), valued the market price of land parcels in the area of Hajvalia at around €50/70 per square meter.

notice be given to directors of matters for determination at board meetings. The Secretary pointed this out but the Chairman brought the matter to a vote regardless.

33. It is therefore submitted that Kosovo Government, namely Ministries Ahmet Shala and Enver Hoxhaj, had a strong determination in offering the land parcels to AUK, as agreed with the institution itself and with the American Embassy. It is submitted that PAK and the Municipality undertook all the necessary steps to execute this decision, regardless of the legal obstacles, and with little or no attention to any of these, or to the objections coming mainly from Dr. Andrea Capussela.
34. Yet, for unknown reasons, the expropriation proceedings were frozen after 2011, and annulled in 2014 after the investigation was disclosed. The expropriation has now been conclusively cancelled and the land parcels remain socially owned properties under PAK administration.
35. It is submitted that the criminal offence of “Organized Crime” and “Participation in or organization of an organized criminal group” is ungrounded. The aforementioned defendants, the Ministry of Economy and Finances and the Ministry of Education (the latter are, *de facto*, the main suspects) cannot be considered part of an organised criminal group pursuant to article 120(3.13) of the CC. There is no evidence that the aforementioned people created, or were part, of a “*structured association, established over a period of time*”, but only that they cooperated in the commission of the above described unlawful activities.
36. It is also submitted that the criminal offence of “Abusing official position or authority” is not grounded. Technically speaking, an offence under article 422 CCK has been committed because, in fact, the only requirement is “*the intent to acquire any benefit for himself or another person or to cause damage to another person or to seriously violates the rights of another person*”. In this case, although the benefit (to AUK) and the damage (to PAK and Kosovo in general) have not been caused, the intent – *mens rea: dolus specialis* – is recognizable. Nevertheless, a key principle of modern criminal law is that nobody should be punished unless he/she causes substantial harm (*nullum crimen sine iniuria*). The expropriation procedure has been finally annulled and revoked; there has been no transfer of land parcels neither in favour of the Government nor in favour of the AUK; the land parcels are still socially owned; and no private organisation is able to construct a campus, or anything else, in that area. In the end, therefore, no material damage has been done.
37. The decision to terminate this investigation is in accordance with Article 158(1.6) CPC, which mentions broadly “other circumstances that preclude prosecution”, and with Article 292 CPC, which allows the Prosecution to withdraw the indictment, for whatever reason, prior to opening of the main trial.

[*The discussion of two more cases follows, which is omitted*]

## WHEREFORE

Pursuant to Article 158 paragraph 1 of the CPC, the undersigned Prosecutor decides:

1. To terminate the investigation of the case against all the aforementioned defendants for the commission of all the criminal offences
2. To inform immediately the Pre-Trial Judge of the Basic Court of Pristina about this decision.

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**Danilo Ceccarelli**  
EULEX Prosecutor  
Special Prosecution Office for the Republic of Kosovo