ANNEX 3 to

Veseli Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers

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Appellate Court

Kž-S 1/2012

22. March 2012

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U IME CRNE GORE

APELACIONI SUD CRNE GORE, u vijeću sastavljenom od sudija, Radmile Mijušković, kao predsjednika vijeća, Milića Međedovića i Svetlane Vujanović, kao članova vijeća, uz učešće namještenika Maje Tošić, kao zapisničara, u kriv.predmetu protiv optuženih Đ. R.1., Đ. R.2., C. S., G. Đ., B. M., S. S. i Š. R., svi iz P., zbog krivičnog djela zločin protiv čovječnosti iz čl. 427 Krivičnog zakonika (Kz-a) u vezi čl. 7 st. 2 Evropske konvencije o ljudskim pravima, odlučujući o žalbama Vrhovnog državnog tužilaštva - Odjeljenja za suzbijanje organizovanog kriminala, korupcije, terorizma i ratnog zločina Podgorica i žalbi punomoćnika oštećenih, adv. S. P. izjavljenih na presudu Višeg suda u Bijelom Polju Ks.br. 6/11-10 od 03.10.2011. godine, nakon održane sjednice vijeća dana 22.03.2012.g.,kojoj su prisutvovali zamjenika VDT CG Slavice Popović i branioci optuženih, advokata M. J. i M. G.

i nakon tajnog vijećanja i glasanja, donio je:

P R E S U D U

Povodom žalbe Vrhovnog državnog tužilaštva - Odjeljenje za suzbijanje organizovanog kriminala, korupcije, terorizma i ratnih zločina i žalbe punomoćnika oštećenih, a po službenoj dužnosti **p r e i n a č a v a s e** presuda Višeg suda u Bijelom Polju Ks br. 6/11-10 od 3.10.2011.godine, tako što se:

1. Optuženi Đ. R.1., JMBG: ....., od oca D. i majke I., rođene D., rođen ..... godine u P., živi u selo J. kod P., državljanin CG, metalostrugar, oženjen, završio srednju školu, vojsku služio 1988/89 u D. u Z., srednjeg imovnog stanja, osuđivan presudom Osnovnog suda u Podgorici K.br. 04/247 od 03.02.2009. godine, zbog krivičnog djela iz čl. 207. st. 3 u vezi st. 1 KZ CG i izrečena mu uslovna osuda 6 mjeseci zatvora uslovno za dvije godine, nalazio se u pritvoru od 22.04. do 31.12.2010. godine.

2. Optuženi Đ. R.2., JMBG: ....., od oca D. i majke I., rođene D., rođen ..... godine u P., živi u selo J. kod P., državljanin CG, oženjen, završio srednju školu, vojnu obavezu regulisao 1990. godine u K., srednjeg imovnog stanja, neosuđivan, nalazio se u pritvoru od 22.04. do 31.12.2010. godine.

3. Optuženi C. S. zv. C. JMBG: ....., od oca Đ. i majke M., rođene T., rođen ..... godine u P. gdje i živi, državljanin CG, vozač, oženjen, završio srednju školu, vojsku služio u S. i D. 1990/91 godinu, srednjeg imovnog stanja, osuđivan presudom Vojnog suda u Podgorici K.br. 20/02 od 08.04.2002. godine zbog krivičnog djela iz čl. 37. st. 2 KZ RCG gdje mu je izrečena uslovna osuda tri mjeseca zatvora uslovno za jednu godinu i presudom Osnovnog suda u Pljevljima K.br. 53/05 od 15.02.2007. godine zbog krivičnog djela iz čl. 348. st. 3 KZ RCG gdje je osuđen na novčanu kaznu u iznosu od 1.200,00€, nalazio se u pritvoru od 22.04. do 31.12.2010. godine.

4. Optuženi G. Đ. zv. Đ., JMBG: ....., od oca S. i majke S. rođene B., rođen ..... godine u P. gdje i živi, državljanin CG, radnik, neoženjen, pismen, završio osnovnu školu, vojsku služio u S. 1988. godine, srednjeg imovnog stanja, osuđivan presudom Okružnog suda u Bijelom Polju K.br. 23/86 od 16.06.1986. godine, zbog krivičnog djela iz čl. 153. st. 1 KZ SRCG na kaznu zatvora u trajanju od tri mjeseca, nalazio se u pritvoru od 22.04. do 31.12.2010. godine.

5. Optuženi B. M., JMBG: ....., od oca B. i majke J. rođene R., rođen ..... godine u P., gdje i živi, državljanin CG, radnik, oženjen, pismen, završio srednju školu, vojsku služio u mjestu V. 1991. godine, neosuđivan, srednjeg imovnog stanja, nalazio se u pritvoru od 22.04. do 31.12.2010. godine.

6. Optuženi S. S., JMBG: ....., od oca Č. i majke M. rođene J., rođen ..... godine u P., gdje i živi, državljanin CG, oženjen, privatnik, vojsku regulisao 1983. godine u V., srednjeg imovnog stanja, neosuđivan, nalazio se u pritvoru od 22.04. do 31.12.2010. godine.

7. Optuženi Š. R., JMBG: ....., od oca T. i majke M., rođene P., rođen ..... godine u P., gdje i živi, državljanin CG, policajac, oženjen, završio srednju školu, vojsku služio u sklopu školovanja, slabog imovnog stanja, osuđivan presudom Osnovnog suda u Pljevljima K.br. 77/98 od 14.04.1999. godine, zbog krivičnog djela iz čl. 39 RCG kada mu je izrečena kazna zatvora od tri mjeseca uslovno za jednu godinu, nalazio se u pritvoru od 22.04. do 31.12.2010. godine,

Na osnovu čl. 373. tač. 1. Zakonika o krivičnom postupku (Zkp-a),

OSLOBAĐAJU OD OPTUŽBE:

Kojom je predstavljeno da su:

U vrijeme međunarodnog oružanog sukoba u BiH u toku 1992-1995. godine, kao pripadnici graničnog bataljona Vojske Jugoslavije u Pljevljima i pripadnici Ministarstva unutrašnjih poslova - Centra bezbjednosti u Pljevljima kršeći pravila Međunarodnog prava utvrđena čl. 7 st. 2 Rimskog statuta prema civilnom stanovništvu u BiH, u okviru šireg i sistematskog napada uperenog protiv civilnog stanovništva Bošnjačko-muslimanske nacionalnosti, prilikom pretresa kuća radi pronalaska i oduzimanja oružja da su nehumano postupali prema građanima muslimanske nacionalnosti, da su vršili torturu i nasilje, tukli ih dok su tražili da predaju oružje, provjeravali da li učestvuju u borbenim okršajima na strani Zelenih beretki i da li zelenim beretkama dopremaju hranu i ostale namirnice i kriju pripadnike zelenih beretki u svojim kućama u Bukovici, pa da su kod istih nehumanim ponašanjem prouzrokovali teške patnje i ozbiljno im ugrožavali zdravlje i vrijeđali tjelesni integritet, primjenjivali mjere zasrtašivanja, stvarali psihozu za prinudno iseljavanje iz sela tog područja, usled kojeg ponašanja da je došlo do iseljavanja dijela muslimanskog stanovništva na područje Sarajeva, Goražda i Pljevalja, na način što da su i to:

1. Okrivljeni Đ. R.1., Đ. R.2., C. S. i G. Đ., kao pripadnici rezervnog sastava Vojske Jugoslavije, dana 22.02.1993. godine u selu M., opština P. s ličnim naoružanjem došli ispred kuće R. Š., pa da je Đ. R.2. uperio pušku prema oštećenom, naredio mu da odmah izađe iz kuće u dvorište, što je ovaj učinio i izašao ispred kuće nakon čega da su ga okrivljeni pitali, gdje je bio u četvrtak sumnjajući da je doturao hranu "zelenim beretkama" iz BiH, pa kada im je oštećeni kazao da je bio kod kuće i pekao rakiju, okrivljeni da su ga počeli tući kundacima pušaka po tijelu, cijevima pušaka ga ubadali u tijelo, od kojih udara je oštećeni pao, a okrivljeni da su nastavli da ga udaraju kundacima pušaka, i nogama u predjelu stomaka, posle čega da je Đ. R.2. ušao u kuću i nogama i rukama nanio više udaraca R. A., suprugi oštećenog R. Š. i odgurnuo je, kojom prilikom je ista udarila u zid i zadobila povrede u vidu sjekotine na glavi, a kada je oštećeni R. Š. ustao i krenuo da uđe u kuću okrivljeni C. S. da ga je još nekoliko puta udario sa cijevi puške u predjelu grudnog koša i stomaka.

2. Okrivljeni B. M., kao pripadnik rezervnog sastava Vojske Jugoslavije sa nepoznatim pripadnicima VJ i policije, u februaru 1993. godine u selu P. MZ Bukovica, opština Pljevlja da je fizički zlostavljalo oštećenog B. A. iz istog mjesta, na način što ga je presreo kada se oštećeni vraćao iz prodavnice dok je tjerao brašno na konju i kazao mu da to brašno tjera zelenim beretkama i pitao ga gdje mu je brat D., za kojeg se sumnjalo da je pripadnik zelenih beretki pa kada mu to oštećeni nije kazao, okrivljeni da ga je više puta udario otvorenom šakom po licu usled čega da mu je nanio povrede u vidu otoka lica i glave, nakon čega da su izvršili pretres kuće oštećenog i tražili oružje koje oružje nije pronađeno.

3. Okrivljeni S. S. i Š. R., kao pripadnici policije CB u Pljevljima u prvoj polovini aprila (05. aprila) 1992. godine u selu V. MZ Bukovica, opština Pljevlja sa još nekoliko naoružanih NN lica Vojske Jugoslavije i policije da su došli u selo, da su pozvali punoljetna lica Bošnjačko-muslimanske nacionalnosti D. I., D. O., S. H., T. H.1. i njegove sinove T. O. i T.H.2. i da su od istih zahtijevali da predaju oružje nakon čega da su izvršili pretres njihovih kuća radi pronalaska oružja, kojom prilikom da su prije izvršenog pretresa i nakon izvršenog pretresa pošto su u kućama D. I., D. O., T. H.1., pronašli oružje, okrivljeni da su oštećene zlostavljali, na način što su ih udarali po tijelu, plašili ih pucajući iz oružja iznad njihovih glava, stavljali im palice u usta, pa da su lica kod kojih su pronašli oružje, lišili slobode priveli u CB u Pljevlja, a lica kod kojih nijesu pronašli oružje pustili kućama, pa da je usled straha i ovako nehumanog ponašanja okrivljenih narednog dana okrivljeni S. H. izvršio samoubistvo

vješanjem.
4. Okrivljeni Š. R. istog dana, nakon što je s ostalim pretresao kuću D. M. u kojoj su radnici policije pronašli automatsku pušku i dvije ručne bombe, zbog čega je lišen slobode njegov sin D. I., pa kada je došao u dvorište kuće oštećeni D. J., da je okrivljeni Š. R. iz džepa na pantalonama izvadio ručnu bombu koju je predhodno pri pretresu pronašao u kući D., i zaprijetio da će je staviti u usta D. J., nakon čega da je prišao D. J. i izudarao ga šakama i nogama po tijelu, te vrhom palice u predjelu grudi i stomaka, dok je NN lice iz rezervnog sastava VJ prišlo i šljemom ga udarilo u predjelu vilice, a drugo NN lice pripadnik VJ ga udario nogom u predjelu butine noge,

- čime da su izvršili krivično djelo zločin protiv čovječnosti iz čl. 427 Krivičnog zakonika Crne Gore u vezi čl. 7 st. 2 Evropske konvencije o ljudskim pravima, jer djelo za koje su optuženi po zakonu nije krivično djelo.

Prvostepena presuda u dijelu koji se odnosi na odluku o troškovima krivičnog postupka i imovinsko pravnom zahtjevu, ostaje neizmijenjena.

O b r a z l o ž e nj e:

Presudom Višeg suda u Bijelom Polju Ks.br. 6/11-10 od 03.10.2011. godine, optuženi Đ. R.1., Đ. R.2., C. S., G. Đ., B. M., S. S. i Š. R., u nedostatku dokaza, osnovom čl. 373 tač. 2 Zkp-a oslobođeni su od optužbe da su izvršili krivično djelo zločin protiv čovječnosti iz čl. 427 Kz-a u vezi čl. 7 st. 2 Evropske konvencije o ljudskim pravima.
Na osnovu čl. 230. st. 1 Zkp-a odlučeno je da troškovi krivičnog postupka padaju na teret budžetskih sredstava suda.

Istom presudom na osnovu čl. 239 st. 3 Zkp-a oštećeni R. Š., B. A., S. Z., D. J., D. I., D. O., T. H.1., T. O., T. H.2. i T. M., radi ostvarivanja imovinsko pravnog zahtjeva upućeni su na parnicu.

Protiv te presude žalbe su izjavili Vrhovno državno tužilaštvo - Odjeljenje za suzbijanje organizovanog kriminala, korupcije, terorizma i ratnog zločina Podgorica (specijalni tužilac) i punomoćnik oštećenih.
Specijalni tužilac prvostepenu presudu pobija zbog: bitne povrede odredaba krivičnog postupka i pogrešno utvrđenog činjeničnog stanja. Predlaže da Apelacioni sud prvostepenu presudu ukine i predmet vrati prvostepenom sudu na ponovni postupak i odlučivanje.
Punomoćnik oštećenih, advokat S. P. žalbu je izjavio iz svih "zakonom dozvoljenih žalbenih razloga". Predložio je da se ukine pobijana presuda i predmet vrati prvostepenom sudu na ponovno suđenje ili da se preinači i "okrivljeni oglase krivim i izreče im se krivična sankcija u skladu sa zakonom".

Na žalbu specijalnog tužioca, odgovor su podnijeli branioci okrivljenih - advokati M. J. i M. G.. Predložili su da se žalba odbije kao neosnovana i potvrdi prvostepena presuda.
Na žalbu punomoćnika oštećenih odgovor je podnio branilac okrivljenih J. M.. Predlaže da Apelacioni sud žalbu punomoćnika oštećenih odbije kao neosnovanu i potvrdi prvostepenu presudu.
U smislu čl. 392 Zkp-u, spisi predmeta su dostavljeni Vrhovnom državnom tužilaštvu na razmatranje i predlog. VDT CG je podneskom Ktž.br.11/12 od 23.01.2012.godine, predložilo da se žalba specijalnog tužioca i žalba punomoćnika oštećenih uvaži, a odgovori na žalbe branilaca optuženih cijene kao neosnovani.

Sjednici drugostepenog vijeća prisustvovao je zamjenik VDT CG, Slavica Popović i branioci optuženih, dok nisu prisustvovali optuženi koji su uredno obaviješteni o terminu održavanja sjednici. Punomoćnik oštećenih žalbom nije tražio da bude obaviješten o sjednici.
Nakon razmatranja pobijane presude, navoda žalbi i odgovora na žalbe, sadržine spisa

predmeta Višeg suda u Bijelom Polju Ks.br. 6/11, pazeći po službenoj dužnosti na povrede zakona u smislu čl. 398 Zkp -u, Apelacioni sud je, povodom žalbi, a po službenoj dužnosti utvrdio da:
-djelo, koje se optuženima stavlja na teret, nije krivično djelo, pa je zbog pravilne primjene zakona, preinačio prvostepeni presudu kojom su optuženi oslobođeni od optužbe zbog nedostatka dokaza da su izvršili krivično djelo zločin protiv čovječnosti iz čl.427 Krivičnog zakonika i oslobodio ih od optužbe na osnovu čl.373 st.1 tač.1 Zkp-u, jer djelo koje im se stavlja na teret nije krivično djelo. Za ovu odluku daje sledeće razloge:
U ovom krivičnom postupku optuženima se sudi za krivično djelo koje zakonom nije bilo propisano kao krivično djelo, u vrijeme kada je po navodima optužnice izvršeno, što predstavlja presedan za domaću sudsku praksu. S toga je Apelacioni sud smatrao potrebnim da, predhodno, izvrši analizu pravnog pitanja kojim se nije bavio ni tužilac, ni prvostepeni sud. Naime, da li se optuženima Đ. R.1. i dr., može suditi za krivično djelo zločin protiv čovječnosti iz čl.427 Kz-a (Sl.list RCG 70/03,13/04,47/06; Sl.list CG 40/08,25/10,31/11), obzirom na načelo zakonitosti - »nullum crimen sine lege, nullum paena sine lege«, koje garantuje da nikom ne može biti izrečena kazna i druga sankcija ako djelo koje mu se stavlja na teret nije bilo zakonom određeno kao krivično djelo i za njega propisana kazna u vrijeme kada je počinilac radio ili bio dužan da radi.
Načela zakonitosti, poznaje i priznaje međunarodno krivično zakonodavstvo u svim značajnijim ugovorima, konvencijama i poveljama koje se bave krivičnim pravom, a jednako i domaće krivično zakonodavstvo i to kako ono iz vremena izvršenja predmetnih djela, tako i ovo iz vremena suđenja.Načelo zakonitosti pruža garanciju protiv proizvoljnog optuživanja, osuđivanja i kažnjavanja.
Optuženima se sudi za krivično djelo inkriminisano u domaćem zakonodavstvu 10 (deset) godina nakon što su, shodno navodima optužnice, preduzeli radnje koje im se stavljaju na teret. Apelacioni sud smatra da, sa stanovišta načela zakonitosti i u vezi sa tim zabrane retroaktivne primjene zakona, za razrješenje ove pravne situacije nije dovoljno to što se u optužnici pravna kvalifikacija djela veže za odredbu čl.7 st.2 Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda (u daljem tekstu Evropska konvencija-EK), kojom je propisano da, načelo zakonitosti (koje se afirmiše u predhodnom - st.1 čl.7 EK), ne utiče na suđenje i osudu lica zbog radnji ili propuštanja koja su se u vrijeme kada su počinjena smatrala za krivična djela prema opštim pravnim načelima koja priznaju civilizovani narodi. Nije dovoljno, ne samo zato što SRJ, u periodu koji se opredjeljuje kao vrijeme izvršenja, nije bila ratifikovala EK, već i zato što odredba čl.7st.2 EK, zbog formulacije "*...prema opštim pravnim načelima koja priznaju civilizovani narodi*" predstavlja blanketnu normu koja upućuje na međunarodno običajno pravo. To nameće potrebu utvrđivanja da li je u vrijeme izvršenja postojala međunarodna običajna norma osnovom čije sadržine se može zaključiti da se u vrijeme koje se optužnicom opredjeljuje kao vrijeme izvršenja (sve radnje vezane za 1992 i 1993.g.) zločin protiv čovječnosti smatrao krivičnim djelom, a što bi značilo da se taj zločin, prema opštim načelima koja priznaju civilizovani narodi, smatra krivičnim djelom.
Nakon toga, ali ne kao manje važno, potrebno je utvrditi da li je u domaćem zakonodavstvu SRJ ili RCG, u vrijeme izvršenja djela, postojao propis osnovom kog se običajno međunarodno pravo tj. opšteprihvaćena pravila međunarodnog prava, (u konkretnom ona koja smatraju zločin protiv čovječnosti krivičnim djelom), imaju smatrati sastavnim dijelom unutrašnjeg pravnog poretka.
Radi razjašnjenja predhodnih dilema, Apelacioni sud je imao u vidu Statut međunarodnog vojnog suda od 08.08.1945g., koji je donijet na osnovu tzv. Londonskog sporazuma od 08.08.1945.g..Ovim Statutom ustanovljen je Međunarodni vojni sud (MVS) za suđenje i kažnjavanje ratnih zločinaca država Evropske osovine, počinjenih tokom drugog svetskog

rata. Odredbom čl.6 Statuta Međunarodnog vojnog suda opisani su zločini koji su pod jurisdikcijom MVS. U čl.6 tačka c). Statuta MVS opisan je zločin protiv čovječnosti koji je u nadležnosti MVS, i to nezavisno od toga da li se djelom za koje se sudi povređuju ili ne povređuju zakoni država u kojima je zločin izvršen, tj. neovisno od toga da li je u zakonima države na čijoj teritoriji je izvršen zločin ovo krivično djelo bilo propisano. Shodno navedenom Statutu, u poznatom Nirnberškom procesu, osuđeni su zločinci za djela koja u vrijeme njihovog vršenja, nisu bila inkriminisana u državama u kojim su počinjena. Na isti način suđeno je i u Japanu od 1946.g. do 1948.g., u tzv. Tokijskom procesu provedenom protiv japanskih ratnih zločinaca koji su počinili ratne zločine na Azijskom kontinentu prije i tokom Drugog svjetskog rata.

Rezolucijom Generalne skupštine UN od 11.12.1946.g. potvrđena su načela sadržana u Statutu Međunarodnog vojnog suda i u Nirnberškoj presudi, kao načela pozitivnog međunarodnog prava. Generalna skupština UN povjerila je Komisiji za međunarodno pravo formulisanje načela međunarodnog krivičnog prava. Komisija je sistematizovala i formulisala tzv. Nirnberške principe, pod nazivom „Principi međunarodnog prava priznati u povelji Nirnberškog tribunala i u suđenju pred tribunalom“ koje je Generalna skupština UN prihvatila, a po prvi put su objavljeni u izveštaju o radu Komisije od 05. juna do 29. jula 1950.godine.

Za predmetni slučaj od značaja su I, II, i VI Nirnberški princip, koji glase:

I.princip: Svaka osoba koja učini delo koje se po međunarodnom pravu smatra zločinom je odgovorna i podložna kazni.

II. princip: Činjenica da domaće (nacionalno) pravo ne propisuje kaznu za delo koje se po međunarodnom pravu smatra zločinom ne oslobađa osobu koja je učinila delo od odgovornosti po međunarodnom pravu.

VI.princip: Sledeći zločini su kažnjivi kao zločini po međunarodnom pravu:

a. ***Zločini protiv mira*** *(slijedi opis)*

b. ***Ratni zločini*** *(slijedi opis)*

s. ***Zločini protiv čovečnosti*** *(slijedi opis):*

Nirnbeški principi predstavljaju dio međunarodnog krivičnog običajnog prava i postali su dio obavezujućeg domaćeg prava u civilizovanim narodima. Ovo dalje znači da države koje pripadaju civilizovanim narodima, na osnovu ovih opštih međunarodnih principa (običajnog međunarodnog prava) koje su prihvatili i koji su po tom osnovu postali dio obavezujućeg domaćeg prava, smatraju krivičnim djelom zločin protiv čovječnosti i dozvoljavaju da se za to djelo sudi i izriče sankcija, iako u vrijeme izvršenja nije bilo domaćim zakonima inkriminisano kao takvo.

Kada se ima u vidu da je u predmetnom slučaju 1992.g. i 1993.godina, opredijeljena optužnicom kao vrijeme izvršenja, proizilazi da vrijeme izvršenja pripada periodu Savezne Republike Jugoslavije (SRJ). S toga je nužno odgovoriti na pitanje, na osnovu kog domaćeg propisa iz tog vremena, se običajno međunarodno pravo moglo smatrati integralnim dijelom domaćeg pravnog poretka? Naime, da bi se krivično djelo zločin protiv čovječnosti koje je u vrijeme izvršenja poznavalo međunarodno običajno pravo, kako je naprijed navedeno, ali ne i domaći zakoni, smatralo sastavnim dijelom domaćeg pravnog poretka, potrebno je da u domaćem pravu postoji upućujući propis, iz vremena izvršenja, koji ga na opisani način (putem priznavanja opštih pravnih načela) uvodi u domaće pravo. To praktično znači da je potrebno utvrditi da li postoji domaći propis koji je dozvoljavao da i međunarodno običajno krivično pravo, kome bi pripadalo krivičo djelo zločin protiv čovječnosti u periodu izvršenja, bude sastavni dio domaćeg obavezujućeg prava u vrijeme navodnog činjenja optuženih. Optužnicom se vrijeme izvršenja,(iz nerazumljivih razloga), veže za rat u BIH i opredjeljuje » u toku 1992-1995 «, a potom prilikom opisa pojedinačnih radnji izvršenja, navode se datumi i to: za djelo pod tač.1) - 22.02.1993 g.; za djelo pod tač. 2) - februar 1993 g.; za

djelo pod tač. 3) - u prvoj polovini aprila (5.aprila) 1992 g.; dok se vrijeme izvršenja djela opisanog pod tačkom 4) optužnice označava »istog dana« što bi se takođe moralo odnositi na neki od prethodnih datuma. U navedenom periodu važio je Ustav SRJ koji se primjenjivao od 27.04.1992. godine. U čl.16 st.2 Ustava SRJ propisano je da »*međunarodni ugovori, koji su potvrđeni i objavljeni u skladu sa ustavom i opšteprihvaćena pravila međunarodnog prava sastavni su dio unutrašnjeg pravnog poretka SRJ*«. Iako je u tački 3 optuženja vrijeme navodnog činjenja jednog djela optuženih opredijeljeno doslovno "u prvoj polovini aprila (5. april) 1992g.", drugostepeni sud nema potrebu da se bavi Ustavom SFRJ (važio u to vrijeme), jer navedeni datum (5. april) nije optužnicom pravilno opredijeljen. Naime, iz provedenih dokaza proizilazi da se opisani pretres dogodio 4.05.1992. g., a ne 5.04.1992.g., te da su u tački 3. optužnice pomiješana dva pretresa kuća prostorno i vremenski odvojena-preduzeta na različitim mjestima i u različito vrijeme, a ni jedna radnja pretresa nije preduzeta na dan 5. april 1992.g. kako je optužbom navedeno, već kako je prethodno navedeno 4.05.1992.g., odnosno oktobra -novembra 1992.g..

Dakle, po navedenoj odredbi Ustava SRJ iz 1992. g. nesumnjivo proizilazi da su opšteprihvaćena pravila međunarodnog prava bila sasatavni dio domaćeg prava u vrijeme koje se optužnicom opredjeljuje kao vrijeme izvršenja. Povezano sa Rezolucijom UN, kojom su načela sadržana u Statutu Međunarodnog vojnog suda i u Nirnberškoj presudi, potvrđena kao načela pozitivnog međunarodnog prava, te u vezu sa tzv. Nirnberškim principima, objavljenim i prihvaćenim od Generalne skupštine UN pod nazivom „Principi međunarodnog prava priznati u povelji Nirnberškog tribunala i u suđenju pred tribunalom“, a u kojima je (u VI. principu) propisano da se zločin protiv čovječnosti, kažnjava kao zločin po međunarodnom pravu, proizilazi zaključak da se za krivično djelo zločin protiv čovječnosti može suditi optuženima, iako to djelo u domaćem zakonu nije bilo u vrijeme navodnog izvršenja propisano kao krivično djelo i to na osnovu opšteprihvaćenih međunarodnih principa koji ovo djelo poznaju kao krivično i da se time ne krši načelo zakonitosti.

Kada se prihvati suđenje za krivično djelo koje po domaćim zakonima nije bilo propisano kao krivično djelo, već je kao takvo bilo priznato po opšteprihvaćenom, dakle običajnom međunarodnom pravu, za drugostepeni sud je takođe bila dilema koju je bilo od značaja razjasniti, za koji propis je pravilno vezati činjenični opis krivičnog djela tj. po kom propisu bi trebalo opredjeljivati pravnu kvalifikaciju?

Apelacioni sud je kod ove dileme imao u vidu da je međunarodna i nekadašnja domaća praksa (iz vremena zajedničke države SFRJ-slučaj Artuković), kao i praksu država okruženja (Srbija(slučaj Egner) i BIH-više slučajeva) ovu dilemu rješavala na način što se djelo koje se stavlja na teret optuženima, a koje u vrijeme izvršenja nije bilo zakonom propisano, a priznato je bilo od civilizovanih naroda kao krivično djelo, pravno kvalifikuje prema zakonu koji je važio u vrijeme suđenja (u kom je bilo naknadno inkriminisano).

Na osnovu izložene analize, Apelacioni sud je našao da nije povrijeđeno načelo zakonitosti time što se ovdje optuženima sudi za djelo koje u vrijeme izvršenja u domaćem zakonodavstvu nije bilo propisano kao krivično djelo, jer je krivično djelo zločin protiv čovječnosti, u periodu koji je opredijeljen kao vrijeme izvršenja, poznavali prihvaćeni međunarodni principi - običajno međunarodno pravo, a koje pravo priznaju civilizovani narodi. Međunarodni principi bili su sastavni dio obavezujućeg domaćeg prava države shodno čl.16 st.2 USTAVA SRJ, u čijem sastavu je bila sadašnja država Crna Gora. U skladu je sa međunarodnom i nekadašnjom domaćom sudskom praksom i sudskom praksom zemalja okruženja, u ovakvim pravnim situacijama, krivično djelo se pravno kvalifikuje po domaćem zakonu u kom je to krivično djelo naknadno inkriminisano.

Po stanovištu Apelacionog suda prednju analizu je bilo nužno izvršiti, (iako se ona konkretno ne reflaktuju na donijetu odluku ovog suda), ne samo zato što se tužilac i prvostepeni sud njome nisu bavili, već i zato što je ovakva pravna situacija presedan za sudsku praksu Crne

Gore.
Zašto djelo koje se optuženima stavlja na teret nije krivično djelo?
Kao i svako drugo krivično djelo i krivično djelo zločin protiv čovječnosti iz čl.427 KZ-a, koje je inkriminisano, kako je predhodno navedeno, po prvi put 2003.g.,a čiji opis predstavlja koncipiranje ovog krivičnog djela onako kako ga je poznavalo međunarodno običajno pravo, definisano je radnjom, posledicom, načinom izvršenja... i drugim obeležjima koja predstavljaju bitne elemente bića ovog krivičnog djela. Kao i većina krivičnih djela protiv čovječnosti i drugih dobara zaštićenih međunarodnim pravom, koja su sistematizovana u glavi XXXV KZ-a, i krivično djelo zločin protiv čovječnosti iz čl.427 Kz-a, ima blanketnu normu, što znači da u zakonskom opisu ova djela upućuju na drugi propis kojim se upotpunjuje biće predmetnog krivičnog djela. Formulacije »ko kršeći pravila međunarodnog prava…«, koju sadrži opis krivičnog djela zločin protiv čovječnosti iz čl.427 Kz-a, upućuje na pravila međunarodnog prava koja sadrže bliže odredbe o protivpravnosti činjenja ili nečinjenja koja su propisana kao alternativne radnje izvršenja, tako da se tek pomoću određenih pravila međunarodnog prava upotpunjuju svi bitni elementi bića ovog krivičnog djela. Svakako da se pod pravilima međunarodnog prava na koja upućuje odredba čl.427 KZ-a, podrazumijevaju pravila utvrđena međunarodnim aktima koji su bili ratifikovani u vrijeme koje se optužnicom opredjeljuje kao vrijeme izvršenja. To je aksiom koji se ne može dovesti u pitanje.
Apelacioni sud konstatuje da se u činjeničnom opis djela koje se stavlja na teret optuženom Đ. R.1. i dr., onako kako je predstavljeno optužnicom, blanketna norma predmetnog krivičnog djela, dopunjava odredbom čl.7st. 2 Rimskog statuta.

Blanketna norma čl.427 KZ-a ne može se dopunjavati navedenom odredbom Rimskog statuta, iz razloga što čl.7 st.1 Statuta nije ništa drugo do opis »zločina protiv čovječnosti«, a stav 2 čl.7 Statuta, ništa drugo do tumačenje izraza koji se koriste u stavu 1.čl.7 Statuta, zbog čega proizilazi da se, shodno optužnici, blanketna norma u kojoj je opisano krivično djelo zločin protiv čovječnosti iz čl.427 KZ-a, dopunjava međunarodnom normom u kojoj je takođe opisan zločin protiv čovječnosti i to dijelom te norme koja predstavlja značenje izraza. Međutim, Apelacioni sud se neće baviti ovom nelogičnošću optužnice jer smatra da se, obzirom na vrijeme izvršenja djela koje se optuženima stavlja na teret, ni jednom odredbom Rimskog statuta ne može dopunjavati blanketna norma čl.427 KZ-a, a to iz sledećih razloga:
Rimski statut, kojim je osnovan Međunarodni krivični sud (MKS), usvojen je 17.07.1998. godine. Stupio je na snagu nakon dostavljanja 60-tog instrumenta ratifikacije generalnoj skupštini UN, dakle 1.07.2002.g.. Svaki učinilac krivičnog djela iz nadležnosti Međunarodnog krivičnog suda (genocid, zločin protiv čovječnosti, ratni zločin), podliježe krivičnom gonjenju MKS posle navedenog datuma.
Optuženi su shodno optuženici radnje koje im se stavljaju na teret preduzeli 1992.g. i 1993.g.. Dakle, optuženima se stavlja na teret da su, radnjama opisanim u optužnici, kršili pravila međunarodnog prava koja nisu postojala u vrijeme izvršenja djela (odredbe Rimskog statuta). To dalje ukazuje da se u Rimskom statutu ne mogu tražiti, niti naći pravila koja bi kao međunarodna, upotpunjavala činjenični opis krivičnog djela zločin protiv čovječnosti iz čl.427 KZ-a, koji je navodno izvršen 1992,1993, u periodu kada Rimski Statut nije bio stupio na snagu niti je čak bio usvojen. Kao što je predhodno ukazano, međunarodna pravila, na koje upućuje formulacija iz opisa krivič.djela 427 KZ-a " Ko kršeći pravila međunarodnog prava...." moraju postojati u vrijeme kada je učinilac radio ili bio dužan da radi. S toga pozivanje u optužnici na Rimski statut nema nikakvo pravno dejstvo i praktično znači da u opisu predmetnog djela nedostaje međunarodni propis koji upotpunjuje blanketnu normu ovog krivičnog djela i u potpunosti konstituiše njegove bitne elemente. To dalje znači da

krivično djelo onako kako je predstavljeno optužnicom nije krivično djelo, jer mu nedostaje jedan bitan element-međunarodni propis protivno kog su optuženi preduzimali djelatnosti za koju se terete. Ukazati je da se Rimski Statut ne primjenjuje retroaktivno, pa čak ni na djela obuhvaćena Statutom. Dakle, ukoliko su krivična djela, iz nadležnosti MKS, izvršena prije nego je država u kojoj su izvršena ratifikovala RS, na takva djela i njihove izvršioce ne može se zasnovati nadležnost MKS.
Imajući u vidu predhodno navedeno, Apelacioni sud je povodom žalbi specijalnog tužioca i punomoćnika oštećenih, a nalazeći da je prvostepeni sud po pogrešnom osnovu oslobodio optužene od optužbe, preinačio prvostepenu presudu i optužene oslobodio od optužbe na osnovu čl.373 st.1 tač.1 ZKP-u, a naime iz razloga što djelo koje im se stavlja na teret, onako kako je opisano optužnicom, nije krivično djelo, jer je taj osnov oslobađanja povoljniji za optužene.
Apelacioni sud je imao u vidu žalbene navode kako specijalnog tužioca tako i punomoćnika oštećenih i to kako one koji su se odnosili na bitne povrede odredaba krivičnog postupka tako i one kojima se pobija utvrđeno činjenično stanje. Međutim imajući u vidu da djelo kako je opisano optužbom nije krivično djelo jer nema sve bitne elmente bića krivičnog djela zločin protiv čovječnosti iz čl.427 KZ-a, niti drugog krivičnog djela koje se goni po službenoj dužnosti, to žalbeni navodi nemaju i ne mogu imati uticaj na drugačiju odluku ovog suda. Naime, ni ispravljanjem eventualnih bitnih povreda odredaba krivičnog postupka, ni eventualno pogrešno ili nepotpuno utvrđenog činjeničnog stanja, ne mogu se konstituisati bitni elementi krivičnog djela koji moraju postojati u činjeničnom opisu krivičnog djela u optužnici, što ovdje nije slučaj. Pri tom treba imati u vidu da je sud dužan da shodno ZKP-u, tokom čitavog postupka, dakle od početka krivične procedure i u svakoj narednoj fazi postupka vodi računa da li je djelo koje se okrivljenima stavlja na teret krivično djelo i da u slučaju utvrđenja da nije, donese odgovarajuću odluku kojom se okončava krivični postupak, (obustavi istragu-čl.262 st.1 tač.1 starog ZKP-u, dok to po čl.290 st.4 tač.1 novog ZKP-u spada u nadležnosti tužioca; po prigovoru na optužnicu da postupak obustavi -čl.282 st.1 tač.1 starog ZKP-u, tj. da to učini u postupku kontrole optužnice po čl.294 st.1 tač.1 novog ZKP-u; te konačno nakon glavnog pretresa da donese presuda kojom se optuženi oslobađaju od optužbe na osnovu čl.363 tač.1 starog ZKP-u tj. na osnovu čl.373 tač.1 novog ZKP-u,), a da se pri donošenju takvih odluka ne upušta u ocjenu dokazanosti navoda optužbe. S toga ni u drugostepenom postupku, kada odlučuje o žalbama na prvostepenu presudu, a u slučaju da utvrdi da djelo koje se optužnicom stavlja na teret optuženima nije krivično djelo, sud se nema potrebe baviti žalbenim navodima mimo eventualno onih koji bi se odnosili na ovaj osnov oslobođenja.

Na osnovu izloženog, a osnovom čl.409 Zkp-u, odlučeno je kao u izreci.

APELACIONI SUD CRNE GORE
Podgorica, dana 22.03.2012.godine

Zapisničar,
Maja Tošić, s.r.

PREDSJEDNIK VIJEĆA - SUDIJA
Radmila Mijušković, s.r.

Link: https://sudovi.me/ascg/odluka/4373

Appellate Court

Kž-S 1/2012

March 22, 2012

Ksž.br. 1/2012 ON BEHALF OF MONTENEGRO THE COURT OF APPEALS OF MONTENEGRO, in a panel composed of judges, Radmila Mijušković, as presiding judge, Milić Medjedović and Svetlana Vujanović, as members of the panel, with the participation of state employee Maja Tošić, as a recorder, in the criminal case against the accused Ђ. R.1., Ђ. R.2., CS, G. Đ., BM, SS and Š. R., all from P., for the criminal offense of crime against humanity under Art. 427 of the Criminal Code (CC) in connection with Art. 7 st. 2 of the European Convention on Human Rights, deciding on the appeals of the Supreme State Prosecutor's Office - Department for the Suppression of Organized Crime, Corruption, Terrorism and War Crimes Podgorica and the appeals of the proxies of the injured parties, adv. SP filed on the judgment of the High Court in Bijelo Polje Ks.br. 6 / 11-10 from 03.10.2011 year, after the session of the Council 22.03.2012.g. day, which was attended by the Deputy Supreme State Prosecutor Slavica Popovic and defense attorneys, lawyers and MJ ME and after secret deliberations and voting, issued the following: VERDICT Following an appeal by the Supreme Public Prosecutor's Office - Department for the Prevention of organized crime, corruption, terrorism and war crimes and complaints proxy damaged, and ex officio **p reina d states , the** judgment of the High Court in Bijelo Polje Ks no. 6 / 11-10 of 3 October 2011, so that: 1. The Accused Ђ. R.1., JMBG: ....., from father D. and mother I., born D., born ..... in P., lives in the village of J. near P., citizen of Montenegro, metal turner, married, finished high school, served in the army in 1988/89 in D. in Z., middle property, convicted by the judgment of the Basic Court in Podgorica K. no. 04/247 dated 3 February 2009 year, due to the criminal offense under Art. 207. st. 3 in connection with para. 1 of the CC of Montenegro and was given a suspended sentence of 6 months probation for two years, he was in custody from 22.04. to 31.12.2010. years. 2. The accused Ђ. R.2., JMBG: ....., of father D. and mother I., nee D., born ..... in P., lives in the village of J. near P., citizen of Montenegro, married, finished high school, regulated his military service in 1990 in K., middle-class, not convicted, was in custody since 22.04. to 31.12.2010. years. 3. The accused CS vol. C. JMBG: ....., from father Ђ. and mother M., born T., born ..... in P. where he lives, citizen of Montenegro, driver, married, finished high school, served in the army in S. and D. 1990 / 91, of medium wealth, convicted by the judgment of the Military Court in Podgorica K.br. 20/02 dated 8 April 2002 years due to the criminal offense under Art. 37. st. 2 of the CC of the Republic of Montenegro where he was given a suspended sentence of three months probation for one year and the judgment of the Basic Court in Pljevlja K.br. 53/05 dated 15 February 2007 years due to the criminal offense under Art. 348 para. 3 of the CC of the Republic of Montenegro, where he was sentenced to a fine in the amount of € 1,200.00, was in custody from 22.04. to 31.12.2010. years. 4. The Accused G. Đ. vol. Đ., JMBG: ....., from father S. and mother S. born B., born ..... in P. where he lives, citizen of Montenegro, worker, unmarried, literate, finished primary school, served in the army in S. 1988., middle class, convicted by the judgment of the District Court in Bijelo Polje K.br. 23/86 of 16 June 1986 year, due to the criminal offense under Art. 153 st. 1 of the CC of the SRCG to imprisonment for a term of three months, was in custody from 22.04. to

31.12.2010. years. 5. The accused BM, JMBG: ....., of father B. and mother J. nee R., born ..... in P., where and alive, citizen of Montenegro, worker, married, literate, finished high school, served in the army in V. 1991, unconvicted, of average financial status, was in custody since 22.04. to 31.12.2010. years. 6. The accused SS, JMBG: ....., from father Č. and mother M. born J., born ..... in P., where he lives, citizen of Montenegro, married, private, regulated the army in 1983 in V., middle class, not convicted, was in custody from 22.04. to 31.12.2010. years. 7. The Accused Š. R., JMBG: ....., from father T. and mother M., born P., born ..... in P., where he lives , citizen of Montenegro, police officer, married, finished high school, served in the army as part of schooling, poor financial situation, convicted by the judgment of the Basic Court in Pljevlja K.br. 77/98 of 14 April 1999 year, due to the criminal offense under Art. 39 of the Republic of Montenegro, when he was sentenced to three months probation for one year, he was in custody from 22.04. to 31.12.2010. years, Based on Art. 373. touch. 1. of the Criminal Procedure Code (CPC), RELEASED FROM THE PROSECUTION: Which is presented as: At the time of the international armed conflict in BiH during 1992-1995. year, as members of the border battalion of the Yugoslav Army in Pljevlja and members of the Ministry of Internal Affairs - Security Center in Pljevlja, violating the rules of international law established by Art. 7 st. 2 of the Rome Statute towards the civilian population in BiH,

as part of a wider and systematic attack against the Bosniak-Muslim civilian population, during searches of houses to find and confiscate weapons, that they treated Muslim citizens inhumanely, that they committed torture and violence, beat them while demanding to surrender their weapons, checked that whether they take part in the fighting on the side of the Green Berets and whether they deliver food and other foodstuffs to the Green Berets and hide the members of the Green Berets in their houses in Bukovica, causing them severe suffering and seriously endangering their health and bodily integrity. applied measures of extortion, created a psychosis for forced eviction from the villages of that area, due to which the behavior that part of the Muslim population was evicted to the area of Sarajevo, Goražde and Pljevlja, in such a way that:
1. Defendant Đ. R.1., Ђ. R.2., CS and G. Đ., As members of the reserve composition of the Yugoslav Army, on 22.02.1993. in the village of M., municipality of P. with personal weapons came in front of the house of R. Š., so that Đ. R.2. pointed a rifle at the victim, ordered him to leave the house in the yard immediately, which he did and went out in front of the house, after which the defendants asked him where he was on Thursday, suspecting that he had supplied food to "green berets" from BiH. the injured party told them that he was at home and brewing brandy, the accused that they started beating him with rifle butts on the body, stabbing him in the body with rifle barrels, from which blows the injured fell, and the accused that they continued to hit him with rifle butts, and legs in the abdomen, after which Ђ. R.2. entered the house and with his legs and arms inflicted several blows on RA, the wife of the injured party R. Š. and pushed him away, on which occasion it hit the wall and sustained injuries in the form of a cut on the head, and when the injured R. Š. got up and started to enter the house of the accused CS that he hit him several more times with the barrel of the rifle in the area of the chest and abdomen. 2. Defendant BM, as a member of the reserve of the Yugoslav Army with unknown members of the VJ and the police, in February 1993 in the village of P. MZ Bukovica, Pljevlja municipality, that he physically abused the injured BA from the same place, by intercepting him when the injured party returned from the store while driving flour on a horse and told him that the flour was driven by green berets

and asked him where his brother D. was, who was suspected to be a member of green berets, so when the injured party did not tell him, the defendant repeatedly hit him in the face with an open fist, as a result of which he inflicted injuries in the form of swelling of the face and head, after which they searched the house of the injured party and searched for weapons that were not found. 3. Defendants SS and Š. R., as members of the CB police in Pljevlja in the first half of April (April 5) 1992 in the village of V. MZ Bukovica, municipality of Pljevlja with several other armed unidentified persons of the Yugoslav Army and police to come to the village, to call an adult persons of Bosniak-Muslim nationality DI, DO, SH, TH1. and his sons TO and TH2. and that they demanded that they hand over their weapons, after which they searched their houses to find weapons, on which occasion they found weapons in the houses DI, DO, TH1, before the search and after the search, accused of being damaged they abused them by hitting them on the body, intimidating them by shooting them with weapons above their heads, putting batons in their mouths, so that the persons with whom they found weapons were taken into custody and taken to the CB in Pljevlja, and the persons with whom they were not found the weapons were released to the houses, so that due to the fear and such inhumane behavior of the defendants, the next day the defendant SH committed suicide by hanging. 4. Defendant Š. R. on the same day, after searching the DM house with the others, where police officers found an automatic rifle and two hand grenades, for which his son DI was deprived of liberty, and when the injured DJ came to the yard, the accused Š. R. took a hand grenade out of his trouser pocket, which he had previously found in D.'s house during the search, and threatened to put it in the DJ's mouth, after which the DJ approached and hit him on the body with his fists and legs, and with the tip of a stick in the area. chest and abdomen, while an unidentified person from the VJ reserve came and hit him with a helmet in the jaw area, and another unidentified person, a member of the VJ, kicked him in the thigh leg, - thus committing the crime of crime against humanity under Art. 427 of the Criminal Code of Montenegro in connection with Art. 7 st. 2 of the European Convention on Human Rights, because the act for which they are charged under the law is not a criminal offense. The first-instance verdict, in the part relating to the decision on the costs of the criminal proceedings and the property claim, remains unchanged. R easoning: Judgment of the High Court in Bijelo Polje Ks.br. 6 / 11-10 from

03.10.2011 year, the accused Ђ. R.1., Ђ. R.2., CS, G. Đ., BM, SS and Š. R., in the absence of evidence, pursuant to Art. 373 tach. 2 of the CPC were acquitted of the charge of having committed the criminal offense of Crimes against Humanity under Art. 427 of the Criminal Code in connection with Art. 7 st. 2 of the European Convention on Human Rights. Based on Art. 230. st. 1 of the CPC, it was decided that the costs of the criminal procedure will be borne by the budget of the court. By the same judgment on the basis of Art. 239 st. 3 of the CPC damaged R. Š., BA, SZ, DJ, DI, DO, TH1., TO, TH2. and TM, in order to realize the property claim, were referred to litigation. The Supreme State Prosecutor's Office - Department for the Suppression of Organized Crime, Corruption, Terrorism and War Crimes Podgorica (Special Prosecutor) and the injured party's attorney filed appeals against that verdict. The Special Prosecutor refuted the first-instance verdict due to: significant

violation of the provisions of the criminal procedure and erroneously established factual situation. He proposes that the Court of Appeals revoke the first-instance verdict and return the case to the first-instance court for retrial and decision-making. The injured party's attorney, SP's lawyer, filed the appeal for all "legally permitted reasons for appeal." He proposed that the challenged verdict be revoked and the case returned to the first instance court for a retrial, or that "the defendants be found guilty and a criminal sanction be imposed on them in accordance with the law". On the appeal of the special prosecutor, the answer was submitted by the defense attorneys of the defendants - lawyers MJ and MG. They suggested that the appeal be rejected as unfounded and that the first-instance verdict be upheld. The defense attorney of the accused JM responded to the appeal of the injured party's attorney. He proposes that the Court of Appeals reject the appeal of the injured party's attorney as unfounded and confirm the first instance verdict. In terms of Art. 392 of the CPC, the case files were submitted to the Supreme State Prosecutor's Office for consideration and proposal. VDT CG, with the submission Ktž.br.11 / 12 from 23.01.2012, proposed that the appeal of the special prosecutor and the appeal of the attorneys of the injured parties be accepted , and the answers to the appeals of the defense counsel of the accused are considered unfounded. The session of the Second Instance Panel was attended by the Deputy VDT CG, Slavica Popović and the Defense Counsel for the Accused, while the Accused, who were duly informed about the date of the session, did not attend. The attorney of the injured parties did not request to be informed about the session. After considering the challenged judgment, allegations of appeals and responses to appeals, the contents of the case file of the High Court in Bijelo Polje Ks.no. 6/11, paying attention ex officio to violations of the law in terms of Art. 398 of the CPC cost, Court of Appeal, on the occasion of the appeal, and ex officio found that: -djelo that the accused are charged, is not a felony, it is because of the correct application of the law, revised the first instance verdict finding the accused acquitted of charges of lack of evidence that they committed the criminal offense of Crimes against Humanity under Article 427 of the Criminal Code and acquitted them on the basis of Article 373, paragraph 1, item 1 of the CPC, because the offense they are charged with is not a criminal offense. He gives the following reasons for this decision: In this criminal proceeding, the accused are being tried for a criminal offense that was not prescribed by law as a criminal offense, at the time when it was committed, which is a precedent for domestic court practice.

Therefore, the Court of Appeals considered it necessary to, previously, analyze the legal issue which was not dealt with by either the prosecutor or the first instance court. Namely, whether the accused Ђ. R.1. etc., may be tried for the criminal offense of Crimes against Humanity under Article 427 of the Criminal Code (Official Gazette of the Republic of Montenegro 70 / 03,13 / 04,47 / 06; Official Gazette of Montenegro 40 / 08,25 / 10,31 / 11), considering the principle of legality - "nullum crimen sine lege, nullum paena sine lege", which guarantees that no one can be sentenced and other sanction if the act charged against him was not determined by law as a criminal offense and for him prescribed punishment at the time when the perpetrator was working or was obliged to work.

Principles of legality, knows and recognizes international criminal law in all major treaties, conventions and charters dealing with criminal law, as well as domestic criminal law, both from the time of the commission of the acts in question and this from the time of the trial. The principle of legality provides a guarantee against arbitrary accusation, conviction, and punishment. The accused are being tried for a criminal offense incriminated in domestic law 10 (ten) years after, according to the indictment, they took the actions charged against them. The Court of Appeals considers that, from the point of view of the principle of legality

and the prohibition of retroactive application of the law, it is not sufficient for the legal qualification of the act to be related to the provision of Article 7 paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Rights. freedom (hereinafter the European Convention-EC), which stipulates that the principle of legality (which is affirmed in the previous - paragraph 1 of Article 7 of the EC), does not affect the trial and conviction of persons for acts or omissions that occurred at the time when committed they were considered criminal offenses according to general legal principles recognized by civilized nations. It is not enough, not only because the FRY, in the period determined as the time of execution, was not ratified by the EC, but also because the provision of Article 7, paragraph 2 of the EC, due to the wording "... *according to general legal principles recognized by civilized nations* " represents a blanket norm referring to customary international law.

This imposes the need to determine whether at the time of execution there was an international customary norm on the basis of the content of which it can be concluded that at the time the indictment defines the time of execution (all acts related to 1992 and 1993) as a crime against humanity, which would mean that the crime, according to the general principles recognized by civilized nations, is considered a criminal offense. After that, but not less importantly, it is necessary to determine whether in the domestic legislation of the FRY or the Republic of Montenegro, at the time of the commission of the act, there was a regulation on the basis of which international law, ie. generally accepted rules of international law (in particular those that consider a crime against humanity a criminal offense) should be considered an integral part of the internal legal order.

In order to clarify the previous dilemmas, the Court of Appeals had in mind the Statute of the International Military Court of August 8, 1945, which was adopted on the basis of the so-called The London Agreement of 08.08.1945. This Statute established the International Military Tribunal (MVS) for the trial and punishment of war criminals of the European Axis states, committed during the Second World War. The provision of Article 6 of the Statute of the International Military Tribunal describes crimes under the jurisdiction of the IVS. In Article 6, point c). The Statute of the Ministry of Internal Affairs describes a crime against humanity that is within the competence of the Ministry of Internal Affairs, regardless of whether the act for which the trial is being violated or not violates the laws of the countries where the crime was committed, ie. regardless of whether this offense was prescribed in the laws of the state in whose territory the crime was committed. Pursuant to the said Statute, in the well-known Nuremberg Trials, criminals were convicted for acts which, at the time of their commission, were not incriminated in the states in which they were committed. Japan has been tried in the same way since 1946. until 1948, in the so-called The Tokyo trial conducted against Japanese war criminals who committed war crimes on the Asian continent before and during World War II. By the resolution of the UN General Assembly from 11.12.1946. the principles contained in the Statute of the International Military Tribunal and in the Nuremberg Judgment were confirmed as principles of positive international law. The UN General Assembly has entrusted the International Law Commission with the formulation of the principles of international criminal law. The commission systematized and formulated the so-called The Nuremberg Principles, entitled "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Trial before the Tribunal " , were accepted by the UN General Assembly and first published in the Commission's work report from June 5 to July 29, 1950. The Nuremberg Principles I, II, and VI are relevant to the present case , which read: *Principle I: Any person who commits an act that is considered a crime under international law is responsible and subject to punishment. II. principle: The*

fact that domestic (national) law does not prescribe a penalty for an act which is considered a crime under international law does not release the person who committed the act from liability under international law. Principle VI: The following crimes are punishable as crimes under international law: a. ***Crimes against peace*** *(description below) b.* ***War crimes*** *(description below) s.* ***Crimes against Humanity*** *(description below): The* Nuremberg Principles are part of customary international criminal law and have become part of binding domestic law in civilized nations. This further means that states belonging to civilized nations, on the basis of these general international principles (customary international law) which they have accepted and which have therefore become part of binding domestic law, consider a crime against humanity a criminal offense and allow it to be tried. and imposes a sanction, although at the time of execution it was not incriminated as such by domestic law. Bearing in mind that in the present case in 1992. and 1993, determined by the indictment as the time of execution, it follows that the time of execution belongs to the period of the Federal Republic of Yugoslavia (FRY).

It is therefore necessary to answer the question, on the basis of which domestic regulation from that time, customary international law could be considered an integral part of the domestic legal order? Namely, in order for the criminal offense of Crimes against Humanity, which at the time of its execution was known to customary international law, as stated above, but not domestic laws, to be considered an integral part of the domestic legal order, it is necessary enforcement, which introduces it into domestic law in the described manner (through the recognition of general legal principles).

This practically means that it is necessary to determine whether there is a domestic regulation that allowed international customary criminal law, to which the criminal offense of Crimes against Humanity would belong at the time of execution, to be an integral part of domestic binding law at the time of the alleged acts of the accused. The indictment links the time of execution (for incomprehensible reasons) to the war in BiH and decides "during 1992-1995", and then when describing individual acts of execution, the dates are stated as follows: for the act under item 1) - 22.02. 1993; for the act under point. 2) - February 1993; for the act under point. 3) - in the first half of April (April 5) 1992; while the time of the commission of the act described under Count 4) of the Indictment is marked "on the same day", which should also refer to some of the previous dates.

In the mentioned period, the Constitution of the FRY was valid, which was applied from April 27, 1992. years. Article 16, paragraph 2 of the FRY Constitution stipulates that " *international treaties, which have been ratified and published in accordance with the Constitution and generally accepted rules of international law, are an integral part of the FRY's internal legal order* ". Although in Count 3 of the Indictment the time of the alleged commission of one of the Accused's acts was determined literally "in the first half of April (April 5) 1992", the second instance court has no need to deal with the SFRY Constitution (valid at that time). April) was not properly assigned in the indictment. Namely, the evidence shows that the described search took place on 4 May 1992. g., and not on April 5, 1992, and that in Count 3 of the Indictment two searches of houses were separated spatially and temporally - taken in different places and at different times, and no search action was taken on April 5, 1992. .g. as stated in the indictment, but as previously stated on May 4, 1992, ie October-November 1992.

Thus, according to the aforementioned provision of the 1992 Constitution of the FRY it undoubtedly follows that the generally accepted rules of international law were an integral

part of domestic law at the time determined by the indictment as the time of execution. In connection with the UN Resolution, which confirmed the principles contained in the Statute of the International Military Tribunal and in the Nuremberg Judgment, as principles of positive international law, and in connection with the so-called The Nuremberg Principles, published and accepted by the UN General Assembly entitled "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Trial before the Tribunal ", which stipulate (in Principle VI) that crimes against humanity are punishable as crimes under international law, It is concluded that the criminal offense of Crimes against Humanity can be tried by the accused, although this offense was not prescribed as a criminal offense in domestic law at the time of the alleged commission on the basis of generally accepted international principles which recognize this offense as criminal. legality.

When accepting a trial for a criminal offense that was not prescribed as a criminal offense under domestic law, but was recognized as such under generally accepted, ie customary international law, the second instance court also had a dilemma that was important to clarify, for which regulation is correctly link the factual description of the crime, ie. according to which regulation should a legal qualification be determined ? In this dilemma, the Court of Appeals had in mind that international and former domestic practice (from the time of the joint SFRY state - Artuković case), as well as the practice of neighboring countries (Serbia (Egner case) and BiH - several cases) solved this dilemma by an act charged against the accused, which at the time of execution was not prescribed by law and was recognized by civilized nations as a criminal offense, is legally qualified under the law in force at the time of the trial (in which it was subsequently incriminated).

Based on the presented analysis, the Court of Appeals found that the principle of legality was not violated by the fact that the accused are tried here for an act which at the time of execution was not prescribed as a criminal offense in domestic law, because the criminal offense is a crime against humanity at the time of execution, they knew the accepted international principles - customary international law, which law is recognized by civilized nations.

International principles were an integral part of the binding domestic law of the state pursuant to Article 16, paragraph 2 of the CONSTITUTION of the FRY, which included the current state of Montenegro.

In accordance with the international and former domestic court practice and the case law of the surrounding countries, in such legal situations, the criminal offense is legally qualified under domestic law in which the criminal offense is subsequently incriminated.

In the opinion of the Court of Appeals, the previous analysis had to be performed (although they do not specifically reflect on the decision of this court), not only because the plaintiff and the first instance court did not deal with it, but also because this legal situation is a precedent for case law. Montenegro. Why is the act charged against the accused not a criminal offense?

Like any other criminal offense and the criminal offense of Crimes against Humanity under Article 427 of the Criminal Code, which was incriminated, as previously stated, for the first time in 2003, and whose description represents the conception of this criminal offense as it was known customary international law, is defined by the action, consequence, manner of execution ... and other features that represent the essential elements of the essence of this

crime. Like most crimes against humanity and other goods protected by international law, which are systematized in Chapter XXXV of the CC, the crime of crimes against humanity under Article 427 of the CC has a blanket norm, which means that in the legal description of these acts refer to another regulation which completes the essence of the criminal offense in question. The wording "who violates the rules of international law", which contains a description of the criminal offense of crime against humanity from Article 427 of the Criminal Code, refers to the rules of international law which contain more detailed provisions on the illegality of acts or omissions prescribed as alternative acts of execution. only with the help of certain rules of international law are all the essential elements of the essence of this criminal offense completed.

Certainly, the rules of international law referred to in the provision of Article 427 of the Criminal Code mean the rules established by international acts that have been ratified at the time determined by the indictment as the time of execution . It is an axiom that cannot be questioned.

The Court of Appeals finds that in the factual description of the act charged against the accused Ђ. R.1. et al., as presented in the indictment, the blanket norm of the criminal offense in question is supplemented by the provision of Article 7 para. 2 of the Rome Statute. The blanket norm of Article 427 of the CC cannot be supplemented by the aforementioned provision of the Rome Statute, because Article 7, paragraph 1 of the Statute is nothing but a description of "crimes against humanity", and paragraph 2 of Article 7 of the Statute, nothing but interpretation terms used in paragraph 1 of Article 7 of the Statute, due to which it follows that, pursuant to the Indictment, the blanket norm describing the criminal offense of Crimes against Humanity under Article 427 of the CC is supplemented by an international norm which also describes the crime against humanity and part of that norm that represents the meaning of the term.

However, the Court of Appeals will not deal with this illogicality of the indictment because it considers that, given the time of commission of the act charged against the accused, no provision of the Rome Statute can supplement the blanket norm of Article 427 of the CC for the following reasons:

The Rome Statute, which established the International Criminal Court (ICC), was adopted on July 17, 1998. years. It entered into force after the submission of the 60th instrument of ratification to the UN General Assembly, ie on 1 July 2002. Any perpetrator of a criminal offense under the jurisdiction of the International Criminal Court (genocide, crime against humanity, war crime) is subject to prosecution by the ICC after that date. . Accordingly, the accused undertook the actions charged against them in 1992. and 1993.

Thus, the defendants are charged with, by the actions described in the indictment, violating rules of international law that did not exist at the time of the commission of the offense (provisions of the Rome Statute). This further indicates that the Rome Statute cannot seek or find rules that, as international, would complement the factual description of the criminal offense of Crimes against Humanity under Article 427 of the CC, which was allegedly committed in 1992-1993, at a time when the Rome Statute was not had entered into force nor had it even been adopted.

As previously indicated, international rules, referred to in the wording of Criminal Code 427 CC "Whoever violates the rules of international law ..." must exist at the time when the perpetrator worked or was obliged to work.

Therefore, the reference in the indictment to the Rome Statute has no legal effect and practically means that the description of the offense in question lacks an international regulation that complements the blanket norm of this offense and fully constitutes its essential elements. This further means that the criminal offense as presented in the indictment is not a criminal offense, because it lacks one important element - the international regulation against which the accused undertook the activities for which they are charged.

It should be noted that the Rome Statute does not apply retroactively, even to acts covered by the Statute. Therefore, if criminal acts within the jurisdiction of the ICC were committed before the state in which they were committed ratified the RS, the jurisdiction of the ICC cannot be based on such acts and their perpetrators. Having in mind the above, the Court of Appeals, regarding the appeals of the special prosecutor and the attorneys of the injured parties, and finding that the first instance court acquitted the accused on charges, changed the first instance verdict and acquitted the accused on the basis of Article 373, paragraph 1, item 1. To the CPC, namely because the act charged against them, as described in the indictment, is not a criminal offense, because this basis for acquittal is more favorable for the accused.

The Court of Appeals had in mind the appellate allegations of both the special prosecutor and the attorneys of the injured parties, both those that referred to significant violations of the provisions of the criminal procedure and those that refuted the established factual situation. However, bearing in mind that the act as described by the Prosecution is not a criminal offense because it does not have all the essential elements of the criminal offense of Crimes against Humanity under Article 427 of the CC, or any other criminal offense prosecuted ex officio, the appellate allegations do not and cannot have an influence on a different decision of this court.

Namely, neither by correcting possible significant violations of the provisions of criminal procedure, nor possibly erroneously or incompletely established factual situation, essential elements of the criminal offense that must exist in the factual description of the criminal offense in the indictment can be constituted, which is not the case here. It should be borne in mind that the court is obliged to, in accordance with the CPC, during the entire procedure, ie from the beginning of the criminal procedure and in each subsequent phase of the procedure take into account whether the act charged against the defendants is a criminal offense. did not, make an appropriate decision terminating the criminal proceedings, (suspend the investigation - Article 262, paragraph 1, item 1 of the old CPC, while according to Article 290, paragraph 4, item 1 of the new CPC, this falls within the competence of the prosecutor; upon the objection to the indictment to suspend the proceedings - Article 282, paragraph 1, item 1 of the old CPC, ie to do so in the procedure of control of the indictment under Article 294, paragraph 1, item 1 of the new CPC, and finally after the main to render a verdict acquitting the accused on the basis of Article 363, item 1 of the old CPC, ie on the basis of Article 373, item 1 of the new CPC,), without making any assessment when making such decisions. evidence of the allegations of the prosecution. Therefore, even in the second-instance proceedings, when deciding on appeals against the first-instance verdict, and in case it finds that the act charged in the indictment is not a criminal offense, the court does not need to deal with appellate allegations other than those related to this basis of acquittal. . On the basis of the above, and on the basis of Article 409 of the CPC, it was decided as in the

dictum. COURT OF APPEALS OF MONTENEGRO Podgorica, on 22 March 2012 Recorder, PRESIDENT OF THE CHAMBER - JUDGE Maja Tošić, sr Radmila Mijušković, sr