Bosna i Hercegovina **Босна и Херцеговина**

Sud Bosne i Hercegovine

Суд Босна и Херцеговина

Case No.: **S1 1 K 004648 12 Krž 3**

Date: **28 March 2012**

Before the Appellate Panel: **Judge Hilmo Vučinić, Panel President**
Judge Mirko Božović, Panel Member
Judge Senadin Begtašević, Panel Member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Saša Baričanin

VERDICT

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

Behaija Krnjić

Defense Counsel for the Accused:

Attorney Dušan Tomić

Number: S1 1 K 004648 12 Krž 3
Sarajevo, 28 March 2012

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, the Panel of the Appellate Division comprised of Judge Hilmo Vučinić, as the Panel President and Judges Mirko Božović and Senadin Begtašević, as the Panel Members, with legal adviser-assistant Belma Čano, as the minutes-taker, in the criminal case against the Accused Saša Baričanin, for the criminal offence of Crimes against Humanity, in violation of Article 172(1)(a) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), as read with Article 29 of the same Code, and sub-paragraphs (c) and (g) of the same Article of the CC of BiH, all in conjunction with Article 180(1) of the CC of BiH, deciding upon the appeals of the Prosecutor's Office of Bosnia and Herzegovina, the Accused and the Defense Counsel for the Accused, Attorney Dušan Tomić, lodged against the Verdict of this Court, No. S1 1 K004648 11 Kri (X-KR-05/111) dated 9 November 2011, following the public session of the Panel of the Appellate Division, in the presence of the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Behaija Krnjić, the Accused and Defense Counsel for the Accused, Attorney Dušan Tomić, pursuant to Articles 310, 311 and 313 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC of BiH), issued the following:

V E R D I C T

I The appeal of the Accused Saša Baričanin filed from the Verdict of the Court of Bosnia and Herzegovina, No. S1 1 K004648 11 Kri (X-KR-05/111) dated 9 November 2011 **is dismissed as untimely**.

II The appeals of the Prosecutor's Office of Bosnia and Herzegovina and Defense Counsel for the Accused Saša Baričanin, Attorney Dušan Tomić, **are refused as unfounded**, and the Verdict of the Court of Bosnia and Herzegovina, No. S1 1 K004648 11 Kri (X-KR-05/111) dated 9 November 2011 **is upheld**.

R e a s o n i n g

1. Under the Verdict of the Court of Bosnia and Herzegovina, No. S1 1 K004648 11 Kri (X-KR-05/111) dated 9 November 2011, the Accused Saša Baričanin was found guilty of the criminal offence of Crimes against Humanity under Article 172(1)(a) of the CC of BiH, as read with Article 29 of the same Code, and sub-paragraphs (c) and (g) of the same Article of the CC of BiH, all in conjunction with Article 180(1) of the CC of BiH, and sentenced to imprisonment for a term of eighteen years, toward which sentence the time the Accused spent in custody shall be also credited as from 1 February 2011 onwards.

A. APPEALS

2. The Prosecutor's Office of Bosnia and Herzegovina and the Defense Counsel for the Accused, Attorney Dušan Tomić, timely filed appeals from this Verdict.

3. On 10 January 2012, the Accused delivered a submission titled „An Appeal in Response to the Appeal“ contesting the state of facts as established in the appealed Verdict, and moving the Panel of the Appellate Division to grant the appeal, order a retrial, and revoke the imposed sentence of imprisonment for a term of eighteen years. It is obvious from the contents of the referenced submission that the Accused challenged the arguments of the appealed Verdict, or suggested that the state of facts was incorrectly established. Therefore, the referenced submission had to be treated as the Accused's appeal.

4. It is, however, obvious that the aforementioned submission was faxed to the Court on 10 January 2012, that is, almost one month after a written copy of the Verdict was delivered to the Accused. More specifically, a review of the case record revealed that the Accused had received the contested Verdict on 12 December 2011. The Court recalls that, pursuant to Article 292 of the CPC of BiH, a verdict may be appealed within 15 (fifteen) days from the date when the copy of the verdict was delivered, and that the contested Verdict contained this note too. The Court has established that the Accused’s appeal was filed after the expiration of the statutory deadline for filing an appeal, and therefore, pursuant to Article 311 of the CPC of BiH, dismissed the appeal as untimely.

(a) Appeal of the Prosecutor's Office of Bosnia and Herzegovina

5. The BiH Prosecutor's Office appealed the decision on sanction pursuant to Article 300(1) of the CC of BiH. The appeal stated that the imposed sentence of imprisonment

was not appropriate to the gravity of the committed criminal offense, the circumstances under which the offense was committed, the degree of criminal responsibility of the Accused, and that it was particularly inappropriate to the gravity of consequences suffered by the victims-injured parties as a result of this criminal offense. The Prosecution argues that the length of sentence was not properly determined, namely that the aggravating circumstances were not sufficiently taken into account, particularly the Accused's motives to commit the offenses, the ruthlessness and persistency with which the Accused committed the offenses, and severe consequences of the offenses committed. The appeal specifically indicated that in meting out the sentence, the Trial Panel failed to take into account the retribution principle, which should have been taken into account along with the principles of general and special deterrence, so as to be able to conclude that the sentence imposed will achieve the purpose of punishment.

6. Therefore, the Prosecution moved the Court to grant the referenced appeal in its entirety, alter the contested Verdict by imposing on the Accused a long-term imprisonment within the guarantees as prescribed under Article 172(1) of the CC of BiH.

(b) Appeal of Attorney Dušan Tomić, Defense Counsel for the Accused

7. The Defense Counsel for the Accused filed an appeal on the grounds of essential violations of the criminal procedure provisions under Article 297(1)(k) of the CPC of BiH, violation of the criminal code, and incorrectly and incompletely established state of facts. The appeal stated that the operative part of the Verdict did not contain the facts and the circumstances constituting the essential elements of the criminal offense of Crime against Humanity under Article 172 of the CC of BiH since the time period during which a widespread and systematic attack existed was not specified in the factual description thereof. The Defense argued that the referenced time determinant was significant as an essential fact on the ground of which the proper establishment of the state of facts in the operative part of the contested Verdict could be analyzed, and pursuant to which the incriminating offense could be placed within the time frame of the widespread and systematic attack. The appeal further argued that the time frame of the widespread and systematic attack could not be specified on the grounds of the reasoning of the Verdict either. The Defense also argued that no witness whatsoever had confirmed that the Accused had participated in such an attack, wherefore the contested Verdict is incomprehensible and internally contradictory. In addition, the appeal suggested that the operative part of the Verdict found the Accused guilty of the criminal offense of murder,

committed in complicity, and that accordingly both the operative part of the Verdict and the reasoning of the Verdict should have differentiated the acts of each co-perpetrator individually, and specified concretely the acts of the Accused.

8. The appeal also pointed to the inconsistencies in the operative part of the Verdict and the reasoning of the Verdict in relation to the site where the murder was committed, the weapons allegedly used on this occasion, and the clothing found on the killed persons upon the exhumation. The Defense has also challenged the factual findings of the contested Verdict regarding the acts of rape and enslavement of the injured party S-2. The Defense argued that the witness herself testified that it was *„a classical sexual intercourse"*, that the Accused had neither forced her into, nor mistreated her in order to have intercourse with him, that she consented to have sex with him so that in return he would help her to leave Grbavica, etc. In addition, the Defense argued that in evaluating the evidence, the First Instance Panel was neither mindful of the evidence of Defense witness S-4 who testified that the slavery was out of question, nor of the evidence of witness Sead Sinanović, who testified that the Accused had helped him and his family during the war.

9. Finally, the Defense Counsel submitted that the terms "widespread and systematic attack" and "complicity" had no factual grounds, but that a mere stating of the statutory provisions, or the interpretation thereof was in question, that there was no conscious and diligent evaluation of each piece of evidence individually, and in combination with other evidence, wherein the Court's attention was directed only to the Prosecution evidence. Therefore, the Defense moved the Appellate Panel to revoke the First Instance Verdict and order a retrial before the panel of the Appellate Division.

B. SESSION OF THE PANEL

10. On 28 March 2012, the Panel of the Appellate Division held a public session on the grounds of the appeals filed by both the Prosecution and the Defense, provided the parties and the Defense Counsel for the Accused with an opportunity to present and briefly explain their appellate reasons, and respond to the arguments of the opposite party respectively.

11. The Prosecution entirely stood by their appellate arguments, having indicated that the purpose of punishment would not be achieved with the sentence imposed, namely that only a sentence of long-term imprisonment could be considered a proper punishment.

12. The Defense for the Accused also stood by their appellate claims, pointing to the alleged shortages of the contested Verdict in the evaluation of evidence, or in the establishment of the state of facts, noting the evidence given by the witnesses Sead Sinanović and S-4.

13. In response to the Defense appeal, the Prosecution moved the Court to refuse the Defense appeal as ill-founded.

14. In his response to the Prosecution appeal, the Defense Counsel for the Accused entirely stood by his arguments presented in the earlier written responses, and proposed that the Prosecution appeal be refused as ill-founded.

15. Pursuant to Article 306 of the CPC of BiH, the Panel of the Appellate Division of the Court of Bosnia and Herzegovina reviewed the contested Verdict within the appellate reasons and arguments, and rendered the decision as stated in the operative part herein.

C. APPELLATE ARGUMENTS OF THE DEFENSE FOR THE ACCUSED SAŠA BARIČANIN

1. Essential violations of the criminal procedure provisions under Article 297(1)(k) of the CPC of BiH

16. The Defense appeal primarily argued that the operative part of the Verdict did not contain the time determinant of a widespread and systematic attack. The Defense stated that the lack of this time-frame made it impossible to establish that the Accused had knowledge and awareness that such an attack existed, and that his acts constituted an integral part thereof.

17. Even though the operative part of the Verdict does not specify the date when the attack was launched and completed, the referenced appellate argument is groundless. The issue of specification of the time of the criminal offense commission, as obviously raised by this appellate reason of the Defense, is important from several aspects, and as such, it is an element necessary for all factual findings. There is no dispute that the time the offense was committed is relevant from the aspect of application of the appropriate law, and possible statute of limitation, but also for the purpose of proper factual determination of the Accused's acts. However, contrary to the appellate reasons, the operative part of the contested Verdict clearly specified the day when the incriminating acts were committed, that is, 13 July 1992.

18. It is necessary that the operative part of the Verdict, that is, the factual description

of the offense, contains the time specification of the acts charged against the accused, which was satisfied in the concrete case. Contrary to the foregoing, the existence of a widespread and systematic attack is one among a number of essential elements of the referenced criminal offense which is described in the operative part of the Verdict, and as such, it amounts to a fact which is being made objective, proved and established during the proceedings. The characteristics of such an attack are apparent from the operative part of the Verdict (a *widespread and systematic attack of the paramilitary and the police forces of the so called Serb Republic of BiH (thereafter Republika Srpska), directed against the civilian non-Serb population of the city of Sarajevo*). These characteristics were a subject of the trial before the Trial Panel, and, along this line, the Trial Panel gave its conclusions in the contested First Instance Verdict (paras. 122-142). Accordingly, bearing in mind the legal text of Article 172(1) of the CC of BiH, it is clear that the operative part of the Verdict contains all essential elements of the incrimination at issue related to the attack itself – arguments pertaining to its nature, namely that the attack was widespread and systematic, that it was directed against the civilian, non-Serb population, and that it was committed by the military, paramilitary and police forces of the so called Serb Republic of BiH (thereafter Republika Srpska). Furthermore, it ensues from the reasoning of the Verdict and the paragraphs suggested exactly by the Defense (including para. 129) that it was determined that the attack lasted from May 1992 through mid December 1995. The acts of the Accused are being raised under such an established element of the offense, namely it is being analyzed and determined whether these acts, committed on 13 July 1992, were committed within the widespread and systematic attack too.

19. Furthermore, within the referenced appellate reason of the Defense, also contested was the finding of the Trial Panel that the acts of the Accused constituted an integral part of the widespread and systematic attack directed against the non-Serb civilians. The Defense argued that no witness whatsoever confirmed that the Accused had taken part in such an attack. It can be concluded from the reasoning of the appeal that the essence of this complaint is in the submission that the Accused's acts do not constitute an integral part of the widespread and systematic attack because the operative part of the Verdict did not specify the duration of the attack, wherefore the Verdict is incomprehensive and internally contradictory. Even though the foregoing also contests the proper establishment of the state of facts in a certain way, the Defense's reasoning did not suggest any different state of facts, did not contest the Trial Panels' concrete finding or evaluation of evidence, namely it addressed no factual grounds of the arguments of the contested Verdict.

Therefore, since this Panel is limited by Article 306 of the CPC of BiH, the response to the issue of widespread and systematic attack was given exactly in relation to the allegation of incomprehensible verdict, rather than in relation to the alleged incorrectly and incompletely established state of facts.

20. Contrary to the reasons of the Defense appeal, the Trial Panel's reasoning of the contested Verdict provided valid reasons and sufficiently explained the evidence on the grounds of which the existence of widespread and systematic attack was determined. Also explained in detail was the issue of *nexus*, that is, the Accused's knowledge about the attack and his awareness that his acts constituted an integral part thereof. The Defense has tried to present contradictions in the reasoning of the contested Verdict not merely by pointing to certain accepted established facts, but also by taking them out of the context, and evaluating each fact individually.

21. The established facts, however, cannot be viewed in isolation, each fact individually, without being related to the other evidence adduced. In presenting and explaining this appellate reason, the Defense failed to take into account all the established facts which the Trial Panel considered relevant, and which were taken into account in rendering the contested Verdict[1], as well as subjective evidence that was evaluated in the part of the Verdict addressing the existence of a widespread and systematic attack. The Trial Panel provided a detailed reasoning, supported with arguments for each segment of *„a widespread and systematic attack"*, and explained all the elements and specifics of such an attack. Therefore, on the grounds of all the evidence adduced, primarily on the grounds of evidence of the witnesses who had direct knowledge about the referenced events, it was properly concluded that there existed a certain pattern of behavior of members of the Serb military and paramilitary forces, and that it could not have been a result of *„a precipitated willful behavior"*[2].

22. The Trial Panel has properly evaluated the evidence of witnesses Hasan Gobeljić, Hatidža Babić, Jasmina Mujković, Avdo Huseinović and witnesses S-1, S-2 and S-3. These witnesses, as stated in the reasoning of the contested Verdict, testified about the situation at Grbavica, a residential area of the Sarajevo city, described their own experiences and the abuse they survived during 1992 and the other events related to the

[1] Accepted established facts as indicated in paras. 26- 53 of the Verdict.
[2] Para. 124 of the Verdict.

abuse of the non-Serb population at Grbavica by the Serb military and paramilitary formations. All witnesses confirmed that the freedom of movement of the non-Serb civilian population was limited, that Muslims were expelled from their homes on a mass-scale, that Muslim and Croat apartments were intensively searched, that at any time Serb soldiers could identify and search the non-Serb civilian population, and that while moving around this settlement they tried not to "catch an eye of any of these soldiers". Having brought these witnesses' evidence in relation to the accepted established facts and the documentary evidence tendered in the case record, the Trial Panel properly established that the attack was widespread and systematic, and that it lasted from May 1992 through mid December 1995. It is obvious from all the evidence adduced that the attacks in the territory of the Grbavica residential area were not of an isolated character, that the incidents were not sporadic, and that the crimes were not incidental, but rather that it was a systematic treatment against the civilian non-Serb population in question.

23. Furthermore, the Defense neither offered any arguments in rebuttal, nor presented a state of facts other than the one established under the contested Verdict, but rather arbitrarily argued, having no reliance on the evidence adduced, that no witness whatsoever had confirmed the Accused's participation in the widespread and systematic attack. As already stated above, the existence of a widespread and systematic attack is one of the essential elements of the criminal offense of Crimes against Humanity under Article 172 of the CC of BiH, and the contested Verdict has properly established that such an attack did exist.

24. The next important question is whether the Accused was aware that such an attack existed, and that his acts constituted an integral part thereof. The reasoning of the Trial Panel's Verdict presented the evidence and the reasons on the grounds of which it was established that the Accused was aware of the attack, and that his acts constituted an integral part thereof. The reasoning of the contested Verdict pointed to the fact that during the period relevant to the indictment, the Accused was a member of the Army of the Serb Republic of Bosnia and Herzegovina (thereafter Republika Srpska), namely that he was within the armed forces which participated in the widespread and systematic attack. Having properly evaluated the evidence adduced, and having brought it into relation with the fact that certain tasks and duties were assigned to the Accused, that he was issued with a uniform and weapons that was used in the commission of the incriminating acts, with the facts of a mass-scale attack and the large-scale activities of the Serb forces in the

territory held under their control, the Trial Panel concluded that, as a part of the VRS formations which launched the referenced attack, the Accused had knowledge about the daily activities.

25. Accordingly, the Accused was fully aware of his acts and the consequences thereof, he wanted his acts to constitute an integral part of the attack systematically launched in the Sarajevo territory. Thereby, this last, general element of the criminal offense charged against the Accused has been satisfied.

26. Therefore, the appellate claims that the operative part of the Verdict does not contain all essential elements of the criminal offense under Article 172(1) of the CC of BiH, and that the operative part of the Verdict is not comprehensible, are ill-founded.

27. Furthermore, the appeal stated that the operative part of the Verdict did not make a clear distinction of the acts of the Accused in relation to the co-perpetrators' acts, even though he was found guilty of the criminal offense under Article 172(1)(a) of the CC of BiH, committed in complicity.

28. The Defense, however, disregarded the very nature of complicity as a form of commission of an offense in which the participating persons play the same roles, equally contribute to the commission of the offense and the consequences thereof, that is, they act in concert in the commission of the offense and have the status of perpetrators of the offense. Therefore, each person gives a decisive contribution to the commission of the offense and the resulting consequences, and shares the same attitude toward the offense.

29. In the concrete case, the acts of the commission were presented in the factual description, with precisely and in detail described co-perpetrators' acts, from their arrival in the apartment at the 22 Radnička Street, in the Grbavica settlement, the directions given to the injured parties, forcible removal, handcuffing, the take-away from the apartment and finally to the deprivation of lives. These were all common acts taken by the Accused and the person appearing as a co-perpetrator, and they are a result of their common action. Exactly for this reason it is not necessary (and sometimes it is even impossible) to clearly specify a concrete act of each co-perpetrator individually. These persons share the intent, the acts, and they in concert contribute to the commission of the offense and the resulting consequences. This is the incrimination in the concrete case, and the factual description, that is, the operative part of the Verdict is fully harmonized with the legal qualification and

the findings of the Trial Panel.

30. In view of the foregoing, the appellate reasons of the Defense for the Accused suggesting essential violations of the criminal procedure provisions are hereby refused as ill-founded.

2. Incorrectly and Incompletely Established State of Facts under Article 299 of the CPC of BIH

31. Prior to analyzing the concrete objections of the Defense, the Court finds it important to note that, in deciding upon the appeal, the Court was exclusively led by the appellate arguments. Therefore, the Panel will not examine all the findings of the Trial Panel unless they were contested by the appeal, and the appeal failed to explain such appellate reasons.

(a) The killing

32. The Defense contested the Accused's participation in the killing of injured parties Otilija, Amir and Emir Balvanović, and suggested that the Trial Panel allegedly failed to evaluate the adduced evidence. The Defense argued that the testimony of witness S-3 was not taken into account, and that not all the questions arisen during the first instance proceedings were responded.

33. This Panel, however, concludes that the Trial Panel properly evaluated all the evidence adduced, each piece of evidence individually and in combination, presented clear reasons, supported with arguments, and on the grounds of these reasons made a proper evaluation of the guilt of the Accused in depriving the injured parties of their lives, that is, the killing of members of the Balvanović family.

34. Witness S-1 confirmed that on 13 July 1992 the Accused and another person came to the apartment in which she had lived with other members of her family, that they had uniforms and weapons, that they said they would take the men for interrogation, and that thereupon she, witness S-2, and the injured party Otilija Balvanović stayed in the apartment, along with a young man who had to watch them, and prevent them from fleeing. This witness also testified that after a while, the referenced two soldiers returned to the apartment, took them to some other apartment at Vraca where she heard the voice of the other soldier, that is, the Accused asking *„Bato, are we going to use a rifle or a pistol?"*, and the other one responding *„A pistol, it is less loud".* The witness explained that at that moment, she realized that Bato was in fact „Batko" who had been earlier known as a

person who „ravaged“ around Grbavica. Witness S-1 also confirmed that a soldier with a Serb peasant cap, whom she subsequently identified in a photo as Veselin Vlahović Batko,[3] and as a person who had repeatedly raped her on that day, ordered that all of them be tied up and the golden jewelry seized from them. After they themselves took off their jewelry, he returned to the witness her two rings, grabbed her breasts and said „This one is mine“, and took the injured party Otilija out of the room.

35. Witness S-2 similarly described the course of the referenced events on 13 July 1992, and fully confirmed the evidence of witness S-1 as to how and when Emir, Amir and Otilija Balvanović were taken away from the apartment. In addition, this witness confirmed seeing that the injured parties were tied in a hall, namely that she saw the silhouettes of the injured parties Emir and Amir while being taken away.

36. As correctly stated in the reasoning of the contested Verdict, these witnesses' statements were also fully confirmed by the witness S-3 who had been with them in the apartment, that is, whose task was to guard them. This witness confirmed that Batko and the Accused Baričanin had come to the injured parties' apartment, thereupon took them to another apartment which the witness had previously visited, that he was present when the Accused seized the golden jewelry from the injured parties, and that he knew that, while they were in the apartment, the injured parties-men were held in a larder, with their hands and mouths tied. This witness confirmed that the Accused and Batko had left him in the apartment to guard the witnesses S-1 and S-2, and that he had noticed that the Accused and Batko agreed on something, thereupon „picked up“ the two men and the older woman, and ordered the witness to stay in the apartment with the two younger women. As properly interpreted by the Trial Panel, at that moment the witness realized what was going on and he was afraid. The Accused and Batko returned to the apartment after some 15-20 minutes, but did not mention what had happened with the persons taken away.

37. Contrary to the Defense allegations, the fact that only witness S-1 heard the conversation between the Accused and Batko (Are we going to use a rifle or a pistol?), does not bring into question this witness’s testimony. This evidence is of a subjective nature: the witnesses were exposed to a very stressful situation and enormous fear,

[3] In the text below, in paraphrasing the witness’s evidence, and for an easier survey of the verdict, this Panel will use a nickname „Batko“, as used by the witnesses in their evidence to describe the person who appears as an alleged co-perpetrator of the offenses of which the Accused was found guilty.

wherefore it is not realistic to expect that all participants in the event will have the same perception of the situation, that they will observe all details in the same way, and that 20 years later, they will have the same memories and identically reproduce what they remember and describe the course of the events. The witness S-2 observed through a glass door the silhouettes of men being taken away, and that they were tied. The witness S-1 neither saw this, nor did she mention this in her evidence. It is realistic and certain that the witnesses who eye-witnessed a certain event will observe different details, wherefore their statements will differ in certain details, that is, certain witnesses will offer more or less information. This is exactly the purpose of the evaluation of evidence, and the Trial Panel has provided clear reasons and supported them with arguments for giving credence to these witnesses' statements, which the Defense appeal tried to contest to no avail.

38. Furthermore, contrary to the Defense submission that the Court gave no credence to the evidence of witnesses S-2 and S-3, the reasoning of the contested Verdict clearly shows that these witnesses' statements were considered in combination with the evidence of witness S-1, and that full credence was given to this evidence. The Trial Panel has also noted that, when it comes to the relevant event description, the evidence of witness S-2 is almost identical to the evidence of witness S-1, while the relevant part of the S-3's evidence was paraphrased in the reasoning of the Verdict, and thereupon the credence was given to this evidence too. In addition, on the grounds of the evidence of both witness S-3 and witness S-2, as reasoned in para. 164 of the Verdict, the Court has established that it was exactly the Accused who, on the critical day, came to the family apartment of the injured parties, and participated in the abduction of Otilija, Amir and Emir Balvanović and in the deprivation of their lives.

39. The Defense further incorrectly argues that the witness S-3 testified that the Accused and Batko returned 5 minutes after they had taken the injured parties Otilija, Amir and Emir Balvanović out of the apartment. More specifically, at the main trial held on 18 May 2011, the witness confirmed that the Accused and Batko had returned after a while, namely some 10, 15 or 20 minutes later. In evaluating the evidence concerning the Accused's involvement in the killing of members of the Balvanović family, the Trial Panel took into account exactly this fact, particularly in the part where this witness testified that he realized what would happen after he had observed the agreement being made between the Accused and Batko, and after they had taken the injured parties out of the apartment located at Vraca, and that thereupon he felt fear.

40. In addition, the appeal argues on no grounds that the evidence of witness S-1 lacks logic because all witnesses confirmed that the Accused had only rifles on them. More specifically, witnesses S-1 and S-2 are not military persons, they neither can, nor should know what equipment the Accused and Batko possessed, and what weapons they had on them. The fact that the witnesses mentioned only rifles does not mean that the Accused were not issued with other types of weapons and military equipment too. Furthermore, the fact that during the exhumation of bodies of the injured parties found in a mass grave, only three cartridge cases were found that matched an automatic rifle bullets, and a bullet caliber 9x19mm, does not bring into question the Trial Panel's conclusions. This was a mass grave site in which 28 bodies had been buried, including the bodies of Otilija, Amir and Emir Balvanović. Such an assertion of the Defense boils down to a mere assumption and hypothesizing as to which traces could have, or should have been preserved at the crime scene, provided that this mass grave site was at the same time the site where the remaining 25 victims were deprived of their lives. This was a mass grave, whereas the actual site of execution of all the victims has not been identified. Therefore, it cannot be assumed that a number of traces found should match the number of victims, or the number of wounds found on victims, as it ensues from the appellate allegations. Witness Zoran Vaclav confirmed that he had seen the bodies of the killed Balvanovićs, namely that on the Trebević Mountain he saw unburied bodies of the killed people, including the Balvanovićs. This mass grave was located and the bodies exhumed many years after the executions and burial had taken place. One should therefore be mindful of the passed period of time, the earth movement and all other circumstances characteristic of the evidence obtained from mass graves.

41. Furthermore, it is an indisputable fact that certain clothing was found with the bodies of the killed members of the Balvanović family, which is not usual for the year season in which the killed persons had disappeared. This Panel, however, does not find that this fact either contests or brings into question the Trial Panel's finding related to the participation of the Accused in the killing of these peoples. First, as also noted in the contested Verdict, one should be mindful of the circumstances in which the injured parties were taken away from their apartment. It was a very stressful event, the injured parties certainly experienced enormous fear for their lives, and it is therefore realistic to expect that, at that moment, the selection of clothing was of no decisive importance for them. In addition, the Record on exhumation of the bodies of the injured parties reveals that members of the Balvanović family were differently dressed in terms of warmer or less

warm clothing. Furthermore, as correctly noted by the Trial Panel, the Grbavica inhabitants lived in a constant fear that they would be taken away, and when being taken-away, they wore the clothing more appropriate for a longer absence and staying in the open. In addition, the mere fact that, according to the Defense, the injured parties were not dressed in accordance with the year season is not inherently sufficient to contest the findings of the Trial Panel.

42. Finally, the Defense has fully disregarded the other witnesses' evidence, and the documentary evidence adduced which, together with the evidence already mentioned, constitute a number of indications suggesting only one realistic conclusion that the Accused did participate in the killings, as presented in the contested Verdict.

(b) **The rape and enslavement of witness S-2**

43. Contrary to the appellate complaints, this Panel has not found that the First Instance Verdict incorrectly established the state of facts regarding the rape of witness S-2. More specifically, it is clear from this witness's evidence that there was no free will on the part of this witness to have sexual intercourse, as implied by the Defense, but rather the witness offered no resistance during each sexual assault by the Accused being in fear for her own life. The presented view of the Defense that each time when a rape victim offers no physical resistance to a sexual act itself it would qualify as a voluntary sexual intercourse, is fully unacceptable.

44. First, one should be mindful of the circumstances in which the injured party was taken away and separated from other members of her family, as addressed in more detail in this Verdict too, but primarily in the Trial Verdict, in the part related to the killing of Otilija, Amir and Emir Balvanović. This is an extremely stressful situation in which the injured party feels fear both for her own life and the lives of other members of her family. Having used such a situation and condition of witness S-2, the Accused singled her out, took her to his apartment, and repeatedly raped her over a longer period of time.

45. The Trial Panel properly evaluated this witness's evidence and gave credence to it. This evidence clearly reveals the condition of the witness at the critical time, her perception of the course of the events, and the reasons for not offering any physical resistance each time she was raped. This witness first confirmed that the Accused had told her he would help her and transport her to the territory controlled by the Army BiH. The witness described that, following this promise, the Accused brought her to his apartment,

after other members of her family had been taken away, that he left his rifle by the bed, and ordered her to put her things on a certain place. This witness testified that they had several sexual intercourses during the night. She explained that she was in a state of shock, and that therefore she left to the Accused to do with her whatever he wanted. The witness testified that while she was in the Accused's apartment in the forthcoming days, she cleaned and washed around the place in order to avoid being raped again, that she was desperate, and that she was trying to figure out how to flee.

46. In view of the foregoing, it is clear that the injured party-witness S-2 was in shock and feared for her own life and the lives of her family members. She was in a state of constant fear and uncertainty, and aware of the fact that any resistance she offered could be fatal. For these reasons, she cleaned and maintained the apartment, hoping that she would thereby avoid being abused and raped. Even though the Accused did not abuse her by beating, as the Defense argued, it is clear that the witness had an enormous fear for her own life, that all her actions were imbued with exactly this feeling, the feeling of hopelessness and the lack of realistic possibility of choice. Therefore, the contested Verdict properly concluded that willingness is excluded on the part of the injured party.

47. In deciding on the referenced incrimination, the Trial Panel has properly started from the view that a rape implies sexual activity in addition to force, or other differently specified circumstances which made a victim particularly vulnerable, or unable to express her refusal, bearing in mind the overall gravity of the situation in which the injured party found herself. Expert witness, Dr Senadin Ljubović, stated in his findings and opinion, and testified at the main trial, that the injured party had offered no active resistance as she was fully helpless in this situation. The expert witness explained that such behavior was a result of the experienced traumatic events of extreme proportions, fully beyond a course of the ordinary events and directly directed against the witness's own integrity, or against someone closely related to the injured party. In addition, in his findings and opinion, the expert witness described in detail all mental traumas still present with the injured party. The Trial Panel has properly evaluated all the foregoing, and concluded that the injured party had expressed a fear for her own safety, and the safety of her family, which was of such intensity that prevented her from offering any resistance, and that the Accused had conscientiously used his position and the vulnerability of the injured party in order to force her into sexual intercourse.

48. Furthermore, this Panel has found that the Trial Panel properly evaluated the

adduced evidence, and, subsuming it under Article 172(1)(c) of the CPC of BiH, correctly concluded that the Accused's acts, as described in the operative part of the Verdict, have satisfied the elements of the criminal offense prescribed by this Article.

49. More specifically, the evidence of witness S-2 clearly shows that the Accused had a certain control over her, her movement and freedom of choice. The injured party was in the apartment to which the Accused had brought her, and kept locked to prevent her from fleeing, prohibited her from opening the apartment door to other persons, forced her into sexual intercourse, and obviously expected from her to clean and maintain the apartment in which they lived. The witness S-2 confirmed all the foregoing at the main trial, and clearly stated that she had tried to clean and maintain the apartment hoping that thereby she would avoid being abused and raped, that she was afraid of the Accused, that his reactions were disproportionate, that she offered him whiskey and other things only to save her life. The witness also stated that she wanted to flee, but the door of the room where the Accused had brought her was locked, and that he did not take her to the bridge to cross over to the territory controlled by the BiH Army, as he had earlier promised her.

50. In determining whether the Accused had any effective control over the injured party, or whether he exercised over the injured party any or all authorities generally related to the right of ownership, including the exercise of such powers in trafficking in people, particularly women and children, the Court was particularly mindful of the fact that on the second night after the injured party's arrival in his apartment, the Accused had brought an unidentified person, left him alone with the injured party, whereupon this person repeatedly raped her during the night. Contrary to the Defense allegations, the Trial Panel was mindful of the evidence of witness S-4, by which the Indictment allegations were actually supported. This witness testified that the Accused had told him to take away witness S-2, and that she herself told him that the Accused had told her to go with witness S-4. All the foregoing confirms that the Accused had an effective control over the injured party S-2, namely that he fully controlled her movement, kept her in the conditions in which her free will was excluded, and that he behaved in a way which reflects his understanding that he had certain ownership powers over the injured party.

51. In view of the foregoing, this Panel finds that, upon a proper examination and evaluation of the evidence adduced, the Trial Panel drew the correct conclusion and established that the Accused committed the criminal offense of Crimes against Humanity under Article 172(1)(a), (c) and (g) of the CC of BiH. Therefore, all the Defense

appellate reasons pertaining to the referenced findings and conclusions are hereby refused as ill-founded.

D. APPELLATE ARGUMENTS OF THE DEFENSE FOR THE ACCUSED AND THE BIH PROSECUTOR'S OFFICE REGARDING THE DECISION ON SANCTION UNDER ARTICLE 300 OF THE CPC OF BIH

52. Pursuant to Article 300 of the CPC of BiH, both the Defense and the Prosecution filed their respective appeals from the decision on sanction. The Prosecution argued that in meting out the sanction, the Court did not take into account all the aggravating circumstances on the part of the Accused, which resulted in a too lenient sanction imposed on the Accused. The Defense submitted that the sentence imposed on the Accused by the Trial Panel for the committed criminal offense was too stringent.

53. Prior to addressing the concrete appellate reasons, the Appellate Panel notes that the Trial Panel has a wide discretion to determine an appropriate sentence, because the position of the Panel is such that it can best fashion a sentence and evaluate the evidence adduced at the main trial. Accordingly, the Appellate Panel will not interfere with the Trial Panel's examination of the aggravating, the extenuating circumstances, and the gravity attributed to these circumstances, unless the applicant showed that the Trial Panel abused its wide discretion. More specifically, the applicant must show that the Trial Panel gave weight to irrelevant and insignificant issues, that no or insufficient weight was given to the relevant issues, that the Panel manifestly erred in relation to the facts to which its discretion was applied, or that the Trial Panel's decision was unjustified, or simply unfair to such an extent that the Appellate Panel can conclude that the Trial Panel inappropriately used its discretion. The Appellate Panel has also taken into account that the Trial Panel is not bound to separately explain any aggravating or extenuating circumstances. Therefore, if the Appellate Panel is satisfied that these circumstances were evaluated by the Trial Panel, it will not conclude that the Trial Panel abused its discretion in fashioning an appropriate sentence.

54. According to this Panel, the Prosecution and the Defense appellate complaints regarding the sentence, respectively, are ill-founded in their entirety.

55. More specifically, in fashioning the sentence, the Trial Panel took into account all the circumstances suggested by the appeals, and gave them certain weight, which resulted in the imposed sentence of imprisonment for a term of eighteen years. First, the Trial Panel has properly concluded that the Accused acted as a co-perpetrator in the killing

of members of the Balvanović family, and that he independently acted in relation to the rape and enslavement of the injured party S-2.

56. In addition, also properly evaluated were the Accused's personal circumstances, his health condition, his family situation, prior convictions, and the fact that he had helped Muslims during the war. The Trial Panel properly concluded that the foregoing indeed were the extenuating circumstances, but that these circumstances were neither of such a character, nor intensity so as to suggest that it is necessary to impose on the Accused a more lenient sentence, that is, a sentence reduced in relation to the sentence imposed under the contested Verdict. The Trial Panel has also correctly evaluated the aggravating circumstances on the part of the Accused, the criminal quality as a result of his acts, the extent of violation of the protected value, and the mere manner of the commission of the criminal offense. The Trial Panel evaluated all the circumstances suggested in the Prosecution appeal, and gave them certain weight, which is upheld by this Panel too. Along this line, the reasoning of the contested Verdict properly stated that the ultimate result of the Accused's acts was a physical and mental destruction of a whole family, in a way that, in a single day, two brothers and their mother were brutally deprived of their lives, and the injured party subjected to repeated rapes, in addition to the consequences thereof in terms of inevitable physical and mental suffering and degradation.

57. Therefore, in view of the foregoing, the Prosecution and the Defense appellate arguments in relation to the imposed sentence, respectively, were refused as ill-founded.

58. For the aforementioned reasons, and pursuant to Article 310, as read with Article 313 of the CPC of BiH, it was decided as stated in the operative part herein.

MINUTES-TAKER **PANEL PRESIDENT**

JUDGE

Belma Čano **Hilmo Vučinić**

NOTE ON LEGAL REMEDY: No appeal lies from this Verdict.