SUPREME COURT of KOSOVO

15 June 2010
Prishtine/Pristina
Pkl-Kzz **131/09**

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of International Judge Gerrit-Marc Sprenger as Presiding Judge, International Judge Norbert Koster, and Kosovo Judges Avdi Dinaj, Emine Kaçiku, and Emine Mustafa as panel members, and in the presence of Andrea Chmieliński Bigazzi as recording clerk, in the criminal case Pkl-Kzz nr. **131/09** of the Supreme Court of Kosovo;

Against the Defendant **Nexhat Ramadani,** male, Kosovo Albanian, son of father's name Nuhi, mother's maiden name Fikrije, born on 20 September 1984 in Gjilan/Gnjilane, residing at Avdulla Presheva Road No. 395 in Gjilan/Gnjilane, unemployed, single, literate, having completed four years of elementary school, without prior military service, of middle financial status, without prior convictions, in detention since 5 April 2004;

Charged by the amended indictment with committing the criminal offence of Aggravated Murder (Article 30, paragraph 5 of the Criminal Code of the Socialist Autonomous Province of Kosovo (CC SAPK) in conjunction with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), in conjunction with Articles 146, 147, paragraph 5 and 6, and Article 23 of the Criminal Code of Kosovo (CCK), two criminal offences of Causing General Danger (Article 157, paragraph 1 and 3 of the CC SAPK in conjunction with Article 164 paragraph 2 and Article 22 of the CC SFRY, Article 291, paragraph 1, 3 and 5 in conjunction with Article 23 of the CCK), two criminal offences of Participation in a Group that commits a Criminal Act (Article 200, paragraph 1 of the CC SAPK in conjunction with Article 22 of the CC SFRY, Article 320, paragraph 1 in conjunction with Article 23 of the CCK).

Convicted in the first instance by the verdict of the District Court of Gjilan/Gnjilane, dated 19 May 2005, P. No. 142/04 for having committed the criminal acts of:

- **Aggravated Murder**, contrary to Articles 146 and 147, item 5 of the Provisional Criminal Code of Kosovo (PCCK) in conjunction with Article 23 of the PCCK;
- **Participation in a Group that commits a Criminal Act**, contrary to Article 200, paragraph 1 of the CC SAPK;

And sentenced to an aggregate punishment of 16 (sixteen) years of imprisonment, according to Article 71 of the Provisional Criminal Code of Kosovo (PCCK), which was based on a single punishment of 15 (fifteen) years of imprisonment for the criminal offence of Aggravated Murder, and 2 (two) years and 6 (six) months of imprisonment for the criminal offence of Participation in a Group that commits a Criminal Act, with credit for the time served in detention on remand since 05 April 2005 and continuously thereafter, pending the date when the verdict becomes final;

Convicted in the second instance according to the judgment of the Supreme Court of Kosovo, Ap.-Kz. No. 179/2007, dated 23 June 2009 which partially granted the appeal of the accused as to the legal qualification of the criminal offence of Aggravated Murder according to Article 30, paragraph 2, item 5 of the CC SAPK;

Acting upon the Requests for Protection of Legality filed by the Defendant and also by his Defence Counsel, dated 25 November 2009, both directed against the first instance judgment of the District Court of Gjilan/Gnjilane dated 19 May 2005 (P. No. 142/04), and the judgment of the Supreme Court of Kosovo dated 23 June 2009 (Ap.-Kz. No. 179/2007);

Considering the OSPK reply filed on 30 December 2009, dated 3 December 2009 (PKK nr. 138/2009);

After a deliberation and voting held on 15 June 2010;

Acting pursuant to Article 456 of the Kosovo Code of Criminal Procedure (KCCP).

Issues the following:

JUDGMENT

The Requests for Protection of Legality of the Defendant and also the one of his Defense Counsel, both dated 25 November 2009, against the first instance judgment dated 19 May 2005 (P. No. 142/04), and the judgment of the Supreme Court of Kosovo dated 23 June 2009 (Ap.-Kz. No. 179/2007) are

Rejected as unfounded

REASONING

I. Procedural Background

The charge is related to an Aggravated Murder e.g. committed on 17 March 2004 in Gjilan/Gnjilane, Kosovo where some Defendants in co-perpetration with others have taken the life of Slobodan Peric, to have seriously injured Anka Peric and to have damaged their property after the property had been attacked by a large angry mob.

Based on police investigations, Nexhat RAMADANI was arrested on 5 April 2004; the detention on remand was extended till the verdict becomes final with ruling of the District Court of Gjilan/Gnjilane dated 19 May 2005.

Against **Nexhat RAMADANI** and five other alleged co-perpetrators namely Agron IBRAHIMI, Saqip BRAHIMI, Xheladin SALIHU, Sadri SHABANI and Agim

ABDULLAHU, the International Public Prosecutor filed an indictment dated 28 September 2004 for the charge of Aggravated Murder, two criminal offences of Causing General Danger, two criminal offences of Participation in a Group that commits a Criminal Act, whereas Xheladin SALIHU was charged also with the criminal offence of illegal possession of a weapon and ammunition without lawful authorization and, the criminal offence of prevention of evidence.
The allegations were related to the murder of Slobodan PERIC and the serious injury suffered by his mother Anka PERIC occurred on 17 March 2004 in Gjilan/Gnjilane.

For the six Defendants the indictment was confirmed on all charges with ruling dated 14 October 2004.

The main trial started in front of the District Court Gjilan/Gnjilane on 25 January 2005, was held in the presence of the Public Prosecutor, of the Defendants and their Defence Counsels and included 25 hearings until 19 May 2005. Pieces of evidence were the statements of witnesses heard at the main trial and in the investigation phase, out of which some of them had been given anonymously, as well as the statements of the Defendants before the Police, the Investigating Judge and during the main trial. Some pieces of material evidence, such as cloths of the victims, photos and expertise were taken in consideration too.

At the hearing of 12 May 2005 the Prosecutor amended his indictment charging:
1 Nexhat RAMADANI together with Agron IBRAHIMI, Saqip BRAHIMI and Xheladin SALIHU with the criminal offence of **Aggravated Murder** against Slobodan PERIC, committed in a ruthless and violent mannerand/or for racial, national or religious motives;
2 Nexhat RAMADANI together with Agron IBRAHIMI, Saqip BRAHIMI, Sadri SHABANI and Xheladin SALIHU with the criminal offence of **Causing General Danger** by a general dangerous act against Slobodan PERIC,
3 Nexhat RAMADANI together with Agron IBRAHIMI, Saqip BRAHIMI, Sadri SHABANI, Xheladin SALIHU and Agim ABDULLAHU with the criminal offence of **Causing General Danger** by a general dangerous act against Anka PERIC,
4 Nexhat RAMADANI together with Agron IBRAHIMI, Saqip BRAHIMI, Sadri SHABANI, Xheladin SALIHU and Agim ABDULLAHU with the criminal offence of **Participating in a Group that took the life** of Slobodan PERIC,
5 Nexhat RAMADANI together with Agron IBRAHIMI, Saqip BRAHIMI, Sadri SHABANI, Xheladin SALIHU and Agim ABDULLAHU with the criminal offence of **Participating in a Group that caused serious injury** to Anka PERIC,
6 Xheladin SALIHU with the criminal offence of **Illegal Possession of a Weapon and Ammunition without lawful Authorization,**
7 Xheladin SALIHU with the criminal offence of **Prevention of Evidence,**
8 Nexhat RAMADANI together with Agron IBRAHIMI, Saqip BRAHIMI, Sadri SHABANI, Xheladin SALIHU and Agim ABDULLAHU with the criminal offence of **Participating in a Group that caused considerable damage to the property** of Slobodan and Anka PERIC,

9 Nexhat RAMADANI together with Agron IBRAHIMI, Saqip BRAHIMI, Sadri SHABANI, Xheladin SALIHU and Agim ABDULLAHU with the criminal offence of **Causing General Danger by fire** which caused substantial danger to the property of Slobodan and Anka PERIC.

On 19 May 2005, the First Instance Judgment was pronounced, thus sentencing Nexhat Ramadani as mentioned above. The Defendant was acquitted from all remaining charges.

Against the First Instance Judgment of the District Court Gjilan/GnjilaneThe the Defence Counsel of Defendant Nexhat RAMADANI filed an appeal on 12 December 2006.

The opinion of the International Prosecutor was expressed on 28 January 2009.

After the hand over of the case to EULEX Judges in January 2009, the Supreme Court of Kosovo scheduled the appeal session on 23 June 2009 where the Presiding Judge made his report, the Defendants and their Defence Counsels explained their appeals, the International Prosecutor replied, finally Defence Counsels and Defendants made their last statements as recorded in the minutes.

The appeal filed in the interest of Nexhat RAMADANI and dated 12 December 2006 was partially GRANTED as to the legal qualification of the criminal offence of Aggravated Murder according to Article 30, paragraph 2, item 5 of the CC SAPK, and was REJECTED in the remaining part.

By separate ruling, the District Court Gjilan/Gnjilane had decided on the extension of detention on remand for Nexhat RAMADANI according to Articles 426 and 393 of the KCCP. The appeal against this ruling was rejected by the Supreme Court on 23 September 2009. Therefore, the Defendant Nexhat Ramadani is still in detention on remand.

The Defence Counsel and the Defendant Nexhat Ramadani timely filed two separate requests for protection of legality against the 1st and 2nd Instance Judgments on 25 November 2009.

The OSPK filed its opinion on 30 December 2009, dated 3 December 2009 (PKK nr. 138/2009).

The request for protection of legality of the Defence Counsel of the Defendant Nexhat Ramadani challenges the 1st and 2nd Instance Judgments under diverse aspects as follows:

The 1st Instance Judgment is challenged due to:

1. essential violations of criminal procedure of Article 403, paragraph 1, item 12 of the PCPCK
2. violation of the Criminal Law Article 404 of the PCPCK.

The 2nd Instance Judgment is challenged due to violation of the Criminal Law of Kosovo.

The Defence Counsel proposes:

- to modify the first instance verdict as requested in the appeal to it,
- to accept the request of the Defendant,
- to modify the verdict and acquit the accused from the penal liability, or
- to pronounce a lenient punishment, or
- to quash the verdicts and to send the case to the First Instance Court for a re-trial.

The request for protection of legality of the Defendant Nexhat Ramadani was filed on 25 November 2009.

The judgments of 1st and 2nd Instance are challenged due to violations of the criminal law and to essential violations of the criminal procedure (ex Article 451, paragraph 1, sub-paragraphs 1 and 2).

The Defendant proposes:

- to quash the verdict of the 1st Instance Court as to the count of aggravated murder and acquit him from this charge, or
- to impose on him only one sentence in relation to the criminal charge of participation in a group which commit a criminal offence.

The Office of the State Prosecutor of Kosovo (OSPK), represented by EULEX Chief Prosecutor Theo Jacobs, filed an opinion to the Supreme Court of Kosovo on 30 December 2009 arguing that the requests of the Defendant and his Defence Counsel are ungrounded, thus moving the Supreme Court to reject them.

II. Supreme Court Findings

1. Admissibility of the Request for Protection of Legality

The Request for Protection of Legality is admissible. It was filed with the competent court pursuant to Article 453 of the KCCP, and within the deadline set by Article 452, par. 3 of the KCCP.

2. Procedures followed by the Supreme Court

The Supreme Court panel has decided in a session pursuant to Article 454, par. 1 of the KCCP. Parties have not been notified of the session, since according to Article 451 through 460 of the KCCP there is no obligation for the Supreme Court to notify the parties.

3. On the merits of the Requests for Protection of Legality

a. The Defence Counsel's request dated 25 November 2009:

The Request for Protection of Legality is unfounded.

The Defence Counsel in his request for Protection of Legality dated 25 September 2009, has challenged the 2nd Instance Judgment of the Supreme Court of Kosovo (Ap. Kz. No. 179/2007) dated 23 June 2009 as being based on the 1st Instance Judgment of the District Court in Gjilan/Gnjilane (P. No. 142/04) dated 19 May 2005, although this Judgment essentially had violated the criminal procedure, especially as set out by Article 403, paragraph 1, item 12 of the KCCP as well as the criminal law as set out by Article 404 of the KCCP.

Moreover, the Defence Counsel has challenged the 2nd Instance Judgment of the Supreme Court of Kosovo due to the violation of the criminal law of Kosovo.

There is no violation of Article 403, par. 1, sub-par. 1 of the KCCP.

aa. Substantial violations of the provisions of the criminal procedure (Article 402, paragraph 1, item 1 as read with Article 403 of the KCCP):

(1) Alleged violations of Article 403, par. 1, sub-par. 1, item 12 of the KCCP by the First Instance Court

The Defence Counsel has stressed that especially the 1st Instance Judgment of the District Court in Gjilan/Gnjilane essentially violates criminal procedure law, as it would be incomprehensible, contradictory within itself and with the given reasons, which the latter would not be convincing regarding the decisive facts whereas the respective reasons would be considerably unclear and contradictory amongst themselves as well as with the contents of the case files and the minutes of the main trial. Therefore, the 1st Instance Judgment would be confusing to the extent that it cannot be studied in regard to what the Court considered to be a relevant fact for deciding the case.

The Supreme Court of Kosovo finds that this concern completely refers to Article 403, paragraph 1, item 12 of the KCCP but that the allegation does not stand despite the fact that it is not substantiated at all. The Supreme Court has especially identified that the First Instance Judgment of the District Court Gjilan/Gnjilane is very clear in terms of for which counts of the indictment the accused was found guilty, what he was acquitted for, which punishment was imposed to him, on the applied provisions of the law, as well as on its factual findings and in terms of admissibility and evaluation of evidence.

In the respective context, moreover the 2nd Instance Court has already ruled out as follows:

*"- As already observed above (see point **II.1**) the law does not require that the enacting clause contains a very detailed description of the conduct of the convicted person, however it must be "comprehensible", that means that it must make clear what the Defendant has done.*
In this case the enacting clause appears to be very clear as to the conduct of each Defendant, included that of RAMADANI.
In fact it explains that on 17 March there was a large angry mob which attacked Slobodan Peric, his mother and his property in Gjilan.
In these circumstances the Defendant Nexhat RAMADANI, acting ruthlessly and violently, caused the death of Slobodan Peric.
After the attack against the property RAMADANI and the angry mob followed Peric, RAMADANI hit the victim twice with a stick, once on the hands and once on the head, then he jumped on the body of the victim.
This conduct and that of the other co-perpetrators, who attacked Peric with sticks and stones, deprived the victim of his life.
The enacting clause adds the legal definition of the described factual conducts of the Defendants and of the other perpetrators.
The enacting clause contains therefore all elements required by the law and has no contradictions in itself.

- As to the alleged lack of persuasive reasons on decisive facts the reasoning part examines the statements and the defense of RAMADANI in many points.
His statements are confronted with those of the prosecutor's witnesses like Avni URUQI, Blerim THAQI, Jeton LIMANI and others.
His trial statements are examined (page 38) particularly on their consistence.
The Court of First Instance goes through the issue of the admissibility of his Police statements (pages 44 and 45).
Finally (pages 47 and 48) are examined the grounds for the conviction of this Defendant.
All elements given by the attacked verdict appear to be coherent with each other, persuasive and leading to the same result of the enacting clause.
- The evidence on which the District Court based his judgment about Nexhat RAMADANI are clearly indicated in the reasoning part of the verdict without contradiction.
Once the Court explained what evidence it deemed as reliable and the reasons for this choice (that is the Police statements of the Defendants, see page 41) it followed then coherently its choice.
The grounds of the conviction of RAMADANI are found in the Police statements of Agron IBRAHIMI, Xheladin SALIHU and Agim ABDULLAHU.
Agron IBRAHIMI remembers:

- *that he together with his friends RAMADANI and ABDULLAHU helped other people to burn a car with Serbian plate,*

- *that the three of them joined the protestors and threw stones in the house of the Serbian victim,*
- *that at the moment the victim went out of the house with a weapon and left toward the centre RAMADANI followed him "with stick on his hand", also IBRAHIMI and ABDULLAHU followed the victim,*
- *that with his stick RAMADANI hit the Serbian on the hands, so that the weapon and also the victim fell on the ground,*
- *that Xheladin took away the automatic weapon,*
- *that after all this "it became a mess" because the crowd hit the Serbian with stones and wooden sticks.*"

The Supreme Court fully refers here to this reasoning to reject the request of the Defence Counsel as unfounded.

(2) Alleged violation of Article 403, paragraph 2, item 2 of the KCCP.

Finally, the Defence Counsel in the context of the 1st Instance Judgment has stressed that no translated minutes of the main trial had been submitted to him, although he had requested this throughout the whole of the proceedings. Thus, a serious obstacle had been created for an efficient defense of high quality.

The Supreme Court understands that the Defence Counsel in this way challenges the 1st Instance Judgment – and thus also the 2nd Instance Judgment for upholding it - for the violation of the rights of the defense as set out by Article 403, paragraph 2, item 2 of the KCCP.

It in the first place, is noteworthy that according to the law the 1st Instance Court did not have any obligation to submit the translated minutes of the main trial to the Defence Counsel. Article 77, paragraph 3 of the KCCP recognizes amongst others that *"the defense counsel has the right to inspect the records and evidence of the case in accordance with the provisions of the present code"*. Also, Article 142, paragraph 1 of the KCCP provides thus using a similar wording that *"at no stage of the proceedings the defense (may) be refused inspection of records of the examination of the Defendant..."*. Therefore, the Supreme Court understands that the applicable law does not provide for any obligation of the court to be proactive thus sending translated copies of almost the whole case file to the Defence Counsel after the main trial was concluded.

Additionally, the Supreme Court finds that the accused himself was continuously present during the 1st Instance main trial. Moreover, on 17 January 2005 the President of the District Court of Gjilan/Gnjilane has appointed *ex officio* the current Defence Counsel to the Defendant, who from that time on was also continuously present during the main trial sessions and thus has had all chances and opportunities to be adequately prepared for the sessions and their contents. There was only one session (on 22 March 2005) when the *ex officio* appointed Defence Counsel of the

Defendant was not present in the trial, but was adequately and lawfully replaced by lawyer Gazmend Syla.

(3) Violation of Article 395, paragraph 1 of the KCCP.

Finally, the issue of the very long period until when the written reasoning of the judgment was filed needs to be addressed. In this context, and in consideration of Article 6 of the European Convention on Human Rights (ECHR), already the 2nd Instance Judgment has pointed out as follows:

Particularly the time elapsed from the announcement of the judgment and the compilation and the serving of the verdict is defined as excessive by the defense of Nexhat RAMADANI which points out that this Defendant was in custody during the time used by the Court to prepare the written judgment.
In this case according to article 395.1 PCPCK the judgment should be delivered within fifteen days from its announcement.
Analogue consideration can be done for Xheladin SALIHU who was continuously detained since 31 march 2004, while the other appellants were released before the announcement of the judgment of first instance.

This case is of particular complexity: the first instance was related to six Defendants, each of them charged with specific criminal offences, during the main trial were heard thirty five witnesses and were necessary twenty six hearings, due to the participation of international judges and prosecutor everything was translated in English and in Albanian, the dimensions of the case file include more than three thousand pages, the written judgment amount to fifty six pages.
It is undeniable that this complexity requires time for conducting the main trial, for deciding and for writing the judgment.
The judgment of first instance was announced on 19 May 2005; the written decision was filed in the Registry of DC of Gjilane UNMIK on 29 November 2006.
The last appeal was filed on 26 January 2007; the appeal session was not scheduled before the hand over of the case to EULEX on 30 January 2009.
This Court deems that the time as indicated was very long and not consistent with the "reasonable" duration of a proceeding prescribed by international conventions.
According to the jurisprudence of the European Court of Human Rights and to the legislation of the Member States of the Council of Europe the "unreasonable" length of a proceeding may conduct to form of economic compensation.
It is not within the competence of this Court to decide on a form of economic compensation grounded on the unreasonable delay of the criminal proceeding.
Nevertheless, and in case of conviction, this point may be considered under the provision of article 66 no. 2 of PCCK as a mitigating circumstance[1]*, which however must be compared with aggravating circumstances and the gravity of the offence.*

[1] In this sense confront District Court of Pristine 9 November 2007 Shkumbin MEHMETI, District Court of Pristine 5 October 2007 B.M and Supreme Court of Kosovo 10 April 2009 Selim KRASNIQI et al.

However, the Supreme Court now finds that this point, which does not fall under Article 403 of the KCCP and thus cannot be evaluated *ex officio*, was not challenged by the Defense (Article 455, paragraph 1 of the KCCP).

bb. Violation of the criminal law (Article 402 paragraph 1 item 2 as read with Article 404 of the KCCP):

Although the Defence Counsel in his request for Protection of Legality has proposed to challenge the 1st Instance Judgment also for the violation of the criminal law, at no point a clear reasoning is brought forward in these terms against the Judgment.

The Supreme Court therefore understands that the intention of the Defence Counsel is to stress that the Judgment of the District Court in Gjilan/Gnjilane is based on non-existing evidence as far as the accused was found guilty for the murder of Slobodan Peric, and circumstances had been disregarded which would have precluded the accused from being prosecuted and sentenced in the case at hand.

The 1st Instance Court – as already conformed by the 2nd Instance Court – has conducted a complete and detailed evaluation on admissibility and reliability of all evidence, which this Court fully refers to. As of the evaluation of the statements of co-Defendants, the 2nd Instance Court especially found:

"No contradiction between the reasons given by the District Court and the collected evidence is to be found in the challenged verdict.
It can be added that RAMADANI himself before the Police admitted to have met IBRAHIMI and ABDULLAHU, to have joined a group of protestors who were throwing stones in the Serbian house, to have participated together with his friends to the throwing of stones, to have followed the Serbian man when he was walking on the street, to have brought in his hands a stick, to have been followed on this occasion by IBRAHIMI and ABDULLAHU.

This Court ... shares the assessment of the first judge, considering that the first statements were genuine, not contaminated by the knowledge of the statements of other Defendants nor by late and mere defensive intent.
In relation to the conduct of Nexhat RAMADANI, the evidence given by Agron IBRAHIMI, Xheladin SALIHU and Agim ABDULLAHU before the Police can be completed through the statements given in the same circumstances by the Defendant himself.
RAMADANI admitted to have been present during the riots together with IBRAHIMI and ABDULLAHU, to have thrown stones against the house of the victim, to have followed Slobodan Peric carrying a stick on his hands.
All these elements are consistent with each other in the sense expressed by the verdict of the first judge.

- As to the result of expertise conducted on cloths and shoes of RAMADANI it can be noticed that this Defendant was interviewed by the Police on 6 April 2004, that is twenty days after the facts.
That he on the 17 March wore certain cloths and shoes is only his assumption without corroboration.
Moreover, before the interview by the Police RAMADANI could have had all the time to clean cloths and shoes.
- The conduct of Slobodan Peric, going through the street with a Kalashnikov in his hands can not be considered outside the general context of the facts of that day.
He went out from his house after this had been violently attacked by a large and angry mob through the throwing of stones.
ABDULLAHU remembers specifically that during this attack against the house he saw the Serbian guy looking from the window of the house.
When Peric finally went out was bleeding from his head, sign that the throwing against the house had reached also the body of the victim.
Peric used the weapon to protect himself during an action which can be considered as a retreat.
He did not shot, as confirmed by the witnesses and by the number of bullets found in the magazine of the weapon some days later.
He was surrounded by the same large and angry mob which had attacked his house and injured him.
His conduct can not be considered as an illegal danger for the crowd of protestors but only as a mean of necessary defense: he was under an unlawful, real and imminent attack and his act (to threaten the crowd in order to gain the way) was proportionate to the degree of that danger (article 8 PCCK).
The conduct of Slobodan Peric did no justify that of the crowd, nor constitutes a mitigating circumstance for the perpetrators".

cc. Erroneous or incomplete determination of the factual situation (Article 402, paragraph 1, item 3 as read with Article 405 of the KCCP):

The Defence Counsel, again without substantiated reasoning, has challenged that the 1st Instance Court, in this point upheld by the 2nd Instance Court, had taken into consideration witness statements given to the police. It is moved that these statements had been challenged by the accused whereas other co-Defendants had denied their entire statements given to the police, thus exculpating the accused. Still on the defense position, given that these circumstances had not been fully considered by the District Court, evidence would be lacking for the conviction of the Defendant.

Although not expressively mentioned in the request for Protection of Legality, the Supreme Court understands that the intention of the Defense is to stress that the Court in its Judgment has determined the factual situation erroneously or incompletely, as set out by Article 405 of the KCCP.

Insofar, the Supreme Court expressively refers to Article 451, paragraph 2 of the KCCP, which clearly provides that *"a request for Protection of Legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation.... "*. Therefore, an assessment on the reconstruction of a factual situation cannot be subject to the scrutiny of the Supreme Court in the context at hand.

Just in order to be as careful as needed in examining the challenged aspects, the Supreme Court additionally underlines that the 1st Instance Judgment reflects in detail the intense weighing of evidence as conducted by the District Court, especially when it comes to statements of witnesses as well as co-accused or the Defendant himself. The 1st Instance Court has based its decision on all the carefully evaluated evidence as found admissible. Thus, no erroneous or incomplete determination of the factual situation by the 1st Instance Court was established.

dd. Alleged violations of Article 403, par. 1, sub-par. 1 item 12 of the KCCP by the 2nd Instance Court

The Defence Counsel has stressed that the 2nd Instance Judgment was incomprehensible as well, because it would not have been possible to find out "what was granted and what was rejected".

The Supreme Court, after examination of the respective Judgment, finds that the raised allegation is ungrounded. The 2nd Instance Court has partially granted the appeal filed in the interest of the Defendant as to the legal re-qualification of the criminal offense of Aggravated Murder contrary to Article 147 of the CCK into that of Murder contrary to Article 30, paragraph 2, item 5 of the CC SAPK, but rejected the appeal as for the remaining part. In this way, the 1st Instance Judgment was confirmed despite its legal qualification of the crime of Aggravated Murder as said above.

No serious doubts can be raised in this concern, since the wording of the 2nd Instance Judgment and its reference to the 1st Instance decision make it clear that the Judgment of the District Court in Gjilan/Gnjilane was affirmed regarding:

- the sentence for the re-qualified crime of Aggravated Murder into that of Murder contrary to Article 30, paragraph 2, item 5 of the CC SAPK (15 years of imprisonment);
- the conviction for the crime of Participation in a Group that commits a Criminal Act contrary to Article 200, paragraph 1 of the CC SAPK;
- the sentence for the crime of Participation in a Group that commits a Criminal Act (2 years and 6 months of imprisonment);
- the aggregate punishment of 16 (sixteen) years of imprisonment.

ee. Alleged additional violation of the criminal law by the 2nd Instance Court

Finally, the Defence Counsel in his request for Protection of Legality has challenged the 2nd Instance Judgment for re-qualifying the crime of aggravated murder and sentencing the accused according to Article 30, paragraph 2, item 5 of the CC SAPK instead of Article 147 of the Criminal Code of Kosovo (CCK), although he had not proposed for this in his appeal and since the previous provision would be the more favorable law.

Having carefully examined the 2nd Instance judgment, the Supreme Court finds that the re-qualification of the criminal offense of Aggravated Murder was clearly made in favor of the Defendant. In this context, the Supreme Court refers to the reasoning of the 2nd Instance Judgment which states as follows:

The First Instance Court has mistakenly applied to the criminal offence of aggravated murder the legal provisions of Articles 146 and 147 item 5 of PCCK (read in conjunction with article 23 for RAMADANI and article 25 for SALIHU) instead of the correct legal provision of article 30 paragraph 2 item 5 of Kosovo Criminal Law (read in connection with the Articles of the Criminal Code of the Socialist Federal Republic of Yugoslavia 22 for RAMADANI and 24 for SALIHU).
The issue of the applicable law must firstly be solved through the application of the law in effect at the time a criminal offence was committed: in this sense article 2 paragraph 1 of PCCK and article 4 paragraph 1 CC SFRY.
Both the above mentioned legal provisions foresee the case of a change in the criminal law in the time between the fact and the final decision on it, in this case the more favorable (or the less severe) law shall find application (see article 2 paragraph 2 PCCK and article 4 paragraph 2 CC SFRY).
In this case the alleged crime of aggravated murder was committed on 17 March 2004, before the PCCK entered in force and when KCL and its provisions were in effect.
The First Instance Court examined this issue (pages 51 and 52) and decided to apply the new law (articles 146 and 147 in connection with article 23) because it was deemed to be more favorable to the Defendant.

This Court deems the old law (article 30 paragraph 2 item 5 KCL) applicable because the new one is not more favorable to the Defendant.
According to the legal provision of KCL the fact is punished by imprisonment from ten to forty years.
It is one unique type of punishment (imprisonment) because UNMIK Reg. no. 2000/59 section 1.6 substituted death penalty, originally foreseen by KCL, with imprisonment up to a maximum of forty years.
According to article 38 CC SFRY the person convicted to the punishment of imprisonment can obtain conditional release after having served half of his punishment.
Article 147 PCCK sets forth two different types of punishment: imprisonment from ten to twenty years (read article 147 together with article 38 paragraph 1 PCCK) and

long term imprisonment that is imprisonment from twenty one to forty years (see article 37 paragraph 2 PCCK).
It must be noticed that long term imprisonment is less favorable than imprisonment foreseen by article 30 KCL, even though the maximum length is the same.
This happens because of two reasons: the minimum of long term imprisonment (twenty one years) is higher than the minimum of imprisonment (ten years); the person convicted to long term imprisonment can obtain conditional release only after having served three quarters of his punishment instead of the half.
According to the new law the judge has the possibility to choose between imprisonment and long term imprisonment; this means that he has the possibility to apply a punishment (long term imprisonment) which is less favorable than the one foreseen by the old law.
For these reasons in case of conviction of the Defendants article 30 paragraph 2 item 5 of Kosovo Criminal Law must find application.

No substantial differences can be seen between article 22 CC SFRY and article 23 PCCK.

Finally it can be noticed that the first judge has correctly applied article 200 paragraph 1 KCL as the law in force at the moment of the fact instead of article 320 PCCK because these two legal provisions are identical in terms of punishment.

The fact that the re-qualification of the crime did not have any impact on the punishment, which remains 16 (sixteen) years of imprisonment, does not affect the aforementioned evaluation of a law being more favorable than another one of the same legal content. There is no guarantee that the accused effectively profits from the obligation for the court to apply the more favorable law.

Already the 2nd Instance Court in this context has stated as follows:

"The first Court considered both aggravating (degree of criminal liability, the motives for committing the act, the special circumstances, the brutal manner of the act, the gravity of the offences) and mitigating circumstances (the previous conduct, the blank record, young age, personal and familiar circumstances of the Defendant), determined the punishment for the aggravated murder in fifteen years and the punishment for the criminal offence foreseen by article 200.1 KCL in two years and six months.
The punishments were thus determined near the minimum.
The aggregated punishment was sixteen years imprisonment.

According to article 64.1 PCPCK the punishment shall be determined taking into consideration all mitigating and aggravating circumstances and shall be proportionate to the gravity of the offence, the conduct and the circumstances of the offender.

This Court shares the assessment of the first judge on the existence of both aggravating and mitigating circumstances.
To this Defendant can be recognized also a mitigating circumstance linked to the excessive time for delivering the judgment of first instance.
However, the gravity of the offence and its motives related to the hate against a different ethnicity appear to be so high to prevail on any mitigating circumstance.

The amount of the punishment will remain the same as decided by the First Instance Court even though the legal qualification of the crime of aggravated murder must be found in article 30 paragraph 2 item 5 KCL and not in article 146 and 147 item 5 PCCK.
In this case the applied punishment (fifteen years) falls within the legal terms provided by the applied law".

The Supreme Court fully refers to this reasoning.

b. The Defendant's request dated 25 November 2009:

The Request for Protection of Legality is unfounded.

The Defendant in his request for Protection of Legality dated 25 November 2009 has challenged both the 1st Instance Judgment of the District Court of Gjilan/Gnjilane (P. No. 142/04) dated 19 May 2005, and the 2nd Instance Judgment of the Supreme Court of Kosovo (Ap. Kz. No. 179/2007) dated 23 June 2009, due to essential violation of the criminal procedure as set out by Article 403, paragraph 1, items 3, 8 and 9 of the KCCP as well as that the Defendant understands that both Courts have violated the principle of *ne bis in idem.*

As of both Judgments, the Defendant has stressed also alleged violation of the criminal law as set out by Article 404 of the KCCP, since he was found guilty for aggravated murder in the 1st Instance and since in the 2nd Instance the Court erroneously had applied Article 30 of the CC SAPK instead of Article 147 of the CCK.

aa. Alleged violations of the criminal procedure code

(1) The Defendant has stressed maltreatment during him being questioned by police and prosecutors, thus claiming that before he was interrogated by the Prosecutor, police had taken his sneakers, so that as a consequence he had to appear barefooted in front of the Prosecutor. Moreover, the 1st Instance Court had considered all police statements as admissible evidence although KPS as well as UNMIK Police had been suspended by KFOR during the March riots and thus the whole investigation had

been conducted under violation of UNMIK Regulation 2001/28 on the rights of arrested persons.

The Supreme Court understands the respective intention of the Defendant in the way that on his opinion the Judgments were based on inadmissible evidence as set out by Article 403, paragraph 1, item 8 of the KCCP.

The Supreme Court understands that – whilst KFOR under its mandate had to keep peace and order to the extent possible – UNMIK and KPS in the respective case just had assisted by collecting and saving evidence in the context of the case at hand. Therefore, the Supreme Court does not see any violation of UNMIK Regulation 2001/28 as challenged by the Defendant.

Moreover, the Defendant in the same context has stressed that he was interviewed by the police in an improper way, since he would have had to give his statement after Police had seized his shoes.

The Supreme Court finds that this allegation already was subject of the 2nd Instance Judgment. The appeal panel has found that the allegation of maltreatment through the seizure of shoes during the questioning can not be accepted, since according to the testimonies of the Police Officers the shoes of the Defendant were taken off after, not during the questioning (Supreme Court of Kosovo, Ap.-Kz. No. 179/2007, dated 23 June 2009, p. 15 of the English version).

(2) Additionally, the Defendant has underlined that the 1st Instance Court had prevented him from being accompanied by a Defence Counsel all the time and thus had violated Article 73 of the KCCP by erroneous application of Article 69 of the KCCP.

The Supreme Court understands that the Defendant wants to express his opinion that he had had the right to mandatory defense and that the main trial was conducted in absence of persons whose presence was required by the accused, as set out by Article 403, paragraph 1, item 3 of the KCCP.

The Supreme Court has already pointed out that as of 17 January 2005 the Defendant had mandatory defense and that (except from 22 March 2007, when a substitute lawyer was found) he from that time on continuously was accompanied by a lawyer when on trial (p. 9).

(3) The Defendant has finally stressed that the 2nd Instance Judgment, through accepting the factual findings of the 1st Instance Judgment, had neglected the fact that – although he had pleaded not guilty on all counts – he during the 1st Instance trial was examined before the presentation of evidence was completed. He thus has challenged both verdicts for the violation of Article 403, paragraph 1, item 9 of the KCCP.

In total it needs to be underlined that already the 2nd Instance Court has found that there were no violations of Article 403, paragraph 1, items 1, 2, 6, 8, 9, 10, 11 and 12 of the KCCP, a legal viewpoint the Supreme Court fully shares in the context given.

bb. Alleged violations of the criminal law

(1) As of the 1st Instance Judgment, the Defendant has stressed alleged violation of the criminal law as set out by Article 404 of the KCCP, since he was found guilty for aggravated murder although he had not committed the crime nor wanted it and the evidence which had led the Court to its sentence had been obtained illegally.

The Supreme Court has already pointed out that the question of re-construction of the factual situation falls under Article 405 of the KCCP and concerns alleged erroneous or incomplete determination of the factual situation, which according to Article 451, paragraph 1 of the KCCP does not fall into the scrutiny of the Supreme Court in the context of a request for Protection of Legality.

(2) As of the 2nd Instance Judgment, the Defendant has also stressed alleged violation of the criminal law as set out by Article 404 of the KCCP, since the Supreme Court had erroneously found that Article 30, paragraph 2, item 5 of the CC SAPK is the more favorable law in comparison with Article 147 of the CCK and thus had partially re-qualified the criminal offense, but without diminishing the original punishment.

The Supreme Court in this context has already pointed out that the re-qualification of a crime must not necessarily have any impact on the punishment, which in the case at hand remains 16 (sixteen) years of imprisonment and that there is no guarantee that the accused effectively profits from the obligation for the court to apply the more favorable law.

(3) In addition, the Defendant moves that both courts had found him guilty of two criminal offenses, one aggravated murder and one criminal offense of participation in a group that commits a criminal act, although he had acted only once. Therefore, both courts would have had neglected the principle of *ne bis in idem* and thus violated Article 404 of the KCCP.

The Supreme Court in this context fully refers to what the 2nd Instance Court has already pointed out and what is in line with international and European law standards. It is self-explaining that it is not impossible to commit two (or even more) crimes at the same time, meaning to fulfill the requirements of two different criminal offenses as defined by the respective criminal law through one unique deed or act of behavior. What is not admissible is the case when a Defendant is convicted for the same fact according to two or more different legal proceedings, which means he is convicted twice for the

same doings, which would violate the legal principal of *ne bis in idem*. However, this is not given in the case at hand.

4. Conclusion of the Supreme Court of Kosovo

For the abovementioned reasons, the Supreme Court concludes that the Requests for Protection of Legality are unfounded and therefore rejected.

The judgment of the Supreme Court of Kosovo dated 23 June 2009 (Ap.-Kz. No. 179/2007) is ENTIRELY AFFIRMED.

Pursuant to Articles 100 and 121 of the KCCP, the costs of these criminal proceedings shall be borne by the Defendant.

Consequently, pursuant to Article 456 of the KCCP the Supreme Court of Kosovo decides as in the enacting clause.

SUPREME COURT OF KOSOVO IN PRISHTINE/PRISTINA
Pkl-Kzz 131/09, 15 June 2010

Prepared in English, an authorized language.

EULEX Presiding Judge
Gerrit-Marc Sprenger

EULEX Judge
Norbert Koster

Kosovo Judge
Avdi Dinaj

Kosovo Judge
Emine Kaçiku

Kosovo Judge
Emine Mustafa

EULEX Legal Officer, Recording Clerk
Andrea Chmielinski Bigazzi

Legal Remedy

Against this Judgment it is not possible to file another request for protection of legality (Article 451. paragraph 2 of the KCCP).