



Number: X-KRŽ 05/49  
Sarajevo, 13 December 2006

### **IN THE NAME OF BOSNIA AND HERZEGOVINA!**

The Court of Bosnia and Herzegovina, Appellate Division Panel of Section I for War Crimes, composed of Judge Azra Miletić as the president of the Panel and Judges Finn Lynghjem and Jose Ricardo Juan de Prada as members of the Panel, with the participation of Legal Officer Lejla Fadilpašić as the minutes taker, in the criminal case against the accused Neđo Samardžić for the criminal offense of Crimes against Humanity in violation of Article 172(1)(a), (d), (e), (g), (h) and (k) of the Criminal Code of Bosnia and Herzegovina (the CC BiH), deciding upon the Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ-89/05 dated 30 March 2006, following the main and public trial, in the presence of the prosecutor of the BiH Prosecutor's Office, Behajja Krnjić, the accused Neđo Samardžić and his defense counsel, attorney Slaviša Prodanović, reached and publicly announced the following

### **VERDICT**

The accused **Neđo Samardžić**, son of Ilija and mother Kosa née Babić, born on 7 April 1968, in Bileća, ... by ethnicity, citizen of ..., literate, tradesman by occupation, married, father of two children, served the army, entered in the records of the Foča Ministry of Defense, indigent, convicted by the judgment of ..., currently in custody since 19 October 2004

### **I**

### **HAS BEEN FOUND GUILTY**

#### **In as much as he:**

In the period from April 1992 until the end of March 1993, as part of a widespread and systematic attack of the army and police of the so-called Serb Republic of BiH directed against the Bosniak civilian population of the Foča Municipality, as a member of the army of the so-called Serb Republic of BiH and in concert with other members, being aware of such an attack, he carried out persecution of the civilian population of Bosniak ethnicity on national, ethnic, religious and sexual grounds in the form of forcible transfer of population,

severe deprivation of physical liberty in violation of fundamental rules of international law, forcing to sexual slavery, rapes and other inhumane acts intentionally causing great suffering, or serious injury to body or health, in as much as

**1.** On 9 June 1992 in the village of Rataje, Foča Municipality, together with his brother Zoran and Mićo Olović, he participated in the abuse and forceful taking away of civilians by coming with the said two persons to Ismet Softić's house, where the Grbo family temporarily resided, and then, forcing Sulejman Grbo and Seid Grbo out of the house and Mustafa Grbo out of the neighboring house, they beat and pushed all three of them into a vehicle and drove them in the direction of Miljevina; thereupon, he came to the said house on the following day and threatened and abused the women who were in the house, Fatima Grbo in particular, by holding an automatic rifle to Fatima Grbo's neck and saying: "I'll kill you, get me mines, get me money";

**2.** On an unknown date in the month of June 1992 in the village of Rataje, Foča Municipality, armed with a firearm, together with his brother Zoran and Mićo Olović, he came to Šučrija Softić's family house wherefrom he and his brother Zoran took out Šučrija Softić, handcuffed him and thereupon physically abused him in a manner that they tied him to an iron fence, beat him with a baton and rifle butt, made him call his brother Raif, while during this time Mićo Olović was sitting in a vehicle, and then they put him in the same vehicle and drove him to the Police Station in Miljevina, whereupon he was transferred to the KPD (Penal and Correctional Facility) "Foča" where he remained imprisoned for several months; he was subsequently transferred to the KPD "Kula"; later on he was exchanged and died five days afterwards;

**3.** On an unknown date in the month of May 1992 in Miljevina, Foča Municipality, he came to the apartment of the injured party S.N. where he raped her and abused her by hitting her, pulling her hair and making her eat it; thereupon, he took her out of the apartment and tied her half-naked to a post in the Stara Kolonija settlement and then went away from the spot leaving her tied;

**4.** On 31 May 1992, together with a group of soldiers, he came to Štović, Foča Municipality, and then entered a house where he started beating the injured party "N" who was in the house, ordered her to strip naked and, when she did it, he knocked her down and lay on top of her and then raped her although she was shouting and begging for help, which he ignored, even when her mother came in and begged him to let her go; thereupon, he left their house with the group; then, several days later, on an unknown date in the month of June 1992, together with a group of soldiers, he came to the same house and they took out of the house the injured party "N", put her into a car and drove her to the Miljevina Hotel in Miljevina, Foča Municipality, in which the Command was allegedly located, following which he took "N" to a room and started beating her and after that he raped her which caused her to faint and then he left her in that hotel where she spent 7 days during which she was subjected to rapes by other soldiers on a daily basis;

**5.** In the period between June and September 1992, in the so-called Karaman's house in Miljevina, Foča Municipality, which was a kind of camp for women, together with Nikola Brčić and Radovan Stanković, he held in sexual slavery several women of Bosniak ethnicity, among whom were underage girls A.B. and J.G., who were deprived of liberty

and on a daily basis forced into sexual intercourses with soldiers who were coming to that house and to do household chores in the house, and he personally forced the detained women into sexual intercourses with him, in particular B.J., originally from Kalinovik, whom he selected and kept for himself, and in the same house he also raped the injured party "K" and the injured party "L" who was 15 at the time and whom he had previously separated from her family and brought to the Karaman's house;

6. On an unknown date in the month of August 1992, he took B.J. from the so-called Karaman's house in Miljevina, Foča Municipality, who was imprisoned there, and placed her in an apartment in Miljevina which he used for his own needs and where he forced her on a daily basis into sexual intercourses, and once he forced the injured party, at that time underage "G", who was also imprisoned in that apartment, to strip naked and stand in a corner of the room and watch him have a forced sexual intercourse with B.J.;

7. On an unknown date in the month of August 1992, together with another soldier he came to the apartment of person "C" in Miljevina, Foča Municipality, armed with an automatic rifle, where he forced the injured party "B" to go into a room and then he came in after her, ordered her to take off her clothes and when she did it, he raped her;

8. On 3 September 1992, together with other members of the military and police he expelled Bosniak civilian population from Miljevina, Foča Municipality in the way that they previously forcibly transferred the population consisting mainly of women and children to Partizan Sports Hall in Foča where they were subjected to physical maltreatment and robbery, from where many women were taken to apartments where they were raped, and thereafter they were transported by buses to a location near the separation line where they were forced out of the buses to cross over on foot from the territory of the Foča Municipality to the territory of the Goražde Municipality;

9. On an unknown date in the month of November 1992, together with his brother Zoran, he took the injured party, at that time underage "G", from the apartment he used in Miljevina, Foča Municipality, who was imprisoned in his apartment, and took her into sexual slavery to the so-called Karaman's house in Miljevina, where she was subjected to rapes by Nikola Brčić and other soldiers and forced to do household chores together with the injured party „L“ and G.J. until 23 March 1993, when all three of them were taken to be exchanged;

**Consequently**, as part of a widespread and systematic attack against the Bosniak civilian population of the Foča Municipality, being aware of such an attack, as a member of the army of the so-called Serb Republic of BiH, he carried out persecution of the Bosniak civilian population on national, ethnic, religious and sexual grounds in the form of forcible transfer of population, severe deprivation of physical liberty in violation of fundamental rules of international law, coercing to sexual slavery, rapes and other inhumane acts intentionally causing great suffering, or serious injury to body or health,

**Whereby**, by the acts described under Counts 1 through 9 of the convicting part of the Verdict, he committed the criminal offense of **Crimes against Humanity in violation of**

**Article 172(1)(h) as read with subparagraphs (d), (e), (g) and (k) of the Criminal Code of Bosnia and Herzegovina,**

Accordingly, pursuant to the above-referred legal provision and applying Articles 39, 42 and 48 of the Criminal Code of Bosnia and Herzegovina, the Court

**S E N T E N C E S   H I M**  
**TO A LONG TERM IMPRISONMENT OF 24 YEARS**

Pursuant to Article 56(1) of the CC BiH, the time the accused has spent in custody from 19 October 2004 shall be counted as part of the sentence of imprisonment.

Pursuant to Article 188(4) of the Criminal Procedure Code of Bosnia and Herzegovina, the accused is relieved of the duty to reimburse the costs of the criminal proceedings.

**II**

Conversely, pursuant to Article 284(c) of the Criminal Code of Bosnia and Herzegovina  
**the accused Nedo Samardžić**

**HAS BEEN ACQUITTED OF THE CHARGES**

**that:**

As part of a widespread and systematic attack of the army and police of the so-called Serb Republic of BiH directed against the Bosniak civilian population of the Foča Municipality, as a member of the Army of the so-called Serb Republic of BiH and together with other members, being aware of such an attack:

**1.** On an unknown date in the month of August 1992, after a bus with the civilians of Bosniak ethnicity who had been previously captured in the Miljevina area arrived in front of the Miljevina Police Station, Foča Municipality, and after those civilians were taken out of the bus, together with his brother Zoran and a group of soldiers, he took part in physical maltreatment and beatings of those civilians by punching and kicking them and hitting them with rifle butts all over their bodies, and after that they boarded them again onto the bus and drove them in the direction of Miljevina mine, the locality “Šljivovice”, where those civilians were deprived of their lives by use of firearms, and on 31 October 2001, following the exhumation at the said location, 13 bodies of the killed civilians were exhumed, out of which the following 9 were identified: Rahmo Valjevčić, Lutvo Abdurahmanović, Šaćir Brajanac, Hamza Dorić, Rašid Valjevčić, Fikret Abdurahmanović, Fikret Hasović, Hasan Dorić and Rasim Dorić, while the 4 remaining bodies have not been identified to date;

whereby he would have committed the criminal offense of **Crimes against Humanity in violation of Article 172(1)(a) of the Criminal Code of Bosnia and Herzegovina;**

## REASONING

The Indictment of the Prosecutor's Office of Bosnia and Herzegovina (the Prosecutor's Office of BiH) number KT-RZ-89/05, which was amended on 30 March 2006 in terms of the description of facts and legal qualification, charges the accused Neđo Samardžić with committing the criminal offense of Crimes against Humanity in violation of Article 172(1), subparagraphs (a), (d), (e), (g), (h), (i) and (k) of the Criminal Code of Bosnia and Herzegovina (CC BiH) by the acts described under Counts 1 through 10 of the operative part of the Indictment.

By the Verdict of the Court of Bosnia and Herzegovina (the Court of BiH) number X-KR-05/49 dated 7 April 2006, the accused Neđo Samardžić was found guilty of committing the criminal offense of Crimes against Humanity in violation of Article 172 of the CC BiH by the acts described in the operative part of the mentioned Verdict under Counts 1 through 4, namely under Counts 1 and 2 imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law under Article 172(1)(e) of the CC BiH and under Counts 3 and 4 coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape) and aiding and abetting in holding women in sexual slavery under Article 172(1)(g) as read with Article 31 of the CC BiH.

The first instance court imposed against him a prison sentence for a term of 12 years for the above criminal offence, while the non-served portion of the former sentence imposed on the basis of the judgment of the Higher Court in Mostar number K: 33/90 dated 22 June 1990 in the duration of one year, ten months and 24 days was taken as established, thus the Court sentenced him to a compound sentence of imprisonment for a term of thirteen years and four months.

Pursuant to Article 56 of the CC BiH, the time that the accused spent in custody was counted as part of the pronounced sentence, while with application of Article 188(4) of the CPC BiH he was relieved of the duty to reimburse the costs of the criminal proceedings.

By the same Verdict the accused was acquitted of the charges that in the manner described under Counts 1 through 6 of the acquitting part of the Verdict he committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) (a), (d), (e), (g), (h), (i) and (k) of the CC BiH, while pursuant to Article 283(c) of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC BiH) the Verdict dismissing the charges was rendered in relation to Counts 1 through 4 of the part of the Verdict, thus dismissing the charges after the Prosecutor's Office of BiH had withdrawn them at the main trial.

By the Decision of the Appellate Division Panel of Section I for War Crimes number KRŽ 05/49 dated 29 September 2006, the appeals of the Prosecutor's Office of BiH and the

defense counsel for the accused Nedo Samardžić were granted, thereby the Verdict of the Court of Bosnia and Herzegovina number X-KR-05/49 dated 7 April 2006 was revoked in both its convicting and acquitting parts, and it was determined that a new trial was to be held.

At the hearing held pursuant to Article 317 of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC BiH) before the Appellate Panel of the Court of BiH, the prosecutor of the Prosecutor's Office of BiH read the amended Indictment number KT-RZ 89/05 dated 30 March 2006, maintaining his opening statement presented in the first-instance trial in its entirety.

The accused exercised his right to remain silent guaranteed by Article 6(3) of the CPC BiH, and he, therefore, did not present his defense.

During the evidentiary procedure the Appellate Panel presented again the evidence that had been presented in the first-instance proceedings, namely by listening to the audio recordings of the statements of the prosecution witnesses: Hasnija Kavazić, Fatima Grbo, Mustafa Bajrović, Mersada Bektović, Nura Sajtović, Murat Kršo and witnesses under pseudonyms A, B, C, D, E, F, G, H, I, K, L, N, P and R.

Furthermore, the following documentary evidence was inspected: ICTY Judgment in the case against Dragoljub Kunarac *et al.* number IT- 96-23-T and IT-96-23/1-T dated 22 February 2001; ICTY Judgment in the case against Dragoljub Kunarac *et al.* number IT-96-23 and IT-96-23/1-A dated 12 June 2002; ICTY Judgment in the case against Milorad Krnojelac number IT-97-25-T dated 15 March 2002; ICTY Judgment in the case against Milorad Krnojelac number IT-97-25-A dated 17 September 2003; Decision of the Cantonal Court Sarajevo number KRI-400/01 dated 23 October 2001 ordering the exhumation, autopsy, forensic analysis and identification of the killed civilians at the locality „Šljivovice“, Foča Municipality; Exhumation Record of the Cantonal Court in Sarajevo number KRI-400/01 dated 31 October 2001; Autopsy Records of the Forensic Institute dated 14 November 2001; Ballistic Report on Firearms Traces of the Crime Police Department of the MOI of Canton Sarajevo number 03/1.8-04-09-9915 dated 19 December 2001; Official Note of the Crime Police Department of the MOI of Canton Sarajevo number 03/1.3-57/02 dated 29 January 2002; Records of the Crime Police Department of the Sarajevo Canton MOI on Identification of Mortal Remains number 03/1.3-57/01 dated 17 January 2002 and 03/1.3-57/02 dated 22 January 2002; Official Note of Crime Police Department of the MOI of Canton Sarajevo number 03/1.3-7/02 dated 8 January 2002; Records of the Crime Police Department of the Sarajevo Canton MOI on Identification of Mortal Remains number 03/1.3-7-A/02, 03/1.3-7-B/02, 03/1.3-7-C/02, 03/1.3-7-D/02, 03/1.3-7-E/02, 03/1.3-7-F/02 and 03/1.3-7-G/02, all dated 3 January 2002; Photo-documentation of the Forensic Department of the MOI of Canton Sarajevo number 2869/01 dated 19 November 2001; Sketch of the crime scene of the Forensic Department of the MOI Canton Sarajevo number 2869/1 dated 1 November 2002; Certificate of the Military PO Box 7502 Sokolac number 05/4189 dated 3 March 2005; Decision of the Municipal Court in Goražde number R-545/99 dated 4 November 1999 declaring the missing persons, Sulejman Grbo and Sejdo Grbo, dead; Book of Missing Persons on the territory of BiH dated 11 October 2004; Death Certificate for Šućrija Softić; Memo of the Ministry of Defense, Foča Department, number 8-05-4-8-835-30/05 dated 14 March 2005; Consent of

the ICTY dated 16 August 2002; and Criminal Record of the accused issued by the PS Bileća no. 14-7/02-234-449/05 dated 1 March 2005, and the testimonies of the witnesses under pseudonyms “J” and “M” were read.

With the consent of the parties, testimonies of the following defense witnesses were read: Srećko Davidović, Srđan Stanković, Miodrag Miletić, Danislav Cicović, Sretko Gagović, Darinka Mrgud and the photo-documentation of the residential building where Hasnija Kavazić had lived was inspected.

Both parties proposed that new exhibits, which they had not been able to present during the first-instance proceedings, be presented as well, and in that respect the prosecution sought from the Court to order identity protection measures for a witness who gave a statement in another case conducted before this Court (in the proceedings against another person) and to allow reading of a part of her testimony, while the defense proposed that the statements of Nura Sajtović and Šućrija Softić taken by Živko Miletić be inspected, that the confirmed Indictment against Živko Miletić be inspected, as well as the List of camp detainees number 01-41-2710/2006 dated 2 June 2006, and it was proposed that Živko Miletić be heard as a witness.

Out of the above evidence the Court accepted to inspect the List of camp detainees number 01-41-2710/2006 dated 2 June 2006, while it refused the other proposed evidence, considering that its presentation is not relevant for the adjudication in this legal matter.

The Court did not accept that a part of the witness testimony that she gave in another case concerning completely different circumstances be read, because thereby the defense would be deprived of its right to cross examine the witness and the principle of equality of arms, as one of the requirements for a fair trial, would be violated, while the examination of Živko Miletić, the person who has been indicted before another court for participation in some of the acts that Neđo Samardžić has also been charged with, and who is exercising his right to remain silent in the said proceedings, was not considered relevant by the Court since the accused is accountable for the acts he personally undertook as a part of his intent, whereby possible participation of other individuals (the proposed witness) is not relevant for the adjudication in this legal matter and it does not in itself exclude the participation of the accused Samardžić.

Also, the fact that the accused did not personally bring Nura Sajtović and Šućrija Softić to the witness, which the defense wanted to establish by the testimony of this witness, is not relevant, because that in itself is not a proof that the accused did not forcibly take the mentioned persons from their home and bring them in front of the police station in Miljevina, even if he did not personally hand them over to Živko Miletić.

The statements of Nura Sajtović and Šućrija Softić, at the time they were given to Živko Miletić as an official person, could not be considered as valid evidence, because they were not obtained pursuant to the provisions of procedural law applicable at the time and as such they could not be accepted as evidence in this case.

Having evaluated all the presented pieces of evidence both individually and in their correlation, the Court decided as in the operative part for the following reasons:

I With regard to the general elements, the existence of a widespread or systematic attack directed against any civilian population, knowledge of the accused of such an attack and the fact that the act of the accused was a part of that attack needed to be proven.

The prosecution argued that in the period from April 1992 until the end of March 1993, in the area of the Foča Municipality, the army and police of the so-called Serb Republic of BiH carried out a widespread and systematic attack directed against Bosniak civilian population.

In order to prove this important element of the criminal offence of Crimes against Humanity, the Prosecutor's Office proposed to the Court to inspect the ICTY Judgments in the cases against Dragoljub Kunarac *et al.* number IT-96-23-T and IT-96-23/1-T dated 22 February 2001; and IT-96-23 and IT-96-23/1-A dated 12 June 2002; as well as in the case against Milorad Krnojelac number IT-97-25-T dated 15 March 2002; and IT-97-25-A dated 17 September 2003, and to accept as proven facts pertaining to the existence of a widespread and systematic attack of Serb forces against Muslim civilian population established in the mentioned judgments in terms of Article 4 of the Law on the Transfer of Cases from the International Criminal Tribunal for the former Yugoslavia (the ICTY) to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in BiH (the **LOTC**), as specified in the motion of the Prosecutor's Office of BiH dated 29 March 2006.

The mentioned judgments established: "that, in the areas of the municipalities of Foča, Gacko and Kalinovik, before the armed conflict had started, Muslim civilians were removed from their social and professional lives, their salaries remained unpaid or they were told that their services were no longer needed. Most Muslim men were disarmed. Complete ostracism soon followed with their freedom to move about and to gather critically curtailed. (Paragraph 571, ICTY judgment in the case against Dragoljub Kunarac *et al.* number IT-96-23-T and IT-96-23/1-T dated 22 February 2001).

The SDS political propaganda grew more aggressive, and the outbursts of violence and house-burning more frequent. Many Muslim villagers from the area around Foča were so scared that they decided to sleep in the woods rather than risk being burned alive in their houses, or otherwise being caught in the attack on their places. (Paragraph 572, ICTY judgment in the case against Dragoljub Kunarac *et al.* number IT-96-23-T and IT-96-23/1-T dated 22 February 2001).

Once towns and villages were securely in their hands, the Serb forces – the military, the police, the paramilitaries and, sometimes, even Serb villagers – applied the same pattern: Muslim houses and apartments were systematically ransacked or burnt down, Muslim villagers were rounded up and captured, and sometimes beaten or killed in the process. Men and women were separated, with many of the men detained in the KP Dom prison. (Paragraph 573, ICTY judgment in the case against Dragoljub Kunarac *et al.* number IT-96-23-T and IT-96-23/1-T dated 22 February 2001).

The women were kept in various detention centers where they had to live in intolerably unhygienic conditions, where they were mistreated in many ways including, for many of them, being raped repeatedly. Serb soldiers or policemen would come to these detention



centers, select one or more women, take them out and rape them. Many women and girls, including 16 of the Prosecution witnesses, were raped in that way. Some of these women were taken out of these detention centers to privately owned apartments and houses where they had to cook, clean and serve the residents, who were Serb soldiers. They were also subjected to sexual assaults. (Paragraph 574, ICTY judgment in the case against Dragoljub Kunarac *et al.* number IT-96-23-T and IT-96-23/1-T dated 22 February 2001).

In particular, the Trial Chamber finds that the Muslim civilians held at Kalinovik School, Foča High School and Partizan Sports Hall were kept in unhygienic conditions and without hot water. They were provided with insufficient food. Their freedom of movement was curtailed; they were not allowed to go to any other territory or to go back to their houses. Most of their houses were burnt down or ransacked. They were guarded and lived in an atmosphere of intimidation. The Trial Chamber is satisfied that Kalinovik School, Foča High School and Partizan Sports Hall served as detention centers at the relevant time. (Paragraph 575, ICTY judgment in the case against Dragoljub Kunarac *et al.* number IT-96-23-T and IT-96-23/1-T dated 22 February 2001).

All this was done in full view, in complete knowledge and sometimes with the direct involvement of the local authorities, particularly the police forces. The head of Foča police forces, Dragan Gagović, was personally identified as one of the men who came to these detention centers to take women out and rape them. (Paragraph 576, ICTY judgment in the case against Dragoljub Kunarac *et al.* number IT-96-23-T and IT-96-23/1-T dated 22 February 2001).

After months of captivity, many women were expelled or exchanged. Some men spent as much as two years and a half in detention for no reason other than their being Muslims. All traces of Muslim presence and culture were wiped out of the area. Almost no Muslims remained in Foča. All the mosques of Foča were destroyed. In January 1994, the Serb authorities crowned their complete victory – their “gaining supremacy” over the Muslims as was candidly stated by the Defense [1368] – by renaming Foča “Srbinje”, literally “the town of the Serbs”. [1369] Almost all the remaining Muslim men and women from all three municipalities were arrested, rounded up, separated and imprisoned or detained at several detention centers like Buk Bijela, Kalinovik High School, Partizan and Foča High School, as well as the KP Dom in Foča, in accordance with a recurring pattern. Some of them were killed, raped and severely beaten. The sole reason for this treatment of the civilians was their Muslim ethnicity. (Paragraph 577, ICTY judgment in the case against Dragoljub Kunarac *et al.* number IT-96-23-T and IT-96-23/1-T dated 22 February 2001).

The abovementioned facts were subject of an appeal, so the ICTY Appeals Chamber in the judgment number IT-96-23 and IT-96-23/1-A dated 12 June 2006, paragraphs 92 and 97, established the following:

The Appeals Chamber is satisfied that the Trial Chamber correctly defined and identified the “population” which was being attacked and that it correctly interpreted the phrase “directed against” as requiring that the civilian population which is subjected to the attack must be the primary rather than an incidental target of the attack. The Appeals Chamber is further satisfied that the Trial Chamber did not err in concluding that the attack in this case

was directed against the non-Serb civilian population of Foča. This part of the Appellants' common grounds of appeal is therefore rejected.

The Trial Chamber thus correctly found that the attack must be either "widespread" or "systematic", that is, that the requirement is disjunctive rather than cumulative. It also correctly stated that the existence of an attack upon one side's civilian population would not disprove or cancel out that side's attack upon the other's civilian population. In relation to the circumstances of this case, the Appeals Chamber is satisfied that the Trial Chamber did not err in concluding that the attack against the non-Serb civilian population of Foča was systematic in character. The Appellants' arguments on those points are all rejected and this part of their common grounds of appeal accordingly fails.

Furthermore, the Trial Chamber judgment in the case against Milorad Krnojelac number IT-97-25-T dated 15 March 2002 established that: "a widespread and systematic attack by the Serb forces against the non-Serb civilian population took place in and around Foča in the period covered by the Indictment."

Article 4 of the **LOTC** prescribes that, after hearing the parties, at the request of a party or *proprio motu*, the court may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY. As the LOTC does not prescribe criteria which must be met in order for a certain fact to be considered "adjudicated", the Panel, examining the facts relevant for adjudication in this legal matter, and bearing in mind the obligation to respect the principle of the right to a fair trial guaranteed by the European Convention on Human Rights and Fundamental Freedoms (ECHR), as well as by the CPC BiH, applied to them the criteria which the ICTY established in that regard in the decision of 28 February 2003 in the case Prosecutor v. Momčilo Krajišnik.

Under mentioned criteria which supplement Rule 94(b) (Judicial Notice) of the ICTY Rules of Procedure and Evidence, judicial notice may be taken of an adjudicated fact provided it is: distinct, concrete and identifiable, restricted to factual findings and does not include legal characterizations, contested at trial and forms part of a judgment which has either not been appealed or has been finally settled on appeal or contested at trial and now forms part of a judgment which is under appeal, but falls within issues which are not in dispute on appeal. Furthermore, it must not confirm the criminal responsibility of the accused or be the subject of (reasonable) dispute between the parties in the case and it may not be based on plea agreements in previous cases and affect the right of the accused to a fair trial.

Since the above cited facts from final ICTY judgments entirely meet the mentioned criteria, the Panel, after the defense stated its position, granted the Prosecution motion to accept them as proven, as it was correctly established also by the first instance Verdict of this Court.

This conclusion is also supported by the fact that in the course of the evidentiary procedure they were additionally corroborated by the testimonies of the witnesses Hasnija Kavazić, Murat Kršo, Fatima Grbo, Mustafa Bajrović, Mersada Bektović and others who described in their testimonies how the attack on villages around Foča had been carried out and how, as a

result of it, they had been exposed to constant physical and mental abuse and plunder and expelled from their homes in the end.

Assessing the above mentioned evidence in relation to accepted facts, the Panel established that in the area of the municipalities of Foča, Gacko and Kalinovik, in the period from April 1992 until the end of March 1993, the army and police of the so-called Serb Republic of BiH carried out a number of acts of violence, which were extensive and resulted in a large number of victims.

Bearing in mind the pattern of committed crimes which took place in the mentioned period, multiple rapes, taking away, killings, pillaging and destruction of property, the Appellate Panel concludes that the acts of violence were organized and systematic and that they were directed solely against Bosniak civilian population.

It follows from the above-mentioned that, in the period from April 1992 until the end of March 1993, there was a widespread and systematic attack by the army and police of the so-called Serb Republic of BiH directed against Bosniak civilian population of the Foča Municipality.

Therefore, this Panel assesses as unfounded the defense claim that a widespread and systematic attack did not exist in the area of Miljevina because there were no war operations there, as the concept of “attack” is not limited to the hostilities but encompasses situations in which persons not taking any active part in the hostilities are mistreated, and humanitarian law is applied on the entire territory under the control of one side, which was indisputably the case in the entire territory of the Municipality of Foča, including Miljevina.

As for the other important elements of the subject matter of the criminal offence, it is indisputable that, in the period from 6 April 1992 until 31 December 1996, the accused was a member of the army of the Republika Srpska, which follows from the Certificate of the Military PO Box 7502 Sokolac dated 3 March 2005 and the Memo of the RS Ministry of Defense, Foča Department, dated 14 March 2005.

It is also indisputable that after 6 April 1992 an intervention unit, whose command post was in the motel “Miljevina”, was formed in Miljevina and that the accused and his brother Zoran Samardžić were assigned to the mentioned unit. The Court drew such a conclusion on the basis of the testimonies of the defense witnesses, Srećko Davidović, who was also assigned to the same intervention unit, and Srđan Stanković, Commander of a 3<sup>rd</sup> Battalion Company. From the testimony of the witness Srđan Stanković also follows that he was obliged to come twice a day to the command post in the motel Miljevina to briefings and that he used to see the accused Neđo Samardžić on those meetings, as well as that he was sometimes going to do reconnaissance with him.

In addition to the mentioned above, almost all prosecution witnesses confirmed that during the stay in Miljevina or in the Partizan Sports Hall they used to see the accused Neđo Samardžić, most frequently in company of the other members of the RS army and police, Zoran Samardžić, Mićo Olović, Radovan Stanković and others.

From the overall assessment of the testimonies of the heard witnesses, which will be analyzed in more detail when assessed in relation to individual acts which the accused undertook, follows that he not only knew about the existence of a widespread and systematic attack but his acts actually constitute part of that attack.

Namely, the facts that the accused treated inhumanely the Bosniak population which happened to be in the area around Foča, i.e. participated in abuse and forcible taking away of civilians, raped and held in sexual slavery a number of Muslim women and girls, repeating those acts many times over a longer period of time, which clearly fit in the context of a large number of acts of violence which took place at that time, clearly show that the accused was fully aware of his acts and their consequences and actually wanted them to be part of such an attack, whereby all essential elements of the criminal offence of Crimes against Humanity have been met.

**I 1.** With regard to the acts of perpetration for which the accused was found guilty under Count 1 of the operative part of the Verdict, the Court, before all, bore in mind the testimony of Fatima Grbo, as she was an eyewitness to the event and an injured party in it, as well as the testimony of the witness Mustafa Bajrović and the List of camp detainees number 01-41-2710/2006 dated 2 June 2006. The witness Grbo Fatima stated in her testimony that, after the attack on the village of Jeleč had been carried out, she had been transferred to the summerhouse of Ismet Softić by Milenko Vuković on 1 May 1992, together with her brothers Sulejman, Seid, Munib, sister Fata, mother Tifa, uncle Meho and cousin Mustafa, where she stayed until 2 September of the same year. She further stated that on 9 June 1992, the accused Nedo Samardžić, “armed to the teeth”, had come to the mentioned summerhouse together with his brother Zoran and Mićo Olović and they had taken away her two brothers, Sulejman and Seid, as well as her cousin Mustafa from the neighboring house, because on that day two Serb soldiers had been killed. When taking them away, the accused, together with his brother and Mićo Olović, yelled at her brothers and cousin, cursed their Balija mother and then forced them into a car, which went in the direction of Miljevina, and that was the last time she saw them. The witness described in detail how the accused, with his brother and a few persons unknown to her, had come back to the same house on the following day, forced her to go to the basement and throw out all the things that were in it, then he pointed an automatic rifle to her neck and head asking her to give him mines and money and then he hit her in her back by a rifle butt and pulled her breasts, telling his brother to take her to Karaman’s house.

The Court gave full credence to the testimony of this witness, since she very precisely described how the accused had taken away her brothers and cousin and how he then returned and maltreated her, remembering all relevant details pertaining to the time when the event took place, persons who were present and what the accused looked like. Her testimony was also corroborated by the testimony of the witness Mustafa Bajrović, who, admittedly, was not an eyewitness to the event, but learned about it from Ramiza Softić, whose husband had also been taken away. According to what this witness learned, Grbo’s brothers and cousin had been taken away exactly by the accused. The fact that the witness learned about the name of the accused and his brother from a neighbor did not challenge the credibility of her testimony in any way, since the accused and his brother are not originally from Miljevina and they did not live there before the war, so it is quite normal and acceptable that she did not know their names in the beginning. As the place in question,

where the accused was often seen in the period covered by the Indictment, is very small, the Panel believes that the fact that the witnesses learned about the name of the accused from other persons or only subsequently, having heard soldiers calling each other, does not challenge the truthfulness and reliability of such an identification.

It was exactly owing to the detailed and precise description of the event by the witness Fatima Grbo that the Panel established the exact sequence of acts in which this event had taken place, so in accordance with that it specified factual description, not interfering with the objective identity of the Indictment, while, inspecting the List of camp detainees number 01-41-2710/2006 dated 2 June 2006, it established that Sulejman Grbo and Mustafa Grbo, who had been taken away, had not disappeared without a trace after the above described taking away, but they had been brought to the KPD Foča and for that reason this part of the factual description in the Indictment was left out in the operative part of the Verdict.

**I 2.** Furthermore, the accused has been charged with taking part in the abuse of Šućrija Softić, with his brother Zoran, in June 1992, after which they forced him in a vehicle and took first to the police station in Miljevina, whereupon he was transferred to the KPD Foča and then to the KPD Kula, and after that exchanged only to die five days after the exchange.

Fatima Grbo, Mustafa Bajrović, witness “A” and Miodrag Miletić testified with regard to circumstances of this Count of the Indictment. The witness Fatima Grbo was an eyewitness to this event as well and she stated in her testimony that several days after her brothers and cousin had been taken away, the accused, his brother and Mićo Olović came to Šućrija Softić’s house. She further described in detail how she, from the window of the house where she temporarily resided, which was about 200 meters away from the house of Šućrija Softić, had watched the accused and his brother Zoran take Šućrija Softić out of his house and tie him to a fence, beating him with a baton and rifle butt and making him call his brother Raif to come back. After that, they forced him into a small truck and drove him in the direction of Miljevina; she learned about his further fate from Šućrija’s wife, Ramiza, who told her that her husband was transferred after that to the KPD Foča and then to Kula and that he died soon after that. The testimony of this witness is fully corroborated also by the testimony of the witness “A”, who was imprisoned in the KPD Foča from 17 April 1992 and in the period from November 1992 until April 1993 stayed in the same room with Šućrija Softić, who told him how he was imprisoned and by whom. This witness confirmed that he had learned directly from Šućrija Softić that the accused Neđo Samardžić had captured him in a forceful and rough manner in the village of Rataje, near Miljevina, and brought him to the police station in Miljevina together with Čengiće Fehim, Nezir and Hilmo, where they were kept for ten to fifteen days. He was mentally and physically maltreated in the police station, he was deprived of food and clean water, and then he was transferred to the KPD Foča. The testimonies of those two witnesses are essentially consistent and complement each other and for that reason the Court is satisfied that they are credible and truthful. The witnesses testified very clearly about all details which, taking into consideration the circumstances under which the event took place, they could objectively memorize, and in that respect, very convincing is the testimony of the witness “A”, who gave to the Court information he had obviously learned directly from Softić Šućrija, such as, for example, the information that Mićo Olović had been sitting in a car when he had been taken away, that the Grbo brothers had been taken away before him, how he was treated in the station in Miljevina and the like. The witness also easily remembered other

details in relation to the period when they stayed together in the KPD Foča, the date when they were transferred there and the number of the room in which they stayed.

With regard to the mentioned above, the Court did not find the testimony of the witness Miodrag Miletić, by which the defense tried to challenge allegations of the witness Fatima Grbo, relevant to establish decisive facts pertaining to the participation of the accused in the mentioned event, since this witness only denied that he had participated in taking away of the Grbo brothers and Šućrija Softić, and the Panel finds this answer quite foreseeable and logical, while at the same time he confirmed that he knew that they had taken place and he did not assert in any way that the accused had not taken part in the event in question.

**I 3.** That the accused abused and raped the injured party Nura Sajtović in May 1992, whereupon he took her out of the apartment and tied her half-naked to a post in the settlement of Stara Kolonija and then left the scene leaving her tied, the Court established on the basis of the testimony of the witness-injured party, and partly the witness Darinka Mrgud.

To wit, the witness-injured party Nura Sajtović did not hesitate in recognizing the accused before the Court as the person who had come to her apartment with his brother and another girl. She further stated that the accused had taken her to a small room where he had physically abused her by inflicting several injuries upon her by bayonet, pulled her hair making her eat it, and then raped her. After that he took her out of the apartment in her slip and took her to the settlement of Stara Kolonija where he tied her to a pole. In her testimony, the witness further stated that Đorđe Mrgud who was passing by untied her from the pole and gave her his clothes to wear, took her to his home and she was hiding in his cellar for 15 days. The Court gave full credence to this witness' testimony, bearing in mind that, regardless of certain lack of clarity in her statement which, in the opinion of this Panel is the result of her traumatic experience, she clearly stated that it was exactly the accused that had abused and raped her.

Although the mentioned witness, also the injured party, is the only eyewitness to the referenced event, having carefully considered it the Panel accepted her testimony in its entirety, given that, considering the circumstances of the event and the nature of the criminal offence, she was the only one present, beside the accused, when the mentioned event occurred. Furthermore, in her testimony, the witness mentioned on several occasions that on his arrival the accused had been accompanied by his brother Zoran and a girl whom she did not know, and that girl had stayed in her apartment together with him. This part of the testimony has been supported by the testimony of the witness "G" who confirmed that Nedo Samardžić had brought her to the apartment which she knew belonged to one Nura.

The defense witness, Darinka Mrgud, wife of the late Đorđe Mrgud denied that her husband had saved Nura Sajtović in the way she described, as well as that she had stayed for 15 days in their cellar. The Court did not give credence to this witness' testimony, believing that it was very unconvincing and mainly untrue, given that the witness confirmed that Nura Sajtović had come to her house on one evening, scared, however, being asked whether she told her why she was scared, the witness replied unconvincingly and illogically that "she may have insisted on her telling her something" but she did not want to listen to her. In addition, in her testimony, the witness stated she had feared possible consequences she

might have had due to the fact that Nura had come to her house, as it was war, whilst in the cross-examination her testimony was additionally discredited by the fact that prior to her coming to testify she had heard from her friend she was summoned to the Court because “Nura Sajtović set her up”, which is why the Panel believes that she failed to provide a truthful testimony before the Court or that her husband did not inform her about the event as he had the realistic situation in mind and tried to leave unknown the act of helping in order to protect his family. The Court also assessed the fact that the witness stated her late husband was a good man who did not distinguish people by ethnic or religious affiliation, which along with the fact that the witness Sajtović was their neighbor and even saved their son, supports the assertion of the witness Sajtović that Đorđe Mrgud had helped her. Finally, why would the witness Sajtović claim something like that, and contrary to that, is the fact that the witness Darinka Mrgud, who lost her husband and elder son, still lives in Miljevina with her younger and ill son, whilst it is not excluded that she did not want others to get the impression that her husband had helped Bosniaks during the war.

**I 4.** In the establishment of the acts of the commission of which the accused was found guilty under Count 4 of the operative part of the Verdict, the Court based its conclusion on guilt of the accused on the testimony of witness under pseudonym “N” who stated that on 31 May 1992, the day after her father was taken to the KPD Foča, precisely on 30 May 1992, a group of soldiers came to the house in which she stayed with her mother. The accused Neđo Samardžić was among the soldiers who separated her from her mother and took her to another room, tied her eyes with a towel and hit her by bayonet on her head. According to the witness, the accused ordered her to undress which she refused to do, whereupon, although she resisted he forcibly took her clothes off, pulled her down on the couch and then raped her. Since the witness was screaming, her mother entered the room begging him to save her child, whereupon the accused got dressed and left. The witness further said that after a few days the accused had returned with two other soldiers, had taken her to the motel in Miljevina placing her in one of the rooms where he “had beaten her well” and raped again, and then left her in the motel for about seven days where she was subjected to rape by other soldiers who came there.

The Court gave full credence to the testimony of this witness, as she completely confirmed the allegations of the Indictment throughout her testimony, and categorically and consistently identified the accused as the person who had committed the referenced criminal acts. The Court also accepts as truthful the part of the testimony of the witness pertaining to the way she first identified the accused, given that she did not know him from before but she found out what his name was from the ID card he dropped on the floor after he had raped her. To wit, both in direct and cross-examination, this witness adhered to the statement that she had seen the ID card of the accused wherefrom she had found out his name and surname, as well as that he was from Bileća. Discrepancies between the testimony of the witness given at the main trial and the statement given to the Prosecutor’s Office of BiH pertaining to the detail whether she saw the ID card on the accused’ first or second arrival, in the opinion of the Panel are not of such nature to question the credibility and truthfulness of her statement.

To wit, her testimony must be brought into context of the time in which the mentioned events happened, in other words the fact that she first had extremely traumatic experience in her own house, followed by her detention contrary to her will in a room wherein she was

subjected to severe physical and mental abuse by several persons, including the accused, who obviously abused her on several occasions, and given the said she cannot be reasonably expected to say with hundred percent accuracy whether she saw the ID card on his first or second arrival. What is important for this Panel is the fact that the witness is definite in that she saw the ID card and read the data she could actually find out from the ID card (name, surname and place of birth), which is why the above-mentioned discrepancies are not of such nature to question the truthfulness of the entire testimony. In addition, allegations of her testimony are fully supported by the testimony of her father, witness K.M. who had found out the details on the referenced events from the witness "N" and his wife who died in 1998, and his testimony corresponds in its important parts with the testimony of the witness "N", whilst the discrepancies or events the witness was not familiar with pertain exactly to the events particularly unpleasant and traumatic to the witness "N" and her mother, and quite naturally one cannot expect them to go into details while speaking of the events with the father or the husband.

**I 5.** Furthermore, the Panel established in a reliable and undisputed way that the accused had committed the criminal acts with which he is charged and which pertain to keeping in sexual slavery several Bosniak women, in "Karaman's house" in Miljevina, Foča Municipality, and which by its characteristics constituted a detention camp for women. The Panel based such a viewpoint on the fact that detention camps constitute places in which, to the greatest extent, civilization standards are systematically suspended, whilst legal norms regulating interpersonal behavior in a rather wide community are reduced and violated in the most drastic manner. In doing so, the Panel has in mind that such a type of detention camps has its specific characteristics in comparison to majority of others, ensuing from the purpose of its establishing: it is a detention camp for mass rapes (therefore, hygienic and living conditions were "better") of young women of Bosniak population in order to cause severe humiliation, mental and physical pains, and accomplish the general, long-term goal, ethnic cleansing, given that the raped women constitute displaced population deciding to take permanent refuge for psychological, moral, religious, customary and other reasons.

The part of the factual description which the Court could not establish with certainty based on the presented evidence pertains to whether the accused, while persecuting Bosniak civilians together with Radovan Stanković, separated the underage A. B. from her mother and brought her to the "Karaman's house" and whether he raped her, which is why this part of the factual description was deleted from the operative part of the Verdict.

Such a state of facts clearly ensues from the statements of the witnesses L, G, K, J, M, H, R, I and P, detained for certain time in the "Karaman's house" in the period from June through September 1992. All the witnesses described the "Karaman's house" in the same way, as some kind of a brothel wherein they were brought against their will, forced to clean and cook for the soldiers visiting it and were subjected to almost daily raping by various persons, including the accused Neđo Samardžić. As their testimonies indisputably suggest, they were very afraid, could not eat, sleep and the accused and other soldiers treated them as legitimate war booty or personal property. In particular, this is suggested in the testimony of the witness "J" who said she had been the property of Radovan Stanković, as well as the witness "M" who also described the way the girls, upon their arrival, had been allocated to soldiers. All the girls who stayed in the "Karaman's house" were raped. This fact indisputably ensues from their testimonies, and there were underage girls among them, such



as A. B. and J. G. which is also confirmed by the witnesses M, L, J and K. In her testimony, the witness "K" clearly, logically and convincingly describes how, among others, Neđo Samardžić, Radovan Stanković, Nikola Brčić and Pero Elez used to come on a daily basis, ordering them what to cook, and in the evening organize "drinking bouts", bringing various "Miljevina men and Montenegrins" who also raped them. The witness gave detailed description as to how, on one occasion, the accused had forced her in a room upstairs and raped her in a particularly brutal manner for over one hour, both orally and vaginally. The witness "L" also, in her testimony suggesting that she had particularly traumatic experience throughout her detention in the "Karaman's house", confirmed that, among the others, she had been raped by the accused and described the first rape as the one leaving the strongest imprint on her memory. The testimonies of the above-mentioned women and girls correspond to that extent that they leave no doubt for the Panel in their truthfulness and credibility. Based on their testimonies, the Court established with certainty that the "Karaman's house" had constituted a detention camp in which women of Islamic religion were brought, the main aim being to rape and subject them to physical and mental torture. As the consequences of their stay in the camp, majority of the heard witnesses are of seriously disrupted physical and mental health and due to their several-month long detention and isolation under particularly agonizing circumstances they had difficulties to remember all the details. However, they, notwithstanding, testified in a very clear and undisputed manner on all relevant circumstances pertaining to both the role of the accused as one of those "in charge" of the "Karaman's house" and his acts, in other words without any hesitation they described the accused as the person who had raped, abused and kept in sexual slavery numerous women and little girls in the aforementioned period.

**I 6.** Furthermore, in the Indictment the accused was charged with taking away B. J. on undetermined day in August 1992 from the "Karaman's house" where she was detained, placed her in an apartment in Miljevina where he forced her into sexual intercourse on a daily basis, and on one occasion he made the injured party, the then underage "G" who was also detained in the apartment to strip naked and watch him forcing B. J. into sexual intercourse from the corner of the room.

With regard to the circumstances of this Count of the Indictment, the Court heard the witness "G" who, in early 1992, lived in the village of Gradac, Foča Municipality, with her grandmother and two uncles who were killed in June by Miško Savić, Pedo, little Miško and Vule, taking her into a hotel in Miljevina, wherefrom Zoran Samardžić took her to an apartment in which she found Dž. R. and M. Č. and where she lived for about four months. Thereupon, the accused Neđo Samardžić took her to an apartment two floors up owned by a person called Nura and in which she found J. B. and Almasa, whereas Almasa was taken away ten days upon her arrival by Pero Elez. In her testimony, the witness clearly described how, throughout two and a half months of her stay in the apartment, together with B. J., she had to clean and cook whilst they were not allowed to go out. She clearly stated that Neđo Samardžić had kept B. J. in that apartment for himself, that she had had to be with him and had been very often forced into sexual intercourse, almost every night, given that he came only at night. Further, she stated that on one night she had heard some noise and incomprehensible conversation between the two of them, which was followed by the accused coming to her room and ordering her to come to "their" room, strip naked and stand in the corner of the room "to watch him sadistically abusing her". The witness then described how the accused had raped B. J. or completed sex act while holding her hands.

The circumstances that B. J. stayed in the apartment with the accused because he had separated and kept her only for himself, without her explicit consent, ensuing from the way she had been taken off a truck and brought from Kalinovik to Miljevina and the way he had treated her while he kept her in the apartment, as the witness "G" stated, indisputably point to the conclusion that the accused kept B. J. in sexual slavery, whilst lack of resistance or obvious and constant disagreement throughout the sexual slavery cannot be interpreted as a sign of consent. Neither the resistance is the requirement nor the permanent application of force in itself is the element of the subject matter of rape.

The witness "G" testified concerning the circumstances of the charges pertaining to the period from November 1992 through 23 March 1993 when she, upon her transfer from the above-mentioned apartment to the "Karaman's house", was kept in sexual slavery, in other words forced, together with the injured "L" and G. J., into doing the housework, and subjected to rape by Nikola Brčić and other soldiers. Her testimony, completely consistent with the one given by the witness "L", suggests that the accused brought her to the "Karaman's house" where she found J. G. and "L" and that throughout their stay there all three of them were subjected to rape by Nikola Brčić, in the first place. According to the witness, he made them drink with him, sing Chetnik songs, and do whatever he requested them to.

This witness' testimony was fully supported by the testimony of the witness "L" and the Court found it completely reliable and authentic, in particular having in mind its objectivity reflected in the fact that the witness was very clear in that throughout her stay in the apartment with Zoran Samardžić, as well as the two and a half months she stayed in the apartment with the accused, no one, including the accused, treated her inappropriately or abused her, which makes it obvious that the witness has no intention or motive to charge the accused groundlessly. Considering the above-mentioned, the Panel indisputably established that the accused had committed the criminal offences of which he was found guilty under Counts 6 and 9 of the operative part of the Verdict, and it is necessary to particularly stress out that the criminal offence of rape, within the context of Crimes against Humanity, considerably differs in its nature from the criminal offence of rape as an offence constituting general crime requesting corroborating evidence or direct examination of the very victim, since in such cases of rape in war as an act against humanity, the examination of the victims themselves is very often impossible due to objective reasons, as many were killed, are unaccounted for or, quite understandably, at unknown address. The fact that B.J. as a victim of rape was not available to the Court did not question reliability of the Court's finding pertaining to the acts of the commission by the accused in relation to B.J. In addition, part of the testimony pertaining to Count 9 of the operative part of the Verdict is entirely supported by the witness "L" whose testimony was very clear and impressive, and who confirmed that together with the injured party "G" and J. G., she was detained in the "Karaman's house" until 21 March 1992, describing what they have gone through in the same way as the witness "G".

**I 7.** That the accused undertook the acts constituting rape of the witness "B" in the way as described in more details under Count 7 of the operative part was established by the Court through the assessment of the testimonies of the injured party "B" and her mother, witness under pseudonym "C", as well as on the basis of their testimonies established in a reliable

manner that the accused had committed the offence with which he is charged under this Count.

To wit, the testimony of the witness “B”, which is consistent with the testimony of the witness “C”, suggests that at the beginning of the war she lived in Miljevina with her father, mother and brother until 9 June 1992 when her father and brother were taken away and she remained living with her mother in the apartment. She did not know the accused in person, however she used to see him while he was passing by with his brother in a car without an exhaust pipe and the neighbors told her what his name was. Some time in mid-August the accused, together with a male person, came to their apartment and immediately separated her into a bedroom. As she entered, the accused closed the window, let the shutter down, ordering her to take her clothes off which she obeyed. Then, under the threat that if she screams he will kill her, he completed the sex act, after which the second person accompanying him invited him to go and the two of them left the apartment together. The witness’ testimony is fully supported by the testimony of her mother, witness under pseudonym “C” who was present in the apartment throughout this event. She was in the kitchen where the other man who accompanied the accused attempted to rape her when she heard her daughter crying in the other room; after the two of them left she helped her to wash herself in order to prevent possible pregnancy.

The Court gave credence to the testimonies of the witnesses believing that they were given objectively and bearing in mind that they were consistent in important parts. In addition, both witnesses stated that they had known the accused by sight, in other words because of his car which he often drove past and which did not have the exhaust pipe thereby producing a loud noise. This detail was also mentioned by other witnesses heard in the course of the evidentiary proceedings, such as witnesses under pseudonyms K, H and D, who also clearly stated that the accused was known by driving a “Lada” without the exhaust pipe, which is how they knew when he arrived, and which also represented certain kind of mental terror for them. Discrepancies in their testimonies pertaining to the color of the car, according to this Panel, are not of such nature to question the credibility of their testimonies, particularly if taken into account that only one of them said she thought the car was red, whereas all others conformably stated it was yellow or banana. Witnesses B and C gave the physical description of the accused, whilst the witness B was more precise describing him as a tall, heavily-built, rather young man with black, wavy hair, medium-length beard, which is the description matching with the one given by other witnesses in their testimonies: Nura Sajtović, N, P, G and in particular “L” and their statements also suggest that Neđo Samardžić was tall, with dark, wavy hair, flat-faced, so that the Court had no doubts in the identity of the accused. Such an established state of facts indisputably suggests that the accused committed the criminal acts with which he is charged under this Count, exactly in a way as the witnesses described.

**I 8.** With regard to Count 8 of the operative part of the Verdict, the Court based its decision on the testimonies of almost all witnesses of the Prosecution including witnesses I, P, H, B, C, D, F, N, E, Fatima Grbo, Nura Sajtović and Hasnija Kavazić. The testimonies of these witnesses agree in important parts concerning their transfer to the “Partizan” Sports Centre in Foča on 3 September 1992. In that Centre they were subjected to physical and mental abuse and looting. Thus, for example, the witness P describes that approximately 200 women, children and the elderly were transferred together with her to “Partizan”. Having

arrived in the Centre, they were taken in small groups to a separate room where they were deprived of all gold and money they had on them, whereas she personally saw the accused in the room who extorted gold and money from her. These allegations are fully supported by the witnesses E, F, I and Fatima Grbo who also saw the accused there extorting money or beating women and little girls. Their testimonies also agree in that the women and little girls were taken to nearby apartments where they were subjected to rape, and in that way the witness "H" describes how she, S.A. and Belma, as well as A.F. and Amra were taken by "Žaga's" men to an apartment where they beat them, putting pistol barrels in their mouth and sadistically abused them by raping them, whilst the witness N stated that the accused personally had beaten her in the mentioned hall. The testimonies of the witnesses also agree in that they were transferred by buses from the "Partizan" hall to immediate vicinity of the line of separation where they were forced out of the buses and forced to walk to the territory of Goražde Municipality. Defense witnesses Srđan Stanković, Srećko Davidović and Sretko Gagović also stated that they were aware of Muslim population being transferred by buses from the territory of Foča Municipality, and the witness Gagović even clearly stated that it concerned women, children and the elderly, whereas the claim of the witnesses that it was voluntary leaving was not supported by presented evidence, having in mind the circumstances of the manner of bringing Bosniak population to the "Partizan" Centre which is why the Court could not accept such allegations as true.

Furthermore, the testimonies of all Prosecution witnesses suggest that, at the time covered by the Indictment in the territory of Foča Municipality or neighboring villages, Muslim men were successively taken away from their homes, whereupon majority of them never returned, and those facts were partly confirmed by the testimonies of defense witnesses who stated that they were aware that men had been taken away for interrogation. Bringing the mentioned in connection with the fact that mainly women, children and the elderly stayed in the houses and were exposed to daily terror, mental and physical abuse, rape and looting, in the manner as described in detail above, as well as with the fact that they were later told to leave their homes (as more precisely described by the witnesses P, D, F and others), completely exclude any voluntariness in their actions, but this Panel believes that it concerns forcible transfer of population as mentioned in the Indictment.

Having in mind the above-mentioned, the Panel established in a reliable and indisputable manner that the accused had committed the criminal actions in the manner, at the time and in the places as precisely stated in Counts 1 through 9 of the operative part of the convicting part of the Verdict.

With regard to the application of the substantive law and legal qualification of the offence, having in mind the principles prescribed by Articles 3, 4 and 4a) of the Criminal Code of Bosnia and Herzegovina, in the particular case the Panel applied the Criminal Code of Bosnia and Herzegovina and established that through the mentioned acts the accused had committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) (h) in conjunction with items (d), (e), (g) and (k) of the mentioned Code.

With regard to the application of the substantive law in this criminal case, the Court finds relevant two legal principles: the Principle of Legality, according to which 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 offence by law or international law, and for

which a punishment has not been prescribed by law (Article 3 of the CC of BiH) and the principle of Time Constraints Regarding Applicability, according to which the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence 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 (Article 4 of the CC of BiH).

The principle of legality has also been prescribed by Article 7 (1) of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR) and Article 15 (1) of the International Covenant on Civil and Political Rights (hereinafter: ICCPR).

Article 7 (1) of the ECHR prescribes: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.” On the other hand, Article 15 (1) of the ICCPR prescribes: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”

Accordingly, these provisions prescribe the prohibition of imposing a heavier penalty, failing to establish obligatory application of the most/more lenient law (if the law was amended on several occasions) on the perpetrator in relation to the punishment applicable at the time of the commission of the criminal offence.

However, Article 7 (2) of the ECHR prescribes: “This 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.” On the other hand, Article 15 (2) of the ICCPR reads: “Nothing in this article shall 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 the community of nations.”

Article 7 (2) of the ECHR and Article 15 (2) of the ICCPR contain provisions constituting exceptions to the rule established under Article 7 (1) of the ECHR and Article 15 (1) of the ICCPR.

Finally, the same exception is contained in 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. Thereby, in fact, provisions of Article 7 (2) of the ECHR and Article 15 (2) of the ICCPR were adopted, thus exceptionally departing from the principle referred to in Article 4 of the CC of BiH, as well as departing from obligatory application of more lenient law in the proceedings concerning criminal offences according to international law. It is exactly the case in these proceedings against the accused, as it actually concerns the incrimination including the violation of the rules of international law.

The state of Bosnia and Herzegovina as a successor state of the former Yugoslavia ratified the ECHR and ICCPR and thereby these agreements are obligatory for it, and the authorities of Bosnia and Herzegovina, including courts, must apply them. Therefore, Article 4a) of the CC of BiH is merely national legal reminder, as it is not necessary for the application of these agreements. For that reason, these agreements are obligatory for all BiH courts, and the provision as Article 4a) of the CC of BiH is not necessary for their application.

Article 172 of the CC of BiH prescribes the criminal offence of Crimes against Humanity defined under Article 5 of the ICTY Statute as specific offences “when committed in armed conflict, whether international or internal in character, and directed against any civilian population.” At the time of the commission of the offences, Crimes against Humanity were not explicitly prescribed under Criminal Codes in Bosnia and Herzegovina.

Customary status of punishability of the crimes against humanity and attributing of individual criminal responsibility for its commission in 1992 was confirmed by the UN Secretary General<sup>1</sup>, the International Law Commission<sup>2</sup>, as well as the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR)<sup>3</sup>. These institutions have assessed that the punishability of the crimes against humanity constitutes peremptory norm of general international law or *jus cogens*<sup>4</sup>, which is why it is indisputable that in 1992, crimes against humanity were part of customary international law. This conclusion was confirmed by the Study on Customary International Humanitarian Law<sup>5</sup> produced by the International Committee of the Red Cross. According to the 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 on 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)

Article 4a) of the CC of BiH deals with “the general principles of international law”. Article 7 (2) of the ECHR deals with “the general principles of law recognized by civilized nations”, and Article 15 (2) of the ICCPR with “the general principles of law recognized by the community of nations”. Since neither international law nor the ECHR recognize term identical to the one used in Article 4a) of the CC of BiH, this term actually constitutes combination of “the principles of international law” as recognized by the UN General Assembly and the International Law Commission, and “the general principles of law

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<sup>1</sup> Report of the UN Secretary General pursuant to paragraph 2 of the Security Council Resolution 808, 3 May 1993, paragraphs 34-35 and 47-48.

<sup>2</sup> International Law Commission, Commentary to Draft Code of Crimes against the Peace and Security of Mankind (1996), Article 18.

<sup>3</sup> ICTY, Appellate Chamber, *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 141; ICTY Trial Chamber, *Tadić* judgement dated 7 May 1997, paragraphs 618-623; ICTR, Trial Chamber, *Akayesu*, 2 September 1998, paragraphs 563-577.

<sup>4</sup> International Law Commission, Commentary to the draft articles on Responsibility of States for Internationally wrongful acts (2001), Article 26.

<sup>5</sup> Jean-Marie-Henckaerts and Louise Doswald-Beck; Customary International Humanitarian Law, ICRC, Cambridge University Press, 2005.

recognized by the community of nations”, as recognized by the Statute of the International Court of Justice and Article 7 (2) of the ECHR, as well as Article 15 (2) of the ICCPR.

The principles of international law recognized by the General Assembly Resolution 95(I) (1946) and the International Law Commission (1950) pertain to the “Charter of the Nurnberg Tribunal and the Judgment of the Tribunal”, thus to crimes against humanity. “Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal” adopted by the International Law Commission in 1950 and filed with the General Assembly, or Principle VI.c. prescribes that Crimes against humanity are punishable as crimes under international law. Principle I prescribes: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.” Principle II prescribes: “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.”

Case law of the European Court of Human Rights stresses out the application of the provision of Article 7 (2) in relation to the application of Article 7 (1) of the ECHR in several similar cases<sup>6</sup> in which the subject matter of discussion was the existence and punishability of crimes against humanity as a criminal offence. In the *Kolk and Kislyiy v. Estonia* case the European Court “recalls that that the interpretation and application of domestic law falls in principle within the jurisdiction of the national courts...<sup>7</sup>, which is applicable also when the domestic law pertains to the rules of general international law or international agreements.

Accordingly, the criminal offence of crimes against humanity can in any case be subsumed under “general principles of international law” referred to in Article 4a) of the CC of BiH. Therefore, regardless of whether viewed from the viewpoint of international customary law or the viewpoint of “principles of international law”, it is indisputable that crimes against humanity constituted a criminal offence in the incriminated period, and that the principle of legality has been met. In doing so, the fact should not be neglected that the criminal acts enumerated in Article 172 of the CC of BiH can be found in the law that was in effect in the relevant time period (at the time of the commission of the act), more precisely in Articles 134, 141, 142, 143, 144, 145, 146, 147, 154, 155 and 186 of the CC of SFRY, in other words that the acts constituting charges were punishable under the then applicable criminal code. Finally, with regard to Article 7 (1) of the ECHR, the Court notes that the application of Article 4a) is additionally justified by the fact that the pronounced punishment is in any case more lenient than the death penalty applicable at the time of the commission of the offence, which satisfies the application of the principle of time constraints regarding applicability of the criminal code, in other words, “the law that was more lenient to the perpetrator”.

As for the qualification of individual acts undertaken by the accused, the Panel established that all substantive elements of the criminal offence of Crimes against Humanity in violation of Article 172 (1) (k) of the CC of BiH have been acquired in the acts described under Counts 1 and 2 of the operative part of the Verdict, given that the established state of

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<sup>6</sup> See e.g. ECtHR Judgement in the *Naletilić v. Croatia* case, 51891/99 and the Judgement

<sup>7</sup> See *Papon v. France* No. 54210/00, ECtHR 2001-XII and *Touvier v. France*, No. 29420/95, decision of the Commission dated 13 January 1997.

facts suggests that the acts undertaken by the accused beyond doubt constitute inhumane acts which, considering the ruthless and cruel manner of the commission, were aimed at causing great suffering, or serious injury to body or to physical or mental health.

In the acts described under Counts 3, 4, 5, 6, 7 and 9 all the substantive elements of the Crimes against Humanity - coercing another by force or by threat of immediate attack upon his life or limb, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, or any other form of sexual violence of comparable gravity as referred to in Article 172 (1) (g) of the CC of BiH have been acquired, and in Counts 4, 5, 6, 8 and 9 also by imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law as referred to in item e) of the same Article, whereby it is particularly characteristic that women and girls, detained in places serving as military headquarters, detention centers, apartments in which soldiers lived, and the "Karaman's house" were raped by the accused, as well as other soldiers in an extremely brutal manner and with shocking regularity. This concerns such coercive circumstances that the possibility of the consent of the injured parties is completely excluded, whilst the intention of the accused to effect the sexual penetration and the knowledge that it is done without the consent of the victim clearly ensue from the presented evidence. The circumstances under which the injured parties stayed in the above-mentioned apartments and rooms, the fact that they were surrounded by army and police, separated from male members of their families, without any funds and realistic possibility of escape, exclude any possibility of their voluntary residing and stay at such places.

Finally, the presented evidence suggests that by the acts described under Count 8 of the operative part of the Verdict the accused committed the Crimes against Humanity through forcible transfer of population in violation of Article 172 (1) (d) of the CC of BiH. The results of the presented evidence concerning this act of the commission indisputably show that the Bosniak inhabitants of Foča Municipality and surrounding places were contrary to their will taken away from their houses and placed in "Partizan", whereupon they were transferred by buses to the territory of Goražde Municipality. The transfer was not motivated by security reasons of the population but it was exactly the accused who, along with other members of the Army and Police of the Serb Republic of BiH, jeopardized their security, with the intention of their permanent transfer and aim not to have them returned.

Given that each of the above-mentioned acts constitute grave and flagrant violation of fundamental rights of individuals as established under international law, carried out exclusively on discriminatory grounds and with a discriminatory intention on religious, ethnic and political grounds against the persons of Bosniak ethnicity and Islamic (Muslim) affiliation, and within the group in particular against the most vulnerable category - women, and even children, acting with direct intent, knowing that by undertaking the mentioned acts he violated the rules of international law, and even beside that he wanted the forbidden consequence, the Panel concluded that they, notwithstanding the number of acts of the commission, constitute a single criminal offence - Crimes against Humanity - persecution, in violation of item (h) in conjunction with items (d), (e), (g) and (k) of Article 172 (1) of the CC of BiH, of which offence it found him guilty.

Deciding on the type and length of the criminal sanction, concerning the extenuating circumstances the Court found that the accused was the father of two underage children,



while concerning the aggravating circumstances the Court, in the first place, had in mind the fact that the accused repeated the acts constituting the elements of the subject matter of this criminal offence, expressing particular brutality which caused extremely severe physical and mental pain to the injured parties. At the time of the commission of the offence, some of the injured parties were very young girls, even little girls, whilst the traumatic experience they were subjected to left lasting and far-reaching effects on their mental and physical health, and it also carries particular gravity from the psychological, moral, religious, customary and other points of view of lives of both the victims and their families. The accused had prior convictions for the criminal offence of Murder in violation of Article 36 (2) of the CC of R BiH and was sentenced to the term of imprisonment of 8 years, as well as for the criminal offence of Illicit Possession of Weapons in violation of Article 213 (2) of the CC of the RS and was pronounced suspended sentence, which are the circumstances the Court considered as aggravating while meting out the punishment. Therefore, having in mind the mentioned circumstances, for the purpose of Article 48 of the CC of BiH, it sentenced the accused to long-term imprisonment in the duration of 24 years, believing that the pronounced punishment corresponds to the degree of his criminal responsibility, the motives due to which the offence was committed, as well as the intensity and degree of endangering the protected value, also bearing in mind the purpose of the punishment in terms of individual and general prevention.

While meting out the punishment, the Court had in mind that at the time of the commission of the mentioned criminal offence, the accused was on the run from the Penal and Correctional Facility Foča where he was serving the term of imprisonment in the duration of 8 years imposed by the Verdict of ....

By the Decisions of the Presidency of BiH No. 08-248-429/91 dated 30 April 1991 and the Presidency of the RS No. 01-1189/95 dated 21 June 1995 each he was granted pardon for 2 years, and accordingly the period of 1 year, 10 months and 24 days is left for him to serve.

Article 55 of the CC of BiH prescribes that if a convicted person is tried for a criminal offence committed at the time while serving the term of imprisonment, the Court shall impose a compound punishment for all the criminal offences by applying the provisions of Article 53 (Concurrence of Criminal Offences) of the CC of BiH, considering previously imposed punishment as already established, while the punishment or part thereof already served by the convicted person shall be included into the punishment of imprisonment or long-term imprisonment.

Paragraph 2 of the same Article prescribes that the Court shall impose the punishment on the perpetrator aside from previously imposed punishment for the criminal offence committed while serving the term of imprisonment, long-term imprisonment or juvenile imprisonment, if by applying the provisions of Article 53 of the CC of BiH could not meet the purpose of punishment, given the duration of part of previously imposed punishment that was not served.

Bearing in mind that the punishment of long-term imprisonment in the duration of 24 years was imposed on the accused for this criminal offence, by applying Article 53 (1) of the CC of BiH, after considering previously imposed punishment in the duration of eight years as already established, the Court would only have to impose the punishment of long-term

imprisonment on the accused and include the time the accused spent serving previously imposed sentence, precisely more than 6 years, whereas the accused was granted pardon for major part of the punishment.

In this way, given the nature and gravity of the criminal offence of Crimes against Humanity, as well as the reasons guiding the Court while meting out the punishment therefor, the purpose of its pronouncement would be considerably impaired, which is why the Court applied the provision of Article 55 (2) of the CC of BiH and imposed the punishment on the accused for the criminal offence committed aside from the one imposed previously.

Pursuant to Article 56 of the CC of BiH, the time the accused spent in custody and which started on 19 October 2004 shall be included into the punishment imposed on him and given that he is unemployed and has no means to reimburse of the costs of the criminal proceedings, pursuant to Article 188 (4) of the CPC of BiH he will be relieved of the duty of their reimbursement.

**II** With regard to the acquitting part of the Verdict concerning Count 1 of the Indictment charging the accused with participating in physical abuse and beating of civilians in front of the Police Station in Miljevina, along with his brother Zoran and a group of soldiers, in August 1992, whereupon the civilians were transported by bus in the direction of the Miljevina mine where they were deprived of their lives by being fired at from firearms, based on the presented evidence the Panel could not in a reliable manner establish that the accused undertook the acts with which he is charged under this Count of the Indictment, which is why he was acquitted of charges concerning the Count. To wit, the documents indisputably suggest that the bodies of Rahmo Valjevčić, Lutvo Abdurahmanović, Šaćir Brajanac, Hamza Dorić, Rašid Valjevčić, Fikret Abdurahmanović, Fikret Hasović, Hasan Dorić, Rasim Dorić and another 4 unidentified persons were exhumed on 31 October 2001 at the “Šljivovice” site and that their death was the result of the use of firearms. Furthermore, witness Hasnija Kavazić confirmed in her statement that she had observed from her balcony Neđo Samardžić, Rade Drašković, Dragan Janjić, Mićo Olović and Nikola Rašević, along with other persons physically abusing a group of civilians in front of the Police Station in Miljevina. According to the witness, the above-mentioned persons beat civilians with kicks, rifle butts and clubs, then making them to drag each other into the bus parked there, which then drove off in the direction of the Miljevina mine. The witness Mustafa Bajrović also in a similar way described how he had observed a similar event from the apartment where he lived, however the testimonies of these two witnesses differ in certain parts, such as to which transporting company the bus belonged and whether an excavator followed it or not. However, neither the witness Kavazić nor Mustafa Bajrović recognized a single person physically abused in front of the bus on that occasion, and their testimonies do not suggest that any of subsequently exhumed persons was present at the material time in front of the Police Station.

Due to the aforementioned reason, even if it accepted that the witnesses were telling the truth before the Court and that given the position of the building in which they lived they could see the area in front of the Police Station, the Panel could not in a reliable manner establish that they observed exactly that event described under Count 1 of the Indictment.

Since the accused is charged with the abuse of individually named civilians who were subsequently deprived of their lives by the use of firearms and exhumed at the Šljivovica site on 31 October 2001, and having in mind that the heard witnesses did not recognize any civilian brought in front of the Police Station on the day when they observed the event from the window or balcony, based on such established facts, the Panel could not with certainty establish necessary cause-effect connection between the acts of the accused and abuse and subsequent killing of the civilians mentioned in Count 1 of the Indictment, and therefore, pursuant to Article 284 (3) of the CPC of BiH acquitted him of charges for the acts referred to in Article 172 (1) (a) of the CC of BiH.

Record-taker

Lejla Fadilpašić  
*(signature affixed)*

President of the Panel

Judge  
Azra Miletić  
*(stamp and signature affixed)*

Instruction on legal remedy: No appeal shall be permissible against this Verdict.