Supreme Court of Kosovo
Pkl.-Kzz. No. 49/2010
Prishtinë/Priština

IN THE NAME OF THE PEOPLE

SUPREME COURT OF KOSOVO in the panel composed of

Maria Giuliana Civinini EULEX Supreme Court Judge and Presiding Judge

Nesrin Lushta Supreme Court Judge - panel member

Emine Mustafa Supreme Court Judge - panel member

assisted by Maria Rosa del Valle Lopez as court recorder in the criminal case against the defendants:

, born 8 April 1978 in Sofia, Bulgaria, father's name Ivan, residing
in detention since 18 September 2009.

born 8 January 1984 in Sofia, Bulgaria, father's name Kiril, residing in
, in detention since 18 September 2009.

For the criminal offence of **Intrusion into Computer Systems** in violation of articles 264 paragraph (1), 20 and 23 of the Criminal Code of Kosovo.

Acting upon the request for protection of legality filed by the legal representation of the defendants and against the ruling of the Municipal Court of Prishtinë/Priština P. nr. 2397/2009 dated 14.04.2010 and against the ruling of the District Court of Prishtinë/Priština Kp. Nr 146/2010 dated 19.04.2010, in the session held on 8 July 2010 after deliberation and voting;

Issues the following:

RULING

To **REJECT** the Request of the defendants for Protection of Legality filed against the ruling of the Municipal Court of Prishtinë/Priština P. nr. 2397/2009 dated 14.04.2010 and against the ruling of the District Court of Prishtinë/Priština Kp. Nr 146/2010 dated 19.04.2010 on extension of detention on remand.

Therefore, the defendants and in detention since 18 September 2009, will remain in detention on remand until the judgment rendered by the Municipal Court of Prishtinë/Priština P nr. 2397 dated 14.04.2010 that convicts each of them separately to one year and six months of imprisonment become final and not beyond the expiry date of the punishment on **18 March 2011**.

REASONING

1. Procedural history

On 14 April 2010 the Municipal Court of Prishtinë/Priština found and guilty as co-perpetrators for both criminal offence of **Intrusion into Computer Systems** in violation of articles 264 paragraph (1), 20 and 23 of the Criminal Code of Kosovo and convicts them to imprisonment of one year and six months; the ruling have been appealed and is pending in District Court of Prishtinë/Priština. Both defendants are in detention since 18 September 2010.

On 14 April 2010, the Municipal Court of Prishtinë/Priština ordered the extension of the detention on remand for the defendants until the judgment become final but not beyond the expiry of the punishment imposed by the court, namely one year and six months (until 18 March 2011).

The defense counsels Osman Havolli and Vahid Halili filed a joint appeal in favor of the defendants

against the ruling of the Municipal Court of Prishtinë/Priština dated 14.04.2010 that decided on the extension of detention on remand until the judgment become final.

On 19 April 2010 the District Court of Prishtinë/Priština issued the ruling Kp. nr. 146/2010 that rejected the appeal and confirmed the ruling issued by Municipal Court of Prishtinë/Priština dated 14.04.2010 on the extension of detention on remand.

On 24 May 2010 the defense counsels Osman Havolli and Vahid Halili in representation of the defendants filed a joint request for protection of legality against the ruling of the Municipal Court of Prishtinë/Priština P. nr. 2397/2009 dated 14.04.2010 and against the ruling of the District Court of Prishtinë/Priština Kp. Nr 146/2010 dated 19.04.2010 on extension of detention on remand.

On 17 June 2010 the State Prosecutor filed a motion proposing that the request for protection of legality against the verdicts be rejected as ungrounded.

The present ruling resolves the above mentioned request for protection of legality filed by the defense counsels of the defendants on the extension of detention on remand.

2. *Reasoning*

2.1. Whether attempt intrusion into computer systems is a punishable offence (articles 20.2 and 264.1 CCK).

The defense counsel of the defendants affirms that "an attempt to commit a criminal offence, pursuant to article 20.2 CCK, punishable by imprisonment of above three years shall be punishable, while with regard to other criminal offences, an attempt shall be punishable only if expressly provided for by law". According to the defense counsel, the criminal offence of intrusion into computer systems (article 264.1 CCK) is punished by a fine or by a maximum imprisonment of up to three years, which

means that the attempted intrusion into computer systems is not punished unless specifically provided by law; and in this sense the CCK doesn't provide that the attempted intrusion into computer systems shall be punished. So, according to the defense counsel, the attempt of this criminal offence is not punishable and the detention of the defendants is therefore unlawful.

The opinion of the Supreme Court differs on the subject. The defense counsel misread the law when he indicates that "according to article 20.2 CCK an attempt to commit a criminal offence punishable by imprisonment **of above** three years shall be punishable (...)"; in fact, the law provides that "An attempt to commit a criminal offence punishable by imprisonment of **at least** three years (...)". Where the defense counsel read **"of above three years"**, the law provides **"of at least three years".** This makes a substantial difference as we explain below.

The criminal offence of intrusion into computer systems is punishable by imprisonment of three years according to article 264.1 CCK (maximum punishment); and according to article 20.2 CCK an attempt to commit a criminal offence punishable by imprisonment of at least three years shall be punishable. Therefore, the attempted intrusion into computer systems established in article 264.1 CCK is in the range of the imprisonment foreseen in article 20.2 CCK. So, the attempted intrusion into computer systems established in article 264.1 CCK is a punishable offence according to article 20.2 CCK.

A similar case has already been decided by the Supreme Court in its judgment " and , Ap.-Kž. No.394/2007 dated 2 July 2009". In this case, the defendants were acquitted by the first instance court of the offense of organized crime established in UNMIK Regulation 2001/22 and article 274 CCK; the decision of the court of first instance was overruled by the Supreme Court.

In regard to the case, Section 1 (a) of UNMIK Regulation 2001/22 defines Organized Crime as follows: *"Organized crime shall mean the commission of a serious crime by (...)"*. So, in order to determine whether the defendant committed an offense of Organized Crime, the concept of "serious crime" should be defined first. In this sense, Section 1 (b) of UNMIK Regulation 2001/22 defines "serious crime" as follows: *"Serious crime shall mean conduct constituting an offence punishable by* ***a maximum deprivation of liberty of at least four years".***

The court of first instance considered that the defendants didn't commit a serious crime according to Section 1 (b) given that articles 229 CCK and 245 Socialist Federal Republic of Yugoslavia Criminal Law (related to narcotic drugs) foresee a range of punishment from six months to fifteen years and, therefore, a minimum sentence of less than four years is possible; so, the court of first instance acquitted the defendants of the offence of organized crime established in article 274 CCK.

Nevertheless, according to the opinion of the Supreme Court, the first instance judgment totally disregarded the word "maximum" of Section 1 (b); so, when the law refers to an offence punished by a MAXIMUM deprivation of liberty of AT LEAST four years, means that a punishment of less that four years may also be admissible.

According to the Supreme Court judgment Ap.-Kž. No.394/2007 dated 2 July 2009 *" These criminal drugs traffics (counts 1, 2, 3vii) are to be considered, contrary to the first instance judgment, as serious crimes because they are punishable by imprisonment of « at least four years » (article 274 (7) 3) CCK). Indeed* ***the imprisonment of 4 years is in the range of the imprisonment foreseen by article 245 (2) CC SFRY and article 229 (3) CCK.***"

2.2. Falsification, trafficking and illegal use of bank cards: qualification of the offense as theft, fraud or intrusion into computer systems.

The emerging criminal methods developed within the context of the information society are a continuous challenge for criminal prosecution. Indeed, the current panorama sometimes obliges to choose between the impunity derived from the strict application of the principle of legality and forced adaptation of traditional models to new situations for which they were never truly designed.

In this context, and only as a reference, the Supreme Court would like to mention that the Council of the European Union issued a Framework Decision dated 28 May 2001 on "Combating Fraud and Counterfeiting of Non-cash Means of Payment" with the aim to "ensure that fraud and counterfeiting involving all forms of non-cahs means of payment are recognized as criminal offences and are sujet to effective, proportionate and dissuasive sanctions in all Memeber Sates". In this sense, Finland, France, Germany, Ireland, Italy, the Netherlands, Spain, Sweden and the United Kingdom among others have already amended their national laws in order to comply with the Union Policy on fighting falsification, trafficking and illegal use of bank cards, both preventive and repressive aspects of the problem.

In regard to the particular problem raised in this proceeding, the punishment of the attempted instusion into computer systems, article 5 of the European Union Framework Decision provides that "Each Memeber State shall take the necessary measures to ensure that participating in and instigating the conduct referred to in Articles 2, 3 and 4, **or attempting** the conduct referred to in Article 2 (a), (b) and (d) and Article 3, are punishable."

Nowadays Kosovo doesn't comply with the minimum standards necessary to face the challenges of falsification, trafficking and illegal use of bank cards; and this whole process has showed from the

very beguining the lack of adequate legal instruments in order to address this particular criminal offenses.

Until Kosovo has the appropriate legal instruments and a clear description of the different forms of behavior requiring criminalisation in relation to fraud and counterfeiting of non-cash means of payment, it will be a matter of each court to adapt the current penal classifications of the Kosovo Criminal Code (theft, fraud, intrusion into computer systems or others) that better fit the particular facts of the case, in order to find proportionate, effective and dissuasive sanctions for this particular criminal behaviour.

In conclusion, the allegation of legal errors in the challenged Judgment of second instance is ungrounded and the request has to be rejected.

SUPREME COURT OF KOSOVO

On 19 July 2010, Pkl.-Kzz. No. 49/2010

Recording clerk

Maria Rosa del Valle Lopez

Presiding Judge

Maria Giuliana Civinini