Supreme Court of Kosovo
Pkl-Kzz no. 39/2012
24th April 2012

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Dr. Horst Proetel as presiding judge, and EULEX Judges Tore Thomassen and Elka Filcheva-Ermenkova, Supreme Court Judges Salih Toplica and Nesrin Lushta as panel members assisted by Legal Officer Chiara Rojek in the capacity of recording clerk,

In the criminal case against **Vukmir Cvetkovic** born on in , father's name , mother's maiden name , Kosovo citizenship, Serbian nationality, last residence , in detention since 10 March 2009 (in Kosovo since 13 July 2010), currently held in the Detention Centre Mitrovica/ë,

Convicted in First Instance by Judgment P no. 285/10 of the District Court of Pejë/Peć dated 9 November 2010 for the criminal offence of War Crime against the civilian population contrary to Articles 22 and 142 of the Criminal Code of the Socialist Federal republic of Yugoslavia (CC SFRY), in violation of Article 3 common to the four Geneva Conventions of 12 August 1949, and Article 1 and 17 of Protocol II of 8 June 1977, additional to the 1949 Geneva Conventions, and sentenced to seven (7) years of imprisonment, and further confirmed in Second Instance by Judgment Ap-Kž no. 140/11 of the Supreme Court of Kosovo dated 16 August 2011,

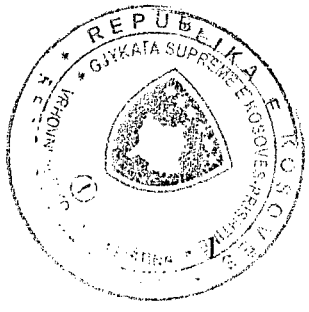
Acting upon the Request for Protection of Legality filed by Defence Counsel Ljubomir Pantovic on the behalf of the Defendant Vukmir Cvetkovic against both judgments and registered in court on 15 February 2012, and the Reply of the Office of the State Prosecutor of Kosovo (OSPK) to the Defendant's Request for Protection of Legality filed on 23 March 2012,

JUDGMENT

The Request for Protection of Legality filed by Defence Counsel Ljubomir Pantovic on the behalf of the Defendant Vukmir Cvetkovic against the Judgment P no. 285/10 of the District Court of Pejë/Peć dated 9 November 2010 and the Judgment Ap-Kž no. 140/11 of the Supreme Court of Kosovo dated 16 August 2011 and registered in court on 15 February 2012 is **REJECTED** as ungrounded, with the modality that a reference to Article 22 of the CC SFRY is added in the enacting clause of the Judgment Ap-Kž no. 140/11 of the Supreme Court of Kosovo dated 16 August 2011.

REASONING

I. Procedural background



On 8 September 2010, the Special Prosecution Office of Kosovo (SPRK) filed an Indictment PPS no. 18/09 charging Vukmir Cvetkovic with War Crime against Civilian Population in violation of Articles 22 and 142 of the CC SFRY. On 21 September 2010, the Indictment was confirmed in its entirety by Ruling KAQ no. 271/10.

On 26 October 2010, the main trial commenced. Four sessions, including a site inspection, were held in October and November 2010.

On 09 November 2010, the District Court of Pejë/Peć, by Judgment P no. 285/10 found the Defendant guilty of the criminal offenses of War Crimes against the civilian population contrary to Articles 22 and 142 of the CC SFRY, in violation of Article 3 common to the four Geneva Conventions of 12 August 1949, and Article 1 and 17 of Protocol II of 8 June 1977 additional to the 1949 Geneva Conventions. Because "On the 27th or 28th of March 1999, the defendant together with another individual, both wearing uniform and both armed, forced S[redacted] T[redacted] S[redacted] and his family to leave their house in Kline/Klina and go to Albania" and "On 27th or 28th of March 1999, the defendant wearing a uniform set on fire at least two houses in Kline/Klina – the house of N[redacted] S[redacted] and the house of Z[redacted] and K[redacted] Q[redacted] – by using a flame-thrower." Vukmir Cvetkovic was sentenced to seven (7) years of imprisonment.

Upon the Appeal of the Defence, the Supreme Court of Kosovo issued the Judgment Ap-Kž no. 140/2011 on 16 August 2011. The Supreme Court panel partially granted the Appeal by modifying the verdict as follows: "The criminal offence committed by the defendant is qualified as War Crimes against the Civilian Population pursuant to Article 142 paragraph 1 of the Criminal Code of Yugoslavia and in violation of Article 3 of the Fourth Geneva Convention of 12 August 1949 and Articles 1 and 17 of the Second Additional Protocol of 8 June 1977 to the 1949 Geneva Conventions." The remaining parts of the appeal were rejected as ungrounded.

Defence Counsel Ljubomir Pantovic filed a Request for Protection of Legality on the behalf of Vukmir Cvetkovic registered in the District Court of Pejë/Peć on 15 February 2012. The OSPK filed a Reply to the Defendant's Request on 23 March 2012.

II. Submissions of the parties

A. Request for Protection of Legality

The Defence files the Request for Protection of Legality against the Judgment P no. 285/10 of the District Court of Pejë/Peć, and the Judgment Ap-Kž no. 140/2011 of the Supreme Court of Kosovo on the grounds of a violation of the criminal law, and substantial violations of the provisions of criminal procedure. He proposes to the Supreme Court of Kosovo to grant the Request, and pursuant to Article 457 Paragraph 1 Item 2 of the KCCP, to either modify the challenged judgements as to acquit the defendant, or annul them and return the case for retrial before a different panel.

Violation of the criminal law under Article 451 Paragraph 1 sub-paragraph 1 read in conjunction with Article 404 Paragraph 4 of the KCCP

The Defence claims that the legal provisions in the challenged judgments, i.e. the four Geneva Conventions of 12 August 1949 and Articles 1 and 17 of the Additional Protocol II of 8 June 1977 were not applicable, based on the following grounds:

- The international criminal law was not directly applicable in Kosovo at the time of the criminal acts.
- Article 142 of the CC SFRY does not include the requirement of a widespread or systematic attack directed against any civilian population, though relevant for the events that occurred in Kosovo.
- Article 142 does not refer to any international laws and at the critical time there were no existing international or European agreements that entail the immediate application of such laws.
- Doubts arise on the applicability of the criminal law, namely the disparity between the immediate application of the international law and the procedural guarantees for the Accused on one hand, and the explicit requirements of the Statute and the Code of the SFRY on the other hand. This should be solved by applying the principle *in dubio pro reo*.
- The universal jurisdiction does not have room for application.

Substantial violations of the provisions of the criminal procedure under Article 451 Paragraph 1 sub-paragraph 2 read in conjunction with Article 403 paragraph 1 item 12 of the KCCP

The Defence avers a substantial violation of the provisions of the criminal procedure based on a contradiction in the enacting clauses of both contested judgments. The reference to Article 22 of the CC SFRY, whilst present in the enacting clause of the First Instance Judgment, was omitted in the verdict on appeal. As a consequence the legal qualification of the criminal acts differs, rendering the enacting clauses incomprehensible.

The Defence also contends the credibility of the witnesses and the findings of the First Instance and Second Instance Courts in this respect. Both courts acknowledged the differences in the witness statements. Despite this, the First Instance Court failed to thoroughly scrutinize these inconsistencies and the Second Instance Court endorsed the District Court's findings to the detriment of the Accused. For the aforementioned reasons, the reasoning of the judgments is unclear and inconsistent.

Substantial violations of the provisions of the criminal procedure under Article 451 Paragraph 1 sub-paragraph 3 read in conjunction with Article 403 Paragraph 2 item 1 and Article 3 Paragraph 2 of the KCCP

The Defence finally alleges that the erroneous conclusions of both courts as to the decisive facts should have interpreted in the light of Article 3 Paragraph 2 of the KCCP.

B. Reply of the OSPK

The OSPK moves the Supreme Court of Kosovo to reject the Defence's Request as ungrounded pursuant to Article 456 of the KCCP. The State Prosecutor furthermore suggests to carefully consider the Residual Remarks contained in the Reply and to draw the relevant conclusions.

The State Prosecutor believes that the alleged violations of the criminal law are not meritorious. It is obvious that reading through the Judgment, the primary statute upon which the Defendant was convicted was the relevant criminal law of the CC SFRY. The fact that this provision is consistent with the Geneva conventions and its Additional Protocols does not detract from this fact. In addition, a reference in Article 142 of the CC SFRY to the 'rules of international law effective at the time of war, armed conflict or occupation' leads to the conclusion that the law comprises such rules.

The State Prosecutor mentions that the SFRY became a party to the IV Geneva Convention on 21 April 1950 and a party to the Additional Protocols I and II of Geneva Conventions on 11 June 1979. Legislation was passed to implement these international instruments. Those protocols were "directly applicable" by the courts of Yugoslavia according to Article 210 of the former Yugoslav Constitution. A succession from the FRY to the SFRY occurred on 29 April 1992. By virtue of the combined reading of the provisions of UNMIK Regulation 2000/59 amending UNMIK Regulation 1999/24 on the Law applicable in Kosovo with Articles 145 Paragraph 2 and 19 Paragraph 2 of the Constitution of Kosovo, Article 3 common to the four Geneva Conventions and Articles 1 and 17 of the 1979 Additional Protocol II are relevant in the case at hand.
The notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is fully warranted from the point of view of substantive justice and equity. Finally the existence of a systematic or widespread attack is not a requirement of the criminal act of War crime.

As to the alleged substantial violation of the provisions of criminal procedure, the State Prosecutor believes that the Supreme Court panel wrongly omitted to mention Article 22 of the CC SFRY in the enacting clause of the Second Instance Judgment. It is however clear that the actions committed by the Defendant were committed in complicity or co-perpetration. The State Prosecutor invites the Supreme Court to apply the same standards as outlined in the Supreme Court Judgment Pkl-Kzz no. 114/09 dated 12 April 2010.
In respect to the allegation of other substantial violations of the provisions of criminal procedure, the OSPK puts forward that these issues fall outside the scope of review in accordance with Article 451 Paragraph 2 of the KCCP.

The State Prosecutor presents residual remarks.
The Prosecutor also believes that the prohibition of the acts committed under Count 2 is found in Article 13 Paragraph 2 of Additional Protocol II. As for Count 1, the State Prosecutor notes that Article 17 Paragraph 1 of Additional Protocol II, as well as Article 121 Paragraph 2 item 8 of the CCK, refer to ordering the displacement of the civilian population. Conclusively, Article 121 of the CCK should be considered as the most

favourable law to the Accused. The conduct for which the Defendant was convicted is no longer criminalized,[1] and he should have been convicted to one count solely.
In the OSPK's view, as the Defence has not contended this ground in the Request the Supreme Court is barred from deciding beyond the strict limits imposed by Article 455 Paragraph 1 of the KCCP. The State Prosecutor will consider whether to file a Request for Protection of Legality in favour of the Defendant at later stage.

III. Findings of the Supreme Court of Kosovo

The Supreme Court of Kosovo finds the Request for Protection of Legality admissible. The Request is rejected as ungrounded.

A. Competence of the Supreme Court of Kosovo

The Supreme Court of Kosovo is competent to decide on the Request of Protection of Legality pursuant to Articles 454 and 26 Paragraph 3 of the KCCP. The Supreme Court panel was constituted in accordance with Article 3 Paragraph 7 of the Law no. 03/L-53 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo. The panel held a session on 24 April 2012 pursuant to Article 454 of the Code.

B. Admissibility of the Request for Protection of Legality

The Defendant received the latest challenged Judgment Ap-Kž no. 140/2011 on 14 November 2011, and the Defence counsel, on 18 November 2011. The Request was registered with the District Court on 15 February 2012. The post stamp is illegible to ascertain the precise date of sending of the Request. Doubts as to the actual date of filing go in favour of the Accused. Therefore the Request is considered admissible as timely filed by an authorized person in accordance with Articles 452 Paragraph 3 and 453 of the KCCP.

C. Merits of the Request for Protection of Legality

Scope of the review of the Supreme Court of Kosovo

The State Prosecutor made some residual remarks that relate to the scope of review exercised by the Supreme Court when seized of a Request for Protection of Legality. The undersigned panel finds necessary to define the scope of review of the Supreme Court before going to the merits of the Request.

A Request for Protection of Legality is an extraordinary legal remedy aiming at addressing violations of the legal provisions affecting the lawfulness of a judicial decision. The intent of the legislator was clearly to restrict the scope to violations of law,

[1] Reference to District Court of Prizren, Ejup Kabashi, KA no. 76/11, Ruling on confirmation, 29 April 2011

not on grounds relating to the factual situation.[2] This interpretation is confirmed by the absence of provisions relating to an *ex officio* examination of the case at this stage of the proceeding, as well as by the long-established jurisprudence.[3] This restriction is justified by the extraordinary character of the remedy that differs from the appeal procedure which prescribes a full review of the facts and law.

Moreover, Article 455 Paragraph 1 of the KCCP prescribes that the Supreme Court "shall confine itself to examining those violations of law which the requesting party alleges in his or her request." It clearly lays down the limitations of the review exercised by the Supreme Court. Though Article 457 Paragraph 1 provides for a possible modification or even an annulment in whole or in part the final decision, that rests that the Supreme Court has to decide within the frame defined in the Request.

The State Prosecutor submits that the Defendant should have not been convicted for Count 1 as the sole commission of the displacement of the civilian population is no longer criminalized under the CCK, and this new provision should apply as the most favourable for the Accused. The Supreme Court Panel expresses its concerns as to this contention, that was not raised at an earlier stage and may seriously infringe the lawfulness of the contested judicial decisions.

Even when the Defendant would not be criminally liable as he might not have 'ordered' the displacement of the civilian population in the sense of the national and international laws, this would not justify the present Request. The Supreme Court is bound by the provisions of the Code, in particular Article 455 of the CCK, that prevents any remedial action on this ground. The State Prosecutor may decide to file a Request for Protection of Legality on behalf of Vukmir Cvetkovic in this respect.

Violation of the criminal law under Article 451 Paragraph 1 sub-paragraph 1 read in conjunction with Article 404 Paragraph 4 of the KCCP

The Supreme Court holds that this contention is ungrounded. There is no doubt that the First Instance Court applies the law criminalizing the act for which the Defendant was convicted.

As a matter of fact, Article 142 of the CC SFRY specifically refers to the 'rules of international law effective at the time of war, armed conflict or occupation'. These rules naturally include Article 3 common to the four Geneva Conventions and others provisions of humanitarian law of fundamental nature.

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[2] See *inter alia* Article 451 Paragraph 2 of the KCCP: A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon.

[3] Case Supreme Court of Kosovo, Pkl-Kzz no. 13/04, Judgment on Request for Protection of Legality, 9 November 2004: the Supreme Court panel rejected the Request as it did not specify which provisions of Article 403 of the Code were violated and failed to challenge the judgment on legal grounds, rather on the erroneous and incomplete determination of the factual situation; see also Supreme Court of Kosovo, Pkl-Kzz no. 15/04, Judgment on Request for Protection of Legality, 9 November 2004

The Supreme Court also notes that the First Instance Court did not directly apply Article 3 common and Articles 1 and 17 of the Additional Protocol II. In fact, the wording of Article 142[4] clearly indicates that a duality test has to be exercised, i.e. the criminal conduct has to violate both international and national law.[5]

In addition as submitted by the State Prosecutor, the Geneva Conventions dated 12 August 1949 were ratified by the People's Republic of Yugoslavia on 21 April 1950 and entered into force on 21 October 1950. The Additional Protocols I and II entered into force in Yugoslavia on 26 December 1978. The FRY became a Party to the Additional Protocols I and II of Geneva Conventions on 11 June 1979. The Conventions and the Additional Protocol II were applicable in Kosovo during the internal armed conflict occurring in the territory of one of the High Contracting Parties. Their ratification to the contracting parties is sufficient to create obligations of the opposing parties to the conflict to comply with these provisions. At last, Article 3 common is indeed part of the customary law and the minimum threshold of protection enclosed in its provisions is to be respected by the contracting parties at any time in case of an internal armed conflict.[6]

Substantial violations of the provisions of the criminal procedure under Article 451 Paragraph 1 sub-paragraph 2 read in conjunction with Article 403 paragraph 1 item 12 of the KCCP

This submission of the Defence is also rejected. The Supreme Court concedes that there is no reference to Article 22 of the CC SFRY in the enacting clause of the Second Instance Judgment.[7] The panel however disagrees with the Defence that the enacting clause is unclear as to the legal qualification of the criminal conduct. The Supreme Court confirmed the First Instance Judgment, including that the act was committed in violation of Articles 22 and 142 of the CC SFRY. It seems that the reference to Article 22 was

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[4] Article 142 of the CC SFRY: "Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, [...]".

[5] See *inter alia* UNMIK DC Prizren, C no. 226/01, First Instance Judgment 31 January 2003, page 12: "Article 142(1) also requires that war crime be in violation of "regulations of international law during war, armed conflict or occupations...." Accordingly, this statement restricts the application of Article 142 to the extent that any of the acts proscribed are also in violation of regulations of international law. [...]";UNMIK DC Pristina, C no. 425/01, 16 July 2003, pages 16 and following

[6] Case IT-94-1-AR72, Prosecutor v. Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2nd October 1995, para 98: "The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, [...]; see also Case IT-96-23 and IT-96-23/1, Prosecutor v. Dragoljub Kunarac et al., Second Instance Judgment, 12 June 2002, para 68

[7] See Supreme Court of Kosovo, Ap-Kž no. 140/11, 16 August 2011, enacting clause, page 3: "The appeal filed by the Defense Counsel Ljubomir Pantović on behalf of the defendant is hereby partially granted and the appealed verdict is modified as follows: The criminal offence committed by the defendant is qualified as War Crimes against the Civilian Population pursuant to Article 142 paragraph 1 of the Criminal Code of Yugoslavia and in violation of Article 3 of the Fourth Geneva Convention of 12 August 1949 and Articles 1 and 17 of the Second Additional Protocol of 8 June 1977 to the 1949 Geneva Conventions. As to the remaining parts, the appeal is rejected as ungrounded and the first instance judgment is upheld."

simply omitted or results from a typographical mistake that can easily be amended. Finally, whilst perusing the challenged Judgment it is obvious that the Second Instance Court intends to mention that the criminal conduct of War crime against the civilian population was committed in complicity as foreseen in Article 22. Considering the principles of efficiency and reasonableness of the criminal proceedings and the jurisprudence referred to by the State Prosecutor,[8] the undersigned panel deems unnecessary to send back the case for re-trial solely because of a deficiency in the enacting clause.

The Supreme Court also considers the second contention related to the discrepancies in the witness statements in the challenged judgements without merit. It is noted that the First Instance Court carefully scrutinized the witness statements and the differences between the testimonies given in court and the prior witness statements. The District Court Judgment lengthy provides detailed explanations on these discrepancies.[9] Acknowledging that "a number of incongruities between the statements of the same witness given on different occasions can be established" the Second Instance Court reached the conclusion "that the challenged judgment does not contain inconsistent reasoning based upon weak or wrongful assessment of evidence".[10] This Supreme Court panel finds that the evaluation of the statements was properly done by the First Instance Court. The undersigned panel endorses these findings as no violation of Article 403 paragraph 1 item 12 of the KCCP can be found in both judgments.

The Supreme Court has not established a violation that affects the lawfulness of the decisions. The rule *in dubio pro reo* only applies when the court evaluating the statements is not convinced in the very existence of the facts, which is not the case in the instance. The ground relating to a substantial violation of the provisions of the criminal procedure read with Article 403 Paragraph 2 item 1 and Article 3 Paragraph 2 of the KCCP is rejected as unfounded.

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

Presiding Judge

EULEX Judge Horst Proetel

Panel member

Kosovo Judge Nesrin Lushta

[8] Case Supreme Court, Pkl-Kzz no. 114/09, Judgment on Request for Protection of Legality, 12 April 2010

[9] See District Court of Pejë/Peć, P no. 285/10, First Instance Judgment, 9 November 2010, Part E, pages 7-12

[10] See Supreme Court of Kosovo, Ap-Kž no. 140/11, Second Instance Judgment, 16 August 2011, Part II., pages 7-9

Panel member

Kosovo Judge Salih Toplica

Panel member

EULEX Judge Elka Filcheva-Ermenkova

Panel member

EULEX Judge Tore Thomassen

Recording clerk

Legal officer Chiara Rojek

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