

Bosna i Hercegovina

Босна и Херцеговина



**Sud Bosne i Hercegovine
Суд Босне и Херцеговине**

**No. X – KR – 05/49
Sarajevo, 7 April 2006**

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina in Sarajevo, Section I for War Crimes, sitting as a Panel composed of Judges Zorica Gogala as the President of the Panel, Roland Dekkers and Tore Lindseth as the members of the Panel, with participation of legal officer Amela Skrobo as the record-taker, in the criminal case against the Accused Nedo Samardžić for the criminal offense of Crimes against Humanity in violation of Article 172(1)(e) and (g) of the Criminal Code of Bosnia and Herzegovina, pursuant to Article 279 of the Criminal Procedure Code of Bosnia and Herzegovina, reached and publicly announced on 7 April 2006 the following

VERDICT

The Accused NEDO SAMARDŽIĆ, son of Ilija and mother Kosa (maiden Babić), born on 7 April 1968, in ... where he resides – at ..., ... by ethnicity, citizen of ..., literate, tradesman by occupation, married, father of two, served the army, entered in the records of the Foča Division of the Ministry of Defense, indigent, convicted by the judgment of ..., currently in custody since 19 October 2004,

HAS BEEN FOUND GUILTY

Of the following:

In the period from April 1992 to the end of March 1993, as part of a widespread and systematic attack of the military and police of the so-called Serb Republic of BiH, directed against the Bosniak civilian population of the Foča municipality, with knowledge of such an attack, he carried out and/or aided and abetted the commission of imprisonment or other severe deprivation of psychical liberty in violation of fundamental rules of international law, 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 sexual slavery, in as much as he:

1. On 9 June 1992 in the village of Rataje, Foča municipality, together with his brother Zoran and Mićo Olović came to Ismet Softić's house, where they forced Sulejman Grbo and Seid Grbo out of the house and Mustafa Grbo out of the house next door, pushed them into a car and took them away into the direction of Miljevina.

2. On an unknown date in June 1992 in the village of Rataje, Foča municipality, armed with a firearm, together with his brother Zoran and Mićo Olović, he came to Šućrija Softić's family house wherefrom he and his brother Zoran took out Šućrija Softić, handcuffed him and thereupon physically abused him in the manner that they tied him to an iron fence, beat him up with a baton and a 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 vehicle and took him to the Police Station in Miljevina whereupon he was transferred to the KPD (Prison Facility) "Foča" where he remained imprisoned for several months and thereafter transferred to the KPD "Kula"; later on he was exchanged and died five days afterwards.

3. In the period from June to September 1992, in the so-called "Karaman's house", in Miljevina, Foča municipality, which was some kind of a camp for women, together with Nikola Brčić and Radovan Stanković, he aided and abetted in holding in sexual slavery several Bosniak women, among whom were underage girls, who were deprived of liberty and forced on a daily basis into sexual intercourses with soldiers who came to that house and he personally forced the detained women into sexual intercourses with him, B.J. in particular, originally from Kalinovik, whom he selected and kept for himself, and the injured party "L" who was 15 at the time and whom he had previously separated from her family and brought to Karaman's house.

4. On an unknown date in December 1992, together with his brother Zoran, he took the injured party, the then underage "G", from the apartment he used in

Miljevina, Foča municipality, 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 until 23 March 1993 when, together with other two women, she was taken to be exchanged.

Whereby he committed the criminal offense of Crimes against Humanity, as follows:

Counts 1 and 2 – Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law defined in Article 172(1)(e) of the Criminal Code of Bosnia and Herzegovina;

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 aided and abetted in holding women in sexual slavery defined in Article 172(1)(g) of the Criminal Code of Bosnia and Herzegovina;

Therefore, pursuant to the above-mentioned legal provisions and with application of Articles 39, 42 and 48 of the Criminal Code of Bosnia and Herzegovina, the Court, in relation to the criminal offense in violation of Article 172(1)(e) and g) of the Criminal Code of Bosnia and Herzegovina, **imposes a punishment of imprisonment for a term of 12 (twelve) years** and, pursuant to Articles 53 and 55 of the said Code, **takes as already established part of unserved punishment of imprisonment for a term of ...** (which sentence he has not served under Judgment of ...).

Based on the quoted legal provisions, the Accused Neđo Samardžić

**IS HEREBY SENTENCED
TO A COMPOUND PUNISHMENT OF IMPRISONMENT FOR A TERM
OF 13 YEARS AND 4 MONTHS**

Pursuant to Article 56 of the Criminal Code of Bosnia and Herzegovina, the time that the Accused spent in custody from 19 October 2004 onwards 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 proceedings.

Pursuant to Article 284(c) of the Criminal Procedure Code of Bosnia and Herzegovina, the Accused Neđo Samardžić

IS ACQUITTED OF THE CHARGES

In as much as he:

1. On an unknown date in August 1992, after a bus with the Bosniak civilians who had been previously captured in the Miljevina area was brought 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 mistreatment and beatings of those civilians by beating up, kicking and hitting them with rifle butts all over their bodies. After that, they put them again onto the bus and took them in the direction of the Miljevina mine, location “Šljivovice”, where those persons were deprived of their lives by use of firearms. On 31 October 2001, following the exhumation at the said location, 13 bodies of the killed civilians were exhumed, out of which the following nine were identified: Rahmo Valjevčić, Lutvo Abdurahmanović, Šaćir Brajanac, Hamza Dorić, Rašid Valjevčić, Fikret Abdurahmanović, Fikret Hasović, Hasan Dorić and Rasim Dorić, whilst the four remaining bodies have not been identified to date;

2. On an unknown date in May 1992 in Miljevina, Foča municipality, he came to the apartment of the injured party S.N. and raped her in the apartment and abused her by hitting her, pulling her hair and telling her to eat it, whereupon he brought her out of the apartment and tied her half-naked to a post in the settlement of Stara Kolonija, went away from the spot leaving her in such condition;

3. On an unknown date at the end of May 1992, together with a group of soldiers, he came to Štović, Foča municipality, and then got into a house where he started beating the injured party “N” who was in the house, and then he ordered her to strip naked and, when she did it, he knocked her down, placed himself on top of her and raped her. She was shouting and begging for help, but he ignored her. He even ignored her mother when she came in and begged him to let her go, whereupon he and the group left their house. Thereafter, a few days later, on an unknown date in June 1992, together with a group of soldiers, he came to the same house which they searched and after that they took out of the house the injured party “N” and put her into a car and brought 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. After that, he raped her which caused her to faint. After that, she was raped by his brother Zoran after which they left her in that hotel where she spent 7

days. During this period, she was subjected to daily rapes by other soldiers and the suspect raped her once again and beat her, inflicting many injuries to her;

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

5. On an unknown date in August 1992, together with another soldier, he came to the apartment of the person "C" in Miljevina, Foča municipality, armed with an automatic rifle, where he forced the injured party "B" to go into a room and, when he came in after her, he ordered her to strip naked. When she did that, he raped her;

6. On 3 September 1992, together with other members of the military and police he expelled Bosniak civilians from Miljevina, Foča municipality, by forcibly transferring the population consisting mainly of women and children to the Partizan Sports Hall in Foča, where they were subjected to physical mistreatment and robbery, from where many women were taken to apartments where they were raped and thereafter they were taken by buses to a location near the line of separation where they were forced out of the buses to go on foot from the territory of the Foča municipality to the territory of the Goražde municipality.

Whereby he would commit the criminal offense of War Crime against Humanity in violation of Article 172(1)(a), (d), (e), (g), (h), (i) and (k) of the Criminal Code of Bosnia and Herzegovina.

Pursuant to Article 283(c) of the Criminal Procedure Code of Bosnia and Herzegovina

CHARGES ARE DISMISSED

Against the Accused Neđo Samardžić inasmuch as:

1) He participated in an inhuman treatment of civilians in Miljevina, Foča municipality, by searching, armed with a firearm, the houses of the following ...: Šaban Aljukić, Hale Oruč, Smajo Đozo, Ekrem Đozo, Kasim Mekić, Zulfo Mekić, Ramiza Ramić, Meho Ćemo, Salko Subašić and Emir Manjo; thereafter, he forced them out of their houses and took them in the direction of the Police Station building wherefrom they disappeared without a trace;

2) In the period from July to August 1992, he frequently visited an apartment occupied by his brother Zoran, which was located in Miljevina, Foča municipality, in which he raped on several occasions Č.M. who was imprisoned in that apartment together with R.DŽ, the latter kept by his brother Zoran for himself;

3) On an unknown date in August 1992, in Miljevina, Foča municipality, he came to the apartment of the injured party D.R. and raped her in front of her two underage children;

4) In the period from June to December 1992, together with other members of the military, in particular Radovan Stanković, Dragomir Kunarac aka „Žaga“, and others, he came to the Foča Hospital on several occasions wherefrom they took hospitalized Bosniak women to apartments in Foča in which they would rape them and subsequently bring them back to the Hospital.

Whereby he would commit the criminal offense of War Crime against Humanity in violation of Article 172(1)(a), (d), (e), (g), (h), (i) and (k) of the Criminal Code of Bosnia and Herzegovina.

R e a s o n i n g

The Prosecutor's Office of Bosnia and Herzegovina, Special Department for War Crimes, by Indictment no. KT-RZ 89/05 dated 26 December 2005, charged the Accused Neđo Samardžić with the criminal offense of Crimes against Humanity in violation of Article 172(1)(a), (c), (d), (e), (g), (h) and (k) of the Criminal Code of Bosnia and Herzegovina (hereinafter: CC of BiH), committed at the time and in the manner described in detail in the aforementioned Indictment. Moreover, the Indictment contained a Motion to exclude the public throughout the trial and a Motion for the joinder of the proceedings, respectively. The Indictment was confirmed by the Preliminary Hearing Judge on 28 December 2005.

As the Accused Neđo Samardžić had already been charged with the criminal offense of War Crime against Civilians in violation of Article 142(1) of the Criminal Code of the Republika Srpska under Indictment of the District Prosecutor's Office of Trebinje no. Kt-2/05 dated 17 April 2005 (confirmed on 18 April 2005 and taken over under the competence of this Court), the Preliminary Hearing Judge of this Court, by Decision no. X-KR-05/49 dated 12 January 2006 upon a Prosecutor's Motion, decided to join the cases, conduct joint proceedings and render a single verdict under both Indictments.

On 12 January 2006, the Accused gave a statement before the Preliminary Hearing Judge in which he pleaded not guilty for all the criminal acts/criminal offense in question and the case file was subsequently referred to the Panel for trial.

For the purpose of efficient and cost-effective proceedings, the Prosecutor's Office organized the factual description of both Indictments into a single Indictment on 9 February 2006 so as to indict the Accused for committing a total of 17 criminal acts and qualified all of them as the criminal offense of Crimes against Humanity in violation of Article 172(1)(a), (c), (d), (e), (g), (h) and (k) of the Criminal Code of Bosnia and Herzegovina (hereinafter: CPC of BiH).

At the main trial and until the completion of the evidentiary procedure, the Prosecutor stood by the consolidated Indictment while the Accused stood entirely by his previously entered plea of not guilty of the criminal offense at issue.

Both parties proposed evidence that was presented in the course of the evidentiary procedure. As to the Prosecution, the following pieces of evidence were presented: the witnesses Hasnija Kavazić, Mediha Hodžić, Fatima Grbo, Mustafa Bajrović, Mirsada Bektović, Nura Sajtović, Murat Kršo as well as the protected witnesses A, B, C, D, E, F, G, H, I, K, L, N, P, R were examined. The Prosecution also presented the following material evidence: ICTY Judgment in the case against Dragoljub Kunarac et al. (IT- 96-23-T and IT-96-23/1-T dated 22 February 2001); ICTY Judgment in the case against Dragoljub Kunarac et al. (IT-96-23 and IT-96-23/1-A dated 12 June 2002); ICTY Judgment in the case against Milorad Krnojelac (IT-97-25-T dated 15 March 2002); ICTY Judgment in the case against Milorad Krnojelac (IT-97-25-A dated 17 September 2003); Decision of the Cantonal Court of Sarajevo no. KRI-400/01 dated 23 October 2001 ordering the exhumation, autopsy, forensic analysis and identification of the murdered civilians at „Šljivovice“, Foča municipality; Exhumation Record of the Cantonal Court of Sarajevo no. 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 Sarajevo Canton Ministry of the Interior no. 03/1.8-04-09-9915 dated 19 December 2001; Official note of the Crime Police Department of the Sarajevo Canton Ministry of the Interior no. 03/1.3-57/02 dated 29 January 2002; Records of the Crime Police Department of the Sarajevo Canton Ministry of the Interior on Identification of Mortal Remains no. 03/1.3-57/01 dated 17 January 2002 and 03/1.3-57/02 dated 22 January 2002; Official note of the Crime Police Department of the Sarajevo Canton Ministry of the Interior no. 03/1.3-7/02 dated 8 January 2002; Records of the Crime Police Department of the Sarajevo

Canton Ministry of the Interior on Identification of Mortal Remains no. 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 Sarajevo Canton Ministry of the Interior no. 2869/01 dated 19 November 2001; Sketch of the Crime Scene of the Crime Police Department of the Sarajevo Canton Ministry of the Interior no. 2869/1 dated 1 November 2002; Certificate of the Military Post 7502 Sokolac no. 05/4189 dated 3 March 2005; Decision of the Municipal Court of Goražde no. R-545/99 dated 4 November 1999 declaring the missing persons Sulejman Grbo and Sejda 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 Division, no. 8-05-4-8-835-30/05 dated 14 March 2005; ICTY Consent dated 16 August 2002; Criminal Record for the Accused issued by the PS Bileća no. 14-7/02-234-449/05 dated 1 March 2005.

As to the evidence proposed by the Defense, the following witnesses were heard at the main trial: Sretko Gagović, Dara Mrgud, Srećko Davidović, Srđan Stanković, Miodrag Miletić and Danislav Cicović aka Mile.

This was followed by the material evidence: the statements of the witnesses M and J made in the Prosecutor's Office of BiH on 27 October 2005 and 12 November 2005 respectively, the written statements of the witnesses Mediha Hodžić, Fatima Grbo, Mirsada Bektović, Mustafa Bajrović, Nura Sajetović, Murat Kršo, and the witnesses A, N, E, B, C, L, G, R, F, P, H, I, D and K made in the preliminary proceedings and the photo documentation. All this will be mentioned and reasoned in detail in the verdict in the sections pertaining to the testimonies of the witnesses where the said evidence appears to be relevant.

Closing the main trial

The major part of the main trial, i.e. until the completion of the evidentiary procedure, was closed for the general public and press. The Court issued, upon a reasoned Motion of the Prosecutor that was not objected by the Defense, a Procedural Decision on 6 March 2006 to exclude the general public and press pursuant to Article 235 of the CPC BiH for the purpose of protecting the interests of the injured parties-witnesses.

However the Court, pursuant to Article 236 CPC of BiH, did not exclude the presence of monitors from OSCE, whose function it is to monitor the proceedings to assure that they comply with international standards of human rights. Likewise public officials, including judges from the Netherlands, were never excluded from any part of the trial. The Panel decided on 30 March 2006 to re-open the trial for the general public and press for the completion of the evidentiary procedure and hearing of the parties.

Although a public hearing is an essential feature of the right to a fair trial, the Court, pursuant to article 235 CPC BiH, has the discretion at any time, *ex officio* or on motion of the parties and the defense attorney, after hearing the parties and the defense attorney, to exclude the public for the entire main trial or a part 'to protect the personal and intimate life of the accused or the injured or to protect the interest of a minor or a witness'.

After hearing of the parties, a procedural decision excluding the general public and the press pursuant to Article 235 CPC of BiH was issued on 6 March 2006 upon the reasoned submission of the Prosecutor for the following reasons.

The Prosecutor established that the summoned witnesses had the status of the injured party under Article 20 item h CPC of BiH and that they were putative of criminal conduct. Furthermore most of the witnesses were women who will testify about rapes and/or other humiliating treatment of which they were victim(s). Some of them were at the time when the crimes were committed underaged and some of the witnesses even today suffer psychological and physical problems as a consequence of the crimes perpetrated against them. Since then they have tried to build up private, family and social life in situations where their former victimization is not known. By giving testimony before this Court they went through and jeopardize the new lives and relationships they have created for themselves.

Testifying in public about such delicate and traumatic matters, even with identity protective measures, is a risk to personal and intimate life of the witnesses, since there was a real risk that their identity would be revealed by the substance of the testimony from and about them, even if technical devices were used to distort their appearance and voice during the testimony.

On the basis of the above, the Court considers the closing of the main trial, is justified for reason of protection of the personal and intimate life of these witnesses and under these special circumstances publicity would prejudice the interests of justice.

Moreover, it was very likely that the witnesses could give names of persons who were linked to the criminal offences of rape and sexual slavery and some of those persons could be prosecuted. In addition, it was also likely, and this proved to be justified in the course of the proceedings, that the witnesses would mention the full names of other victims who were protected witnesses in the present case heard by the Court under respective pseudonyms.

The Court notes furthermore that the Defense supported the motion of the prosecutor, stating that they considered it necessary to exclude the public from the whole course of the proceedings.

Amendment of the Indictment

On 30 March 2006 upon completion of the evidentiary procedure, the Prosecutor withdrew in their entirety four counts of the Indictment listed under numbers 2, 12, 13 and 17 of the Consolidated Indictment dated 9 February 2006 and he joined three counts of the Indictment to the remaining counts, thereby indicting the Accused for a total of ten criminal acts committed in the manner described in detail in the submission dated 30 March 2006. With regard to the legal qualification, the Prosecutor also withdrew item (c) of paragraph 1 of Article 172 of the CC of BiH of the previous Indictment and added item (i) of the said article. The Defense had no procedural objections to the final version of the Amended Indictment.

In his closing argument, the Prosecutor explained in detail all the evidence on which he based the Indictment and concluded that it unequivocally followed from the presented evidence, the testimonies of the witnesses heard and the material evidence attached to the case file, that the Accused Neđo Samardžić committed all ten criminal acts with which he is charged, which qualify as a crime in the full sense of Article 172(1)(a), (d), (e), (g), (h), (i) and (k) of the CC of BiH. Therefore, he suggested that the Court should find the Accused guilty and sentence him to a long-term imprisonment, taking into consideration all aggravating circumstances on the part of the Accused reasoned in detail by the Prosecutor.

In their closing argument, the defense counsel for the Accused made a detailed analysis of the Prosecution evidence and concluded that the Prosecutor failed to prove beyond any reasonable doubt a single count of the Indictment. Consequently, they suggested that the Court should acquit the Accused of all charges under the counts of the Indictment by virtue of Article 184(c) of the CPC of BiH. The Defense objected to the legal qualification of the criminal offense in question and pointed out that it could have been qualified under the then applicable code only, i.e. as the criminal offense of War Crime against the Civilian Population in violation of Article 142 of the Criminal Code of the Federal Republic of Yugoslavia. This code was applicable at the time when the events in question took place and was adopted by Bosnia and Herzegovina following its independence. They also objected to the manner of hearing of the protected witnesses arguing that it violated the right of the Accused to defense.

In relation to the criminal acts withdrawn by the Prosecutor and not objected to by the Defense, the Court, pursuant to Article 283(c) of the CPC of BiH, rendered the verdict dismissing the charges in that part and, since there is nothing in dispute in that regard, those acts will not be separately analyzed in the verdict.

As regards the other criminal acts with which the Accused is charged, the Panel evaluated the presented evidence individually and as a whole, correlating it to both the allegations made in the Indictment and the allegations made by the Defense.

Protected Witnesses

The defense has on several occasions objected to the manner in which protected witnesses were examined. The defense objected on 8 March 2006 that it is impossible to examine a witness in criminal proceedings, who is not directly present in the courtroom and subject to direct observation. The defense stated that it needed to see the reactions of the witnesses and that it needed to be in direct contact with the witness.

The Court considers the objection raised by the defense as an objection based on the principle of fair trial as guaranteed among other in Article 6 of the European Convention on Human Rights (ECHR), which is directly applicable before this Court. In relation to this objection, the Court points to the following.

The Preliminary Proceedings Judge, in his decision X-KR-05/49 of 21 December 2005 upon the motion of the Prosecutor no. KT-RZ-89/05 of 14 December 2005 and his decision X-KR-05/49 of 22 December 2005 upon the motion of the Prosecutor no. KT-RZ-89/05 of 22 December 2005, decided among others pursuant to articles 91 CPC BiH and 12 and 13 Law on Protection of Witnesses under Threat and Vulnerable Witnesses that the protected witnesses shall be allowed to testify behind a screen or utilizing electronic distortion of the voice of the witness or the image of the witness, or both the voice and the image, by using technical means for transferring image and sound.

In relation to the objection of the defense, special attention should be paid to principle of the right to fair trial as laid down in Article 6 ECHR and more specifically to paragraph 3 item d of this article which states that:

3 Everyone charged with a criminal offence has the following minimum rights:

...

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

Article 6 (3) d ECHR provides that the accused has the right to examine or have examined witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her. In principle all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument (see also the *Barberà, Messegué and Jabardo v. Spain*, ECHR judgement of 6 December 1988, § 78, Publ. Series A no. 146).

However, the Court stresses that this provision does not give the accused an absolute right. Domestic law can lay conditions down for the admission of witnesses and the competent authorities can refuse to allow a witness to be heard if e.g. it appears that the evidence will not be relevant. Furthermore, domestic law can regulate special conditions for the hearing of witnesses for their protection. The measures under article 12 and 13 of the Law on the Protection of Witnesses have to be considered in this light. The Court considers in the present case the following consideration of the European Court of Human Rights in the *Doorson vs. The Netherlands* judgement of 26 March 1996, § 70, clarifying:

"It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."

No violation of Article 6 ECHR can be found if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities (*Doorson vs. the Netherlands* judgement, et.al, § 72). In relation to this, the Court points to the fact that the defense had the opportunity to extensively cross-examine the witnesses, put the reliability of the witnesses into question and the identity of the witnesses was known to the defense 30 days before the questioning of these witnesses. The Court thus finds that the handicaps under which the defence

laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities and rejects the objection of the defense.

As it follows from the Indictment, Neđo Samardžić is indicted for the criminal offense of Crimes against Humanity in violation of Article 172(1)(a), (d), (e), (g), (h), (i) and (k) of the CC of BiH and the burden to prove all key elements of that offense rested on the Prosecutor's Office, those elements being as follows: existence of a widespread and systematic attack directed against the Muslim/Bosniak civilian population, knowledge of the Accused that such an attack was taking place and the acts of the Accused are by their nature or consequences an objective part of the attack, of which the Accused was aware.

Adjudicated facts

With regard to the general key elements of the criminal offense in question, the first being the existence of a widespread and systematic attack of the Serb army and police (according to the Prosecution, both have been cumulatively fulfilled) in the period from April 1992 until March 1993 in the area of Foča, directed against Moslem/Bosniak civilian population, the Prosecution proposed, as the evidence that those facts were already established, Judgments of the International Criminal Tribunal for the Former Yugoslavia IT-96-23-T and IT-96-23/1-T dated 22 February 2001 and Appeals Chamber Judgments IT-26-23 and IT-96-23/1-A dated 12 June 2001, as well as Judgment IT-97-02 dated 15 March 2002 and Appeals Chamber Judgment IT-97-25-A dated 17 September 2003.

With regard to this general key element, the Defense did not contest the existence of such an attack in the Foča area and it accepted in their entirety the facts established in the judgments quoted above, but only in respect of the Foča area. However, it contested that such an attack existed in the Miljevina area. In other words, the Defense maintained that existence of an armed conflict and an attack as part of it must be viewed in the immediate area of Miljevina. According to the Defense, this place was for some time a separate municipality before the war.

The Defense argued furthermore that the crimes with which the Accused is charged could not be treated within the context of a widespread and systematic attack against non-Serb civilian population since the Accused could not have known of such an attack (according to the Defense, there was no such an attack at the relevant time in the area of Miljevina according to the ICTY judgment, at least not in relation to the majority of the crimes that the Accused is charged with), all the more so because as a soldier he did not have any authority in the Serb Army, nor was he familiar with the overall atmosphere since he had been

in prison. Likewise, the Defense argued that the Accused was a member of the Military Intervention Platoon and that the police forces under the command of Mićo Olović went to field inspection to detect the attackers on the Serb civilians only when a concrete incident would occur to the Serb Army and civilians, such as when an extensive interrogating operation was carried out among the inhabitants of Miljevina and the surrounding villages with regard to the killing of one Vuković, laying of a mine when two soldiers and one civilian were killed and when a bus of 40 Serbs, many of them civilians, , were killed. Therefore, according to the Defense, the acts of the Accused, even if proven, were completely unrelated to the widespread and systematic attack as they always consisted of interventions following concrete incidents.

Pursuant to Article 4 of the Law on transfer of cases from ITCY to the Prosecutor's Office of BiH and the use of evidence collected by ICTY in proceedings before the Court of BiH, the Prosecution submitted a Motion, dated 29 March 2006, no. KT-RZ-89/05, for adoption of adjudicated facts before the ICTY in the verdicts IT-96-23-T and IT-96-23/1-T, IT/96/23 and IT-96-23/1-A, IT-97-25-T and IT-97-25-A. The parties have been heard on this motion on 30 March 2006.

The Court may, ex officio or upon proposal of the parties, accept as proven the facts established by decisions of the ICTY. The Court, after hearing the parties accepted the following ICTY judgments be reviewed as evidence: 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 in the case of Prosecutor v. Dragoljub Kunarac et.al as well as the Judgments No: IT-97-25-T dated 15 March 2002 and IT-97-25-A dated 17 September 2003 in the case of Prosecutor v. Milorad Krnojelac.

The Court specifically refers to the facts established by the ICTY in the mentioned cases referring to the existence of a widespread and systematic attack of the Army of Bosnian Serbs directed against civilian Bosniak population on the territory of the Municipalities of Foča, Kalinovik and Gacko in the period covered by the abovementioned Indictment.

The Court accepts as proven the facts as following.

On 8 April 1992, an armed conflict broke out between Serb and Muslim-Bosniak forces in Foča and until at least February 1993 there was an armed conflict in the area of Foca. Members of the military and police of the so-called Serb Republic of BiH, and subsequently of the Republika Srpska, carried out a large-scale attack directed against the Bosniak civilian population.

An attack can be described as a course of conduct involving the commission of acts of violence. The term 'attack' in the context of a crime against humanity

carries a slightly different meaning than in the laws of war. In the context of crimes against humanity, 'attack' is not limited to the conduct of hostilities. It may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention.

By mid-April the Foca Municipality has been taken over by the Serb forces and they took over the power in the town of Foča, and in the following ten days they took control over the entire Municipality. The fighting continued in the surrounding villages and municipalities of Gacko and Kalinovik. Following the take-over of power, these forces undertook systematic plundering or burning down of Bosniak houses and apartments, picking up and capturing Bosniaks, occasionally beating or killing them; they separated men from women, imprisoned many men in the Foča "KP Dom", and took women to detention facilities, such as the „Partizan“ Sports Hall, where they were forced to live in intolerably unhygienic conditions, with scarce food supplies and limited freedom of movement, subjected to abuse and rape and to so called brothels such as the Karaman's house, where they were subsequently raped and forced to labor. After several months of enslavement, many women were either expelled or exchanged, while many men were detained for a longer period just because they were Bosniaks. All the traces of Bosniak presence and culture in that territory were obliterated.

Taking account of these facts, it was concluded in the above-referenced Judgments that the military and paramilitary formations of the so-called Serb Republic of BiH, i.e. Republika Srpska, carried out a widespread and systematic attack against the Bosniak civilians, inhabitants of the Foča, Gacko and Kalinovik municipalities.

The Court is satisfied beyond reasonable doubts that the Muslim civilians in the Foca Municipality were simply removed by soldiers from their houses and kept in various facilities, raped or otherwise abused and even killed as a direct result of the armed conflict and because the armed conflict apparently offered blanket impunity to the perpetrators. It is irrelevant that the actual fighting had shifted from Foca town once it was safely in Serb hands to the surrounding areas by the time the events charged occurred, because it's not required that the offences be directly committed whilst fighting is actually taking place, or at scene of combat.

The Court furthermore wants to express that Humanitarian law continues to apply in the whole of the territory under the control of one of the parties, whether or not actual combat continues at the place where the events in question took place. It's therefore not relevant that there was no fighting at all in Miljevina and its surrounding villages before the beginning of September 1992. Also the Court underlines that in the context of a crime against humanity, the

'phrase' attack is not limited to the use of armed force; it also encompasses any mistreatment of the civilian population, as the removal from Muslim civilians from their homes, the rounding up and bringing them to collective points from which they were transported to different places and detained there and their abusing, killing, rape and other facts of violence.

In relation to the knowledge of the accused of the existence of an attack on the civilian population, the Court considers the following.

The accused and his brother were serving a prison sentence at KP Dom. The accused knew Pero Elez from KP Dom, since Pero Elez was a prison guard at this correctional facility. The accused, shortly after he left KP Dom, went to the headquarters of the Serb army in Hotel Miljevina, where he, according to the statement of the witness Davidovic Sretko, met Pero Elez. Pero Elez was a high military commander in Miljevina. He was subsequently placed in the intervention unit in which among others witness Davidović Sretko was placed. On the basis of documents submitted by the Prosecutor it is shown that the accused was a member of the military from 6 April 1992 until at least 30 June 1996.

Furhtermore, the accused has been seen on several occasions in the company of the Mico Olovic, who was the police commander of Miljevina. Both Mico Olovic and Pero Elez were well informed and high in the command in Miljevina. Furhtermore, the attack against Muslim civilians was perpetrated in full view, meaning that it was not possible not to be seen by the someone who, like the accused, was present in the area of Miljevina for a longer period of time.

Moreover, according to witness Stankovic Srđan, the accused was present in the Headquarters in Hotel Miljevina on several occasions when he came to report. The abovementioned circumstances indicate that the accused had access to the highest (military) command. He obviously knew of the aim to overcome Muslims in any possible way, including through criminal means. This can also be inferred from the acts of the accused, which clearly were intended to spread fear among the Muslim population in Miljevina. The accused demonstrated a total disregard for the Muslim population in general and the woman in particular. This can, among others, be inferred from several witness testimonies in which the accused has been stated to refer to Muslim woman as 'balija'.

The nature and consequences of the acts of the accused which this Court has considered established beyond has considered established beyond reasonable doubt, which will be elaborated upon on later in this verdict, clearly fall within the scope of a widespread an systematic attack and are part of it, against the Muslem population in Miljevina. Through these acts the accused not only

showed that he knew of the attack and knew that his acts fitted in or were part of the attack, but – as can be inferred from several testimonies of the witnesses – he also clearly showed that he intended them to be so.

Accordingly, the Court is satisfied, beyond reasonable doubts, that the accused was fully aware of the widespread and systematic attack that took place in the area of Miljevina and the Foca municipality and that his acts were part of this attack. The accused joined the army at the start of the hostilities in the area and on the basis of the contacts of the accused and his general behaviour in the area of Miljevina it can be inferred that the accused must have known the nature of the attack.

Concerning individual criminal acts with which the Accused Neđo Samardžić is charged with under Counts 1 through 10 of the Indictment, the Court had at its disposal, in respect of the majority counts of the Indictment, the testimonies of the witnesses heard at the main trial as well as their statements made during the investigative procedure. There was no material evidence for the majority of the counts of the Indictment. These testimonies have been analyzed with special consideration.

As regards the convicting part of the verdict, the Court established as follows:

General considerations regarding the evaluation of evidence

The Court has assessed the evidence in this case in accordance with the Criminal Procedure Code of Bosnia and Herzegovina. The Court has applied to the accused the presumption of innocence stated in Article 3 of the CPC of BiH, which embodies a general principle of law, so that the Prosecution bears the onus of establishing the guilt of the accused and the Prosecution must do so beyond reasonable doubt.

The Court has made careful evaluation of the evidence or identification during the trial, exercising particular caution in relation to it. The Court accepts that identification evidence involves inherent uncertainties. This because of many difficulties inherent in the identification process, resulting from the vagaries of human perception and recollection. It is insufficient that the evidence of identification given by the witnesses has been honestly given; the true issue in relation to identification evidence is not whether it has been honestly given but rather whether it is reliable. In the turbulent and often traumatizing circumstances in which these witnesses found themselves, the Court is acutely aware of the possibility of error in making an identification later of a person previously unknown to the witness.

The Court has accordingly placed considerable weight upon the descriptions which the witnesses gave of the men who they said had raped them, and it has considered carefully whether the evidence from the other witnesses supports the description given. Each of these witnesses was asked whether she/he or he could identify any of the persons in the courtroom as the man who raped her and/or of the crimes perpetrated against her/him.

By the very nature, the experiences which the witnesses underwent were traumatic for them at the time, and they cannot reasonably be expected to recall the minutiae of the particular incidents charged, such as the precise sequence, or the exact dates and times of the events they have described. The fact that these witnesses were detained over weeks and months without knowledge of dates or access to clocks, and without the opportunity to record their experiences, only exacerbated their difficulties in recalling the detail of those incidents later. The Court has also taken into regard the elapse of time since the events took place and the effect this must have had on their memory.

In general, the Court has not treated minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness has nevertheless recounted the essence of the incident charged in acceptable detail.

In some cases, only one witness has given evidence of an incident with which one of the other of the accused has been charged. Pursuant to Article 15 of the CPC of BiH the Court is free in its evaluation of evidence presented by both of the parties. The Court has, moreover, held that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration. Nevertheless, the fact remains that only one witness has given evidence of that incident, usually because she has been the only person present other than the particular accused when the incident charged is alleged to have taken place. In such a situation, the Court has scrutinized the evidence of the Prosecution witness with great care before accepting it as sufficient to make a finding of guilt against any of the accused.

Under item 1 of the convicting part of the verdict, the Accused was found guilty inasmuch as he:

On 9 June 1992 in the village of Rataje, Foča municipality, together with his brother Zoran and Mićo Olović came to Ismet Softić's house, where they forced Sulejman Grbo and Seid Grbo out of the house and Mustafa Grbo out of the house next door, pushed them into a car and took them away into the direction of Miljevina; consequently, carrying out imprisonment or other severe

deprivation of physical liberty in violation of fundamental rules of international law, thereby committing the criminal offense of Crimes against Humanity in violation of Article 172(1)(e) of the CC of BiH.

The factual description of these criminal acts set out by the Prosecution in Count 2 of the Consolidated Indictment dated 30 March 2006 states, among other things, that the Accused took part in abusing of the mentioned civilians and that he mistreated Fatima Grbo on the same occasion by placing an automatic rifle under her neck and saying: “I will kill you, get me mines, get me money”. According to the Prosecutor, the Accused, in addition to severe deprivation of physical liberty in violation of fundamental rules of international law referred to in item (e) of the quoted article, also committed the criminal offence of enforced disappearance of persons referred to in item (i) and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health referred to in item (k) of the quoted article.

With regard to this count of the Indictment, the Prosecution offered the statements of witnesses Fatima Grbo and Mustafa Bajrović.

Witness Fatima Grbo testified at the main trial and stated before the Prosecutor on 5 October 2005, that she was present when Neđo Samardžić, Zoran Samardžić and Mićo Olović came to Ismet Softić’s summerhouse (where she lived with her brothers, mother and uncle from 1 May 1992 until 2 September 1992) on 9 June 1992 fully armed and took away her brothers Seid and Sulejman and her cousin Mustafa and put them into a car. On that occasion, 9 June 2005, they yelled at them, cursed their balija’s mother and told them they would return as soon as they made a statement regarding the killing of two Serbs. However, she has never seen them or heard anything about them ever since. Of those three persons, she knew only Mićo Olović. Her neighbor Ramiza Softić, whose husband Šućrija according to the witness was taken away a few days later, told her she saw them being taken away and told her that the other two men were Samardžić brothers. Ramiza knew them.

The Court considered the identification of the accused beyond reasonable doubt, especially since the witness told she heard the names of the Samardzic brothers the same evening her brothers and cousin were taken away. Ramiza Softic told her she saw her brothers and cousin being taken away. Because of this the witness immediately recognized the accused as the person who together with Mico Olovic and his brother took away her brothers and cousin when the accused entered the house of Ismet Softic the following day.

Regarding this event, witness Mustafa Bajrović testified that Ramiza Softić told him when crossing over to Goražde that the Accused took away the Grbo brothers, their cousin and her husband Šućrija.

Consequently, on the basis of the testimonies of the said witnesses, the Court, with reference to this count of the Indictment, considers established beyond reasonable doubt only part of the factual description made in the first item of the convicting part of the judgment because it did not have sufficient and undisputable evidence that the Accused (and others on the relevant day) took part in abuse of the Grbo brothers and their cousin.

Likewise, the Court does not have sufficient evidence that the Accused abused witness Fatima Grbo on the occasion referred to in the relevant count of the indictment, whereby he allegedly caused to her great suffering or serious injury to body or to physical or mental health.

Furthermore, the Court did not have sufficient evidence to hold the Accused responsible for the disappearance of the Grbo brothers and their cousin. As stated by witness Grbo herself at the trial, when they were taking them away, they said that they were being taken to the police station to give a statement regarding the killing of two Serbs and that they would return immediately thereafter. The role of the accused in the disappearance cannot be established beyond reasonable doubt on the basis of the submitted evidence.

Consequently, established beyond a reasonable doubt with regard to this item is severe deprivation of physical liberty of the three members of the Grbo family in direct breach of the provision of Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (IV Geneva Convention), which, among other violations whose perpetrators must be sanctioned under Article 146 thereof, mentions unlawful confinement. Such treatment as a grave breach of the Geneva Conventions of 1949 is explicitly set out within the ICTY competences in Article 2 of the ICTY Statute adopted on 25 May 1993, Resolution 827.

That these were persons subject to this protection unequivocally follows from the provision of Article 3 that is common for all four Geneva Conventions where, among others, the persons taking no active part in the hostilities are specifically referred to as the object of protection.

With regard to item 2 of the convicting part of the verdict, the Court established that the Accused, on an unknown date in June 1992 in the village of Rataje, Foča municipality, armed with a firearm, together with his brother Zoran and Mićo Olović, came to Šućrija Softić's family house wherefrom he and his brother Zoran took out Šućrija Softić, handcuffed him and thereupon physically mistreated him in the manner that they tied him to an iron fence, beat him up

with a baton and a 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 vehicle and took him to the Police Station in Miljevina whereupon he was transferred to the KPD “Foča” where he remained imprisoned for several months and thereafter transferred to the KPD “Kula”; later on he was exchanged and died five days afterwards.

Consequently, he, as part of a widespread and systematic attack against the Bosniak civilians of which he was aware, carried out imprisonment and severe deprivation of physical liberty in violation of fundamental rules of international law, thereby committing the criminal offense of Crimes against Humanity in violation of Article 172(1)(e) of the CC of BiH.

Regarding this item of the convicting part of the verdict, the Court had the testimonies of witnesses A and Fatima Grbo.

Witness Fatima Grbo testified at the main trial with regard to this item that the Accused, his brother and Mićo Olović came for Šućrija Softić several days after the Grbo brothers and their cousin had been taken away. The witness stated that she did not remember the exact date. She saw that they tied him to an iron fence. She did not specify which of the three tied him. She then saw Neđo and Zoran hitting him, putting him onto a truck and taking him to Miljevina. Ramiza, Šućrija Softić’s wife, told her subsequently that Šućrija was transferred to the KPD Foča where he spent six months. He was then transferred to Kula prison in Sarajevo. He was exchanged later on but died shortly thereafter.

When the defense attorney confronted this witness with her statement made before the investigative judge of the Cantonal Court of Sarajevo on 1 October 2002 with regard to the taking away of Šućrija, she stated that in addition to the said three about five more men took part in the taking away of her brothers and her cousin. She also stated then that she did not see who was hitting Šućrija Softić. She explained that she remembered better the details of the event at present day. The Court gave credit to her accepting this explanation of hers as realistic especially because her statements were consistent.

Moreover, witness A, who was imprisoned with Šućrija Softić for some time at the KPD Foča between November 1992 and April 1993, corroborated his testimony by stating that Šućrija told him frequently that the Accused captured him in violence in his village Rataje in the beginning of August 1992. He had entered his house and brought him with violence to a car in which Mico Orlovic was sitting and then he was brought to the police station in Miljevina.

The Court also found proved that the Accused committed the criminal acts described under item 3 of the convicting part of the verdict. To wit, that he, in

the period from June to September 1992, in the so-called “Karaman’s house”, in Miljevina, Foča municipality, which was some kind of a camp for women, together with Nikola Brčić and Radovan Stanković, he aided and abetted in holding in sexual slavery several Bosniak women, among whom were underage girls, who were deprived of liberty and forced on a daily basis into sexual intercourses with soldiers who came to that house and he personally forced the detained women into sexual intercourses with him, B.J. in particular, originally from Kalinovik, whom he selected and kept for himself, and the injured party “L” who was 15 at the time and whom he had previously separated from her family and brought to “Karaman’s house”. Consequently, he coerced 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 aided and abetted in holding in sexual slavery, thereby committing the criminal offense of Crimes against Humanity in violation of Article 172(1)(g) of the CC of BiH.

The Court established these facts on the basis of the statements of the witnesses L, G, K, J, M, H, R, I and P.

Witness L, a direct victim of the Accused, spoke of the Accused Neđo Samardžić as the perpetrator of the said acts as clearly and fluently as possible given the ordeals she endured at her early age. She remembered well the day when her father was taken away as well as the day in August 1992 when she was taken away by the Accused, his brother Zoran and Pedo Trifković. They first took her to the police station in Miljevina for interrogation and then to Karaman’s house. She did not know then what that house was. But the girls whom she found there told her that in addition to witnessing the murders of their loved ones, being in Partizan and some of them in apartments in Foča, all of them were also raped in the house. She stated that among the men who frequently visited Karaman’s house Pero Elez, brothers Neđo and Zoran Samardžić, Nikola Brčić, Radovan Stanković and others were “those in charge and the biggest bosses”. Among others, the witness also found JB there. She remembers that that girl was from Kalinovik and that she was a child from ethnically-mixed marriage. Witness L spent the night at Karaman’s house. The Accused took her back to her house on the following morning. One month later, the Accused brought her back to Karaman’s house where she found almost the same persons with the exception of the injured party JB. The witness continued to describe the horrors experienced at Karaman’s house both by herself and other women and daily rapes by soldiers the majority of whom she did not know. What especially imprinted on her memory was when she was raped by the Accused Neđo Samardžić. She saw men coming in groups at night and taking away several girls to rape them in the same rooms at the same time. She also stated that the girls were held imprisoned in Karaman’s house and that this

house was in the center of the Serb settlements. The girls did not know the terrain and they had nowhere else to go.

Witness G also spoke about the events at Karaman's house. After her family was killed, she was first taken to Miljevina Hotel and then to a private apartment. It was Neđo Samardžić who took her from the apartment to Karaman's house telling her that he was taking her to Nikola Brčić. Only the injured party JB remained in the apartment with the Accused. She found witnesses L and JG at Karaman's house and all three of them were subjected to mistreatments and rapes on a daily basis by Nikola Brčić. He made them drink with him and sing Chetnik songs. She remembered Neđo Samardžić and Pero Elez coming to Karaman's house while she was there. Witness G did not see witness L being raped by the Accused Neđo Samardžić.

Witness K also testified about Karaman house, where she stayed around three months. She stated among others that Karaman house was called by 'them' a brothel. She stated that the Accused, Radovan Stankovic and Nikola Brčić were with them everyday.

Witness J., together with her sister who was 16 at the time, also experienced the ordeals of Karaman's house. Fear and anxiety, sleepless nights and starvation are the conditions to which the girls held in captivity at Karaman's house were subjected. She clearly recalls that some of the girls were minors. In addition to having being subjected to rape herself, she recalls that on one occasion the Accused had in front of her a sexual intercourse to J.B., and, in particular, she remembers when her sister who was 16 at the time was raped in front of her by Radovan Stanković. She also recalls Nikola Brčić who, among others, raped and chose for himself a minor J.G. who was 13 at the time. She said that the Accused acted as being in charge of the house, but she also said that he was with J.B. only.

Witness M who was 16 at the time survived not only Karaman's house, but also the rapes at other locations, in particular private apartments. After having been separated from her family, which also remained in captivity, and having survived many rapes by soldiers known and unknown to her, witness M was brought to Karaman's house. She recalls well that Radovan Stanković brought her to Karaman's house where she found J.B. whom Neđo Samardžić had previously "taken" off the truck in which the two of them had been together. She further clearly recalls that she and other girls who were brought with her to Karaman's house were immediately "assigned" by Pero Elez. She was "assigned" to Radovan Stanković and J.B. to Neđo Samardžić. She recalls having been present during many rapes at Karaman's house because they were done openly. In particular, she points out one occasion when at the same time

and in the same room Radovan Stanković was raping her in one corner while the Accused Neđo Samardžić was raping injured party J.B. in another corner. Other minor girls were also at Karaman's house. She particularly recalls J.G. who was 12 or 13 at the time. She describes their status during their stay at Karaman's house as slavery: "We did not have the feeling that we were human beings; they treated us as slaves, they bought us, sold us, gave us away, gave us as gifts".

Witness H also testifies about the captivity of women at Karaman's house. She evaded Karaman's house but not other „prisons“ used for the same purpose. She recalls well that in the evening of 9 June 1992, when her husband was taken away, she was visited by her colleague and friend Zelenović aka Zele who told her that she and women A.P. and K.R. would be taken that night to Karaman's house. The Accused, his brother Zoran, Miško and a person called Pedo were supposed to take them away. He knew that because he was at the Command at Miljevina Hotel where all things would be arranged. She found out later on that witness L, and A.P. and K.R. had indeed been taken to Karaman's house where they had been sadistically abused by men. When the war ended, the witness personally learned from A.P., R.K. and witness L that they had been also raped by Neđo Samardžić.

The statement of witness R, whose 12-year-old daughter was taken to Karaman's house on two occasions, supports the conclusion that the Accused Neđo Samardžić also aided and abetted in holding in captivity of women and minor girls. Due to stress and suffering in which this witness has been living for more than 14 years, she cannot remember the date or the month when her daughter was taken away for the first time but she knows that a few days later she was brought home and then taken to Karaman's house again by the Accused Samardžić who introduced himself at the time, i.e. entered their house and talked to the mother and grandmother of the 12-year-old A.B. Her 12-year-old girl was soon returned home and she spent with her mother all the time until 3 September 1992 when she was taken off a bus on the way to the free territory. She did not see who did it. That was the last time she saw her daughter. However, during that last time they spent together, she recalls her daughter being in "some kind of fear" and when her mother asked her if anyone "touched her", she refused to answer but said that at Karaman's house she only cooked and served food. She recalls her daughter mentioning that witness L was also with her at Karaman's house.

The witness examined under pseudonym I testified about Karaman's house and the Accused from what she heard from other women. She remembers being told that girls, "so to say children" were taken to this house, and the Accused Neđo Samardžić was in charge of that. She substantiated this by one event that happened to her in person, when Zoran Samardžić and another man not known

to her came to take her and her sister to Karaman's house. After they threatened to call Pero Elez, Zoran told her: "Pero is not in charge, Neđo Samardžić is". Her best friend, whose identity the witness did not want to reveal, told witness I about the horrors and rape of her by the accused.

Witness P testified indirectly about the events at Karaman's house. She lived in Miljevina until 3 September 1992 in which period she was forced to daily milk the cows for the needs of the then military. She recalls meeting the Accused in front of K. She met the Accused at the house of her neighbor R.T. She visited her often because she could not move around much. She knows that the women and underage girls who were forcibly brought to Karaman's house were raped there but she does not know who did it. She heard about the events at Karaman's house from AP, ĐM and others, in particular from AP who told her that she experienced all sorts of things at Karaman's house.

Based on the description of these witnesses of the events at Karaman house, the Court finds the role of the Accused Samardžić Neđo in holding, as an aidor and abettor, the Bosniak women in sexual slavery and raping of B.J. and minor L proved beyond reasonable doubt.

In relation to this count, the Court, in the absence of evidence which would substantiate it beyond reasonable doubt, did not accept part of the facts set out by the Prosecution whereby the Accused was charged with rape of the injured party K at the same time and at the same place and of the 12-year-old A.B. whom he according to the charges, together with Radovan Stanković, had previously separated from her mother during the expulsion of the Bosniak civilians from Miljevina in September 1992 and brought her to Karaman's house.

In addition to the testimonies of the above-mentioned witnesses, the Prosecution attempted to prove these facts by the testimony of witness K. who was 25 at the time. This witness gave different answers to certain questions posed by the Prosecution, the Defense and the Court respectively, and described the same situations relating to Karaman house in a different manner in her statement given at the Supreme Court of the Federation of BiH on 24 July 2002, which was introduced as evidence by the Defense and parts thereof were presented at the main trial.

At the main trial on 20 March 2006, this witness, testifying on the events in relation to her being taken to Karaman's house and her stay there, when asked directly by the Prosecutor, said that the Accused Samardžić, who was ordered by Pero Elez, took her together with two other girls in a car – she thinks it was a yellow Lada station wagon without the exhaust pipe – to Karaman's house

where she stayed about three months. Then she said that the Accused raped her on one occasion and that she knew, although she did not see this, that he also raped minor A.B. because he personally bragged to her that he took her virginity and she heard from this girl who was 12 at the time that the Accused and Radovan Stanković brought her to Karaman's house after they forcibly took her from her mother off the bus by which they were supposed to be transferred to the free territory.

The Court notes, when confronted by the defense counsel about her statement given before a judge of the Supreme Court of the Federation of BiH on 24 July 2002, i.e. a statement given more than three and a half years ago, first stated that she also told the truth at that time. When asked to clarify her previous statement in which she only stated in relation to the Accused that „he brought one young girl from Kalinovik“; she stated she maybe did not say everything because she maybe did not have time.

Then when she was informed that she stated at the time that a man named Miško, as ordered by Pero Elez, took them by car to Karaman's house, the witness stated at the trial, “maybe it was Miško, it was either Miško or Neđo that took me there, it does not matter who took me there, I saw both of them at Karaman's house.“ Then when she was confronted with stating in her previous statement in relation to the rape of minor A.B. that it was Pero Elez who raped her first, whereas she stated now that it was the Accused and that he bragged about it, the witness stated: „Many years have passed and I cannot recall everything, I do not know if it was A.B. or J.G., but I know that Neđo raped one of them.“ In her statement given on 30 December 2005 at the Prosecutor's Office of BiH she stated that she was not certain whether the Accused Samardžić raped A.B. or L. Furthermore, when she was confronted with mentioning totally different names in relation to taking the minor A.B. off the bus, the witness responded: „I might have omitted that, I do not know why.“

When the Prosecutor was given the possibility to ask an additional question to the witness and when he asked her if she was certain that the Accused Neđo Samardžić raped A.B., she said, inter alia, that she did not know and that she was not certain.

When Defense attorney asked why she had not mentioned when testifying before the Supreme Court that the Accused had raped her, she stated:

„I don't know. Maybe I forgot it...not that I forgot it but when you are giving statements you are not giving it only in relation to Neđo but for 8...not 8 of them but 100 of them, because I stayed with them 8 months and cant remember anymore in all details.“

The Court stresses that it has no doubt that this witness experienced horrible and traumatizing experiences. Nonetheless, in the Court's opinion it is not established beyond a reasonable doubt that the accused committed the grave criminal offense of rape of Witness K.

Witness R, the mother of minor A.B., stated that men unknown to her got onto the bus, they called her A.B. saying that a cousin of hers who wanted to talk to her was looking for her. They forced her off her mother and took her out of the bus. That was the moment when she saw her daughter for the last time. Answering the questions of the Prosecutor as to whether she saw the Accused Samardžić or Radovan Stanković at that moment, the witness, who also stated that the accused introduced himself to her as Nedo Samardzic before, stated she did not. Proceeding from the statement of this witness, the Court further assessed the testimony of other witnesses examined in relation to taking of A.B. off the bus. None of the witnesses examined saw the taking away of A.B. and she heard from other women about the person or persons who allegedly did it. Thus, witness S.N. only stated that she heard that the Accused took A.B. off the bus; witness H said that she heard from her mother that the Accused took A.B. off the bus; witness B recalls that when the bus stopped in between two „Drina bridges“ A.B. was taken off the bus, but she said that an active police officer from Foča whose name she could not recall took her off the bus; neither witness P who was on one of the buses that stopped could remember seeing the Accused Samardžić at that time; nor Fatima Grbo who was on the same bus could confirm that the Accused Samardžić took A.B. off the bus.

Consequently, the Court considers that taking from the buss and rape of A.B. by the Accused is not established beyond a reasonable doubt on the basis of the foregoing witness testimonies.

In item 4, the Accused was found guilty that he, on an unknown date in December 1992, together with his brother Zoran, took the injured party, the then underage “G”, from the apartment he occupied in Miljevina, Foča municipality, 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 until 23 March 1993 when, together with other two women, she was taken to be exchanged.

The Court established such facts on the basis of the testimonies of witnesses G and L.

Witness G, whose testimony will be reproduced in detail in relation to item 4 of the acquitting part of the verdict, said that it was the Accused who took her to

Karaman's house from the apartment in which she stayed with JB for about two and a half months. That apartment was occupied by the Accused and previously owned by a person named Nura. She recalls walking to Karaman's house for about 15-20 minutes. At Karaman's house she found witnesses L and JG and all three of them were subjected to abuse and rapes on a daily basis by Nikola Brčić who forced them to drink and sing Chetnik songs with him. She recalls that during her stay at Karaman's house Neđo S. and Pero Elez came to that house. She stayed at Karaman's house until the exchange: S.Z. was the co-driver in the car transporting them. Neđo was in another car. They were brought to Pale and then to Kula where they were exchanged.

That witness G was brought to Karaman's house from the apartment occupied by the Accused is also corroborated by witness L who clearly remembers that witness G was brought to Karaman's house in November – December and that she was brought by Samardžić brothers from the apartment, as she alleged, they occupied. They stayed at Karaman's house until 21 or 23 March 1993 when they were exchanged. Based on the testimony of these witnesses the Court considers proved the described criminal acts.

The Court however did not accept part of the factual description from the Indictment alleging that injured party G was imprisoned in the apartment of the Accused, as this does not follow *de facto* from her testimony, in particular due to the fact that she and B.J. had keys to the apartment as well as due to other things which will be reasoned in detail in item 4 of the acquitting part of the verdict.

Thus, in the established manner, all essential elements of the criminal offence of Crime against Humanity have been met in the acts of the Accused in items 1 and 2 of the convicting part of the verdict in violation of Article 172(1)(e) of the CC BiH because the Accused, as part of a widespread and systematic attack against the Bosniak civilian population of which he had knowledge carried out imprisonment and severe deprivation of physical liberty in violation of the rules of international law, i.e. the mentioned Convention, whilst all essential elements of the same criminal offence have been met in his acts described in items 3 and 4 but under item (g) because the Accused coerced another by force or by threat of immediate attack upon his life or limb to sexual intercourse – rape and aided and abetted in holding women in sexual slavery.

Applicable law

As regards the application of the law, the Defense objected to the legal qualification of the criminal offence concerned, pointing out that it can be

qualified only under the then applicable law, i.e. as the criminal offence of War Crime against the Civilian Population in violation of Article 142 of the Criminal Code of Federal Republic of Yugoslavia, which was applicable at the time of the events concerned and which was also adopted by Bosnia and Herzegovina following its independence.

The Panel finds that this objection of the defense is unfounded and that in the specific case, given the qualification of these criminal-legal acts of the Accused by the Prosecution, Article 172 of the CC of BiH should be applied. Two different principles have to be considered in this respect.

Firstly, Article 3 of the CC of BiH stipulates principle of legality, that is, that the verdict can only be founded on the principle which existed at the time when the incriminated act or failure to act happened (*nullum crimen sine lege*).

Furthermore, article 4 paragraph 1 CC of BiH states that 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 thus suggests that the CC SFRY should be applied. However, in respect to the alleged acts of the accused other provisions of the CC of BiH or general principles of international law can be applied pursuant to articles 3 paragraph 2 and 4a of the CC of BiH.

In relation to this the Court points out that the crimes laid down in the indictment at the time relevant to the indictment constituted crimes under customary international law. In this light the provisions relevant to the case in article 172 CC of BiH can be seen as a mere codification of crimes already recognized under customary international law at the time relevant to this case. Customary international law is part of *the general principles of international law* as stipulated in article 4a CC of BiH. Trying the accused under these provisions of the CC of BiH thus does not constitute a breach of the principle *nulla crimen sine lege*.

The customary international law status of crimes against humanity and the attribution of individual criminal responsibility for their commission at the moment relevant to the indictment has been confirmed among others by the Report of the Secretary General of the United Nations pursuant to paragraph 2 of Security Council Resolution 808, dated 3 May 1993, International Law Commission, Commentary on the Draft Code of crimes against the peace and security of mankind (1996) in Article 18 and by the jurisprudence of both the ICTY in among others *Tadic* (IT-94-1) Appeals Chamber, decision on the Defence motion for interlocutory appeal on jurisdiction, 2 October 1995, paragraph 141 and *Tadic* (IT-94-1) Trial Chamber, judgment, 7 May 1997,

paragraphs 618-623 and the ICTR, Trial Chamber, *Akayesu* (ICTR-96-4-T) 2 September 1998, paragraphs 563-577.

Secondly, article 4 paragraph 2 of the CC of BiH stipulates that if the law has been amended on one or more occasions the law that is more lenient to the perpetrator shall be applied (*lex mitior*).

If correlating the said provisions of the CC of BiH with Article 7 (1) of the ECHR, which supersedes all the other laws in BiH (Article 2.2 of the Constitution of BiH), it can be concluded that this principle of legality referred to in Article 3 of the CC of BiH is contained in the first sentence of Article 7 (1) of the ECHR, while the other sentence of Article 7 (1) of the ECHR prohibits heavier penalty to be imposed than the one that was applicable at the time the criminal offense was committed. Therefore, this provision regulates prohibition to impose heavier penalty to the perpetrator but it does not regulate mandatory application of lenient law on the perpetrator compared with the penalty applicable at the time the criminal offense was committed.

Article 4a of the Law on Amendments to the CC of BiH (Official Gazette of BiH, No. 61/04) regulates 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 offense according to the general principles of international law. This Article adopted completely the provision of Article 7 (2) of the ECHR thus providing for exceptional departure from application of the principle referred to in Article 4 of the CC of BiH, as well as from mandatory application of more lenient law in the proceedings representing criminal offenses according to international law, such as the proceedings against the Accused, because it is exactly the offense which includes violation of international law. Actually, Article 4a of the Law on Amendments to the CC of BiH is applied to all criminal offenses falling within war crimes, because these criminal offenses make part of the Chapter XVII of the Criminal Code of BiH - Crimes Against Humanity and Values Protected by International Law.

This exception from application of more lenient law is fully justified if one takes into consideration general purpose of criminal sanctions referred to in Article 6 of the CC of BiH, since it is obvious that the maximum punishment of 20 years of imprisonment stipulated by the adopted Criminal Code(after abolition of capital punishment) could not achieve the general purpose of punishment given the gravity of these criminal offenses and their consequences, in particular if we consider the cases referred by the ICTY to the Court of Bosnia and Herzegovina.

In any case, even strict application of Article 7 (1) of the ECHR in these war crimes cases, prohibiting imposition of heavier penalty to the perpetrator than the one applicable at the time the criminal offense was committed, confirms that it is correct to apply Article 4a of the Law on Amendments to the CC of BiH, because it is evident that there is no heavier penalty than capital punishment, in force in the period the criminal offense was committed.

Even jurisprudence of the European Court of Human Rights (*Naletilić v. Croatia*, judgement of 4 May 2000, No. 51891/99) stresses applicability of the provision referred to in paragraph 2 rather than application of paragraph 1 of Article 7 of the European Convention, which also justifies application of Article 4a of the Law on Amendments to the CC of BiH in these cases.

In the opinion of this Panel, the principle of mandatory application of more lenient law is excluded in processing of those criminal offenses for which at the time of their perpetration it was predictable and generally known that they were contrary to general rules of international law. In the concrete case, it is accepted as established that the Accused had to be familiar with the fact that in the state of war the application of international rules has priority and that violation of internationally protected values has grave consequences. The analysis of the provision of Article 172 (1) of CC of BiH clearly shows that the subject matter of this criminal offense consists of, inter alia, elements of violation of international rules. This fact makes this group of offenses special, because it is not sufficient to commit the criminal offense through some physical activity, but it is necessary to be conscious of the fact that international rules are violated by commission of the offense and it is also assumed that the perpetrator must be aware of the fact that period of war or conflict or hostilities is particularly sensitive and particularly protected by generally accepted principles of international law. As such, the offense is gaining in importance and its commission has graver consequences compared with the offense committed in some other period.

As regards the acquitting part of the verdict, the Court established the following:

In item 1, the Accused is charged with as follows: on an unknown date in August 1992, after a bus with the Bosniak civilians who had been previously captured in the Miljevina area was brought 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 mistreatment and beatings of those civilians by beating up, kicking and hitting them with rifle butts all over their bodies. After that, they put them again onto the bus and took them in the direction of the Miljevina mine, location

“Šljivovice”, where those persons were deprived of their lives by use of firearms. On 31 October 2001, following the exhumation at the said location, 13 bodies of the killed civilians were exhumed, out of which the following nine were identified: Rahmo Valjevčić, Lutvo Abdurahmanović, Šaćir Brajanac, Hamza Dorić, Rašid Valjevčić, Fikret Abdurahmanović, Fikret Hasović, Hasan Dorić and Rasim Dorić, whilst the four remaining bodies have not been identified to date.

The Prosecution attempted to prove this count with the testimonies of witnesses Hasnija Kavazović and Mustafa Bajrović.

Witness Hasnija Kavazović testified that she watched the entire event from her balcony at a distance of about 20-30 meters. The Defense contested this by arguing that the distance was at least 100 meters and it attached as evidence to the case file photographs of the location concerned. It also argued that she could not possibly see the event she was referring to from a ground-floor balcony (the witness confirmed the location of the balcony). She also claimed that she saw a bus of “Tara prevoz” company from Montenegro and that an excavator followed the bus. She also saw the Accused among those who were beating up people. On the other hand, witness Mustafa Bajrović claimed quite the opposite saying that the bus belonged to “Centrotrans”, a BiH transporting company, and that he was certain that no excavator followed the bus. He saw the bus passing by and, as he said, it was packed with people. He could not say anything about the beating up of those people in front of the police station because he did not see that.

However, notwithstanding the said discrepancies in the testimonies of these witnesses in respect of which one could legitimately ask if they were referring to the same event, the Court finds it relevant if their testimonies (either of the two) could correlate the acts set out in this count of the Indictment the Accused is charged with. In the Court’s view, they cannot be correlated since none of the two witnesses confirmed that the civilians referred to in this count of the Indictment were on the bus, whose bodies were exhumed after the war and for whom it was established that they were killed by a firearm. Even if witness Hasnija did see from her balcony a similar event in front of the police station, the Court has no proof that that was the event referred to in Count 1 of the Indictment.

Under item 2, the Accused is charged with as follows: on an unknown date in May 1992 in Miljevina, Foča municipality, he came to the apartment of the injured party Nura Sajtovic and raped her in the apartment and abused her by hitting her, pulling her hair and telling her to eat it, whereupon he brought her out of the apartment and tied her half-naked to a post in the settlement of Stara Kolonija, went away from the spot leaving her in such condition.

As evidence in support of this count, the Prosecutor suggested hearing of the injured party Nura Saitović as a witness. It follows from that testimony that the statement of this witness is unclear and unrelated. She did not state anything specifically with regard to the act of rape in her apartment by the Accused and, by outlining the general circumstances of this event, portrayed it in an entirely different manner as compared to the factual allegations made by the Prosecutor under this count. This witness, when referring to the event in respect of which the Prosecutor claims to have been committed by the Accused himself, stated that Zoran and Nedo Samardžić did it together. She added that Zoran alone raped her on another occasion. However, he did not rape her in an apartment but in an elevator. This witness could not clearly specify how she established that it was Zoran and Nedo Samardžić since, as she herself stated, that was the first time that she saw them. She said that she heard them call each other by names and that the girl that they brought along and left in her apartment told her their names. However, when asked to explain when that girl told her that given the fact that she claimed that she was taken out of the apartment immediately after the rape and that the Accused tied her to a post, she said that she could not explain it. Furthermore, in her statement given before an investigative judge of the Cantonal Court in Sarajevo on 18 February 2002, she gave a substantially different account of the entire event if compared to the allegations made in the Indictment. To that effect, one should point out the testimony of the Defense witness Darinka Mrgud, the then neighbor of Nura Saitović. This witness, substantially contesting Nura Saitović's testimony (who referred to this witness and her late husband Mrgud Đorđe who helped her at that time), stated, among other things, that Nura complained to her that she was having problems without mentioning at all the name of the Accused and she advised her to go to report it to the police in Miljevina. In order to convict the Accused for this grave criminal offense, the Court requires clear and unquestionable evidence and there are vaguenesses in the statement of this witness, so that the guilt of the Accused cannot be proved beyond a reasonable doubt solely on the basis of her testimony.

Under item 3 of the acquitting part of the verdict, the Prosecution charged the Accused inasmuch as he came to Štović, Foča municipality on an unknown date at the end of May 1992 together with a group of soldiers and then got into a house where he started beating the injured party "N" who was in the house, and then he ordered her to strip naked and, when she did it, he knocked her down, placed himself on top of her and raped her. She was shouting and begging for help, but he ignored her. He even ignored her mother when she came in and begged him to let her go, whereupon he and the group left their house. Thereafter, on an unknown date in June 1992, together with a group of soldiers, he came to the same house which they searched and after that they took out of the house the injured party "N" and put her into a car and brought her to 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. After that, he raped her which caused her to faint. Following that, she was raped by his brother Zoran after which they left her in that hotel where she spent 7 days. During this period, she was subjected to daily rapes by other soldiers and the suspect raped her once again and beat her, inflicting many injuries to her.

With regard to this item, the Prosecution offered as evidence the testimony of the injured party who was heard under pseudonym N and witness Murat Kršo, her father.

Witness Murat Kršo stated at the main trial that his daughter N and his wife, who died in 1998, told him about the event in question. With regard to the event in the room (when his daughter was raped), he said that they told him that three men wearing caps came in front of the house. The caps were pulled down so that one could only see their eyes. One of them remained in front of the house while the other two entered the house. Then one of those two took his daughter to another room and raped her. He dropped his ID card in the room and he told N to pick it up. She then managed to read his full name and that was the full name of the Accused. They then left the house and went to the neighboring house. They came back and took away his wife and daughter to Miljevina Motel. They told him that both of them stayed there for about two hours in the hall of the Motel and that they saw other women being brought there. However, the two of them were immediately taken to Foča and none of them was raped there.

Witness N-the injured party, regarding the time spent in Miljevina Motel, said that she was brought there several days after she was raped in the house. She said that she stayed there for seven days. She did not mention that her mother was there. She claimed that she alone was taken to the motel and that the Accused treated her in a violent manner, beat her up and raped her twice. When directly asked by the Prosecutor to provide more details about this or, at least, to say whether the Accused raped her on the same day or at intervals, she answered that she did not know. In general, when this witness was asked relevant questions in the courtroom regarding the criminal acts with which the Accused is charged, would often respond by saying “how should I know”. During the main trial, she did not say at all that Zoran, brother of the Accused, raped her in Miljevina Motel as claimed by the Prosecutor. In addition, she did not say anything specific about being raped by other soldiers. Her answer to the Defense question related to the photograph of the accused on the ID card was vague (which, as claimed by the witness, he dropped in the room where he raped her and which she handed over to him. However, before doing that, she managed to read his full name and the place of Bileća). When asked whether she was certain that she saw the photograph of the Accused on the ID card, she replied “well, it is possible that it was him on the photograph”. As regards this ID card, it

follows from the letter of the KPD Foča no. 03-6450-93/06 dated 29 March 2006 that the detainees/the convicted persons were deprived of all personal documents which would be returned to them only after they were released from the KPD. However, as it further follows from the letter, the convicted Nedo Samardžić escaped from the KPD at the very beginning of the war and he did not return the items issued. Besides, it was common knowledge that the then ID cards were in the form of booklets and one needed to turn over its pages to see the necessary information.

Notwithstanding the allegations related to the ID card, in other words, even if one would accept that the Accused could possibly have it on himself, there are other inconsistencies and vagueness in the testimony of this witness so that the guilt of the Accused under this count of the Indictment could not be proved solely by her testimony. In particular, one should take into consideration that this witness made a statement in the Prosecutor's Office of BiH on 19 October 2005 that is substantially different from what she stated at the main trial, including the rape in the house in May 1992. She did not mention on that occasion that she established the identity of the Accused based on the ID card; in fact, she did not mention that he dropped it at the time. However, the Accused came back to the house to search it a few days later, at the beginning of June 1992. During this search, his second visit to the house, he dropped his ID card and he took her alone without her mother to Miljevina Motel although her father stated that both of them were together in Miljevina Motel.

As regards item 4 of the acquitting part of the verdict whereby the accused was charged inasmuch as he, on an unknown date in August 1992, took B.J. from the so-called Karaman's house in Miljevina, Foča municipality, who was imprisoned there and took her to an apartment in Miljevina which he used for his own needs and where he forced her on a daily basis into sexual intercourse. Once he forced the injured party, the then underage "G" who was also imprisoned in that apartment, to strip naked and stand in a corner of the room and watch him having a forced sexual intercourse with B.J., in an attempt to prove existence of the criminal offense referred to in items (e) Imprisonment or other severe deprivation of physical liberty and (g) Coercing another by force to sexual intercourse or an equivalent sexual act (rape) in violation of Article 172(1) of the CC BiH, the Court established as follows:

The Prosecution attempted to prove this count of the Indictment with the testimony of witness G.

Among other things, she stated at the main trial that the Accused brought her to the apartment previously occupied by certain Nura from the apartment of his brother Zoran. This was a two-and-a-half-room apartment in which she found J.B. and Almasa, the latter leaving the apartment some ten days later. She described the apartment in detail. She said that there were three separate rooms.

She was alone in a small room while the Accused and B.J., according to the witness, “lived” in a separate room. She said that she spent about two and a half months in that apartment. She and B.J. had keys to the apartment and the Accused would usually come at night to sleep over and he was not in the apartment during daytime. Throughout that time, the Accused did not lay a hand on her. She cleaned and cooked in the apartment and the Accused, according to her words, “lived” with B.J. Throughout this period, she described hearing the Accused and B.J. arguing in the room on one occasion. The Accused ordered her to strip naked, come into their room and watch, to use her own words, the Accused “rape” B.J.; in other words, to watch “him sadistically abuse her”. However, she was unable to be more specific about that “rape” and “sadistic abuse” over B.J. Consequently, the Panel takes the view that the testimony of this witness did not establish beyond reasonable doubt a single act with which the Accused is charged with regard to the injured party B.J. under this count of the Indictment. Admittedly, given the fact that this witness said that she found B.J. in the apartment, one can assume that the Accused brought her to the apartment because the Court established in the convicting part of the verdict that B.J. had been detained in Karaman’s house and in such condition forced to sexual intercourses with the Accused. However, regarding the events in the apartment of the Accused that followed later on, this witness used the words “lived together”, which in our language implies a community of two people without duress. This is also supported by the fact that she stated that both of them had the key to the apartment and that the Accused, as she explained, came to the apartment at night and did not lay a hand on witness G during that whole time. Consequently, given the aforesaid, although the Court does not doubt the testimony of the witness G with regard to the account of the events, it cannot be inferred from that testimony beyond reasonable doubt that the acts with which the Accused is charged have been proved.

The Accused is also acquitted of the acts set out in item 5 whereby he is charged with the following:

On an unknown date in August 1992, together with another soldier, he came to the apartment of the person “C” in Miljevina, Foča municipality, armed with an automatic rifle, where he forced the injured party “B” to go into a room and, when he came in after her, he ordered her to strip naked. When she did that, he raped her.

The Prosecution substantiates this count with the testimonies of witnesses “B” and “C” who are mother and daughter, respectively.

In relation to this count, the Prosecution asserts that the Accused came to the apartment of mother “C” armed with an automatic rifle while witness “B”, the injured party who was 36 at the time, contended that these two men were not armed at all and that she saw both of them for the first time on that day. She said

she found out later on the full name of the man who had raped her on that day and it was the Accused Samardžić. She found out his name from a neighbor of hers, Rasema Dedović when they arrived in the free territory in Goražde to their people when, as she said, “all those poor women told one another what had happened to them” in Miljevina; thus, she concluded based on the story of Rasema who was also raped by Neđo the same day that the Accused was the one who had raped her on that relevant day in mid August 1992. She reached such conclusion also on the basis of the fact that she knew he had driven a red noisy car and behaved in such a manner that he wanted everyone to know him. Her mother, witness “C”, gave a similar testimony saying that she **thought** that the Accused raped her daughter that day, that she saw him prior to that through a shutter in her apartment while he was driving a yellow noisy car. However, while describing him, she said he was a stout man and such description was not given by any other witness examined.

Thus, even if one takes into consideration that it is undisputable that witness “B” was raped on that day, the Court finds disputable this identification of the person who did it. Both witnesses identified that person on the basis of a subsequent story of R.D. who told them that on the same day after the accused had raped her children saw the Accused going towards their building in which there were more than **twenty**”. The Court could not accept this entirely disputable manner of identification which would beyond reasonable doubt indicate the Accused as the perpetrator of this offence. The identification on the basis of the car could not be accepted as certain because both of them gave a totally contradictory description in relation to the color of the car. In addition to the aforesaid, it is necessary to take into consideration the statement of witness K who argued that it was exactly that noisy car that was driven by a person named Miško. Thus, in the opinion of the Panel, this count of the Indictment has not been proved either.

The Accused is also acquitted of the criminal acts set out in item 6 of this verdict, charged against the Accused that he, on 3 September 1992, together with other members of the military and police, expelled Bosniak civilians from Miljevina, Foča municipality, by forcibly transferring the population consisting mainly of women and children to the Partizan Sports Hall in Foča, where they were subjected to physical mistreatment and robbery, from where many women were taken to apartments where they were raped and thereafter they were taken by buses to a location near the line of separation where they were forced out of the buses to go on foot from the territory of the Foča municipality to the territory of the Goražde municipality.

The Prosecution corroborated this count of the Indictment with the statements of witnesses Nura Saitović, Hasnija Kavazović, Fatima Grbo, Mustafa Bajrović, and witnesses „E“, „B“, „C“, „D“, „F“, „I“, „P“, „H“ and „R“.

Already the factual description of this count indicates inadmissible generalization, i.e. blanket description, which could not be justified even by a far milder legal qualification of these acts. Namely, the Prosecution contends that the Accused took part in forcible transfer of women and children first to Partizan Sports Hall in Foča and some of them he took from that Sports Hall to apartments for rape and then he took part in their expulsion from Miljevina, thus they transported them by buses to the separation line without alleging even one name of the person against whom such acts were committed. As a matter of fact, the Prosecution made in this count a blanket summary of all counts under which Neđo Samardžić was indicted, subsuming them under the legal qualification of deportation or forcible transfer of population under Article 172(1)(d) of the CC of BiH.

However, even such blanket account of facts was analyzed by the Panel, namely the statements of the witnesses whereby the Prosecution attempted to corroborate this count, and the Court, following its analysis, established that none of the witnesses did corroborate beyond reasonable doubt such blanket allegations of the Prosecution. Admittedly, the Prosecutor argued in the closing argument that the Accused was personally in a group of Serb soldiers who brought the Grbo family to Partizan Sports Hall, considering that to be sufficient to conclude that it was deportation, i.e. forcible transfer of population.

In relation to this count, the witnesses examined (except for witness Fatima Grbo) stated that they did not see the Accused among the Serb soldiers who were transferring Bosniak population from Miljevina. Witnesses Nura Sajtović, E, P and R did see him, although briefly, only at Partizan Sports Hall, but they could not confirm that the Accused carried out in that Sports Hall the acts charged against him in this count by the Prosecution.

As regards the testimony of witness Fatima Grbo in relation to this count of the Indictment, she stated precisely at the main trial on 7 March 2006 that Milenko Vuković aka Zeko was the one “who told us that we had to go to Foča”, and that she saw the Accused only later on in a group of soldiers, in a van, by which members of her family were transported, not being able to describe the specific acts of the Accused in relation to the act of this transfer from Miljevina to Foča. Thus, in the absence of valid evidence that the Accused took part in that forcible transfer of the population, the Court acquitted him of the charges under this count of the Indictment. As reasoned in the items 1 through 6 of this acquitting part of the verdict, the Court acquitted the Accused of the charge as it was not proved beyond reasonable doubt that he committed these criminal acts.

As regards the convicting part of the verdict, the Court found the Accused Samardžić Neđo guilty of the mentioned criminal acts, i.e. the offence perpetrated, as it follows from the verdict, and with the application of cited legal provisions, it first established a punishment of imprisonment for a term of 12 years and, as already established, it took unserved punishment of imprisonment for a term of 1 year, 10 months and 24 four days, which he did not serve pursuant to legally binding judgment of Then, by application of Article 55 of the CC of BiH, it imposed a compound punishment of imprisonment for a term of 13 years and 4 months. In both determining and imposing of the compound punishment of imprisonment, the Court took into account all factors set out in Article 48 of the CC of BiH, i.e. mitigating and aggravating circumstances affecting the type and severity of the punishment.

As aggravating circumstances, the Court took into account that the offences of the accused were committed against particularly vulnerable and defenceless women and girls. He raped „L“ and „JB“, who was respectively 15 years and under 20 years of age when the offence was committed. „L“ had previously been separated from her family and both of them were held in sexual slavery in „Karaman's house“. Raping a juvenile under 16 years of age is a factor which increase the gravity of the crime. The most serious perpetration is however that the accused helped to held several women in sexual slavery in the „Karaman's house“. Among those women were juveniles as young as 12 years of age. He knew that this house was frequently visited by other soldiers and that those soldiers would rape all those women, also the juveniles. Futhermore one of the victims, witness „G“, were subject of enslavement over a periode of at least 3 month and a periode of such length is enough to aggravate the sentence for the offence. The longer the periode of enslavement, the more serious the offence. This in regard to the fact that the crimes were committed in wartime, in which young and elderly women need special protection in order to prevent them from becoming easy targets.

As mitigating circumstances, the Court took into account the family status of the Accused – father of two minor children.

The Court holds that the imposed punishment is proportionate to the severity of the committed criminal offence, the degree of criminal liability of the Accused, the circumstances under which the crime was perpetrated and the motives of the Accused for perpetrating the criminal acts concerned and that the sentence imposed will meet the purpose of punishment under Article 39 of the CC of BiH, both in terms of special and general prevention.

Pursuant to Article 56 of the CC of BiH, the time the Accused spent in custody from 19 October 2004 onwards shall be counted as part of the punishment of imprisonment.

Given the adverse financial status of the Accused, which is confirmed by the statement of his financial status, certified in Bileća on 14 February 2006, and the certificate of the Employment Bureau, Trebinje Branch Office, Bileća Bureau no. 1-42-10065-1-2005-256 of 14 February 2006, certifying that his wife Aleksandra Samardžić is registered at this Bureau as unemployed, the Court, pursuant, to Article 188(4) of the CPC of BiH, relieved him of the duty to reimburse the costs of criminal proceedings and these costs will be paid from the Court budget appropriations.

RECORD-TAKER
Legal Officer
Amela Skrobo

PRESIDING JUDGE
Judge Zorica Gogala

REMEDY: An appeal against this verdict may be filed with the Appellate Division of the Court within 15 days from the date of receipt of the copy of the verdict in writing.