

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine
Суд Босна и Херцеговина

Case No.: S1 1 K 007937 11 Kri

Date: Rendered on 22 June 2012
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Before the Trial Panel comprised of: Judge Darko Samardžić, Panel President
 Judge Davorin Jukić
 Judge Jasmina Kosović

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Šaban Đelilbašić et al.

FIRST INSTANCE VERDICT

Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina:

Slavica Terzić

Counsel for the Accused:

Attorney Izet Baždarević, Counsel for the Accused Šaban Đelilbašić

Attorney Midhat Kočo, Counsel for the Accused Elvir Đelilbašić

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IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting on the Panel composed of Judge Darko Samardžić, as the Presiding Judge, and Judges Davorin Jukić and Jasmina Kosović as members of the Panel, with the participation of Court Officer Azra Bojić, as the Minutes-taker, in the criminal case against the Accused Šaban Đelilbašić and Elvir Đelilbašić for the criminal offence of War Crimes against Civilians under Article 173(1)(c), as read with Article 29 and Article 180(1) of the Criminal Code of Bosnia and Herzegovina (the CC of BiH), deciding on the Indictment of the Prosecutor's Office of Bosnia and Herzegovina No. T20 0 KTRZ 0000610 09 dated 27 December 2011, confirmed on 30 December 2011, having reviewed and accepted the Plea Agreements entered on 24 April 2012 between the BiH Prosecutor's Office and the Accused Šaban Đelilbašić and between the BiH Prosecutor's Office and the Accused Elvir Đelilbašić, following the sentencing hearing held in the presence of the Prosecutor of the BiH Prosecutor's Office Slavica Terzić, the Accused Šaban Đelilbašić, the Accused Elvir Đelilbašić and his Defense Counsel, Attorney Midhat Kočo, on 22 June 2012 rendered and publicly announced the following:

VERDICT

THE ACCUSED

1. ŠABAN ĐELILBAŠIĆ, son of Zahid, born on 23 December 1966 in the village of Selići, Personal Identification Number (PIN) ..., shoe-maker by occupation, Shoemakers Secondary School completed, served the compulsory military service in 1985/86 in Ohrid, the Republic of Macedonia, no ranks, kept in the Travnik Military Records, ethnicity ..., citizen of ..., married, father of two minors, residing at ..., no prior convictions,

2. ELVIR ĐELILBAŠIĆ, son of Zahid, born on 13 April 1969 /sic/, in the village of Selići, PIN ..., carpenter, Carpenters Secondary School completed, served the compulsory military service in 1988/89 in Štip, the Republic of Macedonia, no ranks, kept in the ... Military Records, ethnicity ..., citizen of ..., married, father of a minor child, residing at ..., no prior convictions,

HAVE BEEN FOUND GUILTY

Because:

During the state of war in Bosnia and Herzegovina, and an armed conflict between the Army of the Republic of Bosnia and Herzegovina and the Republika Srpska Army, as members of the 3rd Battalion within the 312th Motorized Brigade called the *Turbe Unit* of the RBiH Army, they acted in violation of the rules of international humanitarian law, and in violation of Article 3(1)(a) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War dated 12 August 1949 in as much as:

On 9 December 1992, having received the information that their brother Suljo Đelilbašić had been killed at the frontline fighting the Republika Srpska Army, **Šaban Đelilbašić** and **Elvir Đelilbašić**, both armed with automatic rifles and with the intent to kill Serb citizens who had at the time lived in the place of Turbe, during the morning hours of the above referenced day, came together to Neđeljko Koščo's family house in Turbe, and, shooting from their automatic rifles, killed one of the present Serbs, **Neđeljko Koščo**, having fired fourteen shots in his back, one shot in his head anteriorly and four shots in his right arm, whereupon they went further to Boško Ljubičić's house in Turbe, and in the immediate vicinity of this house, shooting from the automatic rifles, they killed another Serb, **Božo Katana**, having fired one shot in his head anteriorly, one in his heart anteriorly and one in his right arm,

Whereby they committed the criminal offense of War Crimes against Civilians under Article 173(1)(c)-Murder of the Criminal Code of Bosnia and Herzegovina, as read with Article 29 of the Criminal Code of BiH and Article 180(1) of the CC of BiH.

Therefore, pursuant to Articles 39, 40, 42, 48, 49 and 50 of the CC of BiH, the Panel of the Court of BiH

SENTENCES

THEM TO IMPRISONMENT FOR A TERM OF 6 (SIX) YEARS EACH

Pursuant to Article 188(4) of the CPC of BiH, the Accused are relieved of the duty to reimburse the costs of criminal proceedings, which shall be paid from the budget appropriations of the Court.

Pursuant to Article 198(2) of the CPC of BiH, all injured parties are instructed to pursue their claims under property law in a civil action.

REASONS

I. INDICTMENT AND PLEA AGREEMENT

1. On 27 December 2011, the Prosecutor's Office of Bosnia and Herzegovina filed an Indictment No. T 20 0 KTRZ 0000610 09 against Šaban Đelilbašić and Elvir Đelilbašić, which was confirmed on 30 December 2011.
2. The referenced Indictment charged Šaban Đelilbašić and Elvir Đelilbašić with committing the criminal offense of War Crimes against Civilians under Article 173(1)(c), as read with Article 29 and Article 180(1) of the Criminal Code of BiH.
3. On 25 April 2012, the BiH Prosecutor's Office submitted to the Court a Plea Agreement entered on 24 April 2012 between the Accused Šaban Đelilbašić and the Prosecutor of the BiH Prosecutor's Office in the presence of the Counsel for the Accused, Attorney Izet Baždarević, and a Plea Agreement entered between the Accused Elvir Đelilbašić and the Prosecutor of the BiH Prosecutor's Office in the presence of the Counsel for the Accused, Attorney Midhat Kočo.

II. PLEA AGREEMENT DELIBERATION (UNDER ARTICLE 231 OF THE CPC OF BIH)

4. In the course of deliberating the Plea Agreements under Article 231 of the CPC of BiH entered between the Accused Šaban Đelilbašić and his Counsel Izet Baždarević and Slavica Terzić, Prosecutor of the BiH Prosecutor's Office, and between Elvir Đelilbašić and his Counsel, Attorney Midhat Kočo, and Slavica Terzić, Prosecutor of the BiH Prosecutor's Office, the Court has established, following the plea hearing held on 1 June 2012, that the Accused voluntarily entered the Plea Agreements with the knowledge about and with the full understanding of both the factual description of the offense and the legal qualification thereof. The Court has also established that both the Accused were thoroughly advised of all the consequences resulting from the entered Plea Agreements, including the ones pertaining to claims under property law and the costs of criminal proceedings. The Court has also ascertained that the Accused understood that by entering the Plea Agreements their right to a trial and the right to appeal the sentence to be imposed on them would be

waived.

5. In deliberating the Plea Agreement, the Court has been particularly mindful of the interests and rights of the injured parties, having inquired them if they were aware of a possibility that a plea agreement could be entered with the Accused Šaban Đelilbašić and Elvir Đelilbašić.

6. In this regard, the Court has taken into account Official Notes made on 25 May 2012 and tendered by the Prosecution as undisputed evidence. It transpires from the said Official Notes that the Prosecutor had met the representatives of the injured parties' families to notify them of the entered Plea Agreements, and that the injured parties had no objections to accepting thereof.¹

7. Furthermore, the Court has examined whether the sentence proposed under the Plea Agreement would satisfy the legally prescribed requirements, that is, whether the proposed sentence could be imposed below the statutory prescribed minimum sentence of imprisonment for each criminal offense. The minimum sentence prescribed for the criminal offense of Crimes against Civilians is 10 years, whereas a long-term imprisonment is prescribed as a maximum one. The Court has found that the sentence under the Plea Agreement was foreseen in compliance with the law, namely that, pursuant to the law, applying the rule on reduction of sentence for this crime, the proposed sentence of imprisonment for a term of 5-6 years can be imposed.

8. In view of the foregoing, the Court has established that all statutory prescribed requirements were satisfied, wherefore the entered Plea Agreements have been accepted.

9. Thereupon, the Accused Šaban Đelilbašić and Elvir Đelilbašić gave statements on the record pursuant to Article 231(7) of the CPC of BiH, having expressed their regrets and apologies to the victims and their families for the crimes they committed.

III. ADDUCED EVIDENCE

10. Having been satisfied that the Accused were fully aware of all legal consequences arising from the Plea Agreement pursuant to Article 231(6)(b) of the CPC of BiH, the Court

¹ BiH Prosecutor's Office Official Note No. T20 0 KTRZ 0000610 09 dated 25 May 2012.

examined if there was sufficient evidence to prove the guilt of the Accused. The Court has called the Prosecutor to present the proposed evidence on which the Indictment was built.

11. At the hearing held on 1 June 2012, the Prosecutor presented and tendered into the case record a total of 26 pieces of evidence to which the Accused and their Attorney had no objections or comments. Having reviewed the referenced evidence, the Court concluded that the Prosecution had offered sufficient evidence proving the guilt of the Accused, namely that, at the time and in the way as described in the operative part of the Verdict, the Accused Šaban Đelilbašić and Elvir Đelilbašić committed the criminal offense of War Crimes against Civilians under Article 173(1)(c), as read with Article 29 and Article 180(1) of the CC of BiH. Accepting the Plea Agreements, the Court has found the Accused Šaban Đelilbašić and Elvir Đelilbašić guilty of the above referenced crime.

12. The evidence presented and tendered in the case record was specified in the Annex to the Verdict and constitutes an integral part thereof.

IV. PROSECUTION AND DEFENSE CLOSING ARGUMENTS PRESENTED IN EXPLANATION OF THE PROPOSED SENTENCE

13. At the sentencing hearing, the Prosecutor has maintained her proposed sentence and noted that the Accused had expressed both their remorse for the committed crime and readiness to cooperate with the BiH Prosecutor's Office.

14. At the same hearing, the Counsel for the Accused have entirely accepted the Prosecution arguments, adding that the Accused were aware of the crime they committed, that they were eager to see the initiation and completion of the proceedings against them, and that the crime was committed after their brother had been killed during the war.

15. Having supported their Counsel's arguments, the Accused Šaban Đelilbašić and Elvir Đelilbašić again expressed their remorse for the crimes committed and offered their condolences to the injured parties for their loss.

V. APPLICABLE LAW

16. Having entered the Plea Agreements, the Accused Šaban Đelilbašić and Elvir Šaban pled guilty of committing the criminal offense of War Crimes against Civilians under Article 173 of the CC of BiH.

17. The criminal offense of War Crimes against Civilians was regulated under Article 142 of the SFRY Criminal Code and punishable with a minimum sentence of 5 years imprisonment or a death penalty. The prescribed sentence for the referenced criminal offense under Article 173 of the Criminal Code of Bosnia and Herzegovina is a minimum of 10 years in prison or a long-term imprisonment.

18. Given the time the criminal offense was allegedly committed (1992) and the then applicable substantive law, the view of the Court is that it is important to be mindful of the principle of legality (both *nullum crimen sine lege* and *nulla poena sine lege*), and the principle of time constraints regarding applicability.

19. The Court has accepted the law indicated under the Plea Agreements being primarily led by the principle of legality set out in Article 3 of the CC of BiH. This Article regulates that criminal offenses and criminal sanctions shall be prescribed only by law, and that no punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offense by law or international law, and for which a punishment has not been prescribed by law. At the time they were committed, the crimes or acts of which the Accused Šaban Đelilbašić and Elvir Đelilbašić were found guilty were under the then applicable law already prescribed and punishable as criminal offenses. Specifically, the criminal acts specified in Article 173 of the CC of BiH can also be found in the law that was in effect at the relevant period of time – when the crime was committed, that is, in Article 142 of the CC of SFRY.

20. The Court has compared the sentences prescribed by both these Codes for the referenced crime. Even though Article 4(1) of the CC of BiH regulates that the law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense, Paragraph 2 of this Article also prescribes that if the law has been amended on one or more occasions after the criminal offense was perpetrated, the law that is more lenient to the perpetrator shall apply.

21. Article 7(1) of the European Convention on Human Rights (ECHR) also regulates the principle of legality. Pursuant to Article 2(2) of the BiH Constitution, the European Convention has primacy over all other laws in BiH. This provision of the European Convention includes a general principle that prohibits imposing a heavier penalty than the one that was applicable at the time the criminal offense was committed, but does not provide for the application of the most lenient law.

22. In this regard, it is acceptable for the Court to apply the CC of BiH given that the sentence prescribed under the Criminal Code of BiH is, in any event, more lenient than the death penalty which was in effect at the time the crime was perpetrated, whereby the principle of time constraints regarding applicability, or the application to the perpetrator of the more lenient law, has been satisfied.²

23. Furthermore, Article 4a) of the CC of BiH prescribing that Articles 3 and 4 of the CC of BiH 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 international law.

24. By the same token, Article 7(2) of the European Convention also provides for the same exception 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”.³

25. The foregoing establishes a possibility to derogate, under prescribed requirements, from the principles set out in Articles 3 and 4 of the CC of BiH (and Article 7(1) of the European Convention), and thereby from the application of the criminal code that was in effect at the time of perpetration and from the application of a more lenient law in the proceedings conducted for the crimes incriminated under international law.

26. The criminal offense of Crimes against Civilians charged against the Accused was a crime under customary international law too, wherefore it falls under the ‘general principles of international law’⁴ as set out in Article 4a) of the Law on Amendments to the CC of BiH

²Such a position of the Court is compliant with the position taken in a Verdict of Section I of the Appellate Division of the Court of BiH rendered in *Abduladhim Maktouf*, No. KPŽ 32/05 dated 4 April 2006 and the Verdict in *Dragoje Paunović* No. KPŽ 05/16 dated 27 October 2006, which was also upheld by a Decision of the Constitutional Court of Bosnia and Herzegovina No. : AP -178 5/06 dated 30 March 2007.

³ See also Article 15(1) and (2) of the International Covenant on Civil and Political Rights which contains similar provisions. The State of Bosnia and Herzegovina, as one of the Yugoslavia successor States, has ratified this Covenant.

⁴ Customary status of the criminal liability for Crimes against Humanity and War Crimes against Civilians and that of the individual responsibility for the war crimes committed in 1992 was also confirmed by the UN Secretary General, International Law Commission as well as the jurisprudence of both the ICTY and the International Criminal Tribunal for Rwanda (ICTR). These institutions have established that the criminal

and the 'general principles of law recognized by the UN' as set out in Article 7(2) of the European Convention, wherefore in this case the CC of BiH can be applied on the basis of the cited provisions too.

VI. FINDINGS OF THE COURT

A. RELEVANT LAW

27. Pursuant to the Indictment of the BiH Prosecutor's Office, the Accused Šaban Đelilbašić and Elvir Đelilbašić were charged with the perpetration of the criminal offense of War Crimes against Civilians under Article 173(1)(c) (killings), as read with Article 29 and Article 180(1) of the CC of BiH.

28. The definition of crime under Article 173 includes several general requirements to be explained in detail further below.

29. Article 173(c) of the CC of BiH reads as follows:

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 not less than ten years or long-term imprisonment.

30. Article 173 of the CC of BiH prescribes that certain elements must be satisfied in order for the crime perpetrated by the Accused to constitute War Crimes against Civilians. These elements are as follows:

- The crime of the perpetrator must be perpetrated in violation of rules of international law;
- The violation must be committed in time of war, armed conflict or occupation;

liability for Crimes against Humanity and War Crimes against Civilians is an imperative standard of international law, that is, a *jus cogens*. That is why it appears indisputable that, in 1992, Crimes against Humanity and War Crimes against Civilians were a part of customary international law. The ICRC Study on Customary International Humanitarian Law by Jean-Marie Henckaerts and Louise Doswald-Beck has also confirmed this conclusion.

- The act of the perpetrator must be related to the war, armed conflict or occupation;
- The perpetrator must order or perpetrate the crime;

(i) The crime of the perpetrator must be perpetrated in violation of rules of international law

31. The Prosecution submits that the Accused have committed the crime under Article 173(c) inasmuch as they acted in violation of Article 3(1)(a) of the Geneva Convention on the Protection of Civilian Persons in Time of War dated 12 August 1949. The above referenced Article 3 is a common article for all the Geneva Conventions and it is known as “Common Article 3”.

32. Article 3(1) 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, color, 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:

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

33. Article 3 of the 1949 Geneva Convention is considered as a provision of customary law and it is binding on all parties to a conflict, national or international, wherefore this provision was in effect at the time and in the place the crimes charged against the Accused were committed. The referenced Article is common to all the Geneva Conventions, that is, it has been incorporated in all the four Geneva Conventions dated 12 August 1949. In addition to being applied in all types of conflicts (national and international), its essence is that certain rights are being guaranteed to all persons taking no active part in the hostilities, that is, human treatment is guaranteed to them as well as certain acts prohibited against them as specified under items a) through d) of Article 3.

34. It is clear upon interpretation of this provision that it is not necessary that a perpetrator is aware of, or intends to act in violation of international rules, but it is sufficient that the mere perpetration thereof is in violation of the rules of international law. In order to establish violations of the rules of international law it is necessary to determine against whom the perpetration was directed, namely whether the act was directed against a specific category of persons protected under Article 3(1) of the Geneva Convention. In the concrete case, the Accused Šaban Đelilbašić and Elvir Đelilbašić have undertaken criminal acts against civilians, that is, the persons taking no active part in the hostilities, wherefore they fall within the category protected under this Article.

35. Violations of bodily integrity or health, particularly all types of killings, cruel torture, and all the acts leading to violations of personal dignity and humiliating treatment are particularly prohibited against this category. Therefore, there is no doubt that the Accused have violated the rules of international law.

36. In order to find violations of the rules of international law in the case at hand it is necessary to establish that the act was directed against the protected category of persons pursuant to Common Article 3 of the Geneva Conventions.

37. Violations of Article 173 of the CC of BiH are based on Common Article 3 which stipulates that the *victims of violations of the rules of international law shall take no active part in the hostilities*. In the concrete case, the Accused Šaban Đelilbašić and Elvir Đelilbašić have taken criminal acts against civilians, that is, persons taking no active part in the hostilities, who fall within the category of persons protected pursuant to this Article.

38. That the killed persons Neđeljko Koščo and Božo Katana were civilians was undoubtedly confirmed by the very act of the Plea Agreement entered between the parties to the proceedings. However, the Court has examined the foregoing in compliance with the criteria prescribed under Common Article 3 of the Geneva Conventions.

39. **The civilian status** of Neđeljko Koščo and Božo Katana ensues from the Questioning Records for the Accused Šaban Đelilbašić⁵ and Elvir Đelilbašić⁶ and from the Witness Examination Record for Sulejman Leko⁷ too. According to witness Leko Sulejman,

⁵ Questioning Record for the suspect Šaban Đelilbašić, No. T20 0 KTRZ 0000610 09 of 18 November 2011.

⁶ Questioning Record for the suspect Elvir Đelilbašić, No. T20 0 KTRZ 0000610 09 of 18 November 2011.

⁷ Witness Examination Record for Sulejman Leko, No. KTA-RZ-119/07 dated 18 February 2009.

Neđeljko Koščo and Božo Katana were engaged neither in the Turbe Unit nor in the Mol work detail. It undoubtedly ensues from the foregoing that Božo Katana and Neđeljko Koščo were civilians and that they had been in their respective homes when they got killed. The foregoing has satisfied the definition of civilians pursuant to Common Article 3, namely that the *victims of violations of the rules of international law shall take no active part in the hostilities*.

(ii) The violation must be committed in time of war, armed conflict or occupation

40. In examining the Plea Agreements, the Court was mindful of all the underlying elements of the criminal offense of War Crimes against Civilians. Thus, in order to establish the existence of a war and armed conflict, the Court has first taken into account that these facts were made indisputable when the parties entered the Plea Agreements. In support of the fact that there was a state of war at the time the crimes were committed also goes the fact that, on 20 June 1992, the Presidency of the Republic of Bosnia and Herzegovina rendered a Decision on the Proclamation of the State of War (published in the Official Gazette of the RBiH 7/92), which was abolished also under the RBiH Presidency Decision dated 22 December 1996 (published in the Official Gazette of the RBiH 50/95).

41. In addition, it is indisputable that, at the critical time, there was an armed conflict in the BiH territory, that is, in the Municipality of Turbe between members of the Army BiH and the Army of Republika Srpska (VRS). This fact ensues from a document of the 3rd Corps of the Army BiH dated 2 December 1992⁸, as well as from the statements of witnesses Sulejman Leko⁹, Dragan Tejić¹⁰ and Nermin Mešinović, and the statements of the Accused themselves.

42. It undoubtedly ensues from the foregoing that the crime charged against the Accused was perpetrated during the war time in Bosnia and Herzegovina, and that the evidence obtained demonstrates beyond a doubt that there is a causal relation (nexus) between the war and the crimes committed.

⁸ Document of the 3rd Corps of the Army BiH, No.: 02/63 -1 dated 2 December 1992.

⁹ Witness Examination Record for Sulejman Leko, No. KTA-RZ-119/07 dated 18 February 2009.

¹⁰ Witness Examination Record for Dragan Tejić, No. KTA-RZ-119/07 dated 19 February 2009.

(iii) The act of the perpetrator must be related to the war, armed conflict or occupation

43. Examination of the Accused's status during the critical time is important from the aspect of the requirement necessary for the existence of this crime, namely that the perpetrator's act must be linked to a war, armed conflict or occupation.

44. What is important here is that „the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”¹¹

45. The armed conflict need not have been causal to the commission of the crime. In order to establish if the crime is closely related to the armed conflict, the prosecutor must, at a minimum, prove that the armed conflict „have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed”.¹² It would be sufficient to conclude that the perpetrator acted in furtherance of or under the guise of the armed conflict.¹³ However, it is not sufficient to merely show that the crime was committed „at the same time as an armed conflict” and/or “in any circumstances created in part by the armed conflict”.¹⁴

46. Several factors can determine whether or not the act committed by the perpetrator is sufficiently related to the armed conflict. These factors can include the following: (i) the fact that the perpetrator is a combatant;¹⁵ (ii) the fact that the victim is a non-combatant or the fact that the victim is a member of the opposing party (iii) the fact that the act may be said to serve the ultimate goal of a military campaign; (iv) the fact that the crime is committed as part of or in the context of perpetrator's official duties.

¹¹ *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, case No.: IT-96-23 & IT-96-23/1-A Appeals Chamber Judgment dated 12 June 2002, para. 58.

¹² *Kunarac*, ACJ, para. 58.

¹³ *Kunarac*, ACJ, para. 58.

¹⁴ *Rutaganda*, para. 570.

¹⁵ *Kunarac et al.*, Second Instance Verdict, para. 59.

47. At the critical time, the Accused were members of the 3rd Battalion of the 312th Motorized Brigade, that is, of the so called "Turbe Unit." The Accused have confirmed this fact too. The foregoing also ensues from the witnesses' statements and the documentary evidence: Unit record Vob-3 for Šaban Đelilbašić and Unit record for Elvir Đelilbašić showing that, at the critical time, they were members of the Army BiH. Accordingly, the Accused committed the acts charged against them in the capacity of members of the Army BiH, namely the Turbe Unit, which were exactly the positions which had enabled them to commit the referenced crime at the time and in the way as stated in the operative part of the Verdict, that is, to kill the civilians, which acts have a direct nexus with the existence of war and armed conflict.

48. **That** Neđeljko Koščo and Božo Katana had the status of civilians was indisputably confirmed upon the Plea Agreements entered between the parties to the proceedings but with other the evidence too, which is explained in more detail in the section of this Verdict titled „*The act must be committed in violation of international law*“.

(iv) The perpetrator must order or perpetrate the crime

49. Article 173(1) of the CC of BiH finally prescribes the requirement that the accused must directly perpetrate or order the unlawful crime.¹⁶

50. This Verdict will further below address the unlawful acts committed by the Accused in relation to this general requirement for the crime, as well as the manner of perpetration thereof. This will demonstrate that the last general element of the criminal offense of War Crimes against Civilians has been also satisfied and explain the reasons for which the Accused were found guilty of killing the civilians by their acts.

¹⁶ Đukić, Trial Verdict, para. 179.

**B. CONCRETE CRIMINAL OFFENSE – ACT OF COMMISSION AND FORM
OF COMMISSION**

Relevant provisions

51. The Accused Šaban Đelilbašić and Elvir Đelilbašić were charged with the commission of the criminal offense of War Crimes against Civilians under Article 173(1)(c) (murder) of the CC of BiH, as read with Article 29 (accomplices) and Article 180(1) (individual criminal responsibility) of the CC of BiH.

(a) **Murder**

52. Common Article 3 strictly prohibits the killing of persons taking no active part in the hostilities.¹⁷ According to the ICTY jurisprudence, in order for the “murder” to amount to a violation of laws and customs of war it is necessary that “the death of the victim is a result of an act of the accused, committed with the intention to cause death and against a person taking no active part in the hostilities.”¹⁸

53. **Murder** has consistently been defined by the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda as the death of the victim resulting from an act or omission of the accused committed with the intention to kill or to cause serious bodily harm which he/she should reasonably have known might lead to death.¹⁹

54. “The elements of the definition of “murder” under customary international law are as follows: the victim is dead, the death was caused by an act or omission of the accused, or of a person or persons, for whose acts or omissions the accused bears criminal responsibility. That act was done, or that omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention:

¹⁷ See, e.g.; IV Geneva Convention, Article 3(1)(a) (prohibiting) violence to life and person, in particular murder of all kinds, ...” with respect to the persons taking no active part in the hostilities.

¹⁸ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgment dated 17 December 2004 (Appellate Judgment). See Verdict in *Enes Handžić*, case No. S1 1 K 005760 11 KR1, dated 25 May 2011.

¹⁹ *Prosecutor v. Radislav Krstić*, case No. IT-98-33 (Trial Chamber), 2 August 2001, para. 485.

to kill, or to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death”.²⁰

55. The Court of BiH has previously identified the elements of the crime of murder:

1) the deprivation of life;

2) the direct intention to deprive of life, as the perpetrator was aware of his act and wanted the act to be perpetrated.²¹

56. The Accused have by their acts satisfied the underlying elements of the crime of murder because they had deprived two civilians of their lives with direct intent. The Court has found the foregoing to be proven on the basis of the statements of witnesses Sulejman Leko²², Željka Koščo²³, Nedeljka Katana²⁴, Božidar Jovović²⁵, and the admission of the Accused given before the BiH Prosecutor's Office in their statements dated 18 November 2011 (tendered in the case record under No. /sic/). Death Register Excerpts for the deceased Neđeljko Koščo and Božo Katana were tendered in the case record with regard to their deaths.

C. INDIVIDUAL CRIMINAL RESPONSIBILITY

57. Under the Plea Agreements, the Accused pled guilty of the crimes charged against them. The Court, however, must evaluate both the validity of such confessions and ascertain if sufficient evidence exists proving their criminal liability.

i. Accomplices (Article 29 of the CC of BiH)

58. Article 29 of the CC of BiH stipulates as follows:

„If several persons who, by participating in the perpetration of a criminal offense or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offense, shall each be punished as prescribed for the criminal offense.“

²⁰ Trial Chamber Judgment in *Prosecutor v. Mitar Vasiljević*, case No. IT 98-32, dated 29 November 2002, para. 205.

²¹ See *Trbić*, X-KR-07/386 (Court of BiH), First Instance Verdict dated 16 October 2009, para. 177.

²² Witness Examination Record for Sulejman Leko, No. KTA-RZ-119/07 dated 18 February 2009.

²³ Witness Examination Record for Željko Koščo, No.j KT-6/06- Rz dated 30 October 2006.

²⁴ Witness Examination Record for Nedeljko Katana, No. KTA-RZ-119/07 dated 26 November 2009.

²⁵ Witness Examination Record for Božidar Jovović, No. KT-RZ-83/09 dated 31 March 2010.

59. The Court has referred to the First Instance Verdict in *Rašević and Todović*, in which the Trial Panel stated that “In order to be guilty of co-perpetration under the terms of Article 29, the accused must either participate in the *actus reus* of the crime or take some act “by which a *decisive contribution* has been made” to the commission of the crime.²⁶ If the Accused participated, together with other persons, in the crime itself, provided that the required *mens rea* existed, it is sufficient for the Accused, pursuant to Article 29, to be considered as a co-perpetrator and punished as a principal perpetrator.

ii. Individual criminal responsibility (Article 180(1) of the CC of BiH)

60. Article 180(1) of the CC of BiH prescribes as follows:

„A person who planned, instigated, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offense referred to in Article 173 (War Crimes against Civilians)....., of this Code, shall be personally responsible for the criminal offense.“

61. The Panel has recalled that Article 180(1) of the CC of BiH is derived from and is identical to Article 7(1) of the ICTY Statute. The ICTY Appeals Chamber has concluded that Article 7(1) „...covers first and foremost the physical perpetration of a crime by the offender, or the culpable omission of an act that was mandated by a rule of criminal law”.

62. *Actus reus* required for the commission of crime is “... that the accused participated, physically or otherwise directly or indirectly, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others. The accused himself need not have participated in all aspects of the alleged criminal conduct.²⁷ There can be several perpetrators in relation to the same crime where the conduct of each one of them fulfills the requisite elements of the definition of the substantive offense.²⁸

63. The requisite *mens rea* is that the accused acted with the intent to commit the crime ...”²⁹ or, as in other forms of participation in crimes under Article 7(1), he must have “an

²⁶ *Rašević and Todović*, X-KR-06/275 (Court of BiH), First Instance Verdict dated 28 February 2008, pg. 185.

²⁷ *Stakić*, Trial Judgment, para. 439.

²⁸ *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1, Judgment dated 22 February 2001.

²⁹ *Limaj*, Trial Judgment, para. 509.

awareness of the probability, in the sense of the substantial likelihood, that the crime would occur as a consequence of his conduct.”³⁰

VII. CONCLUSION

64. Under the Plea Agreements, the Accused have also pled guilty as charged for the form of criminal liability as indicated under the Indictment. The Court, however, must evaluate both the validity of their admission and ascertain whether sufficient evidence exists to demonstrate their criminal liability.

65. In this regard, the Court has found that there is sufficient evidence proving that the Accused Šaban Đelilbašić and Elvir Đelilbašić are guilty as charged for the crimes committed as co-perpetrators given that they together participated in the acts of commission and thereby gave a decisive contribution to the commission of the crime. On the basis of the evidence presented, the Court has found that on 9 December 1992, the Accused Šaban Đelilbašić and Elvir Đelilbašić, as members of the so called *Turbe Detachment* of the BiH Army, armed with automatic rifles, together came to Neđeljko Koščo's house and killed him using their automatic rifles, thereupon they proceeded toward Boško Ljubičić's house, and in a close vicinity thereof killed Božo Katana. The Accused are therefore held criminally liable on the basis of individual criminal responsibility (Article 180(1) of the CC of BiH) because, by their acts, they have directly *perpetrated* the crimes under Article 173(1)(c) of the CC of BiH.

66. All the foregoing suggests the conclusion that there is sufficient evidence proving the guilt of the Accused Šaban Đelilbašić and Elvir Đelilbašić, and that by their acts, all essential elements of the criminal offenses of War Crimes against Civilians under Article 173(1)(c) of the CC of BiH, have been satisfied, as well as other elements set forth under Article 231 of the CPC of BiH. The Court has therefore accepted the referenced Plea Agreements.

³⁰ *Kvočka*, Trial Judgment, para. 251; *Limaj*, Trial Judgment, para. 509.

VIII. SENTENCING

67. With regard to the criminal offense of War Crimes against Civilians, the Panel has considered necessary sanctions which would be appropriate to the referenced statutory purpose, including all relevant legal elements.

68. Ruling on the type and duration of sentence to be imposed on the Accused, and taking into account the provisions pertaining to the sentence under the Plea Agreement, the Panel has first concluded that the proposed range of sentences is acceptable and accordingly imposed on the Accused a sentence of imprisonment for a term of 6 (six) years each.

69. In fashioning this sentence, the Court was mindful of all the surrounding circumstances of the case, and in addition, of the purpose of punishment, particularly the need to serve the justice, primarily the interests of the injured parties. The Court has been also mindful of the requirements that the sentence imposed should be proportionate to the degree of vulnerability of the protected value, on the one hand, and the personality of the Accused as perpetrators on the other hand, and that the purpose of sentence is both general and special deterrence.

70. In fashioning the sentence, the Court was mindful of the previous life of the Accused Šaban Đelilbašić and Elvir Đelilbašić, that is, of the fact that they had no prior convictions until the moment they committed the concrete crime, that they have minor children, and that they were young persons at the time of the commission of the crime of which they have been found guilty under this Verdict. In addition, the Accused were open and ready to cooperate with the BiH Prosecutor's Office.

71. Apart from the foregoing, the Court has also taken into account that in such a way, the Accused have contributed to the efficiency and economy of judicial proceedings, and even more importantly, that entering the Plea Agreements prior to the main trial opening has reduced the need to summon the victims to testify and thus again re-experience the war time and painful memories of the events in which they had lost their families' closest members.

72. Finally, the Court has found that the sentence imposed is an adequate and proportionate criminal sanction concerning the gravity of the crime and the degree of the

criminal liability of the Accused who committed the referenced crime, but admitted their guilt and expressed their sincere regrets.

IX. DECISION ON THE COSTS OF PROCEEDINGS AND CLAIMS UNDER PROPERTY LAW

73. Pursuant to Article 188(4) of the CPC of BiH, the Court has relieved the Accused of the duty to reimburse the costs of criminal proceedings given that the payment thereof would jeopardize the support of the Accused and their families.

74. Pursuant to Article 198(2) of the CPC of BiH, the Court has instructed the injured parties to pursue their claims under property law in a civil action. Being of the view that ruling on these claims would significantly affect the duration of the criminal proceedings, and being mindful of the efficiency and economy of the proceedings, the Court decided as stated in the operative part of this Verdict.

RECORD-TAKER

Azra Bojić

PANEL PRESIDENT

JUDGE

Darko Samardžić

NOTE ON LEGAL REMEDY: An appeal from this Verdict can be filed within 15 days following the receipt of a written copy thereof. No appeal lies from the decision on sentence.

X. ANNEX

- Suspect Questioning Record for **Šaban Đelilbašić**, No.: T 20 0 KT RZ 0000 610 09 dated 18 November 2011,
- Suspect Questioning Record for **Elvir Đelilbašić**, No.: T 20 0 KT RZ 0000 610 09 dated 18 November 2011,
- Witness Examination Record for **Sulejman Leko**, No.: KTA-RZ 119/17 dated 18 February 2009,
- Witness Examination Record for **Nedeljka Katana**, No.: KTA-RZ 119/07 dated 26 November 2009,
- Witness Examination Record for **Dragan Tejić**, No.: KTA-RZ 119/07 dated 19 February 2009,
- Witness Examination Record for **Safet Margjić**, No.: KT-RZ 83/09 dated 31 March 2010,
- Witness Examination Record for **Božidar Jovović**, No.: KT-RZ 83/09 dated 31 March 2010,
- Witness Examination Record for **Nermin Mešinović**, No.: KT-RZ 83/09 dated 28 December 2009,
- Witness Examination Record for **Željka Koščo**, No.: KT-RZ 6/06 dated 31 October 2006,
- Death Register Excerpt for **Suljo Đelilbašić**, No.: 03-12-202-31/09 dated 5 February 2009, Turbe
- Death Register Excerpt for **Nedeljko Koščo**, No.: 03-12-202-31/09 dated 17 February 2009, Turbe
- Death Register Excerpt for **Božo Katana**, No.: 03-12-202-32/09 dated 17 February 2009,
- Unit personal file for **Šaban Đelilbašić** - Form Vob 3,

- Unit personal file for **Elvir Đelilbašić** - Form Vob 3,
- Document of the 3rd Corps of the Army BiH No.: 02/63-1 dated 2 December 1992, strictly confidential, forwarded to the Municipal Staff Travnik concerning the establishment of the 312th Motorized Brigade,
- Official Note of the MUP CSB Zenica – SJB Travnik dated 9 December 1992,
- Photo-documentation of the MUP Travnik, PU Travnik dated 9 December 1992,
- A copy of a portion of the SJB Travnik crime scene investigation log dated 9 December 1992,
- SJB Travnik Certificate No.: 21-17/02-23-29/96 dated 27 January 1996,
- Decision of the Presidency of the Republic of Bosnia and Herzegovina Declaring the State of War („Official Gazette of the R BiH” No.: 7/92 dated 20 June 1992),
- Decision of the Presidency of the Republic of Bosnia and Herzegovina Abolishing the State of War („Official Gazette of the R BiH”, No. 50/95),
- Decree with the force of law on the Armed Forces of Bosnia and Herzegovina published in „Official Gazette of the R BiH”, No. 4/92 dated 20 May 1992,
- Criminal Record Excerpt – Criminal Record Information from the SP Travnik concerning Šaban Đelilbašić: No. 02/7-3-04-2-4-554/11 dated 15 December 2011,
- Criminal Record Excerpt - Criminal Record Information from the SP Travnik concerning Elvir Đelilbašić: No. 02/7-3-04-2-4-554/11 dated 13 December 2011.