Supreme Court of Kosovo
Ap.-Kz. nr. 264/2011
Prishtinë/Priština
14 February 2012

EULEX Judge Gerrit-Marc Sprenger of the Supreme Court of Kosovo, as Presiding Judge in the appeal panel in criminal case AP-KZ nr. 264/2011 against defendants:

1) [redacted] (nickname '[redacted], father's name [redacted] mother's maiden name [redacted] born on [redacted], Kosovo Albanian, last residing in [redacted] village, single, former [redacted]

2) [redacted], father's name [redacted] mother's maiden name [redacted] born on [redacted] in [redacted], Kosovo Albanian, last residing at [redacted], [redacted] village, married, father of three children, former [redacted]

3) [redacted] father's name [redacted] mother's maiden name [redacted] born on [redacted] in [redacted], Kosovo Albanian, last residing in [redacted] municipality of Kacanik, married, father of three children, unemployed; and

4) [redacted], father's name [redacted] mother's maiden name [redacted], born on [redacted] in [redacted] village, [redacted] Municipality, last residing in [redacted] Kosovo Albanian, married, father of three children, former [redacted] member; unemployed;

Acting ex office pursuant to Article 397 paragraph (1) of the Kosovo Code of Criminal Procedure, issues the following:

RULING

Verdict Ap.-Kz. nr. 264/2011 of the Supreme Court dated 12 October 2011 is corrected as follows:

1) The reference in paragraph I) on page 2 to the Prishtine/Pristina District Court verdict case P. nr. 459/2009 "dated 07 February 2007" shall be corrected to read "dated 07 February 2011".

2) The reference on page 5 to case "P. No. 628/2004 of the District Court of Prishtinë/Priština dated 08 May 2007" shall be corrected to read "P. No. 459/2009 of the District Court of Prishtinë/Priština dated 07 February 2011".

Reasoning

The verdict in this case was pronounced on 12 October 2011 and the written verdict was served on the parties between the dates of 24-29 November 2011. Two parties have filed timely appeals against the verdict.

This ruling merely corrects inconsequential typographical errors in the written verdict pursuant to paragraph (1) of Article 397 of the KCCP, without respect to any data provided for in Article 391 paragraph (1) subparagraphs 1) through 4) and subparagraph 6) KCCP. Therefore, this ruling has no effect on the period of time for filing an appeal against verdict Ap.-Kz. nr. 264/2011 dated 12 October 2011.

Supreme Court of Kosovo
Ap.-Kz. nr. 264/2011
14 February 2012
Prishtinë/Priština

Presiding Judge:

Gerrit-Marc Sprenger
EULEX Judge

Recording Officer:

Tara Khan
EULEX Legal Officer

Legal Remedy

Pursuant to Article 397 paragraph (2) of the KCCP, there is no appeal permitted against this ruling.

SUPREME COURT OF KOSOVO

Supreme Court of Kosovo
Ap.-Kz. No. 264/2011
Prishtinë/Priština
12 October 2011

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 11 October 2011 in the Supreme Court building in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, EULEX Judges Martti Harsia and Charles Smith III and Supreme Court Judges Marije Ademi and Salih Toplica as panel members

And with Svetoslava Savova as Court Recorder,

In the presence of the

Public Prosecutor Juzuf Mezini, Office of the State Prosecutor of Kosovo (OSPK)

Defense Counsels Av. [redacted] and Av. [redacted] for the defendant [redacted] Av. [redacted] and Av. [redacted] for the defendant [redacted] Av. [redacted] for the defendant [redacted] and Av. [redacted] for the defendant [redacted]

The injured parties [redacted], represented through [redacted]

In the criminal case number AP-KZ No. 264/2011 against the defendants:

1) [redacted], nickname [redacted] born on [redacted] in [redacted], Kosovo Albanian, last residence in freedom in the village of [redacted] fathers name [redacted] mother's maiden name [redacted] single, High School education, former [redacted], average economical situation,

continuously in custody since 21 January 2008 with regard to another criminal proceeding at Dubrava Prison ;

2) [redacted], born an [redacted] in [redacted], Kosovo Albanian, last residence in freedom [redacted] Village of [redacted] father's name [redacted] mother's maiden name [redacted], married, father of three children, High School education (not completed), former [redacted] officer, average economical status, continuously in custody since 21 January 2008 with regard to another criminal proceeding; currently detained in Dubrava Prison

3) [redacted], born on [redacted] in [redacted], Kosovo Albanian, residing in [redacted] municipality of [redacted], father's name [redacted] mother's maiden name [redacted], married, father of three children, Primary School education, average economical stutus, unemployed;

4) [redacted], born on [redacted] Kosovo Albanian, residing in [redacted] father's name [redacted] mother's maiden name [redacted] married, father of three children, High School education, former [redacted] member; unemployed; average economical status

I. By the Verdict of the 1st Instance District Court of Prishtine/Pristina in the case no. P. No. 459/2009 dated 07 February 2007 and registered with the registry of the District Court of Prishtine/Pristina on the same day, **the defendants were found guilty of the following criminal offenses:**

1. [redacted] together with his co-defendant [redacted] because:

a. between 00.10-00.15 of the night between 27 and 28 September 2007 they murdered [redacted], [redacted] and [redacted] in a deceitful manner at the [redacted] (located on the road that from the [redacted] leads to the village of [redacted]. In particular the defendants ambushed the car Golf 2 with license plates [redacted] on which [redacted], [redacted], and [redacted] (together with [redacted] and [redacted]) were travelling towards the village of [redacted]. When the car reached the [redacted] and [redacted] (who were waiting on the right side of the road) opened fire against the car with two AK 47 automatic rifles. [redacted] was hit by many bullets on the right part of the body and one bullet hot him on the right part of the head, penetrating the brain and causing his death. [redacted] died of damages cused to his heart, lungs and liver by the bullets and [redacted] died as a result of injuries caused by the bullets to the right part of his head.

Thus [redacted] and [redacted] jointly committed the criminal offence of Aggravated Murder, contrary to art. 23, 147, para 1, nn. 3 and 11, CCK.

b. between 00.10-00.15 of the night between 27 and 28 September 2007 they attempted to murder [redacted] and [redacted] in a deceitful manner by the [redacted] (located on the road that from the [redacted] leads to the village of [redacted]). In

particular the defendants ambushed the car Golf 2 with license plates [redacted] on which [redacted] and [redacted] were traveling towards the village of [redacted] When the car reached the [redacted], [redacted] and [redacted] (who were waiting on the right side of the road) opened fire against the car with two AK 47 automatic rifles. At least 40 shells of AK 47 cal. 7.62 were fired against the car used by the victims. [redacted] was was hit by bullets at the head and at the right side of the abdomen, including the skin tissue, the cell tissue, the *colon ascendens*, which then perforated and whose content dispersed to the abdomen cavity and partially damaged the *omentum majus*. Despite the serious injuries sustained, [redacted] survived.

[redacted] was directly exposed the raffles of bullets which caused the death and injuries of the other victims but remained miraculously unharmed.

By doing so [redacted] and [redacted] intentionally took an immediate action towards the commission of the criminal offence of **Attempted Aggravated Murder**, thus jointly committing the **criminal offence described in art. 20, 23, 147, para 1, nn. 3 and 11, CCK;**

c. in the circumstances described above sub count 1 and 2, they without authorization transported, were in possession of and used two automatic rifles model AK-47 Kalashnikov cal. 7.62, by which they committed the criminal offences described above sub a. and b.

Thus [redacted] and [redacted] committed the criminal offence of unauthorized ownership, control, possession or use of weapons, contrary to art. 328 para 2 CCK.

2. [redacted] because in a non specified date in the month of September 2007 he received from [redacted] an automatic rifle AK-74 Kalashnikov, cal. 7.62. [redacted] tested such automatic weapon in the forest of [redacted]. After the murder of [redacted] he asked and obtained from [redacted] brother of [redacted] the restitution of the said AK47 rifle, together with another AK74 rifle, which he took away himself.

Thus he committed the criminal offence of unauthorized ownership, control, possession or use of weapons, contrary to art. 328 para 2 CCK.

3. [redacted] was **acquitted** because it was not proved that he committed the criminal offences he had been charged with.

II. Therefore, the defendants were convicted as follows:

1. [redacted] and [redacted] were sentenced

a. to the punishment of long term imprisonment for the duration of thirty (33) years with regard to the criminal offence described in count **a;**

b. to the punishment of ten (10) years of imprisonment with regard to the criminal offence described in count **b;**

c. to the punishment of two (2) years of imprisonment with regard to the criminal offence described in count **c;**

Pursuant to art 71, para 2, n.1, CCK, the aggregate punishment of 33 years of long term imprisonment was imposed against [redacted] and [redacted]

2. [redacted] was sentenced to the punishment of a fine of 5,000 Euros with regard to the criminal offence described in count d, to be paid by the defendant within three (3) months after the judgment has become final. In case the fine cannot be collected by compulsion it shall be substituted with a day of imprisonment for each fifteen Euro of the fine.

Pursuant to art. 112, para 2 and art. 392 KCCP, [redacted] and [redacted] cumulatively and jointly, were condemned to the payment of the sum of 25,000 Euros to each one of the injured parties [redacted] as a partial compensation for the moral damage suffered.

The Defence Counsels of the accused [redacted] Av. [redacted] and Av. [redacted] each one timely filed an appeal, Av. [redacted] dated 25 May 2011 and Av. [redacted] dated 11 June 2011, against the Verdict. Both Defense Counsels asserted that the Verdict contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state and violation of the criminal code and Av. [redacted] in addition has challenged the punishment decision as well. It was proposed to annul the challenged Verdict and to send the case back to the 1st Instance for re-trial.

The Defence Counsil of the accused [redacted] Av. [redacted] timely filed an appeal against the 1st Instance Judgment, which was registered with the registry of the District Court of Prishtinë/Priština on 03 June 2011, asserting that the challenged Verdict would contain essential violations of provisions of the Criminal Procedure pursuant to Article 403 of KCCP, erroneous determination of factual state pursuant to Article 405 of KCCP and violations of the Criminal Code pursuant to Article 404 of KCCP

The defendant [redacted] by written appeal dated 30 May 2011 also has timely appealed the 1st Instance Judgment and asserted that the Verdict would contain erroneous and incomplete establishment of the factual state and that the decision on the punishment would be unjust. Therefore, he proposes the challenged Judgment to be amended and the Court to pronounce the defendant not guilty.

The Office of the Special Prosecutor of Kosovo (SPRK) through their timely appeal dated 26 May 2011 has challenged the 1st Instance Judgment for substantial violation of the criminal procedure code, erroneous and incomplete determination of the factual situation and violation of the criminal law and therefore proposed that the Supreme Court of Kosovo approves the SPRK appeal so that the Verdict P. No. 495/2009 dated 07 February 2011 concerning defendant [redacted] and [redacted] is annulled and the case is returned for a re-trial.

The OSPK with an opinion dated 04 August 2011 and registered with the registry of the Supreme Court of Kosovo the same day supports the appeal of the SPRK with regards to alleged essential violations of the criminal procedure and therefore proposes to annul the challenged Judgment and send the case back to the 1st Instance for re-trial.

Based on the written Judgment in case P. No. 628/2004 of the District Court of Prishtinë/Priština dated 08 May 2007 (filed with the registry of that Court on the same day), the submitted written appeals of the defendants and their respective Defence Counsels as well as the SPRK and OSPK, the relevant file records and the oral submissions of the parties during the session on 11 and 12 October 2011, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 12 October 2011, hereby issues the following:

JUDGMENT

The appeals of Defence Counsels [redacted] and [redacted] filed on behalf of defendant [redacted], of Defense Counsel [redacted] filed on behalf of defendant [redacted], of defendant [redacted] and of Special Prosecutor [redacted] against the Judgment of the District Court of Prishtinë/Priština, P. No. 459/2009, dated 7 February 2011, are hereby REJECTED AS UNGROUNDED. The Judgment of the District Court of Prishtinë/Priština is AFFIRMED.

REASONING

Procedural History

1. On the 28 September 2007 between 00.10-00.15 hrs at night [redacted], [redacted], [redacted] and [redacted] were travelling towards the village of [redacted], using a car Golf 2 with license plates [redacted] When they reached the [redacted] (located on the

road that from the [redacted] leads to the village of [redacted], fire from two automatic rifles AK-47 Kalashnikov, cal. 7.62 mm was opened from the right side of the road against their car. [redacted] and [redacted] were hit by many bullets on the right parts of their bodies and died of injuries sustained, while [redacted] was seriously injured but survived the attack and [redacted] miraculously remained unharmed.

2. On 2 Novemver 2009 the Special Prosecutor of Kosovo filed an indictment (PPS 41/09) with the District Court of Prishtine/Pristina against the defendants [redacted], [redacted], [redacted], [redacted] and [redacted], charging the defendants with Aggravated Murder, Attempted Aggravated Murder ([redacted], [redacted] and [redacted]), Criminal Association ([redacted], [redacted] and [redacted] and Unauthorized Ownership, Control, Possession and Use of Weapons ([redacted] and [redacted].

3. After the confirmation hearings conducted on 21 December 2009 and on 5 January 2010 only the charges of Aggravated Murder of [redacted] contrary to Article 147 paragraph 1, sub-paragraphs 3, 8 and 9; Article 23 of the CCK, Aggravated Murder of [redacted] and [redacted] contrary to Article 147 paragraph 1, sub-paragraph 3 related to Articles 20 and 23 of the CCK and Attempted Aggravated Murder of [redacted] and [redacted] against the defendants [redacted], [redacted] and [redacted] and Unauthorized Possession, Ownership, Control and Use of Weapons contrary to Article 328 paragraph 2 of the CCK against the defendants [redacted] and [redacted] as well as the charge of Unauthorized Possession, Ownership, Control and Use of Weapons contrary to Article 328 paragraph 2 of the CCK against the defendant [redacted] were confirmed.

4. The Main Trial commenced in public through 19 sessions on 16, 17, 18, 23, 24 June, 13, 14, 15 July, 06, 14, 16, 29, 30 September, 21 October, 05, 09 November and 09 December 2010 as well as on 31 January and 01 February 2011, in the presence of SPRK Prosecutor Mr. [redacted], all the accused and their respective Defense Counsels.

During the main trial, the 1st Instance Court questioned the following witnesses: [redacted] (16 June 2010), [redacted] (17 June 2010), [redacted] (18 June 2010), [redacted] (23 June 2010) [redacted] (24 June 2010), [redacted] (13 July 2010), [redacted] (13 and 14 Kuly 2010), [redacted] (14 July 2010), [redacted] (15 July 2010), [redacted] (06 September 2010), [redacted] (14 September 2010), [redacted] (16 September 2010), [redacted] (29 September 2010), [redacted] (30 September 2010) and [redacted] (21 October 2010). After the presentation of material evidence, the defendants were examined by the Court.

5. Deliberation and voting took place on 04 and 07 February 2011 and the Judgment was pronounced on 07 February 2011.

6. Dated 25 May 2011 the **Defence Counsel of the accused** [redacted], Av. [redacted] and dated 13 June 2011 the Defense Counsel of the accused [redacted] Av. [redacted] timely filed an appeal against the 1st Instance Judgment, asserting violations of the law and proposing Supreme Court decision as pointed out before.

7. Dated 03 June 2011 the Defence Council of the accused [redacted] Av. [redacted] in person timely filed an appeal with the registry of the District Court of Prishtinë/Priština, which in none of its three copies ever was added into the case file, but upon request of the Presiding Judge at the Supreme Court was handed over again to the panel by the Defence Counsel.

8. Dated 30 May 2011 the accused [redacted] filed an appeal against the 1st instance Judgment, asserting violations of the law and proposing a new court decision, as described before.

9. Dated 26 May 2011 the **Office of the Special Prosecutor of Kosovo (SPRK)** challenged the 1st Instance Judgment and proposed a new court decision, as pointed out before.

10. **The OSPK**, with an opinion dated 04 August 2011 supports the appeal of the SPRK with regards to alleged essential violations of the criminal procedure and therefore proposes as well as described before.

Findings of The Court

A. Substantial violation of the provisions of the Criminal Procedure

11. Both, Defense Cousels Av. [redacted] and Av. [redacted] for the defendant [redacted] as well as the Defence Counsel Av. [redacted] for the defendant [redacted] and the SPRK, the latter supported by OSPK, have challenged the 1st Instance Judgment for several violations of the criminal procedure. In particular, the enacting clause of the 1st instance Judgment would lack sufficient elements as to the motive for the commission of the crimes as well as to objective and subjective elements of intent as required by Article 174 of the CCK for consideration of a crimes commission in an insidious manner. The enacting clause would not make any reference to the crucial facts, while the reasons given later in the Judgment would be unclear and partially in contradiction to the contents of statements given in the course of evidentiary procedures. In particular point **a.** and **b.** of the enacting clause of the challenged Judgment would be controversial and confusing, because the fact that point b makes reference to more that 40 shells being fired, whilst nothing like this is said under point a would result in doubts whether or not both points refer to the same situation. Therefore, the enacting clause of the challenged Judgment would be incomprehensible, controversial with its contents and with the reasons of the Judgment and thus would violate Article 403 paragraph 1 item 12

of the KCCP. In addition, according to the Defence Counsel of defendant [redacted] Av. [redacted] the 1st Instance Judgment would violate Article 403 paragraph 1 item 8 of the KCCP, since it would relay upon inadmissible evidence. In particular the statements of witness [redacted] given in front of the Prosecutor on 04.March 2009 and in front of the police on 02.February2008 would be inadmissible in the sense of Article 156 and 157 of KCCP because neither the accused Shpend Qerimi nor his Defence Counsel were present at the time these statements were given. The SPRK, supported by OSPK in addition has challenged the Judgment because the acquittal of the accused [redacted] as stipulated in the enacting clause would not be supported by sufficient reasons, since the Court did not trust the witness statement of [redacted] as given in front of the Prosecutor on 04 March 2009.

I. ALLEGED LACK OF ELEMENTS OF THE ENACTING CLAUSE

12. The Supreme Court of Kosovo finds that alleged weaknesses of the enacting clause of the challenged Judgment do not reach a level of severity that would justify annulling the Judgment because of substantial violation of the criminal procedure, as presumed by Article 403 paragraph 1 item 12 of the KCCP.

13. Article 396 paragraphs 3 and 4 of the KCCP stipulate as to the requirements for the enacting clause as follows:

(3) The enacting clause of the judgment shall include the personal data of the accused (Article 233 paragraph 1 of the present Code) and the decision by which the accused is pronounced guilty of the act of which he or she is accused or by which he or she is acquitted of the charge for that actor by which the charge is rejected.

(4) If the accused has been convicted, the enacting clause of the judgment shall contain the necessary data specified in Article 391 of the present Code, and if he or she was acquitted or the charge was rejected. The enacting clause shall contain a description of the act with which he or she was charged and the decision concerning the costs of criminal proceedings and the property claim if such claim was filed.

Article 391 of the KCCP as referred to by Article 396 paragraph 4 of the KCCP stipulates in its paragraph 1, which is relevant in the case at hand, as follows:

(1) In a judgment pronouncing the accused guilty the court shall state:

1) *The act of which he or she has been found guilty, together with facts and circumstances indicating the criminal nature of the act committed, and facts and circumstances on which the application of pertinent provisions of criminal law depends;*
2) *The legal designation of the act and the provisions of the criminal law applied in passing the judgment;*
3) *The punishment imposed on the accused ...*

1. Requirement of motives to be mentioned in the enacting clause

14. In particular, the law in general does not require any mentioning of the motives to commit a crime in the enacting clause. Although Article 391 paragraph 1 item 1 of the KCCP requires *"...mentioning of facts and circumstances indicating the criminal nature of the act committed..."*, this as a rule does not refer to the motive for the commission of a crime, since the latter *per definitionem* is not part of the essential objective or subjective requirements of a criminal offense. Whatsoever criminal offences regularly consist of objective criteria describing the elements of a certain crime and subjective criteria, describing the moods of the perpetrator as willingness of a certain degree or negligence. In difference to that, motives of a crime may remain in the dark and are not needed at all in the context of assessment of guilt regarding the commission of a crime. However, when discovered, motives can additionally indicate criminal responsibility of an alleged perpetrator.

15. In the context given, as to Aggravated Murder pursuant to Article 147 of the CCK, the law indeed knows some constellations with certain reference to motives as well. This for example could be considered under Article 147 item 3 of the CCK, when a Murder was committed in a *cruel* manner and the victim was brought to death with more pain than necessarily needed and so to say was intentionally 'cut into pieces when still alive'. Some kind of motive also could be considered under Article 147 items 4 through 9 of the CCK, where always a particular 'motivation agenda of the perpetrator is required as to the intention to endanger somebody else's' life, to act ruthlessly and violently, to commit the crime on a racial, national or religious background, to act with the purpose to obtain material benefit ort to prepare for or conceal another criminal offence or to act for unscrupulous revenge or other base motives. In all these cases the elements listed above need to be included by the subjective criteria of the criminal offence, meaning by the intention of the perpetrator.

16. However, the situation as described in the paragraph above is not given in the case at hand, where the 1st Instance Court has established the elements of Aggravated Murder as per Article 147 items 3 in its second alternative (commission in a deceitful way) and 11 (commission of two or more murders). In both regards no motive is required by the law.

17. In the case at hand, the 1st Instance Court has found that *"...the prosecution alleges that the murders were committed by the defendants because [redacted] was telling around that [redacted] was guilty of the bombing of the [redacted] on [redacted] which took place on 23.9.2007* [...but that...] *prosecution failed to submit sufficient evidence of the fact that the defendants actually were informed of these behaviours of [redacted]" (p.29-30 of the English version).*

Nevertheless, the 1st Instance Court correctly points out that *"...the absence of full proof on the motives of the crime is not of any obstacle to the affirmation of criminal responsibility against the defendants..." (p.30 of the English version).*

In this context it is worth underlining that the 1st Instance Court has found other arguments to base its opinion upon regarding the criminal responsibility of [redacted] and [redacted] The Court has elaborated its argumentations, particularly on p. 31 of the English version of the challenged Judgment.

2. Requirement of objective and subjective elements of a criminal offense to be mentioned in the enacting clause:

18. More serious deems the concern of the Defence and the Prosecution that the enacting clause of the challenges Judgment does not contain any reference to the objective and subjective elements of Article 147 of the CCK.

19. With regards to the objective requirements of Article 147 items 3 and 11 of the CCK the Supreme Court of Kosovo is satisfied that the descriptions of the situation and the actions of the accused as provided by the enacting clause under its items **a.** and **b.** are sufficient to describe the objective criteria of Aggravated Murder in accordance with the law, whereas upon first look one could take the position that clear reference to subjective criteria is lacking.

20. However, the Supreme Court finds that also in this regard the enacting clause at least meets the minimum requirements on subjective criteria of Article 147 of the CCK, since under item **a.** it stipulates that the accused *"...murdered* [redacted] *and* [redacted] *in a deceitful manner at the* [redacted] and that they had *"...ambushed the car Golf 2 with license plates* [redacted] *on which* [redacted] *and* [redacted] *(together with* [redacted] *and* [redacted] *) were travelling..."*. Under item **b.** the challenged enacting clause stipulates that *"...they attempted to murder* ... [and] *...ambushed the car..."*. In both contexts given the formulations used by the 1st Instance Court at least implicate that the subjective requirements of intentional commission of the crime are met.

II. ALLEGED INCONSISTENCY BETWEEN THE ENACTING CLAUSE AND THE REASONING OF THE CHALLENGED JUDGMENT

21. The Supreme Court finds that the enacting clause is fully supported by the factual findings and the assessment of evidence as given in the reasoning of the challenged Judgment.

1. In this regard, reference is made to the general findings of the 1st Instance Court as particularly pointed out at p.7-29 of the Judgment (English version) as well to the assessment of witness statements and physical evidence one by one as laid down on p. 10-24 of the Judgment (English version). There in particular the statements of witness [redacted] a re analyzed in detail and set in relation with the statements of other witnesses, as there are specifically [redacted] and [redacted] well as [redacted] (p.21 of the Judgment in its English version).

2. Although not explicitly challenged by the Defence, the Supreme Court of Kosovo finds it necessary to make reference to one aspect of the punishment decision as expressed in the enacting clause and in the reasoning of the challenged Judgment, as there is in particular the fact that under its point **1.a.** the enacting clause of the 1st Instance Judgment reads that *"[redacted] and [redacted] are sentenced to a long term imprisonment of thirty (33) years with regard to the criminal offence described in count a. [...]"*.

As to the fact that there is an obvious discrepancy regarding the duration of punishment imposed for count **a.** of the challenged Judgment between its expanded version (thirty years) and its reflection as a number (33 years), the Supreme Court finds that no inconsistency between the enacting clause and the reasoning or within the enacting clause can be established. Reading the enacting clause as such as well as reading the Judgment as an entire document and in particular the reasoning regarding the *punishment (p.35-36 of the English version)*, it becomes clear beyond all doubts that a punishment of thirty-three (33) years was imposed to each of the defendants. This also becomes clear while reading the decision on imposing an aggregate punishment, which the latter also was defined with thirty-three (33) years. This obviously is in compliance with Article 71 paragraph 2 item 1 of the CCK, which regarding the case of concurrent criminal offences like in the case at hand stipulates that *"[i]f the court has pronounced a punishment of long term imprisonment for one of the criminal offences, it shall impose this punishment only"*. Thus it illuminates that the respective line of the challenged 1st Instance enacting clause contains a typo only, which easily can be corrected by the District Court, but does not lead to a situation as described under Article 403 paragraph 1 item 12 of the KCCP.

III. ALLEGED CONTRADICTIONS WITHIN THE ENACTING CLAUSE

22. The Supreme Court of Kosovo finds that no violation of the law can be established as to an alleged contradiction of confusion caused by the time of the commission of the murders as defined by the enacting clause of the challenged Judgment or by its items **a.** and **b.**

1. Time of the crime's commission:

23. Although a time frame *"[...] between 27 and 28 September 2007 [...] between 00.10 and 00.15 of the night"* as defined by the challenged enacting clause seems contradictory in itself, this weakness does not lead to the necessity to annul the challenged Judgment due to essential violation of the criminal procedure, since the Judgment in its entirety is clear and not confusing at all in this regard.

From the reasoning of the challenged Judgment with regards to *"[t]he location of [redacted] and [redacted] immediately before and after the murder" (p.26 of the English version)* it illuminates that the 1st Instance Court has considered it as *"uncontested that on the night of the murder, before it was committed, [redacted] and [redacted] were*

at [redacted] *when also the victims were there"* and that *"*[redacted] *during his examination admitted that he left* [redacted] *before midnight"*. Moreover, based on the testimony of [redacted] the Court found that the later victims from the [redacted] family *"arrived to* [redacted] *twenty minutes after him* ([redacted]) *and left* [redacted] *at about 23.40"*. Based upon all these details and a calculation of the time needed to travel from the restaurant to the [redacted] where the crime was committed, the 1st Instance Court then has defined the alleged timing of the events from the immediate preparation phase to the commission of the murders/attempted murders, which the latter is thoroughly elaborated in the context of "[t]*he falsity of the alibi provided by* [redacted]*" (p. 27-28 of the English version)*. The 1st Instance Court in particular has found that [redacted] and [redacted] have left [redacted] on 27 September 2007 at 23.40 and that between 0.16 and 0.21 on 28 September 2007 they have been stopped and controlled by a police patrol. In between the murders/attempted murders were committed at [redacted]

Therefore, the Supreme Court finds that – although the formulation used in the enacting clause might not be the most lucky one – it does not make the enacting clause contradictory in itself, but was apparently used due to some uncertainty regarding the exact time of commission of the crimes, which can be defined only approximately by reference to different witness statements.

2. Description of the factual situation under points a. and b. of the enacting clause:

24. The mention of *"...at least 40 shells of AK 47, cal. 7, 62* [having been] *fired against the car used by the victims..."* only under item **b.** but not under item **a.** of the enacting clause can not lead to the conclusion that the situation described under item **a.** is different from the one described under item **b.** of the enacting clause. Also item **a.** clearly stipulates that *"...at the respective time between 00.00-00.15 of the night between 27 and 28 September 2001 [...] the defendants ambushed the car Golf 2 with license plates 469KS117 on which* [redacted] *(together with* [redacted]*) were travelling towards the village of* [redacted]*"*. Thus, the enacting clause of the challenged Judgment makes clear beyond serious doubts that all five victims of the [redacted] family were travelling together in the same car at the same time and location, when they were ambushed and automatic gun fire was opened towards them.

IV. ALLEGED INADMISSIBILITY OF THE STATEMENTS OF [redacted] DATED 02 FEBRUARY 2008 AND 04 MARCH 2009

25. The Supreme Court of Kosovo finds that the concerns of the Defence Counsel of Shpend Qerimi as raised in the context given are without merits.

Article 156 paragraph 2 of the KCCP, which is relevant in case at hand, stipulates as follows:

(2) A statement of a witness given to the police or the public prosecutor may be admissible evidence in court only when the defendant or defense counsel has been given

the opportunity to challenge it by questioning that witness during some stage of the criminal proceedings.

The Supreme Court of Kosovo in this regards finds that indeed the respective statements of witness [redacted] as given in front of the police on 02.February 2008 and in front of the Prosecutor on 04.March 2009 have been conducted without one of the defendants or their Defense Counsels being present. It therefore goes without saying that they did not have a chance to challenge these statements at the times when they were given.

However, both, the defendant [redacted] and also his Defense Counsel Av. [redacted] (as well the other defendants and their respective Defense Counsels) have been present in the 1st Instance main trial and in particular during the session on 17 June 2010, when – amongst others – the witness [redacted] was interrogated at length and when he was confronted with all his statements as given in the course of the criminal proceedings up to that point. Therefore, the defendants as well as their Defense Counsels have had the possibility to challenge all the statements of the witness, as required by Article 156 paragraph 2 of the KCCP.

V. ALLEGED SHORTCOMINGS OF THE REASONING REGARDING THE ACQUITTAL OF [redacted] AS STIPULATED IN THE ENACTING CLAUSE

26. The Supreme Court finds that no discrepancies can be established between the challenged part of the enacting clause and the respective part of the reasoning.

The 1st Instance Court in particular has assessed the statements of [redacted] and specifically the one given to the Prosecutor on 04 March 2009 and has come to the opinion that there are important ground to understand his stating in the way that he did not positively recognize [redacted] as the driver of the vehicle that allegedly was involved in the ambush. The 1st Instance Court found that *"...it is clear from the statement of [redacted] [...] that he did not know [redacted] before the shooting and that he had never seen his car. Specifically for this reason did the [redacted] family, in the days after the shooting, need to take him around the villages in order to see whether he could recognize a car similar to the one he had seen at the bridge. This makes it clear that the sole possible interpretation of [redacted] sentence "such a vehicle was driven by [redacted]" is 'such a kind of vehicle' was driven by [redacted]. In other words, after coming to know (in the days after the murder) that [redacted] owned a similar car, he was in the position to affirm to the prosecutor that [redacted] drove such a vehicle. [redacted] at the same time was very clear in affirming that he had not recognized [redacted] in the car" (p.33 of the challenged Judgment in the English version).*

Based upon this assessment the District Court has come to the logical conclusion that there is lack of evidence which needs to be interpreted in favor of the accused [redacted]

B. Alleged violation of the Criminal Law

27. Defence Counsels Av. [redacted] and Av. [redacted] for the defendant [redacted] Av. [redacted] for the defendant [redacted] (limited to the latter being found guilty at all) as well as the SPRK have challenged the 1st Instance Judgment for alleged violation of the Criminal Law. In particular, the Judgment would be insufficient regarding the alleged commission of the (attempted) Aggravated Murders in an "insidious manner" as required by Article 174 of the CCK. Thus, Article 404 paragraph 1 items 1 and 2 of the KCCP would be violated.

28. The Supreme Court of Kosovo finds that the challenged Judgment meets all requirements of Article 147 items 3 and 11 of the CCK, which the accused [redacted] and [redacted] have been found guilty for.

29. Article 147 items 3 and 11 of the CCK read as follows:

A punishment of imprisonment of at least ten years or of long-term imprisonment shall be imposed on any person who: ...

3) Deprives another person of his or her life in a deceitful way;

...

11) Intentionally commit two or more murders except for the offences provided for in Articles 148 and 150 of the present Code ...

30. Although the challenged Judgment through the majority of its altogether 37 pages has a clear focus on evidentiary issues and evidence assessment, it makes clear and undisputable reference to the objective and subjective requirements of Article 147 items 3 and 11 of the CCK, which are classified there as *actus reus* and *mens rea* (p.31-32 of the English version).

As to the requirements of Article 147 item 3 of the CCK on commission of a killing in a deceitful way the 1st Instance Judgment stipulates in particular that *"...the behaviour of the defendants prior to the shooting was typical of a violent ambush (they were transported and dropped at the crime scene in the dead night, armed with long weapons, just ten minutes before the shooting, in an isolated place)"* (p.31 of the English version) and that thus *"...the murder was committed in a deceitful way, in consideration of the fact that the defendants ambushed the car of the victims at night time, from the side of the road, surprising the victims who could not even try to organize a reaction"*.

As to the requirements of Article 147 item 11 of the CCK on intentional commission of two or more murders, the 1st Instance Court has found that *"...also the circumstance of Article 147 n.11 is present, in that three persons were killed simultaneously by the actions of the defendants, who both in equal parts concurred to the commission of the criminal offence (thus integrating also the provision of Article 23 KCCP)" (p.32 of the English version).*

With regards to the subjective requirements of Article 147 of the KCCP, in the challenged Judgment characterized as *mens rea*, the 1st Instance Court has found that *"...the intention of the perpetrator of a criminal offence, in absence of a confession of oral evidence, must be inferred from the objectivity of the acts.*
In the instant case there can be no doubts, in consideration of:

- *the modality of the commission of the crime (shooting with an automatic weapon) cannot be explained otherwise than assuming the existence of the will to kill;*
- *the organization of the ambush, with the involvement of several persons, implies necessarily the conscious willingness to commit the criminal offence.*

In other words, the panel deems that not only was there the will to kill, but also the premeditation to do so" (p.32 of the English version).

31. The Supreme Court of Kosovo is satisfied that the 1st Instance has properly assessed all requirements of Article 147 items 3 and 11 of the CCK, the objective as well as the subjective ones.

32. **1. As to Article 147 item 3 of the CCK**, the three victims who have come to death were ambushed and taken by surprise. In this context, Defence during the appeal session has raised the question, whether or not the manner of commission has to be qualified as "deceitful" in the meaning of Article 147 item 3 of the CCK and if the latter has the same content as the expression of "insidious manner" as provided by Article 47 paragraph 2 of the old Criminal Code of the Republic of Serbia (CC SFRS).

33. Commentaries on the old Law define that "[t]*he objective component of insidiousness is the manner of committing the murder as concealed and secret (from an ambush; while the victim is asleep; from the back; by poison without color, smell or taste; by releasing infective germs etc.). Besides physical action, there can also be chemical and biological action on the victim. The subjective side of the insidious murder is characterized by deceitful, dishonest and badly intended use of the acquired trust of the victim or of their helplessness or guilelessness. Therefore, the existence of an insidious committing of murder cannot be based only on objective circumstances, and thus a series of verdicts reflect that a murder from an ambush or when victim is asleep, by poison of from the back, does not represent sufficient basis to consider the committed murder as insidious. It is still necessary to establish that the perpetrator has deceitfully or maliciously abused the trust of the victim, based on a long relationship or a certain quality of the perpetrator (e.g. a doctor, a police officer, and so forth)" (Srentic, Nikola; Stajic, Aleksandar; Kraus. Bozidar; Lazarevic, Ljubisa; Djordjevic, Miroslav in: Commentary on the Ciminal Laws of the SR of Serbia, SAP Kosovo and SAP Vojvodina; third commentary 1981; Savremena Administracija; Belgrade).*

From this commentary it can be understood that the term "deceitful" already was used with regards to the subjective side of "insidiousness" as provided in the old Law. Therefore, the Supreme Court of Kosovo understands that "deceitfulness" as referred to by Article 147 item 3 of the CCK is identical to "insidiousness" as known by the old Law.

34. In the case at hand, a mode of assault as described above (by creating an ambush and catching the victims by surprise) is deceitful by definition and the defendants [redacted] and [redacted] have been aware about this, actively contributing to the way how the crimes have been committed.

35. **2. As to Article 147 item 11 of the CCK,** it goes without saying that the killing of three persons traveling in the same vehicle by the use of two AK-47 automatic rifles and shooting a hail of at least 40 bullets against them meets al objective criteria of Article 147 item 11 of the CCK as well. As to the subjective elements of the criminal offence of Aggravated Murder in the case at hand which requires intention as defined in Article 15 of the CCK, it is noteworthy that already the old law knew a construction like the one described by Article 147 item 11 of the CCK. In particular, Article 47 of the Criminal Code of Serbia was commented upon the issue, underlining that *"this criminal act exists only when at least two or more persons have been deprived of life. If only one person has been deprived of life and there has been an attempt to deprive of life another person, that shall not amount to the attempted murder from item 6) if the perpetrator premeditated the murder of several persons; if opposite is the case, that shall be considered a real concurrence between a committed and an attempted murder".(Srzentic, Nikola; Ljubisa Lazarevic; Commentary ot the Criminal Code of Serbia 1995; 5th Edition in: "Savremena Administracija"; Belgrade; (Article 47 of the CCS; item 9))*. On this background it can be extracted for the case at hand that intentionality as per Article 147 item 11 of the CCK requires direct intent as defined under Article 15 paragraph1 and 2 of the CCK, so that multiple murders intentionally are committed, when the perpetrator is aware of his or her acts and desires their commission. In addition to what already the 1st Instance has pointed out upon the subjective side of the crime it needs to be mentioned that shooting a hail of bullets (in the case at hand at least 40 shells) from two automatic rifles into a vehicle with five passengers contains a high probability for all of the latter being killed. Having this in mind also the intent and premeditation of the perpetrators must include this option as most likely.

C. Erroneous and incomplete determination of the factual situation

36. Both Defense Counsels of [redacted], Av. [redacted] and Av. [redacted] as well as the Defence Counsel of [redacted], Av. [redacted], defendant [redacted] the latter during the appeal session represented through his Defence Counsel Av. [redacted] and the SPRK have challenged the 1st Instance Judgment for alleged erroneous and incomplete determination of the factual situation as per Article 402 paragraph 1 item 3 of the KCCP. The Defence of [redacted] has stressed that the assessment of the different statements of particularly witness [redacted] would be insufficient because selective and sided to the detriment of the defendant. Therefore it never had been properly established, who the – uncontested – murders committed. The SPRK, on the contrary, has criticized that the 1st Instance Court did not fully believe the statement of [redacted] as given on 04 March 2009. Because of this decision, the defendant [redacted] had been wrongfully acquitted. Finally, the defendant [redacted]

has stressed that on his understanding it never had been proved that he ever had possessed an AK-47 as stated by the witnesses [redacted] and [redacted]. For all these reasons the challenged Judgment would violate also Article 405 of the KCCP.

I. ALLEGED SELECTIVE AND INSUFFICIENT ASSESSMENT OF WITNESS STATEMENTS, PARTICULARLY REGARDING [redacted]

37. The Supreme Court finds that no violation of the law can be established with regards to the assessment of witness statements by the 1st Instance Court.

1. Selective assessment of evidence to the detriment of [redacted]

38. In particular, it needs to be stressed that the 1st Instance Court has assessed very carefully all the evidence presented to the detriment as well as in favor of the defendants. Reference is made to the list of witnesses questioned as presented in the procedural history on p.7 of this Judgment. The 1st instance Court has not only analyzed in all details the different statements of the key-witness [redacted], listed all his various statements, described the Defence's position upon these statements, elaborated on their contested and uncontested parts as well as on their credibility and the reliability of the witness himself, but also looked into possible reasons for false accusations against the defendants from the perspective of [redacted], threats of the defendants families against him and has set the statements of [redacted] into relation with corroborating witness statements, in particular of [redacted] and [redacted] as well as [redacted] *(p.10-23 of the English version)*. Finally, the 1st Instance Court has also pointed out, that certain witnesses presented by the Defense were considered irrelevant and therefore have not been admitted *(p.6 of the English version)*.

The Supreme Court of Kosovo of course realizes that in particular the assessment of [redacted] statements by the 1st Instance Court is selective in terms of that the Court has found certain parts of these statements credible, while this was not considered to be the case in other parts. However, reference is made to the core analysis of these statements in the challenged Judgment and the assessment reasons given there.

39. The Supreme Court of Kosovo finds that it is neither under the competence of the appeal panel nor possible in fact to replace the findings of the First Instance Court by its own, especially not without taking all the evidence again. In the case [redacted] *and* [redacted] *(Supreme Court of Kosovo, AP-KZ 477/05 dated 25 January 2008, page 20)*, the Supreme Court of Kosovo in this context has pointed out that *"appellate proceedings in the PCPCK rest on principles that is for the trial court to hear, assess and weigh the evidence at trial [...]. Therefore, the appellate court is required to give the trial court a margin of the deference in reaching its factual findings. It should not disturb the trial court's findings to substitute its own, unless the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of factor where its evaluation has been 'wholly erroneous' "*.

Therefore as a rule, this Court will not elaborate on the collection of evidence and based on this on the details of the findings of the First Instance Court.

2. Credibility of the statement of [redacted] dated 04 March 2009:

40. Also as to the statement of [redacted] given in front of the Prosecutor and dated 04 March 2009 reference is made to what was said before. The Supreme Court will not overrule the assessment of evidence as conducted by the 1st Instance Court unless *the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of factor where its evaluation has been 'wholly erroneous'* This can not be established in the case at hand.

II. ALLEGED IMPROPER ASSESSMENT OF EVIDENCE TO THE DETRIMENT OF DEFENDANT [redacted]

41. As far as the accused [redacted] has stressed that it never had been proved that he ever had been in possession of an AK 47 Kalashnikov rifle and that the 1st Instance Court had been erred when they believed the witnesses [redacted], reference is made again to the findings of the 1st Instance Court on the topic as layed down at p.34 of the English version.

Again the Supreme Court will not replace the 1st Instance findings by it own, due to the fact that the assessment of the District Court does not in any part give the impression of being unreasonable at all.

III. ALLEGED NEW EVIDENCE OF THE PUBLIC PROSECUTOR THAT WOULD LEAD TO A CHANGE OF FOCUS AND TO THE ACQUITTAL OF DEFENDANTS [redacted] AND [redacted]

42. Finally, a word needs to be spent upon the question whethet or not the Public Prosecutor would have new evidence to be presented in the Court, which in its consequence would lead to a complete change of focus and to the acquittal of the defendants [redacted] and [redacted] as it was proposed by the Defense Counsel of [redacted], Av. [redacted] in the course of the appeals session on 11 October 2011.

43. It at this point needs to be mentioned that neither the Defence nor the Prosecution has presented any new evidence. The latter could have been expected in particular from the Defence, since finding and presenting arguments in favor of the defendants is their most distinguished task. However, although upon motion of the Defence Counsel Av. [redacted] explicitly asked by the Presiding Judge in the appeal session, whether or not the Prosecutor would like to present new evidence to the Court, also the OSPK Prosecutor Juzuf Mezini finally clearly denied. It is also worth mentioning in the context given that it

was communicated to the Presiding Judge of the Supreme Court panel unofficially but after the appeal session that the defendant [redacted], who until now has defended himself completely in silence, together with defendant [redacted] meanwhile (after them having been found guilty for the murders) have stated in front of the Prosecutor that it had been the acquitted defendant [redacted] together with some of the witnesses, who had fired at the vehicle of the victims. Moreover, it was communicated to the undersigned that the SPRK had opened a new case because of this and that – before the appeal session commenced – a new indictment, this time against [redacted] and others, had been filed already.

44. Despite that even the Supreme Court of Kosovo is not gifted with clairvoyance abilities and therefore can not just assume what one of the parties of a trial may want to present, if this finally is not being done in fact, it deems almost superfluous to mention that in the case of alleged new evidence the re-opening of the procedure against [redacted] and [redacted] pursuant to Articles 438 through 447 of the KCCP would have been the appropriate way to re-enter into court proceedings against other defendants, particularly those who already have been acquitted in the respective case. The latter in particular applies to the former co-defendant [redacted] under the principle of *ne bis in idem*, which for the applicable Kosovo Law is defined by Article 4 paragraph 1 of the KCCP.

D. Decision on the punishment

45. Defense Cousel Av. [redacted] for defendant [redacted] and defendat [redacted] both have challenged the 1st Instance Judgment due to the decision on punishment. Both – each of them as a result of his respective line of argumentation – arrive to the opinion that the only possible result of the 1st Instance Court could have been the acquittal of [redacted] as well as of [redacted] from all charges.

46. The decision on the punishment is fair regarding both, the accused [redacted] (and [redacted] as well as the accused [redacted]

As to the accused [redacted], the Defence has stressed that the accused had to be acquitted due to the fact that his participation in the commission of the Aggrated Murder had not been proved.

Reference is made to what was pointed out before under point C (p.13-14 of this Judgment). Since the 1st Instance Court after careful assessment of all available evidence has come to the conclusion that [redacted] together with [redacted] had to be found guilty of the crimes they were charged with, sufficient ground for the establishment of a punishment are given. Since the punishment as such was not challenged by the Defense till now, the Supreme Court finds itself reduced to state that the contruction of the punishment is in accordance with the law and that also its duration deems just, considering the seriousness of the crimes at hand.

47. As to the accused [redacted], the Supreme Court finds that the punishment proposed is balanced regarding the severity of the crime the accused was found guilty for.

The Supreme Court of Kosovo considers that the 1st Instance Court correctly and completely has taken into consideration all the circumstances that influence in severity of punishment and has fairly evaluated those circumstances, as well to the detriment as in favor of the accused. The decision of the Court in this regard is twofold. Whilst the facts that the accused does not have any previous criminal record, the intensity and duration of the detention of weapons was considered as being of no particular relevance and taking into consideration also the correct attitude of the accused during the whole criminal proceedings, the 1st Instance Court held a fine instead of an imprisonment sentence for sufficient.

The latter then was defined with 5,000.00 Euros, considering the significance of the contribution of the accused. Although the 1st Instance Court has not explicitly elaborated on the method, in which they have measured the punishment of 5,000.00 Euros, the latter illuminates from the sentence as stipulated in the enacting clause, when the Court finds that in case the fine can not be collected by compulsion, the accused shall be substituted with a day of imprisonment for each 15 Euros of the fine. Accordingly, the 1st Instance Court has based its decision on an alleged daily income of the accused of about 15.00 Euros, which deems not unrealistic. Thus, the accused was fined with 333.33 daily income rates, which corresponds to approximately one year of imprisonment.

Taking into consideration the seriousness of the crimes committed with the weapons transported by the accused, this punishment deems balanced. Therefore, no reason can be seen to lower the punishment.

For the foregoing reasons the Supreme Court decided as in the enacting clause.

Members of the panel:

Charles Smith III.
EULEX Judge

Martti Harsia
EULEX Judge

Marije Adema
Supreme Court Judge

Salih Toplica
Supreme Court Judge

Presiding Judge:

Gerrit-Marc Sprenger
EULEX Judge

Recording Clerk

Holger Engelmann
EULEX Legal Officer

Legal Remedy

Pursuant to Article 430 paragraph 1 subparagraph 1 and Article 398 paragraph 1 of the KCCP, an appeal against a judgment of a court of second instance may be filed if a court of second instance has imposed a punishment of long-term imprisonment or has affirmed the judgment of a court of first instance by which such punishment was imposed. Authorized persons may file an appeal through the competent District Court with the Supreme Court of Kosovo within fifteen (15) days of being served with a copy of the Judgment.