

IN THE NAME OF THE PEOPLE

The District Court of Prizren in a panel composed of international judge Dr. Ingo Risch as presiding judge and international judges Mr. Daniel Gruia and Mrs. Lis Sejr as members of the panel, assisted by the recording clerk Ms. Fllanza Shporta, deciding in the penal case against the accused Andjelko Kolasinac, of father Dobrivoje and mother Natalija Mihajlovic, born on January 11, 1951 in Rahovec/Orahovac, permanent residence Rahovec/Orahovac, str. Nemanjina No. 13, of Serb nationality, married, father of four children, completed the Law Faculty of Pristina, lawyer of occupation, of medium economic status, no criminal record, in detention since August 20, 1999 and Cedomir Jovanovic, of father Stojan and mother Jefa, born on October 9, 1941 in the village of Zociste, with the same permanent residence, municipality of Rahovec/Orahovac, of Serb nationality, married, father of six children, of medium economic status, no criminal record, in detention since September 27, 1999 accused of the criminal acts of war crimes as per Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia ("CCY"), according to the indictment of the Public Prosecutor of Prizren, No. CC 83/99, dated August 7, 2000, after having held the main hearing in public on May 2, 3, 7, 8, 9, 10, 21, 22, 23, 24, 28, 29, June 8 and 11, 2001, all in presence of the accused, their defense attorneys and the International Public Prosecutor, and all in the District Court of Prizren except for the hearing on June 8, 2001, which was held in the District Court of Belgrade, on June 14, 2001 in a public session in the presence of the International Public Prosecutor of Prizren Mr. Thomas Hickman and of both the accused pronounced the following

VERDICT

The accused Andjelko Kolasinac is guilty of giving help to the offender after the commission of a crime as per Article 174, paragraphs 1 and 3 of the Criminal Code of Kosovo ("CCK"), applied in accordance with United Nations Interim Administration Mission in Kosovo ("UNMIK") Regulations, by organizing the concealment of the traces of the war crime of expulsion of Kosovar Albanian citizens by organizing destruction and disposal of remains of their properties and personal belongings in Malisevo/Malisheve during April/May 1999.

Therefore, the accused Kolasinac is sentenced to five (5) years of imprisonment in which sentence the period of custody since August 20, 1999 until this verdict becomes final is to be included.

The accused Cedomir Jovanovic is found guilty of war crime against civilian population as per Article 142 of the CCY, applied in accordance with UNMIK Regulations, for participating in two massacres on the 25 March 1999 in Rahovec/Orahovac, one in a place called "Ura e

Bellajes” where 62 persons were killed, and the other near the village of Celina where at least 13 persons were killed.

Therefore is sentenced to twenty (20) years of imprisonment in which sentence the period of custody since September 27, 1999 until this verdict becomes final is to be included.

The detention of the accused Kolasinac and Jovanovic shall continue until this verdict becomes final.

None of the accused shall pay the costs of the proceedings according to the Article 98(4) of the Yugoslav Law on Criminal Procedure (“LCP”).

The injured parties are referred to file any property compensation claims within civil procedure.

REASONING

I. INTRODUCTION

A. The Indictment

On 7 August 2000, the local public prosecutor for Prizren filed an indictment, CC. No. 83/1999, that named Andjelko Kolasinac, Cedomir Jovanovic and six others as defendants. The indictment alleged that each defendant had committed the criminal act of war crime against the civilian population. The indictment made these charges with reference to Article 142 of the CCY. This article is applicable to the criminal proceeding under UNMIK Regulation 1999/24, “On the Law Applicable in Kosovo,” as amended by UNMIK Regulation 2000/59. According to the indictment, the acts committed by the eight defendants that constituted war crimes occurred in the municipality of Orahovac/Rahovec.

On 2 September 2000, the six indicted defendants, other than Jovanovic and Kolasinac, escaped from the detention center in which they were held. The court recognizes that under European Court of Human Rights jurisprudence and other authority, trials in absentia may be held under certain conditions. However, UNMIK Regulation 2001/1, “On the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law,” expressly prohibits trials in absentia for violations of international humanitarian law, as defined by Chapter XVI of the CCY. Article 142 of the CCY, under which the indictment was brought, is found in Chapter XVI.

Consistent with Regulation 2001/1, the public prosecutor proposed to sever the cases of Kolasinac and Jovanovic from those of the escaped defendants. On 01 May 2001 the Police Investigation Section in Orahovac/Rahovec reported that the six escapees were still at large. Following this, the panel adopted a decision to try only Kolasinac and Jovanovic for the crimes alleged in the indictment.

Neither the local prosecutor who filed the indictment nor the international prosecutor who was assigned later to the case, modified or amended the original indictment’s allegations or charges against Jovanovic or Kolasinac.

(i) Charge Against Jovanovic

The indictment charged Jovanovic with a single count of war crime on the basis of several acts. First, the indictment alleged that Jovanovic participated in the killing of two groups, one in Ura e Bellajes and one near the village of Celina on 25 March 1999. Further, the indictment alleged that Jovanovic committed beatings and the murder of a child in Xerxe. The indictment also contained general allegations regarding Jovanovic's possible involvement in the killing of an individual named Sakip Rexhepi.

(ii) Charge Against Kolasinac

The indictment charged Kolasinac with single count of war crime on the basis of the following acts: Participating in killings; requesting additional police for Orahovac/Rahovec in his capacity as municipal assembly president; failing to prevent the commission of war crimes; inviting Kosovar Albanians to return to Orahovac/Rahovec under conditions he knew to be dangerous; registering citizens in order to expel them; taking part in expulsions; organizing forced labor efforts; creating a civilian protection headquarters for the purpose of covering the traces of criminal activity; confiscating property; and maltreatment, including beating citizens.

(iii) Detention of Jovanovic and Kolasinac

Pursuant to the order of a local investigating judge, Andjelko Kolasinac was arrested on 20 August 1999. Pursuant to the same order, KFOR arrested Cedomir Jovanovic on 27 September 1999 as he was attempting to move from Kosovo to Serbia proper. Both defendants have been detained from the dates of their arrests until the present.

B. Competence of the Court

(i) Competence of the Prizren District Court

Under the Yugoslav Law on Criminal Procedure, subject matter jurisdiction for criminal cases is determined by the law of the relevant republic or autonomous province.¹ The Kosovo Law on Regular Courts ("LRC") states that district courts are competent to hear criminal cases involving charges for which the law allows the imposition of a penal sentence of five years or more.² Territorial jurisdiction is proper with the court in the district where a crime is alleged to have been committed.³

As discussed, the indictment in this case alleged that the defendants committed war crimes in the municipality of Orahovac/Rahovec. Orahovac/Rahovec is located in the Prizren region. Further, a defendant found guilty of a war crime must be sentenced to a term of imprisonment of at least five years.⁴ Thus, the Prizren District Court was the competent judicial body to hear this criminal proceeding.

(ii) Panel composition

¹ Article 22 LCP.

² Article 29 LRC.

³ Article 26(1) LCP.

⁴ Article 142 CCY.

The first panel constituted to hear the trial in this case comprised Judge Xhevdet Elshani, a local professional judge in the Prizren District Court, as the presiding judge, Judge Daniel Gruia, an international judge in the Prizren District Court and three lay judges.

The trial of Kolasinac and Jovanovic was to begin on 11 December 2000 in the Prizren District Court. However, the defendants were not present on that day because of security issues in Mitrovica where they were being detained. The panel ruled the trial could not proceed in the absence of the defendants and adjourned the trial until 12 February 2001. The bill of indictment was not read.

On 12 December 2000, UNMIK Regulation 2000/64, "On Assignment of International Judges/Prosecutors and/or Change of Venue" came into effect. Section 1 of the Regulation provides that the Special Representative of the Secretary-General ("SRSG") may order the assignment of international judges and/or an international prosecutor to a criminal proceeding at "any stage in the criminal proceedings." However, according to Section 2.4 of the Regulation, such assignment shall not be made once a trial session has already commenced. According to a clarification issued by the office of the SRSG on 29 December 2000, a trial session is commenced for purposes of Regulation 2000/64 once the indictment is read.

On 2 February 2001, the Department of Judicial Affairs (DJA), acting pursuant to a decision of the SRSG taken under Regulation 2000/64, designated Judge Ingo Risch, an international judge in the Prizren District Court, as the presiding judge for this matter and Judge Daniel Gruia, an international judge in the Prizren District Court, as a member of the panel. Further, DJA designated Thomas Hickman, the international prosecutor for the Prizren District Court, as the prosecutor for the case.

On 19 February 2001, Judge Xhevdet Elshani, who was to serve as a member of the three-judge trial panel, wrote to DJA stating that he was unable to participate in the trial. As a result, DJA designated Judge Lis Sejr, international judge from the Gjilan/Gnjilane District Court as the third member of the panel.

C. The Main Session

Apart from the following exception, the trial was open to the public: Several hours of the session held on 29 May 2001 in Prizren was closed to the public. The trial panel, the prosecutor, the defendants, and interpreters attended the closed portion of the session, during which confidential NATO reports regarding Jovanovic were read. The public was excluded from the session because of the sensitive nature of the documents. Once the NATO reports were read, the panel opened the courtroom to the public.

At the request of defense counsel, a session was held on 8 June 2001 in the Belgrade District Court. Defense counsel had requested a session in Belgrade to hear the testimony of witnesses who no longer lived in Kosovo and refused to testify in Prizren. The court recognized that the defendants would have been prejudiced had they not been able to present witnesses they believed would offer relevant testimony. For this reason, the court agreed to travel to Belgrade, thus eliminating any security concerns that might have prevented the witnesses from testifying.

Article 7 of the LCP provides that criminal proceedings are conducted in the language of official use in a court. For trials conducted by international judges, English is the official language. As such, this trial was conducted in English. Article 7 also requires that interpreters translate proceedings for principals and witnesses whose language is not the

official language of the court. Further, all court documents must be translated as necessary.⁵ In accord with these procedural rules, interpreters translated court proceedings into Serbo-Croatian and Albanian, as necessary. Further, interpreters translated all court documents relevant to the trial into Serbo-Croatian and Albanian as necessary.

II. The Applicable Law

The indictment charged the defendants with war crimes against the civilian population under Article 142 of the CCY.⁶ This article prohibits ordering or executing various acts against the civilian population during war or armed conflict, if ordering or executing such acts violate international law.

Thus, to find a defendant guilty of a war crime under Article 142, CCY the following elements must be proven: 1) the existence of a war or armed conflict; 2) the victims of the acts proscribed by the statute are civilians; 3) the defendant ordered the commission of, or performed, said act or acts; and 4) the commission of said act or acts violated international law effective at the time of the war or armed conflict.⁷

Article 142 CCY refers to a range of proscribed acts, including the following: killings, violation of bodily integrity, dislocation or displacement, application of measures of intimidation and terror; forcible labor; property confiscation; and pillage.⁸

The court recognizes that at least one commentator has argued international criminal-law instruments are inapplicable in Kosovo.⁹ Evidently, this argument relies on constitutional provisions requiring criminal offenses be established by statute, certainty of law principles and the argued inapplicability of customary international law. The court does not concur with this thesis, at least not in the context of the case at hand. First, Article 142 of the CCY provides a statutory basis for a war crimes charge by enumerating elements of the offense and establishing penal sanctions. The statute does refer to international law, but, as noted by the commentator, this reference limits the statute's scope, rather than create the offense. Second, a statute that lists all acts it proscribes does not lack for notice. Finally, if Article 142 of the CCY is applied with reference to instruments that have been ratified, such as the Convention Relative to the Protection of Civilian Persons in Time of War (1949) ("Geneva Convention IV"), there is no issue of customary international law to address.¹⁰

⁵ Article 8 LCP.

⁶ Under UNMIK Regulation 1999/24, "On the Law Applicable in Kosovo," as amended by UNMIK Regulation 2000/59, the court must apply the law that was in force in Kosovo on 22 March 1989. Thus, the court will apply Article 142 as found in the 1977 CCY and not in light of the 1995 amendments to the article. While, Regulation 2000/59 requires the court apply the most favorable provisions of the criminal code in force between 22 March 1989 and October 2000, that requirement does not change the court's analysis. The court refers to guidance issued by the SRSG on 29 December 2000 stating that "most favorable provision" refers to the range of potential penal sanctions. In light of Regulation 2000/59's abolishment of the death penalty, there is no difference in possible penalties between the 1977 and 1995 versions of Article 142.

⁷ Article 142 CCY. *See also*, Ljubisa Lazarevic, COMMENTARY ON THE CRIMINAL LAW OF THE FEDERAL REPUBLIC OF YUGOSLAVIA, 5th Edition (1995) (an act may be qualified as a war crime only if it violates international criminal law).

⁸ Article 142 CCY.

⁹ Michael Bohlander, "The Direct Application of International Criminal Law in Kosovo," a contribution to the OSCE/Council of Europe seminar in Pristina for international and Kosovar judges, March 2001.

¹⁰ Lazarevic, COMMENTARY ON THE CRIMINAL LAW, Article 142 (The Geneva Convention IV and the Hague Conventions of 1899 and 1907 are referred to by Article 142). Regarding ratification, the Socialist Federal Republic of Yugoslavia ("SFRY") ratified the Geneva Convention IV in 1950. At its formation, the Federal Republic of Yugoslavia ("FRY") declared its assumption of all international commitments made by the SFRY.

III. Analysis of the Charge Against Jovanovic

A. Element One: The Existence of Armed Conflict

The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) has addressed the definition of armed conflict. While this jurisprudence is not binding authority, the court does view it as persuasive.

The ICTY has defined an internal armed conflict as resort to armed force or protracted armed violence between governmental authorities and organized armed groups within a state.¹¹ The court notes that a municipality in a region where armed conflict is occurring may be deemed the site of armed conflict, even if there are no active hostilities in the municipality itself.¹²

The court finds that an internal armed conflict existed in the municipality of Orahovac/Rahovec itself during the summer of 1998. During that time, the municipality saw fighting between Serbian forces and the Kosovo Liberation Army (“KLA”). More specifically, armed combat occurred between the KLA, a group made up almost entirely of Kosovar Albanians and the FRY military, Serb police units and Serb paramilitary groups. Indeed, according to testimony at trial and independent sources, the KLA took control of, at least, portions of the Orahovac/Rahovec municipality through the use of force during July 1998, to be expelled later by Serb forces.¹³

It is also clear that an internal armed conflict existed in the municipality between the same parties during the late winter and spring of 1999. Again, as Kolasinac testified, there was fighting in the municipality between Serb forces and the KLA, especially during February and March.¹⁴ This period saw a tremendous movement of Kosovar Albanians from the municipality to Albania because of violence or threatened violence on the part of Serb forces.¹⁵

Further, the efforts of international organizations are evidence that an internal armed conflict existed in Kosovo generally during 1998 and 1999, in particular during July 1998 and the spring and summer of 1999. Specifically, the United Nations Security Council passed Resolution 1160 in March 1998, “condemning the use of excessive force by Serbian police forces” and imposing an arms embargo on FRY. In September 1998, the Security Council passed Resolution 1199 which stated that the situation in Kosovo was a threat to peace and security in the region and demanded that all parties cease hostilities.

In October 1998, representatives of the North Atlantic Treaty Organization (NATO), and the Organization for Security and Co-operation in Europe (OSCE) negotiated with FRY authorities regarding the hostilities. The negotiations resulted in the “Clark-Naumann Agreement.” This Agreement provided for the partial withdrawal of FRY and Serbia forces from Kosovo; a limitation on the introduction of additional forces and equipment into the area; and the deployment of unarmed OSCE verifiers.

¹¹ *Prosecutor v. Tadic*, Case IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) para. 70.

¹² *Prosecutor v. Blaskic*, It-95-14-T, Judgment, (3 March 2000) para. 64.

¹³ Organization for Security and Cooperation in Europe, KOSOVO/KOSOVA, AN ANALYSIS OF THE HUMAN RIGHTS FINDINGS OF THE OSCE VERIFICATION MISSION, p. 274.

¹⁴ *See also, Id.* at p. 275.

¹⁵ Between 24 March 1999 and 5 April 1999, approximately ten-thousand ethnic Albanians left the municipality. American Association for the Advancement of Science, “Policy or Panic? The Flight of Ethnic Albanians from Kosovo,” p.16

Further negotiations occurred in Rambouillet, France beginning on 7 February 1999. The deputy prime minister of the FRY and the Serbian president were among the FRY representatives. The Kosovar Albanians were represented, in part, by leaders of the KLA. The talks concluded without success in mid-March 1999.¹⁶

The court notes that the defense did not contest the issue of armed conflict. In sum, there is no dispute that such conflicts existed, as required by Article 142 CCY, at the times relevant to this case.¹⁷

B. Element Two: Victims of the Acts at Issue are Civilians

The court next addresses whether victims of the acts alleged in the indictment were members of the civilian population. Article 142 CCY contains no definition of “civilian population.” Therefore, the court relies upon the definitions of civilian population found in the Geneva Convention IV and the Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977) (“Protocols”). As addressed, these instruments are among the international laws referenced by Article 142 CCY. The Geneva Convention IV defines a civilian as one who is taking no active part in the hostilities. The commentary to the Protocols clarifies this point by stating that civilians are those who are not members of the armed forces or other legitimate combatants. Importantly, the ICTY has held that the presence of non-civilians among a civilian population does not alter the character of the population.¹⁸

The court finds there is no dispute that the victims of the acts relevant to this case were civilians. These individuals were taking no part in any hostilities. Further, the victims would not be characterized other than as civilians, even were members of the KLA in or around the Orahovac/Rahovec municipality at the time of the relevant events.

Witnesses of the Popaj family testified that the two groups Jovanovic is alleged to have participated in killing included the elderly and children. According to this testimony, these groups were fleeing hostilities, rather than taking part in violence. No witnesses testified that anyone in these groups was in uniform, carrying weapons or engaging in violent behavior. No witnesses testified that anyone in these groups was a member of the KLA or associated with other combatants.

In light of the above-described testimony and the defense’s choice not to raise a single argument on this issue, the court finds it is indisputable that the victims of the relevant alleged acts were civilians.

C. Element Three: Ordering or Committing Proscribed Acts

The indictment charges Jovanovic with war crimes based on several acts.

¹⁶ The failure of these talks led to the NATO bombardment that began on 24 March 1999 and continued until 10 June 1999.

¹⁷ The court would deem an armed conflict to have existed in the Orahovac/Rahovec municipality during the relevant periods, even were it not established that fighting between the KLA and various Serb forces was occurring in the municipality itself. An armed conflict existed in Kosovo during the relevant periods. Thus, under the *Blaskic* standard, the regional conflict is imputed to the Orahovac/Rahovec municipality.

¹⁸ *Prosecutor v. Kunarac, Kovac & Vukovic*, It-96-23-T & IT-96-23/1-T, Judgment, (22 February 2001) para. 11.

(i) Alleged Acts in Xerxe and Alleged Murder of Sakip Rexhepi

The indictment avers that Jovanovic beat passengers on a bus in Xerxe and killed a child. The indictment also states Jovanovic took part in the murder of an individual named Sakip Rexhepi. The indictment offers few details regarding Jovanovic's alleged participation in these acts. No trial witnesses testified in relation to the killing of a child. Only one witness, Gani Krasniqi (sometimes referred to as Emrullah Krasniqi) testified about the killing of a single man he said occurred in the period between the massacre near Bela Crkva and the massacre near Celina. The panel was unable to establish whether this alleged victim was Sakip Rexhepi, the victim described in the indictment. Only one witness, Haxhi Gashi, testified regarding the alleged bus beating. He stated that Jovanovic beat some of the eighty-four passengers on the bus. Apart from the issue of whether this alleged beating had adequately grave consequences to be proscribed by Article 142 of the CCY, the court was not able to conclude that events occurred as described by the witness.¹⁹ In particular, no other witnesses presented testimony regarding this incident, even though the witness claimed that approximately eighty-three people were present at the time. Further, the witness offered contradictory statements regarding his knowledge of the co-defendant Kolasinac. Thus, the court had doubts regarding the reliability of Gashi's testimony.

Likely for these reasons, the public prosecutor did not refer to these events in his closing argument. Due to this lack of evidence, the court is unable to find the defendant committed the acts alleged to have occurred in Xerxe or the murder of Sakip Rexhepi.

(ii) Alleged Killings at Ura e Bellajes and Celina

The indictment contends that Jovanovic, as a uniformed paramilitary member, participated in the execution of sixty-two people on the morning of 25 March 1999. According to the indictment, these murders occurred at a place known as "Ura e Bellajes" near the village of Bela Crkva. The indictment also states that on the same day, Jovanovic participated in the killing of an additional thirteen people near the village of Celina.

The court finds that ample eyewitness testimony was presented to prove that Jovanovic took part in the killings at Ura e Bellajes and near Celina. Further, the putatively exculpatory witnesses presented by the defense offered vague and conflicting testimony that cannot be considered reliable or credible.

a) Testimony of Eyewitnesses

The witness Dashnoor Popaj, who was almost fifteen at the time of relevant events, testified that he had identified Jovanovic from among a great number of photos shown to him by police upon his return from Albania. From these photos, which did not have names of numbers as the panel confirmed by viewing said photos, Popaj had identified Jovanovic without having had any doubts.

Krenare Popaj, the sister of Dashnor Popaj, stated that she had been able to identify the accused Jovanovic because she had been at "Ura e Bellajes" where the massacre occurred. She had no doubts that Jovanovic was with the group of Serbs who shot at the group of Kosovar Albanians. Krenare Popaj had also identified Jovanovic for German officers who presented a great number of photographs to her. This identification occurred at a different time from when her brother identified Jovanovic.

¹⁹ Generally, a separate finding must be made that the defendant's act caused "grave consequences for the victim" if the act is not a breach of Article 147 of the Geneva Convention IV. *Prosecutor v. Tadic* at para. 94.

Further, Shukrije Popaj, a fifty-seven year old widow, first identified Jovanovic to police investigators in September 1999 from a book with over three-hundred photos. Shukrije Popaj was interviewed four times in a sixty-day period and identified additional perpetrators, but Jovanovic was the first person she identified, even describing his attire in detail. At trial Shukrije Popaj emphatically identified Jovanovic as being a member of the uniformed group that committed the massacre at “Ura e Bellajes.”

An additional eyewitness, Sabri Popaj, also testified that he had seen Jovanovic at “Ura e Bellajes” at the time of the killing, although he had not observed Jovanovic firing shots.

Finally, Salajdin Shterbani stated that he had seen Jovanovic by the river after the massacre on the morning of 26 March 1999.

The panel finds all these witnesses reliable. Dashnor, Krenare and Sukrije Popaj identified Jovanovic separately from each other and on two different occasions from a great number of photos shown them by police. Because the names of the individuals in the photos were on the back of the photos, and the photos were not numbered, this identification process was fully fair. Furthermore, Sabri Popaj’s testimony supports the statements of these witnesses. The testimony of Sabri Popaj is itself credible because the witness did not exaggerate his knowledge in any way. Sabri Popaj testified that he saw the accused Jovanovic at the scene, but was very forthright that he did not see Jovanovic shoot.

Finally, Salajdin Shterbani’s testimony also supports the statement of the above-mentioned witnesses, although he reported having seen Jovanovic by the river on 26 March 1999, instead of 25 March 1999. This is a small and understandable mistake.

b) Testimony of Jovanovic

The accused Jovanovic denied he was associated in any way with paramilitary units such as the “black hand.” According to Jovanovic, the testimony against him was fabricated or mistaken. The defendant stated that he had simply been a bus driver for the past eighteen years, well known by all the people in the region. Jovanovic denied any participation in all massacres and stated that he had never seen the witnesses who appeared at the main trial. According to the defendant, he was very active only in relation to the “village board” that oversaw the determination of damages caused by accidents to farms and other agricultural land. Jovanovic testified that this was always his main activity. For these reasons, the defendant testified that he did not leave the municipality after the entry of KFOR into Kosovo and did not escape from prison when he had a chance.

c) Testimony of “Alibi” Witnesses

The court also heard the testimony of witnesses proposed by the defense. These witnesses testified regarding the defendant’s whereabouts at the time the killings occurred. However, the testimony of these witnesses did not establish that the defendant was at a location different from those where the killings occurred on the morning of 25 March 1999. Indeed, these witnesses offered testimony that was irrelevant, conflicting or otherwise not credible.

Tomislav Trpkovic testified that he had seen the defendant on 24 March and then again sometime during the “afternoon close to evening” on 25 March. On its face, this testimony is irrelevant to establishing the defendant’s location during the morning of 25 March when the killings occurred.

In contrast, Milenko Jovanovic, the defendant's nephew's, offered testimony relating to the morning of 25 March. Milenko Jovanovic testified that he had had coffee with the defendant between 8:00 and 8:30 on 25 March in the defendant's house. However, Vesko Stojanovic, who is also the defendant's nephew, testified that he had seen the defendant in a shop in Zociste during that exact same half-hour period. When confronted with the inconsistencies between his statement and that of Milenko Jovanovic, Mr. Stojanovic said that he could not be certain about the time when he had seen his uncle that morning. In contrast to both Milenko Jovanovic and Mr. Stojanovic, Stanko Stankovic testified that he had seen the defendant in his shop on the morning of 25 March between 10:00 and 11:00.

The testimony of Milenko Jovanovic and Mr. Stojanovic cannot be viewed as reliable or credible for several reasons. First, the statements of Milenko Jovanovic and Mr. Stojanovic are in direct conflict regarding the defendant's location on the morning of 25 March. Second, Mr. Stojanovic, initially, did not indicate he was at all uncertain regarding the time period in which he had seen his uncle. However, when confronted with the testimony of Milenko Jovanovic, Mr. Stojanovic stated that he was, in fact, not certain about the time he had seen his uncle. Third, these witnesses are relatives of the defendant and might naturally be predisposed to tailor their testimony to benefit their uncle.

The testimony of Stanko Stankovic also lacks in reliability and credibility. First, his testimony is in conflict with that of the defendant's nephews, as discussed. Second, Mr. Stankovic claimed that there were about ten people in his shop when he had seen the defendant there on 25 March. However, upon questioning by the public prosecutor, Mr. Stankovic remembered the names of only several other people in the shop. No explanation was offered as to why the witness remembered specifically the defendant's presence, but was unable to name the other individuals who had also been present.

Krsta Misic testified sweepingly that between 24 March and 27 March, he had been with the defendant "all the time" in or around the Zociste shop. However, the witness made no specific representations regarding the defendant's presence in the shop on the morning of 25 March. Further, upon questioning by defense counsel, Mr. Misic said that he had not been at or around the shop continuously because, at times, he had had other things to do.

Mr. Misic's testimony is not credible because it is internally inconsistent. The witness stated both that he had been in the shop "all the time" with the defendant during a three-day period and, also, that he sometimes had left the shop. Also, Mr. Misic never actually stated that he remembered having seen the defendant at the time in question on the morning in question.

In sum, the court finds that the testimony offered in defense of defendant Jovanovic is either lacking in credibility or relevance. Thus, this testimony does not support that defendant's arguments regarding his location on the morning of 25 March 1999.

d) Findings

The panel is convinced that the following facts are established concerning Jovanovic:

During the NATO bombing, on the morning of 25 March 1999, people from Bela Crkva tried to escape from their village to the village of Celina. One group of these people consisted of members of the Zhunijqi and Spahiu families. There were at least thirteen persons in this group.

At the same time the accused Jovanovic approached the area of Bela Crkva. He was uniformed and accompanied by at least a dozen other Serb men, each wearing the same type of uniform. Jovanovic and each member of this group of Serb men was carrying a machine gun. Between Bela Crkva and Celina, the accused and his companions met the group made up of members of the Zhuniqi and Spahiu, who were unarmed. Realizing that everyone in the group of thirteen was of Albanian ethnicity, Jovanovic and his comrades immediately fired with their machine guns at the group. All thirteen people were killed.

The same morning the armed and uniformed group that included Jovanovic marched in the opposite direction from the village Xerxe towards a railway bridge over a small creek in a place called “Ura e Bellajes.” At the same time, a group of approximately one-hundred Kosovar Albanians approached this very place. When the Albanians in this group became aware of the group of uniformed and armed Serb men, they displayed white clothes to signify surrender.

The unit of Serbs then ordered the women in the Albanian group to separate and directed them to go to Xerxe. A group of women obeyed, leaving the place on the right side of the creek, climbing upwards to the railway bridge, crossing the bridge itself and walking towards Xerxe. Meanwhile, a sixty-five Albanians remained on the bank of the creek. Only one member of the group, the witness Dashnoor Popaj, was able to escape from this group. He did so by making his way across the creek and hiding himself behind a bush next to a concrete pillar that supported the bridge. Jovanovic and his companions then ordered the remaining Albanians to turn over all their valuables and ordered the men to undress. After this, Jovanovic and the entire unit of armed men shot with their machine guns at the remaining sixty-five people, including unarmed men, elderly women and a two-year old child. Sixty-two people were killed. Three survived by miraculous luck.

In memory of this massacre a memorial was erected at the place where the victims were first buried in a mass grave. Later the bodies were buried at a particular cemetery.

During the main trial, the presiding judge inspected the area where these events occurred by himself, because KFOR and police had reservations about security matters during a preliminary discussion and objected the entire panel or parts of it going to the scene officially.

For the reasons discussed, the court finds that Jovanovic committed the killings at Ura e Bellajes and near Celina. Thus, Jovanovic committed an act proscribed by Article 142, satisfying the third element under the statute.

D) Element Four: Jovanovic’s Acts Violated Rules of International Law

Having established that Jovanovic committed the acts in question, the court must address whether said acts were in violation of international law at the time of their commission.

The international laws referenced by Article 142 of the CCY include the Geneva Convention IV. As discussed, this Convention was ratified in 1950 and, thus, was applicable at the time of relevant events as treaty law, in addition to being referenced by Article 142. The court notes further that Geneva Convention IV is arguably applicable as customary international law as well.²⁰

²⁰ See *Prosecutor v. Kunarac* at para. 406.

Common Article 3, found in the Geneva Convention IV, prohibits parties to domestic armed conflicts, occurring in the territory of a contracting party, from committing murder against a protected party.

The court has already addressed the existence of a domestic armed conflict. Further, the court has established that the armed conflict occurred on the territory of a contracting party. Thus, the court must address whether Jovanovic was a party as contemplated by common Article 3, whether he committed murder as contemplated by the article and whether his victims were protected persons. The court will also evaluate whether there was a nexus between Jovanovic's acts and the armed conflict.²¹

It is well established that a criminal perpetrator assumes party status for common Article 3 purposes when he fights directly for a party.²² Under this principle, Jovanovic is a party. As discussed, FRY and Serb forces, including police and paramilitaries were active in the conflict at issue and, thus, were parties. Trial testimony referenced earlier established that Jovanovic was a member of an organized police, military or paramilitary unit that took part in the conflict. In particular, the testimony established that Jovanovic was well armed, wore a uniform and operated with a group of similarly armed and uniformed personnel. It is clear that this group was acting against the Albanian population in a manner identical to that of other FRY forces. Specifically, the group was engaged in killing. The testimony of trial witnesses was confirmed by a confidential NATO report, dated 26 September 1999, reviewed by the court that described Jovanovic as a deputy commander of the 3rd sector of the *Ministarstvo Unutrasnih Poslova* ("MUP").²³

For these reasons, the court finds that Jovanovic was fighting for Serb forces, even if the precise nature of his unit remains ill-defined. Thus, the court finds Jovanovic was a party for purposes of common Article 3.

A willful killing occurs when a defendant demonstrates an intention to kill or inflict serious injury in reckless disregard of human life.²⁴ All testimony relevant to this issue established that Jovanovic aimed his weapon at the victims and fired from close range. Under these circumstances, the court is unable to reach any conclusion except that Jovanovic wanted to kill or maim those at whom he shot. No other explanation was offered by the defense and no other explanation would be even slightly credible under the circumstances as established.

The court must address whether the victims were "protected" by the Geneva Convention IV. According to the Convention's plain language, an individual is protected if she takes no part in active hostilities and, at any given moment, is in the hands of a party to the conflict of which she is not a national. Recent jurisprudence has clarified the issue of nationality in this context. The ICTY appeals chamber has noted that ethnicity, rather than nationality, is often determinative of party allegiance in current conflicts to which the Geneva Convention IV was intended to apply.²⁵ Thus, a nationality requirement is overly legalistic and does not provide the safeguards contemplated by the Convention. For this reason, the appeals chamber has held that party allegiance and party control over victims are determinative in evaluating protected status, rather than nationality. The court adopts this reasoning as being especially

²¹ *Id.* at para. 407. It would be gratuitous and circular to address the other common Article 3 elements discussed in *Kunarac* in the context of the charge against Jovanovic.

²² *Prosecutor v. Kunarac* at para. 407.

²³ The MUP is a special police unit of the Ministry of the Interior.

²⁴ *Prosecutor v. Delalic et al.*, Case IT-96-21-T, Judgment (16 November 1998) para. 439.

²⁵ *Prosecutor v. Tadic* at para. 166-168.

relevant to the conflict in Kosovo that, like conflicts in other parts of the former Yugoslavia, occurred between parties of ostensibly uniform nationality.

The court has already addressed that the victims were taking no part in hostilities. Further, the court finds that the victims of these shootings were in the hands of a party with which they were not allied. Specifically, the victims were of Albania ethnicity. The persons may or may not have been allied with the KLA, one party to the conflict, but it is indisputable they were not allied with FRY or Serb forces, the other party to the conflict. Trial testimony clearly established that the victims were fleeing from FRY and Serb forces that were acting against the Albanian population. At the moment of the killings, the victims were in the hands of precisely these forces. Thus, at the time of the relevant acts, the victims were protected by the convention.

The court finds that the actions of Serb paramilitaries and police towards the Kosovar Albanian population were closely linked to the conflict. Such actions were often in direct response to actions of the KLA. Indeed, the defendant Kolasinac testified that he requested additional police following a period of great KLA activity in 1998. It was established that these police forces, along with paramilitaries, engaged in violent and aggressive behavior towards the civilian population at that time. Similarly, March 1999 saw armed conflict in the municipality, as discussed. Testimony was heard regarding the activities of Serb forces against civilians during that period as well. It may be debated whether Serb forces took action against civilians to identify legitimate KLA members, to eliminate potential KLA recruits or for criminal motives. There is no question, however, regarding the link between the actions and the conflict at issue.

It was established that Jovanovic was a member of a uniformed and armed unit of Serbs. Jovanovic and this unit engaged in the behavior described above during the armed conflict. The court finds the necessary nexus to be established.

In sum, Jovanovic was a party to an armed conflict occurring on the territory of a contracting party to the Geneva Convention IV when he engaged in the willful killing of protected victims. This killing was linked closely to the armed conflict. Therefore, Jovanovic acted in violation of this Convention and, consequently, committed a war crime against the civilian population under Article 142 of the CCY.

The court finds, *ex officio*, that there are no doubts regarding the mental capacity or physical health of the defendant either at the time of the relevant acts or during the trial.

E) Intent and Personal Responsibility

Concerning all facts and circumstances, in particular regarding the shooting itself as established above, Jovanovic acted with direct intent. It is not mandatory to establish, if Jovanovic also was aware that his acts violated international-law standards. The violation of international law is an objective condition of liability that determines the character and framework of illegality of the criminal act, i.e. the act must also be illegal according to international law.²⁶ This condition is established, as discussed.

F) Penal Sanctions to be Applied Against Jovanovic

Article 142 of the CCY, as in effect on 1 July 1977, provided a range of punishment from a term of imprisonment of not less than five years to the death penalty. However, under the

²⁶ Lazarevic, COMMENTARY ON THE CRIMINAL LAW at Article 142, note 5

1995 criminal code, the range of punishment was from five to twenty years. Further, as discussed briefly, UNMIK Regulation 1999/24, as amended by Regulation 2000/59 abolished the death penalty for all criminal offenses. Regulation 2000/59 also states that a defendant must have the benefit of the most favorable criminal law provision that existed between 22 March 1989 and 27 October 2000. Thus, the death penalty is no longer available as a punishment under Article 142.

Article 38(2) of the CCY stipulates the possibility for the court to punish a perpetrator to a maximum of twenty years imprisonment instead of the death penalty. After the abolishment of the death penalty, a term of imprisonment of up to twenty years automatically became the most severe possible punishment. Such a sentence is an exception to the maximum penalty up to fifteen years as foreseen in Article 38(1) of the CCY.

Consequently, the range of penal sanctions for a war crime as per Article 142 of the CCY is now from five to twenty years of imprisonment.

The panel evaluated all aggravating and mitigating factors. The following mitigating factors were to the favor of the accused Jovanovic:

- he had never been convicted of a criminal offense in his life;
- he was integrated into his family as the head of household;
- the circumstances of the armed conflict/war might have reduced his inhibition threshold; and
- in his advanced age, a penalty taken from the upper part of the possible range of punishment becomes closer to a lifetime penalty.

The panel also has to consider the following aggravating factors:

- the accused participated in not one, but two massacres;
- in both massacres a large number of persons were killed;
- not only unarmed young men but also old and absolutely harmless women and very young children were among the victims, even though the group has used clothes as flags of surrendering; and
- in particular the killing at Ura e Bellajes was not a spontaneous action, but done in several steps: first the entire group of refugees from the village of Bella Cerca were divided; then the group of victims had to surrender their valuables (money, jewellery, etc.); and then the young men had to undress themselves before machine gun fire was opened on all of them.

Evaluating all mitigating and aggravating aspects, the panel was convinced that only the maximum penalty of twenty years of imprisonment was appropriate, because of the overwhelming nature of the aggravating factors.

IV. Analysis of the Charge Against Kolasinac

The indictment charged Kolasinac with a single count of war crime against the civilian population under Article 142 of the CCY. The court discussed the elements of this Article in detail under section II of this decision. The court refers to that discussion for the purpose of analyzing the charges against Kolasinac. In particular, the court refers to its earlier discussion of elements one and two, which applies to Kolasinac largely as it applied to Jovanovic.

A. Element Three: Ordering or Committing Proscribed Acts

The indictment charges Kolasinac with war crimes based on a wide range of acts.

(i) Failing to Prevent Commission of Crimes

The indictment alleges that Kolasinac failed to take action to prevent unlawful acts, such as killings, kidnappings, burnings and deportations. The court finds, as a threshold matter, that this theory is viable under the well-established doctrine of command responsibility. To establish culpability under this doctrine, it must be shown that: 1) there existed a superior-subordinate relationship between the defendant and the criminal perpetrator; 2) the defendant knew or should have known of the crimes that had been or were about to be committed; and 3) the defendant failed to take necessary and reasonable measures to prevent the crime or punish the perpetrators.²⁷

The panel is not convinced that Kolasinac commanded the forces that attacked the Kosovar Albanians in a concerted manner. It was not established that he had been the formal leader or a member of a paramilitary group such as the “black hand.” None of the witnesses testified in this regard and the defendant denied such membership. Kolasinac, in his official capacities as the president of the municipal assembly and the head of civil defense, did not command military or police forces. During the time he was holding these positions, the military and police had their own organizational structures that did not include the positions Kolasinac held. Thus, from a formal perspective, the court found that Kolasinac never exercised authority over the military or police.

The court notes Kolasinac could have been the *de facto* superior of those who committed crimes. For example, if in times of crisis, standard organizational structures fail to function, an individual in a position such as that of Kolasinac could be accepted as a superior for police forces. Kolasinac’s decision to wear a uniform during meetings and being accompanied by members of the military and police, his successful intervention concerning the arrest of some meeting participants and his statement of 22 August 1999, to UN police (“Who gives the orders in Orahovac? I do. No one orders me.”) might point to this conclusion.

However, this conduct is insufficient to prove that Kolasinac had control over, for example, communal police, such as mayor Jean Paul Akayesu has had.²⁸ Kolasinac was wearing a uniform because he had been mobilized. The presence of the military and police at assembly meetings was not unusual in the socialistic scenery, in particular, not during a time of war. Further, Kolasinac’s statements to the police seem to have a boastful quality and in contradiction to other statements from the same day, to the effect that he had no control over the FRY military or the MUP. Finally, Kolasinac’s success in securing the release of Kosovar Albanians from police detention does not indicate he was a police commander. Kolasinac had summoned the detainees to a meeting before the police arrested them. The meeting was to deal with issues of interest to the police. It appears reasonable that after Kolasinac’s intervention, the police commander released the arrested persons to ensure the meeting proceeded as planned.

²⁷ *Prosecutor v. Blaskic* at para. 294. The court notes an argument could be made that the command-responsibility doctrine is inapplicable under Article 142 of the CCY because the statute contemplates “ordering” or “executing” an act. While the court believes Article 142 is broad enough to create liability for nonfeasance, the issue is moot because of evidentiary shortcomings.

²⁸ International Criminal Tribunal for Rwanda, case No. ICTR-96-4-1.

In sum, no evidence was presented to establish the elements that relate to the nature and authority of Kolasinac's position. Specifically, the court was unable to find the existence of a superior-subordinate relationship between Kolasinac and the FRY or Serb forces at issue. Because the court was not able to establish Kolasinac's authority over these forces, the court did not find the defendant was empowered to prevent the relevant crimes or punish the perpetrator.

The court wishes to make clear it did not believe Kolasinac when he testified he had been unaware of illegal acts against the Kosovar Albanian population. Specifically, the court finds it incredible that Kolasinac did not observe the well-documented and extensive deportations, theft and violence that occurred in the municipality where he was municipal assembly president. The panel finds these representations of ignorance chilling in their similarity to statements made by German civilians in the aftermath of World War II.

However, even in disbelief of the defendant on this issue, the court cannot make a guilty finding without sufficient evidence of the charged crime. As discussed, this evidence was simply not presented.

(ii) Invitation to Kosovar Albanians to Return to Municipality

It is uncontested that Kolasinac made a public appeal during July 1998, in which he encouraged the return of internally displaced Kosovar Albanians to the Orahovac/Rahovec municipality. The indictment alleges that Kolasinac made this broadcast for the purpose of luring civilians to their homes where they would be subjected to further mistreatment. The court notes that an action with such intent, if proven, would create principal liability under Article 24 of the CCY on aiding.

The accused Kolasinac testified on 2 May 2001 that he had had no ill intentions when he made the televised statement. With hindsight, Kolasinac's action might be seen as deceptive, but no evidence was offered on the issue of Kolasinac's intent at trial. Therefore, the court cannot conclude that the defendant made public remarks with the intent to lure civilians back to face mistreatment.

(iii) Participation in Killings

The indictment alleges that Kolasinac participated personally in the killing of seven people in July 1998. The indictment also appears to make reference, although not clearly so, to Kolasinac's possible direct involvement in other murders.

a) Massacre in the Sheh Medini's mosque in July 1998

The indictment makes reference to Kolasinac's possible direct involvement in the July 1998 murders of Xhemal Rama, Faik Sylka, Haxhi Sharku, Qemal Sylka, Eqrem Sylka, Baki Shehu and Nesimi Sylka inside the Sheh Medini's mosque. It is alleged that Kolasinac, armed with a machine gun, participated in these killings as a member of the paramilitary formation known as the "Black Hand."

Not a single piece of evidence was presented to the trial panel relevant to these murders. There was no suggestion that Kolasinac had ever been a member or a supporter of the "Black Hand," that he had ever carried a machine gun, or that he had been present in the Sheh Medini's mosque at any time in July 1998. Therefore, the court was not able to conclude that he participated in this crime.

b) Massacre in the village of Pastasella

The indictment charged Kolasinac with participating in a massacre of Pastasella, in which ten people were killed. The indictment does not contain any details regarding the time or circumstances of the crime or any details regarding Kolasinac's particular role.

The court learned from the eyewitness Gani Krasniqi that the massacre had occurred on 31 March 1999 in Pastasella alias Rudina in a school building near the field known as "Ara e Spahijes." The witness testified that a group of Serbs with the word "Policia" on the back of their uniforms had shot at a group of young Kosovar Albanian men, although he testified that he did not see the actual shooting. The witness reported that this occurred after a group of 500 to 1000 Kosovar Albanians had gathered in the field during the NATO bombing. According to Krasniqi, both defendants were with the Serb group; Jovanovic was not charged with this killing in the indictment.

However, Krasniqi's testimony is inadequate. Krasniqi claims to have seen Kolasinac among the group of Serbs that approached the field. He further testified that the shooting had taken place inside the school and that he had not seen the shooting itself. Thus, even accepting this testimony as accurate, the witness was not able to say what Kolasinac had done inside the building. This is insufficient to find Kolasinac participated in this murder. Further, there was no other testimony that Kolasinac had ever received or worn a police uniform.

In light of these facts, the court cannot find Kolasinac criminally liable for these acts.

c) Massacre in the village of Hoqa e Vogel

The indictment charges Kolasinac with participating in the massacre of Hoqa e Vogel where thirteen persons were killed.

The panel was unable to establish any responsibility of the accused Kolasinac concerning this crime, because none of the witnesses testified regarding any acts taken by the defendant in connection with this massacre.

Finally, the court examined the question whether Kolasinac could be convicted as an accomplice to any killings by establishing that he had knowledge about mass graves. On 22 August 1999, Kolasinac spoke to police about several mass graves, telling them he had been informed about the location of such graves by MUP staff in April 1999, after killings. Kolasinac reported that local municipal workers prepared the mass graves on behalf of local police and the MUP, who were responsible for the killings.

There is no evidence that Kolasinac had known previously about the killings that led to the mass burial. There is not sufficient evidence that he was involved in the preparation of these mass graves personally. To the leading question of the police investigator, "who gave order to him to prepare the area for mass graves," Kolasinac answered evasively, "the area was prepared at a place called Muslim graves."

In sum, there is insufficient evidence to prove that Kolasinac was personally involved in any killing. Other than one witness' insufficient testimony, no evidence was presented to the trial panel relevant to these allegations. No physical evidence was offered. The panel itself was not able to discern any method by which further evidence could have been gathered in

connection with the allegations. Further, the public prosecutor, in his closing argument, did not make any reference to any murders performed by Kolasinac himself. The court is unable to conclude that Kolasinac engaged personally in killings because of the utter lack of evidence on this point.

(iv) Request for Additional Police Forces

According to the indictment, Kolasinac used his position within the municipality to request military and/or police assistance to protect the ethnic-Serb population. Evidently, the indictment ascribes to Kolasinac an intent that his request would lead to criminal acts by the requested forces. The court did not hear evidence to establish this malicious intent on the part of Kolasinac.

Kolasinac testified that he had requested police and military assistance because of the volatile situation in the municipality. The court finds Kolasinac's explanation plausible. In a state of, at least, intermittent armed conflict, it is reasonable that a municipal official would summon police authorities to restore order. Such a request could even be viewed as responsible in a general sense, especially absent any intent that the requested armed force misuse its authority.

The panel was not able to exclude the possibility that Kolasinac had requested further forces in order that they commit crimes against the Kosovar-Albanian population, as did occur. However, this was no more than a presumption, because the evidence did not establish that Kolasinac had had malicious intent in making the request.

The court notes that it lends little credence to Kolasinac's argument that his request had been ignored and that it was a colleague's request that had actually brought armed assistance. First, this explanation is entirely too convenient. Second, Kolasinac did not offer the panel any testimony regarding how he came to believe his request was ineffective. Finally, Kolasinac's request would have obviously supported the other request that putatively brought additional armed forces to the municipality.

(v) Registration of Civilians

The indictment makes reference to two registration drives. According to the indictment, registration efforts were undertaken to gather demographic information about the Kosovar-Albanian population to facilitate later illegal acts.

It is not disputed that Kolasinac took part in the first registration drive. According to Kolasinac, the drive's purpose was locating civilians for humanitarian aid distribution. Kolasinac claims that he still believes the registration occurred to facilitate aid efforts. The court is uncertain whether Kolasinac sincerely believed the registration was for humanitarian purposes at that time, given the conflicts in the municipality.

The court finds Kolasinac's claim that still he holds this belief today to be utterly incredible, because he now knows no humanitarian aid was delivered. Nonetheless, the court must find that Kolasinac's registration activities were undertaken with the intent to aid in the commission of subsequent crimes.

The public prosecutor argued that the registration had been connected to the crimes, including arson, looting, and expulsion that had been committed against the Kosovar-Albanian population in Orahovac/Rahovac. The prosecutor is convinced that Kolasinac – in contrast to

his statement given during the main trial – told the truth to the police on 22 August 1999 when he admitted having delivered the registration lists to military forces and the MUP.

The court is convinced that concerning both registration drives, Kolasinac ordered the registration of only the Kosovar-Albanian population in light of the statement of the witness Bejtulla Hoxha. It seems very likely to the panel that the registration efforts, particularly the more detailed second drive, were a first step in the widespread and systematic persecution and expulsion of Kosovar Albanians. The court notes that it remains unclear, if the registration efforts were ordered by Belgrade for all of Kosovo or if the registration was only at a district or municipal level.

However, there are doubts as to whether Kolasinac intended, at least, to aid in the expulsion of civilians. In other words, the court is not fully convinced that Kolasinac conducted the registrations and delivered the results to other authorities because of a general criminal agreement with the subsequent perpetrators. These doubts are reinforced by the demographics in the municipality. Orahovac/Rahovac had approximately twenty-thousand inhabitants, of whom not more than fifteen percent were Serbs. Because the Serb population was so small in number, most Serb families would have known the location of each other even without the registration drive. Thus, there was little need for a registration list to locate Albanians or distinguish between Serb and Albanian homes. Further, there was no evidence that registration lists were used for calculated attacks against Kosovar Albanians or that those attacks started right after the lists were completed.

Under these circumstances, the panel is not fully convinced that hostile Serb forces intended to use the results of the registration campaign to avoid collateral damage to Serb houses and property or that they intended to rely on data given by Kosovar Albanians to plan their criminal activities. Thus, it is even less clear, in light of the presented evidence, that Kolasinac had such intent.

(vi) Deportation and Expulsion

The panel has no doubt that many Kosovar Albanians from the municipality of Orahovac/Rahovac were expelled from their homes by Serbian forces, which could be qualified as displacement or de-patriation within the meaning of Article 142 of the CCY. The court finds that this displacement occurred in two distinct phases. On one hand, police took them to the homes of Kosovar Albanians and forced them to depart within a short set time-frame through massive threats. Numerous witnesses from Orahovac/Rahovac offered reliable testimony regarding this practice. On the other hand, more extreme cases of expulsion occurred around Malisevo/Malisheve after the NATO bombing started.

Concerning the first mentioned phase of expulsions, the court could not establish that Kolasinac took any action in this regard directly or as an accomplice. Although there were some indications that previous disputes between Kolasinac and Kosovar-Albanian citizens were related to rapidly following expulsions, the panel is not convinced of the causal effect of the disputes.

Witness Nysret Mullabazi was interrogated by the investigating judge on this issue, but offered little testimony. The witness Gjembali Jaha seemed to make reference to the connection between words exchanged with Kolasinac and police actions. However, his testimony did not establish this connection. On one hand, Jaha testified that he had asked Kolasinac to support his efforts to leave Orahovac/Rahovac, and that Kolasinac had refused. However, if Kolasinac had intended to get rid of the Jaha family it is not logical that he would

have sent police to Jaha's house to expel the family, instead of assisting Jaha to depart voluntarily. Furthermore according to Jaha's statement given to this court on the 9 May 2001, the police arrived at the witness' house at a time before he had had the dispute with Kolasinac.

Finally it is established that hundreds of thousands of Kosovar Albanians were expelled or deported during that time and it has to be considered that it was daily work for Kolasinac to have discussions with Kosovar Albanians from his town. Taking all this into consideration, it cannot be proved that Kolasinac gave orders to the police regarding such a widespread practice of expulsion.

At the end of April 1999, a great number of villagers from the areas surrounding Orahovac/Rahovac, among them the witnesses Fejzulla Sokoli, Xhemile Krasniqi and Hajrulla Thaqi, left their homes and gathered in a valley. A group of Serbian police became aware of this group and forced them to leave. The Kosovar-Albanian villagers were brought to Malisevo/Malisheve and were forced to drop their property in the schoolyard and the yard of the hospital. Then the villagers were expelled to Albania.

The panel is unable to find that Kolasinac was involved in this maneuver of expulsion. There was no evidence that Kolasinac even knew about this activity before this big group of Kosovar Albanians was forced to leave for Albania. There is no more than the presumption that such a big action required some logistic preparations such as providing the ten buses the witness Hajrulla Thaqi reported. It is very likely that one in the position of Kolasinac would have been informed and asked to support the operation from the very beginning. However, in light of the presented evidence, the court cannot find that this was so for Kolasinac. With regard to the centralized structure of the military and police, described by the witness Muhedin Bekeri, the panel cannot exclude the possibility that these forces dealt with such matters themselves to keep secret their criminal actions.

(vii) Maltreatment

The indictment alleges that Kolasinac engaged in maltreatment by engaging in beatings and by appropriating the truck of a villager.

The court is not certain whether these acts, considered jointly, could be characterized as adequately grave to constitute a violation of Article 142 of the CCY. Regardless, the court was not able to find that these acts occurred. The only witness to testify regarding a beating by Kolasinac was Hahxi Gashi. Gashi stated that Kolasinac had beaten him on 4 September 1998. However, as discussed, the panel did not find this witness to be reliable generally. Further, Gashi's testimony regarding the alleged event does not match Kolasinac's appearance as an older, white-collar worker. The panel cannot establish the reported act as fact.

The panel also doubts that a criminal act was committed in connection with the truck. This truck was needed and used for communal purposes. Once the truck had been used it was returned to its owner. These acts constitute neither a war crime nor a lesser crime.

(viii) Forced Labor

The indictment claims that Kolasinac organized forced labor efforts to prune vineyards, dig trenches and clean the municipality of Malisevo/Malisheve following the deportation of Kosovar Albanians.

Under certain conditions organized involuntary work can be qualified as a war crime, for example if it is similar to slave-related practices.²⁹ Forced labor is prohibited under international laws such as the Forced Labor Convention from 28 June 1930 which entered into force on 1 May 1932 and was ratified by the SFRY on 4 March 1933. Article 2 of this Convention defines forced or compulsory labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily,” not including, for example, normal civic obligations, work or service in cases of emergency or minor communal services. Forced labor in this meaning can be classified as a crime against humanity, if it is widespread or systematic.

a) Vineyards

The witnesses Gjemajli Jaha, Qasim Qeska, Bejtullah Hoxha, Hasan Sokoli and Zyber Zeka stated that they had worked in vineyards at the beginning of May 1999 and that Kolasinac had organized this work. Generally, pruning work in Kosovo is done not later than March.

The witness and agricultural expert, Halil Sharku, stated that the decision to prune the vineyards later than normal had been proper because failing to prune at all would have had worse results for the vineyard. Further, Zyber Zeka testified that the workers had pruned vineyards belonging to both Serbs and Albanians. The testimony of these two witnesses established that these efforts, while organized by Kolasinac, were reasonable and had been approved of by the interested population. Therefore, the work done in the vineyards cannot be characterized as forced labor.

b) Trench digging

The indictment alleges Kolasinac organized the digging of trenches. No witnesses testified regarding such an order. Therefore, the court cannot find that the defendant took this action.

c) Sanitation work

The court will examine Kolasinac’s responsibility in relation to the events in Malisevo/Malisheve at the end of April and beginning of May 1999 from three perspectives.

First, Kolasinac could be responsible for contributing to the expulsion itself. However, it must be proved that Kolasinac was in explicit or tacit agreement with the police, who were the direct perpetrators, prior or during the commission of the crime to establish accomplice liability. The court cannot conclude that Kolasinac took any acts before or during the commitment of the expulsion. To the contrary, the panel is convinced, or at least cannot exclude the possibility, that Kolasinac was informed about the expulsions of Kosovar Albanians in Malisevo/Malisheve after the expulsions had been completely executed by the police and those expelled had already arrived in Albania. It was not possible for Kolasinac to act as an accomplice to the expulsions after they had been committed when he did not know of the expulsions beforehand.

Second, the work organized by Kolasinac in Malisevo/Malisheve could fulfill the criteria of forced labor. The accused Kolasinac reported to the panel on 29 May 2001, that he had been first informed about the property abandoned or confiscated in Malisevo/Malisheve on the 24 April 1999 by Radomir Simic who had explained to the accused it could become a big

²⁹ Bassiouni, “Crimes Against Humanity In International Criminal Law,” 2nd Edition, Kluwer Law International 1999.

problem. The panel has no doubts that Kolasinac is intelligent enough that he understood immediately the cause of this “problem” and that he was aware that the property of hundreds of Kosovar Albanians remained in the town when he summoned prominent citizens for a meeting on the 26 April 1999; Kolasinac attempted to convince the court he had not been informed in this regard. Kolasinac was able to organize appropriately the work efforts in question only because he had an idea of the approximate volume of work to be done. If he had not understood the situation, he would not have been able to decide how many workers and what kind of equipment was necessary as he did. The court found Kolasinac to be an experienced person who often took reasonable management decisions. Thus, it has to be taken as a fact that Kolasinac was informed about the circumstances of the disposals in Malisevo/Malishevo before the meeting of 26 April 1999 that he chaired.

Therefore, the main question is whether Kolasinac actually organized forced labor during this meeting. It is indisputable that thirty to fifty men went to Malisevo/Malisheve and worked there for at least two days on, at most, a partly volunteer basis. In keeping with Kolasinac’s careful approach, he did not order directly that these men work. Instead, prominent Kosovar Albanians selected the staff and organized the details of the work. Thus, the court had to establish if these prominent Albanians acted under threats to put pressure on their compatriots to perform the work. None of the witnesses testified that Kolasinac had stated that there would be negative consequences for the failure to assist in these efforts. Of course, implicit threats can exist in a dictatorial system. The mentioned prominent Kosovar Albanians obviously would have wanted to avoid any escalation of tension during that troubled time. They likely feared house searches by Serb police and other consequences that could have resulted had they refused to “cooperate.” Finally – at least in the stage of preparation – these individuals wanted to avoid the possible alternative that Serbs would deal exclusively with the belongings of the Kosovar Albanians. For all these reasons, the Kosovar Albanians agreed to organize the work in Malisevo/Malisheve.

It may appear contradictory that while the work can be understood as having been less than voluntary, it was not forced labor within the meaning of Article 142 of the CCY. In his closing arguments, the public prosecutor provided an apt example of forced labor: Forced labor is that which is done by emaciated human beings in striped uniforms. Contrary to this, the court heard testimony about agreements to work and the fact that food and even Raki were given to workers; the panel did also hear testimony that the workers were carefully guarded by armed forces. Taking also into consideration that some communal work obligations are excluded from the definition of forced labor, the panel doubts that the participating individuals were overburdened with slavery-like work as contemplated by Article 142 of CCY.

Third, Kolasinac could be found guilty under Article 142 of the CCY if it were found that he had contributed to confiscation, pillaging, illegal and self-willed destruction or stealing of property on a large scale. It is indisputable that a great number of Kosovar Albanians had to leave their belongings – on a large scale – at the schoolyard and hospital yard before they were expelled to Albania. Kolasinac, himself, stated that he saw around one-hundred tractors and other property. Knowing that, normally, Albanian families owned no more than one tractor, it can be said that at least one-hundred families were expelled.

The panel learned from eyewitnesses that property without value had been disposed of in a valley outside Malisevo/Malisheve. The court heard that valuable property had been looted by Serbs, although no witness was able to testify regarding the fate of the tractors. Further several items had been stored inside the hospital. Finally, the panel was not able to determine

when the looting began and if it terminated after the arrival of the thirty to fifty Kosovar-Albanian workers at Malisevo/Malisheve.

In dubio pro reo, the panel had to take as fact that looting was only committed before Kolasinac took action by organizing the work which was done by the Kosovar Albanians themselves. It cannot be established that Kolasinac, himself, influenced the distribution and disposal of the property left by the expelled Kosovar Albanians. He did not order that the property be destroyed or taken by particular individuals. Kolasinac's main intention was to remove the property from the public yards. He left it to the Kosovar-Albanian workers to determine how to remove the property. Kolasinac's contribution also cannot be qualified as confiscation of property because all the property of the expelled Kosovar Albanians had already been confiscated. This confiscation was completed when the property owners were forced to leave their belongings before departing for Albania. Kolasinac took action only after the confiscation was concluded. Property that has been confiscated from its original owner cannot then be confiscated from the same original owner a second time by subsequent action.

In sum, the court does not find adequate evidence to convict the defendant of forced labor under Article 142 of the CCY. However, the court does find that the testimony and evidence offered in relation to this charge proved that the defendant is guilty of giving help to the offender after the commission of the criminal act under Article 174 of the Criminal Law of Kosovo.

Article 174 of the Kosovo Criminal Code forbids the concealment of tools, traces or things in order to prevent the discovery by law enforcement authorities of the perpetrator of a criminal act that is prosecuted *ex officio*. Serb police had confiscated all the property of the Kosovar Albanians who had been forced to leave their possessions in Malisevo/Malisheve before being expelled to Albania. As already explained, by doing so, the Serb police committed a crime per Article 142 of the CCY that is prosecuted *ex officio*.

The panel is convinced that Kolasinac knew that the Serb police had committed these acts and that he intended to prevent the discovery of the police officers. Kolasinac testified to the panel on 7 May 2001, that he had had contact with members of the OSCE in September or October 1998 regarding missing Serbs and Albanians. The panel is convinced that Kolasinac was expecting later investigations by internationals concerning expulsion and mass murder. As discussed, the defendant had known about mass graves since April 1999. Kolasinac's concerns regarding possible investigations would have been aggravated greatly by NATO's bombardment. Kolasinac could have easily imagined that, at the conclusion of the bombardment, an international presence in Kosovo was very likely. Thus, Kolasinac used Kosovar Albanians as the tools by which he removed the traces of the crimes that had been committed by Serb police, as described by witness Myhedin Bekeri. He took this action in the hopes of hiding the Serb police from the international authorities who were likely to arrive later.

The court is within its discretion to convict Kolasinac on this charge, even though the legal qualification contained in Article 174 of the CCK did not appear in the indictment. Under Article 346(2) of the LCP, the court is not bound by the legal qualification given to a particular act by the prosecutor. Thus, the court may convict the defendant of a lesser crime, provided the court does not refer to any fact of significance that was not alleged in the indictment.³⁰

³⁰ See Lazarevic, COMMENTARY ON THE CRIMINAL LAW at Article 346.

The factual predicate for a conviction under Article 174 is contained in the indictment. The indictment alleges that Kolasinac was guilty of a war crime because he ordered expulsions, and committed or ordered illegal appropriation of property. In connection with the expulsions and property confiscation, the indictment states, on page twenty-seven, that the FRY Ministry of Defense ordered the creation of the civilian protection headquarters in the Orahovac/Rahovec municipality and that Kolasinac was appointed as the commander of the headquarters. The indictment further alleges that this headquarters was created for the purpose of “*covering the traces of the crimes* committed against the Albanian population.” The indictment also alleges that Kolasinac, as the commander of the headquarters, “organized forced labor for the sanitization of Malisevo, as well as of Rahovec...”

The court did not find adequate proof that Kolasinac ordered or knew of the deportations or illegal appropriation of property prior to their occurrence. Therefore, there was no basis for a war crime conviction under Article 142 of the CCY in relation to those acts. However, the court found that Kolasinac did order the cleaning of Malisevo/Malisheve for the purpose of covering the traces of crimes, as alleged in the indictment. This act, by itself, is not a war crime under Article 142 of the CCY. However, this act does constitute the lesser crime of giving help to the offender after the commission of the criminal act under Article 174 of the CCK.

Further, there is a question whether Kolasinac committed the crime of concealment under Article 154 of the CCK in connection to his activities in Malisevo/Malisheve. The facts necessary for a conviction under this article were not established, however. In particular, no evidence was presented regarding the ways in which property owned by particular individuals was treated.

(ix) Summary

In conclusion, the court did not find adequate evidence that Kolasinac committed acts proscribed by Article 142 of the CCY. Thus, no conviction under that Article is possible. The court does find the defendant guilty for concealing the traces of a crime under Article 174 of the Criminal Code of Kosovo.

The court finds, *ex officio*, that there were no doubts regarding the mental capacity or physical health of the defendant either at the time of the relevant acts or during the trial. Kolasinac did feel vaguely indisposed during the main trial on 3 May 2001 and 10 May 2001. However, the court arranged for immediate, simple and effective medical attention. Thus, there are no doubts regarding Kolasinac’s criminal responsibility.

B) Penal Sanctions to be Applied Against Kolasinac

Because the offender aided by Kolasinac committed a crime as per Article 142 of the CCY. Therefore, the range of punishment for Kolasinac is taken from Article 174(3) of the KCC.

The panel evaluated all aggravating and mitigating factors. The following mitigating factors were to the favor of the accused Kolasinac:

- he had never been convicted of a criminal offense in his life;
- he was integrated into his family as the head of household; and
- the circumstances of the armed conflict/war might have reduced his inhibition threshold.

The panel also has to consider the following aggravating factors:

- he had public responsibilities relating to his professional functions;
- that he concealed a grave crime, involving many victims and much property;
- the victims of the crime concealed by the defendant had difficulties in resettlement; and
- the defendant's act almost constituted the commission of a war crime itself.

Evaluating all mitigating and aggravating aspects, the panel was convinced that a median penalty of five years of imprisonment was appropriate.

V. Further Decisions

A. Detention

Under Article 353(1) of the LCP, detention for both defendants must continue.

B. Credit for Pretrial Custody

For both defendants, the period of pretrial custody is to be credited against the sentences imposed by the court per Article 351(6) of the LCP.

C. Costs of Criminal Proceeding

The panel believes that requiring either defendant to assume the costs of the proceeding would jeopardize the financial state of the accused and their families; the accused are both required to maintain their families. Therefore, the court relieves both defendants of the duty to reimburse the costs of the proceeding under Article 98(4) of the LCP.

D. Compensation of Injured Parties

Pursuant to Article 108(2) of the LCP, all injured parties are instructed that they may take civil action to pursue their claims under property law against both defendants.

Legal Remedy:

Under Article 359 of the LCP, an appeal may be filed against this verdict within fifteen days from the date when a copy of the verdict is delivered.

Done in English, an authorized language.

Recording Clerk
Fllanza Shporta

Presiding Judge
Dr. Ingo Risch

Dated 2 July 2001
At Prizren, Kosovo