

SUD BOSNE I HERCEGOVINE

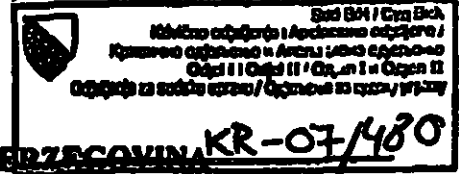


СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Rad dokumenta br. 416

X-KR 07/480

Sarajevo, 22 October 2008



IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, in the Panel composed of Judges Darko Samardžić, as the Presiding Judge, and Davorin Jukić and Patricia Whalen as members of the Panel, with the participation of the legal associate Emira Hodžić as the record-taker, in the criminal case against the accused Marko Škrobić, for the criminal offence of War Crimes against Civilians in violation of Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), all in conjunction with Article 180(1) of the CC of BiH, under the Indictment of the Prosecutor's Office of Bosnia and Herzegovina No. KT-RZ-165/07 of 14 January 2008, confirmed on 16 January 2008, following the main trial, in the presence of the accused Marko Škrobić and his Defense Counsel Nikica Gržić and Branka Praljak, and the International Prosecutor of the Prosecutor's Office of BiH, David Schwendiman, on 20 October 2008 handed down the following verdict which is announced on this 22nd day of October 2008.

VERDICT

ACCUSED:

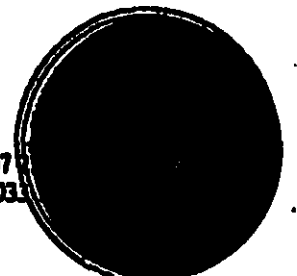
MARKO ŠKROBIĆ, son of Drago and mother Ora, nee Manović, born on 20 July 1971 in Duratovci, Municipality of Kotor Varoš, PIN 2007971102758, residing in Vitez at 48 Stjepana Radića Street, citizen of BiH and the Republic of Croatia, stonemason by profession, literate, graduated from the secondary school of civil engineering, married, served the army in 1990 in Subotica, holds no rank, has never been decorated, of average financial standing, no other criminal proceedings pending against him,

Pursuant to Article 285, paragraph 1) of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: the BiH CPC),

IS GUILTY

Because:

In the second half of 1992, during the war in Bosnia and Herzegovina, at the time of the armed conflict, he acted in contravention of international humanitarian law violating Article 3 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and Article 51(1)(2) and (3) of the Protocol Additional I to the Geneva



Convention relative to the Protection of Civilian Persons in Time of War dated 12 August 1949.

On 31 July 1992, in the early morning hours, in the place of Novo Selo, Municipality of Kotor Varoš, as a member of the Kotor Varoš HVO unit, along with four other armed persons, he came in front of the family house of Boro Glamočak, and after he banged on the door he entered the house and ordered Boro Glamočak, his wife Stana, his underage daughters Irena, Dajana and Sanela, to leave the house immediately; he forced them out, and then, from another house which was located in the same yard, he took out Boro's father Stojko Glamočak, and then he, along with other soldiers, took them in the direction of the village of Ravne where two soldiers separated Boro Glamočak and took him in a nearby forest threatening him that they would slaughter him unless he turns in the weapons to them; they ordered him to turn around and shot a round in the air; after that, several yards from there on a meadow, the Accused Marko Škrobić, taking other members of family, grabbed Stojko Glamočak by his chest knowing that he was a civilian and intending to deprive him of his life, fired a bullet from his pistol; that he had with him, in Stojko Glamočak's chest, which resulted in an instant death of Stojko Glamočak,

Therefore,

During the state of war in BiH, in violation of international humanitarian law, he deprived the life of a civilian.

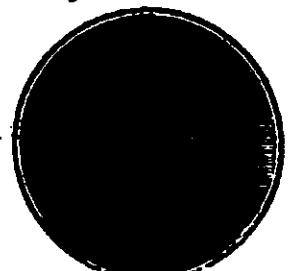
By doing so, he committed the criminal offence of War Crimes against Civilians in violation of Article 173(1)(c), in conjunction with Article 180(1) of the Criminal Code of Bosnia and Herzegovina.

Pursuant to Article 285 of the BiH CPC, having applied Article 39, 42 and 48 of the BiH CC, the Panel of the Court of BiH

SENTENCES THE ACCUSED TO A TERM OF IMPRISONMENT OF 10 (TEN) YEARS.

Pursuant to Article 56(1) of the BiH CC, the time that the Accused spent in custody pursuant to the Decision of the Court, from 19 December 2007 until 6 February 2008, shall be credited towards the pronounced term of imprisonment.

Pursuant to Article 185 and 188(1) of the BiH CPC, the Accused is obliged to reimburse the costs of the criminal proceedings in the amount of 3,610.00 KM (three thousand six hundred and ten convertible marks), of which the amount of 2,144.00 KM (two thousand one hundred and forty four convertible marks) are the costs of the Prosecutor's Office, the amount of 966.00 KM (nine hundred and sixty six convertible marks) represents the costs of the testimonies before the Court, and the lump sum of 500.00 KM (five hundred convertible marks) for the Court, within 30 days as of the day of the finality of the Verdict.



Based on Article 198(2) of the BiH CPC, all injured parties are instructed that they may take civil action to pursue their claims under property law.

REASONING

1. Charges

Under the Indictment of the Prosecutor's Office of Bosnia and Herzegovina No. KT-RZ 165/07 dated 14 January 2008, charges were brought against Marko Škrobić for grounded suspicion that he committed the criminal offence of War Crimes against Civilians in violation of Article 173(1)(c), in conjunction with Article 180(1) of the Criminal Code of Bosnia and Herzegovina.

On 28 January 2008, the Accused pleaded not guilty to the charges of the Indictment which was confirmed on 16 January 2008, whereupon the case file was referred to the Trial Panel.

2. Presented evidence

a) In the course of the evidentiary proceedings, the following pieces of evidence were presented by the Prosecution:

Hearing of the witnesses: Boro Glamočak, Stana Glamočak, Ljubomir Petrušić, Irena Todorović and Ivo Marić.

In the further course of the main trial, the following documents moved into evidence were inspected by the Court:

Decision of the RBiH Presidency on the proclamation of the state of war dated 20 June 1992 (Official Gazette of RBiH, No. 7/92); Document of the PH Travnik, No. 02/7-5-04-2-3894/07 of 12 June 2007; Certificate of previous convictions re: Marko Škrobić; Document of the PS Kotor Varoš, No. 10-9/02-234-1180/07 of 2 July 2007; Certificate of Citizenship re: Marko Škrobić, No. 204-343/07 of 22 June 2007 issued by the Municipal Board of the Municipality of Kotor Varoš; Document of the Tax Office Novi Travnik No. 10-06-04-49-3988/07-Ž.S. of 5 November 2007; Document of the Federation Ministry for Veterans and Disabled Veterans, Compulsory Military Service Records Sector No. 07/1-03-127-1/07 of 22 October 2007; Document of the Ministry of Security, SIPA, Regional Office Banja Luka No. 17-12/3-04-2-101-2/07 of 29 October 2008; Death Certificate for Stojko Glamočak No. 202-17 of 21 March 2008 issued by the Local Office of the Kotor Varoš Municipality; Copy of the ID card file in the name of Marko Škrobić No. 1681/86, issued by the Police Station Kotor Varoš, issuance date 25 August 1986; Copy of the ID card file in the name of Tomo Jurinović No. 109/85 issued by the Police Station of Kotor Varoš, issuance date 8 January 1985; Daily order of the Prosecutor's Office of BiH No. KTA-RZ-236/05 of 5 June 2007 with an attached

excerpt from the CIPS database in the name of Marko Škrobić; Daily order of the Prosecutor's Office of BiH No. KT-RZ-165/07 of 13 December 2007 with an attached excerpt from the CIPS database in the name of Tomo Jurinović.

b) Defense evidence presented at the main trial is as follows:

Hearing of the witnesses: Miroslav Kalamanda, Miroljub Bibić, Dragoslav Perišić, Muhamed Sadiković, Slavko Bujdo, and the Accused in his own defense.

The Court has also reviewed the following documents moved into evidence :

Record of examination of the witness Stana Glamočak by the District Prosecutor's Office in Banja Luka No. KT-RZ-1/05 of 23 February 2005; Record of examination of the witness Stana Glamočak by the Prosecutor's Office of BiH No. KT-RZ-165/07 of 18 June 2007; Official note - Miroljub Bibić, Public Security Station, Police Station Kotor Varoš No.: DD.450/98 of 11 July 1998; Official note - Dragoslav Perišić, Ministry of the Interior, Public Security Center Banja Luka, Kotor Varoš Police Station No. 10-9/02-27/05 of 2 February 2005; Official note - Miroslav Kalamanda, Public Security Station, Kotor Varoš Police Station No. DD385/98 of 10 June 1998; Record of examination of the witness Boro Glamočak, District Prosecutor's Office in Banja Luka No. KT-RZ-1/05 of 23 February 2005; Record of examination of the witness Boro Glamočak, Prosecutor's Office of BiH No. KT-RZ-165/07 of 18 June 2007; Record of examination of the witness Irena Todorović, Prosecutor's Office of BiH No. KT-RZ-165/07 of 14 April 2007; Roman Catholic Parish Office of Birth, Blessed Virgin Mary - Certificate of baptism of five persons with the first and last name Marko Škrobić of 28 August 2008;

c) Evidence adduced by the Court

Under the terms of Article 261(2)(e) of the CPC of BiH, the Court re-examined the witnesses Stana Glamočak and Boro Glamočak and adduced into evidence the document of the Local Office of Kotor Varoš, dated 28 August 2008, regarding the delivery of information on persons named Marko Škrobić who were born in the area of Kotor Varoš.

3. Closing arguments

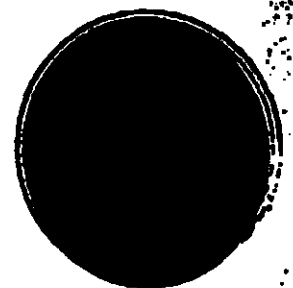
a) Prosecutor's Office

Upon the completion of the evidentiary proceedings, the prosecutor in his closing arguments underlined that it was undoubtedly proved that in the territory of the Kotor Varoš Municipality there was a state of war and that the Accused during the relevant period of time was a member of the Croat Defense Council (HVO). The prosecutor also emphasized that the witnesses Stana Glamočak and Boro Glamočak described the manner in which Stojko Glamočak was killed and that the testimonies of these two witnesses were consistent in all important elements. Both witnesses stated that on

critical day, a group of 4-5 soldiers banged against the door of the Glamočak family house and forced out the members of this family, namely Boro Glamočak, Stana and their three daughters, while they took out from the adjacent house Boro's father Stojko, and took them together down the road from the house to the Ravne village. They also described how at one moment a group was separated and how Boro Glamočak was taken aside by two soldiers from the group while the rest of the family members stayed where they were and how after one round was fired from the nearby clump of trees where Boro was taken, an act of murder was committed by the soldier who had previously introduced himself to Stana as neighbor Marko at the door of her house. All this was confirmed by their daughter Irena Todorović. The prosecutor underlined that the witness Ivo Marić stated that he knew Marko Škrobić and that he and Tomo Jurinović, the other person whom the witnesses Glamočak knew very well, and who together with Škrobić took part in the mentioned events, were from the same village of Duratovci. This witness did not indicate that he knew another Marko Škrobić, let alone from Duratovci. Prosecution further argued that the witness Ljubomir Petrušić stated that he worked on the preparation of the criminal report right after the murder of Stojko Glamočak, based on the report of Boro Glamočak, and that he remembered that the report was to be filed against the known perpetrator, Marko Škrobić. Boro Glamočak heard from his wife that his father was killed by the soldier who introduced himself as neighbor Marko and that he knew that it was Marko, son of Ora, and that he had said so to his wife. The prosecutor argued that the witnesses Boro and Stana were not explicit when they testified before the Court first time around, that they were confused because they were frustrated by the courtroom, and focused on the instructions of the Court to look in a given direction and that they seemed more relaxed when the Court summoned them again and that they spoke clearly and comprehensively. He pointed out that Boro Glamočak was a person of rural background and that he did not know that saying „I suspect“ would cause others to mistrust him and his testimony and that based on the words “neighbor Marko“ and the conversation he had with other neighbors, the witness connected the dots and concluded that it could only be Marko Škrobić or Ora's Marko as he had put it.

The prosecutor further emphasized that the witness Stana Glamočak recognized Marko Škrobić when police officer Dragoljub Perišić showed her photocopies of the ID cards of four persons with the same first and last name during the identification procedure, and that at the main trial she recognized the photograph that she had identified before this police officer during the foregoing identification procedure.

The prosecutor noted that the Accused defended himself by remaining silent during the investigation, and that upon the defense's motion he testified as a witness and made up an alibi by using names of his fellow soldiers who were with him, that while he was with the military he was issued with personal piece of weapon, namely a scorpion pistol, and that during his compulsory military service he learned how to use this pistol.



In the prosecutor's opinion, credence could not be given to the testimony of Slavko Bujdo because he was biased and because he revealed through his relationship with Marko's family when exactly he learned that an indictment was issued against Marko.

At the end, the prosecutor concluded that it was proven that the Accused committed the criminal offence charged against him in the Indictment and that he should be found guilty, without specifying the length of the prison term sought for the Accused.

b) Defense

Defense of the Accused Marko Škrobić underlined in the closing argument the undisputed facts, namely that there was a state of war in Bosnia and Herzegovina and that the relevant incident did take place in the manner and at the time described in the Indictment. What was questionable, in the Defense's opinion, was whether Marko Škrobić was with those armed persons and whether he was the person who shot Stojko Glamotak from the pistol and what was the cause of death of Stojko Glamotak. Further in the closing argument, the Defense analyzed the presented evidence and particularly emphasized the manner in which the witness Stana Glamotak identified the Accused because the identification procedure was carried out in contravention of Article 85(2) of the CPC of BiH, which prescribes that a witness must first give a description of the person and his/her distinguishing features and that only then can this person be shown to the witness, even if on a photograph, together with other persons unknown to the witness. Defense argued that the witness Stana Glamotak was first shown the photographs for identification purpose while she was giving her statement in the District Prosecutor's Office in Banja Luka and only after that did she give a description of the Accused.

The witness again recognized the Accused on one photograph when she was giving her statement in the Prosecutor's Office of BiH, having given no description of him before that. Defense further noted that this witness gave different descriptions of the Accused several times and that during the main trial, when asked by the Prosecution, she described the Accused as a short, dark-tanned, slim person, not older than 21, and when asked by Defense, she described him as a short, full figured, dark haired person, after which she pointed at the Accused in the courtroom. When asked by the Court to describe the Accused, the witness provided a vague answer. As to the manner in which the identification of the Accused was carried out, Defense also referred to the flaws in the identification by the witness Boro Glamotak. When this witness was giving his statement in the District Prosecutor's Office in Banja Luka, he inspected the photographs shown to him without previously giving the description of the Accused. Also, when he was giving his statement in the Prosecutor's Office of BiH, he did not describe the Accused, again, and when the photograph was shown to him, he said that it „could be Marko Škrobić“, while he immediately recognized Tomo Jurinović. Defense noted that the witness Mirosljub Bibić confirmed that he interviewed Stana Glamotak in her house and that the only information she gave to him was that the person who shot at her father-in-law was „Marko“ and that she did not know his last name. Defense further noted that

the witness stated that she found out his last name from her neighbors Ilija and Ljubica Vidović and Ivo Marić, but that only witness Ivo Marić could confirm this because the other two witnesses had passed away. This witness, Defense argued, not only failed to confirm that it was he who disclosed to her the last name but contended that he did not talk about this with anyone after the war. Defense also argued that the memory of the witness Ljubomir Perušić was questionable because even if he did remember that Boro and Stana recognized the Accused on the photograph and that Boro said on that occasion that it was Marko Škrobić, he gave some incorrect averments.

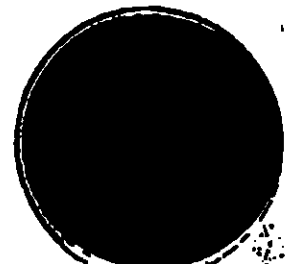
Defense considered the identification of the Accused by Stana and Boro Glamočak to be unreliable for the following reasons:

First of all, the witness Stana gave several descriptions of the Accused, she only remembered one photograph of the Accused at the main trial even though she looked at his photograph together with her husband in the house, she also could not remember the exact number of the armed persons, how they were dressed, that the visibility was poor at the time of the perpetration of the criminal offence. Defense also argued that the conviction of these two witnesses that Marko Škrobić killed Stojko Glamočak was the result of the suggestions made by other people. Defense contends that the following facts lead to this conclusion: one of the persons who showed up at the door introduced himself as neighbor Marko, which led the witness Boro to immediately conclude that it might be the person Škrobić; other persons told Stana that it could be Marko Škrobić and those other persons were not eyewitnesses of the incident, and it had not been determined with certainty how exactly she learned his last name; witness Boro only at the main trial remembered that he told his wife Stana that Stojko Glamočak had been killed by „Ora's Marko". Further on, Defense noted that the police officers showed to the witnesses the photographs with the names of the persons written on them and that in the area of Kotor Varoš there were at least four persons who shared this first and last name.

Defense noted that the Accused himself testified at the main trial and stated that he did not pass by the house of the Glamočak family on the critical day, 31 July 1992, at around 4 o'clock in the morning, or any other day, alone or with other persons, and that he did not even know the family. He also stated that as an HVO member he did not leave Kotor until the end the month of August, not even for a brief while, and that he remembered this period very well because of the very difficult situation which prevailed in the area. Defense further noted that this testimony was confirmed by Slavko Bujdo who was explicit in his statement because he was in Kotor at the time.

At the end of the closing argument, Defense referred to the ICTY decision *Kupreškić et al* Appeal Judgment¹ case, dated 23 October 2001, upon the pronouncement of the convicting verdict based on the identification of the Accused by witnesses.

¹ *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Jostpović, and Vladimir Sanić*, IT-95-16-A, Appeal Judgment, 23 October 2001.



In its conclusion, Defense proposed that the Accused Marko Škrobić be acquitted of the charges due to the lack of evidence.

Having heard the closing arguments of the Defense Counsel, the Accused joined the closing arguments in their entirety.

4. Applicable law

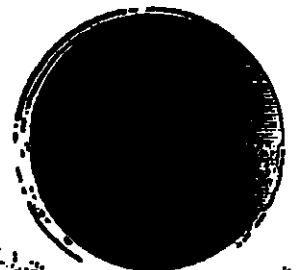
In view of the applicable law, it should be explained why the Criminal Code of the SFRY, which was in effect at the time of the relevant events, is not applicable in this case.

Namely, Article 3 of the CC of BiH defines the principle of legality, that is, that the criminal offence and sanctions thereof can be defined only in the law and that no one can be punished or sanctioned for an action which, prior to its perpetration, was not defined as a criminal offence punishable under the law or international legislation. Further on, Article 4 of the CC of BiH prescribes that the law which was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator and if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

The principle of legality is defined also in Article 7(1) of the European Convention on Human Rights (ECHR). The European Convention has priority over all other laws in Bosnia and Herzegovina, pursuant to Article 2(2) of the BiH Constitution. This provision of the European Convention provides for the general principle which forbids the imposition of a heavier penalty than the one that was applicable at the time the criminal offence was perpetrated, but does not foresee the application of the more lenient law.

However, Article 4a) of the CC of BiH, prescribes that Articles 3 and 4 of the CC of BiH shall not prejudice the trial and punishment of any person for any action or omission, which at the time when it was committed, was "criminal according to the general principles of international law". Also, Article 7(2) of the European Convention foresees exceptions provided that paragraph 1 of the same Article "shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations." (see also Article 15(1) and (2) of the International Covenant on Civil and Political Rights which foresees similar provisions. Bosnia and Herzegovina, as one of the successor states of Yugoslavia has ratified this Covenant).

This determines the possibility of derogation, under the prescribed conditions, from the principles defined in Articles 3 and 4 of the CC of BiH (and Article 7(1) of the European Convention) and from the application of the criminal code in effect at the time of the perpetration and the from application of the more lenient law in the proceedings for the actions defined as criminal offences under international law.



The Court underlines that the criminal offence charged against the Accused is a criminal offence pursuant to customary international law and therefore falls under "general principles of international law", as defined in Article 4a) of the Law on Amendments to the Criminal Code of BiH and "the general principles of law recognized by the community of nations", as defined in Article 7(2) of the European Convention. Based on these provisions, the CC of BiH is applicable in this case.

Further on, the fact that the criminal offences defined in Article 173 of the CC of BiH were also defined by the law which was in effect at the relevant time – the time of the perpetration of the criminal offence, Article 142(1) of the CC of the SFRY, namely, that the criminal offence at issue was punishable under the criminal code applicable at the time, only affirmed the conclusion of the Court on the principle of legality.

Finally, the application of the CC of BiH is additionally justified by the fact that the punishment prescribed by the CC of BiH is in any case more lenient than the capital punishment that was in force at the time of the perpetration of the criminal offence, which satisfies the principle of the constraints regarding the applicability of the law, that is, the application of the law which is more lenient to the perpetrator.

This position of the Court is consistent with the ruling of the Appellate Panel of Section I of the Court of BiH in the Verdict handed down against Abduladhim Maktouf, No. KPŽ 32/05 of 4 April 2006, and the Verdict against Dragoje Paunović, No. KPŽ 05/16 of 27 October 2006, which was upheld by the Decision of the Constitutional Court of Bosnia and Herzegovina No. AP- 178/05 of 30 March 2007.

5. International law and war crimes

During the time when the criminal offences were committed, Bosnia and Herzegovina, as a successor state of the SFRY, was a signatory party to all relevant international conventions on human rights and international humanitarian and criminal law.²

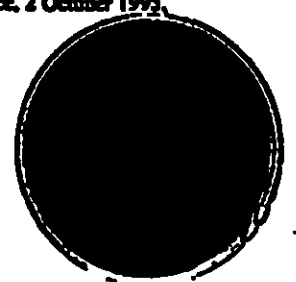
Likewise, the customary status of the criminal liability for the crimes against humanity and war crimes against civilians and individual liability for war crimes committed in 1992 was confirmed also by the UN Secretary General³, International Law Commission⁴ and the jurisprudence of the ICTY and the ICTR⁵. These institutions have determined that the criminal liability for crimes against humanity and war crimes against civilians

² This explicitly includes: Genocide Convention (1948); Geneva Conventions (1949) and their additional protocols (1977); Slavery Convention amended in 1956; Convention on Racial Discrimination (1966); International Covenant on Civil and Political Rights (1966); Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968); Convention on Apartheid (1973); Convention on Elimination on All Forms of Discrimination against Women (1979), UN Convention against Torture (1984).

³ Report of the UN General Secretary pursuant to paragraph 2 of the Security Council Resolution 808 of 3 May 1993, para 34-35 and 47-48.

⁴ International Law Commission, Commentary to the Draft Law on Crimes against Peace and Humanity (1996).

⁵ Prosecutor v. Tadić, Decision on the Defense Motion for interlocutory appeal concerning competence, 2 October 1995, para 151; Prosecutor v. Tadić, IT-94-I-T, Judgment, 7 May 1997, para 618-623;



represents an imperative standard of international law, that is, *jus cogens*.⁶ Therefore, it is indisputable that the crimes against humanity and war crimes against civilians in 1992 constituted part of customary international law. This conclusion was also confirmed in the Study on the Customary International Humanitarian Law⁷ made by the ICRC. According to that Study "serious violations of international humanitarian law constitute war crimes" (Rule 156), "individuals are criminally responsible for war crimes they commit" (Rule 151), and "States must investigate war crimes allegedly committed by their nationals or armed forces, or in their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects." (Rule 158).

According to the principle of universal jurisdiction, customary international humanitarian law is binding for every country in the world, regardless of whether it has ratified the relevant international legal instruments. Thus, every country has an obligation to prosecute or extradite (*aut dedere aut judicare*) all persons suspected of violating customary international humanitarian law.

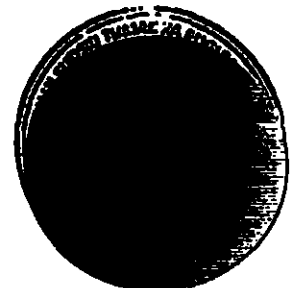
The principles of international law acknowledged by Resolution 95 (I) of the UN General Assembly (1946) and the International Law Commission (1950) are relative to the "The Charter of the Nuremberg Tribunal and the Verdicts of the Tribunal" and therefore war crimes in general. "Principles of international law acknowledged by the Charter of the Nuremberg Tribunal and the Verdicts of the Tribunal", adopted by the International Law Commission in 1950 and delivered to the General Assembly, foresee in Principle I that "any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." Principle II likewise foresees that "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."

Therefore, the criminal offence of war crimes against civilians must be, in any case, subsumed under "general principles of international law" in the light of Article 3 and 4(a) of the CC of BiH. Hence, it is indisputable that war crimes against civilians constituted criminal offences at the relevant time, be it considered from the aspect of customary international law, international treaty law or "principles of international law", and that the principle of legality was satisfied also in the sense of *nullum crimen sine lege* and *nulla poena sine lege*.

The criminal offence of war crimes against civilians, pursuant to common Article 3(1) (a) and (c) of the Geneva Conventions and Article 27(2) of the Geneva Convention relative to the Protection of Civilians in Time of War of 12 August 1949, should be

⁶ International Law Commission, *Commentary to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), Article 26.

⁷ Jean-Marie Henchaerts and Luce Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Cambridge University Press, 2005, pp. 368 and onwards.



classified under "international law" or "general principles of international law" pursuant to Article 3 and 4(a) of the CC of BiH. It is therefore indisputable that the crime against civilians constituted a criminal offence in the relevant period of time.

6. Findings and Reasoning of the Court

A) General considerations

The Court has evaluated the evidence pursuant to the applicable procedural code, namely the Criminal Procedure Code of Bosnia and Herzegovina. The Court has applied to the Accused the principle of presumption of innocence, as defined in Article 3 of the CPC of BiH, which embodies the general principle of law according to which the Prosecutor's Office bears the burden of proving the guilt of the Accused beyond reasonable doubt.

In the process of evaluation of the testimonies of the witnesses in the courtroom, the Court has taken into consideration, to the highest degree possible, the demeanor, conduct and character of the witnesses. In relation to the witnesses, the Court has evaluated also the probability, consistency and other evidence and circumstances concerning this case. Throughout this process, the Court was aware that the credibility of witnesses depended on their knowledge of facts that they testified about, their personal integrity, authenticity and their duty to tell the truth to which they swore.

It is not sufficient for a testimony to be given in a sincere manner. The real question concerning the evaluation of a testimony is not only whether the testimony is given in a sincere manner, but whether it is reliable. The Trial Panel was aware that the testimony about the facts which happened years before the testimony took place entails certain imprecision due to the deceitfulness of human perception and recollection of traumatic events. Namely, the Court was mindful of the fact that the witnesses testified about the events which took place more than ten years prior to their testimony at the main trial, which justifies the minor deviations from earlier statements in the part which concerned the facts of no significance for the event that they testified about.

Witnesses in this case were placed under a severe burden. Testifying in this case was consequently extremely difficult for most witnesses especially for family members who were recalling the trauma of the undisputed event.

Because of these factors, the assessment of the credibility of the witnesses and the facts to which they testified was a challenge for the Panel. The Panel observed first hand the witnesses, their demeanour, their attitude, their physical and emotional reactions to the questions, and the atmosphere within which they gave their testimony. The Panel was always mindful that this case presented factors which made credibility decisions more difficult and was always aware that because of the seriousness of the charges those assessments had to be made with diligence.

Some of the witnesses testified about the same incidents or facts, which each saw or heard from a differing physical, mental and sometimes chronological perspective. It is rare for two witnesses to the same event to perceive the event identically, or relate it verbally in the same way. The Panel evaluated the credibility of the testimony of each witness, first by presuming that each witness intended to tell the truth. Where it was possible to reconcile the testimony of various witnesses, the Panel attempted to do so. Where such reconciliation was impossible, the Panel assessed the testimony of each, first in terms of the likelihood that the differences were the result of honest mistakes in recollection or perception and then in terms of the likelihood that the witness was consciously attempting to mislead the Panel.

In reaching these findings, the Panel observed the manner and demeanour of the witnesses when testifying, tested the internal consistency of their evidence as given on the stand and in prior statements, and evaluated their ability to respond to difficult questions. The Panel examined the facts about which each witness gave testimony and compared them with the facts established by other witnesses and the admitted documentary evidence in order to determine whether they were corroborated or contradicted by other evidence in the case.

As to the indirect evidence, the Court emphasizes that it is well established in the jurisprudence and practice of this Court that indirect evidence is admissible. In addition, according to Article 15 of the CPC of BiH, the Court has a right to free evaluation of evidence. The Court holds that it is necessary for the Court to be convinced that such evidence is reliable in the sense that it was provided voluntarily, that it was truthful and authentic. Further on, the probative value of a hearsay statement depends on the context and the character of the evidence at issue, whether this evidence is corroborated with other evidence and whether there is any other motive for the evidence.

In this case, the documentary evidence was not voluminous and was not disputed by the Defense. The Court has inspected every single document in order to decide on its authenticity and probative value.

Bearing in mind the principle according to which the Prosecution has a duty to prove the authenticity, the Court has inspected all presented documents, one by one, and is satisfied that the Prosecution has proven their authenticity beyond reasonable doubt. In order to evaluate the authenticity of documents, the Court has inspected the documents in the light of other evidence. Even when the Court was satisfied that a specific document was authentic, it did not automatically accept that the statements contained therein represented an accurate summary of facts. The Court has evaluated those statements in the light of all evidence it had at its disposal.

B) Evidence and assessment of evidence in the context of the elements of the referenced criminal offence

Following the adduced pieces of evidence, assessing them individually and collectively, the Panel rendered decision as stated in the operative part for the following reason:



First, the chapeau elements of the criminal offence:

1) By virtue of the Indictment of the Prosecutor's Office, the Accused is charged with the commission of the criminal offence of War Crimes against Civilians in violation of Article 173 (1) c), reading:

Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

c) killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health;

shall be punished by imprisonment for a term of not less than ten years or a long-term imprisonment."

2) The next chapeau element of the criminal offence of War Crimes against Civilians and, in that regard, which elements should be proved by the Prosecutor's Office, ensue from its legal definition:

- i. The act must be perpetrated in violation of the rules of international law;
- ii. The violation must be committed in time of war, armed conflict or occupation;
- iii. The act must be related to war, armed conflict or occupation;
- iv. The perpetrator must order or commit the act.

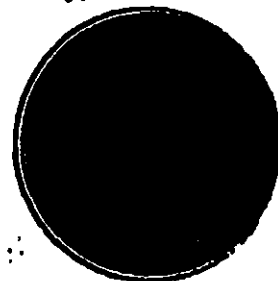
i. The act must be perpetrated in violation of the rules of international law:

The Indictment charges the accused Marko Škrobić with War Crimes against Civilians in violation of Article 173 (1) of the BiH CC, because at the relevant time he acted contrary to Article 3(1) of the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in time of War (hereinafter: the Geneva Convention).

Article 3(1) a) of the Geneva Convention reads as follows:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) *Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without*



any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

Article 2, subparagraph b) of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I) prescribes as follows:

"Rules of international law applicable in armed conflict" means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict;"

Common Article 3 of the 1949 Geneva Convention is generally considered as the provision of customary law, and is binding upon all parties in the conflict, either non-international or international, and the same provision was applicable at the time and in the place of the incident the Accused is charged with.

In interpreting this provision it is clear that it is not necessary that the perpetrator knows about or that he intends to violate international norms, but it is sufficient that the perpetration *per se* is contrary to the rules of international law. In order to establish the violation of a rule of international law, it is necessary to establish against whom the commission was directed, in other words, whether the offence was directed against the particular category of population protected by Article 3(1) of the Geneva Convention. According to the definition of the term protected categories contained in Article 3(1) of the Geneva Convention, civilians are persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat.⁸

Besides, Protocol I Additional to the Geneva Conventions defines civilians in negation, stating that civilians are "persons who are not members of armed forces".⁹

Article 43(1) of Protocol I prescribes:¹⁰

⁸ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, Judgment, 17 January 2005, para. 544.

⁹ J. Pictet and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, relating to the Protection of Victims of International Armed Conflicts (Protocol I), p. 610.

¹⁰ In addition to indicating Article 43 of the Additional Protocol I, Article 50 (*Definition of civilians and civilian population*) of the same Protocol also explicitly refers to Article 4(A) of the Third Geneva Convention in respect of those who are covered by the definition of armed forces. Commentary of Article 50 of the Additional Protocol I, however, indicates that Article 43 of the Additional Protocol I contains a new definition covering the provisions of Article 4(A) of the Third Geneva Convention; see *supra* note 4, p. 611.

