

**DISTRICT COURT OF PRISTINA**

**Date: 26 November 2010**

**Case: P. No. 555/06**

**IN THE NAME OF THE PEOPLE**

The District Court of Pristina, in the trial panel composed of:

EULEX Judge, Mr. Francesco Florit, presiding judge

EULEX Judge, Ms. Karen Asphaug, panel member

Local Judge, Mr. Ramadan Gudaci, panel member

assisted by the court recorder Stephen Parkinson

In the criminal case against:

**Muje Ukaj**, born on 21 January 1958 in Zallq, Municipality of Istog, residing at the same place, Kosovo Albanian,

**Nexhat Shatri**, born on 7 February 1948 in Village of Tomoc, Municipality of Istog, current residence Bregu I Diellit 2, 34/33, Pristina, Kosovo Albanian,

**Qefser Baholli**, born on 20 February 1961 in Pristina, where he is currently residing, in street Lidhja e Prizrenit 2, Kosovo Albanian.

**Blerim Svirca**, born on 10 June 1971 in Pristina, where he is currently residing in Kalabrija bldg A3, Kosovo Albanian.

Respectively charged for the criminal acts of

**Muje Ukaj, Nexhat Shatri, and Qefser Baholli:**

*Abusing Official Position or Authority contrary to Article 339 PCKK, all as co-perpetrators pursuant to Article 23*

**Blerim Svirca:**

*Money Laundering contrary to UNMIK Regulation 2004/2 section 10*

After the trial sessions held on 7<sup>th</sup>, 8<sup>th</sup>, 17<sup>th</sup> of September, 5<sup>th</sup>, 7<sup>th</sup> October, 3<sup>rd</sup>, 8<sup>th</sup> and 26<sup>th</sup> November 2010, in the presence of the Prosecutor Mr. Nazmi Mustafi, the accused mentioned above and their defense counsels;

After the panel's deliberation held on 26 November 2010;

based on the Article 390 and 391 (1) of the Kosovo Criminal Code of Procedure (KCCP)

in public and in the presence of the accused, their defense lawyers and the Public Prosecutor issues the following:

## JUDGMENT

After requalification of the charges,

**Muje Ukaj and Nexhat Shatri** are found guilty for the criminal acts of **Irresponsible Economic Activity**, contrary to article 233 CCK, the crime being committed in co-perpetration, *ex art.* Article 23 of the CCK;

Specifically, because in their respective capacities of responsible persons in the Office of the President of the Republic of Kosovo (Muje Ukaj as Secretary of the President and Authorizing Officer and Nexhat Shatri as Head of the Procurement Department in the Office of the President) **Muje Ukaj and Nexhat Shatri** acted in an irresponsible way and therefore they caused a substantial material damage to the Office of the President of Kosovo. In particular, they omitted any substantial form of due diligence and of control in the procedure of the purchase of armoured and non armoured cars described in the amended indictment;

**Blerim Svirca** is found guilty for the criminal act of **Abusing Official Position or Authority** contrary to Article 339 (1) in connection with (3) CCK;

Specifically, because as an official person, by terms of the Letter of Authorization received on 17 March 2005, and so officially delegated by the Office of the President of Kosovo, he abused his official position and exceeded the limits of his authorization with the intent to obtain, for himself and for the company Auto Park Loninggen an unlawful material benefit with correspondent damage of the Office of the President of Kosovo, in the terms described by the amended indictment;

Based on article 390, n.3 KCCP,

### **Oefser Baholli**

In relation to the same criminal acts charged against Muje Ukaj and Nexhat Shatri is found not guilty and is therefore acquitted.

For the above mentioned reasons the Panel issues the following

### SENTENCE

#### **1. Muje Ukaj**

Pursuant to article 38 of the Criminal Code of Kosovo and Article 233 and Article 23, is sentenced to imprisonment of 2 years and 2 months.

Pursuant to Article 41, paragraph 1 point 1, 42, 43 and 44 CCK, the sentence against **Muje UKaj** is suspended. The punishment shall not be executed if the defendant does not commit another criminal offence for the period of four years;

## **2. Nexhat Shatri**

Pursuant to article 38 of the Criminal Code of Kosovo and Article 233 and Article 23, is sentenced to imprisonment of 2 years and 2 months.

Pursuant to Article 41, paragraph 1 point 1, 42, 43 and 44 CCK, the sentence against **Nexhat Shatri** is suspended. The punishment shall not be executed if the defendant does not commit another criminal offence for the period of four years;

## **3. Blerim Svirca**

Pursuant to article 38 of the Criminal Code of Kosovo and Article 339, is sentenced to imprisonment of 3 years and 4 months.

Pursuant to Article 73 of the CCK the time spent in detention on remand from 1 September 2005 to 21 January 2006 shall be included in the amount of punishment.

Pursuant to Article 277 (4) of the KCCP the bail imposed on Blerim Svirca of EURO 60.000,00 pursuant to the ruling of the pre-trial judge Nurul Khan dated 20 January 2006, is cancelled.

Pursuant to Article 494 of the KCCP the same amount of money of EURO 60.000,00 is confiscated and it is transferred to the treasury of Kosovo.

## **COST**

Pursuant to Article 102 paragraph 1 of the Kosovo Code of Criminal Procedure (KCCP) the convicted persons shall pay the costs of the proceedings which are determined, in relation to the number of sessions held, in 400,00 euro.

## **REASONING**

### **A. Procedural background**

On 20 July 2006 the UNMIK prosecutor Andrea Venegoni filed with the District Court of Pristina the indictment against the four accused.

An amended version of the indictment was filed on 18 July 2007. In it, the only substantial variation was the modification of a sum at page 11 of the document, from Euro 935,000.00 to Euro 750,000.00.

The confirmation hearing was held on 12 September 2007.

With decision dated 14 November 2007 the judge for the hearing on the confirmation of the indictment confirmed all the counts towards the accused.

The case was subject to the jurisdiction of EULEX judges, following the decision of the President of EULEX Judges dated 5 January 2009, based on articles 3 and 16.2 of the

Law 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, providing that “the criminal case... shall remain under the authority of EULEX Judges in the District Court of Prishtina”.

The trial commenced on 7 September 2010. After the preliminary formalities (including the communication of the composition of the Panel, the verification of the summons to the witnesses of the day, the reading of the indictment and the pleas of the accused) the examination of the witnesses started. Witnesses Hashim Dëshishku, Bekim Canolli, and Lumniqe Murati were heard in the course of the session.

In the subsequent hearings, witnesses were heard in the following order.

On 8 September 2010 witnesses Mustaf Avdyli, Latif Islami, and Ganimete Bytyci.

On 17 September 2010 witnesses Elez Nikqi, Shyqrije Hakaj, Mentor Mulliqi.

On 5 October 2010, witnesses Xhemajl Prekaj, Skender Komoni and Nazmi Berisha.

On 7 October 2010 the trial panel took a decision on the admission of evidence and, based on the request of the parties, who lamented that they had not yet received the translations of the minutes of the hearings of the trial, postponed to the 3 November 2010 for the examination of the accused.

On 3 November 2010 the examination of the accused followed.

The Court heard the final speeches from the Public Prosecutor, the Defence Counsels and the accused on 8 November 2010.

Eventually, the panel announced the judgment on the following session, held on 26 November 2010.

### **B. Competence of the Court**

Under article 23 Item 1) j) of the Criminal Procedure Code of Kosovo (KCCP), District Court are competent to hear and adjudicate criminal cases involving charges for which the law allows the imposition of a penal sentence of at least five years. Pursuant to Article 27 Paragraph (1) of the KCCP, territorial jurisdiction is proper with the Court in the district where a crime is alleged to have been committed.

Three of the defendants (Mujje Ukaj, Nexhat Shatri, and Qefser Baholli) are charged with the criminal offence of Abusing Official Position or Authority, contrary to Article 339 (1) and (3) CCK, all as co-perpetrators pursuant to Article 23 of the same code. The said criminal offence carries a sentence in the maximum of eight years, i.e. well above the threshold requested by the law.

The last defendant is accused of money laundering, contrary to UNMIK Regulation 2004/2 section 10. The criminal offence is punishable by imprisonment up to ten years.

The events described in the charges allegedly happened in Pristina, where the consequences of the allegedly illicit behaviour took place as well.

Based on this it can be concluded that the District Court of Pristina is the competent judicial body to hear this criminal proceeding both for material and territorial jurisdiction.

At the time of the Initial Operational Capability, when EULEX mission started its executive powers (9 December 2008), the case was assigned to an EULEX panel, following a decision of the President of the Assembly of EULEX judges, Ms. Giuliana Civnini, in application of the Law on Jurisdiction.<sup>1</sup>

At the opening of the trial, the composition of the panel was made known to the parties. No objection was raised against the composition of the Panel

### **C. Summary of Evidence Presented**

During the course of the main trial, the following witnesses were heard:

#### On 7 September 2010

- (1) Hashim Dethisku
- (2) Bekim Canolli
- (3) Lumniqe Murati

#### On 8 September 2010

- (4) Mustaf Avdyti
- (5) Latif Islami
- (6) Ganimete Bytyci

#### On 17 September 2010

- (7) Elez Nikqi
- (8) Shyqrije Hakaj
- (9) Mentor Mulliqi

#### On 5 October 2010

- (10) Xhemajl Prekaj
- (11) Skender Komoni
- (12) Nazmi Berisha

On 7 October 2010, the following documents were read into the record:

- (13) statements of Michael Sawatzki
- (14) statement of Pred Koroushi

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<sup>1</sup> Law nr. 03/L-053, Law on the Jurisdiction, Case selection and Case Allocation of EULEX judges and Prosecutors in Kosovo.

- (15) statements of Michael Hellbrueck
- (16) documents provided by the Office of the President and the Treasury Department of the Ministry of Economics and Finance (in various binders)
- (17) bank documents from bank accounts of Autopark Loeningen, Ital Kosova, Deshisku and Bucaj
- (18) documents from International Legal Assistance from Germany and United States of America
- (19) evidence from searches.

#### **D. Evaluation of Presented Evidence**

##### *1. Testimony of Hasim Deshisku*

The witness, a well established business man in Kosovo, was at the time of the facts and is still now the director of the company Lesna; he was the shareholder and chairman of the board of directors. He confirmed that, in agreement with the general director and the financial director of the bank, it was decided to allow a short-term loan (two-three weeks) in the amount of 800.000,00 Euro to Blerim Svirca (through the bank account of his company, Italkosovo).

He confirmed what he had said in the statement he had given to the investigators on 3 February 2006, i.e. that Blerim Svirca after borrowing the money stated that the money would be paid back by one of the ministries of Kosovo.

The loan application, the witness recalled, was initially only a verbal one but it was subsequently followed by a written application. Mr.Deshisku confirmed the positive outlook of the bank on the client ("the fact that we lent him 800.000,00 Euro shows he was considered a very good client")<sup>1</sup>. The witness confirmed that at the time he only knew Blerim Svirca and that he had never met the other defendants before the trial.

Mr.Deshisku confirmed that no collateral or guarantee was asked by the bank when the loan was given. He justified the obviously unusual circumstance stating that "when we give short-term loans, emergency cases, no collateral was required". On the point of the formalities required and followed by the bank, he further added: In emergency cases, we did not follow this kind of contract but had a verbal agreement that he would return the money within two weeks...Yes, not just myself (had a lot of trust in him) but the whole board had. And the money was paid back". The witness refused to concede the abnormality or at least the uncommonness of the operation permitted by the bank and insisted, if also repeatedly contested, that the loan, in the given circumstance, was a normal practice.

##### *2. Testimony of Bekim Canolli*

An Administrative Assistant in the Office of the President of Kosovo (OPK) as Logistic officer and receptionist, shortly before the facts described in the indictment he had been appointed by the chief civilian officer, Mujë Ukaj, as an alternate certifying officer in the OPK, called to substitute Ganime Bytyci in case of her absence. The witness admitted to not having the needed professional qualification as alternate certifying officer, confirming that his appointment was only a formality. He remembered signing a

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<sup>1</sup>The same defendant Svirca, on the contrary, has a different opinion: in his examination on 17 September 2005, admits that Italkosova was "just surviving. Keeping the business running. Because there is a lot of competition and we were not very successful." (pg.7 of the statement).

compulsory order for the purchase of armoured vehicles for the OPK and briefly narrated the circumstances and the modalities of the administrative procedure. He recalled that he was called to sign a pre-compiled document in the office of the Secretary, Mujje Ukaj. He remembered his hesitation to sign because of the urgency imposed on him, for the relevant amount of the authorization, and due to the complexity of the procedure, to which he was not accustomed and that he did not understand. Nevertheless, he signed, at the end, obeying the order given to him by the defendant, Mujje Ukaj. After refreshing the memory of the witness, Mr.Canolli confirmed that the stated to the Prosecutor that it was an order and a strict one... "It is not that they forced me, it was a kind of pressure because it was the end of business hours and they said 'Nobody will leave this office without signing this document'".

He confirmed he met Blerim Svirca once in the office of the Secretary having coffee with him, a while after the signatures. Working in the OPK, he obviously knows the other defendants.

### *3. Testimony of Lumnje Murati*

In January 2005 the witness was appointed an approving officer by the permanent Secretary Mujje Ukaj despite her lack of experience in the field. Her entire testimony was centered on the circumstances of the signature on the Compulsory payment Order (CPO) requested of her in the amount of one million euro. The witness unhesitatingly recalled the difficult moments she went through due to the pressure exerted on her by Mujje Ukaj in order to have the CPO signed. To the expressed objection of the witness to sign, due to the amount of the order, the lack of accompanying documentation and the short time allowed to her to examine the case, at the end of the working day, the reply of the Secretary and of Nexhat Shatri was a mixture of arrogance and reassurances. The witness recognized her signature, when it was showed to her, noticing that her hand was trembling at the moment of the signature.

Lumnje Murati went on to tell that she also signed a second order for the same purchase, bearing the sum of 400.000,00 and more euro.

The witness further confirmed that she had regular contacts with the personal assistant of President Rugova, Lumturije Shabani who told her, in one occasion, "Why are you not signing this? Why are you so hesitant to sign this document?"

### *4. Testimony of Ganimete Bytyci*

As certifying officer in the OPK, at the time of the facts, she took part in the procedure for the purchase of the armoured cars, preparing the CPO 7561 with the relevant data, on the order of Mujje Ukaj.

Answering the questions of the parties, the witness wholly described her duties as certifying officer in general and in the specific case.

Upon examination by the Presiding Judge, the witness confirmed the peculiarity of the amount indicated in the CPO she had to prepare, compared with her previous experience ("according to my experience and I have worked there since 2003, it has never happened that it was issued even for the amount even of 500,000 euro") and in consideration of the yearly budget of the OPK ("2 millions and an half<sup>1</sup>").

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<sup>1</sup> The correct figure is even lower, in the region of 2.270.000,00; see statement of Hellbrueck, dated 13 March 2006, pg. 6, binder IV.

The witness discussed the abnormality of the procedure, since she was not given any possibility to check the data and the documents related to the operation she was being asked to carry out. Moreover, she was prohibited, contrary to the practice existing in the office, to retain a copy of the document and was warned to treat the issue as confidential and not to disclose the document to anybody.

#### *5. Testimony of Latif Islami*

Latif Islami was the Director of the Loans Department in the Kasabank in 2005. The witness referred to Blerim Svirca as an excellent client of the bank, “regular in payments... stable in character and with an excellent personality”. On the issue of the loan of 800,000,00 euro, the witness expressed his opinion that it was a borrowing or an overdraft on the bank account of the company Italkosova, rather than a formal loan, since no paperwork was done when giving the money and his department was extraneous to the entire procedure. The witness, requested about the irregularity of the procedure (without any documentation of the loan) responded evasively and tried to justify the activity of the bank. Near the end of his examination, he was confronted with the statement he had given to the police on 23 January 2006 where he had stated that “Blerim Svirca, as a client in casa Bank, is a bad client who has been sued in Court for not fulfilling commitments to the bank, he used the money provided by the bank that sometimes later the money would be returned to Kasabank, this money was not allowed by the Credit department”. The witness confirmed he does not know Mujte Ukaj and Nexhat Shatri.

#### *6. Testimony of Mystaf Avdyli*

An officer of the bank, he described the procedure for the borrowing of 800.000,00 euro, confirming that the Loan Committee of the bank had been involved and had authorized the loan. The witness mentioned Hashim Dëshisiku, Millazim Abazi and Millazim Zegjiri as the members of the Loan Committee that authorized the operation but referred that a written document of a session or of a deliberation of the said Committee was never given to him. Avdyli expressed his opinion that the loan was done in a regular way adding however: “But if a committee decided, whose members are the main and the second shareholder and the director of the bank in that instance, it was approved.... The practice is that the client would come to the bank and would apply and would hand over the documentation. The commission of the bank goes to the field to assess and evaluate the client and then they produce the evaluation and on the basis of the positive evaluation the request is submitted to the committee for approval and committee then decides if it should be approved”.

#### *7. Testimony of Elez Nikqi*

Elez Nikqi from 1999 until 2005/2006 was head of security for the late President Rugova. He said it was his conclusion that the reason for his substitution in that position was “the issue of the armoured vehicle coming to surface”. He added that: “they knew that had I been there, then these vehicles could not be bought in the manner they were bought and they bought on this game to keep from me the purchase of the vehicles”.

The testimony of the witness had in general a recriminatory tone, based as it was on the witness’ conviction that his career had been prejudiced.

He confirmed knowing Rame Maraj and Blerim Svirca for a long time.

On request of the defence Counsel, the witness described with an abundance of detail the purchase of an armoured car when he was head of Rugova's security.

#### *8. Testimony of Shyqrije Hakaj*

Shyqrije Hakaj is the chief of the Budget and Finance at the OPK, a position she has held since 2003. She said she signed the CPO for the payment of the vehicles described in the indictment. However, she explained, at the time she “was ailing from a gall bladder condition” and “I was not on medical leave but had to receive medication now and then. The signature performed by me could have been done by anyone”. In her words, the document was brought to her at her flat to sign saying it was urgent “and I signed it”. After refreshing the witness' memory, the witness confirmed she signed a blank document which was not accompanied by the needed documents.

#### *9. Testimony of Mentor Mulliqi*

In 2005 Mentor Mulliqi was working in Peja, as Custom officer. In that capacity, he took part in the paperwork related to armoured vehicles imported for use for the OPK. His duty was to see and examine the goods, in the specific case, the technical details, chassis number, color, number of seats, engine capacity. He remembered that the moment the documents were received, it was ascertained that the vehicles were not in the position that they were meant to be. The officers in question were told “to sort all relevant documents in relation to the vehicles and were told that the vehicles would be brought over at some other time”. The witness expressed his perplexities to his supervisor whom invited him to proceed anyway, after a consultation with the Custom headquarters in Pristina.

#### *10. Testimony of Nazmi Berisha*

Nazmi Berisha, a Custom officer from October 2002 until January 2010, had no direct knowledge of the facts described in the indictment. When the investigation of the case started, in 2005, he was requested to cooperate with UNMIK police.

#### *11. Testimony of Xhemajl Prekaj*

Xhemajl Prekaj was a shift leader in the Custom service in Peja in 2005. He confirmed the version of his subordinate in relation to the arrival of the documents related to the vehicles and of the vehicles to the Airport of Gjakova. He confirmed what said by Mulliqi, that after consultation with the Headquarter in Pristina, it was decided to clear the procedure for the importation of the cars, considering their final destination and the low or non existing risk that the entire operation resulted in damage for the Kosovo Customs. As described by the witness, four cars were physically presented for examination, while two other were missing. Besides that, the payment for the import taxation was done for six cars. As the witness confirmed, there was no custom tax evasion and the payment were done as per custom declaration.

#### *11. Testimony of Skender Komoni*

Another Custom officer, involved in the process of 'harmonization' of the documentation of importation of the vehicles for the Office of the President of Kosovo, he described, in generic terms, the procedure. His entire testimony was of minor significance.

#### *Assessment of the evidence*

In general, the examination of the witnesses was smooth and tranquil.

On only a few occasions, and by only one defendant (Muje Ukaj) the cross-examination of the witnesses introduced elements of controversy. In addition, the contestations moved by the defendant Muje Ukaj personally were not based on specific facts, but on the generic devaluation of the credibility of some witnesses (Canolli, Murati) based on their quality as cooperative witnesses.-

On the other hand, the Prosecutor (and, occasionally, the Presiding judge) only sporadically made recourse to the mechanism foreseen by article 364 KCCP in order to refresh the witness' memory.

The witnesses can be grouped in three groups.

A first group is formed by the bank employees and by Hasim Dëshishku, shareholder and chairman of the board of directors of the Kasabank. These witnesses explained the modalities of the granting of the loan to the company Italkosova, which was a client of the bank. Their statements in Court episodically departed from those given to the investigators, but with limited consequences.

For example, Latif Islami described (and repeated, despite the Prosecutor ex art.364 KCCP confronting him with the different version given to the investigators) Blerim Svirca as a good client of the bank<sup>1</sup> and a valid businessman: however, Islami had described the economic situation of the defendant in negative terms in his deposition to the investigator. In addition, the bank statements present in the file confirm that Italkosova's bank account at the time was permanently in red.

Mystaf Avdyli partially departed from his previous declaration to the investigator, at least in the part where he commented on the modalities of the loan in terms of normality.

It does not take a great degree of sophistication or experience in economic affairs to understand that the last version given by the witness is ungrounded and based only on a generic favour to the client or desire to avoid discredit for the bank which so lightly had permitted the loan operating in circumstances which should appear suspect. Common sense teaches that only the existence of the personal relationship between Blerim Svirca and the chairman of the board of directors of the bank (Mr.Dëshishku) and the proximity of Svirca to the President of the Republic of Kosovo, permitted the granting of the loan for 800.000,00 despite the lack of guarantees, in a couple of days and without any written documentation.

Despite such discrepancies, the testimonies of the three witnesses belonging to this group (Latif Islami, Mystaf Avdyli, Hasim Dëshishku) have contributed to the clarification of the facts of the case. The circumstances referred by them adequately illustrate the role of Blerim Svirca in the event, who as it will be explained better later, can not be

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<sup>1</sup> The same Blerim Svirca, in the course of the examination before the Prosecutor, dated 17 September 2005, described his financial situation as difficult.

simply reduced to the minor role of an executor of superior orders or of driver of the cars from the airport of Gjiakova.

A second group of witnesses includes the employees of the OPK. These individuals, all subordinates of the defendants Muje Ukaj and Nexhat Shatri, are Bekim Canolli, Lumnje Murati, Ganimete Bytyci, Shyqrije Hakaj.

The subject of their depositions in Court was the circumstances and the modalities through which the procedure for the purchase of the vehicles for the OPK was completed. The witnesses described in coincident terms the abnormality of the procedure, in terms of the amount of money involved, the swiftness of the process and for the substantial lack of control of the entire operation. Under the direction of Nexhat Shatri and Muje Ukaj, they were put in the condition (i.e. subject to undue pressure) of signing without the practical possibility of examining the documents that preceded the purchase and therefore were unable to check what they were doing.

The testimonies of this group of witnesses corroborate reciprocally in the description of the facts. Their respective depositions were simple accounts of facts, logical and detailed. Despite the attempt of Mr. Muje Ukaj to discredit two of them (Canolli and Murati) based on their status of being cooperative witnesses, their declarations were credible. Not only did they confirm in each passage what they said to the investigators soon after the facts (and before being declared cooperative witnesses, by the way); what counts more is that they gave precise descriptions and logical explanations for their part of activity in the procedure. At all times, they distinguished their clerical responsibility from the responsibility of those who had initiated the procedure and who imposed on them (the witnesses) a procedure with which the same witnesses had strong perplexities.

From the explanations the witnesses gave, it clearly emerged that the four (Bekim Canolli, Lumnje Murati, Ganimete Bytyci, Shyqrije Hakaj) simply executed (despite their perplexities) the orders they received for the completion of the procedure, by signing the CPO. And it couldn't be different, since the entire procedure was being conducted, in exceptional secrecy, under the direct control of the Head Secretary and the Chief of Procurement in the OPK. Muje Ukaj's attempt to place responsibility on his subordinates for the procedure used is both disingenuous and uncourageous. His approach was doomed to fail, in any case, since it was clear to the Panel, throughout the entire depositions of the four witnesses, that Bekim Canolli, Lumnje Murati, Ganimete Bytyci, Shyqrije Hakaj were in their respective roles genuine and trustful executors of orders coming from above, i.e. from Muje Ukaj and Nexhat Shatri.

To this group, the witness Elez Nikqi can be added, although his declaration was centered on his personal professional tribulations rather than on the procedure of purchase of the vehicles. For this reason, his testimony can be considered of secondary relevance.

The last group of witnesses includes Custom officers Mentor Mulliqi, Xhemajl Prekaj and Skender Komoni who, in their respective capacities, were involved in the procedure of examination of the vehicles, of harmonization of the relative documentation and of determination of the importation fees and subsequent payment.

Their depositions were substantially not contrasted. They helped to shed light on the facts of the case, confirming the payment of import taxation and, foremost, confirming that the entire procedure of purchase (including the harmonization of documentation and the

payment of the importation taxes) was treated outside of the normal practices, since the goods were for the use of the OPK.

The witness Nazmi Berisha can be included in the third group even though, for the reasons explained above, his deposition is of scarce relevance in the ascertainment of the facts of the case.

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From the evidence collected in the course of the trial and admitted by the Panel, the following reconstruction of the facts can be drawn.

Following an attack with explosives against the armoured car of the President of Kosovo, Mr. Rugova, which damaged the car and endangered the life of the Head of the Provisional Institutions of Self-Government, it was decided to purchase a number of armoured and non armoured vehicles for the exigencies of the OPK.

From the declarations of the same defendants<sup>1</sup> it emerged that the decision itself was taken at the highest level of the Institution, i.e. by President Rugova, in adherence with the advice given to him by the head of the presidential security<sup>2</sup>.

The circumstance finds a reasonable confirmation in the statement of the witness Lumnje Murati, who recalled the request of the personal assistant of President Rugova, Lumturije Shabani, with whom she had daily contacts, who asked her, on one occasion, the reasons for her hesitation in signing the CPOs<sup>3</sup>. By this we know that President Rugova, through his personal assistant, was informed of the procedure, of the existence (and amount) of the CPOs and of the presence of hesitation by at least one staff member on the specific procedure. It should be concluded that President Rugova himself, as alleged by the defendant Muje Ukaj, had taken the decision to buy the number of cars that were the object of the purchase.

Answering a question of the Presiding Judge, the same defendants have confirmed that the decision of the President was not limited to the indication of the number of cars to buy. The selection of the dealer to be contacted abroad for the purchase of the vehicles was made by Mr. Rugova autonomously, i.e. without any consultation with the procurement office. Moreover, it emerged that President Rugova had direct phone contact with the seller of the cars, Mr. Nikqi, the main shareholder of the Company Autoloningen, to whom he had indicated the needs of his office.

Of this reconstruction of the facts, there is no direct evidence, since neither during the course of the investigation nor at the trial stage, did the Prosecutor try to understand who initiated the entire procedure. Satisfied with the idea that the choice of the vehicles and of the seller had been made by those who allegedly abused the function, this aspect was never really investigated.

However, the circumstance is confirmed by some other facts.

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<sup>1</sup> Statement of Muje Ukaj and Nexhat Shatri, minutes hearing 3 November 2010.

<sup>2</sup> Statement of Baholli, minutes hearing 3 November 2010

<sup>3</sup> This episode is better described in the witness' examination *ex art.299 KCCP* dated 7 March 2006 in front of Judge Boollell (binder

4): "... with a loud and arrogant voice she (Lumturije Shabani) told me: "...Take your purse and go home if you don't want to sign it. Somebody else will come in your place and sign it... You are preventing the President from doing his work. Who are you not to sign this document?"...And being afraid to lose my job, I signed it."

First, there is no evidence that activity directed towards the identification of a possible seller occurred in the OPK, directed by the Secretary Mjuge Ukaj or in the Procurement Office, directed by Nexhat Shatri. This point will be examined at a later stage, for the role it plays in terms of juridical qualifications of the facts. For now, however, its relevance lays in its suitability to represent an element of confirmation of Mjuge Ukaj's version, that the research (if any) and the choice of the seller and of the cars was made by the President himself.

A further confirmation that the decision to buy the vehicles and the choice of the seller was made out of the office of the Secretary Mjuge Ukaj or of the Procurement Office directed by Nexhat Shatri, is in the timing of the operation.

Based on the timeline of the events represented in exhibit 3 accompanying the statement given on 7 and 13 March 2006 by the witness Michael Hellbrueck on occasion of the hearing of the extraordinary investigative opportunity<sup>1</sup>, it can be concluded that the purchase of the cars preceded the initiation of the administrative procedure for the procurement of the vehicles by the OPK.

In the various binders, evidence can be found to confirm this.

It is represented by the documentation prepared for the purchase of the cars and namely:

- 1) the letter of authorization signed by Qefser Baholli and dated 17 March 2005;
- 2) the statement by ultimate consignee and purchaser (request of export of 6 armoured cars) dated 23 March 2005;
- 3) the bank statements of the bank account of the company Italkosova, where the transfer of money in favour of Autoloninggen is documented and dated.

All these factual elements confirm that the purchase of the vehicles took place before 24 March 2005, i.e. before the procurement procedure for the entire operation begun.

The main source of information concerning the purchase is from the statements given by Michael Hellbrueck. The witness, an UNMIK investigator, made a comprehensive reconstruction of the facts, based on the information that he gathered and analyzed in the course of the investigation. His deposition was admitted as evidence in Court and can be used without restriction, since the defence counsels of the defendants (and of those suspects that have been later declared cooperative witness) were present in the course of the examination.

On the point of the credibility of the witness, no speculation can be raised: due to his professional position the witness is extraneous to the events described in the charges and to the interests that caused them. If not in a position of independence, acting under the direction of the Prosecutor, he was a detached observer and analyzer of the facts of the case. For these reasons, the argument used by the Defence Counsels at the onset of the witness' examination, that the police officer who acted as an investigator in a case can not be called to give testimony on the object of the said investigation, is not correct (and so it has been declared by Judge Boolell<sup>2</sup> in passing) and it is spurious.

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<sup>1</sup> Binder 4, n.36.

<sup>2</sup> Minutes hearing 7 March 2011, pg.3: "Article 161 lists the circumstances in which the testimony of the witness is inadmissible. None of the conditions in article 161 finds its application in the present case".

In the course of the investigation, Hellbrueck researched, collected and examined the entire documentation available of the case; before Judge Boolell, he made a thorough reconstruction of the facts, linking with a comprehensive reading the various passages.

After mentioning the starting point of the investigation (allegations of mismanagement of funds in the OPK in the press), he continued by mentioning the collection of documents on the purchase of vehicles for the OPK from various offices (the OPK itself, Treasury Department of the Ministry of Public Service and the Public Procurement Agency of the Ministry of Economy and Finance, UNMIK Custom) and outlined with the following words the suspicion that immediately gave a direction to the investigation: "Based on these documents, the price of one of the armoured cars was 338,875 Euros. I conducted a search on the Internet for the price of the armoured vehicle described in detail in the invoice. The purchase price for a similar vehicle was USD 130,000 per vehicle... Obviously, the OPK paid at least three times more... The suspicion then arose that a criminal offence was committed. The reason for procurement procedures in public procurement law is just to avoid or to prevent such a waste of money"<sup>1</sup>.

Further information about the case and the ensuing investigation is furnished by the witness in the continuation of the statement, given on 13 March 2006.

Answering the questions of the Prosecutor, Hellbrueck described the chain of money transfers and money withdrawals that took place in the second half of March 2005 between the bank accounts of Italkosova (partially owned by Blerim Svirca at the time, who acted as its manager), Auto Park Loeningen, Alpine Armouring, Inc. (the American Company which was the original supplier of the cars), and the OPK.

Besides the narration of the witness, the movements of money are clearly reconstructed both in exhibit 1 (a flowchart that is appended to the statement of the witness) and in the list of money transfers that is contained in the Memorandum<sup>2</sup> dated 21 May 2005, written by the same witness.

Let's sum them up briefly:

**23 March 2005**

From Italkosova, bank account in Kasabanka

    □ 800.000,00 euro

To Auto Park Loeningen, bank account in Germany

**29 March 2005**

From Auto Park Loeningen, bank account in Germany

    □ 324.924,80 euro and 315.181,75 euro

To Alpine Armouring, Inc., bank account in USA

**31 March 2005**

From Office of the President of Kosovo, CPO 7561

    □ 1.016.625,00 euro

To Auto Park Loeningen, bank account in Kasabanka

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<sup>1</sup> Minutes hearing 7 March 2011, pg.4.

<sup>2</sup> Binder named "Bank 1", first document of the binder.

**31 March 2005**

From Auto Park Loeningen, bank account in Kasabanka  
    ¤ 800.000,00 euro and 210.000,00 euro  
To Italkosova, bank account in Kasabanka

**2, 4, 5, 6 and 21 April 2005**

Five withdrawals in cash by Blerim Svirca from bank account of Italkosova in Kasabanka for total amount of 264.900,00 euro.

**5 April 2005**

From Office of the President of Kosovo, CPO 7561 and 5874  
    ¤ 42.224,76 euro and 430.650,00 euro  
To Auto Park Loeningen, bank account in Kasabanka

**21/22 April 2005**

From Auto Park Loeningen, bank account in Kasabanka  
    ¤ 100.000,00 euro and 30.000,00 euro  
To Italkosova, bank account in Kasabanka

**21/22 April 2005**

From Auto Park Loeningen, bank account in Kasabanka  
    ¤ 100.000,00 euro and 75.000,00 euro  
To Auto Park Loeningen, bank account in Germany

Besides the transfers of money, reported above, in the mentioned Memorandum dated 21 May 2006, Hellbrueck describes other suspicious movements or withdrawals of money from the same and from other bank accounts in the same days and by the same individuals.

These transactions are not reported here analytically, for ease of reading. Suffice it to say that they consist of a passage of money from the bank account of Auto Park Loeningen in Kasabanka on 22 April 2005 in favour of Hasim Deshishku (shareholder of the bank and witness in this trial), which almost balances a transfer of money in the opposite direction made on 14.4.2005 by Deshishku in favour of a bank account of Auto Park Loeningen in Germany.

Other circumstances that are mentioned in the Memorandum relate to (i) the date of opening of the bank account in Kasabanka by Auto Park Loeningen (30 March 2005, one day before the payment of the first CPO) and (ii) the modality of money transfers made on the 31 March from Auto Park Loeningen's to Italkosova's bank account in Kasabanka (for the total, mentioned above, of 1.010.000,00 euro). On this last point, Deputy General Director Mustafa Avdyli told the investigator that there money transfer slip of the transactions are not available because it was ordered directly by Blerim Svirca. If not authorized to operate on Auto Park Loeningen's bank account, the operation was executed anyway in consideration of the relations of Berim Svirca with the management of the bank. Anyway, in relation to the two transactions in favour of Italkosova, there has never been any recrimination by Xhevdet Nikci or Ahmet Ademaj, the two legal representatives of the company Auto Park Loeningen, who were the only individuals formally entitled to manage the account.

The list of the various money transfers is complex and may be not immediately understandable. However, looking at the big picture, what emerges is that Blerim Svirca's Italkosova, thanks to Svirca's personal relations with Hasim Dëshishku and within Kasabanka, was able to receive the funds (800.000,00 Euro) that were transferred to Auto Park Loeningen in Germany for the purchase of **six armoured vehicles** from the America supplier (Alpine Armouring, Inc.). The entire operation, as said before, was completed before the start of the procedure at the OPK.

Once the OPK paid to Auto Park Loeningen the CPOs 7561 and 5874 (for total 1.489.499,76 Euro), related to the purchase of **four armoured cars and two Hummers**, Auto Park Loeningen returned to Blerim Svirca's Italkosova 800.000,00 euro for the loan and further 210.000,00 on 31 March 2005 plus additional 100.000,00 and 30.000,00 on 21 and 22 April. No justification was given for the sum of 340.000,00 which exceeds the restitution of the loan. Of this amount, Blerim Svirca withdrew a large portion in the following days, through a series of cash withdrawals.

As described by witness Hellbrueck, the bank operations are clearly marked by singularity, exceptionality and opacity.

Blerim Svirca is the main man behind them, the person who made them all possible. Without his connections in the bank system and his capacity to guarantee that the loan of 800.000,00 euro would be returned in few days, the entire operation would not have taken place or at least not in the shape it took. For his position of acquaintance (the word 'friend' used by some of the witnesses appears really excessive to link two men, President Rugova and Blerim Svirca, so far away in terms of origin, experiences of life and age<sup>1</sup>) of the President of Kosovo and his delegated representative in the entire operation, Svirca could spend the name of the Institution he purported to represent and could gain credit and assistance in the Kasabank.

For this reason the granting of the loan (or overdraft, as specified by witness Latif Islami) was a singular and exceptional occurrence, exclusively based on personal circumstances and not in any way related to the analysis of the economic base of operation.

It is an opaque operation, in which the violations of bank regulations and of rules of good sense abound, as illustrated in part by the lack of documentation and the lack of collateral. As further evidence, the bank granted the loan to a company (Italkosova) whose bank account was showing red figures and whose manager (Blerim Svirca) had been sued by the bank for failing to pay back the money previously borrowed from the same bank. The opacity of the entire procedure is confirmed by the circumstance, mentioned above, that the return of the money to Italkosova from Auto Park Loeningen was ordered by the same Svirca.

This side of the story is adequately documented. In the folder denominated "Bank 1", the entire bank documentation is collected and ordered. The documentation is easy to consult and easy to read and understand. Given its official nature, it is not contestable.

It is worth noticing that, amongst the accused, only Blerim Svirca participated in this part of the events. Mujë Ukaj, Nexhat Shatri, and Qefer Baholli are never mentioned in the documents or by the witnesses of the trial. Both Hasim Dëshishku and Latif Islami refer to knowing only Blerim Svirca, as an entrepreneur who had contacts with the financial institution as a professional partner. Mystaf Avdyli was not asked about his knowledge of

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<sup>1</sup> On the point, see the perplexities expressed by witness Elëz Nikçi, minutes hearing 17 September 2010, pg. 7.

the accused but his testimony is obviously centered on the loan allowed to Blerim Svirca and does not go beyond that.

We leave this point as it is, for now. But at a later stage, it will be appropriate to come back to it again, in order to draw some conclusions on the entire reconstruction of the facts.

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Besides the exposition of the financial flow, the witness Hellbruek exposed the result of his investigation on the procedural aspects of the purchase of vehicles<sup>1</sup>.

He described two distinct procedures, meaning the procedure for the purchase of the vehicles in Germany, with the mediation of Michael Sawatzki, on one side, and the procurement procedure started in the OPK, on the other.

The main actor in the first procedure was Blerim Svirca. Delegated by Qefser Baholli with the authorization dated 17 March 2005, he travelled to Germany where he met on 18 March 2005 with Xhevdet Nikqi and Michael Sawatzki in order to broker the agreement for the purchase of armoured vehicles.

On the content of the meeting, the statement of Michael Sawatzki is available.

In the statement, acquired through International Legal Cooperation and read into the minutes following the decision of the Panel dated 7 October 2010, the witness explained the role of Svirca and of Nikqi in the negotiations for the purchase of the armoured vehicles. Sawatzki had been contacted as contact point with the American supplier, Alpine Armouring Inc., for which Sawatzki had worked previously. In the course of the meeting, Svirca exhibited two documents, i.e. (i) his authorization to negotiate and to buy the cars and (ii) a printout of the web page of the company Alpine Armouring Inc. The buyer (Svirca identified himself as such, as referred by Sawatzki) asked Sawatzki to contact the owner of the company Alpine Armouring, Fred Khoroushi. In the course of the phone call which followed between Sawatzki and Khoroushi, the availability of the requested car was discussed by Svirca and Nikqi. Based on the received information, that six armoured vehicles were on sale, matching the requirements of the buyer, Blerim Svirca decided to buy them. The payment for the six vehicles was made on 29 March 2005, through the two money transfers indicated above, at page 14 (for 324.924,80 euro and 315.181,75 euro respectively), from a bank account of Auto Park Loeningen in Germany to the bank account of Alpine Armouring, Inc. in USA. Alpine Armouring however, issued the invoices and the consequent export licences in the name of OPK.

In his statement, Hellbrueck further continued in the reconstruction of the procedure: he mentioned that three days after the purchase of the car, i.e. on 21 March 2005, the public procurement procedure was initiated at the OPK by Qefser Baholli.

The request for purchase filed at the office of the authorizing officer, Mujë Ukaj<sup>2</sup>, was for four armoured vehicles instead of the six already negotiated and agreed upon between Blerim Svirca with Fred Khoroushi. The authorization to purchase is dated 24 March

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<sup>1</sup> Minutes of the hearing 13 March 2006, pg.5.

<sup>2</sup> The document is in binder IV.

2005; it was subsequently forwarded to the procurement department within the OPK, headed by Nexhat Shatri. On 30 March 2005, the contract between Nexhat Shatri and Ahmet Ademaj, legal representative of the company Auto Park Loeningen was signed.

In the course of the procedure an additional step was made, with the request of the special procurement procedure (single source procedure) by Nexhat Shatri to the Public Procurement Agency within the Ministry of Economy and Finance. The request and approval bear the same date (24 March 2005).

In the days that followed, the procedure was completed with the compilation of the CPOs and the consequent payments, in various installments, described above, of the money due to Auto Park Loeningen.

With the arrival of the vehicles in Kosovo, the entire scheme was concluded.

The four armoured vehicles bought by the OPK were delivered in Gjakova. The vehicles were accompanied by the original documentation of the American supplier of the cars, Alpine Armouring Inc., indicating the total price of \$828,734 (\$692,759 and \$135,975 in the two invoices) for six armoured vehicles. Also the exportation documentation obviously showed the same price and number of vehicles.

The vehicles were then presented to the competent custom office.

The administrative procedure for the introduction of the goods in Kosovo and the payment of the importation taxation was not done at the point of arrival of the goods (the airport of Gjakova, where the goods were delivered, is a military airport and it does not have a custom office). The procedure was performed at the competent office in Peja.

The vehicles were not presented with the documentation that accompanied them at their arrival on Kosovo soil but with the documentation prepared at the OPK for the purchase of the vehicles from Auto Park Loeningen.

The custom officers heard in the course of the trial (Mentor Mulliqi, Xhemajl Prekaj and Skender Komoni) all referred to discrepancies between the vehicles and the documentation, further admitting that all hesitations and obstructions to clear the procedure (this is the expression used by witness Xhemajl Prekaj) were removed "after consultation with the Headquarters in Pristina ... considering their final destination and the low or non existing risk that the entire operation resulted in damage for the Kosovo Customs".

The discrepancies described by the witnesses consisted of the fact that the export licence (exhibit 7 in binder 4) indicated a number of six armoured vehicles while the contract signed by Nexhat Shatri and the documentation prepared by the OPK mentioned 4 armoured cars for the OPK. Prices for the vehicles and technical standards changed as well.

The exchange of the documents is well described in the deposition of Hellbrueck (page 8 and following of the minutes).

On the basis of the factual reconstruction made so far, it is now time to draw some conclusions on the evidence.

The participation of Blerim Svirca in the negotiations for the purchase of the vehicles is confirmed by a plurality of elements and is not contested by the same defendant in the last statements he gave to the investigators. Far from being only a middleman with no autonomous role, he was chosen for his privileged position of holder of a bank account at the Kasabank and person of trust of the bank shareholder Hasim Dëshishku.

In short, he was in condition to provide the financial means needed to pay the supplier of the six vehicles, Alpine Armouring, Inc. The financial operation was done through the bank account of his company Italkosova to the benefit of Auto Park Loeningen.

At the same time, for his acquaintance in the business environment and for his familiarity with visa procedures and with travelling arrangements<sup>1</sup>, he was ready to serve as a representative of the President in the specific affair<sup>2</sup>.

On the nature of the authorization received, it is important to note the following:

It is undisputed by the defence counsel and by the defendant himself, that the 'letter of authorization' dated 17 March 2005, attributed to the defendant the power to represent the President's will in the negotiations for the purchase of some armoured vehicles.

The document constitutes the formal act for the transmission of the power to negotiate from the Presidential Office to an individual (Svirca) who was not even a member of the institution.

It is a document in which the irregularities are plentiful.

First, it is signed by the head of the Security Service, who is not an authorizing officer, in the terms of the law on Public Procurement. Second, the object is insufficiently determined (it refers to 'several' vehicles without further specification). Third, it includes the negotiation of vehicles for 'members of the government of Kosova', i.e. for a different institution which was extraneous to the purchase procedure.

Nonetheless, the document was a sufficient basis for the transmission of the power to enter into negotiations with potential sellers, because of the trust that was accorded to a document coming from the Office of President and from the President of Kosovo himself.

The document was sufficient to enable Svirca to present himself as a person with the authority to negotiate (in the terms foreseen by article 84 para 1, last part of the Law of Contract and Torts<sup>3</sup>), in the name and on behalf of the President of Kosovo, Mr. Rugova.

From a juridical viewpoint, it goes without saying that such an attribution of powers was not legitimate: when a public entity or a state institution is involved, any delegation of power must be done formally, with the appointment of an officer through the procedure foreseen by the law on Public Procurement.

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<sup>1</sup> Witness Elëz Nikçi (minutes hearing 17 September), Muje Ukaj, Qel'ser Baholl (minutes 3 Nov. 2010, pg.45) confirmed Svirca's role in the organization of the travel of President Rugova to Rome for the funeral of Pope John Paul II in 2005. It should be noticed, however, that the Pontiff's funeral took place only in May 2005, i.e. *after* and not *before* the attack on President Rugova's motorcade, as implicit in the defendants' reconstruction. Svirca recalled his role of coordinator of President Rugova's travels to Italy on occasion of Mother Theresa's beatification, the Pope's funeral and the President's summer holidays: statement 17 September 2005, pg. 8.

<sup>2</sup> For the relation between Svirca and President Rugova, see minutes 17 Sept 2010, pg 45: Qel'ser Baholl: "Blerim Svirca came regularly to President Rugova's place for many years and he would perform tasks upon request of the President. I never attended a meeting between them so I don't know the content of their discussions. Blerim Svirca was a businessman, running his own company".

<sup>3</sup> Law on Contract and Torts of the Federal Republic of Yugoslavia (Zakon o obligacionim odnosima), published on the Official Gazette of Yugoslavia n.29/1978.

However, this did not prevent Blerim Svirca from acting on behalf of the delegating authority, in the conviction, both from his side, and from the side of the seller of the vehicle (Fred Khoroushi, of Alpine Armouring, Inc.) that the procedure was correct and sufficient to establish the terms of the contract of purchase of the vehicle.

At the same time, the two sides involved in the negotiation for the purchase of the vehicles (Svirca and Xhevet Nikqi on one side; Fred Khoroushi and Michael Sawatzki on the other) were aware that the simple authorization was not sufficient to stipulate the contract with a public institution and that the agreement reached orally would have to be confirmed by a Public Procurement Procedure.

This is implicit, in the case of Alpine Armouring, Inc.: as car armourer and armoured cars dealer, a significant portion of the business must be generated by the public sector and by purchases from public entities for their institutional needs. Experience teaches that in such cases verbal contracts are not allowed and that, on the opposite, a procedure to assess the needs of the institution and to guarantee that public money is spent in the best possible manner are always put in place in different countries. For Khoroushi, an experienced businessman, there was no reason to believe that in the case of the Presidency of Kosovo, a verbal agreement with a proxy was sufficient.

As for Svirca, he could not have ignored the need of a subsequent procedure at the level of the OPK, if for nothing else, for his personal interest to recover the money lent to Auto Park Loeningen. Indeed, for his position as a proxy and financier of the entire operation, he had to be sure that the cars would have been purchased by the OPK at the end and that the loan would be paid back in a short period of time. His exposition towards Kasabank was consistent and the only argument to convince the bank to lend him the money was the trust that the entire operation would be successful from the beginning, that no risk was taken either by the Svirca or by the bank, given the guarantee that the OPK would be the final buyer and payer. In these terms, the loan was not seen as an investment, whose profitability was dubious; it was seen by Svirca and Deshishku as a simple temporary transfer of money, due to be returned in few days<sup>1</sup>.

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As known, Blerim Svirca has chosen to remain silent in the course of his examination in Court. Asked whether he wanted to speak or to remain silent, he replied: "I would like to stand by my statement I have given previously and remain silent today"<sup>2</sup>.

In his statements (Svirca was heard in numerous occasions in the course of the investigation, on 19 July, 14 September, 26 September, 28 September and 10 October 2005 and on 16 January 2006) the defendant tried to portray himself as a simple executor of the President's will. More, he tried to give of himself the image of an unaware instrument in the hands of Mr. Sali Cacak, the Advisor of the President of Kosovo, sent to Germany with the task to deliver an envelope.

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<sup>1</sup> Hasim Deshishku, in his deposition 3 Feb 2006, confirmed in Court on 7 Sept 2010, recollected that "Svirca stated that the money would be paid back by one of the ministries of Kosovo".

<sup>2</sup> Minutes hearing 8 November 2010, pg.20.

In the last of Svirca's versions, a few days after the attack on the presidential motorcade, he was contacted by Sali Cacak for the execution of the said errand. An Italian visa was arranged for him to travel into the Shengen area; on the same day, he bought two plane tickets for the flight to Dusseldorf scheduled on the next day, in order to meet the consignee of the envelope, Xhevet Nikqi, a car dealer that he had known from about 1995.

In the previous version he had excluded his involvement in the business.

In his first statement (19 July 2005), he negated any participation and role in the negotiation for the purchase of vehicles for the President of Kosovo. He confirmed transferring the sum of 800.000,00 Euro from the bank account of his company to the bank account of Auto Park Loeningen, but refused to acknowledge that he knew the reason for the request of money<sup>1</sup>, speaking of a simple request of money from a friend and on the phone. In the first statement, he didn't mention his travel to Germany and did not link the transfers of money to the purchase of the cars<sup>2</sup>.

Concerning the amount of 340.000,00 euro received by Auto Park Loeningen on the same day of the restitution of the loan (210.000,00 euro received on 31 March) and on 21 and 22 April 2005 (130.000,00 euro)<sup>3</sup>, he explains it was a loan that he had asked of Xhevet Nikqi in order to buy some land "from a Serbian". Asked which land, for which price and from whom, Svirca replied in an evasive way, that he was not interested in a specific plot of land and that anyway the projected investment aborted immediately, since he had to give the money back to Xhevet Nikqi in a short time.

Now, the justifications given by Svirca (less than three months from the facts) are not corroborated and are scarcely credible.

About the loan allegedly received by Nikqi, one may ask why Svirca, who had demonstrated the ability to receive 800.000,00 euro from the bank and to give it back to the bank in one week's time (from 23 March to 31 March) did not think to ask the bank directly. He says he had to pay back the loan to Nikqi only few days after receiving the money. He said he did so withdrawing the money from the bank account where it had been transferred (Italkosova bank account, from the bank account of Auto Park Loeningen) and giving it in cash in banknotes of 500,00 euro to Xhevet Nikqi in Pristina. But this reconstruction does not make sense and numbers do not add up: Italkosova received 210.000,00 euro (in addition to the 800.000,00 euro of the restitution of the loan) on 31 March from Auto Park Loeningen; 4 withdrawals of money –allegedly given back to Nikqi- took place respectively on 2 April (5.000,00 euro), 4 April (52.900,00 euro), 5 April (100.000,00 euro) and 6 April (47.000,00) for a total of 204.900,00 euro.

But then, again, Italkosova received from Auto Park Loeningen 100.000,00 euro on 21 April and 30.000,00 on 22 April. Svirca withdrew 50.000,00 euro in cash on 21 April.

The timeline of money transfers and cash withdrawals does not help corroborate the version of Svirca. Also if the panel believed (which is not the case) that the restitution of such amount of money is done by expert businessmen in cash and without signing a receipt, it does not make sense that the loaned money (210.000,00 euro) is asked back in less than a week, in different *tranches* and is followed, after just a couple of weeks, from

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<sup>1</sup> See, on the opposite, the testimony of Deshishku, mentioned in the first footnote of the previous page.

<sup>2</sup> Page 2 of the statement 19 July 2005: "Question: Does that have to do anything with the requested vehicles of President Rugova? Answer: No. Q.: Were you involved in any way with these vehicles? A.: No".

<sup>3</sup> Above, pg.15.

another money transfer in the same direction (Auto Park Loeningen – Italkosova). In the second interview, held on 17 September, he justified the restitution in cash because the bank account of Auto Park Loeningen had been blocked by the German Authorities. But, as shown in the document dated 21 May 2005 (Memorandum to the International Prosecutor, prepared by the Investigator Hellbrueck) both bank accounts of Auto Park Loeningen, in Germany and in Kosovo, continued to operate well beyond the date of the alleged restitution of the money to Nikqi. On occasion of the second examination, on 17 September 2005, the Defence Counsel of Blerim Svirca, Ms. Nekibe Kelmendi, handed over to the Prosecutor a declaration made in front of a German notary (half in German and half in Albanian!), where Xhevdet Nikei confirmed giving 340.000,00 as a loan to Blerim Svirca and receiving the same amount back from him. The said declaration does not have any credibility and it shows one of the main aspects of the line of defence of Blerim Svirca, based on the attempt to create false representation to conceal the truth. The document is not credible for two reasons.

First, it comes from the person that has received the greatest advantage from the entire fraudulent operation at the damage of the OPK (it was through his company Auto Park Loeningen that the cars were commercialized in Europe and he was to receive the disproportionately high payment for vehicles costing less than one half the money spent by the OPK for their purchase).

Second, the document proves too much: in it, Nikqi declares having received back the same sum he had given as a loan to Svirca (340.000,00 euro). But, as seen above, Svirca withdrew in cash from the bank account of Italkosova 80.000,00 euro less than the 340.000,00 received. In addition, the last withdrawal (50.000,00) was made the same day (21 April) when the second installment (100.000,00 euro) of the alleged loan was transferred to Svirca, one day before the last part of the 340.000,00 was given. This is sufficient to show that Svirca did not withdraw the money to pay back Nikqi.

The statement of Xhevdet Nikqi, therefore, is not trustworthy; it must be taken as a favour made by Nikqi to Svirca, an attempt to corroborate the defence of the defendant with a false statement.

In conclusion, Nikqi's readiness to sign a false statement in order to give credit to Svirca's explanation of the transfer of money and of the withdrawals, is an indicator of the solidarity that exists between the two.

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As said, it is only on 10 October that Svirca admitted, if also in very minimal terms, his participation in the negotiations preliminary to the purchase of the vehicles.

In previous statements (19 July, 17, 26 and 28 September) the accused had refused to admit it or had preferred to remain silent and not to answer to the interviewer, when asked the specific question ("have you participated in the purchase of the vehicles for the OPK?") or when he felt that the interrogation was heading toward that direction.

It is obvious to say (the argument was used by the Defence Lawyers of the Defendant in the course of the examination 10 October 2005, in order to reply to the question of the Prosecutor: "Why didn't you tell me these things since the first interview?") that "the defendant is entitled to change his statement and ... he has the right to remain silent".

The defendant does not speak under oath; he can lie or he may prefer to remain silent. This is a fundamental application of the principle “*nemo tenetur se detegere*” (privilege against self-accusation, also said freedom from self-incrimination<sup>1</sup>) which finds in the legislation, at the level of the Constitution<sup>2</sup> and at the level of ordinary legislation<sup>3</sup>, positive confirmation. The principle means that the defendant who does not say the truth or who prefers to remain silent, can not suffer negative consequences from his/her choice. However the principle can not be interpreted in the sense to prevent the judge from drawing inferences from a change of version by the defendant. And the specific conclusion that can be reached in the specific case is that the concealment by Svirca of his involvement is motivated by his desire to minimize his knowledge and role in the facts, in the awareness that unveiling the real dimension of his participation (the participation in the negotiation on one side; the procurement of the funds for the entire operation, on the other side) would have worsened his position as accused.

Through the words of Sawatzki (who, as mediator paid by Alpine Armouring, is a witness who does not have any specific interest in the investigation and is therefore credible) the Panel has learned that Blerim Svirca had a decisive role in the negotiation. The defendant’s contribution can not be reduced to that of the postman who delivers to Xhevdet Nikqi a document, as pretended by Svirca until the end.

The letter of authorization signed by Qefser Baholli was in favour of Svirca, not of Nikqi. In addition, the documents seized in Svirca’s house, on 19 July 2005, i.e. 2 printouts of different models of armoured cars with prices and different configurations, indicate that Blerim Svirca was not a simple executor of the requests of Sali Cacaj.

Now, it is surely possible that Svirca was not part of the initial exchange of information and agreements between the Advisors of the President of Kosovo (the mentioned Cacaj and the Security Advisor of the President, Rame Maraj) and Xhevdet Nikqi<sup>4</sup> on the number of cars to buy and their features and price. However, the evidence accumulated by the Prosecutor shows that he was immediately made part of the party leading the business and was accorded a particular status of trust, for his role, his familiar links<sup>5</sup>, his knowledge with Xhevdet Nikqi and his dynamic character.

Let’s now turn to the defendants Muje Ukaj and Nexhat Shatri.

It is understood that in the Prosecutor’s reconstruction of the facts, the existence of a criminal agreement directed to defraud the budget of the OPK from the staff members of the same OPK was never assumed. It is understood that the charge of abuse of office or

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<sup>1</sup> On the exact boundaries of the principle, extrapolated from article 6(1) of ECHR and enshrined in art 14(3)(e) of ICCPR, see *Saunders v UK 1996-IV; 23 EHRR 313 para 68 GC, Murray v UK 1996-I; 22 EHRR 29 para 46 GC.*

<sup>2</sup> Article 30.1.6 of the Constitution of the Republic of Kosovo: *Everyone charged with a criminal offense shall enjoy the following minimum rights: ... (6) to not be forced to testify against oneself or admit one’s guilt.*

<sup>3</sup> Article 11.2 KCCP: *the defendant shall not be obliged ... to answer any questions and ... shall not be obliged to incriminate himself or herself or his or her next of kin not to confess guilt.*

<sup>4</sup> On the exchange of phone calls at the highest level, see above, pg.12.

<sup>5</sup> His father was the handyman of the President’s family (see Svirca’s statement of 17 September 2005, pg.8; the examinations of Muje Ukaj and Qefser Baholli, pg and pg. respectively); Svirca presents himself as contiguous in some degree to the LDK, the political party lead by President Rugova (statement 17 September 2005, pg.10).

position is not linked to a direct patrimonial advantage of Muje Ukaj or Nexhat Shatri in particular.

And indeed, the investigation did not expose any link between the three or between them, Svirca and/or Xhevdet Nikqi, which may support the allegation of a fraudulent scheme or of any agreement for any illicit profit to the damage of the budget of the OPK.

Research in this direction was made in the manner of phone interceptions/disclosure of financial data. But they did not bring about anything significant.

This profile is reflected in the formulation of the indictment, where a possible personal advantage for one or more of the three accused is not mentioned and is not delineated.

By doing so, it is understood, the Prosecutor has renounced bringing any evidence of a possible personal interest in the affair by Muje Ukaj, Nexhat Shatri and Qefser Baholli.

This configuration of the charge, however, has its implications.

In the absence of any element of intentional material advantage for the alleged perpetrator, for some other individual or for a business organization, or of any intentional damage caused to anybody or any business organization, the application of the provision of article 339 CCK is obviously problematic.

In order to distinguish a criminal abuse from innocuous malpractice in the exercise of a public power or from any sort of improper handling of public functions devoid of criminal relevance, the specific intent of obtaining a material benefit or of damaging someone or an organization is necessary.

The specific intent constitutes the essence, the parameter that qualifies an otherwise indistinct and generic behaviour as a criminal offence. If the specific intent is lacking, the misuse of a public function which may constitute the abuse is meaningless; it is reduced to a wrong behaviour which serves no purpose; it's a mistake that, as all mistakes, is not made on purpose.

In other words, it is difficult (and incompatible with art.339 CCK) to imagine an abuse which is done intentionally but purposeless, i.e. without a specific intent.

On these premises, the behaviour of the two officers of the OPK must be requalified.

The facts described in the indictment in relation to Muje Ukaj and Nexhat Shatri have been substantially proven.

The two, in their respective functions of General Secretary of the OPK and of head of the Procurement Office of the OPK, prepared the paper for the procurement procedure for the purchase of four armoured vehicles and two non armoured vehicles. In order to do so, and to do it swiftly, they imposed their authority on their subordinate, accelerated the procedure in a manner which did not leave any space for reflection, and they ran blindly to execute what they perceived as the indisputable will of their superiors.

By doing so, they omitted the due diligence.

Convinced that the correct performance of their professional mandate consisted in the blind execution of whatever decision was coming from above, they omitted any scrutiny, any assessment of feasibility or legitimacy of the purchase.

When requested from the President, they were unable to use any degree of discretion. It's a process of nullification of individual personality and responsibility, based on absolute trust in the superior.

But, as noticed by Hellbruek in his statement<sup>1</sup>, "the reason for procurement procedures in public procurement law is just to avoid or to prevent such a waste of money"<sup>2</sup>.

Muje Ukaj and Nexhat Shatri attempted to validate this purchase with a public procurement procedure. However, a purchase that had already been concluded at Presidential level (i.e., between the President or his advisors Cacaj and Maraj, on one side, and Xhevdet Nikqi, on the other side) meant that any possibility to expose the public interest in the procedure was excluded. The public procurement procedure, at that point, was void: if the contract was already concluded (the cars were already paid *before* the start of the procedure, on 24 March), why to start the procedure? At that point, the procedure was a mockery. Until the very end, Muje Ukaj with obstinacy showed his incapacity to understand where he had committed a violation. Until the end, he professed his adhesion to the forms, his respect for the letter of the law on public procurement.

The omission of the due diligence by the two officers has caused damage to the OPK.

Muje Ukaj and Nexhat Shatri renounced (or better, they didn't even try) to research different options available on the market for the same goods.

The Defendants and their respective defence Counsels put forward several defensive arguments, on the point. They said that (i) there was the need of an urgent supply of the goods and that (ii) it was a single source procedure. In addition, they said, (iii) the procedure, as performed, was approved by the competent authority (Public Procurement Agency of the Ministry of Finance and Economy).

The arguments are not grounded, in the opinion of the Panel.

While it is uncontested that the matter was urgent, this does not allow the omission of procedures and it does not authorize officers (Sali Cacaj and Rame Maraj, in the specific case) who do not hold the qualification of authorizing officers and that are extraneous to the Procurement Office, to negotiate the purchase of vehicles for the OPK, determining model, make and number of the cars to buy.

Analogously, reasons of urgency do not constitute a justification for Muje Ukaj and Nexhat Shatri from abstaining from performing their respective duty with due diligence.

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<sup>1</sup> Minutes of hearing 7 March 2006, pg.4.

<sup>2</sup> The same concept, expressed in the words of Section 1 (in Title I, Chapter 1) of the Law on Public Procurement in Kosovo, 2003/17 reads as follow: "The purpose of the present law is to ensure the most efficient, cost-effective, transparent and fair use of public funds, public resources and any other funds and resources of contracting authorities in Kosovo...."

Section 3 (Exemptions) of the Law on Public Procurement states that: “3.1 Notwithstanding any other provision of the present law, a contracting authority shall not be required to use or comply with any specific procurement procedure nor to observe the provisions of the present law on transparency to the extent that such compliance and/or observance would compromise legitimate secrecy or security concerns when conducting procurement activities leading to the award of a public contract that the SRSSG and the Prime Minister have agreed to exempt from the application of the present law because (i) the performance of such contract requires, under the law applicable in Kosovo, the use of special security measures, or (ii) the SRSSG and the Prime Minister have agreed to classify the subject matter of such contract as secret”.

The provision, which excludes ordinary procedures, does not apply in the current case, for obvious reasons.

In addition, the Law on Public Procurement foresees the following exceptions to the rule set out by Section 30 (open procedures in conducting procurement activities leading to the award of a public contract). They are spelled out in article 31 (Restricted Procedures) and in article 34 (Negotiated Procedures Without Publication of a Contract Notice).

Both articles, in different ways, foresee the exclusion of open procedure, should some circumstance occur.

In the first case (Section 31) a restricted procedure is permitted “if the concerned Procurement Officer, on the basis of objectively verifiable factors and without any discriminatory intent, makes a formal written determination that: a. the concerned product, service or works – by reason of its/their highly complex or specialized nature – can only be supplied, provided or performed by an economic operator having adequate technical, professional and/or financial capacity”. This eventuality clearly did not recur in the specific case: there are no “objectively verifiable factors” to indicate that a second-hand car dealer in Germany was the only holder of “adequate technical, professional and/or financial capacity”.

In the second case (Section 34) “34.2 A contracting authority may seek an authorization to use negotiated procedures without prior publication of a contract notice to conduct a procurement activity having as its object the award of:

a. *any public contract:*

(i)....;

or

(iv) if, insofar as is strictly necessary for reasons of extreme urgency brought about by objectively verifiable events that were not reasonably foreseeable by the concerned contracting authority, such contracting authority cannot afford the time required to conduct any other procedure provided for by the present law.”

The provision that proceeds is apparently fitting the situation in which Mjue Ukaj and Nexhat Shatri have initiated the procurement procedure for the purchase of the armoured vehicles.

It is uncontested that there were “reasons of extreme urgency brought about by objectively verifiable events that were not reasonably foreseeable by the concerned contracting authority”.

However, accepting passively the decision formed above, both Muje Ukaj and Nexhat Shatri omitted their duties foreseen in the last paragraph of Section 34. Section 34.9 reads: "The conduct of a negotiated procedure without publication of a contract notice shall not in any way relieve a contracting authority of its obligation (i) to play an active role in determining the terms of the contract, with special reference to prices, delivery deadlines, quantities, technical characteristics and guarantees, (ii) to ensure that the contracted price is not higher than the concerned market price, and (iii) to carefully assess the quality of the concerned product, service or works."

The two employees of the OPK, respectively CAO (chief authorizing officer) and PO (procurement officer) violated the provision because they did not take any active role in the determination of the terms of the contract, with special reference to the prices; they did not ensure that the contracted price was not higher than the concerned market price; they did not investigate or tried to understand if the quantity of the vehicles was adequate to the needs of the OPK.

Had they performed their task, they would have actively determined the terms of the contract, and not simply rubber stamped it from Qefser Baholli and Ahmet Ademaj; if they had determined the terms of contract with special reference to the prices, they would have at least tried to understand if the price indicated in the contract made sense at all or if it was disproportionate; they would have immediately understood that the price for each vehicle was a multiple of the market price; eventually, they would have seen that the number of cars that were being purchased was senseless.

On this last point, in particular, it may be the opinion of Muje Ukaj<sup>1</sup> that whatever the number, model or make of cars requested by the President of Kosovo, the request had to be executed because that was the will of the President and because the security of the President was at stake. However, it is clear that the provision of the law on Public Procurement would not permit such a practice: for its exceptionality, the procedure foreseen by section 34 can not logically be applied beyond strict necessity. In the specific case, it could not be applied to the purchase of six cars, i.e. beyond the number of cars strictly necessary for the security of the President in the immediate aftermath of the attack on the President's car. Of course, one may say, who can decide what is the number of cars, if not the President himself, assisted by the Security Advisor Rame Maraj and the Political Advisor, Sali Cacaj? How can the judge assess the need of the highest institution of the Country?

The answer is quite simple. It is indicated in two documents.

The first one is the letter of authorization 17 March 2005, handed over by Baholli to Svirca, which entrusts Svirca with the power to negotiate the purchase of vehicles also for 'members of the government of Kosovo'. Now, the government of Kosovo is a distinct institution from the OPK. The OPK should have not decided on behalf of the Government and should have not burdened the budget of the OPK for the purchase of good used by another institution. Was the office of the Government of Kosovo consulted? Who made the assessment of the urgency and of the risk of attack on members of the Government? In essence, the document shows that the standards indicated in article 34.9 of the Law on PP were not held in consideration and that the entire procedure was done with

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<sup>1</sup> Minutes hearing 3 November 2010, pg 10 and following

approximation and abuse. In conclusion, it shows that reasons of urgency existed only in part.

There are documents that show, beyond any doubt, that the purchase of six vehicles was disproportionate and that the conditions to buy the cars with the omission of the publication of the notice of contract were not fulfilled.

They are the request of the chief of the Kosovo Protection Corps (KPC) and the subsequent approval by the head of the Administration of the OPK for the use of the two Hummers bought in the same occasion and with the same procedure utilized for the purchase of the four armoured Chevys. It is an uncontested circumstance, which is confirmed by the two documents listed above, that the two unarmoured vehicles were not used by the OPK. They were parked somewhere in a garage rented and paid by the OPK and left there to rest until requested by the KPC for their needs. How is it possible to state that it was impellent to buy two Hummers for the OPK, if they were never used? Why were they bought through the urgent procedure foreseen by Section 34 LPP, if they were left unused for years? And last, assumed that it was necessary the swift purchase of armoured cars for the security of the life of the President of Kosovo, why were two non armoured cars bought with the same procedure?

The impossibility to find a logical answer to the questions above shows that the arguments put forward by the defence counsels are ungrounded.

The Panel is of the opinion that the purchase of the two Hummers and of some of the armoured cars was disproportionate and in violation of the principles of the Law on Public Procurement.

The decision to start the procedure without an open procedure and without a proper scrutiny of the contractual conditions is at the basis of the damage caused to the budget of the OPK for the disproportionate price paid for the goods.

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What was the size of the damage?

The amount of the loss inflicted on the OPK by the operation can be summed by the following operation.

If  $X$  is the damage,  $Y$  is the money spent by the OPK for the purchase and  $Z$  is the initial cost of the cars purchase by Auto Park Loeningen from Alpine Armouring. In the same equation,  $J$  represents ancillary shipment and  $K$  is a deduction for the potential mediation service cost that the mediator in the purchase (Auto Park Loeningen, not Svirca) should have legitimately charged.

$$X = Y - (Z + J + K)$$

When we know that

$$Y = 1.489.499,72 \text{ (amount determined by OPK in CPOs and transferred to the bank account of Auto Park Loeningen)}$$

$$Z = 639.800,00 \text{ (amount indicted in the invoices sent by Alpine Armouring. Prices are indicated both in dollars and in euro—which is taken as parameter)}$$

J = 11.000,00 (as per testimony of witness Hellbrueck, minutes 13 March 2006)  
K = 64.000,00 (the amount is discretionarily determined by the Panel: if also ordinary business standards limit the mediation service fees to a modest percentage of the value of the contract –usually 3/5 % - the specific circumstances of urgency and secrecy of the case justify a larger percentage, in the region of the 10% of the value of the contract; as a term of comparison, the fee paid to the other mediator in the contract, Sawatzki was of 44.000,00 euro)

It is easy to establish that the value of X is therefore 774.699,72.

It represents the damage suffered by the OPK in comparison to a negotiation not influenced by the negative factors described above.

On the other hand, the Panel does not consider as damage the extra-taxation for the importation of the vehicles at a price which was artificially inflated. If it is uncontested that the purchase at a higher price meant a higher level of fiscal imposition on the operation, it is also true that the fiscal revenue benefited the Kosovo Consolidated Budget (KCEB). In other words, since the budget of the OPK is part of the KCEB, the operation, from an economic view point, was neutral.

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To the damage, a similar advantage corresponds for the mediator, Auto Park Loeningen.

Does this margin constitute the honest retribution of the mediation activity done by Auto Park Loeningen in the negotiation? Can it be said that, from the viewpoint of the German car dealer, that the operation is an ordinary purchase and re-selling of vehicles? And that in the passage, the seller (Auto Park Loeningen) was free to determine the price of the goods?

And more, in these transactions, what was the role of Svirca? Was he an associate of Xhevdet Nikqi and Ahmet Demaj or was he kept out of the negotiation procedure, unaware of the profit that his friend Nikqi was doing for himself at the damage of the OPK?

The Panel is of the opinion that the size of the margin is incompatible with any decent commercial practice and is only justifiable in terms of a fraud to the damage of the public budget.

It has been noticed that Xhevdet Nikqi and Ahmet Demaj have not been indicted in Kosovo nor have been convicted in Germany, where they were investigated.

The argument is inconsistent. The missed involvement of the owner of Auto Park Loeningen in the investigation by UNMIK may be justified by the different interpretation that the UNMIK Prosecutor has given of the facts.

Or may be justified by the will to avoid *double jeopardy*. The two (Nikqi and Ademaj) were being prosecuted in Germany. And the acquittal decision of the County Court of

Osnabrick, 1<sup>st</sup> Higher criminal division, case KLS/730 Js 19170/05 – 2/08<sup>1</sup> against Xhevdet Nikqi and Ahmet Demaj for the crime of fraud and other, is exclusively based on a cost-oriented evaluation and on the denounced lack of cooperation by Kosovo Authorities and UNMIK rather than on the assessment of the facts of the case and on the legal qualification of the charges.

It's an acquittal decision based on insufficiency of evidence that can not be taken in favour of the accused<sup>2</sup> as a generic estoppel from prosecution in Kosovo.

The Prosecutor has qualified Svirca's conduct as money laundering, contrary to section 10 of UNMIK Regulation 2004/2 and the conduct of the three other defendants as abuse in office, in violation of article 339 CCK.

However, the Panel thinks that the reconstruction of the fact as emerged in the course of the trial does not permit those qualifications.

The money laundering is precluded for the fact that Svirca, for the part taken in the negotiation, has not only profited of the money, but he has actively participated in the organization of the entire operation.

There are no sufficient factual elements to establish a form of coordination between Svirca and the other defendants, in the terms of article 23 CCK. But there are sufficient elements to establish that he abused of the official authority entrusted to him with the letter of authorization dated 17 March 2005.

Article 339 CCK reads: "(1) An official person who, with the intent to obtain an unlawful material benefit ... abuses his... official position... shall be punished by imprisonment.

(2)...

(3) when the offence result in a material benefit exceeding 5.000 EUR, the perpetrator shall be punished by imprisonment of one to eight years".

Article 107 CCK indicates that: "(1) The term 'official person' means:

1)...

2)... an authorized person in a ... legal person, who, ...by ...provision issued in accordance with the law, exercises public authority, and who within this authority exercise specific duties."

There is no question that the Presidency of Kosovo is a legal person in the broad terms foreseen by the same article 107 para (4) CCK<sup>3</sup>

Blerin Svirca was authorized to act on behalf of the President of Kosovo by the letter of authorization, issued in accordance with the law, to exercise a public authority, i.e. to negotiate the purchase of vehicles for the OPK.

It matters little that Svirca was not a public officer and was not on the payroll of the OPK. The concept of official person is different from that of public employee. Of course, in

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<sup>1</sup> A copy of the Court decision was handed over in the course of the hearing 8 November 2010 by Defense Counsel Troshupa and translated on 22 November 2010.

<sup>2</sup> As requested by Defense Lawyer Bajram Tmava in the course of the hearing 8 November 2010, pg.22.

<sup>3</sup> the term "legal person" means... an institution ... which, within the framework of its regular business ... provides resources and disposes of them"; in the case of the Presidency of Kosovo the provision and disposal of resources can be referred to the employment relations, supply contracts, rent of premises etc which are necessary for the activity of the office.

most cases, the two concepts overlap. But they still retain their respective distinct function and autonomy.

The gardener of a public premise does not exercise public authority, in the terms of article 107 CCK, if also he/she is on the payroll of the public institution for which he/she works.

On the other side, all persons elected/appointed to honorary functions within a public entity are not usually remunerated for their activity.

In his capacity, Svirca negotiated the purchase of the vehicles, made available the funds for the purchase of the vehicles by Auto Park Loenigen from Alpine Armouring Inc., received part of the goods, received the money which was originated from the fraud committed by Auto Park Loenigen at the damage of the OPK and finally appropriated of part of the money (340,000,00 euro) withdrawing it in cash from the bank account, abusing his position.

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As far as the other three defendants are concerned, the Panel considers that, at the end of the trial, the involvement of Qefser Baholli must be distinguished.

If his name and signature are also at the bottom of a number of documents (the letter of authorization, the licenses of exportation of the goods, in first place), his role and participation in the events must be devaluated. For his modest profile (the driver of the President, promoted to Head of Security services at the residence of the President, but subordinated to the Advisor of the President for issues of security, Rame Maraj) and for his modest intellectual level, as emerged in the course of the entire trial and in particular in the course of his examination, he was a mere executor of his superiors' will. To append on him a criminal liability appears disproportionate in relation to his limited capacity to influence the ongoing or to take an autonomous decisions. For his modest education and social extraction, he was requested to sign documents that he was probably not in a condition to understand (legal documents in a language that he does not speak and that he was not in condition to prepare). He played the role of an instrument in the hands of others.

Muje Ukaj and Nexhat Shatri, on the opposite, could not claim to having been in the same position. More skilled from an intellectual viewpoint, they were at the head of the entire administration of the OPK or of an important branch of it (procurement office). With a good level of education and accustomed to direct people, they were in the condition to understand that the contractual activity that they were performing was in detriment of the administration that they should have protected from abuses.

If also not linked to the fraud committed at the damage of the OPK or to the abuse committed by Svirca (or at least their involvement in these two crimes has not been proven) they have committed the crime foreseen by article 233 CCK (Irresponsible Economic Activity).

Article 233 reads: "A responsible person, within a ...legal person who, by consciously violating the law ..., acts in an irresponsible way and hereby causes substantial material damage to the...legal person shall be punished ....

Pursuant to article 107 (2), a responsible person is “an individual in a...legal person who because of his ...function ... is entrusted with duties which are related to the implementation of the law... in managing or administering property.

Muje Ukaj was the head of the administrative hierarchy of the OPK. Nexhat Shatri was his subordinate, in turn head of the procurement. They both held managerial functions in relation to the acquisition and administration of the OPK’s property.

If also the damage that was caused to the OPK was not intentionally caused by them, they consciously omitted the due diligence imposed on them by the Law on Public Procurement and specifically by article 34.9, as seen above.

By doing so, they acted irresponsibly and caused the substantial material damage described at pages 28/29.

#### *E. Sentencing*

When imposing the criminal sanction, the Court must bear in mind both the general purpose of punishment to suppress socially dangerous activities by deterring others from committing such criminal acts, and the specific purpose to prevent the offender from re-offending. In the present case, the Panel came to the conclusion that only by applying the imposed sentence of imprisonment would the above mentioned double purpose be reached.

The behaviours attributed to the three defendants Muje Ukaj, Nexhat Shatri and Blerim Svirca are different for origin and gravity.

Svirca profited enormously from the illegal activity that he contributed to perform to the damage of the OPK, while the other two, for an ill interpreted sense of loyalty, acted irresponsibly.

For each of the defendants, the imposed sentence is meant to work as a deterrent from the commission of further criminal activity.

In determining the duration of punishment, the Court must evaluate all mitigating and aggravating factors, pursuant to Article 64 paragraph (1) of the CCK.

The Court considered as a mitigating circumstance for Muje Ukaj and Nexhat Shatri the condition of psychological subordination to the President of Kosovo and to his *entourage*, to whom they conceded a somehow excessive condescendence, which in turn prevented objectivity.

As aggravating circumstance for Svirca, the Court took the relevant damage caused and the corresponding profit acquired especially in consideration of the living conditions in Kosovo. The amount of money that illegally arrived in the bank account administered by Svirca is a fortune in Kosovo, which corresponds to many decades of salary for an honest employee and that many people in Kosovo do not earn in their lifetime.

That it was taken illegally from the budget of the Country is a sign of outrageous arrogance.

For the criminal offence of Irresponsible Economic Activity in violation of article 233 CCK, the law foresees the punishment of a fine or of imprisonment up to three years.

In consideration of the circumstances of the case, the Court imposed on Muje Ukaj and Nexhat Shatri the sentence of imprisonment for 2 years and 2 months.

Pursuant to Article 41, paragraph 1 point 1, 42, 43 and 44 CCK, the sentence against Mujic UKaj and Nexhat Shatri is suspended. The punishment shall not be executed if the defendants do not commit another criminal offence for the period of four years;

For the criminal offence of Abusing Official Position or Authority in violation of article 339 CCK (1) and (3), the law foresees the punishment of imprisonment of one to eight years.

In consideration of the circumstances of the case, the Court imposed on Blerim Svirca the sentence of imprisonment for 3 years and 4 months.

Pursuant to Article 73 of the CCK the time spent in detention on remand from 1 September 2005 to 21 January 2006 shall be included in the amount of punishment.

#### ***F. Confiscated Item. Bail.***

Pursuant to Article 277 (4) of the KCCP the bail imposed on Blerim Svirca of EURO 60.000,00 pursuant to the ruling of the pre-trial judge Nurul Khan dated 20 January 2006, is cancelled.

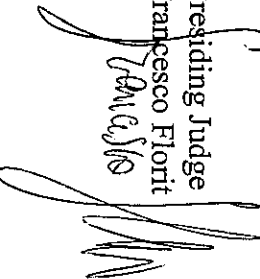
Pursuant to Article 494 of the KCCP the same amount of money of EURO 60.000,00 is confiscated and it is transferred to the treasury of Kosovo.

#### ***G. Costs of the criminal proceedings***

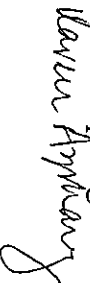
Pursuant to Article 102 paragraph 1 of the Kosovo Code of Criminal Procedure (KCCP) the convicted persons shall pay the costs of the proceedings which are determined, in relation to the number of sessions held, in 400,00 euro.

26 Novembre 2010

Presiding Judge  
Francesco Florit



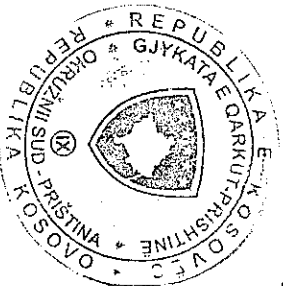
Panel Member  
Karen Asphaug



Panel Member  
Ramadan Gudaci



The court recorder  
Stephen Parkinson



#### **LEGAL REMEDY:**

The parties have the right to appeal this verdict within fifteen (15) days of the day the copy of the judgment has been served pursuant to Article 398 Paragraph 1 of the Kosovo Criminal Procedure Code (KCCP) to the Supreme Court of Kosovo through the District Court of Pristina.

