

District Court of Pristina
P. No. P.23/08
3 March 2009

IN THE NAME OF THE PEOPLE

The District Court of Pristina, in a panel composed of EULEX Judge Tron Gundersen, as Presiding, Eulex Judge Andrea Cruciani and local professional Judge Zahide Gijonaj, as members, in the criminal case against the defendant

Gani Gashi, charged according the International Public Prosecutor's Indictment PP -KT 546-1/07, filed with this Court on 14 November 2007, with **War Crimes Against the Civilian Population**, in violation of the Socialist Federal Republic of Yugoslavia Criminal Code, Article 142, as read with the Geneva Convention Relative to the Protection of Civilians in Time of War (Geneva Convention IV), articles 3 and 147 and Protocol II to the Geneva Conventions, article 4.

After a main trial held in public on 3, 4, 10, 25, 26 February 2009 and 3 March 2009 in the presence of the accused, his defense lawyer Fazli Balaj, and the Eulex Public Prosecutor Jens Christensen, and after deliberation and voting held on 3 March 2009 announced the following enacting clause of the judgement (verdict):

VERDICT

The accused Gani Gashi, father's name, [REDACTED] born on [REDACTED], in Komoran village where he currently resides, married with 4 children, poor financial status, Kosovo Albanian, in detention on remand since 16 August 2007 until 16 November 2007, and in house arrest since 16 November 2007,

Is found

GUILTY

of:

- a. the willful murder of [REDACTED] O [REDACTED] a civilian person, on 12 July 1998, by shooting him in the back with a firearm while I [REDACTED] O [REDACTED] was sitting in a Fiat vehicle, on the road between Komoran/e village and Kishnareke/Kisna Reka village in Glogovac/Glogovac municipality, Kosovo, and as a result of this shooting [REDACTED] O [REDACTED] died;

- b. the willful attempted murder of Sh [REDACTED] O [REDACTED], a civilian person, on 12 July 1998, by shooting him in the head with a firearm while Sh [REDACTED] O [REDACTED] was sitting in a Fiat vehicle on the road between Komoran/e village and Kishnareke/Kisna Reka village in Glllogovc/Glogovac municipality, Kosovo
- c. the violation of bodily integrity and health of H [REDACTED] O [REDACTED] and S [REDACTED] O [REDACTED], civilian persons, on 12 July 1998, by shooting them with a firearm while H [REDACTED] O [REDACTED] and S [REDACTED] O [REDACTED] were sitting in a Fiat vehicle on the road between Komoran/e village and Kishnareke/Kisna Reka village in Glllogovc/Glogovac municipality, Kosovo

By these actions, Gani Gashi committed the criminal offence of War Crimes against civilian population, in violation of Socialist Federal Republic of Yugoslavia Criminal Code (SFRY CC) article 142, ref. article 19 as for item b, ref UNMIK Regulation 2000/59, as read with the rules of international law effective at the time of war, armed conflict, or occupation, namely the Geneva Convention Relative to the Protection of Civilians in the Time of War (hereafter Geneva Convention IV) Articles 3 and 147 and in violation of Protocol II to the Geneva Conventions, Article 4.

Therefore, the accused Gani Gashi,

pursuant to article 38 PCCK is

SENTENCED

to imprisonment of **17 (seventeen) years.**

PROPERTY CLAIMS

No property claims have been put forward.

COST

The defendant Gani Gashi must reimburse all the costs of the criminal proceedings.

Since the data of the amount of the costs is lacking a separate ruling on the amount of the costs shall be rendered.

REASONING

1. Procedural history

The indictment has been filed on 14 November 2007 and confirmed 18 January 2008 by international Confirmation Judge Timothy Baland. The defendant has been in detention on remand since 16 August 2007 until 16 November 2007 replaced by house detention as from 16 November 2007 until the conclusion of main trial .

2. Summary of the evidence presented

The Court heard the testimony of the following witnesses/injured parties: A [redacted] O [redacted] (3 February), F [redacted] C [redacted] (10 February), H [redacted] O [redacted] (3 February), B [redacted] O [redacted] (10 February), S [redacted] C [redacted] (3 March), A [redacted] R [redacted] (4 February), Xh [redacted] N [redacted] (10 February), I [redacted] B [redacted] (10 February), H [redacted] H [redacted] (10 February), T [redacted] G [redacted] (25 February), I [redacted] B [redacted] (25 February), M [redacted] V [redacted] (26 February), F [redacted] L [redacted] (26 February), and the defendant himself (3 March). All except Mr. V [redacted] have been called by the Prosecution. Mr. V [redacted] has been called as a defense witness during the main trial. The Trial Panel considered also and attached to the minutes the following documents which was presented

- a. Exhibit 1 autopsy report and minutes of extraordinary investigative hearing of S [redacted] C [redacted]
- b. Exhibit 2 criminal report explaining Latin expressions used by doctor T [redacted] G [redacted] in his report (folder 21)
- c. Exhibit 3 medical report of Sh [redacted] O [redacted] (folder 21)
- d. Exhibit 4 medical report dated 12.08.00 regarding S [redacted] O [redacted] (folder 22)
- e. Exhibit 5 death certificate I [redacted] O [redacted] (folder 28)
- f. Exhibit 6 seat's photos (folder 24) and report dated 01.11.07 of Police officer I. K [redacted] re examination of passenger seat (folder 25)
- g. Exhibit 7 photo of the victim's cloths (folder 27)
- h. Exhibit 8 aerial photo of the crime scene (folder 29)
- i. Exhibit 9 report on the examination of the headrest dated 25.02.09 by police officer F [redacted] L [redacted]
- j. Exhibit 10 metal remains from headrest, 2 plastic bags
- k. Exhibit 11 headrest

A [redacted] O [redacted]

A [redacted] O [redacted] testified in front of the Court panel on February 3. He told that after the war started, the KLA headquarter in the village of Komoran where his family lived, ordered the villagers to leave their home since their lives were in danger. They had to go to the village of Kishnareka where he also had family.

Komorane No 1 was under the control of the Serb forces at the moment when the incident happened. The witness's village was under KLA control at the time of the incident. The Serb forces were located in the centre of Komorane and also placed in Quka, Zabelli Nalt, which was called Komorane 3. Kishnareka and Nekofci were also under KLA control.

On 12 July 1998, sometime in the morning when the Serb forces were not able to notice the villagers from the distance they were positioned, O [redacted] family drove by car to their home in Komorane to pick up some personal things. The car was a Fiat Croma metallic grey in color. A [redacted] O [redacted] was driving, the father I [redacted] and Sh [redacted] the nephew, was in the front. The mother H [redacted], brothers F [redacted] B [redacted] S [redacted] and A [redacted] 6-year old son Sh [redacted] in the back of the car. There were some other families in the village and also I [redacted] B [redacted] with some of witness' cousins R [redacted] and A [redacted] O [redacted]

I [redacted] B [redacted] at that time, was in charge of the village. The KLA Headquarters informed I [redacted] that the villagers who had returned to their houses should be informed that they had to go and dig trenches in the night; thus I [redacted] came at the witness' house, spoke with I [redacted] who said that two sons would do the digging of trenches. O [redacted] packed the stuff in the vehicle and some time between 8.10 and 8.30, this was the time when the Serbs would not be able to see them from their position, would drive back. It had not got dark and they had no lights turned on the car. On the way back, A [redacted] was driving, I [redacted] and Sh [redacted] were in the front, Sh [redacted] sitting on I [redacted] lap. All the other occupants of the car were seated in the back of the car: F [redacted] behind the driver, to the left side and at the door, and next to F [redacted] was sitting B [redacted]. Then S [redacted] and the mother H [redacted] to the very right at the door with Sh [redacted] on her laps.

Approximately 2 to 300 meters later there is a small creek and a kind of water fountain. It is a hidden position with big trees. The car's speed was 30-40 km/hour. Once they reached the creek they saw two persons and the first one was running. They were dressed in KLA military uniforms. The person running was Gani Gashi. He had an automatic weapon and he made a gesture with his hand indicating that they had to stop. A [redacted] thought that he was alerting them of something, may be of Serb forces, so he immediately braked and the engine shut off. The witness opened the window at that time and recognized Gani Gashi and Xh [redacted] N [redacted]. Xh [redacted] was 5 to 6 meters maybe 10 meters behind. They were both wearing KLA uniforms and had AK-47 rifles. Gani had crossed the creek.

A [redacted] O [redacted] opened the window and said: "Good evening neighbor." He replied: "Don't say 'good evening neighbor'. Who is in your car?" At that time, he placed his rifle to the witness temple of his head and he asked: "Where are you going?" A [redacted] told him: "You know that we are staying with my aunt's sons in Kishnareke." He asked: "Where were you?" A [redacted] told him that they had been at home to pick up some stuff. Gani ordered Xh [redacted] N [redacted] to call Commander M [redacted]. Gani said that the Commander had said that they could not go in that direction. Gani asked the witness: "Who is in the car with you?"

even though he could see very clearly who was in the car. It was not so dark as not to be able to see. A [redacted] replied that in the car are he and his father, mother, two children and his brothers. Xh [redacted] N [redacted] left to go and call the Commander. Once Xh [redacted] N [redacted] left, Gani Gashi used threatening words and said: "Oh, I have been looking for all of you together like this for a long time." Then he went behind the car and started cursing at the witness and his family. He cocked his weapon and he started firing from his position behind the vehicle. All the occupants of the car turned their heads and that is why S [redacted] survived. There were two or three shots fired. A [redacted] father I [redacted] was shot with two bullets. His mother was wounded on her lip, brother Selman was shot in his shoulder and the 6-year old Sh [redacted] was shot in his head as he turned.

After the shots, I [redacted] fell at A [redacted] lap. The brothers S [redacted] B [redacted] and F [redacted] tried to give their help because A [redacted] was shouting: "Our father is killed". S [redacted] got out of the car first from the right side of the car, shouting: "he killed also Sh [redacted] O [redacted]?" Sh [redacted] was also at the feet of I [redacted]. Xh [redacted] N [redacted] came back immediately and he forced Gani Gashi to go away. He was saying to his colleague: "Let me kill them all because apparently I did not kill them all. It is a long time that I am waiting for this."

When Xh [redacted] N [redacted] arrived at the incident scene, the witness was in the car trying to help his father and Sh [redacted]

As a consequence of the gun shots, the whole of the rear window was broken; there were also some holes especially at the front seat where I [redacted] was sitting.

The witness further stated that Gani Gashi could not kill all of them because the weapon got blocked. He knew it because the rear window was broken and could hear every noise very clearly. Gani Gashi was cursing and mentioning that the weapon blocked.

Immediately, Xh [redacted] N [redacted] arrived at the crime scene and took Gani away. Then M [redacted] the commander arrived. He said some provocative words. After being confronted with the testimony of Xh [redacted] N [redacted] in court the witness stated that he might have been wrong about who grabbed Gani and took him away. It might have been M [redacted] that stopped Gani Gashi. M [redacted] then sat at the front seat of the car and went with the victims to get medical help from KLA doctor I [redacted] B [redacted] H [redacted] and A [redacted] son were taken out of the car because there was no room left, so they left them at the crime scene. Gani O [redacted] a cousin, helped H [redacted]

At a later moment in his testimony in court, after having been confronted with the witness N [redacted] A [redacted] stated that Gani Gashi said to them: "Turn on the engine and go away!". Then Gani Gashi shot. This crucial element in the event was not mentioned earlier in his testimony in court before the panel.

The car arrived at the house of doctor's uncle A [REDACTED] Sh [REDACTED]. The doctor came out and the people who were in the house also came out. They took Sh [REDACTED] as he was shouting and crying, bleeding heavily. Other people took I [REDACTED] inside to be examined by the doctor. The doctor said that I [REDACTED] is dead, and then he turned to help Sh [REDACTED].

No weapons were in C [REDACTED]'s car at the moment on the critical day, according to the witness.

The motive behind the shooting is unknown to the witness as they never had any problems. However, before this occurred Gani Gashi had a hostile look towards the family of O [REDACTED]. It started in 1997 when the C [REDACTED] had a problem with another family. Gani was angry with the O [REDACTED] for having a fight with that family of H [REDACTED] N [REDACTED]. M [REDACTED] is nephew of N [REDACTED].

The witness stated also that there have been people to come and see the O [REDACTED] to try to reconcile but as far as he knows they were never sent by Gani Gashi but came on their own behalf.

He finally explained that the reason why he did not report the event to the police until 2006 was that he waited for the military commanders to take action against Gashi. The family of Gani Gashi had threatened him and the family of the witness.

H [REDACTED] O [REDACTED]

The witness corroborated the testimony of A [REDACTED] O [REDACTED], giving the same information as A [REDACTED] did, therefore the Panel does not find it necessary to summarize further her testimony. She heard three shots and a bullet hit her lip. She lost hearing on one ear.

A [REDACTED] R [REDACTED]

A [REDACTED] R [REDACTED] is a forensic anthropologist, now EULEX co-head of Office of Missing Persons. He was present at the autopsy performed on 31st September 2007. With the help of photos and a skeleton model, the witness explained to the Panel on 4 February (p 4-11 of the minutes), which of the bones affected by injuries sustained around the time of death. The injuries they determined were located through the left side of the chest. An area was fractured by a high velocity impact.

From the pictures (8 and 9) on the bones recovered for the autopsy there are close up photos that corresponds to an impact of a high velocity projectile, characteristic of a gunshot wound. In photo 17 there are parts of the rib bone missing. This is again the result of a high velocity impact caused by a high velocity projectile. It is exactly the area on the left hand side, compatible with the damage caused by a high velocity impact, most likely a gunshot wound. At the autopsy they were able to determine the point of entry of the gun shots, which was from behind. This was possible because of the way bone reacts to pressure such as high velocity impact defines how that bone will break. In the affected area, the bones are curved and when point pressure is applied to this particular area it will mean there is more damage

on the exiting than the entry point. So in terms of the entry, they can approximate the trajectory by placing the trajectory of the projectile between the two ribs that were affected. At the chest bone there is a fracture as well. This fracture was caused by the same event, the same trajectory, meaning that the same projectile exited approximately somewhere outside the bones. It was the release of the kinetic energy that shattered the bone. The forensic suspect the bullet went through a soft area of cartilage, a non-bone area. So indeed they determine this was a 'through-and-through' perforating wound which entered through the back, at a slight angle to the left, exiting to the right side just above center¹.

The point this bullet entered, could be said it was the neck or the chest, close to the vessels related to the throat. There is a chance that there was more than one bullet perhaps.

The witness stated that they had collected all the bones, only a few digits from the hand and feet were missing.

The autopsy conclusions are that the individual was hit by at least one projectile that was determined. That was not to the exclusion of any others.

Also the facial area has been affected by some sort of injury that disintegrated some portion of the face. It also affected part of the lower jaw; so there was damage to the face and damage to the mandible. However the forensic was unable to determine what kind of force caused this injury. It is worth saying that the bones of the face are rather thin and delicate, so a relatively minor impact on that area may cause severe fractures. These injuries had the character of injuries occurring around the time of death. It could have been caused by a move or fall.

The seat and the clothes, namely a shirt and jacket, had very clear indications of an entry which are characteristic of entries of projectiles. They were unable to see similar damage on the exit, but bearing in mind the time of the year, one cannot exclude the possibility that the shirt was partly open.

Analyzing the chair of the car, putting the skeleton model in the seat chair, the witness pointed to a perforation with burnt the fabric which appears to be an entry. The exit is also identified. The witness did examine the chair in terms of ballistics, identifying an exit point. This is very useful, as it gives a trajectory as almost identical to that in the bones. Regarding the skull fractures, the witness was unable to determine the force, but in a general sense and given that the facial bones are so delicate, an impact from a projectile would have caused much more damage than it was shown.

¹ See A [REDACTED] F [REDACTED] testimony of 4 February 2009, page 6 of the English minutes of the trial

The projectile hit the back of the neck, broke two small bones and the rib, and exited in between two ribs. The projectile velocity lessened, kinetic energy dissipates as it hits the bones.

Xh [REDACTED] N [REDACTED]

Xh [REDACTED] N [REDACTED] testified in front of the Court. He said that during the war he was a KLA soldier, on duty on the critical day, performing checkpoint activities. KLA soldiers were told to protect the workers who were opening positions for the army, on the streets at the neighborhood where the C [REDACTED] lived.

When he started his duties, it was completely dark; he was on duty with H [REDACTED] G [REDACTED], who left after a while, being replaced by Gani Gashi. At a certain moment, they heard the noise of a car approaching their check point, and then they saw a car coming, with the lights off, without knowing who the occupants of the car might be. In very short time, both of them decided to stop the car and see who is occupying that car. Thus, they shouted to the car to stop and the car stopped in front of the witness. From his position, Mr. N [REDACTED] saw A [REDACTED] O [REDACTED] opening the window. During these moments, Gani Gashi was on the right hand side of the witness.

A [REDACTED] O [REDACTED] asked: "What is going on brother?". The witness then walked backwards 4-5 meters. Gani Gashi had a word with A [REDACTED] and at that particular time, Gani Gashi ordered to the witness to go and notify the Commander who was with the workers, asking if this car was to be let to continue its journey or not. The witness did not hear what A [REDACTED] and Gani were talking about. Gani was close to the car, near the window and they talked together. Gani had a gun, an automatic weapon, when he was standing at the window. After approx. 20 meters of walking, the witness heard the noise of the wheels of the car which he presumed was the vehicle leaving the scene quickly. Then he heard a gunshot from an automatic weapon and only one bullet being fired. Then the car came up near the place where the witness was. It came so close to him that the wheels touched his leg. The witness however continued up the hill. After the car stopped, he heard the door of the car opened. A [REDACTED] got out of the car and after the door was opened, the lights inside the vehicle came on. A [REDACTED] shouted: "Gani killed us." Then, just after this, he heard another shot. It was kind of a softer shot, it was a revolver shot. The witness then arrived at the place where the workers were, but M [REDACTED] was not there. Mr. N [REDACTED] got downhill and approximately 4 to 5 meters from the car, he noticed Commander M [REDACTED] coming from the place where the workers were, up the hill, to where the car was. He noticed M [REDACTED] going there in a hurry and trying and managing to put A [REDACTED] in the car. The witness noticed that members of the family started getting out of the car. He saw A [REDACTED] mother whom he knows very well and there were other people. Even though it was very dark, the inside car lights were on, so the witness even noticed the children in the car. After M [REDACTED] managed to put A [REDACTED] in the car, the car went up the hill quickly, with lights on. They took the injured person to the hospital.

When the first shot was heard, the witness knew that there was no one else who shot apart from Gani Gashi .

He stated that he did not at all try to stop or grab Gashi from shooting.

Later, after this incident, the witness met the both of them ,M [REDACTED] V [REDACTED] and Gani Gashi, and Gani Gashi told to Mr. N [REDACTED] to say that the vehicle did not stop thus they fired at the vehicle. At that moment, M [REDACTED] ordered to the witness: "You have to say that the vehicle did not stop and that the army killed this man."

Mr. N [REDACTED] had no knowledge if Gani Gashi had another weapon apart from the automatic one. But he did not see if A [REDACTED] was in possession of a weapon because it was dark.

After this incident, M [REDACTED] informed the witness that I [REDACTED] had died. He returned from the village, met all of them at the E [REDACTED] neighbourhood and he said that I [REDACTED] was already dead. At that exact moment the Commander took away from Gani his personal weapon. Then Gani was taken to Headquarters somewhere. Two or three days later, two policemen from the KLA unit called "Dove" came. They were military police. They took Mr. N [REDACTED] and brought him to the main Headquarters to give a statement as to how the incident took place. Mr. N [REDACTED] gave a written statement and then orally explained how the incident took place.

Mr. N [REDACTED] told that the only reason Gani Gashi shot at A [REDACTED] was because he fled without being given the order of the soldiers.

He said to the panel that both the O [REDACTED] and Gashi family have tried to influence him in what to say.

F [REDACTED] O [REDACTED]

F [REDACTED] O [REDACTED] testimony on February 10 corroborated the testimony given by his brother A [REDACTED], giving the same sequence of the events, as already explained by A [REDACTED] O [REDACTED]. He just mentioned that on the spot where the soldiers, the checkpoint had never existed; soldiers were never found there. That was the first time they saw KLA at that spot. He stated that he sat in the car on the left side, next to the door and could see what happened.

B [REDACTED] O [REDACTED]

The witness gave to the Panel the same sequence of events as already known by the Panel from the testimony of the other brothers. He also mentioned that bearing in mind the circumstance and the noise, he heard two to three shots and there was lots of smoke inside the vehicle.

B

The witness is from Komoran and lived there before. He recalls that on the critical day, a KLA official ordered him to notify the people about the digging of the trenches. Everyone in this village moved out, but some had returned from time to time to pick up food, see to the cattle and so on. He stated that when you do not have food, you would risk life to get food. A lot of people declared themselves volunteers but it was his duty to inform others. The digging of these trenches was organized by all structures from the KLA, political and non-political structures. The witness's village is divided into three parts Komoran 1, 2 and 3, and he visited only his neighborhood which consisted of 30 houses. He spoke with the Obrijas', one of the sons. They said they would help in digging but after they would finish their job in the field as far as the witness remembers. The trenches were protected by KLA soldiers; Gani Gashi and X N were in charge of protection that evening. M V was also present. On that evening, the witness heard shots. He is not sure if he heard more than one, but for sure he heard one shot.

T G

Dr. G is a surgeon doctor (neurologist) working in Pristina. He recalled that on 15 July 1998 he examined a child at the Rezonanca clinic. After the x-rays were conducted, he noticed a foreign object in the head of the patient. After the examination, the patient underwent a surgery. When the doctor opened the skull, he noticed that the foreign object stopped in the bone, thus not penetrating into the brain. It had damaged the bone by putting pressure but it did not damage the brain because it had slow velocity and the penetration was in tangential form rather than direct. The bullet penetrated the bone and it got stuck under the bone without damaging the brain. He remembered that the bullet was in the left side of the skull.

Unfortunately, the doctor was not able to see this patient after this intervention, but from what he saw at the time of the surgery he would conclude that the patient would be able to function properly. The bullet did not have high speed before it hit the child, most probably because the bullet lost the speed before it hit the child.

The witness admitted that he had limited knowledge about guns and weapons; however he said that the bullet found was of higher caliber, not from a pistol. They do not have the bullet, since they had to leave the clinic.

H H

The witness told the panel that he had been told that I O had been killed. He was approached by Gani Gashi with his brothers many years later. He wanted the witness and his father to go to A to prevent A to report the case to the police.

I ■■■ B ■■■

I ■■■ B ■■■ is a doctor. In 1998 the witness had his clinic in Kishnareke. The witness recalled that sometime in July 1998, I ■■■ O ■■■ had been brought to him, in the house of his uncle, where he was staying at that time. When I ■■■ O ■■■ had been brought, it was early evening. The doctor examined him; looking for the right signs, the patient had irises quite large, they did not react towards light, he did not have pulse, and he didn't have any blood pressure. The doctor started to make reanimation without any result. As far as he remembers the patient had an injury around his neck/throat. The witness did not notice any other injury on the body of he deceased; even though he unbuttoned the upper two buttons of his shirt, when trying to give the first aid. However, he only examined the front side of his throat. He did not examine if there were any other injuries. From the examination he performed on I ■■■ O ■■■s body, the doctor could conclude that the death has been caused by a fire weapon.

The witness also saw the child, S ■■■ C ■■■. He noticed that the child was vomiting and had injury in his skull; perhaps on the right side of the skull. The doctor just washed the wound out, gave the child the first aid, and then directing the family to the KLA hospital in Likovc for further treatment.

At the critical time, the doctor examined the wife of I ■■■ O ■■■. She was bleeding from her mouth but most probably the bleeding has been caused by the window blast. I ■■■ B ■■■ told that I ■■■ O ■■■ death was caused by a fire weapon.

M ■■■ V ■■■ (defense witness)

Mr. V ■■■ was the commander of a unit in Komoran village; responsible for Zone 3, called Aktivi 3. At or around June 1998, the Komoran village has been evacuated due to the close presence of the Serbian forces. In June and July 1998 there were fights everywhere. The serbs were in Komoran also. KLA had 40-60 soldiers and weapons at that time. Two to three days before the incident took place they started digging the trenches. The people digging the trenches were civilians; the soldiers' task was to protect the civilians.

On the critical day, there were plans to dig out trenches. The people from the neighborhood were invited at 20:00 to 21:00 hrs to dig trenches. KLA commander appointed two soldiers who were going to protect the civilians because the area was a dangerous one. The witness said that he had no knowledge that people from that neighborhood would be there. The guards were told to stop all the movements and report them to the commander and if necessary, they would let people pass by.

After a while, a shot was heard, and he ran at the place where he left the guards. It was dark and he could not see anything. When he arrived close to 20 meters, the car's door was

opened, the inside light on, therefore he saw the people in the car, and realized there were civilians. Some of them were already out of car, other inside the car. One of the persons who was getting out, fired one shot. The witness knew those persons; it was A [REDACTED] O [REDACTED] with his brothers.

The second shot was fired from A [REDACTED] O [REDACTED] with a revolver. However, the witness added that it was dark so he could not really distinguish a pistol from a revolver. He has seen the weapon in the A [REDACTED] hand because he fired it. He went in between A [REDACTED] and Gashi and stopped the shooting.

When Mr. V [REDACTED] went to the crime scene, approx 15 meters from the car, the vehicle had stopped up the hill, with the lights off, and people in the car were getting out of the car, from the left door. A [REDACTED] O [REDACTED] and the defendant were not more than 15 meters from me. The second shot was heard after the witness arrived there, thus after having seen A [REDACTED] and the defendant. The distance between Gani Gashi and the car was ca 20 to 25 meters, on the left back side. The witness went in between Gani and A [REDACTED] and tried to get the gun. But he did not get the gun and he went on giving aid to the injured.

At that moment the witness ordered Gani to leave and begged A [REDACTED] O [REDACTED] and his brothers to put them back in his car, leave and give the first aid to the injured people. As a result of this injury, the old man had died and the child next to the old man was injured.

The witness accompanied the injured persons to the improvised hospital in Kisnareka and came back to the crime scene, looking for Gani Gashi, who was found in company of I [REDACTED] B [REDACTED] Gani Gashi was crying, and I [REDACTED] was trying to calm him down. Then the witness asked Gani Gashi: 'how did you come to this?' He said: 'The car did not stop and while attempting to stop, I accidently triggered the gun.'

The witness did not try to grab the weapon from Gashi at the incident, but later in the day he personally disarmed Gani Gashi and took him in the car, drove towards the Commander, F [REDACTED] Sh [REDACTED], at the Head Quarters of Negrov. F [REDACTED] Sh [REDACTED] took over the weapons and Gani Gashi, in their offices.

The witness did not know that there were civilians in Komoran on that day. Usually, every time a person would want to go back to their house, they would have to contact KLA first.

The duties of KLA soldiers at that check point were to stop any movement on that road and one of the two were tasked to come to the commander and inform for any possible movement. The instructions were given orally. The persons at this check point had done professional military service and knew what to do when a car was stopped. So, the procedure was that the person in charge of the check point stands and makes the stop sign, not verbally. This person gets closer to the car and asks questions such as who they are and where they are heading to. After the verification, they ask the chain of command if the car can continue with

travel or not. The stop sign and the warning sign is repeated 2 to 3 times, next step is to shoot in the air, and the last step, if the car does not stop, is what happened in this case, he told.

He stated however, that they should never shoot at unarmed civilians , like in this case.

The witness stated that the families of Gashi and O [REDACTED] had never had any disagreement and he thinks that the accident was unintentional.

F [REDACTED] I [REDACTED]

The witness is a police officer of KPS at the Forensic Ballistic Unit. He performed the examination of the passenger seat and the headrest and came before the panel to testify about the results of this examination. Some X-ray was performed on the said headrest, which revealed presence of small metal particles.

Furthermore, in the headrest of the car, the expert had noticed 2 holes. However, the objects which made these wholes did not penetrate further.

In the places E1 and E2, the expert found pieces of metal. These were very small particles. The witness took them out, took pictures and put them in plastic bags for possible further exam. It was surely metal, probably lead, taken into consideration the color of these fragments and also their smoothness. However, he couldn't specify if they were a component part of a bullet because they carried no such characteristics that would allow him to examine them.

The expert noticed 3 holes in this headrest. In the first hole, meaning the hole marked E1, he found a metal particle or fragment which surely was lead. But it should be further examined to confirm this. The second hole was a slightly penetrating hole, but the experts are not sure if this penetrated it, because at first before they cut it he inserted a metal stick in order to see if there was an exit point. This metal stick had a diameter of 7 mm. It did not penetrate it. When he cut it, splitting the two parts, it couldn't be said if this was a penetrating hole. The third hole 3 is the scratch. The examiners may say that the damages have occurred as a result of objects of high speed and also objects that have considerable energy. They may be caused by a projectile, but he was not sure. The wholes E2 and E3 are not linked, since there is a distance between them. It could also be possible that the metal remains came from a sports weapon.

From the conclusion of his report it is stated:

"1. Delivered evidence : One (1) front passenger 's chair, right side, consisted of three parts, sitting part, backrest part with textile cover, brown in color and the chair part for the head support of rubber material or pressed sponge, black in color which is object of examination. During the physical examination of this part, respectfully the chair part for the head support of passenger side , the following was noticed:

- A. *One (1) hole of upper part of the left side of said chair part for the head support recorded as E#1. One (1) piece or fragment of metal dark grey in color that probably is (Pb) lead metal. But, it has to be examined with chemical methods.*
- B. *One (1) penetrating gap or opening on the left lower of head support part of the recorded chair with E#2 in which one were found four (4) pieces or fragments of metal dark grey in color that probably is Pb lead metal. But, it has to be examined with chemical methods.*
- C. *One scratch or a cut part in the middle of the lower head support part of the chair recorded as E#3 on which one we did not find any metal piece or fragment.*

These damages , holes or openings in the head support of the passengers chair were likely caused by metal objects with a considerable or great speed or power. "

S [REDACTED] O [REDACTED]

S [REDACTED] O [REDACTED] clarified that during the incident he had been wounded at the back of his right shoulder. He explained that he was seated in the back seat, turning to his left side in order to watch the defendant going at the back of the car. He has been hit by a bullet, which has been confirmed during the surgery he undergone in Italy in 2000. The witness further stated that the bullet did not penetrate, just entered the muscle. He had no injury at the front side of the shoulder. The bullet kind of scratched , cut through, but not penetrated. After the surgery he has undergone he saw particles of bullets which had been extracted from his shoulder.

The witness recalled that during the shooting he heard maybe 2-3 or 4 shots, it was difficult to say.

Gani Gashi

Gani Gashi told that he was born in Komoran and that he had always been living there.

On 16 June 1998, he became a KLA soldier, and he went to Albania to get the weapons. When he left Komoran for Albania, there were 7 soldiers in his unit and when he returned there were 20. M [REDACTED] V [REDACTED] was a commander and head of the unit of that place. They started to become an equipped unit and were implementing ideas such as training, digging trenches; the orders were coming from the Unit Commander, M [REDACTED] V [REDACTED]

On 12 July 1998, the defendant had been asked to guard the check point together twith Xh [REDACTED] N [REDACTED] The Komoran police checkpoint was well known. They were guarding around 30 young men digging trenches in order to stop the progression of the Serbian forces and protect the civilian population. It was certainly around 10 o'clock because there was no way the trenches could have been done during day time. The whole area in Quka was under

KLA control. Komoran 1 was empty but full of paramilitary troops. In Quka army forces gathered and would control all these other places. Komoran 2 also and Komoran 3 namely the neighborhoods of O [REDACTED] and B [REDACTED] were emptied before KLA started digging the trenches.

The persons who were evacuated from these villages would come back to pick up their stuff only with the escort from KLA. It was completely illegal to go to those places without permission of the Commander. If the permission was given, then the soldiers in charge to guard the respective location would be informed about the name of the family allowed to come back.

In the night of the incident, the place was quite dark, there is a creek and there are trees and vegetation. The Unit Commander ordered them to pay attention and be careful. The defendant and Xh [REDACTED] N [REDACTED] sat against the wall of a house and some 20 or 30 minutes later, they heard a car heading towards them on an unpaved road. The weapons, semi-automatic rifles AK-47, were ready in case of emergency. They understood each other in a few words.

The soldiers quickly shouted at these persons and asked them to stop. Usually in a war they would not walk one after the other but stay parallel. Xh [REDACTED] N [REDACTED] was in front some 4 meters ahead and it took them a few moments before they could get on the road and were screaming to stop. The car had no lights on and there was no sign. The driver was not driving very fast but kept the speed and past some 7 or 8 meters ahead. The defendant was 5 or 6 meters behind Xh [REDACTED] N [REDACTED] and ordered him to check the car and not to let them go before the Unit Commander came to verify the situation. In that moment, the defendant was standing 10 meters away; could not hear any conversation that they might have had. Xh [REDACTED] N [REDACTED] executed the order and ran to the Commander. In that moment, he heard the car accelerating and the first thought was to shoot in the air but unfortunately the road in that place is in bad condition and it goes up. Had the road been flat, he could have shot in the air. The car was going up; he was shooting and the bullet might have hit the car. When the doors of the car opened, it was just then, only then, that he saw it was a family but still did not know he had killed anyone. In that moment from the start on the road, he went 3 or 4 meters away in the field and once in the field, he said: "Why didn't you stop in time?" The defendant did not insult them. He just said: "You will be responsible before God. God will punish you." A [REDACTED] got out of the car and immediately fired a shot towards the defendant but his bullet did not hit him. Two other brothers of A [REDACTED] S [REDACTED] and another one, ran towards the defendant. He had the weapon and the belt of the weapon was around his belly. The two brothers of Agim grabbed the barrel of his weapon and tried to take it away from him. Before the commander V [REDACTED] arrived to the scene, the defendant saw A [REDACTED] shooting at him the second time, but he was not hit. M [REDACTED] V [REDACTED] managed to get A [REDACTED] back in the car and his brothers left and got in the car. Later on, M [REDACTED] V [REDACTED] came back and informed the defendant: "Gani, you should not be too sad that I [REDACTED] has left us." Gashi was feeling bad

hearing that also the son had been wounded. The defendant's reaction was: "Is it a serious wound?" The commander said it was just a scratch to the head but he felt bad.

Gani Gashi indicated that he held the gun upwards, not flat when he shot the gun. He shot only once. The shots towards him were three. When the gun went off, the defendant must have been 10 meters away. He and Xh [REDACTED] N [REDACTED] were four meters between each other. When the shot went off, Gashi was behind the car on the left side.

He recognized A [REDACTED] only when the lights of car went on. He denied having talked with A [REDACTED] before the shooting. It was absolutely not true what Xh [REDACTED] N [REDACTED] told the panel that the defendant went to the window of the car and talked with A [REDACTED]

After the incident, Gashi's commanders kept him in Negrovc for a month and then the offensive started and soldiers were needed everywhere, so he had been asked to go to the front.

Gani Gashi told the panel he was sorry for what happened and that it was an accident.

He had never had any disputes with A [REDACTED] or his family before.

3. Factual findings and assessment of the evidence

a) Factual findings

Based on the evidence presented during the trial sessions, of which the details of the assessment of evidence is referred to below, the panel has established beyond reasonable doubt that on 12 July 1998, Gani Gashi was guarding a checkpoint on the road which goes from Komoran village to Kishnareka. He was there together with Xh [REDACTED] N [REDACTED], both of them KLA soldiers, both of them appointed there that particular evening by their immediate Commander, M [REDACTED] V [REDACTED] to protect civilians from the Serbs while civilians were digging trenches. They were both wearing uniforms.

At or around 20.30 family O [REDACTED] car, a Fiat Croma, approached the check-point. Inside the car was the O [REDACTED] family with 8 members; A [REDACTED] O [REDACTED], the driver, and next to him was sitting I [REDACTED] C [REDACTED] with a child Sh [REDACTED] 6 years old, on his laps. Behind A [REDACTED] in the back seat, was sitting F [REDACTED] next to the left door. Next to F [REDACTED] were sitting B [REDACTED], then S [REDACTED] and at the right door the mother H [REDACTED] with the other child 6 year old Sh [REDACTED] on her laps. Gani Gashi waived them to stop and the car stopped. A [REDACTED] O [REDACTED] the driver, rolled down the window, and greeted. Gani Gashi saw the occupants of the car and sent Xh [REDACTED] N [REDACTED] to inform the Commander about the passage of this car. Gani Gashi had a conversation with A [REDACTED] O [REDACTED]. Gashi was carrying a AK 47 automatic weapon pointing at A [REDACTED] O [REDACTED]. Gashi then moved so he was standing at the back left side of the car, some meters away from the car. The car then set off, for reasons that have not been established. Gani Gashi shot with his

gun and the bullet went through the back, rear window of the car. The window broke and the bullet scratched the back of the right shoulder of S [REDACTED], since he was turning slightly to the left to see what was going on. Most probably some fragments of glass from the window hit the mother and she got a wound in her lip. The bullet then entered the very upper part of the passenger seat of I [REDACTED] O [REDACTED], exited a bit lower on the other side of the seat and entered the chest (shoulder/neck) of I [REDACTED] O [REDACTED], then exited through his front part of chest a bit lower before it hit Sh [REDACTED] head on the left side. He was sitting on I [REDACTED] laps. The bullet entered into Sh [REDACTED] skull and got stuck under the bones.

There is no evidence - which has been established beyond reasonable doubt - that there were more than one bullet or one shot. Witnesses have testified that there were more than one shot. The Panel cannot exclude this, and it might have also been shots into the air. Metal fragments in the headrest of the Fiat car is no complete evidence that more than one bullet was fired. It could be fragments of another projectile or of the projectile that hit I [REDACTED] O [REDACTED], however this cannot be established without reasonable doubt.

The expert witness police officer of Forensic Ballistic Unit of KPS, F [REDACTED] I [REDACTED], could not even exclude the possibility that these fragments (possibly of lead) came from a sports weapon. It has to be reminded that this chair and the car was abandoned for a long time in a field, after this incident.

After Gani Gashi shot, the car stopped again. Both Gani Gashi and M [REDACTED] V [REDACTED] told the Panel that A [REDACTED] O [REDACTED] then came out of the car with a gun and shot. The Panel cannot see that this fact has been established properly since both V [REDACTED] and Gashi cannot be considered as fully reliable in their testimonies. Further it is not of crucial importance for the assessment of the crimes Gashi is indicted for whether A [REDACTED] O [REDACTED] at this moment shot with a gun or not. Gani Gashi has not stated that he recognized any weapon with A [REDACTED] O [REDACTED] before he, Gani Gashi himself, shot.

M [REDACTED] V [REDACTED] and, just a few moments after him, Xh [REDACTED] N [REDACTED] then arrived at the scene. V [REDACTED] entered the car and went with A [REDACTED] O [REDACTED] and the injured persons to get medical assistance. They met with dr. I [REDACTED] B [REDACTED] who declared that I [REDACTED] O [REDACTED] had died due to a firearm wound. Dr. B [REDACTED] also stated that H [REDACTED] had got a bleeding wound at her lip, probably caused by the window blast. He also noticed that the child they brought had a injury in his skull. Dr. T [REDACTED] Gj [REDACTED] examined Sh [REDACTED] a few days later concluding that the child received a wound in his cranium. He underwent surgery on 17.07.98 and was later released from the Clinical Centre in Pristina in good condition (Exhibit 3). On 12.08.00, at a clinic in Italy (Region Veneto), S [REDACTED] O [REDACTED] underwent surgery to have removed a foreign object of metal in his right shoulder (Exhibit 4).

Gani Gashi later the same day of the incident met with V [REDACTED] and he was disarmed and taken to KLA HQ.

b) Further details of the assessment of evidence:

1. Assessment of witnesses

The Court considers that the facts Gani Gashi has been convicted on have been established beyond any reasonable doubt. To arrive at this conclusion, the Court has considered all the evidence and considered as particularly reliable the testimony of Xh [REDACTED] N [REDACTED] the expert opinions of A [REDACTED] R [REDACTED], T [REDACTED] Gj [REDACTED], I [REDACTED] B [REDACTED] and partly the testimonies of the injured parties, in particular A [REDACTED] O [REDACTED]. The testimony of M [REDACTED] V [REDACTED] who was not called as witness until at the main trial, is interesting, but not as much relevant as N [REDACTED] since V [REDACTED] only arrived at the crime scene at a later moment.

The testimony of A [REDACTED] O [REDACTED] is corroborated by all the other members of the family and, the most important, by an independent witness, Xh [REDACTED] N [REDACTED] Xh [REDACTED] N [REDACTED] corroborated the testimony of A [REDACTED] O [REDACTED], in the crucial part, i.e. that the victims' car stopped at the stop signal and that the defendant had a short conversation with A [REDACTED] O [REDACTED] at that moment. In his testimony before the Panel A [REDACTED] O [REDACTED] at first did not mention that they, after having stopped and talked with Gashi, set off in the car and that the shot then was fired, *after* they set off. The Panel finds the omission of this crucial fact by A [REDACTED] O [REDACTED] in the first place a bit surprising. However, the Panel establishes that this was the fact. The omission does not affect too much the credibility of the witness A [REDACTED] O [REDACTED].

The testimony of A [REDACTED] R [REDACTED] is considered as an important one, and the Panel finds it trustworthy. From this testimony the Panel found that [REDACTED] O [REDACTED] died because of a gunshot, a "through - and - through" perforating wound which entered through the back of the seat, through I [REDACTED] O [REDACTED]'s body. The conclusion of the autopsy report (exhibit 1) of dr. C [REDACTED] and R [REDACTED] is that the deceased had most probably received a minimum of one firearm shot directed at the upper chest region and all the damages and fractures to the skeleton parts that were found in relation to injuries/fractures (no 2,3,4 and 5) to the chest are consistent with perimortem injuries. The probable cause of death was considered to be firearm injuries to the chest.

The trajectory of the bullet as explained by R [REDACTED] is in contradiction with the defendant's statement. The latter testified that he aimed to shoot in the air. The Panel considers that in this point the defendant's testimony cannot be trustworthy. Thus the Panel considers that the trajectory explained to the Panel by A [REDACTED] R [REDACTED] corresponds to the truth, i.e. that the defendant intended to shoot at the persons in the car. The panel considers that the trajectory

as shown by R [REDACTED] in court and also showed in the pictures of the seat (exhibit 6) is highly contradictory to the defendants explanation that he tried to shoot in the air.

R [REDACTED] presented to the panel the shirt worn by I [REDACTED] O [REDACTED] when he was sitting in the car. There was a hole on the back side which matches with the internal injuries. The exit hole was not to be found on his shirt, but this may be due to the fact that it was mid summer and the shirt could have been opened.

A [REDACTED] R [REDACTED] testified that the projectile which killed I [REDACTED] O [REDACTED] had a high velocity. The bullet found in Sh [REDACTED]'s head did not damage the brain because the projectile did not have a high speed, which would be compatible with the thesis that the same projectile first shot I [REDACTED] G [REDACTED] and then went into Sh [REDACTED]'s head. He was sitting on I [REDACTED] laps.

The bullet which hit S [REDACTED] is probably the same bullet which hit I [REDACTED]. That bullet which hit I [REDACTED] had a high velocity. Since it did only scratch the shoulder of S [REDACTED], it did not loose the speed too much.

2. Assessment of documents

The Panel has examined the documents presented as evidence at the main trial and made reference to this under 2. Summary of evidence presented a-k, consisting of in total 11 Exhibits. The Panel considers these documents as reliable evidence and they support the findings of the Panel.

Assessment of the defendant's testimony

The Panel does not believe defendant's testimony. It does not at all corroborate with his colleague, X [REDACTED] N [REDACTED] testimony before the panel. N [REDACTED] told the Panel that Gashi went to the car, stopped there and talked with A [REDACTED] O [REDACTED] who rolled down the window. Gashi told that this was not true at all. The Panel cannot see why N [REDACTED] should not tell the truth. Gashi told he wanted to shoot in the air, but accidentally the bullet went into the car; he found out later that there were victims who he knew in that car. The Court cannot consider this version as trustworthy. As already mentioned, Xh [REDACTED] N [REDACTED] is considered as a reliable witness. Therefore, the Court considers that the defendant did exchange some words with the driver of the car, thus acknowledging who the occupants of the car were. However, the Panel considers that the car speeded up after it stopped. The reason is however not established. It might be that the O [REDACTED] got afraid, it might be that they speeded up for another unknown reason.

Assessment on admissibility of evidence:

The defense counsel has argued that police statements given by the defendant to the police is inadmissible due to the lack of presence by the defense counsel.

To this the Panel would respond that it has not taken into consideration these statements at all. The judgement has been based solely on the evidence presented to the panel at the main trial by the prosecution and the defense as listed in the 1. Summary of the evidence presented section of this judgement (Exhibit 1-11 (a-k), plus witnesses).

4. Legal Assessment

A. Objective elements

Article 142 CC SFRY reads that

“Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings.....or violation of immense suffering or violation of bodily integrity or health,or who commits one of the foregoing acts, shall be punished.....”

In order to settle the conditions of this provision, rules of international law and the violation thereof have to be established.

The application of the Geneva Conventions related to this case has not been disputed. However, the Panel mentions that these Conventions have been ratified by the People’s Republic of Yugoslavia on April 21, 1950. Those Conventions were in force in Kosovo as of March 22, 1989 and were in force during the armed conflict in Kosovo.

The application of article 3 in the Geneva Convention IV has been subject to assessment in many previous judgements, domestic and international.

In order to commit war crimes and the application of the Geneva Convention, the existence of three elements according to jurisprudence of the ICTY need to be established:

- a. existence of the armed conflict
- b. nexus between the armed conflict and the crime perpetrated
- c. victim’s status as protected person according to the Geneva conventions

a. *Existence of the armed conflict*

Reference is made to the decisions of ICTY in the *Tadic* Jurisdiction Decision (which was a matter for the Tribunal to establish its jurisdiction according to its Statutes, however the assessment would be similar to the application under the Geneva Conventions). “An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State” (*Tadic* para 70).

Under the test , in establishing the existence of an armed conflict of an internal character one must assess the following criteria:

- the intensity of the conflict
- the organisation of the parties

The criteria is used to distinguish an armed conflict from banditry and similar activities which are not subject to international humanitarian law and to establish that crimes committed anywhere in the territory under control to a party to a conflict falls within this definition.

By applying these two criteria the ICTY has established in *Limaj et al* (Trial Chamber November 2005) para 129 that by July 2008 the KLA had become accepted by international representatives , and within Kosovo, as a key party involved in political negotiations to resolve the Kosovo crisis and that this had disclosed and confirmed that by that time the KLA had achieved a level of organisational stability and effectiveness. In the Chambers finding it concluded that by end of May 1998 the KLA sufficiently possessed the characteristics of an organised group , able to engage in an internal armed conflict (para 134) . As to the intensity of the conflict it stated (para 154) that towards the end of May 1998 there were reports of attacks on the police checkpoint at Komoran/Komorane, 21 km west of Pristhina/Pristina. Further (para 168) it stated that the acts of violence that took place in Kosovo from end of May 1998 at least until 26 July 1998 were not accurately described as temporally sporadic or geographically disperse. Periodic armed clashes occurred virtually continuously at intervals averaging three to seven days over a widespread and expanding geographic area. The Chamber concluded that before the end of May 1998 an armed conflict existed in Kosovo between Serbian forces and the KLA (para 171) and that this internal conflict continued until long after 26 July 1998 (para 173). Further, also in *Haradinaj el al* (case No IT 04-84-T, 3 April 2008) the ICTY established the existence of an armed conflict from 22 April 1998 and onwards. The Supreme Court of Kosovo has established that between 1 May 1998 and 31 August 1998 (S█████ K█████ *et al*) it existed an armed conflict in Kosovo between FRY and KLA.

Further, the witnesses and injured parties in this case told the Panel that they had been ordered to leave their homes in Komoran due to the aggression of the Serb forces. I [REDACTED] B [REDACTED] and X [REDACTED] N [REDACTED] and the defendant also told that KLA in the area organized trench-digging to protect the civilians living in the area.

So, the Panel concludes that there existed an armed conflict in the period material to the indictment in this case.

b. Nexus between the armed conflict and the crime perpetrated

In Kunarac Judgement², the ICTY established that the nexus between the armed conflict and the crime committed can be established through the following criteria: The crime should be closely related to the armed conflict, the armed conflict should have been given the opportunity to act, and the perpetrator was acting as a soldier.

During the main trial it has been established beyond doubt that the defendant was a KLA soldier. It was his own admission during his testimony. The KLA Commander of the Unit, M [REDACTED] V [REDACTED], testified in front of the Court that the two soldiers, Gani Gashi and Xh [REDACTED] N [REDACTED], were performing official duties at the KLA checkpoint that night. The competence for them to stop the traffic and check the vehicles was based on the order from KLA. The existence of the armed conflict, the vicinity of the Serbian forces from the crime scene gave the defendant the opportunity to act.

Thus, it has been established that Gani Gashi was a KLA soldier, performing official duties on behalf of KLA. The ongoing war, between KLA and Serbian forces gave the defendant the opportunity (his duty at the check point) and the instruments (the gun) to commit the crime.

It was because of the conflict that the defendant had the possibility to stop the car with the O [REDACTED] family. The conflict played a substantial part in the defendants' ability to commit the crime, his decision to commit it and the manner in which it was committed.

The fact that a soldier acts on his own behalf does not imply that the act cannot be considered as a war crime.

So, the Panel has concluded that the necessary nexus exists.

² PROSECUTOR v. DRAGOLJUB KUNARAC RADOMIR KOVAC AND ZORAN VUKOVIC, IT-96-23-T& IT-96-23/1-T, trial judgment, page 203, para 568 and 569

c. *Victim's status as protected person according to the Geneva conventions*

The O [redacted] family were civilians. They never took part in the hostilities. They had civilian cloths and not weapons. The fact that some of the persons had agreed to participate in the trench digging does not affect their status at the time of the criminal act. According to the jurisprudence of ICTY and Supreme Court of Kosovo (*Latif Gashi et al* 21.07.2005) they need not be nationals of the enemy to receive protected status.

So, the panel has concluded that the victims have the necessary protection .

*

Since the three elements necessary to fulfil the criteria of a war crime and the violation of international law are fulfilled, the objective element of the crime has been established.

B. Subjective elements

a) *Criminal responsibility*

Pursuant to article 11 paragraph 1 CC SFRY, the defendant is criminal liable if he was responsible (article 12) and committed the criminal act with premeditation or negligence. Further more, pursuant to article 13 CC SRFY, there is premeditation when "*criminal act is premeditated if the offender is conscious of his deed and wants its commission; or when he is conscious that a prohibited consequence might result from his act or omission and consents to its occurring.*"

The definition of "premeditation" corresponds to the legal term "intent", se more below.

Article 12 will not apply in the sense that there is no evidence that the defendant was not capable of understanding the significance of his acts and his capability was neither substantially reduced.

b) *Mens rea*

Under the Fourth Geneva Conventions of 1949 article 146 and 147 the Convention imposes the obligation on the Contracting parties to undertake and enact legislation necessary to provide effective penal sanctions against e.g. wilful killing and wilfully causing serious injury to body or health. Article 142 CC SFRY and article 11 CC SFRY, as read with article 13 CC SFRY set forth the condition of premeditation. This equivalences to criminal intent (mens rea) and the wilfull act as a condition. There is no indication that the conditions of article 142 is a qualified form of intent. Such a condition would be contrary to the Convention and has no support in any jurisprudence. Even a less qualified form of intent

(dolus eventualis) (recklessness) has to be included in the mens rea condition of the Conventions (ref. International Criminal Law , Antonio Cassese, Oxford University Press 2003 p. 58).

Thus, it has to be established that the defendant acted with the intention to kill. This intention is very clear from the fact that he shot at the car after it has stopped and also in the manner he shot. He did not shoot in the air, as required by the Commander's instructions, but directly into the car. The trajectory of the bullet explains this. It is supported by the form of the trajectory, hitting and entering the seat right up to exiting down left, with the same as for the penetrating trajectory through the body of I O . This trajectory is compatible with the intention to kill, taking into account that the defendant was standing, and the victims were seated in the car, even if the car went upwards. To shoot in the air is completely inconsistent with how this bullet has been shot. At least the defendant must have been aware of the likely consequences of his conduct, knowingly taking the risk of bringing about such consequences. He must have foreseen or accepted the risk that the attack was likely to cause loss of life and injury to persons.

Since the defendant talked with A O he knew who the victims were and that they were civilians; he shot with the clear intention to kill them, for a motive which has not been established by this Panel.

c) The application to article 142 CC SFRY

Article 3 para (1) (a) of the Geneva Convention states that

".....the following acts are and shall remain prohibited at any time.....

a) Violence to life and persons, in particular murder of all kinds,....."

Also article 142 of CC SFRY states that who commits killings or violation of bodily integrity or health, shall be punished according to the said article.

According to the factual findings of the Panel, Gani Gashi has willfully murdered I O , he willfully attempted a murder of the minor Sh O and caused the violation of bodily integrity and health of H and S O .

By these actions he has fulfilled the subjective elements of article 142 CC SFRY.

**

Thus, for this Court both the objective and subjective element of article 142 CC SFRY have been proven beyond any reasonable doubt.

C . Assessment and calculation of the punishment

a) Applicable law

Pursuant to Article 4 (2) CC SFRY the most favourable law shall apply. Thus, the Panel has to establish which law is most favourable law for the defendant: the one in place at the time of the commission of the criminal act or the one in place at the time of the trial.

The crime has been committed in 1998, when the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) 1976 was in force. During this period of time since the commitment of the crime, some criminal provision changed. A new criminal code of Kosovo entered into force in 2004. The war crimes are foreseen also in the new code, in the article 121, the punishment foreseen is maximum 40 years of imprisonment.

Pursuant to the old code, in force during the time of the events, the maximum punishment foreseen for war crimes was death penalty. However the Panel has to consider the UNMIK regulation 1999/24 and 2000/59. The first one abolishes the death penalty. The latter imposes a maximum punishment of 40 years of imprisonment for the crimes where the death penalty was foreseen.

UNMIK regulation 2000/59 provides that this regulation applies only to the crimes committed after 27 October 2000. Thus for the crime committed in July 1998, the old code of Yugoslavia (CC SFRY) shall apply. However, the Panel has to take into account the UNMIK regulation 1999/24 that abolishes the death penalty. Thus, the applicable law for the crime perpetrated in July 1998, shall be the old code as read in conjunction with the UNMIK regulation 1999/24. In light of this, article 38 paragraph 2 of the old code become applicable, thus a maximum of twenty years can be imposed on the perpetrator since death penalty was abolished and 20 years is the substitutive and alternative punishment, in lieu of the non application of the 40 years as imposed by Reg. 00/59.

b) Calculation of punishment

Taking into account article 38 CC SFRY (enacting clause incorrectly refers to PCCK) the Panel has imposed imprisonment of 17 years as mentioned above.

When imposing the punishment, the Panel considered all the circumstances of the case. The defendant was in possession of an automatic weapon capable of causing massive injuries or loss of lives to persons. The defendant shot knowing that his target was a high number of persons and that they were civilians. He abused his position as KLA soldier in order to perpetrate the crime. He misled the trust the civilians would have of persons in KLA

uniform, thus for the victims it would have been impossible to defend themselves. Also, the defendant did not take into consideration that in the victims' car there were two minors, two children both six years old, as well as he did not take into consideration the presence of two elderly persons.

The defendant disobeyed all the standard instructions given from his commander, who testified in front of the Panel saying that he would never order anyone to shoot at civilians as in this case.

All these circumstances were taken into account by the Panel members as aggravating circumstances, thus imposing a punishment of 17 years, which is close to the maximum penalty provided for by the law.

The fact that the car set off after being stopped, leaves no reason to reduce the sentence as a mitigating circumstance, since the fact upon which this relies, has not been established.

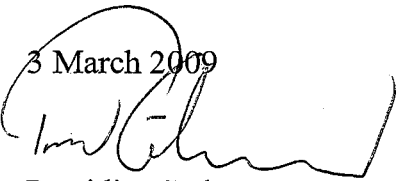
5. Property claims

The injured parties have been informed about their rights to put forward a property claim according to article 107 in the Criminal Procedure Code of Kosovo, however no such motions have been put forward by the end of the trial according to article 109 para 2.


6. Costs

The defendant Gani Gashi has to reimburse all the cost of the criminal proceedings. According to article 100 para 2 of the Criminal Procedure Code of Kosovo a separate ruling will be rendered.

3 March 2009


Presiding Judge

Tron GUNDERSEN


Recording Clerk

Elisabeth BATMAN

Panel Member


Andrea CRUCIANI

Panel Member


Zahide GJONAJ



Legal remedy

Pursuant to article 400 (1) PCPCK, an appeal must be announced within 8 days from the announcement of this verdict and, according to article 398(1) PCPCK, the appeal shall be filed with this Court within 15 days from the date the copy of the judgment has been served to the parties.