SUPREME COURT

Case number: **Pml.Kzz 98/2014**
(P. Nr. 592/2011 District Court of Pristina)
(PAKR 102/2013 Court of Appeals)

Date: **3 September 2014**

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Timo Vuojolahti (Presiding and Reporting), EULEX Judge Willem Brouwer and Supreme Court Judge Emine Mustafa as Panel members, and EULEX Legal Officer Kerry Kirsten Moyes as the Recording Officer, in the criminal case number P. Nr. 592/2011 of the (then) District Court of Pristina against:

S.A., born on …in…, son of …, citizen of Kosovo, convicted of the criminal offence of Aggravated Murder in co-perpetration under Article 30 (1) and (2) of the Criminal Law of the Socialist Autonomous Province of Kosovo (CLSAPK) in conjunction with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 146 and 147 (3), (5) and/or (11) (the legal qualification of Article 147 modified to Article 147 (3) and (5) by the Court of Appeals), and Article 23 of the Criminal Code of Kosovo (CCK) and sentenced to twelve (12) years of imprisonment;

D.H., born on …in …, son of…, citizen of Kosovo, convicted of the criminal offence of Attempted Aggravated Murder in co-perpetration under Article 30 (1) and (2) CLSAPK in conjunction with Articles 19 and 22 CCSFRY, currently criminalized under Articles 146 and 147 (5) and/or (11) (the legal qualification of Article 147 modified to Article 147 (5) by the Court of Appeals), and Articles 20 and 23 of the CCK, sentenced to seven (7) years of imprisonment;

B.S., born on … in …, son of …, citizen of Kosovo, convicted of the criminal offence of Aggravated Murder in co-perpetration under Article 30 (1) and (2) of the CLSAPK in conjunction with Article 22 of the CCSFRY, currently criminalized under Articles 146 and 147 (3), (5) and/or (11) (the legal qualification of Article 147 modified to Article 147 (3) and (5) by the Court of Appeals), and Article 23 of the CCK, sentenced to twelve (12) years of imprisonment;

S.S., born on …in …, son of …, citizen of Kosovo, convicted by the District Court of Pristina of the criminal offence of Attempted Aggravated Murder in co-perpetration under Article 30 (1) and (2) of the CLSAPK in conjunction with Articles 19 and 22 of the CCSFRY, currently criminalized under Articles 146 and 147 (5) and/or (11) (the legal qualification of Article 147 modified to Article 147 (5) by the Court of

Appeals), and Articles 20 and 23 of the CCK, sentenced to a term of eight (8) years of imprisonment;

S.U., born on … in …, son of …, citizen of Kosovo, convicted of the criminal offence of Aggravated Murder in co-perpetration under Article 30 (1) and (2) of the CLSAPK in conjunction with Article 22 of the CCSFRY, currently criminalized under Articles 146 and 147 (3), (5), and/or (11) (the legal qualification of Article 147 modified to Article 147 (3) and (5) by the Court of Appeals), and Article 23 of the CCK, and of the criminal offence of Attempted Aggravated Murder in co-perpetration under Article 30 (1) and (2) of the CLSAPK in conjunction with Articles 19 and 22 of the CCSFRY, currently criminalized under Articles 146 and 147 (5) and/or (11) (the legal qualification of Article 147 modified to Article 147 (5) by the Court of Appeals), and Articles 20 and 23 of the CCK, sentenced to an aggregate punishment of fifteen (15) years;

acting upon **the Requests for Protection of Legality** filed by Defense Counsel N.Q. on 30 April 2014 on behalf of the defendant **S.A.**, filed by Defense Counsel R.K. on 5 June 2014 on behalf of the defendant **D.H.**, filed by Defense Counsel A.B. on 15 May 2014 on behalf of the defendant **B.S.**, filed by Defense Counsel H.M. on 11 June 2014 on behalf of the defendant **S.S.**, filed by Defense Counsels F.G-B. and B.J. on 2 June 2014 on behalf of the defendant **S.U.,** against the Judgment of the (then) District Court of Pristina in this case dated 17 December 2012, and the Judgment of the Court of Appeals dated 12 December 2013;

having considered the Responses to the Requests filed by the State Prosecutor KMLP. II. – ZZZK. II. No. 70/14 filed on 16 May 2014 regarding **S.A.**, filed on 12 June 2014 regarding **D.H.**, filed on 4 June 2014 regarding **B.S.,** filed on 18 July 2014 regarding **S.S.**, and filed on 9 June 2014 regarding **S.U.**;

having deliberated and voted on 3 September 2014

pursuant to Articles 418 and Articles 432-441 of the Criminal Procedure Code (CPC)

renders the following

JUDGMENT

The Requests for Protection of Legality filed by Defense Counsel N.Q. on behalf of the defendant S.A., filed by Defense Counsel R.K. on behalf of the defendant D.H., filed by Defense Counsel A.B. on behalf of the defendant B.S., filed by Defense Counsel H.M. on behalf of the defendant S.S., filed by Defense Counsels F.G-B. and B.J. on behalf of S.U., against the Judgment of the (then) District Court of Pristina dated 17 December 2012,

and the Judgment of the Court of Appeals dated 12 December 2013 are rejected as unfounded.

REASONING

1. **Procedural background**

1.1. On 29 July 2011 Indictment PPS 460/09 was filed, amended on 15 September 2011, and confirmed on 6 October 2011.

1.2. The main trial began on 3 February 2012 and completed on 14 December 2012. On 17 December 2012 the District Court announced its Judgment and convicted the defendants as above. The District Court modified the legal qualification of Count 2 of the Indictment from the criminal offence of Attempted Aggravated Murder (all defendants except S.S. were charged with this offence) to the criminal offence of Kidnapping under Article 164 (1) CCSFRY in conjunction with Articles 19 and 22 CCSFRY, currently criminalized under Article 159 (1) of the CCK in conjunction with Articles 20 and 23 of the CCK. The District Court rejected the charge due to expiry of the period of statutory limitation.

1.3. All 5 defendants appealed. By its Judgment dated 12 December 2013, the Court of Appeals *ex officio* modified the Judgment of the District Court as to the legal qualification of the criminal offences as noted above. The Court of Appeals also partially modified the Judgment on the appeals of D.H., B.S. and S.S., and *ex officio* in relation to S.A. and S.U., to include the time spent in detention in their sentences. All other grounds of the defendants' appeals were rejected as ungrounded.

1.4. Requests for Protection of Legality were filed by Defense Counsel N.Q. on 30 April 2014 on behalf of S.A., filed by Defense Counsel R.K. on 5 June 2014 on behalf of D.H., filed by Defense Counsel A.B. on 15 May 2014 on behalf of B.S., filed by Defense Counsel H.M. on 11 June 2014 on behalf of S.S., and filed by Defense Counsels F. G-B. and B.J. on 2 June 2014 on behalf of S.U. Responses to the Requests were filed by the State Prosecutor on 16 May 2014 regarding S.A., filed on 12 June 2014 regarding D.H., filed on 4 June 2014 regarding B.S., filed on 18 July 2014 regarding S.S., and filed on 9 June 2014 regarding S.U. All are timely.

2. **Submissions by the Parties**

2.1. Defense Counsel N.Q. on behalf of S.A. The Request states that there have been essential and other violations of the provisions of the criminal procedure code, and violation of the criminal code in detriment of the accused.

a. Violations of the provisions of Article 403 (1), item 12 of the KCCP

- the First Instance Judgment is unclear and incomprehensible, and the reasoning is contradictory and confusing.
- the cooperative witness has a psychiatric disease and is lying.

b. Violations *of Article 157 (4) of the KCCP*

- The Judgment is mainly supported by the one testimony of the cooperative witness. S.A.'s conviction is not supported by other evidence.
- The witnesses M.J. and S.T., who have criminal convictions, gave false evidence after colluding with the cooperative witness.
- Other prosecution witnesses do not provide any fact regarding S.A.'s involvement in the criminal offences.

c. Violations of Article 3 (2) of the KCCP

- The First Instance Court has violated the principle of *in dubio pro reo.* There were doubts as to the evidence of the cooperative witness, which should have been interpreted in the defendant's favour.
- The defendant provided an alibi.

d. Violation of Article 387 (1) and (2) of the KCCP

- The Reasoning in the Judgment regarding the cooperative witness is a subjective assessment by the Court.
- The Court has not consciously assessed each piece of evidence individually, particularly the earlier statements by the cooperative witness which contradict the evidence given in Court.
- The Court rejected the defense request for examination of the mental state of the cooperative witness.

e. Violation of Article 396 (7) of the KCCP

- The Court presented its facts and findings in contradiction of the evidence given in the trial, which did not establish the criminal liability of the accused.
- The Court did not provide reasons for rejecting the defense applications.
- The Court did not decide which law is the most favourable to the accused.
- The Court applied the law provisions of the CCSAP, CCSFRY and the CCK, which are not the most favourable to the accused.

f. Violation of Article 1 (2) and Article 5 (1) of the KCCP

- The Judgment is politically influenced, and influenced by public opinion.
- The Court was prejudiced by its belief that the defendant was a member of SHIK.

- The defendant did not receive a fair and impartial trial.

g. Violation of Article 7 (1) of the KCCP

- The Court did not accept the alibi given by the defendant.
- The Court did not assess the facts and exculpatory evidence for the defendant, but confirmed suspicious evidence.

h. Violations of the criminal law

- The legal qualification of the offences is contrary to legal practice.
- It was not correct for the trial court to combine in one case three (3) laws in legal combination.
- Paragraph (2) of Article 30 of the CCSAPK determines only the criminal sanction and not the main indicators of the offence.
- There was no reasoning for the legal qualification of Article 147 (3) and (5) of the CCK.

i. Violations of the Court of Appeals

- The Court of Appeals violated the criminal code as it did not state and eliminate the violations of the First Instance Court.
- The murder cannot be categorised as an aggravated murder under Article 147 (3) and (5) as this can only exist where the violence against the victim caused suffering or serious physical pains. In this case the murder was without notice and was without the use of physical violence, and a murder by shooting with a firing weapon cannot be qualified as a ruthless or ruthlessly violent act.
- For a murder to be qualified as deceitful it must be extremely deceitful, or there be a trust between the perpetrator and the victim, or use of unusual devices. A victim being shot at the entrance to his house cannot be considered a deceitful murder.
- At the session of the Court of Appeals on 12 December 2013 the Defense Counsel submitted material evidence under Article 413 (4), but this evidence was not assessed by the Court or mentioned in its Judgment.

Defense Counsel for S.A. proposes that the Supreme Court approves his Request as grounded, that both Judgments are annulled, and that the case is returned to the Basic court of Pristina. He also proposes that execution of the sentence is postponed under Article 454 (4) of the KCCP.

2.2. Defense Counsel R.K. on behalf of D.H. The Request states that both Judgments have violated the provisions of Article 384 of the Criminal Procedure Code, and violated the Criminal Code under Article 385 (1) of the KCCP.

a. Violations of the Criminal Procedure Code

- There are contradictions between the enacting clause of the Judgments and their Reasonings.
- The Reasonings do not contain the facts of the criminal offence D.H. is charged with.
- There is no credible evidence to support his conviction, only the testimony of the cooperative witness.
- The Court incorrectly supported the claim that A.S. acted in self defense. This should only have been determined in a different procedure.

b. Violations of the Criminal Law

- There is total lack of evidence regarding the role and participation of D.H. in the criminal offence.

He proposes that the Supreme Court approve his Request as grounded and return the case for retrial and re decision.

2.3. Defense Counsel on behalf of B.S. The Request states that both Judgments are in violation of Article 403of the KCCP, and in violation of the Criminal Law under Article 404 of the KCCP.

a. Substantial violations of Article 403 of the KCCP

- The Judgment of the District Court is in violation of Article 403 (1) item 12 of the KCCP because; the enacting clause is incomprehensible, contradictory in itself and with its reasoning, and based on selective evidence; the witnesses lack credibility, particularly the cooperative witness; the enacting clause and the reasoning of the Judgment of the District Court are inconsistent with each other as to legal qualification of the offence in Count 1. The Court of Appeals Judgment is also in violation of Article 403 (1) item 12 of the KCCP as the enacting clause is unclear, in contradiction with itself and its reasoning as it is not clear what was modified. Also, the Court of Appeals concluded that there was a violation of Article 159 of the KCCP when K.V. was questioned without permission from the competent body, but this violation was not considered a substantial violation.
- The Judgment of the District Court is in substantial violation of Article 403 (1) item 8 in conjunction with Article 157 (4) of the KCCP as it relied only on one cooperative witness and no other evidence.
- The Judgment of the District Court is in substantial violation of Article 403 (2) item 1 as it questioned a privileged witness without permission from the competent body.

b. Violation of Article 404 of the KCCP

- The legal qualification of Count 1 is in contradiction with the principle of legality as there are contradictions between the reasoning and the enacting clause as to the legal qualification.
- The Court violated Article 404 (1) item 5 of the KCCP in its decision on punishment by considering as an aggravating circumstances that they were a 'well-organized group'. This is qualifying it as 'Organized Crime', which is surpassing its legal competencies.
- The District Court violated Article 404 (1) item 6 of the KCCP because it did not credit the period of house arrest since 26 July 2011.
- The Court of Appeals Judgment is in violation of Article 404 (1) item 6 of the KCCP because it does not determine exactly the time spent on detention on remand that is to be credited. It is for either the District Court or the Court of Appeals to calculate this time.

He proposes that the Judgments are amended to acquit the defendant, or to cancel them and refer the case back to the Basic Court of Pristina for a retrial.

2.4. Defense Counsel H.M. on behalf of S.S. The Request states that there has been essential violation of Article 403 (1) the Criminal Procedure Code and violation of the criminal law of Article 404 (1).

a. Essential Violation of Article 403 of the KCCP

- The enacting clause of the Judgment is incomprehensible, contradictory in itself and the reasoning is based on the evidence of one person without the support of other evidence in violation of Article 157 (1) of the KCCP.
- The evidence of the cooperative witness is not credible, and has contradictions and discrepancies.
- The Court permitted the interrogation of a privileged witness without the permission of the competent body.
- The privileged witness submitted the name of a witness that the defence requested be summonsed, but this was refused by the Court.
- The cooperative witness should not have been given the status of cooperative witness in this case as he has mental problems, is involved in criminal activities, has a weak personality, has debts, and is sunk in business affairs.

b. Violation of the criminal law, Article 404 (1)

- The legal qualification of Count 3 violates criminal law as he is convicted of both Attempted Murder and Attempted Aggravated Murder, when it must be one or the other.
- The Court has erroneously assessed the criminal offence as having the characteristic of a 'well-organized group' as an aggravating feature, and it is thus evaluated as an Organized Crime, which exceeds its competences by overpassing the Indictment.
- The Court did not include the time spend in house detention from 21 July 2011 in calculating the punishment.
- Eight (8) years of imprisonment is too heavy a punishment.

He proposes that the defendant is acquitted, or that the case is sent back for re-trial.

2.5 Defense Counsels F.G-B. and B.J. on behalf of S.U. The Request states that both Judgments have made substantial violations of the provisions of the criminal proceedings under Article 384, and violation of the criminal law under Article 385 (1) of the KCCP.

a. Violations of criminal proceedings under Article 483 of the KCCP

- Both Judgments are incomprehensible and in contradiction with themselves. Crucial facts were not included, and those that are presented are unclear or in contradiction.
- Both Judgments relied on inadmissible evidence, as the defendant's finding of guilt was based only on the evidence of the cooperative witness, in contradiction with Article 157 (4) of the KCCP. No other witness confirmed his statements.
- The witnesses S.T. and M. are not credible.
- Defense Counsel requested that the District Court allow a neuropsychiatric examination of the cooperative witness, but this was refused. He is also deeply in debt, involved in deceptions and has criminal proceedings ongoing against him. His personality should have been assessed, and his relationship with his family members should have been assessed.

b. Violation of the criminal law under Article 385 of the KCCP

- The violation of the criminal law consists due to the discrepancies in the declaration of the widow of the late A.K. in relation to the declarations of the cooperative witness.
- The bullet shells used for the murder of I.K. given by the cooperative witness belonged to a different kind of weapon than belonged to the shells found at the murder site.
- The murder weapon was not found, and contradictory declarations were made by the cooperative witness regarding it.
- There is no evidence to convict the defendant, and the declarations of the cooperative witness are a product of his imagination.

- Count 3 has not been proved because it has not been proved that there is any consequence to the damaged party.
- The sentence is drastic for this offence in accordance with the case law.

They propose that their Request is approved as grounded and the case sent back for retrial.

2.6. The State Prosecutor

Regarding S.A., the State Prosecutor observes that the claims of the Defense Counsel are repetition of arguments already raised already during the trial in both the first instance and, on his appeal, in the second instance, and rejected by both Courts as ungrounded. The impugned Judgments thoroughly assessed the evidence and gave reasons for the weight they attached to all of the evidence. Otherwise, the claims of the Defense Counsel are of erroneous and incomplete determination of the factual situation, and as such may not be raised in a Request for Protection of Legality. The Prosecutor observes that the attempt of the Defense Counsel to introduce new evidence breaches Article 392 of the CPC which limits this possibility to a 'necessity' which was not met during the appellate session. The Request should be rejected as unfounded and the Judgments affirmed.

Regarding D.H., the State Prosecutor states that both Judgments are free from violations of criminal procedure. Objections on the evidential or factual basis of the Judgments only serve as a basis for claims of erroneous or incomplete determination of the factual situation under Article 386 (2) and (3) of the CPC (same as in Article 405 (2) and (3) of the KCCP. The State Prosecutor refers to Article 432 (2) of the CPC which states that Requests for Protection of Legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation. The Request should be rejected as unfounded and the Judgments affirmed.

Regarding B.S., the State Prosecutor states that the arguments are identical to those raised in the appeal against the Judgment of the District Court. These have already been addressed and rejected by the Court of appeals, save for credit for the period of detention. The Prosecutor submits that the Court of Appeals Judgment contains no violation of criminal procedure. It is clear from the enacting clause that reference to item 11 of Article 147 of the CCK in Counts 1 and 3 are discarded, and equally clear that this is the only modification made to the qualification of the criminal offences. There are no contradictions regarding the evidence of K.V. The Judgment of the District Court clearly states that his statement did not influence the Judgment. The State Prosecutor agrees with Defense Counsel regarding the calculation of the credit for time in detention and in house arrest, in that only the Court has the authority to do this. However, the remedy should not be the defendant's acquittal or the annulment of the Judgments. The Request should be partially granted on this point, and the Judgment of the Court of Appeals

modified *ex officio* for the other four (4) defendants, and the Request rejected for its remaining parts.

Regarding S.S., the Prosecutor notes that it is very difficult to understand the arguments in the Request, as the translator notes that a number of paragraphs are unclear or incomprehensible. It is also not always clear which Judgment is being referred to. Of the arguments that can be understood, many of them have been previously raised. Further, the objections regarding the evaluation of the evidence cannot serve as the basis for claims of violation or the criminal procedure law or of the criminal law as defined in Articles 384 and 385 of the CPC (same as in Article 405 (2) and (3) of the KCCP). Article 432 (2) of the CPC states that a Request for Protection of Legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation. Otherwise, any claim on bias should have been raised earlier and be well substantiated. The issues of confidentiality and the privileged witness did not influence the Judgment of the District Court, neither did the Court's decision not to summons the witness whose name the privileged witness provided. Article 300 of the KCCP does not require a general examination of a cooperative witness. The enacting clause of the Judgment of the Court of Appeals clearly states the qualification of the offence of which the defendant is convicted – Attempted Aggravated Murder – and it is in no way unclear. It is equally clear that the act was not qualified as an Organized Crime, and this point has already been dealt with by the Court of Appeals. The State Prosecutor proposes that the Judgment of the Court of Appeals be modified *ex officio* to calculate the credit for time spent in house detention, and reject the Request for its remaining parts.

Regarding S.U., the Defense Counsels fail to submit specific arguments to substantiate their claims of violations of the criminal code. They fail to explain why they find the evidence of the cooperative witness inadmissible, nor why the evidence of S.T. and M.I. lack credibility. The District Court scrutinized the credibility of the cooperative witness. Objections on the evidential basis of the impugned Judgments do not serve as a basis for violation of the criminal law as defined in Article 385 of the CPC (as in Article 404 of the KCCP). Article 432 (2) of the CPC states that a Request for Protection of Legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation. Regarding Count 3, the Prosecutor submits that the act had no consequence, which is why it is qualified as an Attempt as per Article 19 of the CCSFRY. Finally, the Defense Counsels fail to cite any case law to support their claim that the defendant's sentence is 'drastic'.

3. The Competence of the Panel

The question

3.1. The Panel of the Supreme Court notes that Law No. 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (hereinafter "*Omnibus Law'*), approved on 23 April

2014, entered into force on 30 May 2014 and *inter alia* modified Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (hereinafter '*Law on Jurisdiction'*). *Omnibus Law* raises the matters of jurisdiction of EULEX Judges and composition of the Panels that are related to the competence of the Court. Thus, the Panel has to first determine whether EULEX Judges have any competence to adjudicate this case, and if they do, what shall be the composition of the Panel.

The facts

3.2. The Indictment was filed on 29 July 2011 by a SPRK EULEX Prosecutor with the District Court of Pristina. The main trial was conducted by a Panel of two EULEX Judges and one local Judge. The District Court Judgment was announced on 17 December 2012. The appeals were heard in the Court of Appeals by a Panel of two EULEX Judges and one local Judge. The Court of Appeals rendered its Judgment on 12 December 2013.

3.3. The Requests for Protection of Legality were filed as above:

> S.A. on 30 April 2014, B.S. on 15 May 2014, S.U. on 2 June 2014, D.H. on 5 June 2014 and S.S. on 11 June 2014.

3.4. The case was registered in the Supreme Court Registry as Pml.Kzz 98/2014 on 13 May 2014 upon receipt of the first Request for Protection of Legality in this case (on behalf of S.A.).

The law

3.5. Article 3 of the *Omnibus Law* added Article 1.A and amended Article 3 of the *Law on Jurisdiction* as follows:

> Article 1.A. Ongoing cases
>
> For purpose of this law an ongoing case means:
>
> 1. Cases for which the decision to initiate investigations has been filed before 15 April 2014 by EULEX prosecutors in accordance with the law.
>
> 2. Cases that are assigned to EULEX judges before 15 April 2014.
>
> Article 3. Jurisdiction and competences of EULEX judges for criminal proceedings

> 3.1. EULEX judges assigned to criminal proceedings will have jurisdiction and competence over ongoing cases as stipulated in Article 1.A sub-paragraph 1.2 of this law.
>
> 3.2. …
>
> 3.3. Panels in which EULEX judges exercise their jurisdiction in criminal proceedings will be composed of a majority of local judges and presided by a local judge. Upon the reasoned request of the EULEX competent authority Kosovo Judicial Council will decide that the panel to be composed of majority of EULEX judges.
>
> 3.4. …

3.6. The amended Article 2.3 of the *Law on Jurisdiction* provides that where required, the relevant aspects of the activity and cooperation of EULEX Judges with the Kosovo Judges … will be further outlined, to a necessary extent, in a separate Arrangement between the Head of the EULEX Kosovo and the Kosovo Judicial Council.

3.7. An agreement between the Head of the EULEX Kosovo and Kosovo Judicial Council on relevant aspects of the activity and cooperation of EULEX Judges with the Kosovo Judges working in the local courts was reached on 18 June 2014 (hereinafter 'The Agreement').

Assessment

3.8. There is no doubt the requests were filed and thus registered with the court (both at the Basic Court and at the Supreme Court) after 15 April 2014. Accordingly, it is clear that the case was assigned to a EULEX Judge at the Supreme Court after 15 April 2014.

3.9. A Request for Protection of Legality is an extraordinary legal remedy to be used against final decisions. A Request for Protection of Legality becomes a pending case when it is filed with the court. This supports an interpretation that this case of extraordinary legal remedy was not an ongoing case on 15 April 2014, and thus would be outside of the jurisdiction of EULEX Judges.

3.10. On the other hand, the core question is how the phrase 'cases that are assigned to EULEX Judges before 15 April 2014' shall be interpreted in a situation when the 'case' refers to requests for extraordinary legal remedies.

3.11. The Panel notes that the *Law on Jurisdiction* was amended by the competent authorities of Kosovo following an international agreement between the Republic of Kosovo and the European Union (on the European Union Rule of Law Mission in Kosovo), ratified by Law No. 04/L-274. The 'Exchange of Letters', an integral part of this law, describes that the transitioning of EULEX Kosovo mandate is based on a

"*normally no new case*" policy. This gives reasons to conclude that the international agreement is based on the idea that the cases which EULEX prosecutors and Judges have been dealing with (before 15 April 2014) should also be concluded under the jurisdiction of EULEX Judges.

3.12. The new Art 1.A in the Law on Jurisdiction speaks about 'cases'. The law doesn't give any further explanation what is meant with this concept of 'case'. However, it is very obvious that the 'case' refers to criminal proceedings dealing with one or more criminal offences. Article 68 of the Criminal Procedure Code (CPC) explains the stages of a criminal proceeding as follows:

> A criminal proceeding under this Criminal Procedure Code shall have four distinct stages: the investigation stage, the indictment and plea stage, the main trial stage and the legal remedy stage.

3.13. The Panel notes that when the investigation has been initiated, it means that there is a reasonable suspicion that a criminal offence has been committed (or is to be committed). The decision to initiate the investigation specifies *inter alia* the suspect, a description of the act which specifies the elements of the criminal offence, and the legal name of the criminal offence. Later on, it is possible to expand the investigation. However, when the investigation has been completed and pursuant to the requirements provided by law, the 'case' moves to the next stage (indictments and plea stage), then to main trial and at last to legal remedy stage. But all the time, the 'case' is the same: dealing with the same relevant facts which constitute the elements of the criminal offence of which the defendant has been suspected, or for which they have been indicted, or for which they have been convicted and sentenced.

3.14. The headline of Chapter XXI in the CPC is "Legal Remedies". The chapter includes both ordinary legal remedies and extraordinary legal remedies.

3.15. The Panel considers that the concept of 'case' in Art 1.A of the Law on Jurisdiction must be interpreted in such a way that it covers all of the stages of criminal proceedings, and also the extraordinary legal remedies. The 'case' features the same defendant/s, the same criminal offence/s and the same facts. It does not become a new case simply because it enters a new stage or phase of the criminal proceedings.

3.16. It is a fact that the requests in hand now relate to a criminal case on which the Ruling on Initiation of Investigation was issued by a EULEX Prosecutor and the case was tried by EULEX judges in the District Court and Court of Appeals, all these before 15 April 2014. The Panel, with a majority vote, concludes that the case at hand, the requests for protection of legality, are to be considered as an ongoing case within the meaning of Art 1.A of the Law on Jurisdiction. This means the case belongs to the jurisdiction of EULEX Judges.

3.17. The next question is the composition of the Panel.

3.18. The wording in Art 3 of the Law on Jurisdiction supports an interpretation that the majority of the Panel should consist of local Judges. However, Count 2 of the Agreement states, that *in all ongoing cases the trial panels consisting of a majority of EULEX judges and will continue with a majority of EULEX judges on the panel for the continuation of all phases of the trial and the remainder of the proceedings.*

3.19. The wording of the provision is vague and unclear. On the one hand, it speaks about *trial panels*, which can be considered to refer to the first instance trial only. On the other hand it speaks about '*all phases* of the trial and *the remainder of the proceedings'*, which clearly points to all phases of the trial and *proceedings* .When the Agreement was meant to give guidance ('further outline') for the interpretation of the Omnibus Law, it would have been fair to assume that it would clearly express, by using exact legal concepts, the purpose and scope of this provision.

3.20. The majority of the Panel considers that by repeating twice the same matter using different expressions ('*for the continuation of all phases of the trial*' and '*the remainder of the proceedings'*), the parties of the agreement emphasized that the provision deals with all stages of a criminal proceeding. This means the provision covers also the stage of legal remedies. Thus, the majority of the Panel concludes that the provision must be interpreted meaning *when there has been a Panel consisting of a majority of EULEX Judges, all the following stages of the proceedings may also be conducted with a majority of EULEX Judges.* This interpretation is also consistent with the policy of 'normally no new case' as described in the international agreement (paragraph 3.11, above). Therefore, the majority of the Panel considers that the procedure regarding the adjudication of an ongoing case is not affected by the amendments in force since 30 May 2014.

3.21. Under this interpretation, in this ongoing case a majority of EULEX Judges is competent to adjudicate the Requests with a EULEX Judge Presiding and Reporting.

4. Findings of the Panel

A. General findings

4.1. The Requests for Protection of Legality by the Defense Counsels and the Responses by the State Prosecutor are admissible and timely filed.

4.2. A large number of points were raised by the Defence Counsels. However, the Supreme Court notes that many of them are issues with the evaluation of the evidence by the District Court, particularly that of the cooperative witness. Defense Counsels are reminded that Requests for Protection of Legality may be filed on the ground of a

violation of the criminal law, on the ground of certain substantial violations of the provisions of the criminal procedure, or if there is any other violation of the provisions of the criminal procedure that has affected the lawfulness of the judicial decision. A Request may not be filed on the ground of erroneous or incomplete determination of the factual situation (Article 432 of the CPC). The Supreme Court concurs with the State Prosecutor that the contents of the Requests are largely a repetition of their Appeals against the First Instance Judgment. It is a widely spread and unfortunate tendency among many Defense Counsels to try to use the Request for Protection of Legality as a second Appeal, which it is not supposed to be.

B. Enacting Clause and the grounds of the Judgment

4.3. Generally, all Defense Counsels claim that both Judgments did not clearly and fully indicate what facts and for what reasons were found to be true, or that they are incomprehensible or contradictory, or that the enacting clause of the Judgment is incomprehensible and inconsistent with the reasoning. Most of these allegations can be considered to be formally based on Article 403(1.12) of the KCCP.

4.4. The Supreme Court completely disagrees with these submissions. The First Instance Judgement is very thorough and clear as to what exactly has been found as proven – again, this is detailed in a completely comprehensible manner. The Court of Appeals Judgment is equally articulate in its Reasoning and entirely clear as to its Findings. Nor can the Supreme Court identify any contradictions between the enacting clause and the Reasoning in either Judgment.

4.5. The Supreme Court offers one minor criticism in the Enacting Clause of the Judgment of the District Court. In the enacting clause, in Count 1 the defendants S.A., B.S. and S.U. are found guilty of committing the criminal offence of Aggravated Murder (pursuant to Article 30 (1) and (2) of the CLSAPK). In Count 3 the defendants S.U., D.H. and S.S. are found guilty of committing the criminal offence of Attempted Aggravated Murder (pursuant to Article 30 (1) and (2) of the CLSAPK and Article 19 CCSFRY)[1]. The circumstance qualifying the criminal offences as aggravated is the one described in subparagraph 1 of Article 30 (2) of the CLSAPK; *takes another person's life in a brutal or insidious manner*[2]. The District Court considered that the corresponding aggravating circumstance in the Criminal Code of Kosovo (CCK), effective at the time of the trial, was found in Article 147 (3); *… in a cruel or deceitful way*.

[1] The District Court applied also Article 30 (3) of the CLSAPK to the defendant S.U., considering that by committing these two criminal offences the relevant factor under Paragraph 3, qualifying the offences as aggravated, was established (see the Judgment of the District Court, English version, pages 23-24 and 38). However, the Court of Appeals found that this was a violation of criminal law and found that Paragraph 3 of Article 30 was not applicable to S.U. (see Court of Appeals Judgment, English version, paragraphs 56-60).
[2] See the Judgment of the District Court, English version, pages 22-23 and 38.

4.6. This aggravating circumstance is not mentioned in the enacting clause by using the expressions in the law. However, the facts which according to the District Court established the aggravating circumstance are to be found from the enacting clause. In the reasoning part of the judgment the District Court has properly analysed the existence of the aggravating circumstance 'in a brutal or insidious manner' (and under the CCK 'in a cruel or deceitful way')[3]. The Supreme Court considers that this minor defect in the enacting clause does not constitute a substantial violation of the provisions of criminal procedure as alleged in the requests.

4.7. Thus, the Panel does not find any violations of the rules in Article 403 (1) item 12 of the KCCP alleged in the Requests.

C. Cooperative witness and corroborative evidence

4.8. Some of the requests claim that the Judgment is based on the testimony of the cooperative witness, and there is no supporting evidence presented.

4.9. Article 157 paragraph 4 of the KCCP reads:

> The court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

4.10. First, the Supreme Court notes that the same allegation was raised in the Court of Appeals. The Court of Appeals has stated (see paragraph 47 of the Judgment) that both charges (count 1 and count 3) have been corroborated by other witnesses and forensic evidence. The Supreme Court agrees with the Court of Appeals that the Judgment of the District Court demonstrates that the Trial Panel was mindful of the provision in the Criminal Procedure Code on this issue, and carefully assessed and detailed what it found to be corroborating evidence.

4.11. The only relevant issue left with this question is if there should have been other evidence particularly on the identity of the perpetrators. Namely, there is no other witness than the cooperative witness who has identified the perpetrators.

4.12. The Supreme Court points out that Article 147(4) of the KCCP doesn't set any further rules to specify what kind of other corroborative evidence is required, or for which elements or facts related to the criminal offence. Thus, the Supreme Court considers that this question, whether there is sufficient corroborative evidence presented, has to be assessed in each case separately. When doing this the trial court has to take into consideration all the evidence presented in the case and the reliability of that evidence. So, depending on the case, if the testimony of the cooperative witness is found strongly reliable and trustworthy and the testimony is for some parts supported by other

[3] See the Judgment of the District Court, English version, pages 22-23 and 38.

evidence, there may be no need to require supporting evidence for all other pieces of relevant facts, for example on the identity of the perpetrator.

4.13. The District Court has in an extensive manner studied the credibility of the cooperative witness and found his testimony trustworthy, credible and plausible. The cooperative witness knew the other perpetrators previously and the District Court did not find any uncertainty with his testimony on the identity of the other perpetrators. There is other evidence which the District Court found as supporting some parts of the events described in the testimony of the cooperative witness. The Supreme Court agrees with the Court of Appeals that the defendants were not found guilty based solely on the testimony given by the cooperative witness. The fact that no other evidence directly proved the identity of the perpetrators doesn't mean that the defendants were found guilty based solely on the testimony of the cooperative witness.

4.14. It is clear that the Defence Counsels do not agree with the credibility and the weight attached to this evidence, but that is an entirely separate issue from whether or not corroborative evidence was found by the District Court. The Supreme Court concludes that the challenges on this ground are without merit and there is no violation of Article 157 (4) of the KCCP.

D. New evidence at the Court of Appeals

4.15. Defence Counsel N.Q. states in the request filed on behalf of the defendant S.A. that he submitted new evidence at the Court of Appeals. He states that he justified why the evidence was not submitted in time (and presumably he means during the main trial) and yet it was not assessed by the Court of Appeals and not mentioned at all in the Judgment[4].

4.16 Article 411 paragraph 2 of the KCCP states

> The court of second instance shall decide in a session of the panel whether to conduct a hearing.

4.17. Article 412 paragraph 1 of the KCCP states

> A hearing before the court of second instance shall be conducted only when it is necessary to take new evidence or to repeat evidence already taken due to an erroneous or incomplete determination of the factual situation, and when there are valid grounds for not returning the case to the court of first instance for retrial.

[4] Defense Counsel also claims that 10 documents are attached to his Request for Protection of Legality, but only one can be identified amongst the papers.

4.18. From the minutes of the session of the Court of Appeals the following can be established:

- The Presiding Judge went through the formalities, which included the usual statement that, *'Defendants and parties are hereby informed that during this session the panel will not take any evidence.'*

- Defense Counsel N.Q., on behalf of the defendant S.A., stated, '*I would like to use the rights given to me by provision of Article 393 para 4 even though I understood from the court instructions at the opening of the session that the court will not admit evidence, however, I have prepared written evidence which I would like to present today and this evidence is related to two Prosecution Witnesses, S.T. and M.I.'* He went on, *'Regarding the evidence I will submit today, I have made copies for the panel and parties and I hand them over to the court now. Witness M.I., there is a criminal report against this Witness because he has given false testimony.'*

- Then he was asked if this [evidence] was in Albanian only, to which he replied yes. The Defence Counsel moved on to make comments about the substance of his appeal. He then returned to the subject of evidence and said, *'…I will refer to the evidence submitted today. It results from those pieces of evidence that Witness M.I. in the statement he gave to prosecution and to the court states that S.A. assaulted him and committed the criminal offence of attempted murder against him. From those document submitted I want to prove that it is the opposite that the Witness is the assaulted person in this case. You have the analyses of the weapon which state that the weapon used was that of M.I.'*

4.19. From the minutes of the session of the Court of Appeals it can be established that the Prosecutor did not ask to address the court on the issue of the 'new evidence', the Presiding Judge did not make any further comment regarding the documents, nor did the Panel made any decision on this issue. Further, it is not detailed in the Minutes what documents, or how many, the Defense Counsel was trying to present as evidence.

4.20. There is no doubt that the session conducted was a *session of the Panel* within the meaning of Articles 410 and 411 of the KCCP. New evidence may be presented only in a hearing of the Court of Appeals (Art 412 and 413 of the KCCP), not in a session. A session of the Panel does not become a hearing if a party tries to present evidence. The Supreme Court points out that the Presiding Judge clearly instructed the parties that the session was a session of the Panel and that the Panel would not take any evidence. There is nothing that shows that the presented documents were accepted as part of the case files. On the contrary, the Presiding Judge did not address this material at all, it was not discussed in the session, it was not given to other parties and it was not discussed in the Judgment. If the Defence Counsel wanted to request that the Court of Appeals should conduct a hearing in order to take new evidence, he should have clearly stated that. By presenting the documents the Defence Counsel only violated the provisions of the law

and instructions given by the Presiding Judge, and lengthened the session.

4.21. Thus, there is no violation of the provisions of criminal procedure as alleged on this point regarding these documents.

E. *In dubio pro reo*

4.22. Both the older Criminal Procedure Code of Kosovo (KCCP) and the newer Criminal Procedure Code (CPC), Article 3 paragraph 2, states:

> *Doubts regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision shall be interpreted in favour of the defendant and his or her rights under the present Code…*

4.23. It is a common practice amongst Defense Counsels to invoke the principle of *in dubio pro reo*. It is frequently argued that where the evidence of one witness is in contradiction with that of another witness as to fact, then doubt exists, and therefore applying the principle *in dubio pro reo* the version of facts in the defendants' favour must be found, leading to acquittal. The Supreme Court notes that this is a misunderstanding of the principle.

4.24. The principle means that where there is doubt as to the defendant's **guilt**, this must be resolved in the defendant's favour. A defendant may not be convicted by the Court when doubts about his or her guilt remain. This does not constrain a Trial Panel, as the trier of fact, from assessing conflicting evidence and concluding that they do not have doubts as to their findings.

4.25. The essential content of the principle *in dubio pro reo* can be illustrated by the decision on appeal at the ICTY[5] in the case of *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*[6]. The Appeal Chamber considered that the principle of *in dubio pro reo*, as a corollary to the presumption of innocence and the burden of proof beyond reasonable doubt, applies to findings required for conviction, such as those which make up the elements of the crime charged. The principle is essentially just one aspect of the requirement that guilt must be found beyond reasonable doubt. Further, the principle of *in dubio pro reo* is not applied to individual pieces of evidence and findings of fact on which the judgment does not rely.[7]

4.26. The allegation presented in the request is groundless. The Supreme Court is satisfied that there has been no violation of the principle of *in dubio pro reo.*

[5] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
[6] *Prosecutor v Fatmir Limaj, Haradin Bala, Isak Musliu,* IT-03-66-A, Judgment, 27 September 2007
[7] See page 11 of the judgment IT-03-66-A.

F. Crediting the time spent in detention

4.27. Defence Counsels for B.S. and S.S. raise the issue of crediting time spent on detention on remand and under house detention. The Supreme Court has noted the modification of the enacting clause by the Court of Appeals on this point. The Supreme Court concurs that it is not clear, and has reviewed the Procedural History as detailed by the District Court.

4.28. As far as S.A., B.S., S.S. and S.U. is concerned, it is clear that the measure of house detention was imposed on 28 July 2011 and was extended throughout the proceedings, and therefore at face value it appears that they should be credited with this time. Defence Counsel H.M. on behalf of S.S. has requested that he be credited with this time. However, it was noted during the Court of Appeals session on 12 December 2013 that he had served 4 months of a sentence of imprisonment in Dubrava prison, and had another 2 months to serve, although this information was not offered by either the defendant or his Counsel. This defendant was therefore not serving the measure of house detention as he was serving a sentence of imprisonment, and the time that he spent serving that sentence of imprisonment cannot also count as credit towards the sentence of imprisonment in this case. Similarly, the State Prosecutor notes in her Response to the Request filed by Defence Counsel for B.S that he was no longer available for the District Court at least as of 17 December 2012. The State Prosecutor states that S.U. did not appear at the main trial on 17 December 2012, but the Supreme Court cannot find any further information as to if there was an explanation for his absence, or if he was in non-compliance with house detention.

4.29. The situation regarding D.H. is even more complicated. It appears that he was ordered to house arrest from 13 January 2010, and on 15 January 2010 house detention was terminated and the measure of detention on remand was imposed instead. On 12 February 2010 detention on remand was terminated and house detention was imposed again. On 1 October 2012 the Court ordered a warrant for his arrest due to his non-compliance with house detention, and on 10 October 2012 he was arrested and ordered to detention on remand once more. On 14 November 2012 detention on remand was terminated and house detention was imposed. On 10 December 2012 he was found to be not at his house again, nor did he appear at the main trial on 17 December 2012 and he was at large until he was arrested on 5 March 2014, according to the State Prosecutor. It is not clear where he is now.

4.30. The final entry of the Procedural History in the Judgment of the District Court states that on 22 January 2013 house detention was extended against S.A. and S.S. until 28 March 2013.

4.31. The Panel of the Supreme Court is satisfied that some credit is due to the defendants in the calculation of their punishment. Although the Court of Appeals did not

calculate and express the exact time to be credited, it stated that the time spend in detention shall be credited. This statement covers both detention on remand and house detention. As stated above, it is not clear at all what periods of detention were served by each defendant, and therefore it is not possible for the Supreme Court to make accurate calculations. Therefore, a decision on this point should be made in a separate Ruling by the District Court of Pristina, in accordance with Article 489 of the CPC. This is the correct procedure where a doubt arises as to the calculation of a punishment, and the Defence Counsels should motion to the District Court accordingly.

4.31. The Supreme Court is satisfied that there has been no violation of the provisions of criminal law regarding the question of crediting the time spent in detention.

G. Other allegations

4.31. A number of challenges on other grounds can be briefly dealt with. The issue of confidentiality and the privileged witness K.V. has no relevance as it is clear that these matters had no bearing on the rendering of a lawful Judgment by the District Court.

4.32. The Court of Appeals has clearly addressed the fact that describing an act as 'well organised' does not mean or suggest that the legal qualification of the criminal offence is altered to that of an Organised Crime.

4.33. The allegations on the severity of the sentences do not suggest any reasons to the Panel to consider that there has been any violation of criminal law.

4.34. Finally, the Supreme Court sees no reason to further discuss the other allegations presented in the requests because they are clearly ungrounded allegations against the findings of the District Court and Court of Appeals, and for most parts already discussed in the Judgments.

H. Conclusion

The requests must be rejected.

Done in English, an authorised language.

Presiding Judge **Recording Officer**

_____ _____

Timo Vuojolahti Kerry Kirsten Moyes

EULEX Judge EULEX Legal Officer

Panel members

_____ _____

Willem Brouwer Emine Mustafa

EULEX Judge Supreme Court Judge

SUPREME COURT

Case number: **Pml.Kzz 98/2014**
(P. Nr. 592/2011 District Court of Pristina)
(PAKR 102/2013 Court of Appeals)

Date: **9 January 2015**

EULEX Judge Timo Vuojolahti as Presiding Judge, in the criminal case against:

S.A., born on …in …, son of …, citizen of Kosovo, convicted of the criminal offence of Aggravated Murder in co-perpetration under Article 30 (1) and (2) of the Criminal Law of the Socialist Autonomous Province of Kosovo (CLSAPK) in conjunction with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 146 and 147 (3), (5) and/or (11) (the legal qualification of Article 147 modified to Article 147 (3) and (5) by the Court of Appeals), and Article 23 of the Criminal Code of Kosovo (CCK) and sentenced to twelve (12) years of imprisonment;

D.H., born on …in …, son of …, citizen of Kosovo, convicted of the criminal offence of Attempted Aggravated Murder in co-perpetration under Article 30 (1) and (2) CLSAPK in conjunction with Articles 19 and 22 CCSFRY, currently criminalized under Articles 146 and 147 (5) and/or (11) (the legal qualification of Article 147 modified to Article 147 (5) by the Court of Appeals), and Articles 20 and 23 of the CCK, sentenced to seven (7) years of imprisonment;

B.S., born on …in …, son of …, citizen of Kosovo, convicted of the criminal offence of Aggravated Murder in co-perpetration under Article 30 (1) and (2) of the CLSAPK in conjunction with Article 22 of the CCSFRY, currently criminalized under Articles 146 and 147 (3), (5) and/or (11) (the legal qualification of Article 147 modified to Article 147 (3) and (5) by the Court of Appeals), and Article 23 of the CCK, sentenced to twelve (12) years of imprisonment;

S.S., born on …in…, son of…, citizen of Kosovo, convicted by the District Court of Pristina of the criminal offence of Attempted Aggravated Murder in co-perpetration under Article 30 (1) and (2) of the CLSAPK in conjunction with Articles 19 and 22 of the CCSFRY, currently criminalized under Articles 146 and 147 (5) and/or (11) (the legal qualification of Article 147 modified to Article 147 (5) by the Court of Appeals), and Articles 20 and 23 of the CCK, sentenced to a term of eight (8) years of imprisonment;

S.U., born on …in …, son of…, citizen of Kosovo, convicted of the criminal offence of Aggravated Murder in co-perpetration under Article 30 (1) and (2) of the CLSAPK in conjunction with Article 22 of the CCSFRY, currently criminalized under Articles 146 and 147 (3), (5), and/or (11) (the legal qualification of Article 147 modified to Article 147 (3) and

(5) by the Court of Appeals), and Article 23 of the CCK, and of the criminal offence of Attempted Aggravated Murder in co-perpetration under Article 30 (1) and (2) of the CLSAPK in conjunction with Articles 19 and 22 of the CCSFRY, currently criminalized under Articles 146 and 147 (5) and/or (11) (the legal qualification of Article 147 modified to Article 147 (5) by the Court of Appeals), and Articles 20 and 23 of the CCK, sentenced to an aggregate punishment of fifteen (15) years;

acting upon **the Requests for Protection of Legality** filed by Defense Counsel N.Q. on 30 April 2014 on behalf of the defendant **S.A.**, filed by Defense Counsel R.K. on 5 June 2014 on behalf of the defendant **D.H.**, filed by Defense Counsel A.B. on 15 May 2014 on behalf of the defendant **B.S.**, filed by Defense Counsel H.M. on 11 June 2014 on behalf of the defendant **S.S.**, filed by Defense Counsels F.G.-B. and B.J. on 2 June 2014 on behalf of the defendant **S.U.,** against the Judgment of the (then) District Court of Pristina in this case dated 17 December 2012, and the Judgment of the Court of Appeals dated 12 December 2013;

Acting on the motion of defence counsel R.K. on behalf of the defendant D.H. dated 15 December 2014, pursuant to Article 371 paragraph 1 of the Criminal Procedure Code (CPC) issues the following

---

RULING

The Judgment of the Supreme Court Pml.Kzz 98/2014 dated 3 September 2014 is corrected so that the second sentence of paragraph 4.29 in the Albanian language version is:

'It appears that he was ordered to house arrest from 13 January 2010, and on 15 January 2010 house detention was terminated and the measure of detention on remand was imposed instead.'

REASONING

This sentence in the English language version of the Judgment is correct. During the translation of the Judgment into the Albanian version '15 January 2010' was erroneously translated as '5 January 2010'.

The present Ruling together with the written Judgment shall be served on the parties.

Presiding Judge **Recording Officer**

_____	_____
Timo Vuojolahti	Kerry Kirsten Moyes
EULEX Judge	EULEX Legal Officer