SUPREME COURT of KOSOVO

12 October 2009
Prishtine/Pristina
Pkl - Kzz - 108/08

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 Norbert Koster and Guy Van Craen and Kosovo National Judges Miftar Jasiqi and Feizullah Hasani as panel members,

in the criminal proceedings against:

S[redacted] H[redacted] father's name D[redacted] mother's name A[redacted] born on [redacted] in [redacted] Village, Kosovo Albanian, residing in [redacted] Village at [redacted]; Colonel Chief of Logistics, TMK; married with three children; graduated from commercial high school and able to read and write; middle economic status; in custody from 6 July 2002 to 26 June 2008.

K[redacted] K[redacted] father's name F[redacted] mothers name A[redacted] M[redacted] (maiden name G[redacted] born on [redacted] in [redacted] village; resided at [redacted] in P[redacted]; residence at time of trial unknown; single; literate; average income; in custody from 5 April until 30 October 2002; tried in absentia.

Deciding upon the requests for protection of legality filed 1) on 18 September 2008 by the defense counsel on behalf of K[redacted] K[redacted] and 2) on 24 October 2008 by the defense counsel on behalf of S[redacted] H[redacted] against the verdict of the Supreme Court of Kosovo Judgment AP - KZ 393/2006 dated 20 May 2008 which, in partial reformation of the Verdict of the first instance District Court of Gjilan in case P. Nr. 162/2003 dated 7 April 2005, convicted 1) the two defendants of having committed the criminal offence of attempted intentional murder contrary to article 30, paragraph 1 of the KCL in relation to articles 19 and 22 of the criminal Law of the SFRY, as made applicable by UNMIK Regulation n. 1999/24 (conduct still criminalized under article 146 of the PCCK, in relation to articles 20 and 23 of the PCCK) and 2) K[redacted] K[redacted] of having committed the criminal offence of unlawful possession of weapons contrary to article 199 paragraph 1 of the KCL and Section 8.2 of UNMIK Regulation 2001/7 (conduct still criminalized under article 328 paragraph 2 of the PCCK).

After having read the opinion and motion of the OSPK Prosecutor Ms. Deborah Wilkinson filed on 3 December 2008 and
after a deliberation and voting held on 12 October 2009.

Acting pursuant to Articles 410 and from 451 to 460 of the Criminal Procedure Code of Kosovo (PCPCK) renders this

VERDICT

The request for protection of legality filed by Defense Counsel V[redacted] B[redacted] in the interest of S[redacted] H[redacted] on 24 October 2008 is REJECTED as unfounded.

The request for protection of legality filed by Defense Counsel D[redacted] R[redacted] in the interest of K[redacted] K[redacted] on 18 September 2008 is partially GRANTED and the case is returned for retrial to the District Court of Gjilan as to the charge of attempted intentional murder contrary to article 30, paragraph 1 of the KCL in relation to articles 19 and 22 of the criminal Law of the SFRY, for which the judgment of the District Court of Gjilan in case P. Nr. 162/2003 dated 7 April 2005 and the judgment of the Supreme Court of Kosovo AP - KZ 393/2006 dated 20 May 2008 are ANNULLED.

The request for protection of legality filed by Defense Counsel D[redacted] R[redacted] in the interest of K[redacted] K[redacted] on 18 September 2008 is partially GRANTED and the judgment of the District Court of Gjilan in case P. Nr. 162/2003 dated 7 April 2005 and the judgment of the Supreme Court of Kosovo AP - KZ 393/2006 dated 20 May 2008 are AMENDED:
- as to the period of time of the charge related to the unlawful possession of a weapon, which is reduced to the time from 4 June 2001 up to 6 April 2002 and as to the legal qualification of this fact which is only the violation of UNMIK Regulation 2001/7 Section 8.2;
- as to the crediting of the time spent in detention from 5 April 2002 until 3 November 2002.

The request for protection of legality filed by Defense Counsel D[redacted] R[redacted] in the interest of K[redacted] K[redacted] on 18 September 2008 is REJECTED as unfounded in the remaining parts.

The Judgment of the Supreme Court of Kosovo AP - KZ 393/2006 dated 20 May 2008 is AFFIRMED IN THE REMAINING PARTS.

The costs of these appellate proceedings shall be borne by the two defendants S[redacted] H[redacted] and K[redacted] K[redacted] the latter will bear only the costs related to the charge of unlawful possession of a weapon.

Pursuant to article 50 of the CC SFRY, the time spent in detention on remand by each defendant is included in the amount of punishment.

REASONING

Procedural History

1. In the spring 1998 H[redacted] H[redacted] a Police Officer employed by the Serbian government, was the object of an attempted murder committed at the junction of the road to Terstenik 2 and the Gllogovc-Skenderaj road, where he had made arrangements to meet K[redacted] K[redacted].
When H[redacted] H[redacted] approached K[redacted] K[redacted] he was attacked by some men dressed in UCK uniforms emerged from the bushes and shooting at his vehicle.
Hajra managed to continue driving towards Gllogovac and escaped the ambush.

2. In the evening of 20 August 2001 H[redacted] H[redacted] his wife M[redacted], his son X[redacted] and his daughters M[redacted], A[redacted] and P[redacted] attended a wedding party at the house of S[redacted] and R[redacted] K[redacted] to celebrate the wedding of their sons B[redacted] and E[redacted] K[redacted].
The party took place in the village of B[redacted], R[redacted] K[redacted] was the sister of H[redacted] H[redacted]
H[redacted] family arrived at the party at about 6 pm and left around 11 pm, traveling in a red car along what is known as the bridge road or the Lan neighborhood between the villages of Baica and Terstenik.
When they approached the wooden bridge shots were fired at the car, only P[redacted] H[redacted] survived the ambush.

3. Against K[redacted] K[redacted] the public prosecutor filed on 3 July 2002 an indictment (n. 305/2002) for the attempted murder of H[redacted] H[redacted] occurred around April/May 1998 and illegal possession of a weapon occurred in 2002.

Against S[redacted] H[redacted] the public prosecutor filed on 11 September 2002 a direct indictment (n. 669/2002) for the attempted murder of H[redacted] H[redacted] occurred around April/May 1998.

A[redacted] S[redacted] H[redacted], B[redacted] R[redacted] A[redacted] K[redacted] A[redacted] R[redacted] Z[redacted] K[redacted], P[redacted] K[redacted] and B[redacted] K[redacted] the public prosecutor filed on 7 February 2003 an indictment (n. 523/2002) for complicity and aiding and abetting one another in a) the murders of H[redacted] H[redacted], M[redacted] H[redacted], X[redacted] H[redacted], M[redacted] H[redacted] and A[redacted] H[redacted], b) the attempted murder of P[redacted] H[redacted] c) participation in a group that commits murder and d) agreement to commit a criminal act occurred in the evening of 20 August 2001.

Against A[redacted] X[redacted], B[redacted] M[redacted], A[redacted] K[redacted] and M[redacted] X[redacted] the public prosecutor filed on 5 February 2003 an indictment (n. 415/2002) charging the first three for complicity in a) aiding and abetting the perpetrators of the murders of the H[redacted] family, b) aiding and abetting the perpetrators of the attempted murder of P[redacted] H[redacted]

c) failure to report the preparation of a criminal act, d) failure to report a criminal act or a perpetrator, e) aiding a perpetrator after the commission of the criminal act and the fourth one for f) aiding a perpetrator after the commission of the criminal act.

4. On 16 September 2003 the panel decided to consolidate the different indictments and to join the proceedings against S[redacted] H[redacted] and K[redacted] K[redacted] for attempted murder committed in 1998 with those regarding the other murders and attempted murder committed in 2001.
The venue of the trial was changed from Pristine to Gjilan by a decision of the SRSG on 7 October 2003.
The main trial started on 4 November 2003 and lasted to 7 April 2005

After 107 hearings the judgment was announced on 7 April 2005.

The defendants were found guilty of the following criminal offences:

- S[redacted] H[redacted] (indictment PP. No. 669/2002 of 11 September 2002),
i. Attempted murder of H[redacted] H[redacted] between 17 April and 30 May 2008, acting in complicity with K[redacted] K[redacted] and others.

- S[redacted] H[redacted] B[redacted] R[redacted], A[redacted] K[redacted], A[redacted] R[redacted], Z[redacted] K[redacted], F[redacted] K[redacted] and B[redacted] K[redacted] (indictment PP.No. 523/2002 of 7 February 2003),
ii Murder of H[redacted] H[redacted] M[redacted] H[redacted] X[redacted] H[redacted] M[redacted] H[redacted] and A[redacted] H[redacted] on 20 August 2001 on the road between the villages of B[redacted] and T[redacted] all of them in complicity and in aiding and abetting one another,

iii. Attempted murder of P[redacted] H[redacted] on 20 August 2001 on the road between the villages of B[redacted] and T[redacted], all of them in complicity and in aiding and abetting one another,

iv. Participation in a group that commits murder (of members of the H[redacted] H[redacted] family), all of them in complicity and in aiding and abetting one another,

v. Agreement in committing the criminal act of murder (of members of the H[redacted] H[redacted] family), all of them in complicity and in aiding and abetting one another.

- A[redacted] X[redacted], B[redacted] M[redacted] A[redacted] K[redacted] (indictment PP. No. 415/2002 of 5 February 2003),
vi. Failure to report the preparation of the criminal act of the murder of H[redacted] H[redacted] and his family.

- M[redacted] X[redacted] (indictment PP. No. 415/2002 of 5 February 2003),
vii. Aiding a perpetrator after he has committed the criminal act.

- K[redacted] K[redacted] (indictment PP. No. 305/2002 of 3 July 2002),

viii. Attempted murder of H[redacted] H[redacted] between 17 April and 30 May 2008, motivated by personal gain, ruthless revenge, other basic motives or for vendetta, acting in complicity with S[redacted] H[redacted]

ix. Unlawful possession of weapons between January 2001 and 6 April 2002.

The defendants were convicted as follows:
S[redacted] H[redacted] to the aggregate punishment of 30 years long-term imprisonment,
B[redacted] R[redacted] A[redacted] K[redacted] and A[redacted] R[redacted] to the aggregate punishment of 30 years long-term imprisonment,
Z[redacted] K[redacted] to the aggregate punishment of 11 years long-term imprisonment,
F[redacted] K[redacted] to the aggregate punishment of 21 years long-term imprisonment,
B[redacted] K[redacted] to the aggregate punishment of 11 years long-term imprisonment,
A[redacted] X[redacted], B[redacted] M[redacted] and A[redacted] K[redacted] to 4 years imprisonment each,
M[redacted] X[redacted] to 4 years imprisonment,
K[redacted] K[redacted] to the aggregate punishment of 6 years imprisonment.

The defendants A[redacted] X[redacted], B[redacted] M[redacted] and A[redacted] K[redacted] were acquitted from the charges of complicity in a) aiding and abetting the perpetrators of the murders of the H[redacted] family, b) aiding and abetting the perpetrators of the attempted murder of P[redacted] H[redacted], d) failure to report the criminal act of the murder of H[redacted] H[redacted] and his family or the perpetrators thereof, e) aiding the perpetrators of the murder of H[redacted] H[redacted] and his family after that commission of the criminal act.

5. All defendants filed appeals against the judgment of the District Court of Gjilan.
After a session held on 20 May and deliberations occurred on 21 May and 26 June 2008 the Supreme Court of Kosovo, with its judgment AP – KZ 393/2006, modified the judgment of the First Instance Court as follows:
i. The appeals filed on behalf of B[redacted] R[redacted], A[redacted] K[redacted], A[redacted] R[redacted] and B[redacted] K[redacted] were partially granted,
these four defendants were declared guilty of the criminal offences of five intentional aggravated murders and one attempted intentional aggravated murder, contrary to article 30 paragraphs 1 and 2 (item 1) and 3 of the KCL in relation to articles 19 and 22 of the CL of the SFRY, as made applicable by UNMIK Regulation n. 1999/24 (conducts still criminalized under articles 146, 147 items 3 and 11 in relation to articles 20 and 23 of the PCCK), because they jointly took the lives of H[redacted] H[redacted] M[redacted] H[redacted] X[redacted] H[redacted] M[redacted] H[redacted] and A[redacted] H[redacted] and attempted to take the life of P[redacted] H[redacted] in an insidious manner; on 20 August 2001 at 23:00 on a road between the villages of Baica and Terstenik.
B[redacted] R[redacted] A[redacted] K[redacted] and A[redacted] R[redacted] were sentenced to a term of 30 years imprisonment, while B[redacted] K[redacted] was sentenced to a term of 11[1] years imprisonment.

[1] The sentence against B[redacted] K[redacted] was determined in 10 years imprisonment but, with a ruling of the Supreme Court dated 18 November 2008 and made according to article 358 LCP, the term of 10 years was considered as a material mistake and it was corrected to 11 years according to the first instance judgment which was confirmed on this point.

B[redacted] R[redacted], A[redacted] K[redacted], A[redacted] R[redacted] and B[redacted] K[redacted] were acquitted from all the remaining charges against them.
ii. The appeals filed on behalf of S[redacted] H[redacted] and K[redacted] K[redacted] were partially granted and the two defendants were declared **guilty** of the criminal offence of attempted intentional murder, contrary to article 30 paragraph 1 of the KCL in relation to articles 19 and 22 of the CL of the SFRY, as made applicable by UNMIK Regulation n. 1999/24 (conducts still criminalized under article 146 in relation to articles 20 and 23 of the PCCK), because they jointly also with unidentified accomplices attempted to take the life of H[redacted] H[redacted] on 14 or 15 May 1998 near the junction between the road Glogovac/Skanderaj and the road to Terstenik 2.
K[redacted] K[redacted] was further found **guilty** of the criminal offence of unlawful possession of weapons contrary to article 199 paragraph 1 of the KCL and Section 8.2 of UNMIK Regulation 2001/17 (conduct still criminalized under article 328 paragraph 2 of the PCCK), from January 2001 until 6 April 2002 in Prizren.
S[redacted] H[redacted] was sentenced to a term of 5 years imprisonment, K[redacted] K[redacted]i to an aggregate punishment of 5 years and 6 months imprisonment.
S[redacted] H[redacted] was acquitted from all the remaining charges against him.
iii. The appeals filed on behalf of Z[redacted] K[redacted], F[redacted] K[redacted], A[redacted] X[redacted], B[redacted] M[redacted], A[redacted] K[redacted] and M[redacted] X[redacted] were granted and they were acquitted from all the charges against them.

6. S[redacted] H[redacted] was arrested on 6 July 2002 and released on 26 June 2008, K[redacted] K[redacted] was arrested on 5 April 2002 and released on 3 November 2002.

7. The defense counsels of the convicted persons filed the extraordinary remedy of request for protection of legality against the verdict of the Supreme Court of Kosovo AP – KZ 393/2006 as follows.
The request for protection of legality of Ms. V[redacted] B[redacted] as defense counsel of defendant S[redacted] Halilaj was filed on 24 October 2008.

The request for protection of legality of Mr. D[redacted] R[redacted] as defense counsel of defendant K[redacted] K[redacted] was filed on 18 September 2008.

8. The OPPK filed its opinion on 3 December 2008.

9. After the hand over of the case to EULEX Judges in January 2009, the Supreme Court of Kosovo held its session on the legal remedies above mentioned on 12 October 2009.

Court Findings

I

10. The investigated facts happened in the spring of 1998, when the procedural code in force in Kosovo was the Law on Criminal Proceedings of the SFRY (LCP).
The indictments were filed between July 2002 and February 2003, whereas the main trial started on 4 November 2003.
On 6 April 2004 entered into force the Provisional Criminal Procedural Code of Kosovo (PCPCK), whose article 550 rules that "criminal proceedings at first instance in which the indictment, summary indictment or private charge was filed before the date of entry into force of the present Code but which have not been completed by this date shall be continued according to the provisions of the previous applicable law until:

1) the criminal proceedings are dismissed in a final form by a ruling; or
2) the judgment rendered at the main trial becomes final".

The provision of article 550 PCPCK makes it clear that in the present proceedings, whose indictments had been filed before the entry into force of PCPCK, applicable law was only LCP until the judgment had become final.
Consequently, the first and the second instance (and for other defendants also the third instance) of this proceedings were ruled by LCP.
Considering only the position of S[redacted] H[redacted] and K[redacted] K[redacted] the judgment became final on 26 June 2008 when the Supreme Court of Kosovo, as Second Instance Court, decided on their appeals against the judgment of the District Court of Gjilan.
As to the extraordinary remedies, art. 551.1 PCPCK rules that the ones filed before its entry into force shall be continued and finished according to the provisions of the previous applicable law that is once again LCP.
As to judgments which became final after the entry into force of PCPCK, as in this case, art. 551 paragraph 2 PCPCK admits the possibility to file a request for protection of legality.
This means that in this case the law applicable to the stage of the extraordinary remedies is only PCPCK.

11. The present judgment is related only to the attempted aggravated murder of H[redacted] H[redacted] occurred in the spring of 1998 and not to the aggravated murder of the same victim and of four relatives of him occurred on 20 August 2001 because S[redacted] H[redacted] was definitively acquitted from those criminal offences and K[redacted] K[redacted] was never charged with them.

II

12. The request for protection of legality filed on behalf of S[redacted] H[redacted] challenges the verdict of the Second Instance Court:

- on the ground of violations of the criminal law (art. 451 item 1) and

- on the ground of substantial violations of the provisions of criminal procedure provided for in article 403 paragraph 1 (art. 451 item 2).

13. The request for protection of legality claims substantial violations of procedural law both in the judgment of first and in that of second instance.

As to the first judgment the request claims as follows.
- The verdict was grounded on unacceptable evidence (irrational evidence).

This point can not be accepted.
The request for protection of legality does not explain what piece of evidence would be unacceptable nor the reasons of their irrationality.
The request appears therefore to be generic also because "unacceptable" or "irrational" evidence is a qualification not used by LCP and PCPCK to individuate an essential violation of the criminal procedure.
In fact art. 364 paragraph 1 item 8 LCP envisages the case when a "verdict is based on evidence which may not be used as the basis of a verdict under the provision of this Law".
Art. 403 paragraph 1 item 8 PCPCK makes reference to "inadmissible evidence".
The request does not explain what evidence and why would be inadmissible.

- The defendant was not informed of the indictment and had not an adequate time and facilities for the preparation of his defense.

The direct indictment against S[redacted] H[redacted] for the charge of aggravated attempted murder against H[redacted] H[redacted] occurred between 17 April and 30 May 1998 was filed by the Prosecutor on 11 September 2002.
The direct indictment was filed after that the District Court, according to article 160 LCP, consented to the prosecutor's request that no investigation be conducted because a full and thorough investigation of this crime had already been carried out by the Investigating Judge against the co-perpetrator K[redacted] K[redacted]
Anyway and according to paragraph 2 of article 160 LCP, the direct indictment was filed only after the examination of S[redacted] H[redacted] about his participation in this crime by the Investigating Judge on 15 and on 22 August 2002.
Thus, he was duly informed about the charge during the investigating stage.
The direct indictment was served to S[redacted] H[redacted] on 13 September 2002 and was served once again on 20 September 2003 (see the binder "Direct Indictment").
To his defense counsel B[redacted] K[redacted] the direct indictment was notified on 10 April 2003 (see ib.).
The decision of the trial panel dated 16 September 2003 to join the different proceedings included the one related to the indictment against S[redacted] H[redacted] for the attempted murder of H[redacted] H[redacted] in 1998, was served to the defendant on 23 September 2003.
At the first hearing on 4 November 2003, all the indictments were served once again to every defendant and defense counsels.

On that occasion S[redacted] H[redacted] and his defense counsel did not raise any complain about the lack of notification to them of the direct indictment before the starting of the main trial.
The main trial was then adjourned and lasted from 4 November 2003 up to 7 April 2005 including 107 hearings.
All the aspects of the different charges were examined.
It can be concluded that S[redacted] H[redacted] as the other defendants, was duly informed of the charges against him and had the time and the facility to prepare his defense.

- The defendant pleaded not guilty but was interrogated before the total presentation of evidence against him.

This point of the request for protection of legality is not grounded.
Actually, the substantial violation of the criminal procedure raised by the claimer was introduced ex novo by PCPCK (art. 403 paragraph 1 no. 9) and it is related to an adversarial form of main trial where the defendant is asked at the beginning to plea on the charges (art. 358) and, if he does not plea guilty on each count, it follows the presentation of evidence (art. 360).
Only after the presentation of evidence the defendant is examined (art. 371).
As observed above (see point **II.13**), applicable law to the first and second instance was LCP and not PCPCK.
According to LCP, which provides a different form of main trial, the examination of the defendant (art. 317) comes before the evidentiary procedure (art. 322).
Thus correctly S[redacted] H[redacted], as the other defendants, was examined (in the hearings of 20, 26, 27 November, 2, 3 and 4 December 2004) before the presentation of evidence.

- The requests claims that the defendant S[redacted] H[redacted] was interviewed by the Police on 8 July 2002, after having been arrested on the previous 6 July because of the charge of aggravated murder of H[redacted] and his family occurred in the evening of 20 August 2001.
During the interview the Police asked H[redacted] about the attempted murder against H[redacted] occurred in the spring of 1998.
Moreover before being interviewed, H[redacted] was not informed that he was a suspect for the attempted murder (violation of UNMIK Regulation 2001/28 Section 2.1 and art. 218.2 LCP) and was not represented by a defense counsel (violation of UNMIK Regulation 2001/28 Sections 2.1, 2.2 and 3, of UNMIK Regulation 2002/7 Section 3.1(c) and of article 67 paragraph 1 LCP).
The request for protection of legality claims that on that occasion H[redacted] was interviewed before the total presentation of evidence against him.

The First Instance Court dealt with the admissibility of the statements given by the defendants before the Police (pages 114 – 117) concluding that "the trial panel did not use these police statements in a decisive manner to ground a finding against any of the accused".
The Second Instance Court (pages 44 – 45) examined and rejected the claim related to the alleged violation of UNMIK Regulation 2002/7 and article 67.1 LCP as to the pre-trial

statements made by S[redacted] H[redacted] because "the use of the contested statements is absolute superfluous" since that Court made use only of the statements given by the defendant at the main trial.

This point of the request for protection of legality is not grounded.
In fact article 364 item 8 LCP envisages an essential violation of the criminal procedure if the verdict is based on inadmissible evidence "unless in view of the other evidence it is obvious that the same verdict would have been rendered even without that evidence".
This means that inadmissible but not decisive evidence does not affect the verdict with an essential violation of the criminal procedure.
From the First Instance verdict it is understandable that the police statements were not used in a decisive manner because the relevant and decisive evidence was other.
This reasoning is confirmed also by the Second Instance verdict and appears to be correct.
Thus, no essential violation of the criminal procedure can be found in this case.

- The offence is included in the group of offences committed against the war laws and UNMIK has no mandate to try such cases, which fall under the jurisdiction of the "Court of Hague"

The legal qualification of the fact will be examined in the next paragraphs related to the alleged breach of criminal law.
Here can be observed that the charged criminal offence was not qualified as war crime by the Prosecutor in the indictments nor by the First and the Second Instance Court but as a common crime.
Furthermore it is well known that either UNMIK before (see UN Resolution 1244/1999 art. 10 and UNMIK Regulation 1999/1 art. 1) and later on Kosovo Judiciary as integrated by EULEX judges have the mandate to try every kind of criminal offences according to the applicable procedural provisions (LCP and PCPCK).
The jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY), as "the Court of Hague" mentioned in the request of the defendant, has a "concurrent" and not an exclusive nature (see article 9 of the Statute of ICTY).
This means that the existence and the functioning of ICTY do not deprive national courts of their jurisdiction on any kind of criminal offences.
Moreover without a specific and formal request of ICTY (which in this case lacks) a national court is not obliged to defer the case to the competence of that international tribunal.

- The Court violated article 387 PCPCK when four different proceedings were joined.
Secondly the Court decided to join the different procedures upon a request of the Prosecutor not previously delivered to the defendants and their defense counsels in violation of the contradictory procedure.

The claim related to the join of the proceedings related to the attempted murder of Hamez Hajra in spring 1998 and the aggravated murder of the latter and four members of his

family in August 2001 was raised already in the second instance and was rejected by that Court (page 11).
The Second Instance Court reasoned that, even in the case the decision to join proceedings could be wrong, it was not considered as an essential violation of the provisions of the criminal procedure by the law (article 364.1 LCP).

This Court deems the claim of the appellants as ungrounded considering:
firstly, that article 32 LCP provides the possibility to join proceedings regarding several persons and several criminal acts if there is a mutual relation among the criminal acts and the evidence is the same (paragraph 6) or if separate proceedings are conducted before the same court against the same person for more than one criminal act (paragraph 7).
In this case the decision to join the proceedings was correct according to paragraph 7 because the same person (S[redacted] H[redacted] was charged with both the facts of 1998 and of 2001.
This grounded also a mutual relation between the two facts.
Secondly, the decision to join the proceedings was taken by the First Instance Court on 16 September 2003, upon motion of the Prosecutor filed on 4 September 2003 and before the starting of the main trial, whose first hearing occurred on 4 November 2003.
According to LCP, the power to join different proceedings (art. 32) is balanced by the power to separate "for important reasons of expediency" the proceedings for certain criminal acts (art. 33).
This means that, even in the case the Court had joined the different proceedings without previous opinion of the defense counsels, the main trial Court had always the power to separate again those proceedings upon request of the defense.
This allows to exclude any violation of the right to contradictory procedure as envisaged by national law and international instruments because the parties were in condition to present their reasons and to ask for the separation of the proceedings since the beginning of the main trial.

- The enacting clause was incomprehensible and contradictory because the Court disregarded special war circumstances and the uniform of both combatant parties and the commanding hierarchy.

The legal qualification of the fact will be examined in the next paragraphs related to the alleged breach of criminal law.
Here can be observed that the enacting clause of both the first and the second judgment can not be described as incomprehensible and contradictory.
The first verdict (pages 12 and 13) makes clear the charged criminal act (attempted murder committed through an ambush by S[redacted] H[redacted], K[redacted] K[redacted] and other persons against H[redacted] H[redacted] the 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 (the manner, the time and the place of the conduct).
The second verdict (page 7) clarifies the same elements excluding some aggravating circumstances.
This excludes any form of not clearness or contradiction in the enacting clause.

As to the second instance verdict the request claims as follows.
- The request for protection of legality claims that the Second Instance Court did not take into consideration the procedural breaches committed by the First Instance Court indicated in the appeal of the defendant and referred to those incorporated into article 364 paragraph 1.11 and paragraph 2LCP.
Secondly the request claims that S[redacted] H[redacted] had never the chance to exploit the right of challenging the statements given by K[redacted] K[redacted]

The first point appears to be not grounded because, as to the part dedicated to the attempted murder of H[redacted] H[redacted] in 1998, both verdicts of first and second instance contain a full analysis of evidence and facts, a consistent logical reasoning about the factual situation and the involvement of the defendants and a correct application of juridical principles to the ascertained facts.
No contradiction between the record and the verdict about decisive facts is to be found in the first and second judgment.
Secondly, it is true that S[redacted] H[redacted] had never the opportunity to challenge the statements of K[redacted] K[redacted], because she was tried in absentia and only her statements given to the Investigating Judge (on 6 April, on 8 May and on 2 July 2002) were read in the record of the main trial.
Nevertheless her statements were read into the records without any objection by the accused (hearing of 28 April 2004 page 38).
Moreover in her statements before the Investigating Judge, K[redacted] K[redacted] has always rejected the charges and has never accused S[redacted] H[redacted]
Thus, there was no objection by the defendants, included H[redacted] to the use of the statements given by K[redacted] K[redacted] and K[redacted] K[redacted]s statements were not to detriment of H[redacted]
Thus the lack of possibility for H[redacted] to challenge K[redacted] statements appears to be accepted by H[redacted] himself and finally irrelevant to his defense.
Different evidence is a document written by K[redacted] M[redacted] about the attempted murder, where is mentioned also the name of H[redacted] as one of the perpetrators.
However this is not an oral statement but a written document and its use does not violate the right of defense of H[redacted]

- The request for protection of legality reiterates also in relation to the second instance verdict the claim of breach of article 32 paragraph 6 LCP regarding the decision to join the proceedings deriving from the four indictments.

This point was already examined and rejected above.

14. The alleged violations of criminal law.
- The request for protection of legality claims that both the first and the second verdict violated the criminal law to the detriment of the accused by applying to the fact article 30 KCL as read with articles 19 and 22 of Criminal law of Socialist Republic of Yugoslavia instead of war laws.
The claim is motivated in three points:
- the competence of UNMIK Courts (on this see previous paragraph **II.13**),

- the victim was a combatant "at enemy side whilst the defendant was a simple soldier" and "according to Article 3 of Geneva Convention it is not determined in what way it might be raised an ambush to the enemy, in that case to the Serbian spy of belligerent parties";
- the challenged verdict did not make application of article 10 PCCK which provides justification for the material perpetrator when the criminal act is committed pursuant to an order of a government or of a superior.

This point is not grounded.
In fact it can not be found any violation of the criminal law which goes to the detriment of the accused.
The Second Instance Court noticed (page 44) that H[redacted] H[redacted] "was not a soldier; he was not a combatant and did not wear a uniform. As testified by the victim's brother and daughter (H[redacted] H[redacted] and P[redacted] H[redacted], H[redacted] H[redacted] was just a police officer engaged in tackling thefts".
This observation appears to be correct.
It can be added that national jurisprudence and international instruments are clear when excluding members of the civil Police from the group of the persons who take part in the armed conflict.
In its verdict of 12 May 2005 in the case R[redacted] D[redacted] and others (pages 51 and 52) the District Court of Pristine convincingly stated:
"in most modern states in time of war, the police remain "civilians" and are entitled to be considered as such,[2] unless they take a direct part in the hostilities or have been specifically designated as part of the armed forces and meet the requirements for militia forces (responsible command, distinctive insignia, carrying arms openly, and respecting the laws of war).[3] Policemen without combat duties therefore are not legitimate military targets but are civilians and thus protected persons[4]".
In this case there is no evidence that H[redacted] H[redacted] could be a spy working for the Serbs or an enemy, as alleged by the defendant.
Any action against his safety, as the attempt to kill him, could not be considered as a war action against an enemy but it was a crime.

Secondly, the provision of article 10 PCCK is general, it can therefore be applied indifferently to common and to war crimes.

---

[2] See Council of Europe Resolution 690 (1979) on the Declaration on the Police - Article 11. C. -1. A police officer shall continue to perform his tasks of protecting persons and property during war and enemy occupation in the interests of the civilian population. For that reason he shall not have the status of "combatant", and the provisions of the Third Geneva Convention of 12 August 1949, relative to the treatment of prisoners of war, shall not apply. 2. The provisions of the Fourth Geneva Convention of 12 August 1949, relative to the protection of civilian persons in time of war, apply to the civilian police ; - . See also ICRC Commentary to Article 59 of the Fourth Geneva Convention Para 2279 – " In many countries the Municipal, provincial and national police is purely civilian"
[3] Art 4A GCIII, See also Commentary to Article 144 CCY
[4] See Under Orders - War Crimes in Kosovo (Human Rights Watch) Chapter 19, Protection of Civilian Population- Page 496 (http://www.hrw.org/reports/2001/kosovo/) and Report of Working Group B, Committee I, 18 March 1975 (CDDH/I/238/Rev.1; X, 93), in Howard S. Levie, ed., *The Law of Non International Armed Conflict*, (Dordrecht, Netherlands: Martinus Nijhoff, 1987),

In these proceedings, however art. 10 PCCK does not provide the defendant with a justification.
In fact the superior order is only alleged but not demonstrated by any evidence.
Moreover, even if proved, the order to kill a civilian is manifestly unlawful and therefore could not justify the conduct taken by the defendants.

Thirdly it can be noticed that in this case it lacks the evidence of one of the constitutive elements of a war crime, which is the nexus between the alleged crime and the armed conflict.
That the action was aimed to kill an enemy is not demonstrated at all and could be motivated by alternative explanations like an act of revenge for personal reasons.

Finally, even in the case the indictment and the first two verdicts were wrong on the point of the legal qualification of this act and this should be qualified as a war crime this mistake would not be to the detriment of the accused.
Therefore the accused has no interest to raise it, nor can it be pointed out ex officio according to article 415 paragraph 1 item 4 PCPCK and to article 376 paragraph 1 item 2 LCP.
Considered according to the amount of punishment, the two crimes undergo the same treatment.
In fact, according to article 142 CC SFRY a war crime is sentenced with imprisonment from 5 to 15 years[5], whereas the crime of murder according to article 30 paragraph 1 KCL applied in this case by the Second Instance Court is punished with imprisonment from 5 to 15 years.
Article 19 CC SFRY is common to both types of crime and provides the possibility of a reduction of the penalty in case of an attempt.
Considered under the point of the different penal effects, the two crimes are subject to different treatment and that for the war crime is less favorable to the defendant as the one for the common crime.
According to article 100 CC SFRY war crimes are not subject to the statutory limitation due to lapse of time.
The same rule applies under article 95 PCCK.
On the contrary the crime provided for by article 30 paragraph 1 KCL undergoes the statutory limitation of 15 years according to article 95 paragraph 1 item 2 CC SFRY and article 90 paragraph 1 item 2 PCCK.
In conclusion the law applied in the challenged verdict (art. 30 paragraph 1 KCL) is more favorable to the defendant than the one related to a war crime.

Finally the request for protection of legality claims a violation of the criminal law because the defendant was convicted for the attempted murder of Hamza Hajra and this fact should have been absorbed by the committed murder of the same victim.

[5] The death penalty foreseen originally in the article 142 CL FRY was substituted with the imprisonment for 15 years, see Supreme Court of Kosovo 21 July 2005 in the case of Prosecutor v. L[redacted] et al.

This point is not grounded considering that the two facts (attempted murder in the spring 1998 and aggravated murder on 20 August 2001) did not occurred in the same time context but three years one from the other.
Thus no kind of absorption can be applicable in this case.

Because of the above mentioned reasons the request for protection of legality filed in favor of S[redacted] H[redacted] must be rejected.

III

15 The request for protection of legality filed on behalf of K[redacted] K[redacted] challenges the verdict of the Second Instance Court:

- due to essential violation of the law on criminal procedure from article 403 paragraph 1 subparagraph 10 and 12 of PCPCK;
- because of further violations of the provisions of criminal procedure which influenced the validity of the decision of Kosovo Supreme Court and
- because of the violation of the criminal law in detriment of the defendant.

The request proposes to annul both verdicts of First and Second Instance and return the case at the first instance Court for retrial.

16. The request contains also a proposal, made according to article 453.4 PCPCK, to postpone the execution of the final verdict pending the decision on request for protection of legality.

On this point it must be noticed that the sentence taken by the verdict of the Supreme Court of Kosovo Judgment AP - KZ 393/2006 dated 20 May 2008 in relation to K[redacted] K[redacted] does not result to be executed yet.
For this reason the proposal to postpone the execution of the verdict pending the decision on the present request for protection of legality can not be accepted.

17. It must be preliminarily observed that K[redacted] K[redacted] was originally charged with two different facts, the first is the attempted aggravated murder of H[redacted] H[redacted] and the second the unlawful possession of a weapon, a Zastava pistol found in her house and in her possession during the search of 6 April 2002.

18. In the indictment filed against K[redacted] K[redacted] on 3 July 2002 the time of the attempted murder of H[redacted] H[redacted] is indicated in a day "between 17 April 1998 and May 16 1998".
The District Court of Gjilan convicted the defendant because of the crime of attempted murder committed on a day "between 17 April 1998 and 30 May 1998".
The Supreme Court of Kosovo, acting as a Court of Second Instance precised the day of the fact indicating alternatively 14 or 15 May 1998.

The indication of the time of the fact is crucial because K[redacted] K[redacted] was born on 24 April 1980 and the applicable law, both procedural and substantial, change if the fact was committed between 17 and 23 April, when she was juvenile or from 24 April to 30 May when she was adult.

The request for protection of legality claims the essential violation of provisions of criminal procedure related to the right of the defendant to be considered as a juvenile at the moment of the fact and to be tried as such and not in absentia (articles 452.1 and 454.1 LCP).

This point can not be disregarded considering only the specification of the time of the fact made by the Second Instance Court, when it precised the day within the frame contained already in the indictment.
Actually it was since the beginning that this issue had to be raised or pointed out ex officio, being related to the basic rights of a defendant to be considered as a juvenile and to be tried accordingly.
It can be noticed that from the very beginning it was possible to remark that, according to the time indicated in the indictment, there was a considerable doubt that she could be juvenile at the moment of the fact.
Hence this doubt had to be solved preliminarily, before any other steps of the proceedings because on the solution to give to it depended the type of the proceedings and its consequences.
The lack of solution of this point in the very beginning phase of the trial deprived the defendant of any guarantee linked to her possible status of juvenile and vitiated the whole procedure related to the criminal offence of attempted murder charged to K[redacted] K[redacted]

The conclusion reached by this Court is to annul the part of the first and second verdicts related to the criminal offence of the attempted murder of H[redacted] H[redacted] as to the defendant K[redacted] K[redacted] only and to return the case for retrial to the District Court of Gjilan, which will have to solve preliminaily the problem about the status of the defendant, if juvenile or adult.

19. The request for protection of legality claims that both first and second verdicts violated the criminal law to the detriment of the defendant.

- Violation of article 199 paragraph 1 KCL as to the conviction of K[redacted] K[redacted] because of the unlawful possession of weapons.
The request claims firstly that illegal possession of gun does not constitute a criminal offence and secondly that according to legal practice following the war for these criminal offences are pronounced punishment with fine or, in the opportune moment, the conditional punishment, thirdly that punishment appears to be excessive.

This point is partially grounded and the first two verdicts must be consequently amended.
Actually article 199 paragraph 1 KCL does not prohibit the unauthorized possession of any weapon but only of those "which procurement is forbidden to citizens".

This is consistent with the penalty envisaged for this crime (imprisonment up to three years) and with the provision of the second paragraph, where the unauthorized possession of two or more pieces of firearms is punished with a more lenient punishment (up to one year imprisonment).
The explanation is clearly that in the second paragraph is punished the possession of any kind of firearms, whereas in the first one is punished the possession only of the more dangerous weapons, whose possession is always prohibited to citizens.
The conclusion is that, according to article 199 KCL, the possession of one unique piece of firearm of a common type (the type envisaged by the second paragraph of article 199 KCL), is considered as a minor offence.
This is valid for the charge of possession of the pistol of make Zastava and of its ammunition for the period of time when article 199 KCL was in force, that is from January 2001 until 4 June 2001.
On 4 June 2001 UNMIK Regulation 2001/7 entered into force, whose Section 8.2 prohibits the unauthorized possession of weapons of any kind and number.
Clearly K[redacted] K[redacted] possessed from 4 June 2001 until her arrest in April 2002 the above mentioned weapon and ammunitions without a valid authorization (WAC).
In this limits the previous verdicts must be amended as in the enacting clause.
Secondly the punishment imposed in the first and in the second verdict for this fact falls within the limits of the applicable law (UNMIK Regulation 2001/7 Section 8.6).
Thirdly the criteria followed by the previous Court in deciding on the amount of the punishment for the two crimes for which the defendant was convicted appear to be correct.
It is clear that the Court competent for retrial of the charge of attempted murder will have, in case of conviction for that crime, to apply the criteria foreseen by articles 48 CC SFRY and 71 PCCK as to the integrated punishment for the two different crimes (attempted murder and unlawful possession of weapons).

- Violation of articles 404 subparagraph 6 and 73 PCCK to the detriment of the defendant because the time spent in detention on remand was not calculated correctly by the two challenged verdicts.
The request points out that both verdicts credit the period spent in detention on remand as from 5 April 2002 to 30 October 2002, whereas the defendant remained actually detained till 3 November 2002.
In fact the ruling dated 4 July 2002 extended the detention on remand until 3 November 2002.

Both the first and the second judgments credited against the sentence imposed to K[redacted] K[redacted] the time spent in custody from 5 April until 30 October 2002 (see the enacting clause).
In the case file it is to be found a ruling of the District Court of Pristina dated 3 September 2002, according to which the accused Kimete Krasniqi shall remain in detention pending trial, with a review of the grounds for custody held no later than on 3 November 2002.

According to the decision of the District Court of Pristina dated 30 October 2002 "the detention of the accused K[redacted] K[redacted] is terminated; therefore she shall be immediately released".
This decision was sent to the Lipjan Detention Centre on 31 October 2002 and K[redacted] K[redacted] was in fact released on 3 November 2002.
In this case the violation of the criminal law to the detriment of the defendant is clear but can be amended also by the Supreme Court in his judgment (see for a specific precedent Supreme Court of Kosovo 14 December 2004 Ap.No. 352/2004) and also in case of a request for protection of legality according to article 457 paragraph 1 item 1 PCPCK.
Thus, the time spent by the defendant K[redacted] K[redacted] in detention on remand from 5 April until 3 November 2002 must be credited in the punishment imposed to her.

20. Because of the above mentioned reasons the request for protection of legality filed in favor of K[redacted] K[redacted]

- must be partially granted and the judgment of the District Court of Gjilan in case P. Nr. 162/2003 dated 7 April 2005 and the judgment of the Supreme Court of Kosovo AP - KZ 393/2006 dated 20 May 2008 must be annulled in the part related to the charge of attempted intentional murder of H[redacted] H[redacted] contrary to article 30, paragraph 1 of the KCL in relation to articles 19 and 22 of the criminal Law of the SFRY. For this part the case is returned for retrial to the District Court of Gjilan.
- must be partially granted and the judgment of the District Court of Gjilan in case P. Nr. 162/2003 dated 7 April 2005 and the judgment of the Supreme Court of Kosovo AP - KZ 393/2006 dated 20 May 2008 must be amended:
    - as to the period of time of the charge related to the unlawful possession of a weapon, which is reduced to the time from 4 June 2001 up to 6 April 2002 and as to the legal qualification of this fact which is only the violation of UNMIK Regulation 2001/7 Section 8.2;
    - as to the crediting of the time spent in detention from 5 April 2002 until 3 November 2002.
- The remaining parts of the request for protection of legality filed in the interest of K[redacted] K[redacted] are REJECTED as unfounded.

The District Court of Gjilan will have, in case of conviction of K[redacted] k[redacted] for the crime of attempted murder, to apply the criteria foreseen by articles 48 CC SFRY and 71 PCCK as to the integrated punishment for the two different crimes (attempted murder and unlawful possession of weapons).

IV

21. The Judgment of the Supreme Court of Kosovo AP - KZ 393/2006 dated 20 May 2008 is affirmed in the parts different from those which were annulled or amended as mentioned in the previous paragraphs.

The costs of these appellate proceedings shall be borne by the two defendants S[redacted] H[redacted] and K[redacted] K[redacted], the latter will bear only the costs related to the charge of unlawful possession of a weapon.

Pursuant to article 50 of the CC SFRY, the time spent in detention on remand by each defendant is included in the amount of punishment.