

## PARTLY DISSENTING OPINION OF JUDGE TIMO VUOJOLAHTI

I disagree with the majority only in regards to the question who should be the Presiding Judge in the Panel.

### The question

1. Law No. 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (hereinafter “*Omnibus Law*”), approved on 23 April 2014, entered into force on 30 May 2014 and *inter alia* modified Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (hereinafter ‘*Law on Jurisdiction*’). *Omnibus Law* raises the matters of jurisdiction of EULEX Judges and composition of the Panels that are related to the competence of the Court. Now, The Supreme Court Panel unanimously decided, that the Request for Protection of Legality filed by Defence Counsel Osman Zajmi on behalf of the defendant MB is to be considered as an ‘ongoing case’ within the meaning of the new Article 1.A of the Law on Jurisdiction, and thus EULEX judges have jurisdiction on the case. The remaining question therefore only relates to who should act as the Presiding Judge in the Panel.

### The law

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

Article 1.A. Ongoing cases

For purpose of this law an ongoing case means:

1. Cases for which the decision to initiate investigations has been filed before 15 April 2014 by EULEX prosecutors in accordance with the law.
2. Cases that are assigned to EULEX judges before 15 April 2014.

### Article 3. Jurisdiction and competences of EULEX judges for criminal proceedings

3.1. EULEX judges assigned to criminal proceedings will have jurisdiction and competence over ongoing cases as stipulated in Article 1.A sub-paragraph 1.2 of this law.

3.2. ...

3.3. Panels in which EULEX judges exercise their jurisdiction in criminal proceedings will be composed of a majority of local judges and presided by a local judge. Upon the reasoned request of the EULEX competent authority Kosovo Judicial Council will decide that the panel to be composed of majority of EULEX judges.

3.4. ...

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

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

#### Assessment

5. Relevant to the question of who should act as the Presiding Judge is the issue regarding whether or not the case is to be considered as an “ongoing” case. This is why I have to start with this issue, although the panel unanimously considered the case is an ‘ongoing case’ within the meaning of the new Article 1.A of the *Law on Jurisdiction*.

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

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

8. I note that the *Law on Jurisdiction* was amended by the competent authorities of Kosovo following an international agreement reached by the exchange of letters between the Republic of Kosovo and the European Union (on the European Union Rule of Law Mission in Kosovo, hereinafter *International Treaty*), ratified by Law No. 04/L-274. The International Treaty, with direct nexus to the Law on Jurisdiction, describes that the transitioning of EULEX Kosovo mandate is based on a “normally no new case” policy. This gives reasons to conclude that the International Treaty is based on the idea that the cases which EULEX prosecutors and Judges have been dealing with (before 15 April 2014) should also be concluded under the jurisdiction of EULEX Judges.

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

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

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

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

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

13. The next question is the composition of the Panel and who should act as the Presiding Judge.

14. For me it is clear that the Omnibus Law has its basis in the International Treaty; the Omnibus Law is implementing what was agreed with the International Treaty. This is why I consider that when interpreting the new provisions of the Law on Jurisdiction special attention shall be paid on the provisions in section 3 of the Vienna Convention on the Law of Treaties (hereinafter *Vienna Convention*). This convention is applicable law also in Kosovo. Article 31 of the Vienna Convention sets the rules for interpretation of treaties. Article 31 reads:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - ...
3. There shall be taken into account, together with the context:
  - a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

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

16. Based on the Article 31.3 of the Vienna Convention The Agreement reached between the same parties shall be taken into account when interpreting the new provisions of the *Law on Jurisdiction*.

17. The wording in Count 2 of The Agreement is vague and unclear. On the one hand, it speaks about *trial panels*, which can be considered to refer to the first instance trial only. On the other hand it speaks about '*all phases of the trial and the remainder of the proceedings*', which clearly points to all phases of the trial and *proceedings*. When The Agreement was meant to give guidance ('further outline') for the interpretation of the Omnibus Law, it

would have been fair to assume that it would clearly express, by using exact legal concepts, the purpose and scope of this provision.

18. I consider that by repeating twice the same matter using different expressions (*'for the continuation of all phases of the trial'* and *'the remainder of the proceedings'*), the parties of The Agreement emphasized that the provision deals with all stages of a criminal proceeding. This means the provision covers also the stage of legal remedies. Moreover, the wording of Count 2 of the Agreement clearly refers to 'continuation' with the panel composition when it states that '*... in all ongoing cases the trial panels consisting of a majority of EULEX Judges and will continue with a majority of EULEX Judges'*'. This gives me strong reasons to believe that the purpose was to maintain the previous situation also when it comes to the questions concerning the composition of the Panel and the Presiding Judge. There is no doubt that before 30 May 2014 the cases allocated to EULEX Judges were also presided by a EULEX Judge.

19. Thus, I conclude that the Article 3 of the Law on Jurisdiction, despite of its wording, has to be interpreted in the light of the purpose of the International Treaty as explained in The Agreement. Reading together the Article 3 of the Law on Jurisdiction and the count 2 of The Agreement leads to interpretation that *when there has been a Panel consisting of a majority of EULEX Judges or a EULEX Judge presiding the Panel, all the following stages of the proceedings may also be conducted with a majority of EULEX Judges and presided by a EULEX Judge*. This interpretation is also consistent with the policy of 'normally no new case' as described in the International Treaty (paragraph 8, above). Therefore, I consider that the procedure regarding the adjudication of an ongoing case is not affected by the amendments in force since 30 May 2014.

20. Under this interpretation, in this ongoing case it would have been possible to compose the Panel with a majority of EULEX Judges. The fact that there was no need for a majority of EULEX Judges in this case, does not, however, have any impact on the question of who should act as the Presiding Judge. The case was presided in previous stages by a EULEX Judge, and thus should be presided by a EULEX Judge also in regards to the request for extraordinary mitigation of punishment.

21. The case was allocated to me according to the case allocation system of the Supreme Court. Thus, I consider I should act as the Presiding Judge in this case.

Timo Vuojolahti