SUPREME COURT of KOSOVO

23 June 2009
Prishtine/Pristina
Ap.-Kz No. 179/2007

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of International Judge Emilio Gatti as Presiding Judge, International Judges Maria Giuliana Civinini and Guy Van Craen and Kosovo National Judges Salih Mekaj and Nesrin Lushta as panel members,

in the criminal proceedings against:

A I.

charged by the amended indictment with committing the criminal offence of aggravated murder (art. 30 para. 5 Kosovo Criminal Code in conjunction with art.22 CC SFRY, in conjunction with articles 146, 147 para. 5 and 6 and art. 23 PCCK), three criminal offences of causing general danger (art. 157 para. 1 and 3 KCC in conjunction with art. 164 para. 2 and art. 22 CC SFRY, art. 291 para. 1, 3, 5 in conjunction with art. 23 PCCK), three criminal offences of participation in a group that commits a criminal act (art. 200 para. 1 KCC in conjunction with art. 22 CC SFRY, art. 320 para 1 in conjunction with art. 23 PCCK).

N'R

amended indictment with committing the criminal offence of aggravated murder (art. 30 para. 5 Kosovo Criminal Code in conjunction with art. 22 CC SFRY, in conjunction with articles 146, 147 para. 5 and 6 and art. 23 PCCK), three criminal offences of causing general danger (art. 157 para 1 and 3 KCC in conjunction with art. 164 para.2 and art. 22 CC SFRY, art. 291 para. 1, 3, 5 in conjunction with art. 23 PCCK), three criminal offences of participation in a group that commits a criminal act (art. 200 para. 1 KCC in conjunction with art. 22 CC SFRY, art. 320 para 1 in conjunction with art. 23 PCCK).

X.S.

in detention since 31 March 2004, charged by the amended indictment with committing the criminal offence of aggravated murder (art. 30 para. 5 Kosovo Criminal Code in conjunction with art.22 CC SFRY, in conjunction with articles 146, 147 para. 5 and 6 and art. 23 PCCK), three criminal offences of causing general danger (art. 157 para 1 and 3 KCC in conjunction with art. 164 para.2 and art. 22 CC SFRY, art. 291 para. 1, 3, 5 in conjunction with art. 23 PCCK), three criminal offences of participation in a group that commits a criminal act (art. 200 para. 1 KCC in conjunction with art. 22 CC SFRY, art. 320 para 1 in conjunction with art. 23 PCCK), the criminal offence of illegal possession of a weapon and ammunition without lawful authorization (art. 8.2 and 8.6 UNMIK Regulation 2001/7, art. 328 para. 2 PCCK), the criminal offence of prevention of evidence (art. 177 para. 1 KCC, art. 309 para. 2 PCCK).

S.S.

...ed, in detention since 22 March 2004 until his release in this trial on 4 February 2005, charged by the amended indictment with committing two criminal offences of causing general danger (art. 157 para 1 and 3 KCC in conjunction with art. 164 para.2 and art. 22 CC SFRY, art. 291 para. 1, 3, 5 in conjunction with art. 23 PCCK), three criminal offences of participation in a group that commits a criminal act (art. 200 para. 1 KCC in conjunction with art. 22 CC SFRY, art. 320 para 1 in conjunction with art. 23 PCCK).

A.A.

in detention from 7 April 2004 to 28 August 2004, charged by the amended indictment with committing the criminal offence of causing general danger (art. 157 para 1 and 3 KCC in conjunction with art. 164.2 and art. 22 CC SFRY, art. 291 para. 1, 3, 5 in conjunction with art. 23 PCCK), three criminal offences of participation in a group that commits a criminal act (art. 200 para. 1 KCC in conjunction with art. 22 CC SFRY, art. 320 para 1 in conjunction with art. 23 PCCK).

Deciding upon the appeals on the District Court of Gjilan/Gnjilane Judgment P. no. 142/2004, dated 19 May 2005, convicting A1 (i) NR of having committed the criminal offence of aggravated murder foreseen by articles 146 and 147 item 5 in conjunction with article 23 PCCK, A1 (ii) XS of having committed the criminal offence of assistance in aggravated murder foreseen by articles 146 and 147 item 5 in conjunction with article 25 PCCK, A2 AJ, NR, JB, XS, SS and AA

of having committed the criminal offence of participation on a group that commits a criminal act foreseen by article 200.1 KCL, X.S of having committed the criminal offence of unauthorized possession of weapon foreseen by section 8.2 in conjunction with section 8.6 of UNMIK Regulation 2001/7,

appeals which were filed by the defense counsels
on behalf of S.S on 26 January 2007,
on behalf of N.R on 12 December 2006,
on behalf of X.S on 7 December 2006,
on behalf of A.I on 31 December 2006,
on behalf of A.A on 12 December 2006,

After having heard the submissions of the defense counsels Mr. Mustafe MUSA, Mr. Arben MUSTAFA, Mr. Shemsedin PIRAJ, Mr. Masar MORINA and Mr. Faruk BRESTOVIC, the statements of the defendants and opinion and motion of the OSPK Prosecutor Mr. Theo JAKOBS in the session held on 23 June 2009 and after a deliberation and voting held on 23 June 2009.

Acting pursuant to Article 420 of the Criminal procedure Code of Kosovo (KCCP) renders this

VERDICT

The appeal filed in the interest of A.I. dated 31 December 2006 is REJECTED.

The appeal filed in the interest of N.R dated 12 December 2006 is partially GRANTED as to the legal qualification of the criminal offence of aggravated murder according to article 30 paragraph 2 item 5 of KCL and is REJECTED in the remaining part.

The appeal filed in the interest of X.S. dated 7 December 2006 is partially GRANTED as to the criminal offence of assistance in aggravated murder from which the defendant is **ACQUITTED** and as to the punishment, which is reduced to two years and seven months imprisonment for the remaining criminal charges.

The appeal filed in the interest of S.S. dated 26 January 2007 is REJECTED.

The appeal filed in the interest of A.A. dated 12 December 2006 is REJECTED.

Pursuant to article 391.5 PCPCK, the time spent in detention on remand by each defendant is included in the amount of punishment.

The Judgment of the District Court of Gjilan/Gilan, dated 19 May 2005, P No 142/2004 is AFFIRMED IN THE REMAINING PARTS.

The costs of the second instance proceeding will remain in charge of the defendants jointly.

With a separate ruling is decided about the detention on remand for N.R. and X.S., according to article 426 and 393 KCCP.

REASONING

A. Procedural History

1. Against AI NR SB XS SS and AA 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 XS 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 SP and the serious injury suffered by his mother AP 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.

2. The main trial started on 25 January 2005, was held in the presence of the Public Prosecutor, of the defendants and their defense counsels and included 25 hearings until 19 May 2005.
At the hearing of 12 May 2005 the Prosecutor amended his indictment charging:
1 AI, NR, SB, XS, SS and AA with the criminal offence of aggravated murder against SP
2 AI, NR, SB, XS, SS and AA with the criminal offence of causing general danger by a general dangerous act against
3 AI, NR, SB, XS, SS and AA with the criminal offence of causing general danger by a general dangerous act against AP,
4 AI, NR, SB, XS, SS and AA with the criminal offence of participating in a group that took the life of SP
5 AI, NR, SB, XS, SS and AA with the criminal offence of participating in a group that caused serious injury to AP
6 XS with the criminal offence of illegal possession of a weapon and ammunition without lawful authorization,
7 XS with the criminal offence of prevention of evidence,
8 AI, NR, SB, XS, SS and AA with the criminal offence of participating in a group that caused considerable damage to the property of S and AP
9 AI, NR, SB, XS, SS and AA with the criminal offence of causing general danger by fire which caused substantial danger to the property of S and A P

At the hearing of 19 May 2005 the judgment was announced.

NR was found guilty of aggravated murder against SP

XS was found guilty of assistance in aggravated murder against SP

AI, NR, SB, SJ, XS and AA were found guilty of the participation in a group that took SP's life, inflicted serious bodily injury on AP and considerably damaged the house of SP and at least one car,

XS was found guilty of illegal possession of a weapon and ammunition.

NR was sentenced to an aggregated punishment of 16 years imprisonment,

XS to an aggregated punishment of 11 years imprisonment taking into consideration also one revoked sentence,

SB to an aggregate punishment of 3 years and 6 months imprisonment taking into consideration also two revoked sentences,

AI to the punishment of 2 years and 6 months imprisonment,

SJ to the punishment of 2 years and 6 months imprisonment,

AA to the punishment of 2 years and 6 months imprisonment.

The defendants were acquitted from the remaining charges.

3. AI was arrested on 7 April 2004 and released in this trial on 20 April 2005.

NR 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.

SB was arrested on 29 March 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.

XS was arrested on 31 March 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.

SJ was arrested on 22 March 2004 and released in this trial on 4 February 2005.

AA was arrested on 7 April 2004 and released on 28 August 2004.

4. The defense counsels of the convicted persons filed appeal against the verdict as follows.

The appeal of Mr. Faruk BRESTOVCI as defense counsel of defendant AI was filed on 31 December 2006.

The appeal of Mr. Arben MUSTAFA as defense counsel of defendant NR was filed on 12 December 2006.

The appeal of Mr. Mustafe MUSA as defense counsel of defendant SS was filed on 26 January 2007.

The appeal of Mr. Shemsedin PIRAJ and Mr. Masar MORINA as defense counsels of defendant XS was filed on 7 December 2006.

The appeal of Mr. Azis R. SHAQIRI as defense counsel of defendant RA was filed on 12 December 2006.

SB did not file any appeal.

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

5. 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 defense counsels explained their appeals, the International Prosecutor replied, finally defense counsels and defendants made their last statements as stated in the minutes of the record.

6. The deliberation was taken by the Court on 23 June 2009.

B. Issues raised by the Appellants

I

Preliminarily it is necessary to examine some main points which are common to the appeals or must be investigated ex officio.

1. <u>As to the violation of criminal procedure.</u>
A first point which is raised by the appeals and must be examined also ex officio, according to article 415.1 subparagraph 1 read in connection with article 403.1 subparagraph 8 PCPCK, is the admissibility of evidence used by the First Instance Court to base its judgment.
The issue is particularly raised with reference to the statements given by the defendants before the Police.

1.1 As it was already pointed out in the challenged verdict, the investigations related to this case started on 25 March 2004.

According to article 549 of PCPCK "investigations initiated before the date of entry into force of the present Code but which have not been completed by this date shall be continued and finished according to the provisions of the previous applicable law".
PCPCK entered into force on 6 April 2004.
This means that all the investigative stage had to be carried on and finished according to the criminal procedure in force before the PCPCK, which is LCP.

Article 218 of LCP sets forth the rules of the interrogation of the accused[1], who must be informed about the charge and the reasons for the doubt against him, invited to expose his defense and informed "that he is no obliged to state his defense arguments not to answer to the questions put"(paragraph 2).
The provision of paragraph 8 excludes the possibility to use "force, threat or other similar means" in order to obtain from the accused a statement or a confession.
Paragraph 9 foresees that "the accused may be interrogated in the absence of the defense attorney if he explicitly waived that right and the defense is not mandatory".
Article 67.1 LCP sets forth that the accused "may have defense counsel throughout the entire course of criminal proceedings" and the following article 70 provides for the cases of compulsory defense.
Paragraph 1 of article 70 sets forth the obligation ("must) of the presence of the defense counsel "from the very first examination" if the defendant is mute, deaf or incapable of effectively defending himself or if proceedings are being conducted for a criminal act for which the death penalty may be pronounced.
The second paragraph foresees the compulsory presence of the defense only since the time when indictment is delivered in case of a charge for which an imprisonment sentence of 10 years may be pronounced.
No provision of LCP sets forth a case of mandatory defense based only on the arrest of the defendant.

In this specific case, according to provisions of LCP, before the filing of the indictment the presence of the defense counsel assisting the defendants during the interviews was not mandatory and could be waived by the defendants themselves.
This is because no defendant was in the conditions of disability mentioned in the first paragraph of article 70 and the charge moved could not result in the conviction to death penalty[2].

X.S.

From the case file it results that only) gave his statements to the Police at the presence of his attorney[3]: no remarks of inadmissibility of these statements were raised in the appeal, nor are to be found ex officio.

[1] These regulations are "valid for the interrogation of the accused in every phase and stage of the procedure and by every authority authorized to question the accused (authorities of internal affairs...)": see Branko PETRIC Commentary on the Law on Criminal Procedure, art. 218.
[2] Death penalty, originally foreseen by article 30.2 item 5 of Kosovo Criminal Law for the case of aggravated murder, was abolished by UNMIK Regulation 1999/24 article 1.5, amended by UNMIK Regulation 2000/59. The last provision substituted death penalty with a term of imprisonment the maximum of which is indicated in forty years.
[3] This results from the Investigative Report about this interview, where is quoted the presence of attorney Mr. Masar MORINA, from the statement of the witness) before the Investigative

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On the other side the other defendants were heard without their defense having explicitly waived their right to be assisted.

1.2 The investigative stage was carried out by KPS and UNMIK Police, which had to respect also the provisions of UNMIK Regulation 2001/28 on the rights of person arrested by Law Enforcement Authorities and of UNMIK Regulation 2002/7 on interviews conducted by Law Enforcement Authorities.
The first regulation foresees the rights to be informed about the reasons for the arrest, to remain silent and not to answer any question, to receive the assistance of defense counsel (section 2.1).
His rights must be communicated to an arrested person both orally, immediately after arrest and in writing (section 2.2).
Section. 2.3 sets forth specifically that at the moment to be interviewed the arrested person must be informed of his right to remain silent and to receive the assistance of defense counsel.
Section 3.4 repeats the right of the arrested person to the presence of defense counsel "during all interviews by the law enforcement authorities".
Section 3.6 sets forth the possibility for the defendant to waive his right to the assistance of defense counsel "if such a waiver is made in an informed and voluntary manner".
Section 2 of UNMIK Regulation 2002/7 foresees the right of the person interviewed to read or to have read the written record of any interview.
At the end of the reading the interviewee "shall sign the written record of an interview, if he or she accepts it as accurate".
Section 3 sets forth the conditions under which a Court can determine that a written record of an interview may be used for rendering a decision.
Among other conditions it is prescribed that during the interview "there has been no use of force, threats or other similar methods by the law enforcement authorities in obtaining the statements".

1.3 At the conclusion of the investigation the Public Prosecutor filed the indictment on 28 September 2004.
As a consequence and according to article 550 PCPCK, the main trial and the following phases are regulated by the PCPCK.
This code rules at article 156.1 the value to confer to the statement given by the defendant before the Police recognizing that this statement has value of admissible evidence whenever it was taken in accordance with the provisions of articles 229 through 236.
Moreover the following article 157.2 sets forth that "the court shall not find the accused guilty based solely, or to a decisive extent, upon statements given by the defendant to the police or the public prosecutor".
The provisions of articles 229 through 236 of PCPCK are the same of LCP as to the information about the criminal offence with which the defendant is charged, the right to remain silent and not to answer any questions and the right "to receive the assistance of

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Judge, statement read out during the main trial according to article 368 PCPCK and from the allegation of the defendant at the hearing of 1 February 2005.

defense counsel and to consult with him or her prior to as well as during the examination" (art. 231.2 items 1, 2, 4 and paragraph 3).

Chapter XXIV of PCPCK sets forth provisions on provisional arrest and police detention of suspected.

The Police has the possibility to examine the arrested person (art. 218), under the respect of the provisions given by articles 231 through 235.

The arrested person has among others the right to the immediate assistance of defense counsel (art. 213 paragraph 1), right which may be waived in accordance with article 69 paragraphs 3, 4 and 5 of the same code (art. 213 paragraph 4).

Article 69.3 PCPCK allows the suspect[4] and the defendant to waive the right to the assistance of a defense counsel "except in cases of mandatory defense", which according to article 73.1 are related to conditions of disability of the defendant[5], to the application of detention on remand[6] or to the filing of an indictment for a criminal offence punishable by at least eight years of imprisonment.

No provision of PCPCK sets forth a case of mandatory defense based only on the provisional arrest of the defendant by the Police.

This means that according to PCPCK in case of an interview before the Police during the preliminary proceedings and for this kind of charges the suspect and the defendant, even if arrested, have the possibility to waive their right to the presence of the defense counsel.

This means that, according to PCPCK, the statements given by the defendants before the Police without the presence of their defense counsels are considered "admissible evidence" in the Court, provided that a valid waiver to this right exists.

According to article 69.3 PCPCK a waiver to the right to the assistance of a defense counsel is valid under the conditions to have been "made explicitly and in an informed and voluntary manner", to be in writing and to be signed by the suspect or the defendant and by the witnessing competent authority.

Moreover article 155 PCPCK prohibits in any questioning or examining any form of ill-treatment, physical interference and coercion, to induce fatigue in the defendant, to threaten him with measures not permitted under the law and to hold out the prospect of an advantage not envisaged by law.

Violation of the prohibitions contained in article 155 results in the inadmissibility of the collected evidence.

1.4 's appeal points out the violation of the rights of the defendant during his police statement of 22 March 2004.

[4] According to article 151 PCPCK a "suspect" is a person whom the police or the authorities of the criminal prosecution have a reasonable suspicion of having committed a criminal offence but against whom criminal proceedings have not been initiated, whereas a "defendant" is a person against whom criminal proceedings are conducted.

[5] The defense is mandatory "from the first examination" if the defendant is mute, deaf, displays signs of mental disorder or disability and is therefore incapable of effectively defending himself.

[6] The defense is mandatory "at hearings on detention on remand and throughout the time he or she is in detention on remand".

The appeal claims that, according to the form on rights of the arrested person dated 22 March 2004 at item 7 the defendant had answered with NO to the question: "do you want to give up your right of remaining silent with us at this time".
This means that he wanted to remain silent and that he was forced by the Police to give a statement.
Secondly the questioning lasted without pause from 12:30 to 14:45, consequently the defendant was "extremely tired" and "not able to control what he said and didn't sign it".

The First Instance Court examines these points on the pages 42-44 taking into account the form on the rights of the arrested person, filed on 22 March 2004 by the defendant, the testimony of Police Investigators BT and MU and of other witnesses as well, the allegations made by the defendant at the main trial and concludes that there was no violation of the rights of the defendant, while the allegation of the defendant appear to be "fabricated" in "an effort to protect himself following his co-accused's testimony".

This Court shares the point of view of the First Instance Court.
Starting point is the examination of the form on the rights of the arrested person, filed on 22 March 2004 by the defendant before giving his first statement to the Police.
This form contains two series of questions: first 10 questions, then other 5.
Some questions are repeated, partially formulated in a different way.
The question number 7 of the first block is "do you want to give up your right of remaining silent with us <u>at this time</u>?"
In this case the answer circulated in the Albanian version (original) is "NO" ("JO").
Question number 8 is "do you want to consult your defense counsel?"
Here there is no answer circulated.
The form contains at this point some legal instruction to the proceeding authority about the right of the defendant to remain silent, the need to contact his defense counsel or, in case the defendant gives up to his rights to remain silent and to be represented by a defense counsel, the possibility to carry on with the interview.
The second part of the forms contains five questions.
The 1 question is "I was advised of my rights in my native language", the answer of S. is the word "YES" ("PO").
The 4th question is "I understand my rights and now I would like to talk to the Police", the answer is the word "YES" ("PO").
The 5th question is "would you like to consult your lawyer?", the answer is the word "NO"("JO").

From this form it is to understand that the questions were put, examined and answered by S. one after the other.
If at the beginning (at this time) his answer to question no. 7 was NO, later on he answered YES to the question "I understand my rights and now would like to talk to the police".
In this case, the word <u>now</u> appears to be decisive, because after a first negative answer the defendant has arrived to the conclusion to have understood his rights and to be now willingly to talk to the Police.

The lack of answer to question 8 of the first part does not seem to be decisive, because the very same question was repeated (no. 5 of second part) and answered with a clear "NO" by the defendant.
From this form results clear the final will of S on 22 March 2004 to speak to the Police without the presence of the defense counsel.
This form is undersigned by the defendant, which confirms that it represents his will.

The assessment of this form satisfies the requirements of article 69.3 for a valid waiver to the assistance of a defense counsel.
The waiver is in writing and is signed both by the suspect and by the witnessing authority.
The question about the will to consult a lawyer is repeated and is answered with NO after that the defendant has explicitly stated to have been advised of his rights in his language and to have understood his rights.
Thus, this waiver is made in an informed and voluntary manner.

This makes it no necessary to assess the explanation offered by witness BT when he states that by filling the form at the question no. 7 of the first part mistakenly was circled "NO" instead of "YES" since never was any doubt whatsoever during the interview that SS was willing to be interrogated by the Police.
If the first answer might be interpreted as a mistake made by the Police Officer, the second answer (to question 4 of the second part) does not allow any doubt, because the defendant understands his rights and "now" is willingly to talk to the Police.

The will of the defendant to talk to the Police is confirmed by other documental elements.
On 22 March 2004 S was interviewed twice by the Police: the first one starting from 12:30 and terminating at 16:45; the second one starting from 06:30 (18:30) and terminating at 08:00 (20:00).
The examination of the Albanian (original) version of the two statements of SS allows individuating the signature of the defendant.
According to Section 2 of UNMIK Regulation 2002/7 at the end of the reading the interviewee "shall sign the written record of an interview, if he or she accepts it as accurate".
This means that S by signing the statements had accepted their accuracy.

The Investigative Report filed by International Investigator MU on 24 March 2004 narrates that the previous day (23 March) the reporter and a colleague contacted S in the holding facility.
On that occasion (23 March) U told S to have prepared a report regarding their conversation of the previous day (22 March, that is the day of the two interviews to the Police).
The Police Officer asked S if he was able to read, the answer was positive, he added to have finished school.
S read the report in the Albanian version and confirmed to have understood it.
U asked S if the report was true and accurate and the defendant confirmed it was.

The Police Officer asked the defendant to sign the report, and S signed the last page of this report in the Albanian version.
Actually in the case file there is an Investigative Report (dated 22 March 2004) filed by MU regarding two interviews given by S on the same day 22 March, it contains also the text of some questioning and answers.
The last page of the Albanian version has the signature of JS the date 23 March 2004 and the time 10:14 AM.
Also this signature confirms, pursuant Section 2 of UNMIK Regulation 2002/7, that S had accepted the accuracy of the report and of the statements quoted in it.

The second part of the Investigative Report dated 24 March 2004 reflects the attempt undertaken by MU (on 23 March) to put other new questions to S.
Before starting with the questions the Police Officer asked the defendant if he wanted to have an attorney present.
The answer this time was that S did not accept to talk with the Police before having talked with an attorney.
U gave up the interview.
As already noticed by the First Instance Court (page 44) this shows that in that moment S was well aware of his right to have an attorney.

Moreover, also another Investigative Report filed by International Investigator MU on 23 March 2004 confirms that the previous 22 March S was initially informed of his rights and of the purpose of the interview and accepted to talk with the Police without the presence of his defense attorney.

The same is confirmed by MU during his statements before the Investigating Judge on 8 April 2004.

At the main trial S alleged to have been maltreated during the interview by the Police.
He said to have been very tired and mentally very loaded, for this reason he remembered to have signed something but was not able to remember what he had signed, nor what he had said to the Police, nor to have read anything.
He could not remember if he agreed to voluntarily speak to the Police that day
He remembered the Police accusing him for some weapon and him answering not to know anything.
All these allegations were denied by the witnesses of the Prosecutor (Police Officers and Interpreters) as thoroughly assessed by the first judge.

It must be noticed that the defendant did not mention any maltreatment by the Police when he was interviewed by the Investigative Judge on 25 March 2004, at the presence of his attorney and of the Public Prosecutor.
During the main trial, at the question of the Prosecutor why he did not mention to the Investigating Judge to have suffered maltreatment and threatens by the Police, S firstly answered "I don't know".

He assumed to have told the Investigating Judge that everything was only lies and that at that moment he was waiting for more questions about this.
The Prosecutor observed that the Investigative Judge had asked him if he had anything else he wanted to say but the answer of the defendant had been simply "no".
Only at this moment of the main trial S explained not to have mentioned to the Investigating Judge any maltreatment by the Police because he was afraid to be beaten again, since he had been told that he was going to return to the same place.

This point of the version of S is clearly denied by the minutes of the hearing before the Investigating Judge.
Contrary to his statement he was actually asked to give more explanations.
Moreover in the moment of the questioning he could not be aware that his state of detention would be prolonged because the decision on this matter was taken by the Investigating Judge only after the end of the statements and after the requests both of prosecutor and defense.

S did not mention any maltreatment by the Police even at the hearing about the confirmation of the indictment on 14 October 2004.

The allegations about maltreatment appear to be without any consistence, weak because full of "I don't remember" or "I don't know" and without any corroboration.
They are not only denied by the Police Officers, but also by the documents, which all take the signature of the defendant and were previously read by him.
Important is to notice that S not only read, signed and on this way confirmed his statements of 22 March, but also the Investigative Report where was reported part of his statements.
Therefore the allegations of the defendant appear to be ungrounded.

As to the duration of the interview, this Court deems as correct the assessment of the First Instance Judge: the translation of all questions and answers takes necessarily some time. Police Officers mentioned also a break during the questioning.
SS was at that time 22 years old, an age which seems to allow him to bear an interview for four hours.
Between the first interview (terminated at 16:45) and the second one (started at 18:30) there was a break of one hour and forty five minutes.
In this case there is no evidence of "induced fatigue" as mentioned in the article 155.1 no. 1 PCPCK.

1.5 NR s appeal recalls previous request of his defense to separate the statements given by the defendants to the Police, request which was refused by the First Instance Court.
The appeal does not contain any more specification on this point.
During the main trial R narrated to have been scared and threatened by the Police, that Police Officers U and J had taken off his shoes, whereas J had forced him to indentify suspects from a photo line up.

As to these claims the challenged verdict takes into consideration the allegations of the defendant, the form on the rights of the arrested person filed by R the testimonies of Police Officers BT AV and JT and the statements of the defendants before the Investigating Judge and concludes rejecting this point.

This Court shares the assessment of the first judge.
R filled in twice the form on the rights of the arrested person: the first one at the moment of his arrest on 5 April, the second one before the interview on 6 April (witness T hearing of 10 February 2005 and the two forms).
In both forms questions and answers are the same.
It must be noticed that there is no contradiction between the answer to question no. 7 of the first part ("do you want to give up your right of remaining silent with us at this time?" answer "YES") and the answer to the following question no. 4 of the second part ("I understand my rights and now I would like to talk to the police" answer "YES"): R has expressed twice his willingness to speak to the Police.
Twice has R answered with "NO" to the question (no. 8 of the first part and no. 5 of the second one) if he wanted to consult his defense counsel.
The waiver is in writing and is signed both by the suspect and by the witnessing authority.
The question about the will to consult a lawyer is answered twice with NO after that the defendant has explicitly stated to have been advised of his rights in his language and to have understood his rights.
This waiver is therefore made in an informed and voluntary manner and this satisfies the requirements of article 69.3.
No violation of the rights of the defendant can be found in this point.
- As to the shoes which were taken off by the Police the allegations of R are ungrounded for reasons linked with the documentation of his statements and for logical reasons.
From the text of the statement it results that the question about the cloths and shoes he worn on the critical day was formulated at the end of the questioning.
This confirms the testimonies of the Police Officers, according to which the shoes were taken off after and not during the questioning.
It must be considered that the statements were taken twenty days after the investigated crimes, this means that the defendant could have had the time to change (or to clean) both cloths and shoes.
Therefore, it appears to be logical and necessary to formulate questions about the cloths before deciding to seize them for investigative reasons.
Shoes could not have been seized during the questioning, before having verified if they were the same of the critical day.
And, as it results from the minutes, the pertinent questions were formulated only at the end of the interview.
For these reasons can not be accepted the allegation of maltreatment through the seizure of the shoes during the questioning.
- The allegations about maltreatment and threatens by the Police were firmly denied by all Police Officers involved.

These allegations were formulated for the first time only during the main trial.
Neither before the Investigating Judge on 7 April 2004, nor before the Confirmation Judge on 14 October 2004 the defendant mentioned any maltreatment by the Police during his interview.
At the main trial R explained not to have revealed to the Investigating Judge those maltreatments because he was afraid to be returned to the Police and to be beaten up.
It is an explanation similar to that given by S and also in this case it does not convince.
Actually the decision of the Investigating Judge about the detention status of R was taken after the end of the questioning and the allegation of maltreatment by the Police could have played an important role in the interest of the defendant.
Not having disclosed this fact to the Investigating Judge makes the allegations at the main trial late and not credible.
- At the main trial (hearing of 1 February 2005) it resulted that during the interview of AA made by the Police, that defendant was confronted with R.
This episode is narrated by witness Police Officer AU (hearing of 1 February 2005 page 53) as a short confrontation A was questioned and the Police brought R on the door of the office.
Police Officers asked R if the person in the office A was the same Agim he was with during the riots. R confirmed and was brought away, without entering the room.
No violence or threatens were used.
At the same hearing (pages 34 and 53) A stated to have been beaten with the hands by a colleague of U in the presence of the latter.
R (page 70) stated to have seen both JL and AU slapping A
A on the contrary denied to have been beaten by U
At the hearing of 29 March 2005 R narrated to have felt intimidated during that confrontation by the behavior of Officers U and L, who beat up AA.
Asked to explain what he had seen, R stated that U took down the head of A with a hand, while L was standing behind.
R explained to have seen only the forcible bending of the head of A made by U (page 38).
Confronted with the allegation of the slapping, given at the previous hearing, R denied to have mentioned the slapping and added not to remember.
This point of the allegations of R and A is not convincing because they contradict themselves about U beating the latter, because R has changed his version about the modality of the beating up: slapping or forcible bending of the head and because the last version of R (forcible bending of the head) contradicts that of A on the slapping.
It must be noticed that before the main trial A had never mentioned any violence, threat or beating up against him by the Police.

A has also admitted to have spoken with R and I during the trial about what happened at the Police station (hearing of 22 March 2005 page 42).
It can be concluded that the allegation of R on this point appears to be fabricated in order to corroborate those of A
- The allegation of R about the suggestion he would have received by Police Officers in order to recognize a person in the photo line up lacks of any corroboration, besides being denied by the witnesses.

1.6 The appeal on behalf of A-A does not contain any remarks on the admissibility of his Police statements.
This matter must be examined ex officio according to article 415.1 subparagraph 1 read in connection with article 403.1 subparagraph 8 PCPCK.
During the main trial the defense had claimed:
- the violation of the right of the accused to have an interpreter for the language that he understands, that is German,
- that the interview before the Police was conducted without the presence of the defense and it lasted a considerable time, thus inducing fatigue in the defendant,
- that A had been intimidated and beaten up by the Police.

The First Instance Court considered and rejected all these issues (page 46-47) on the base of the behavior of the defendant during the main trial and of the evidence given by Police officers and translators.

This Court shares the assessment of the first judge.
- The thoroughly comprehension of the Albanian language by the defendant was confirmed by the witnesses and observed directly by the trial panel (hearing of 10 February 2005 page 44).
Moreover the defendant answered completely during his quite long examination (hearing of 22 March 2005).
There is no reason to doubt of the correctness of the assessment made by the District Court on this point.
- The form on the rights of the arrested person clearly states that he gave up to his right to remain silent and accepted to speak to the Police (answer 7 of the first part and answer 4 of the second part) and that he refused twice to consult a lawyer (answers 8 of the first part and 5 of the second part).
Also in this case the waiver satisfies the requirements of article 69.3 PCPCK because it is in writing, is signed both by the suspect and by the witnessing authority, the question about the will of the defendant to consult a lawyer is answered twice with NO after that the same defendant has explicitly stated to have been advised of his rights in his language and to have understood his rights.
This waiver is therefore made in an informed and voluntary manner.
- As to the maltreatment it must be noticed that A alleged them for the first time at the main trial, whereas before the Investigating and the Confirmation Judges he did not mention them.

As it was seen examining the allegation of R there are big discrepancies between the statements of the latter and those of A about what happened during the confrontation between them.

A was not even able to recognize Police Officer L as the one who had allegedly beaten him, saying that he was beaten from behind.
As already noticed, A has admitted to have spoken with R and I during the trial about what happened at the Police station.
His allegations don't stand, are contradictory, have been denied by the witnesses and are without corroboration.
As already observed by the first judge, the reasons given by the defendant why he did not mention any maltreatment while he was interviewed by the Investigating Judge are generic and not convincing.

1.7 The appeal on behalf of AI claims (according to articles 153, 154 and 155 PCPCK) the inadmissibility as evidence of the statements given by the defendant to the Police because:
- he was deprived by the Police Officers of his glasses, which he wore since the time of the elementary school, this conduct was in breach of article 6 of ECHR, impaired the ability of the defendant to read the statement and enabled the Police to fill the statement with something he had not declared,
- during the statements before the Police the Officers exercised psychological pressure against him,
- before the Investigating Judge the defendant narrated to have been deprived of his glasses and did not recognize the previous statements as his own,
The Police report does not bear any date on seized property.
During the main trial the defense claimed also threatens and beating up of the defendant in order to compel him to sign the statement before the Police. Moreover he was denied the right to a defense counsel and his family was not informed about his arrest.

The First Instance Court considered and rejected all these issues (page 45-46) on the base of the evidence given by Police Officers, the report from the detention centre related to the seizure of the personal items, the form on the rights of the arrested person, the medical report on his conditions.

This Court does not find any violation of procedural provisions or of international conventions which could lead to the inadmissibility of the Police statements of the defendant.
- The form on the rights of the arrested person is in writing and signed by the defendant and the witnessing authority.
It states that I answered with "YES" to the two questions (no. 7 of first part and 4 of second part) related to his will to speak to the Police and answered with two "NO" to the two questions related to his will to consult a lawyer after having explicitly stated to have been advised of his rights in his language and to have understood his rights.
This waiver therefore satisfies the requirements of article 69.3 PCPCK.

In the same form I answered with "YES" to the two questions if he wanted to inform his family (no. 9 of the first part, no. 3 of the second part).
Despite of this his family was not informed because according to the Arrest form (page 509 of Police file) "there was no access to the telephone network".
As already noticed by the first judge, according to the law (UNMIK Reg. 2001/28 and PCPCK) the lack of immediate information to the family of the arrested person does not affect the admissibility of his police statements.
The reasoning of the first judge appears correct, considering also the material impossibility to reach the family of the defendant.
- As to the seizure of the glasses of the defendant, the Interoffice Memorandum drafted on behalf of the First Instance Court states that AI was brought to the custody centre on 7 April 2004 at 19:10 and that **all** personal belongings of this defendant have been taken from him that day at 19:10 hrs.
The registry of the Detention Centre (page 1888 of the case file) lists the articles seized, among them there is a pair of glasses, the registry was signed also by the defendant.
Since the Police statements were given that day from 15:30 to 18:30 it is clear that during his statements his glasses as well as the other personal belongings were still in his possession.
The Police Officers who were present during the statement of I have confirmed that the defendant wore his glasses during the whole act (T, L) and that he read his statement by himself (U)
It can be added that the First Instance Court let check the eyesight of the defendant and the result was a simple myopia
Before the Investigating Judge (page 11), asked if he had helped "any protesters that day to try to burn a Serbian registered vehicle", the defendant answered as follows.
"I just have to explain to you that I can't see quite well. Normally, I have some problems with my eye, and that day I did not even have my glasses with me. Now at the detention centre, the police do not allow me to have those glasses. I passed by but I never helped or assisted anybody".
From the above mentioned elements it results that the myopia of the defendant was not so strong to prevent him to go around without glasses through Gjilan during a dangerous day, as the 17th of March and to observe what he stated to the Investigating Judge with many details.
At the main trial I recanted this statement, defined as a "technical mistake" and said to have worn his glasses all the critical day long.
However the sense of the quoted sentences appears to exclude any mistake, technical or not: he denied having assisted anybody to burn a car because of his bad eyesight and the lack of glasses.
Thus, the allegations of the defendant on this point are not grounded in fact, because denied by documents and testimonies and appear to be inconsistent with the other evidence given by him.
- As to the maltreatment and the beating up.
He stated to have been beaten on his back by JL , who accompanied him to the toilet during the Police statement.
With them was present also another Police Officer.

The beat was "so hard that if it wasn't for the police officer in front of me I would have hit my head on the wall" (hearing of 15 February 2005 page 27).
Despite of the violence of the punch the defendant did not had any physical sign of the beating up and the medical report on the arrested person (page 1881 of the case file) states that he was treated for sinusitis and cephalea without mentioning any sign of beating up.
The explanation of the defendant (he could not have any sign since he wore coat and jumper because of the cold) appears to be inconsistent with the alleged great violence used to him.
He did not mention the beating up to the medical doctor nor to the Investigating Judge or even to his own lawyers.
His explanations on this point (in front of the doctor he did not dare and he did not know the rules of detention, in front of the Investigating Judge he thought the court would behave the same as the police, he did not know the rules and thought that the police present at the hearing would behave the same way, his lawyers did not speak to him and had been appointed ex officio) don't convince.
He pretends to have mentioned to the doctor some hurt in his back, so that he was given an injection.
On the contrary, as above mentioned, it results that the diagnosis was related only to sinusitis and cephalea and not to any hurt in the back.
Before the Investigating Judge he denied to have stated many of the things reported in his Police statement, thus expressing that some irregularities had happened on that occasion.
Nevertheless he did not mention any violence or maltreatment, which therefore are to be considered as late allegations.
I claims to have been maltreated and forced by the Police to recognize the photos of some persons.
However and despite of this maltreatment he did not recognize anybody and this allegation seems to be inconsistent.
The Police Officers who were present during the statement denied any maltreatment or violence against the defendant.
The allegations of maltreatment are without any corroboration, denied by the witnesses and by the medical documentation and inconsistent in itself.

1.8 A last remark is related to the credibility of the Police statements given by the defendants.
It is well known, that statements given in a time very near to the fact are generally more accurate, more sincere, more genuine than statements given later on, sometimes after months or years.
Generally speaking in that very first moment a witness or a defendant has not yet had the time to elaborate a version according to his interests.
In this specific case the First Instance Court (page 41) has deemed more reliable the statements given by the defendants in the earlier stages of proceedings than other evidence collected during the main trial, adding that none of the people present came forward to assist the investigation despite of a public appeal of the police and that even eyewitnesses produced by the Prosecutor did not identify the perpetrators: they "directly or indirectly expressed the fact that they were not in this courtroom willingly".

The reasoning of the first judge is, on this point, correct.
Police statements given by the defendants are considered by PCPCK as admissible evidence, thus they can be used as a basis of a judgment of conviction.
Moreover the reliability of these statements is higher because they are more genuine and not contaminated by other sources.
In this specific case the version given by the defendants to the Police is genuine, thus is reliable and sufficient to give an account of what happened in those moments, while the different versions given by them only at the main trial appear to be a defensive attempt to avoid any conviction.

2. A second point linked to procedural rules regards the time of the proceedings.
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 NK 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 XJ 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[7], which however must be compared with aggravating circumstances and the gravity of the offence.

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3. Finally it can be observed that, in the proceedings of the First Instance Court don't exist violations of the provisions of criminal procedure foreseen by article 403 paragraph 1 subparagraph 1, 2, 6, 8, 9, 10, 11 PCPCK which this Court has the duty to examine ex officio.
The violation envisaged by art. 403 paragraph 1 subparagraph 12 PCPCK must be also examined ex office.
This kind of violation was raised in details by each appeal and will be examined for each defendant in the following parts.
The main trial was not conducted in the absence of the accused persons or of their defense counsels.
Thus there were no the violations envisaged by article 415 paragraph 1 items 2 and 3 PCPCK.

4. <u>As to the violation of the criminal law.</u>
A first point is represented by the possible concurrence of two different criminal offences (as the perpetration of an aggravated murder on one side and the participation in a group that commits criminal acts on the other side) committed within the same context.
The appeal of NR claims the violation of the criminal law assuming to be "impossible to commit two crimes at the same time", according to the appeal the first Court failed to choose between the two charges as it was its duty.
The same problem could be seen in the case of XS who was convicted for having assisted in an aggravated murder and for having participated in a group that commits criminal acts.

This point can not be accepted.
As it was seen before, the Court of First Instance convicted NR for having perpetrated the aggravated murder and XS for having assisted in the perpetration of the aggravated murder to detriment of SP and both of them for having taken part in a group that commits a criminal act, meaning as criminal act the murder of SP the serious bodily injury on AP and the considerable damages to their house and to one car.
The appeal on behalf of R does not centre the problem when deems as impossible "to commit two crimes at the same time", because it is well possible in fact to commit two different criminal offences with one unique conduct: one can think of the murder of one person and the injury of another caused through the same conduct as i.e. to make explode a bomb.
What is not admissible is the case when a defendant is convicted for the same fact according two different legal provisions, which means he is convicted twice for the same fact.
And at first sight it could seem to be correct the remark of the defense when it claims that R and S were convicted for having murdered (or assisted the murder of) S.P. and <u>at the same time</u> for having participated in a group that murdered the same victim.

On the contrary it can be observed that art. 200.1 KCL punishes the "mere participation" to this kind of group, without the necessity that the defendant commits directly the criminal offence which represents the goal of the group.
Moreover in the concrete case the conviction of both defendants for the crime foreseen by article 200.1 is grounded on their participation in a group that, beyond the murder of J.P. committed other criminal offences as to inflict serious bodily injury to A.P. and considerable damages to the property of other persons.
The concrete participation of the two defendants in this group is object of other parts of this judgment.
It must be concluded that they were not convicted twice for the same fact, because for them the provision of article 200.1 KCL finds application for the activities of the group other than the murder of S.P.

5. A second point is related to the violation of the applicable criminal law and must be examined ex officio according to article 415 paragraph 1 item 4 related to article 404 paragraph 4 PCPCK.

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 R and article 25 for S 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 R and 24 for S.
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 art. 147 together with art. 38 paragraph 1 PCCK) and long term imprisonment that is imprisonment from twenty one to forty years (see art. 37 paragraph 2 PCCK).
It must be noticed that long term imprisonment is less favorable than imprisonment foreseen by art. 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 art. 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.

II

The appeal of Mr. Mustafe MUSA as defense counsel of defendant JJ was filed on 26 January 2007.
The judgment of first instance is challenged due to:

- essential violations of criminal proceedings, particularly of articles 403 paragraph 1, item 12 in connection with articles 153, 154 paragraphs 4 and 5, article 155 paragraph 1 and article 157 PCPCK,
- erroneous and incomplete determination of factual state,
- violation of substantial law,
- the decision on sentencing.

The defense counsel proposes:

- to modify the verdict and acquit the accused from the penal liability, or
- to pronounce a lenient punishment, or
- to quash the verdict and to send the case to the First Instance Court for a re-trial.

The grounds of the appeal are as follows.

1. Essential violations of criminal proceedings as:

- the enacting clause lacks to give a thorough description of the incriminating actions of the defendant,
- alleged contradiction between the enacting clause and the reasoning,
- lack of presentation of the right reasons on decisive facts,
- the enacting clause is incomprehensible because inappropriate for the execution,
- violation of the rights of the defendant during his police statement of 22 March 2004, statement which should have been alienated from the case file and not be able to ground the judgment of the Court,
- violation of article 157 PCPCK in the sense that the conviction of the defendant was based on a single statement.

This ground of appeal is object of the following considerations by this Court.

a) The enacting clause lacks to give a thorough description of the incriminating actions of the defendant.

It must be noticed that the substantial violations of criminal procedure envisaged by Art. 403 paragraph 1 item 12 PCPCK as to the enacting clause are related to its comprehensibility, its internal consistence and its consistence with the grounds for the judgment.
The law does not require that the enacting clause contains a very detailed description of the conduct of the convicted person, this description being matter of the reasoning of the judgment.
The enacting clause however must be "comprehensible", meaning that it must make clear what the defendant has done.
If, as in this case, the enacting clause regards the conducts of more defendants acting in some part together, it must be read completely because the general context can give some indications on the conduct of the single participant.
The description of the conducts of this and of the other defendants given in the enacting clause is quite clear and comprehensible.
On 17 March in Gjilan there was a large angry mob which acting ruthlessly and violently "attacked" S and A.P. and their property.
The attack is described by the reference to a mob which followed, surrounded and hit with sticks and stones S.P.
Some persons (R and others) acted directly against S.P. and took his life, some S. assisted in this.
Others, among them S.S. participated in the large angry mob which attacked the victims and their property, took the life of the man, seriously injured the woman and considerably damaged the house and a car of them.
From the enacting clause it is clear, as to S.S. that he was present and participated willingly with others to this violent attack which resulted in the death, the injury and the damages above described.

b) Alleged contradiction between the enacting clause and the reasoning.

The appeal does not clarify the alleged contradictions between enacting clause and reasoning.
The challenged verdict explains (page 50) the reasons for the conviction of this defendant: "the court finds that the act of throwing stones at the house of P constitutes all the objective and subjective elements of the criminal offence" envisaged by art. 200.1 KCL, it follows the description of the conduct of the group and of the results of this conduct.
This part of the reasoning is fully consistent with the part of the enacting clause reserved to the position of SJ
Therefore this point of the appeal is ungrounded.

c) Lack of presentation of the right reasons on decisive facts.

Also this point of appeal is ungrounded.
Here can be made considerations similar to those of the previous point: the appeal does not specify why the reasons presented in the verdict should not be "right".
Bearing in mind the context of the facts of that day, context which is described in details and more than once by the first judge, the verdict indicates the conduct of this defendant as a participant in the large angry mob, which attacked the victims and their property.
His specific contribution is seen in throwing stones at the house of the victim (according to the statement of A and against the victim S P (according to the statements of S before the Police).
Thus his participation was active, material, violent and intentional; the results of his direct action were a likely damage to the property and to the victim and the indirect encouragement given to the others for other crimes.
Other decisive facts as the alibi of the defendant and the result of forensic and DNA examination will be examined in the next paragraph.

d) The enacting clause is incomprehensible because inappropriate for the execution.

This point is not grounded.
The enacting clause clearly states the crime for which there is the conviction (art. 200.1 KCL), the punishment (2 years and 6 months of imprisonment), the time spent in detention on remand (from 22 march 2004 to 4 February 2005) which must be included in the amount of the punishment, the conviction of all defendants jointly to the reimbursement of the costs.
On this base there are no incomprehensibilities in the enacting clause which can make it "inappropriate for the execution".

e) Violation of the rights of the defendant during his police statement of 22 March 2004, statement which should have been alienated from the case file and not be able to ground the judgment of the Court.

This point was already examined above and found ungrounded (see point **I.1.4**).

f) Violation of article 157 PCPCK in the sense that the conviction of the defendant was based on a single statement.

Article 157.2 PCPCK does not allow the court to find the accused guilty "based solely, or to a decisive extent, upon statements given by the defendant to the police or the public prosecutor".
This means that conviction can not be based on a unique statement given by the defendant not before a judge.
In this case however the sources of the evidence against SS are three different statements, two of them given by AA to the Police and to the Investigating Judge and one given by SS himself to the Police.
In both his statements A remembered having seen SS (whom he recognized in the pictures shown to him by the Police) in front of the house of the Serbian citizen throwing stones against it.
S himself admitted to have thrown rocks at the same house and also at the Serbian man when he got out and started walking down the road.
Therefore the provision of article 157.2 PCPCK can not find here application and this point of the appeal is ungrounded.

<u>2. Erroneous and incomplete determination of factual state, as:</u>
- the alibi of the defendant was not correctly considered by the first judge,
- no material evidence were produced against him, since both forensic and DNA examinations resulted negative,
- the statements given by AA both before the Police and the Investigating Judge accusing SS were fabrications as A stated at the main trial.

This ground of appeal is developed in the following points.

a) The alibi of the defendant was not correctly considered by the first judge.
According to the defense, S spent all time in his neighborhood except for a brief visit to a pharmacy of the town on behalf of his neighbor, during which no trouble was going on.
Only later and again in his neighborhood the defendant and some other residents had to face an attack of violent people who were expelled.

The challenged verdict examines the alibi of the defendant in three points, giving an account of the testimonies of the defense witnesses (pages 33 and 34), of the trial statement of the defendant (pages 39 and 40) and of the overall evaluation of the evidence related to him (page 50).
The reasoning of the first judge appears to be free from illogical elements, explaining that the statements of the defense testimonies don't cover the time of the fact and their stories take place before the attack on S.

Actually the defense witnesses speak about single episodes, lasted few minutes and happened between 3 and 5 o' clock in the afternoon.

The fact against SP is situated by the witness N.B. after 5 o'clock.
Witnesses of the Police arrived at the place still later (BZ have received a call at 18:20, JX remembers that the emergency unit arrived after 20:00).
It must still be added that according to the statements of the defendant and of the defense witnesses the place of the facts (the house of SP and the place where S alleged to have been (his house and its neighborhood) are situated very near to each other.

S spoke about 2/3 minutes walking from his house to the Courthouse going through the park.

It must be remembered that the house of P was located near the park.
NA stated that the house of ! was 300 meters from his own house located in the school building, he could hear the noises of the mob; he saw S for few seconds about 3.30 pm in front of the school.
S D house is located 10 meters from the one of S and close to that SP

Finally the alibi of S is contradicted by his own first statements to the Police where he admitted to have been present in the mob throwing rocks against the house of the victims.

b) No material evidence was produced against him, since both forensic and DNA examinations resulted negative.

The challenged verdict examines the result of forensic examinations on page 40.

This Court is of the opinion that the result of DNA examinations does not exclude the responsibility of the defendant, as grounded on other and different evidence.
Actually, as it results from the Investigation Report dated 22 March 2004 the cloths of S were seized on the same 22 March after the investigators were told by the defendant that he wore the same cloths of the previous 17th.
That the cloths which were seized to the defendant are the same he wore the day of the fact grounds only on his assumption, which could be not true.
Even though the cloths are the same they could have been washed in the meantime and the eventual trace could have been removed.
For these reasons the negative result of DNA and forensic examinations on the cloths of the defendant is not decisive in this case.

c) The statements given by AA both before the Police and the Investigating Judge accusing SJ were fabrications as A stated at the main trial.

This point was already examined above (see point **I.1.6**) and found groundless.

3. Violation of substantial law, as:

- misapplication of article 200 paragraph 1 of KCL as to the required subjective element,
- violation of article 23 PCCK as to the actions undertaken by the defendant and as to the subjective element required by the legal provision.

This ground of appeal is developed in the following points.
a) The criminal offence set forth by article 200.1 KCL requires the intent "which implies the awareness of the perpetrator to be in a group that by joint actions commits criminal offence".
No evidence would confirm this intent as regards SS

This Court shares the opinion that the criminal offence foreseen by article 200 is "intentional" which means to be aware of the act and of its consequence and to desire its commission (art. 15.2 PCCK) or at least to accept its prohibited consequence (art. 15.3 PCCK).
The evidence in the case file are clear in the sense that S was well aware of the mob throwing rocks against the house and the person of SP he stated before the police to have joined a group of protestors and together with them to have thrown stones against the house and the person of the victim.
These conducts are clearly intentional, animated by the necessary awareness and will.
It is not necessary to plan and to organize in advance (to premeditate) a crime in order to have the intent, because the decision can be taken by the perpetrator in the very moment of the crime.

b) The co-perpetration foreseen by article 23 PCCK requires the division of work among the participants, their joint intention to carry out the criminal offence, the need that every participant is decision maker of the crime. The appeal points out the lack of evidence on the role, the actions, the decisions and the desire of the defendant as regards his co-perpetration of the crime.

This Court deems this point groundless for the same reasons examined under the previous one.
The charged criminal offence does not require a previous plan nor a precise organization.
Here is punished a group of people which forms, also spontaneously, and decides, also suddenly, to commit a crime.
There is no need to have a specific, express arrangement among the participants about the decision, the roles and the aims of the actions because this criminal offence is given even when the agreement on the co-perpetration is silent and made through material conducts (facta concludentia).
S admitted to have seen the angry mob, to have understood that it was attacking the house and the victim and to have participated in this, giving his material contribution and throwing some stones.
This satisfies the requirements of article 23 PCCK.

<u>4. The decision on sentencing, as:</u>
- extreme severity of the sentence.

On this point the appeal claims that no enough consideration was given by the first judge to the young age, the absence of criminal record and the correct conduct of the defendant at court and asks for a more lenient punishment.

The first Court considered both aggravating and mitigating circumstances of the case..

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 considerations of the first judge on the degree of the criminal liability of the defendant, the particularly dangerous motives, the special circumstances of the act and the brutal manner of commission of the crime as aggravating circumstances.
To this defendant can be recognized the mitigating circumstances indicated in the appeal and 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.

5. All this put under consideration the Court of Second Instance decides to reject the appeal filed on behalf of F J

III

The appeal of Mr. Arben MUSTAFA as defense counsel of defendant N R was filed on 12 December 2006.

The judgment of first instance is challenged due to:

- essential violations of criminal proceedings, particularly of articles 403 paragraph 1 item 12 PCPCK,
- violation of the criminal law, article 404 PCPCK,
- erroneous and incomplete verification of the factual status, article 406 PCPCK,
- decision on announcement of the sentence, article 406 PCPCK.

The defense counsel proposes:

- to quash the verdict and to send the case to the First Instance Court for a re-trial, or
- to modify the verdict in the meaning of the claims.

The grounds of the appeal are as follows.

1. Essential violations of criminal proceedings.

This ground of appeal is developed in the following points.
- the verdict is allegedly incomprehensive, confuse and controversial with itself and the given reasons,
- lack of persuasive reasons on decisive facts,

- considerable contradiction between the given reasons and the examined evidence retrieved during the main trial
- the Court violated the criminal proceeding provisions when it did not separate the statements given by the defendants before the Police despite the fact that these statements were contradicted by the statements given by them at the main trial;
- the time to deliver the written judgment to the parties is deemed as excessive,
- the Court never supplied the defense with translated documents, which might have had an impact to the quality of defense.

This Court does not share the claims of the appellant.
- The point related to the separation of Police statements as inadmissible evidence was examined and rejected above (see point **I.1.5**).
Here can be added that the contradiction between statements given by the same person or by different persons in different stages of proceedings is object of assessment on the merit of the case (see further point **III.2**) and is not related to the admissibility of the evidence.
- 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 R
In fact it explains that on 17 March there was a large angry mob which attacked SP , his mother and his property in Gjilan.
In these circumstances the defendant NR acting ruthlessly and violently, caused the death of SP
After the attack against the property and the angry mob followed P 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 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 R in many points.
His statements are confronted with those of the prosecutor's witnesses like AU BT, JL 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 NR R 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 R are found in the Police statements of AI XS and AA

AI remembers:

- that he together with his friends R and A 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 R followed him "with stick on his hand", also I and A followed the victim,
- that with his stick R hit the Serbian on the hands, so that the weapon and also the victim fell on the ground,
- that X took away the automatic weapon,
- that after all this "it became a mess" because the crowd hit the Serbian with stones and wooden sticks.

XS remembers:

- that he saw the Serbian man walking toward the centre and carrying a Kalashnikov,
- that the Serbian was fighting against an old man who had a brick in his hand and close to him there was R with a wooden stick in his hand,
- that both the old man and R hit the Serbian in the head, the first one with the brick and the second one with the stick,
- that the old man took away the weapon,
- that some individuals, among whom he recognized R beat the victim.

AA remembers:

- that he, R and I joined the people throwing stones against the house of the victim,
- that when the Serbian man went out from the house carrying a weapon R who had a stick in his hand went behind him "very close",
- that other people followed the Serbian, among them there was an old man,
- that the Serbian was hit on the head by a wooden stick and fell down in the ground,
- that R jumped with both legs on the body of the Serbian,
- that the crowd hit the victim with stones and sticks,
- that few minutes later R told him "I fucked his (of the Serbian) mother, I hit him 2 times with wooden stick".

The first judge has reported correctly and in a logic way the content of the Police statements of these defendants, founding that they corroborate each other and lead to the judgment expressed in the enacting clause.
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 R himself before the Police admitted to have met I and A, 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 I and A
- The time to deliver the written judgment is object of other points of this reasoning (see point **I.3** and **III.4**).
- The appeal does not give any indication about what documents were not translated with the effect to impair the defense.
This point appears thus to be generic.
Moreover, it can be observed that in the case file there are the translations of the minutes of the main trial and of all other procedural documents.

<u>2. Violation of the criminal law, article 404 PCPCK, as:</u>
- impossibility of the coexistence at the same time of the crime provided by article 146 PCCK and the crime provided by article 200 CLK, as affirmed by the Court.

The appeal deems as incorrect the decision of the Court of first instance to convict NR both for the charges of having committed aggravated murder **and** of having participated on a group that commits a criminal act.
Since "it is impossible to commit two crimes at the same time" the defense deems that the first Court had to choose between the two charges.

This point of the appeal was examined above (see point **I.2**) and found ungrounded.

<u>3. Erroneous and incomplete verification of the factual status.</u>
The grounds of the appeal are as follows:
- the Court did not consider the statements given by witnesses and defendants at the main trial when they exonerated NR from any responsibility,
- other material evidence and scientific expertise conducted on cloths and shoes of the defendants exclude his participation in the facts, but these decisive elements were not considered by the Court,
- the conduct of the now late SP, as representing a danger for the crowd of protestors was not evaluated by the Court.

This Court does not share the claims of the appellant.
- As it was already examined above (see point **III.1**) the Court of First Instance has clearly indicated what evidence found reliable and what unreliable.
The first judge preferred the statements given by the defendants before the Police than the following evidence.

The logical procedure followed by the first judge is indicated on page 41 of the challenged verdict: due to the unstable security situation the Police could process the crime scene only five days after the facts.
Despite the number of people who witnessed the event the Police could not rely on the assistance of the citizens in identifying the real perpetrators.
There was even a public appeal calling witnesses to assist investigation but none appeared.
The witnesses who appeared before the Court let understand that they did not come willingly to testify.
That Court found the first version of the facts given by the defendants to the Police as the most reliable source of information.

This Court (see above point **I.1.8**) 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 , the evidence given by AI XS and AA before the Police can be completed through the statements given in the same circumstances by the defendant himself.
R admitted to have been present during the riots together with I and A to have thrown stones against the house of the victim, to have followed SP 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 R 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 R could have had all the time to clean cloths and shoes.
- The conduct of SP, 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.
A remembers specifically that during this attack against the house he saw the Serbian guy looking from the window of the house.
When P finally went out was bleeding from his head, sign that the throwing against the house had reached also the body of the victim.
P 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 (art. 8 PCCK`
The conduct of SP did no justify that of the crowd, nor constitutes a mitigating circumstance for the perpetrators.

4. The decision on the sentence, as:
- the illegality of the sentencing.

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 art. 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.

5. All this put under consideration and made an exception for the legal qualification of the criminal offence of aggravated murder, the Court of Second Instance decides to reject the remaining parts of the appeal filed on behalf of NTC

IV

The appeal of Mr. Shemsedin PIRAJ and Mr. Masar MORINA as defense counsels of defendant XS was filed on 7 December 2006.
The judgment of first instance is challenged due to:

- essential violations of criminal procedures,
- violations of the criminal code,
- erroneous and incomplete establishment of factual state and
- the decision on the penal sanction.

The defense counsel proposes:

- to quash the verdict and to send the case to the First Instance Court for a re-trial, or
- to impose a lenient punishment, or
- to hold a hearing which would establish that in the actions of the accused there is no element of the criminal offense he was found guilty of.

1. Preliminary observation on the request for holding a hearing.
It must be noticed that the appeal fails to indicate the grounds for the request to hold an hearing where to repeat the evidence administered in the main trial.
In its content the appeal challenges the verdict both for factual and legal reasons, claims that the first Court did not evaluate properly the collected evidence, but does not indicate pieces of evidence, testimonies, statements of the defendants or material evidence which should be repeated in order to reach a correct determination of the factual situation.
As it is expressed ("repeat the earlier on administered evidence and render a pertinent decision in this case") this means to repeat all evidence.
This request is therefore generic and inadmissible.

The grounds of the appeal are as follows.

2. Essential violations of criminal procedures as:
- not clarity of the enacting clause and inconsistency between it and the reasoning part,
- lack of consideration for decisive facts,
- the given reasons are unclear and contradict to the content of the administered evidence.

This ground of appeal is developed in the following points.
- The appeal deems the enacting clause as obscure, because it fails to clarify the circumstances, the way and the concrete actions through which the defendant would have assisted NR in depriving SP of his life.
The same obscurity is allegedly present in the part of the enacting clause related to the participation in a group which commits a criminal offense.

This point is ungrounded.

Here the discussion is limited on the formulation of the enacting clause, whereas the points related to the content of the reasoning will be examined further on.
As to the assistance in aggravated murder it must be noticed that the enacting clause is not obscure at all and must be read in its entirety, at least as to the determinations on Count 1 which is under examination.
Thus, it is clear that the charged facts happened in Gjilan on 17 March 2004, when SP was attacked by a large angry mob.
It is clear as well that the Court of First Instance deemed NK as the responsible for the direct act of depriving the victim of his life, while acting ruthlessly and violently, hitting the victim with a stick and jumping on his body, while other members of the surrounding crowd also attacked P with sticks and stones.
All these elements represent the factual circumstances of the criminal offence charged to XS
The conduct of the defendant was defined as intentional assistance in depriving the victim of his life.
The concrete conduct of S is described as "taking from the scene the "Kalashnikov" that had in his possession at the time of the attack".
The way of the charged assistance to the murder is described as depriving the victim of the weapon "which he had used before to keep the mob from attacking him", that means depriving the victim of the last mean of self-defense.

As to the crime envisaged by article 200.1 KCL the enacting clause (A2) describes a group that "through joint action took SP's life, inflicted serious bodily injury on AP and considerably damaged" their properties.
In this case the above described conduct of the defendant clearly represents his participation in this group and to all these facts.
The reason is that S directly took part at one important part of this "joint action" with the awareness of the more general riots in Gjilan and of the specific acts of violence which were going on in that limited area near the city park.

- The appeal argues that the rights of defense were violated by the conduct of the Prosecutor who, after having submitted on 28 September 2004 a first indictment (where defendant S was not charged with the criminal offence of aggravated murder) and on 12 May 2005 an amended indictment (where AI NK SR and XJ were charged with aggravated murder in co-perpetration among them and with others), has submitted *orally* an extended indictment including the criminal offence of *assistance* in committing aggravated murder according to articles 146, 147 and 25 PCCK.
The appeal claims that on this way it was not possible to assess the reasonability of the indictment and to prepare the defense.

This point is ungrounded.
From the amended indictment dated 12 May 2005 and from the *oral* explanation about the amendments given by the Prosecutor on the hearing of 11 May 2005 it results that the charge of aggravated murder in co-perpetration (pursuant to articles 22 CC SFRY and 23

PCCK) was elevated against four defendants, among whom there was also XS while before he had not been charged with it.
The reading of the indictment describes the conduct of this defendant as follows:
XS took from the scene a Kalashnikov that SP had possessed immediately prior to or at the time of the attack".
The following part is referred to the conduct of all four defendants and explains:
"with the actions of one or more of these defendants having had the result of encouraging the surrounding crowd to then attack SP as well with sticks and/or stones and, where the attack of the defendants and the others caused the death of SP
In her *oral* explanation the Prosecutor pointed out that the conduct charged to defendant S deprived the victim's only mean of defense, resulting in the encouragement of the surrounding crowd to attack P
There is no mention of assistance in the commission of a criminal offence, nor of article 25 PCCK.
In the following hearings the Prosecutor did not amend again the indictment as to S.
Thus the position of the Prosecutor was clear: S was charged of co-perpetration in aggravated murder.
It was the Court of first instance to decide that the proven conduct of this defendant had to be qualified as assistance pursuant to article 25 PCCK and not as co-perpetration pursuant to article 23 PCCK (pages 3, 49, 53 and 56).
The grounds for such a type of qualification will be discussed in the next points.
Here must be pointed out that there was not any violation of the right of defense.

3. Violations of the criminal code.

This ground of appeal is developed in the following points.
- The appeal argues the violation of article 25 PCCK by the Court of first instance because the actions of the defendant can not be incorporated in the provision of assistance as read by that article.

Here can be examined only the legal qualification of the conduct as the first judge deemed as proven, while the reconstruction of the factual situation will be examined in the next paragraph.
In this sense this point of the appeal is ungrounded.
From the statements of AI and of S himself it results that this defendant took away the weapon of the victim, SP which was fallen on the ground few meters from the victim.
The weapon had fallen down following the first hits the victim had suffered by the surrounding mob.
After the weapon was taken away the mob attacked and finally killed the Serbian.
The verdict of first instance (page 49) explains that by removing the weapon, XS facilitated this ruthless attack against the victim, who at that moment lacked of any means for self-defense. This directly resulted in the brutal murder of SP by the mob.

Under a legal viewpoint the decision of the first judge does not violate the provision of criminal law as the defense pretends.
What the Court of First Instance deemed as proven in this case was just the conduct of a person who acts "removing the impediments to the commission of a criminal offence", which is exactly one of the cases envisaged in art. 25 PCCK related to the assistance in the commission of a criminal offence.
Until the weapon was within the reach of the victim it could be an impediment to the attack, so that as soon as it was removed ("after all this" says AT the crowd started to hit the Serbian with stones and wooden sticks.
Since removing an impediment is not considered by the law as acting in co-perpetration but as assisting in committing a criminal offence, the Court of First Instance had to apply article 25 of PCCK.

- The appeal argues that the conviction for the participation in a group pursuant to article 200 paragraph 1 CLK is not substantiated, because the defendant "randomly" was in the city, moreover he did not join the group with the consciousness and the intention to participate with others to the commission of the charged crimes

This point is ungrounded.
The challenged verdict (page 49) underlines the full conscious and intentional participation of the defendant in the group that committed the charged criminal offences, ethnically motivated with strong anti-Serbian feelings.
As also the appellant recognizes, a group that commits a criminal act can be generated by irregular or occasional gathering of persons, not organized before.
With other words, it is not necessary the existence of an organized group before the facts, nor the planning or the premeditation of these.
Many people can gather occasionally at the moment and in the place of a fact and nevertheless constitute a "group" in the sense required by article 200 of CLK.
The important elements are on one side the consciousness that the group of person is going to commit or is committing a crime and on the other side the will to take part to this crime.
As it becomes clear from his Police statement, XJ was aware of the riots against Serbian people and buildings which were happening in the town since the beginning of the afternoon: he saw a vehicle burning, another attacked by the mob, which renounced only when the passengers said to be Albanians, he saw protestors throwing rocks at the Church and at some houses located nearby.
Later on he saw a big crowd gathered at a parking place in the park and noticed some individuals coming from the road behind the park and yelling "Serbian with a Kalashnikov".
He saw the man with the Kalashnikov in the hands, pointing the weapon to a crowd which was following him.
The man with the Kalashnikov was fighting against an old man who had a brick and against N who had a wooden stick in his hand.
The defendant saw both the old man and N hitting the head of the man with the Kalashnikov.

The old man succeeded to take the weapon away from the hand of the man and threw it in the park, just 2-3 meters away from the place of the fighting.
At that moment XS grabbed the weapon and saw the crowd hit someone with wooden sticks.

It is clear that the defendant was aware of the riots, which he could see directly.
He was aware of the fact that an episode of these riots occurred between a crowd and a Serbian man carrying a Kalashnikov.
He saw the crowd followed that man and some of the members of the crowd engaged a fighting with him.
S could follow all the moments of this fighting, saw the man beaten and could observe that he let fall the weapon.
All this facts happened close or even very close (2-3 meters) to the defendant.
He then grabbed the weapon and went away with it.
XS was therefore full conscious of the existence of a group of persons who was committing a grave violence and by grabbing the weapon he was conscious as well to take part in this action.
Therefore his participation to that group was intentional.

- As to the unlawful possession of the weapon, the appeal assumes that "taking into account the place and the circumstance under which the weapon was taken and knowing the owner of the weapon and who possessed it, the disposal of this weapon does not mean that the accused has committed the criminal offense he was found guilty of".
In other words it seems arguable from the appeal that the possession of the Kalashnikov by the defendant, its removal from the crime scene, its hiding near the stadium for some days should not be considered as the charged criminal offence.

The legal provision of Section 8.2 of UNMIK Reg. 2001/7 incriminates the possession of a weapon by a person who is not the holder of a valid WAC for that weapon.
In this case the defense does not raise any issue about WAC.
The possession is considered as a factual situation of power over an object corresponding to the factual power exercised by the owner of that object.
In other words the agent has an object with him, i.e. in his hands and he can use it free from any factual and upper power exercised on the same object by other persons.
Under the circumstances described in the challenged verdict, XS had this factual power on that weapon because its owner, SP was fighting against the mob and was therefore unable to contrast the conduct of the defendant and because no other people prevented S from seizing it.
The defendant was free to go away with the weapon, to make use of it, to hid it.
Simply he possessed the weapon without being holder of a valid WAC for it.
This fulfils the requirements of the charged criminal offence.

4. Erroneous and incomplete establishment of factual state.

This ground of appeal is developed in the following points.

The defendant denied in each stage the commitment of the criminal offense he was convicted for, he was not implicated in the assault against SP , nor in the other actions of the crowd, he did not participate in the crowd.
No concrete evidence were brought to demonstrate his guiltiness, while the statements before the Police given by AG and NK are not sufficient to ground the conviction since they refer only to the disposal of the weapon and to the direction of the accused.
The place were crowded, in the vicinity of a school and the defendant was concerned for the danger constituted by the weapon in the hands of children, that's why he took and put away the Kalashnikov.
The appeal claims that if the First Instance Court deemed the versions given by the defendant in different occasions as contradictory, it had the duty to clarify the differences and which version was believable.
The conclusions of the first Court could not stand because the defendant stated to have taken the weapon from some young persons and not from the victim, nor he made possible the assault of the crowd because his intention was only to prevent eventual dangerous consequences.
The simple fact of taking the weapon does not establish guiltiness for aggravated murder, or assistance in it.
The statement of the defendant was not assessed despite of its importance in order to shed light to the case.
The evaluation of the testimony of witnesses was not just, or at least the reasoning does not give sufficient and convincing reasons on the unreliability of the testimonies of eyewitnesses.
Lack of analysis of evidence, both separately and as a whole conducted the first Court to a wrong decision.

This point is grounded as to the charge of assistance in aggravated murder.
Even though theoretically it can be accepted that the conduct of a person who deprived the victim of his last means of defense had the effect to facilitate and to encourage the act of the murders, in this concrete case and considered the evidence collected this hypothesis does not convince fully.
It must be considered that. J did not act directly on the victim; he did not take the weapon away from the hand of Slobodan Peric.
The statement of AT according to which, after SJ took the weapon and left, the crowd started to hit the victim indicates only a temporary and not a causal relation between the two facts.
The admission of the defendant to have taken the weapon when this was 2-3 meters from the victim does not properly indicate that the weapon was within the reach of the victim considering the large crowd and the big confusion of the moment.
It can not be excluded that, in the moment was going to take the weapon, the victim was (however and independently from the conduct of the defendant) unable to regain his Kalashnikov in order to defend himself.
Due to the circumstances of that moment there is a reasonable doubt on the perception and awareness SJ could have to deprive through his conduct the victim of his last means of defense.

In other words it can not reasonably be excluded that S acted on the base of other and different considerations.
It seems difficult to believe to the "altruistic" reasons offered by the defendant and by his defense that is the concern about the fate of other and innocent persons.
It can be imagined another and more consistent intent, that to take possession of a weapon, which later on could have been used or sold.
Anyway there is no certain evidence on one side of the causal link between the conduct of S and the murder nor of his intention, no matter if direct or eventual, to assist the protestors in the murder of P.
Lack of certain evidence on these points must result in the acquittal of the defendant from the crime of assistance in aggravated murder.

Different is the matter related to the other two crimes.
As to the unauthorized possession of the weapon there are the admission of the defendant and enough evidence coming from other sources.
As to the crime of participation in a group which commits a criminal offence the responsibility of the defendant was correctly established by the first judge considering that in those circumstances the defendant took part in the crime of the group also through the mere possession of the weapon of the victims.
If it can not be established that this act concretely encouraged people in the specific action to deprive S P of his life it can not be denied that S's conduct was of strong effect in convincing the protestors that they would not find any resistance and that they could go on with their violence.

5. The decision on the penal sanction.
The defense claims the severity of the punishment without considering mitigating circumstances as the familiar status of the defendant, his poor economical status and that he alone provides for the need of his family.

On this point the first judge took into consideration both aggravating (as the degree of criminal liability, the motives for committing the act, the special circumstances, the gravity of the offences and the prior criminal record of the defendant) and mitigating circumstances (as his limited involvement in the crimes of the mob and the familiar circumstances of the defendant).
Thus the first judge, beside that for the assistance in the murder, determined the punishment for the crime foreseen by art. 200.1 KCL in two years imprisonment and the punishment for the crime of unauthorized possession of weapon in eight months imprisonment.
The Court revoked a suspended sentence of three months imposed by the Municipal Court of Gjilan and determined the aggregated punishment in eleven years imprisonment.

This Court shares the general assessment of the first judge.
The punishment must be recalculated taking into account the acquittal of the defendant from the criminal offence of assistance in aggravated murder and the criteria set forth by art. 71 PCCK for the aggregated punishment.

Both aggravating and mitigating circumstances indicated by the first judge and in the appeal, as well as the mitigating circumstance linked to the excessive time for delivering the judgment of first instance must be considered.
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.
All this put under consideration the Court of Second Instance deems correct and adherent to the legal criteria about sentencing to confirm the singular punishments decided by the first judge for the criminal offence foreseen by art. 200.1 KCL and for the criminal offence of unauthorized possession of weapon, to confirm the repeal of the sentence of the Municipal court of Gjilan and finally to impose the aggregate punishment of two years and seven months imprisonment.

V

The appeal of Mr. Faruk BRESTOVCI as defense counsel of defendant A.I. was filed on 31 December 2006.

The judgment of first instance is challenged due to:

- essential violations of the provisions of the criminal proceeding, article 403 item 12 in connection with article 396 item 7 PCPCK,
- violations of the criminal code,
- wrongful and incomplete establishment of the factual situation and
- the decision of the punishment.

The defense counsel proposes:

- to amend the verdict and to send the case to the First Instance Court for a re-trial.

The grounds of the appeal are as follows.

<u>1. Essential violations of the provisions of the criminal proceeding, as:</u>
- alleged inconsistency of the enacting clause with the reasoning,
- lack of the necessary reasons on decisive facts, particularly as to why some evidence were deemed trustworthy and some other not,
- inadmissibility of the Police statements of the defendant because of the violation of the provision of article 155 Paragraph 1 item 1 and 2 in connection to article 154 item 4 and 5 and in connection with article 153 item 1 and 2 PCPCK and of art. 6 ECHR.

The point related to the admissibility of Police statements of the defendant was examined and found groundless above (see point **I.1.7**).

The violations related to the alleged inconsistency between enacting clause and reasoning and the lack of necessary reasons don't exist.
The challenged verdict states in the enacting clause the conviction of A.I. only for the criminal offence foreseen by art. 200.1 KCL and his acquittal from all other

charges, included the serious charge of having directly taken part in the murder of SP
The reasoning explains clearly the evidence taken into account as to this defendant, examining his statements (page 39), his allegation of violence by the Police (pages 45 and 46), what evidence is deemed trustworthy and the reasons of this choice (page 41, 49 and 50), the conclusions on his personal responsibility and the grounds of his partial acquittal (page 50).
The single parts of the challenged verdict appear to be complete and consistent in itself and with each other.

2. Wrongful and incomplete establishment of the factual situation,.

This ground of appeal is developed in the following points.
The defendant has admitted to have participated in the mass protest of the critical day and to have thrown one time towards the house of SP
Nevertheless he denied to have been involved in physical violence against S and AP

The appeal claims that the Police statements of NR and AA don't describe AI with objects in the hands, nor indicate that he hit the victim with stones or anything.
~~Moreover~~ I was at the side of the park while the victim and the crowd moved towards the centre of the town, therefore the defendant did not follow the victim.
The scientific expertise conducted on clothes and shoes supplied by the defendant resulted negative, this would establish the absence of any physical contact between the defendant and the victim.

This point is ungrounded.
The establishment of the factual situation made by the first judge is correct.
The criminal offence for which the defendant was convicted is related to the participation in a group which through joint action committed different criminal offences: took SP's life, inflicted serious bodily injury on AP and considerably damaged their house and car.
In order to be liable for the crime foreseen by art. 200.1 KCL it is not necessary to take direct part to any criminal offence committed by the group.
This legal provision punishes the "mere participation" to the group.
Both before the Police and the Investigating Judge the defendant admitted to have thrown some stones against the house of the P family, to the Police he admitted to have helped to burn cars with Serbian plate number.
Before the Police A admits that he, NR and AI joined the group of protestors and threw stones against the house of the victim.
According to A when SP walked down the street with his weapon he was followed very close by N and two other persons and after these men were present A himself, AI and others who before threw stones against the house of P.

Before the Police R Confirms that the three of them threw stones against the house of the victim.
Later on R had followed the victim and behind R were present A and AI

Thus, from the above mentioned evidence it results that AI directly damaged PI's property and then he was part of the group which followed and threatened SP fact which resulted in the attack against the victim and in his murder.
This fulfils the requirement of the legal provision applied by the first judge.

The negative result of scientific examinations on IL, cloths and shoes does not contradict the findings of the first Court, considering that cloths and shoes were seized on 7 April 2004, that is twenty one days after the fact and this had given him all necessary time to clean eventual stains or traces.

3. The decision on the punishment.
The appeal claims that the challenged verdict does not mention any mitigating circumstance, which on the contrary should be found in his young age, in the absence of any previous conviction and in his low educational level.
The defendant should in any case benefit of conditional release.

The first judge has considered both aggravating (as the degree of criminal liability, the particularly dangerous motives, the special circumstances and the brutal manner of the act) and mitigating circumstances (as the young age of the defendant) and determined the punishment in two years and six months imprisonment.

This Court shares the assessment of the first judge.
As already observed, in this case 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, included the one linked to the excessive time for delivering the judgment of first instance.
The punishment determined by the first judge therefore must be confirmed.
To decide on conditional release does not fall in the competence of this Court (art. 80.5 PCPCK).

4. All this put under consideration the Court of Second Instance decides to reject the appeal filed on behalf of AI.

VI

The appeal of Mr. Azis R. SHAQIRI as defense counsel of defendant AA was filed on 12 December 2006.

The judgment of first instance is challenged due to:

- the decision on the penal sanction, article 406 paragraph 1 PCPCK.

The defense counsel proposes:

- to change the verdict and to reduce the punishment.

The grounds of the appeal are as follows.

The punishment seems to be excessively severe if compared with the acts and the personality of the defendant, who did not hit anybody directly with the stones he threw on the critical day.
He was there only for curiosity, without any premeditative purpose to damage anything or to hurt anybody belonging to the Serbian minority.
The Court of First Instance should have therefore recognized mitigating circumstances, linked to the conditions of life of the defendant and apply a more lenient punishment.

The first judge has considered both aggravating (as the degree of criminal liability, the particularly dangerous motives, the special circumstances and the brutal manner of the act as well as the past conduct of the defendant) and mitigating circumstances (as the young age of the defendant) and determined the punishment in two years and six months imprisonment.

This Court shares the assessment of the first judge. considering that, according to the statements given by the defendant. AI and NR in the investigative stage, AA's conduct was grave because he was positively and directly involved in the damage of the house of the victims and in the group which followed and attacked SP on the road.
As already observed, in this case 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, included the one linked to the excessive time for delivering the judgment of first instance.
The punishment determined by the first judge therefore must be confirmed.

All this put under consideration the Court of Second Instance decides to reject the appeal filed on behalf of AA

VII

The verdict of first instance was partially modified as to the acquittal of XS from the criminal offence of assistance in aggravated murder and as to the legal qualification of the aggravated murder charged to NR according to article 30 paragraph 2 item 5 KCL.

The Judgment of the Court of First Instance is affirmed in the remaining parts.

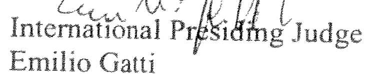
Pursuant to article 391.5 PCPCK the time spent in detention on remand by each defendant is included in the amount of punishment.

The costs of the second instance proceeding will remain in charge of the defendants jointly.

With a separate ruling it is decided about the detention on remand for NR and XS ; according to article 426 and 393 PCPCK.

Dated this 23 day of June 2009.
Ap.-Kz No. 371/2008

Prepared in English, an authorized language.



International Presiding Judge
Emilio Gatti

International Recording Officer
Annette Andersen

International Judge
Maria Giuliana Civinini

International Judge
Guy Van Craen

Kosovo National Judge
Salih Mekaj

Kosovo National Judge
Nesrin Lushta

Legal Remedy

No appeal is possible against this Judgment (art. 430 KCCP). Only a request for the protection of legality is possible, to be filed with the court which rendered the decision in the first instance, within 3 months of the service of this decision (art. 451 – 460 KCCP).