

DISTRICT COURT OF PRISHTINË/PRIŠTINA

KA 505/11

GJPP 25/10

PPS 07/10

Dated 26 August 2011

EULEX confirmation judge Ingo RISCH, in the criminal case against:

1. **A. K.**,

, arrested in Switzerland in view of extradition on 16 March 2011, in house arrest since 14 April 2011; charged with *War Crime against the Civilian Population and Prisoners of War*, under Articles 142, 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), also foreseen in Articles 120, 121 of the Criminal Code of Kosovo (CCK), read in conjunction with Articles 22, 24, 26 CCSFRY and 23, 25, 26 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of Protocol II Additional to the four Geneva Conventions (APII); and with *two (2) counts of War Crime against Prisoners of War*, under Articles 22, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 of the four Geneva Conventions 1949 and Articles 4, 5(1) APII;

2. **N. K.**,

, in detention on remand since 16 March 2011; charged with *War Crime against the Civilian Population and Prisoners of War*, under Articles 22, 142, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; *War Crime against the Civilian Population*, under Articles 22, 142 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; charged with *four (4) counts of War Crime against Prisoners of War*, under Articles 22, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII;

3. **N. K.**,

, in detention on remand since 16 March 2011; charged with *War Crime against the*

Civilian Population and Prisoners of War, under Articles 22, 142, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; charged with **five (5) counts of War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; **War Crime against the Civilian Population**, under Articles 22, 142 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII;

4. **B. L.**,

, under house arrest since 16.03.2011; charged with **War Crime against the Civilian Population and Prisoners of War**, under Articles 22, 142, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; **War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII;

5. **F. L.**,

; charged with **War Crime against the Civilian Population and Prisoners of War**, under Articles 22, 142, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; and **with two (2) counts of War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII;

6. **R. M.**,

, in detention on remand from 16 March 2011 until 11 July 2011 and under house arrest since 11 July 2011; charged with **War Crime against the Civilian Population**, under Articles 22, 142 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; **War Crime against Prisoners of War**, under Articles 22, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII;

7. **N. SH.**,

, in detention on remand since 16 March 2011; charged with *War Crime against the Civilian Population and Prisoners of War*, under Articles 22, 142, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; and *with four (4) counts of War Crime against Prisoners of War*, under Articles 22, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; *War Crime against the Civilian Population*, under Articles 22, 142 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII;

8. **S. SH.**

, in detention on remand since 16 March 2011; charged with *War Crime against the Civilian Population and Prisoners of War*, under Articles 22, 142, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; *War Crime against Prisoners of War*, under Articles 22, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII;

9. **Sh. SH.**

, arrested on 16 March 2011, since 16 March 2011 under the measure of attendance at police station; charged with *War Crime against the Civilian Population and Prisoners of War*, under Articles 22, 142, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII;

10. **B. SH.**

, since 16 March 2011 under house arrest; charged with *War Crime against the Civilian Population and Prisoners of War*, under Articles 22, 142, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII; *War Crime against Prisoners of War*, under Articles 22, 144 CCSFRY, criminalized under Articles 23, 120 CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5(1) of APII;

After the confirmation of indictment hearing held on 24 and 25 August 2011, in the presence of the defendants and their defense counsels:

A. K., his defense counsel Fehmije Gashi-Bytyqi,

N. K., his defense counsels Florin Vertopi and Xhafer Maliqi,
N. K., his defense counsel Mahmut Halimi,
B. L., his defense counsel Ramiz Krasniqi,
F. L., his defense counsels Tome Gashi and Klaus W. Kirchner,
R. M., his defense counsel Haxhi Millaku,
N. SH., his defense counsel Bajram Tmava,
S. SH., his defense counsel Mexhid Sylja,
Sh. SH., his defense counsel Destan Rukiqi,
B. SH., his defense counsel Fazli Balaj,

and also with the participation of Prosecutor Maurizio SALUSTRO of Special Prosecution Office of Kosovo;

Pursuant to article 316 par. 4 of the Kosovo Code of Criminal Procedure (KCCP), issues the following:

R U L I N G

Indictment of the Special Prosecution Office in Pristina PPS no. 07/2010, dated 25 July 2011, is hereby CONFIRMED.

The Indictment, together with all the records of the case file, shall be sent to the Presiding Judge for the main trial, immediately after this ruling becomes final.

Reasoning

I. Introduction

On 25 July 2011, the Prosecutor of Special Prosecution Office of Kosovo has filed with the court the Indictment PPS no. 07/2010, dated 25 July 2011.

The Indictment charges the defendants with the respective criminal offences allegedly committed from early 1999 until mid-June 1999 against Serbian and Albanian civilians and Serbian military prisoners and police officers detained in an improvised Kosovo Liberation Army (KLA) detention center located in the village of Klečkë/Klečka. The allegations made in the Indictment support various counts against the defendants of violations of the laws and customs of war.

After the Indictment was filed, the confirmation judge assessed the Indictment pursuant to article 306 par. 2 of the KCCP.

With respect to defense counsels' objections regarding requirements described in article 305 par. 1 sub-par. 4 and 5 of the KCCP, as to content of the Indictment, the confirmation judge finds the following:

In relation to article 305 par. 1 sub-par. 4 of the KCCP:

- The time (early 1999 until mid-June 1999) and place (Klečkë/Klečka village) of commission of the criminal offences regarding all the counts of the Indictment are indicated;
- The object upon which the criminal offences were committed are described in clear relation to the relevant victims (the prisoners indicated in the Indictment);
- The instruments by which the criminal offences were committed (chains, automatic rifles, pistols, scythe and by beatings);
- Other precise circumstances are also described, like roles, structures, hierarchy issues, etc.

In relation to article 305 par. 1 sub-par. 5 of the KCCP:

- The explanation of the grounds for filing the Indictment as a result of the investigation are described;
- The evidence which establishes the key facts is also clearly mentioned.

Therefore the confirmation judge is satisfied that the Indictment is drawn up in accordance with article 305 of the KCCP.

Additionally, pursuant to article 306 par. 3 of the KCCP, the confirmation judge finds that the Indictment does not contain inadmissible evidence or reference to such evidence.

Consequently the confirmation judge scheduled the confirmation hearing on 24 and 25 August 2011 (and also initially on 26 August 2011) pursuant to article 309 par. 2 of the KCCP.

At the hearing all defendants pleaded not guilty to all counts of the Indictment against them.

II. Procedural issues

Initially during the confirmation hearing the defense counsels raised the issue of article 307 of the KCCP, regarding obligation of the prosecutor to disclose the evidence. The main complaint was that the prosecutor did not provide the defense with the ruling on initiation of investigation, the extension of the investigation done by the pre-trial judge and expansions against other defendants; and therefore they could not assess whether the evidence was collected within the timeframe of the investigation.

Further complaint of the defense was in relation to the statements of cooperative witness X. The defense received redacted versions of the statements and therefore was precluded to view certain parts of the statements. Also they did not receive statements of the cooperative witness X given to the ICTY investigators.

Another complaint was in relation to exhumation of the mortal remains and autopsy reports. Defense raised the issue whether exhumation was conducted pursuant to an order of the pre-trial judge and also that the autopsy report was only in the English Language.

During the confirmation hearing the prosecutor provided the defense counsels with the rulings on initiation of investigation, extensions of investigation and the expansions of investigation, with redactions on the names which should not be revealed. Also a CD containing statement of the cooperative witness X given to the ICTY investigators was provided to defense counsels. In relation to this CD, prosecutor stated that he did not take notice of the content of the CD and that it was not used for filing of the Indictment.

Further, as to the redaction of the parts of the statements of cooperative witness X, the prosecutor stated that he complied with the order of the pre-trial judge dated 25 August 2010. That order prescribes that all parts of the statement, which can lead to revealing identity of cooperative witness X, must be redacted.

The confirmation judge has assessed all the relevant documents on these issues and finds that investigation has been initiated on 02 February 2010. All evidence collected during the investigation was collected within the timeframe of the investigation.

Regarding exhumation of the mortal remains and autopsy reports, the confirmation judge finds that the orders to conduct the exhumation were issued by the pre-trial judge of the District Court of Pristina. In fact, the reports are only in the English Language. However, the issue that those reports are in the English Language cannot lead to the inadmissibility. The reports in the Albanian Language will be provided to the defense prior the main trial.

With regard to the question if defense counsels were timely provided with the documents mentioned in article 307 of the KCCP, the confirmation judge refers to explanation of the

public prosecutor, who had invited defense counsels to collect the listed documents. The public prosecutor furthermore claimed not to be obliged to provide the defense counsels with those documents which are not mentioned in article 307 of the KCCP.

However according to explanation of the prosecutor, defense counsels did not approach the prosecutor's office, and for this reason the confirmation judge finds it justified that prosecutor provided defense counsels with the missing documents during the confirmation hearing and in particular does not see a need for postponement.

As to redaction of parts of certain documents, the confirmation judge has assessed the need of the redactions and finds it justified for the reasons of safety of witnesses and to ensure successful completion of further investigation.

III. Considerations in assessment of the Indictment

In the present stage of criminal proceedings, the confirmation judge is to determine whether or not there is sufficient evidence to support a well-grounded suspicion that defendants have committed the criminal offences provided in the Indictment (article 316 par. 1 sub-par. 4 of the KCCP).

The standard to be met for the Indictment to be confirmed is that of well-grounded suspicion. Accordingly, it is not for the confirmation judge at present stage of the proceedings to scrutinize every single piece of evidence as when determining the innocence or guilt of each of the defendants. This is not the task to be carried out at the confirmation of indictment stage and rests with the main trial proceedings.

Consequently, there must be sufficient evidence to allow conclusion that it is more probable that the defendants committed the relevant criminal offences.

IV. Assessment of a well-grounded suspicion

The confirmation judge does not find any reason to dismiss the Indictment under article 316 par. 1 and 2, considering that the criminal acts mentioned in the Indictment are criminal offences; that there is no circumstance to exclude criminal liability; that the statutory limitations have not expired; that the Indictment was filed by an authorized prosecutor; that there are no circumstances which bar the prosecution; and that there are sufficient evidence to support a well-grounded suspicion that the defendants have committed the criminal offences mentioned in the Indictment.

A "grounded suspicion" can be defined as *"the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence"* – (ECHR, Fox, Cmbell and Hartley v. United Kingdom, 30 August 1990, par.32). A "well-grounded suspicion" requires more certainty than a grounded suspicion – without reaching the threshold of a proven fact.

The confirmation judge finds, according to the case file and the evidence contained in it, that there is sufficient evidence to support a "well-grounded suspicion" regarding all charges in the Indictment, and renders the present ruling pursuant to article 316 par. 4 of the KCCP.

The well-grounded suspicion as to all counts and all defendants in the Indictment is mainly raised from statements of the cooperative witness X. His statements are supported by other pieces of evidence, such as at least the statements of witness A, C, H, I, M. The statement of cooperative witness X is also supported by the exhumation and autopsy reports and post mortem examination on the mortal remains found on the sites where the victims were buried, as described prior by the cooperative witness X. Furthermore cooperative witness X gave explanatory statements about the method and the manner in which the victims were murdered.

V. Confirmation judge obligations

It is a task of the confirmation judge to make a decision on the questions, if

- the Indictment was elaborated pursuant to article 305 of the KCCP, in particular not containing contradictions, and, for example, allegations which are not supported by evidence;
- the status of well-grounded suspicion is reached by sufficient evidence;
- pieces of evidence are inadmissible.

It is not a task of the confirmation judge to examine witnesses or other pieces of evidence (see article 314 par. 6 of the KCCP).

Accordingly the confirmation judge can only fulfill a preliminary examination and consequently the question of credibility or non-credibility of a witness is a subject of the main trial panel, because the confirmation judge is not even entitled to see or to interview a witness.

For this reason the confirmation judge can only assess if the evidence collected during the investigation was lawful. Regarding the cooperative witness, at this stage of the proceedings the confirmation judge has an obligation to evaluate if the procedure to

declare a person as cooperative witness or regarding the anonymous witness was respected.

In the present case the confirmation judge finds that the procedure was fully respected as foreseen in Chapter XXXI of the KCCP regarding the cooperative witness and XXI of the KCCP regarding the anonymous witnesses.

In particular, cooperative witness X, contrary to the opinion of defense counsels, cannot be seen as an organizer or leader of the criminal group pursuant to article 300 par. 5 of the KCCP, since this limitation refers to organized crime and cooperative witness X does not fulfill the requirements of being an organizer or leader of the group of persons which commits criminal offences.

VI. Defense submissions

As far as defense raised the issue of sufficiency of the evidence, which was mainly based on the statement of one cooperative witness, leads to the question of interpretation of article 157 par. 4 of the KCCP.

In the present case evidence is not **solely** based on the testimony given by the cooperative witness, although cooperative witness X can be seen as the key witness. Furthermore, article 157 par. 4 of the KCCP – given the fact the question of solely evidence could be established – is addressed to the main trial panel and limits the court to find someone guilty. However, as mentioned above, the confirmation judge does not give an answer to the question of guilt, but rather, through his preliminary examination, only an answer on sufficiency of well-grounded suspicion and the question of admissibility of evidence.

In relation to defense complaint about admissibility of statements given by the cooperative witness X before he was declared a cooperative witness, while he was a suspect/defendant,- it is noted that this is a matter of credibility and liability of the cooperative witness. The duty to assess the credibility and liability is of the main trial panel and not of the confirmation judge.

Next, defense counsels complained about prosecutor's obligation to give specific details regarding the criminal acts of each of the defendants and on each count. More specifically, defense claimed that Indictment contains only copy-paste parts of the charges and in such manner are used for the defendants, and there is missing a higher degree of individualization of the specific contribution to the charges in question. In this regard it has to be pointed out that charges consist of criminal acts allegedly committed in

cooperation and therefore it is sufficient to describe that co-perpetrators had the intent to commit the criminal offences and to contribute to the result of the crime. In other words, if two people want to kill a person, and they do so, the prosecutor and the court are not obliged to give a precise description on who pulled the trigger, if this remains as an open question.

With regard to the alleged inhumane treatment in Kleçkë/Klečka detention center, the Indictment describes clearly the conditions (chained prisoners, inappropriate premises, excessive cold, lack of sanitation, inadequate nutrition, and frequent beatings) and also the role of each defendant is described. Therefore the claim given by defense counsel Fazli Balaj, who raised the question if someone commits a criminal offence of war crimes by slapping a prisoner of war, can only be seen as an attempt to trivialize the charge.

In relation to the defense counsels' submission about the issue that Indictment contains several counts of war crimes for each of the accused (with the only exception that defendant number 9 is charged only with one count), the confirmation judge finds that each count of the Indictment is in relation to different criminal acts and – again – the confirmation judge finds that in relation to each of these counts there is sufficient evidence to conclude a well-grounded suspicion.

VII. Inadmissibility/admissibility of evidence

In addition to complaints of the defense, the confirmation judge *ex officio* assessed the matter of inadmissibility of evidence and finds that all evidence presented by the public prosecutor is admissible. Pursuant to article 153 par. 1 of the KCCP, pieces of evidence can only be declared as inadmissible when they are obtained in violation of the provisions of the criminal procedure. In particular case no provision, which expressly prescribes the inadmissibility, like for example article 161, 246, 254 par. 2 of the KCCP, are violated.

It is therefore decided as in the enacting clause of this ruling, pursuant to article 316 par 4 of the KCCP.

DISTRICT COURT OF PRISHTINË/PRIŠTINA
KA 505/11 dated 26 August 2011

Confirmation Judge

Ingo RISCH
EULEX Judge