

SUD BOSNE I HERCEGOVINE



СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Pravod 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 Samaržić, as the Presiding Judge, and Davorin Jukić and Patricia Whalen as members of the Panel, with the participation of the legal associate Ervira Hodžić as the recorder, 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 Prajak, 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 2007971 102758, 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

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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 Glamčak, and after he banged on the door he entered the house and ordered Boro Glamčak, 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 Glamčak, and then he, along with other soldiers, took them in the direction of the village of Ravas where two soldiers separated Boro Glamčak 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 Glamčak 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 Glamčak's chest, which resulted in an instant death of Stojko Glamčak,

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 Petručić, 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, STPA, 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, Mirosljub Bibić, Dragoslav Perkić, 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 Glamčak 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 Glamčak by the Prosecutor's Office of BiH No. KT-RZ-165/07 of 18 June 2007; Official note - Mirosljub Bibić, Public Security Station, Police Station Kotor Varoš No.: DD.450/98 of 11 July 1998; Official note - Dragoslav Perkić, 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 Glamčak, District Prosecutor's Office in Banja Luka No. KT-RZ-1/05 of 23 February 2005; Record of examination of the witness Boro Glamčak, 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 Glamčak and Boro Glamčak 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 Glamčak and Boro Glamčak described the manner in which Stojko Glamčak was killed and that the testimonies of these two witnesses were consistent in all important elements. Both witnesses stated that

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 Daratovci. This witness did not indicate that he knew another Marko Škrobić, let alone from Daratovci. 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 the 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 Glamočak from the pistol and what was the cause of death of Stojko Glamočak. Further in the closing argument, the Defense analyzed the presented evidence and particularly emphasized the manner in which the witness Stana Glamočak 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 Glamočak 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 Glamočak. 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 Glamočak 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 Ljebica 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 Marito, 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 Marito". 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 Bejdo 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 *Kuprešić et al Appeal Judgment*¹ 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 Kuprešić, Mirjan Kuprešić, Vlado Kuprešić, Drago Jasović, and Vladimir Šantić*, 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 Pantović, 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.³

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 General⁴, International Law Commission⁵ and the jurisprudence of the ICTY and the ICTR⁶. These institutions have determined that the criminal liability for crimes against humanity and war crimes against civilians

³ *Inter alia*, includes: Genocide Convention (1948); Geneva Conventions (1949) and their additional protocols (1977); Slavery Convention amended in 1963; 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 (1971); Convention on Elimination of All Forms of Discrimination against Women (1979); UN Convention against Torture (1984).

⁴ Report of the UN General Secretary pursuant to paragraph 2 of the Security Council Resolution 882 of 3 May 1993, para 34-35 and 41-42.

⁵ International Law Commission, Commentary to the Draft Law on Crimes against Peace and Humanity (1996).

⁶ Prosecutor v. Tadić, Decision on the Defence Motion for interlocutory appeal concerning competence, 2 October 1997, para 151; Prosecutor v. Tadić, IT-94-I-T, Judgment, 7 May 1997, para 616-623.

represents an imperative standard of international law, that is, *ius 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 iudicare*) 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 ~~customary~~ 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 Henckaerts and Ludo Dorez-Dock, 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 demeanor, 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 offense

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



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:

e) 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 Strobic 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.⁹

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

⁹ 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.

"The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."

Therefore, except for members of armed forces, each person present in the territory is a civilian.¹¹ Article 50 of the Protocol I further holds that civilian population comprises all persons who are civilians and that the presence of individuals who are not covered by the definition of civilians among civilian population does not deprive the population of its civilian character. The Article also states that, in case of doubt whether a person is a civilian, a person shall be considered to be a civilian.

Therefore, bearing in mind the definition of the term "civilian" which explicitly states that civilians are all persons who do not participate in hostilities and who are not members of armed forces, it is clear that all persons whom the accused Marko Štrobić, together with four armed soldiers, expelled from the house were civilians. In fact, one might argue that this family represents what this term civilian means. In the instant case there were three minor children at home with their family. The youngest was under two years of age. The family was asleep in their homes. The eldest member of the family was a defenseless old man, the late Stojko Glamočak. He was not armed and was almost 80 years old. No one in the family had any weapon. Stojko Glamočak was confused and disoriented. He had to be helped with his clothes and shown how to hold his hands up over his head when ordered to do so. None of the family members were combatants, which ensues from the statements given by Boro and Stana Glamočak. The offence the Accused is charged with was directed against civilians whose ethnicity was other than the ethnicity of the military force that controlled the territory in which civilians lived. The Glamočak family was the only local Serb family. They elected not to leave their home in Kotor Varoš as they felt they were on good terms with their neighbors and community. This category of civilians is particularly protected by international law. ~~Violence~~ ~~is~~ ~~inflicted~~ ~~on~~ ~~life~~ ~~and~~ ~~bodily~~ ~~integrity~~, in particular murder of all kinds, mutilation, cruel treatment and torture are especially prohibited in respect of this category. Hence, it is obvious that the criminal offence referred to in the indictment, which is established to have been committed by the Accused, was inconsistent with the rules of international law, more specifically, Article 3(1)(a) of the Geneva Convention. This type of vigilante act is abhorrent to any concept of a just military act.

ii. The violation must be committed in time of war, armed conflict or occupation;

Also, a particular legal element of this criminal offence is the time of its commission, that is, the offence can be committed only during the war or armed conflict.

¹¹ See *supra* fn. 4, p 611.

While assessing the existence of the criminal offence and criminal responsibility of the Accused, the Court was mindful of all elements making up the legal element of the criminal offence with which the Accused is charged, so that, in respect of this first requirement, that is, the existence of the armed conflict, the Court, having reviewed evidence of the Prosecutor's Office – Decision of the Presidency of the Republic of Bosnia and Herzegovina (R BiH) on Declaring the State of War of 20 June 1992, established the existence of the armed conflict in the territory of the R BiH, and it is a fact about which no dilemma existed in this case.

Therefore, it is incontestable that, within the territory of Bosnia and Herzegovina, there also existed the armed conflict in the area of the Kotor Varoš Municipality and that it occurred between the members of the Republika Srpska Army on one side and the Army of BiH and HVO on the other, and that they are covered by the indictment.

Also this fact was not challenged in the course of the proceedings, and it should be noted that both Prosecution witnesses and Defence witnesses testified in respect of the circumstances surrounding the existence of the armed conflict. The Prosecution witness Ivo Marić testified at the main trial that in 1992, after he had returned from abroad, there was the state of war in the area of the Kotor Varoš Municipality. He also stated that local residents organized themselves and stood guard, and that men slept in woods at night, and that there were shootings at the villages of the Kotor Varoš Municipality, as well as attacks by the Serb army who entered Kotor Varoš at the relevant time.

The state of war caused additional problems. The witness Ljubomir Petrušić stated that at the time he was a chief of the Crime Investigation Department in the Kotor Varoš Police Station. On 31 July 1992, he received a complaint on the murder of Stojko Glamočak and that he wrote his report by hand and that he lost it because of the state of war, and that a lack of discipline prevailed. Also, the Defence witness Muhamed Sadiković stated that on 11 June 1992 Serb forces came in Kotor Varoš from Banja Luka and that the war began at that point. He also stated that on that occasion all municipal institutions, court and police station were captured, and that check-points were set up on the way in and out of Kotor Varoš. The witness testified that the killings started right about that time, and that a certain number of local residents organized themselves territorially for defence, and that he was a commander in that part of the territory. There existed a line of separation between the Serb forces and the Territorial Defence. According to this witness, the largest number of attacks by the Serb forces was recorded in the period from 25 July 1992 and a large number of civilian residents of Croat and Bosniak ethnicity were killed. The Defence witness Slavko Đurđo also testified that on 11 June 1992 a forced mobilization took place, and that he himself signed up for the defence of the village of Šibovo, the Kotor Varoš Municipality, in defence against potential attacks by the Republika Srpska Army. At that time, there were so-called crisis staffs prior to the very attack, and on 25 July 1992 an all-out attack on Kotor started and in that attack many people were killed, both military and civilians.

The aforementioned is important for the reason that Article 173 of the BiH CC prescribes that this criminal offence, in addition of the requirement that it

connected with violations of the rules of international law, must be committed at the time of an armed conflict. It should be noted at this point that the requirement for the existence of this offence is not connected with the nature of the armed conflict in terms of making distinction whether it concerns the armed conflict of non-international or international character, given that Article 3 itself of the Geneva Conventions prescribes that the provisions of the Conventions will be applied also in the event of the armed conflict which does not have the international character.

III. The act must be related to a war, armed conflict or occupation:

The analyzing of the status of the Accused at the relevant time is important also from the aspect of another requirement necessary for the existence of this criminal offence, which is that the offence of the perpetrator must be related to a war, armed conflict or occupation.

What is important here is *"the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit the crime, the manner in which it was committed or the purpose for which it was committed."*¹² Therefore, during the main trial the Prosecutor's Office proved the assertion that the accused Marko Škrobić was a member of the Kotor Varoš HVO Unit at the time of the commission of the criminal offence.

First of all, this fact arises from documentary evidence of the Prosecutor's Office, more specifically, from the document of the Federation Ministry for War Veterans and Disabled Veterans of the Homeland War, Number 07/1-03-127-1/07 of 22 October 2007 from which it ensues that at the relevant time the Accused was a member of the Kotor Varoš HVO Unit, as well as from the statements of the Defence witnesses Slavko Bujdo and Muhamed Sadiković who stated in their statements that at the relevant time, at the time of organizing the lines of defence, they were superiors to the Accused. The Accused also personally confirmed that fact when he was giving a testimony as a witness at the main trial, stating that he personally signed up for the defence.

Owing to his status during the armed conflict, the accused Marko Škrobić had appropriate assignments as well as weapons, a Scorpion pistol, and he reported to his command taking part in the defence. In other words at the time of the offence he was a soldier.

In addition, for the existence of a criminal offence it is essential that, owing to the existence of the armed conflict, the Accused was engaged in a military unit and, owing to this obtained status he was able to cause fear in civilian population, more precisely, by taking advantage of his position he was able to force civilians (the Glamočak family)

¹² Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Pisković, IT-96-23 & IT-96-23/1-A, Appeal Judgment, 12 June 2002, para. 58.

to follow, without resistance, his orders and the orders of his fellow-soldiers, which they all did in the particular case when they, on the relevant day, took the members of that family out of their house, the referenced persons being unable to resist and were forced to march to the neighboring town.

iv. The perpetrator must order or commit the act.

The assessment of evidence was directed at identifying the Accused as a person who perpetrated the action described in the indictment. In this regard, given the act of commission of the criminal offence *per se*, it is incontestable that on 31 July 1992 a group of 4 to 5 armed persons came in front of the house of Boro Glamotač and Stana Glamotač, and after banging on the door, those persons entered the house and drove them out together with their minor daughters. It is also incontestable that, after they had been expelled from their house, the same armed persons drove Stojko Glamotač, Boro's father, out of the neighbouring house, and marched all of them away in the direction of the village of Ravne. It is incontestable that two soldiers separated Boro Glamotač and took him towards the woods, that they threatened him with death unless he failed to surrender the weapon to them, and that they fired one shot from a weapon in the air. It is incontestable that one of the remaining soldiers who stayed with the other members of the Glamotač family came up to Stojko Glamotač, grabbed his chest and fired a shot directly at his chest, whereas Stojko Glamotač fell and died.

Second, the evaluation of testimony.

It is questionable whether one of those armed persons was the accused Marko Škrobič and whether he shot the late Stojko Glamotač.

The Court established beyond doubt that Marko Škrobič was in the group of the armed persons who drove the Glamotač family out of their house and marched them towards the village of Ravne. The Court reached such conclusion by virtue of statements of the witnesses Boro Glamotač and Stana Glamotač. Those witnesses gave their statements on a number of occasions, and finally they gave their testimony in this case at the main trial, when both witnesses were categorical in their averments that one of the armed persons was the Accused.

The witness Boro Glamotač stated both in the Prosecutor's Office BiH and at the main trial that, at the relevant time, when the armed persons entered their house, he did not realise at first that the name of one of the armed persons was Marko Škrobič although he heard from his wife that one of them introduced himself as the neighbour Marko, but when they set off for the village of Ravne he remembered who that man was, and knew that he was Marko, son of Ora. He remembered him and who his parents were. He also stated that on that occasion Marko Škrobič had a pistol on him, and that among the armed persons he also recognized Tomo Jurinović who subsequently separated him from his family and marched him away towards the woods, and he, together with another person, threatened that he would kill him unless he surrendered the weapon.

The witness Boro Glamotačak knew the Accused prior to that day by sight, and he knew his parents well, but he did not know any other person who had the same first and last name. It also must be noted that the defense did not dispute the recognition testimony concerning Tomo Jurinović.

The recognition testimony given by Boro Glamotačak must be taken into consideration together with the eyewitness testimony of his wife. Together these testimonies constitute the evidence in chief. The Court gave credence to the testimony of the witness Boro Glamotačak having found that his recognition testimony was credible and reliable, because in respect of establishing whether the Accused was in the group of armed persons, the witness gave the same statement immediately after the event to Ljubomir Petrušić as well as at the Prosecutor's Office of BiH and at the main trial. Furthermore there has never been given any motive for the witnesses to lie, given that from the very outset of the armed conflict they lived in good neighborly relations with their Croat neighbors, and they helped regarding the funeral of Stojko Glamotačak, and after the war those witnesses returned to their house and continued to live there. There is no doubt that the witness gave the account of the event the following day after the murder. Ljubomir Petrušić testified he remembered the date clearly because it was the last day of the month. The incident clearly left an impression on him as this was still early in the war and senseless acts of violence were still shocking.

Ljubomir Petrušić confirmed Boro's testimony when he gave his testimony at the main trial. On 31 July 1992 he received a criminal report about the murder of Stojko Glamotačak, which indicated the known perpetrator Marko Škrobić, and that he received that information from Boro Glamotačak who reported the murder of his father and who recounted to him all the circumstances surrounding the relevant event. The witness stated that he personally wrote the statement but that it got lost because of the state of war (he explained his office was ransacked some time after taking this statement), but that after a certain time it was reconstructed, and that he remembered the date of taking the statement well because he remembered the last date in the month well. Due to the state of war no further action was taken on the criminal report.

The witness Stana Glamotačak stated that, during the banging on their door, in response to the question "Who is it?", she heard the reply by the neighbour Marko. At that time she did not know who of them introduced himself as the neighbour Marko, but when they came out, one of the armed persons introduced himself again as neighbour Marko, so that she saw who introduced himself by that name.

The Court gave credence to the testimonies of the witnesses Stana Glamotačak and Boro Glamotačak in respect of the fact whether Marko Škrobić was in the group of the armed men at the time and in the place described in the factual substratum of the indictment, because those testimonies match each other, they are consistent and concurrent. Given the very act of the murder of Stojko Glamotačak, Stana Glamotačak is a direct eye-witness of the murder. She saw the person who introduced himself as the neighbour Marko grabbing Stojko Glamotačak's chest and firing one shot at his chest, whereupon the instigator

death of Stojko Olamočak occurred. She was less than 7 meters away. This event, traumatic and frightening as it was, has left an indelible mark on her, but regardless of that she was still able to memorize the face of the shooter. At every step of the investigations she has always identified the Accused. The first time she was shown pictures at the District Prosecutor's Office she picked him out of a group of 4 photos. The four photos were of persons of the same name, Marko Škrobić. This procedure may have not been in strict compliance with the CPC procedure at the time but any irregularity did not violate the integrity of the selection. Stana testified she had never seen Marko since that date, but she identified the Accused that time and every time since. What is significant about this identification is that she picked out the one Marko who was the son of Ora. Only one Marko meets this test and she accurately selected him. The defense points to the fact that her verbal description varied, but much of that description was about body characteristics that were not shown in the head photograph. It is clear that while this witness's verbal articulation is more difficult, her visual acuity is sharp.

The witness stated that at the time of the murder of her father-in-law she did not know the last name of the person who committed the murder, but according to her description of the very incident and at her mention of his introducing himself as the neighbour Marko, her neighbours immediately knew which Marko was in question, and that she got to know his last name from them. However, we must underline that this witness, although she did not know the last name of the Accused at the time of the very incident, during her examination at the District Prosecutor's Office in Banja Luka recognized him in a photograph as the person who killed her father-in-law.

Although she was unsure while giving her first testimony, during her second testimony the witness was explicit and clear that it was exactly the accused Marko Škrobić who committed the murder of Stojko Olamočak. Her initial unsurety was caused by fear from the courtroom, which was obvious during her first testimony. Due to the stress of the proceedings, the witness examination had to be stopped, after which the witness was taken to the hospital, recovered and came back at a later day (twice) to provide coherent testimony.

The witness Boro Olamočak stated that, although he did not see the murder of his father directly, when his wife told him that the murder was committed by the same person who introduced himself as the neighbour Marko, he immediately knew which Marko was in question and he said to her that it was Ora's Marko. Ora is mother's name of the Accused. As that is a small place, the area where all residents know one another, the identification of the person by the parent's name can be sufficient to conclude which person is in question.

In addition, the referenced witnesses are fully consistent in respect of the description of the then physical appearance of the Accused. For that reason, their testimonies must be viewed together. The witness Stana Olamočak, as was already stated, memorized and identified the Accused both in the photographs and in the court-room, although she did

not know him by his first and last name. Although the witness Boro Glamotač was not able to recognize him in the photograph at the Prosecutor's Office of BiH several years after the incident, that is, he was not sure that the Accused was exactly the person in the photograph, he nevertheless was able to identify the Accused during the very incident. At the same time, this witness also recalled and recognized another person, that is, Tomo Juriaović whose identification by the witness was not brought into question by anyone. On the whole, although there were certain inconsistencies in the testimonies, none of those inconsistencies substantively affected the credibility of the testimonies of the witnesses – eye-witnesses. Certainly, one should bear in mind that their statements cannot match in their entirety, which is acceptable when the perspective of human observation of some event is taken into account, and that each person experiences the same situation differently. In this connection, it should be underlined that those witnesses went through very stressful and traumatic events, that they feared for their own lives, for the life of the father, that is, father-in-law, as well as the lives of their minor daughters, so that it is quite understandable that they were not able to memorize all details.

It should be also noted that the Defence witness Dragoslav Perišić, the police officer who, as an official person, followed the order of the Prosecutor and performed the action of identification and taking the statement from the witnesses, confirmed at the main trial that both witnesses recognized the Accused from among four photographs, that they knew his first and last name, his father's name, nickname, his mother's name.

As for the alibi of the Accused when he stated that, at the relevant time, he did not leave Kotor and that he was on the front line all the time, as he stated during the testimony, the Court did not find it convincing, given that no evidence corroborates his averments. The witness Slavko Bujdo tried to corroborate the alibi of the Accused, but his testimony is inconclusive, because the Witness listed in general the places where the Accused was at the relevant time, without knowing where the Accused was exactly. Also, the witness said that all members of the Territorial Defence gathered on the front line at night, and it continued until dawn, because that is when the attacks were most frequent, and the relevant event occurred early in the morning when it was dawn and when no major attack was carried out. The Prosecution witness Ivo Marić confirmed this fact by his testimony. He stated that, for security reasons, he did not sleep at home at night, but out of doors with Braco Marić, and that they usually came back home in the morning. At the relevant time, the witness slept out of doors, near the house of the killed Stojko, and he stated that he was woken up in the morning, between four and five a.m., by a shot from this direction. It can be concluded from this that no fierce combats took place at that time, and that it was a calm night. It is evident from the testimony of the witness Muhamed Sadiković, the commander in one part of the territory, who testified about the existence of armed conflicts and the manner of organizing the defence, and about the attack on the Kotor Varoš Municipality, that it was a large territory. He said that he did not see every day Slavko Bujdo who was inferior to him, but in the chain of command he had a more important role than an ordinary soldier, wherefrom it ensues that it was not possible to see every day all the members of the Territorial Defence, especially the



22 *Signe et al. v. Kipwite et al. Appeal Judgment*,
14 at para. 24,
14 at para. 23.

The defense cites *Kipwite et al. Appeal Judgment* as a basis for not accepting eyewitness testimony as being notoriously unreliable. What the Appeals Chamber states is that a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate such evidence, before accepting it as the sole basis for sustaining a conviction. The Court also notes that in appropriate circumstances a Trial Chamber can rely on the evidence of a single witness.¹⁹

What is important to note is how this case differs from *Kipwite et al.* In that case the visibility was reduced in the early morning hours due to fog and rain. It was April not July. The attackers faces were heavily covered with paint. The witness was 13 years old. The defense cites *Kipwite et al. Appeal Judgment* as a basis for not accepting eyewitness testimony as being notoriously unreliable. What the Appeals Chamber states is that a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate such evidence, before accepting it as the sole basis for sustaining a conviction. The Court also notes that in appropriate circumstances a Trial Chamber can rely on the evidence of a single witness.¹⁹

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at the time, recognition evidence was not an issue although the time period was short and the events were equally traumatic.¹⁶

Having considered *Kupreslić et al.*, the Trial Panel looked to other case law for analysis. In the instant case, the Trial Panel looked at standards evaluating witness testimony in other jurisdictions. For example, in *Neil v. Biggers*¹⁷, the US Supreme Court developed a five-step test if an identification is reliable under the totality of circumstances. The 5 factors are as follows:

- 1) the opportunity of the witness to view the accused at the time of the crime;
- 2) the witness' degree of attention;
- 3) the accuracy of the witness' prior description or (as in this case identification) of the accused;
- 4) the level of certainty demonstrated by the witness at the time of confrontation at the Main Trial; and
- 5) the length of time between the crime and the confrontation.

Other courts and jurisdictions have struggled with this issue, such as the supreme courts of Germany, Austria, Sweden etc.¹⁸ A refinement of the above standard was issued in *State of Utah v. Long*¹⁹. There the Supreme Court of Utah defined the 5 factors as follows:

- 1) the opportunity of the witness to view the actor during the event;
- 2) the witnesses degree of attention to the actor at the time of the event;
- 3) the witness's capacity to observe the event, including his or her physical and mental acuity;
- 4) whether the witness's identification was made spontaneously and remained consistent thereafter or whether it was the product of suggestion; and
- 5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly (this last factor relating to whether or not it was an ordinary event or not).

Taking into account the above factors and viewing the totality of the evidence and the circumstances, the Trial Panel found the testimony of both Stana and Boro to be credible and decisive. In evaluating Stana's testimony, the court found that she had ample time to view the accused. This incident lasted a number of hours. Her attention was riveted on the Accused as he was the killer of her father-in-law, the others are vaguer to her but they were not killers. As she had three children with her to protect it is unlikely she took her eyes off him. She was an adult at the time and had no mental or physical impairments that might affect her memory. Her initial id of the Accused was made

¹⁶ *Id.* at para. 127-132.

¹⁷ *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 373 (1972).

¹⁸ See fn. 7, *Kupreslić et al.* Appeal Judgment, para. 34. The ICTY Appeals Chamber also looked at standards involving witness testimony in other jurisdictions.

¹⁹ *State of Utah v. Long*, 721 P.2d 493 (Utah 1986).

spontaneously from among 4 different photos. Although her neighbors first suggested the name of Marko Škrobić to her there is no evidence she contained a description of him. If anything the name came after she told her neighbors of the incident. This is not clear at the main trial as the neighbors are now dead. It is equally a possibility, being in a small village, that by mid-morning many knew of this incident (see testimony of Ivo Marić) as well as the perpetrators. Her husband only identified the Accused as Marko, son of Ora. She testified that she never saw him again until the Main Trial. Given that the nature of the event was so shocking it is clear she could hold the memory of a face and still be confused by other less important details after all this time. Both positions can be equally true. Given this, the totality of her testimony was believed by the Trial Panel.

The same analysis applies to Boro's testimony. His testimony does not have the same problems as traditional eyewitness testimony. He in fact knew the accused and realized this as the event unfolded. Although he did not see the shooting as he had been separated he was reunited with the group shortly thereafter and was told by his wife as to what had happened. He did finally remember his name and who were his parents and at some point told his wife it was Marko, son of Ora. Later that day his wife heard the full name from her neighbors. Boro's clarity of the event was so strong that the next day after the family was released and they buried his father he immediately went to file a police report. The facts reported that day have not changed in substance in 15 years.

The Prosecution has the burden of proof and the trial Panel concluded that the totality of the evidence proved the accused committed the murder of Stojko Glamotačak beyond a reasonable doubt. As such there is no reason to further comment on the defense. It must be noted however that as part of the totality of the evidence the Court considered the alibi defense of the Accused and found it lacking in credibility. There was absolutely no motive on the part of the Glamotačak family to make up this story or to accuse someone they barely knew. It is clear they were on good terms with their neighbors and in fact have moved back to the same community after the war. They have every reason to now forget that this happened for the sake of their new life, except for one thing, the pursuit of justice for Stojko Glamotačak. In contrast, most of the defense witnesses, including the Accused, have a motive to lie.

Taking all the aforementioned into account, the Court has found beyond reasonable doubt that the relevant event occurred in the manner as described in the indictment and that the accused Marko Škrobić is responsible for the murder of Stojko Glamotačak.

2. Decision on punishment

Given the established state of facts and the consequence thereof, and given the causal relation between them, the Court found the accused Marko Škrobić guilty of the criminal offence of War Crimes against Civilians in violation of Article 173(1)c) of the BiH CC and imposed on him the sentence of imprisonment for a term of 10 (ten) years.

While deciding on the punishment of the Accused, besides the circumstances referred to in Article 48 of the BiH CC, the Court was aware of exceptional circumstances in which the Accused acted.

As for the extenuating circumstances, the Court has assessed his life prior to that time, the fact that at the time of the commission of the criminal offence he turned only 21, his behaviour after the commission of the criminal offence, proper conduct during the trial, and the fact that he fully complied with the measures imposed on him instead of custody measure, that he has not been prosecuted until now, that he is a married and family man, so that the Court has found that, even with the minimal sentence of imprisonment for a term of 10 years which is prescribed for such criminal offence, the purpose of the punishment will be fulfilled, both in terms of special and general prevention. The Court did not find particularly extenuating circumstances which, pursuant to Article 49(1)b), would indicate that the purpose of punishment can be achieved by a more lenient punishment than that prescribed for the criminal offence of War Crimes against Civilians, which is the sentence of imprisonment of at least ten years or a sentence of a life imprisonment.

The Court did not find any aggravating circumstances on the part of the Accused.

By virtue of the application of legal regulations referred to in Article 56 of the BiH CC, the time the Accused spent in custody pending trial, starting from 19 December 2007 to 6 February 2008, shall be credited towards the sentence of imprisonment imposed on the Accused.

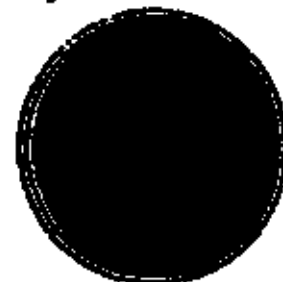
9. Decision on the reimbursement of costs of the proceedings and claims under property law

Pursuant to Article 185 and Article 188(1) of the BiH CPC, the Accused must cover the expenses of the criminal proceedings. The overall expenses of the criminal proceedings amount to KM 3,610.00 (three thousand six hundred and ten Convertible Marks).

During the evidentiary proceedings the total of eleven witnesses testified; this figure included five Prosecution witnesses and six Defence witnesses. While establishing the amount of the criminal proceedings expenses, the following types of expenses were taken into account: travel expenses, reimbursement for transportation, reimbursement for food of the witnesses, escort expenses, reimbursement for witnesses' response to summons.

In this connection, the overall expenses in the phase of investigation amount to KM 2,144.00 (two thousand one hundred and forty-four Convertible Marks), and in the phase of the main trial they amount to KM 966.00 (nine thousand and sixty-six Convertible Marks).

Also, assessing the duration and complexity of the criminal proceedings as well as the financial situation of the Accused, and pursuant to Article 185(1)g) of the BiH CPC, the Court bound the Accused to reimburse the Court's flat rate in the amount of KM 500.00 (five hundred Convertible Marks) within 30 days of the date of the finality of the Verdict.



Pursuant to Article 198(2) of the BiH CPC, the injured parties are instructed to take a civil action with their potential claim under property law, given that the establishing of facts in respect of the amount of the claim under property law would require a long time, whereby these proceedings would be extended without any good reason.

RECORD-TAKER
Enira Hodžić

PRESIDENT OF THE PANEL
JUDGE
Džeko Samardžić

LEGAL REMEDY: This Verdict may be appealed with the Appellate Panel of the Court of BiH within 15 (fifteen) days of the receipt of a written copy of the Verdict.

Translator's note:

I hereby confirm that this document is a true translation of the original written in B/C/S.
Sarajevo, 24 December 2008


Certified Court Interpreter for the English language


Certified Court Interpreter for the English language

