UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-96-23& IT-96-23/1-A
		Date:	12 June 2002
		Original:	French

IN THE APPEALS CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Mohamed Shahabuddeen
Judge Wolfgang Schomburg
Judge Mehmet Güney
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Judgement of: **12 June 2002**

PROSECUTOR
V
DRAGOLJUB KUNARAC
RADOMIR KOVAC
AND
ZORAN VUKOVIC

JUDGEMENT

Counsel for the Prosecutor:

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Ms. Helen Brady

Counsel for the Accused:

Mr. Slavi{a Prodanovic and Mr. Dejan Savatic for the accused Dragoljub Kunarac
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The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 is seised of appeals against the Trial Judgement rendered by Trial Chamber II on 22 February 2001 in the case of *Prosecutor* v *Dragoljub Kunarac, Radomir Kova~ and Zoran Vukovi}*.

Having considered the written and oral submissions of the parties, the Appeals Chamber

HEREBY RENDERS ITS JUDGEMENT.

I. INTRODUCTION

A. Findings

1. The Appeals Chamber endorses the following findings of the Trial Chamber in general.

2. From April 1992 until at least February 1993, there was an armed conflict between Bosnian Serbs and Bosnian Muslims in the area of Foca. Non-Serb civilians were killed, raped or otherwise abused as a direct result of the armed conflict. The Appellants, in their capacity as soldiers, took an active part in carrying out military tasks during the armed conflict, fighting on behalf of one of the parties to that conflict, namely, the Bosnian Serb side, whereas none of the victims of the crimes of which the Appellants were convicted took any part in the hostilities.

3. The armed conflict involved a systematic attack by the Bosnian Serb Army and paramilitary groups on the non-Serb civilian population in the wider area of the municipality of Fo~a. The campaign was successful in its aim of "cleansing" the Fo~a area of non-Serbs. One specific target of the attack was Muslim women, who were detained in intolerably unhygienic conditions in places like the Kalinovik School, Foca High School and the Partizan Sports Hall, where they were mistreated in many ways, including being raped repeatedly. The Appellants were aware of the military conflict in the Fo~a region. They also knew that a systematic attack against the non-Serb civilian population was taking place and that their criminal conduct was part of this attack.

4. The Appeals Chamber now turns to the findings of the Trial Chamber in relation to each individual Appellant.

1. Dragoljub Kunarac

5. Dragoljub Kunarac was born on 15 May 1960 in Fo~a. The Trial Chamber found that, during the relevant period, Kunarac was the leader of a reconnaissance unit which formed part of the local Fo~a Tactical Group. Kunarac was a well-informed soldier with access to the highest military command in the area and was responsible for collecting information about the enemy.[1] In rejecting Kunarac's alibi for certain specific periods, the Trial Chamber found him guilty on eleven counts for crimes under Articles 3 and 5 of the Statute, violations of the laws or customs of war

[1] Trial Judgement, para 582.

(torture and rape) and crimes against humanity (torture, rape and enslavement).[2] The Trial Chamber found the following to have been established beyond reasonable doubt.[3]

6. As to Counts 1 to 4 (crimes against humanity (torture and rape) and violations of the laws or customs of war (torture and rape)), Kunarac, sometime towards the end of July 1992, took FWS-75 and D.B. to his headquarters at Ulica Osmana Đikica no 16, where Kunarac raped D.B. and aided and abetted the gang-rape of FWS-75 by several of his soldiers. On 2 August 1992, Kunarac took FWS-87, FWS-75, FWS-50 and D.B. to Ulica Osmana \iki}a no 16, where he raped FWS-87 and aided and abetted the torture and rapes of FWS-87, FWS-75 and FWS-50 at the hands of other soldiers. Furthermore, between 20 July and 2 August 1992, Kunarac transferred FWS-95 from the Partizan Sports Hall to Ulica Osmana \iki}a no 16, where he raped her.[4]

7. With regard to Counts 9 and 10 (crime against humanity (rape) and violation of the laws or customs of war (rape)), Kunarac took FWS-87 to a room on the upper floor of Karaman's house in Miljevina, where he forced her to have sexual intercourse with him, in the knowledge that she did not consent.[5]

8. As to Counts 11 and 12 (violations of the laws or customs of war (torture and rape)), Kunarac, together with two other soldiers, took FWS-183 to the banks of the Cehotina river in Foca near Velecevo one evening in mid-July 1992. Once there, Kunarac threatened to kill FWS-183 and her son while he tried to obtain information or a confession from FWS-183 concerning her alleged sending of messages to the Muslim forces and information about the whereabouts of her valuables. On that occasion, Kunarac raped FWS-183.[6]

9. Finally, with regard to Counts 18 to 20 (crimes against humanity (enslavement and rape) and violation of the laws or customs of war (rape)), on 2 August 1992, Kunarac raped FWS-191 and aided and abetted the rape of FWS-186 by the soldier DP 6 in an abandoned house in Trnova~e. FWS-186 and FWS-191 were kept in the Trnova~e house for a period of about six months, during which time Kunarac visited the house occasionally and raped FWS-191. While FWS-191 and

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[2] Kunarac was found guilty of the following counts in Indictment IT-96-23: Count 1 (crime against humanity (torture)); Count 2 (crime against humanity (rape)); Count 3 (violation of the laws or customs of war (torture)); Count 4 (violations of the laws or customs of war (rape)); Count 9 (crime against humanity (rape)); Count 10 (violation of the laws or customs of war (rape)); Count 11 (violation of the laws or customs of war (torture)); Count 12 (violation of the laws or customs of war (rape)); Count 18 (crime against humanity (enslavement)); Count 19 (crime against humanity (rape)); Count 20 (violation of the laws or customs of war (rape)).

[3] Trial Judgement, paras 630-745.

[4] *Ibid.*, paras 630-687.

[5] *Ibid.*, paras 699-704.

[6] *Ibid.*, paras 705-715.

FWS-186 were kept at the Trnova~e house, Kunarac and DP 6 deprived the women of any control over their lives and treated them as their property. Kunarac established these living conditions for FWS-191 and FWS-186 in concert with DP 6, and both Kunarac and DP 6 personally committed the act of enslavement. By assisting in setting up the conditions at the house, Kunarac also aided and abetted DP 6 with respect to his enslavement of FWS-186.[7]

10. The Trial Chamber sentenced Kunarac to a single sentence of 28 years' imprisonment.

2. Radomir Kova~

11. Radomir Kova~ was born on 31 March 1961 in Fo~a. The Trial Chamber found that Kova~ fought on the Bosnian Serb side during the armed conflict in the Fo~a region and was a member of a military unit formerly known as the "Dragan Nikoli} unit" and led by DP 2. The Trial Chamber found Kova~ guilty on four counts for crimes under Articles 3 and 5 of the Statute (violations of the laws or customs of war (rape and outrages upon personal dignity) and crimes against humanity (rape and enslavement)). The Trial Chamber found the following to have been proven beyond reasonable doubt.[8]

12. As general background, the Trial Chamber held that, on or about 30 October 1992, FWS-75, FWS-87, A.S. and A.B. were transferred to Kovac's apartment in the Lepa Brena building block, where a man named Jagos Kosti} also lived. While kept in the apartment, these girls were raped, humiliated and degraded. They were required to take care of the household chores, the cooking and the cleaning and could not leave the apartment without Kova~ or Kosti} accompanying them. Kovac completely neglected the girls' diet and hygiene.

13. As to Count 22 (crime against humanity (enslavement)), FWS-75 and A.B. were detained in Kovac's apartment for about a week, starting sometime at the end of October or early November 1992, while FWS-87 and A.S. were held for a period of about four months. Kova~ imprisoned the four girls and exercised his *de facto* power of ownership as it pleased him. It was Kova~'s intention to treat FWS-75, FWS-87, A.S. and A.B. as his property.

14. With regard to Counts 23 and 24 (crime against humanity (rape) and violation of the laws or customs of war (rape)), throughout their detention, FWS-75 and A.B. were raped by Kova~ and by other soldiers. During the period that FWS-87 and A.S. were kept in Kova~'s apartment, Kova~ raped FWS-87, while Kosti} raped A.S..

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[7] *Ibid.*, paras 716-745.

15. Kovac had sexual intercourse with FWS-75, FWS-87 and A.B. in the knowledge that they did not consent and he substantially assisted other soldiers in raping those girls and A.S.. He did this by allowing other soldiers to visit or stay in his apartment and to rape the girls or by encouraging the soldiers to do so, and by handing the girls over to other men in the knowledge that they would rape them.

16. As to Count 25 (violation of the laws or customs of war (outrages upon personal dignity)), whilst kept in Kova~'s apartment, FWS-75, FWS-87, A.S. and A.B. were constantly humiliated and degraded. On an unknown date between about 31 October 1992 and about 7 November 1992, Kova~ forced FWS-87, A.S. and A.B. to dance naked on a table while he watched them. The Trial Chamber found that Kova~ knew that this was a painful and humiliating experience for the three girls, particularly because of their young age.

17. In December 1992, Kova~ sold A.B. to a man called "Dragec" for 200 deutschmarks and handed FWS-75 over to DP 1 and Dragan "Zelja" Zelenovic. On or about 25 February 1993, Kova~ sold FWS-87 and A.S. for 500 deutschmarks each to some Montenegrin soldiers. The Trial Chamber found that the sales of the girls constituted a particularly degrading attack on their dignity.

18. The Trial Chamber sentenced Kova~ to a single sentence of 20 years' imprisonment.

3. Zoran Vukovi}

19. Zoran Vukovi} was born on 6 September 1955 in Brusna, a village in the municipality of Fo~a. The Trial Chamber found that, during the armed conflict, Vukovi} was a member of the Bosnian Serb forces fighting against the Bosnian Muslim forces in the Fo~a region. Vukovi} was a member of the same military unit as the Appellant Kova~. The Trial Chamber found Vukovi} guilty on four counts for crimes under Articles 3 and 5 of the Statute (violations of the laws or customs of war (torture and rape) and crimes against humanity (torture and rape)). The Trial Chamber found the following to have been established beyond reasonable doubt.

20. With regard to Vukovi}'s defence in relation to exculpatory evidence, there was no reasonable possibility that any damage to Vukovi}'s testis or scrotum rendered him impotent during the time material to the charges against him. Accordingly, the suggestion that Vukovic was unable to have sexual intercourse at the relevant time was rejected.

[8] *Ibid.*, paras 745-782.

21. As to Counts 33 to 36 (crimes against humanity (torture and rape) and violations of the laws or customs of war (torture and rape)), sometime in mid-July 1992, Vukovi} and another soldier took FWS-50 from the Partizan Sports Hall to an apartment near Partizan where Vukovic raped her. Vukovi} had full knowledge that FWS-50 was only 15 years old and did not consent when he forced her to have sexual intercourse with him.[9]

22. The Trial Chamber sentenced Vukovi} to a single sentence of 12 years' imprisonment.

B. Appeal

23. All of the Appellants are now appealing from their convictions and from the sentences imposed by the Trial Chamber. The Appeals Chamber has identified certain grounds of appeal that are common to two or all three of the Appellants. These common grounds are dealt with in sections III-VII of the Judgement. Where there are separate grounds of appeal relating to one of the Appellants, these are addressed in individual sections of the Judgement.

24. Dragoljub Kunarac, Radomir Kova~ and Zoran Vukovi} have five common grounds of appeal. They allege errors by the Trial Chamber with respect to: (i) its finding that Article 3 of the Statute applies to their conduct; (ii) its finding that Article 5 of the Statute applies to their conduct; (iii) its definitions of the offences charged; (iv) cumulative charging; and (v) cumulative convictions.

25. The Appeals Chamber now turns to the individual grounds of appeal of each Appellant against his convictions and sentence.

1. Dragoljub Kunarac

(a) Convictions

26. The Appellant Kunarac appeals from his convictions on five separate grounds. He alleges errors by the Trial Chamber with respect to: (i) its rejection of his alibi defence; (ii) its evaluation of evidence and findings relating to Counts 1 to 4; (iii) its findings in relation to Counts 9 and 10; (iv) its evaluation of the evidence and its reliance on the testimony of certain witnesses in relation to Counts 11 and 12; and (v) its findings relating to Counts 18 to 20.

[9] *Ibid.*, paras 811-817.

(b) Sentencing

27. The Appellant Kunarac appeals from his sentence on five separate grounds. He alleges that the Trial Chamber: (i) should have pronounced an individual sentence for each criminal offence for which he was convicted, in accordance with the Rules; (ii) erred in imposing a sentence which exceeded the maximum possible sentence prescribed by the sentencing practice in the former Yugoslavia; (iii) failed to assess properly various aggravating factors; (iv) erred in overlooking certain mitigating factors; and (v) was ambiguous in its application of Rule 101 of the Rules with respect to credit for time served.

2. Radomir Kova~

(a) Convictions

28. The Appellant Kova~ appeals from his convictions on eight separate grounds. He alleges errors by the Trial Chamber with respect to: (i) its reliance on certain identification evidence; (ii) its findings relating to the conditions in his apartment; (iii) its findings relating to offences committed against FWS-75 and A.B.; (iv) its findings relating to offences committed against FWS-87 and A.S.; (v) its findings relating to outrages upon personal dignity; (vi) its finding that he sold FWS-87 and A.S.; (vii) its findings as regards force used in the commission of the crime of rape; and (viii) his cumulative convictions for both rape and outrages upon personal dignity under Article 3 of the Statute.

(b) Sentencing

29. The Appellant Kova~ appeals from his sentence on five separate grounds. He alleges that the Trial Chamber: (i) prejudiced his rights through its retroactive application of Rule 101 of the Rules; (ii) erred in disregarding the sentencing practice in the former Yugoslavia; (iii) failed to assess properly various aggravating factors; (iv) erred in overlooking certain mitigating factors; and (v) would infringe his rights if it did not allow credit for time served.

3. Zoran Vukovi}

(a) Convictions

30. The Appellant Vukovi} appeals from his convictions on four separate grounds. He alleges errors by the Trial Chamber with respect to: (i) alleged omissions in Indictment IT-96-23/1; (ii) its acceptance of the unreliable evidence of FWS-50 as a basis upon which to find him guilty of the

charges of her rape and torture; (iii) its acceptance of certain identification evidence; and (iv) its rejection of his exculpatory evidence relating to the rape of FWS-50.

(b) Sentencing

31. The Appellant Vukovi} appeals from his sentence on five separate grounds. He alleges that the Trial Chamber: (i) erred in its retroactive application of Rule 101 of the Rules; (ii) erred in disregarding the sentencing practice in the former Yugoslavia; (iii) failed to assess properly various aggravating factors; (iv) erred in overlooking certain mitigating factors; and (v) was not clear as to whether there would be credit for time served.

C. Findings of the Appeals Chamber

1. Convictions

32. The Appeals Chamber finds that it is unable to discern any error in the Trial Chamber's assessment of the evidence or its findings in relation to any of the grounds of appeal set out above. Therefore, the Appeals Chamber dismisses the appeals of each of the Appellants on their convictions, as well as all common grounds of appeal.

2. Sentencing

33. The Appeals Chamber finds that the Trial Chamber should have considered the family situations of the Appellants Kunarac and Vukovi} as mitigating factors. However, the Appeals Chamber finds that these errors are not weighty enough to vary the sentences imposed by the Trial Chamber. The Appeals Chamber rejects the other grounds of appeal against sentence of the Appellants Kunarac and Vukovi} and all those of the Appellant Kova~, on the basis that the Trial Chamber came to reasonable conclusions and that no discernible errors have been identified.

34. For the reasons given in the parts of the Judgement that follow, the Appeals Chamber has decided in terms of the disposition set out in section XII below.

II. STANDARD OF REVIEW

35. Article 25 of the Statute sets out the circumstances in which a party may appeal from a decision of the Trial Chamber. The party invoking a specific ground of appeal must identify an alleged error within the scope of this provision, which states:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
>
> (a) an error on a question of law invalidating the decision; or
>
> (b) an error of fact which has occasioned a miscarriage of justice […]

36. The overall standard of review was summarised as follows by the Appeals Chamber in the *Kupre{ki}* Appeal Judgement:[10]

> As has been held by the Appeals Chamber on numerous occasions, an appeal is not an opportunity for the parties to reargue their cases. It does not involve a trial *de novo*. On appeal, parties must limit their arguments to matters that fall within the scope of Article 25 of the Statute. The general rule is that the Appeals Chamber will not entertain arguments that do not allege legal errors invalidating the judgement, or factual errors occasioning a miscarriage of justice, apart from the exceptional situation where a party has raised a legal issue that is of general significance to the Tribunal's jurisprudence. Only in such a rare case may the Appeals Chamber consider it appropriate to make an exception to the general rule.

37. The Statute and settled jurisprudence of the Tribunal provide different standards of review with respect to errors of law and errors of fact.

38. Where a party contends that a Trial Chamber has made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether such an error of substantive or procedural law was in fact made. However, the Appeals Chamber is empowered only to reverse or revise a Trial Chamber's decision when there is an error of law "invalidating the decision". Therefore, not every error of law leads to a reversal or revision of a decision of a Trial Chamber.

39. Similarly, only errors of fact which have "occasioned a miscarriage of justice" will result in the Appeals Chamber overturning the Trial Chamber's decision.[11] The appealing party alleging an error of fact must, therefore, demonstrate precisely not only the alleged error of fact but also that the

[10] *Kupre{ki}* Appeal Judgement, para 22 (footnotes omitted).
[11] *Ibid.*, para 29.

error caused a miscarriage of justice,[12] which has been defined as "?a? grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[13] The responsibility for the findings of facts and the evaluation of evidence resides primarily with the Trial Chamber. As the Appeals Chamber in the *Kupre{ki}* Appeal Judgement held:[14]

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.

40. In the *Kupre{ki}* Appeal Judgement it was further held that:[15]

> The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points.

41. Pursuant to Article 23(2) of the Statute, the Trial Chamber has an obligation to set out a reasoned opinion. In the *Furund`ija* Appeal Judgement, the Appeals Chamber held that Article 23 of the Statute gives the right of an accused to a reasoned opinion as one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute. This element, *inter alia*, enables a useful exercise of the right of appeal available to the person convicted.[16] Additionally, only a reasoned opinion allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of evidence.

42. The *rationale* of a judgement of the Appeals Chamber must be clearly explained. There is a significant difference from the standard of reasoning before a Trial Chamber. Article 25 of the Statute does not require the Appeals Chamber to provide a reasoned opinion such as that required of the Trial Chamber. Only Rule 117(B) of the Rules calls for a "reasoned opinion in writing." The purpose of a reasoned opinion under Rule 117(B) of the Rules is not to provide access to all the

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12 *Ibid*.

13 *Furund`ija* Appeal Judgement, para 37, quoting Black's Law Dictionary (7th ed., St. Paul, Minn. 1999). See additionally the 6th edition of 1990.

14 *Kupre{ki}* Appeal Judgement, para 30.

15 *Ibid*., para 32.

16 See *Hadjianastassiou* v *Greece*, European Court of Human Rights, no. 69/1991/321/393, [1992] ECHR 12945/87, Judgement of 16 December 1992, para 33.

deliberations of the Appeals Chamber in order to enable a review of its ultimate findings and conclusions. The Appeals Chamber must indicate with sufficient clarity the grounds on which a decision has been based.[17] However, this obligation cannot be understood as requiring a detailed response to every argument.[18]

43. As set out in Article 25 of the Statute, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties.[19] In a primarily adversarial system,[20] like that of the International Tribunal, the deciding body considers its case on the basis of the arguments advanced by the parties. It thus falls to the parties appearing before the Appeals Chamber to present their case clearly, logically and exhaustively so that the Appeals Chamber may fulfil its mandate in an efficient and expeditious manner. One cannot expect the Appeals Chamber to give detailed consideration to submissions of the parties if they are obscure, contradictory, vague, or if they suffer from other formal and obvious insufficiencies.[21] Nonetheless, the Appeals Chamber has the obligation to ensure that the accused receives a fair trial.[22]

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17 *Ibid.*

18 See *García Ruiz* v *Spain*, European Court of Human Rights, no. 30544/96, ECHR, Judgement of 21 January 1999, para 26.

19 As held by the Appeals Chamber in the *Kupreškic* Appeal Judgement, at para 27: "[A] party who submits that the Trial Chamber erred in law must at least identify the alleged error and advance some arguments in support of its contention. An appeal cannot be allowed to deteriorate into a guessing game for the Appeals Chamber. Without guidance from the appellant, the Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake. If the party is unable to at least identify the alleged legal error, he should not raise the argument on appeal. It is not sufficient to simply duplicate the submissions already raised before the Trial Chamber without seeking to clarify how these arguments support a legal error allegedly committed by the Trial Chamber."

20 This is also true in continental legal systems, see, e.g., § 344 II of the German Code of Criminal Procedure (*Strafprozessordnung*) containing a strict obligation on appellants to demonstrate the alleged miscarriage of justice. Under German law, a procedural objection is inadmissible if it cannot be understood from the appellant's briefs alone; only one reference in a brief renders an objection inadmissible. This has been established jurisprudence of the German Federal Supreme Court of Justice in criminal matters (*Bundesgerichtshof*) since 1952, e.g. BGHSt., Volume 3, pp 213-214.

21 See *Kayishema* Appeal Judgement, para 137. The second part of this paragraph reads: "One aspect of such burden [showing that the Trial Chamber's findings were unreasonable] is that it is up to the Appellant to draw the attention of the Appeals Chamber to the part of the record on appeal which in his view supports the claim he is making. From a practical standpoint, it is the responsibility of the Appellant to indicate clearly which particular evidentiary material he relies upon. Claims that are not supported by such precise references to the relevant parts of the record on appeal will normally fail, on the ground that the Appellant has not discharged the applicable burden." This burden to demonstrate is now explicitly set out in Rule 108 of the Rules. Furthermore, the "Practice Direction on Formal Requirements for Appeals from Judgement" (IT/201) of 7 March 2002 provides for appropriate sanctions in cases where a party has failed to meet the standard set out: "17. Where a party fails to comply with the requirements laid down in this Practice Direction, or where the wording of a filing is unclear or ambiguous, a designated Pre-Appeal Judge or the Appeals Chamber may, within its discretion, decide upon an appropriate sanction, which can include an order for clarification or re-filing. The Appeals Chamber may also reject a filing or dismiss submissions therein."

22 As regards the impact of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms to an appeal decision, see *Hirvisaari* v *Finland*, European Court of Human Rights, no. 49684/99, ECHR, Judgement of 27 September 2001, paras 30-32.

44. An appellant must therefore clearly set out his grounds of appeal as well as the arguments in support of each ground. Furthermore, depending on the finding challenged, he must set out the arguments supporting the contention that the alleged error has invalidated the decision or occasioned a miscarriage of justice. Moreover, the appellant must provide the Appeals Chamber with exact references to the parts of the records on appeal invoked in its support. The Appeals Chamber must be given references to paragraphs in judgements, transcript pages, exhibits or other authorities, indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made.

45. Similarly, the respondent must clearly and exhaustively set out the arguments in support of its contentions. The obligation to provide the Appeals Chamber with exact references to all records on appeal applies equally to the respondent. Also, the respondent must prepare the appeal proceedings in such a way as to enable the Appeals Chamber to decide the issue before it in principle without searching, for example, for supporting material or authorities.

46. In the light of the aforementioned settled jurisprudence, the procedural consequence of Article 25(1)(b) of the Statute is that the Appeals Chamber ought to consider in writing only those challenges to the findings of facts which demonstrate a possible error of fact resulting in a miscarriage of justice. The Appeals Chamber will in general, therefore, address only those issues for which the aforementioned prerequisites have been demonstrated precisely.

47. Consonant with the settled practice, the Appeals Chamber exercises its inherent discretion in selecting which submissions of the parties merit a "reasoned opinion" in writing. The Appeals Chamber cannot be expected to provide comprehensive reasoned opinions on evidently unfounded submissions. Only this approach allows the Appeals Chamber to concentrate on the core issues of an appeal.

48. In principle, therefore, the Appeals Chamber will dismiss, without providing detailed reasons, those Appellants' submissions in the briefs or the replies or presented orally during the Appeal Hearing which are evidently unfounded. Objections will be dismissed without detailed reasoning where:

1. the argument of the appellant is clearly irrelevant;
2. it is evident that a reasonable trier of fact could have come to the conclusion challenged by

the appellant; or

3. the appellant's argument unacceptably seeks to substitute his own evaluation of the evidence for that of the Trial Chamber. [23]

[23] The test set out, *inter alia*, in the *Kupre{ki}* Appeal Judgement (para 30) states the following: "Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber."

III. COMMON GROUNDS OF APPEAL RELATING TO ARTICLE 3 OF THE STATUTE

A. Submissions of the Parties

1. The Appellants

49. The Appellants' first contention in respect of Article 3 of the Statute is that the Trial Chamber erred in establishing that there was an armed conflict in two municipalities bordering the municipality of Foca, namely, the municipalities of Ga~ko and Kalinovik.[24] The Appellants concede that there was an armed conflict in the area of Foca at the relevant time, that they knew about it and that all three actively participated in carrying out military tasks as soldiers of the army of the Republika Srpska.[25] The Appellants submit, however, that no evidence was adduced before the Trial Chamber which would demonstrate that such an armed conflict was taking place in the municipalities of Ga~ko and Kalinovik at the relevant time and that, when they attempted to show the Trial Chamber that no armed conflict existed in those municipalities, they were prevented from presenting the matter.[26] As a result, the Appellants claim, they regarded this issue as being outside the scope of matters being litigated between the parties.[27] The Appellants submit that this was crucial, because, under Article 3 of the Statute, an armed conflict must exist in the location where the crime has allegedly been committed.[28]

50. Secondly, the Appellants argue that, even if the allegations against them were established, their acts were not sufficiently connected to the armed conflict to be regarded, for the purpose of Article 3 of the Statute, as being "closely related to the armed conflict."[29] According to the Appellants, this requirement implies that the crimes could not have been committed but for the existence of an armed conflict, and this must be established in respect of every crime with which

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[24] *Kunarac* Appeal Brief, paras 5-7 and 11-15; *Vukovi}* Appeal Brief, paras 17 and 46 and *Kova~* Appeal Brief, paras 9 and 33-34. See also Appeal Transcript, T 46-48, 65 and 68.
[25] Appeal Transcript, T 47.
[26] *Kunarac* Appeal Brief, para 13 and *Vukovi}* Appeal Brief, paras 61-65. See also Appeal Transcript, T 46-48.
[27] Appeal Transcript, T 48. See, e.g., *Kova~* Appeal Brief, para 22.
[28] Appeal Transcript, T 64-68.
[29] *Kunarac* Appeal Brief, paras 8-10 and *Vukovi}* Appeal Brief, paras 50-53. See also Appeal Transcript, T 48 and 61-68 and *Kova~* Appeal Brief, paras 35-37.

they were charged.[30] The Appellants contend that it is not sufficient that there was an armed conflict, that they took part therein as soldiers and that the alleged victims were civilians.[31]

51. Finally, the Appellants claim that Article 3 of the Statute is only concerned with a limited set of protected interests, namely, "the property and proper use of permitted weapons", and only protects the rights of warring parties as opposed to the rights and interests of private individuals.[32] Furthermore, the Appellants contend that this Article of the Statute does not encompass violations of Common article 3 of the Geneva Conventions.[33]

2. The Respondent

52. The Respondent argues that the Trial Chamber correctly held that it was sufficient that an armed conflict occurred at the time and place relevant to the Indictments and that it is immaterial whether the armed conflict existed only in Foca or whether it extended throughout the neighbouring municipalities of Ga~ko and Kalinovik.[34] The Respondent points out that, in any case, a state of armed conflict existed throughout Bosnia and Herzegovina at the time, and that the Appellants conceded before trial that an armed conflict existed in the area of Foca.[35] Once it is established that there is an armed conflict, the Respondent asserts, international humanitarian law applies to the entire territory under the control of a party to the conflict, whether or not fighting takes place at a certain location, and it continues to apply beyond the cessation of hostilities up until the general conclusion of peace.[36] The Respondent also points out that the municipalities of Ga~ko and Kalinovik are contiguous and neighbouring to that of Foca, and that the stipulation made between the parties refers to the area of Foca, not merely to its municipality.[37] The Respondent adds that no suggestion was made during trial that the geographical scope of the armed conflict was not envisaged by both parties to extend to all three municipalities and that an objection to that effect is raised for the first time in this appeal.[38]

53. The Respondent submits that the Trial Chamber's conclusion in respect of the required link between the acts of the accused and the armed conflict was irreproachable. The Respondent argues

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30 *Kunarac* Appeal Brief, para 8 and *Vukovi}* Appeal Brief, para 51. See also Appeal Transcript, T 61-63.
31 *Kunarac* Appeal Brief, para 10 and *Vukovi}* Appeal Brief, para 53.
32 Appeal Transcript, T 88.
33 See, e.g., *Kova~* Appeal Brief, paras 131-133 and Prosecution Consolidated Respondent's Brief, paras 2.2-2.4.
34 Prosecution Consolidated Respondent's Brief, para 3.6.
35 *Ibid*., paras 3.5-3.6. See also Appeal Transcript, T 214-215.
36 Appeal Transcript, T 216.
37 Prosecution Submission Regarding Admissions and Contested Matters, 1 February 2000, p 4. See also Appeal Transcript, T 215.
38 *Ibid*.

that such close nexus could be established, as was done by the Trial Chamber, by demonstrating that the crimes were closely related to the armed conflict as a whole.[39] The Respondent argues that the test propounded by the Appellants is unacceptable and wholly unsupported by any practice.[40] It is unacceptable, the Respondent claims, because each and every crime capable of being committed outside of a wartime context would be excluded from the realm of Article 3 of the Statute and it would render Common article 3 of the Geneva Conventions completely inoperative.[41]

54. Finally, the Respondent submits that the scope of Article 3 of the Statute is much broader than the Appellants are suggesting.[42] The Respondent asserts that the Appeals Chamber in the *Tadic* Jurisdiction Decision held that Article 3 of the Statute is a residual clause covering all violations of international humanitarian law not falling under Articles 2, 4 or 5 of the Statute, including offences against a person. The Respondent also refers to the finding of the Appeals Chamber in the *Celebici* case, in which it was decided that violations of Common article 3 of the Geneva Conventions are within the realm of Article 3 of the Statute.[43]

B. Discussion

1. The Existence of an Armed Conflict and Nexus therewith

55. There are two general conditions for the applicability of Article 3 of the Statute: first, there must be an armed conflict; second, the acts of the accused must be closely related to the armed conflict.[44]

56. An "armed conflict" is said to exist "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".[45]

57. There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is

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39 Prosecution Consolidated Respondent's Brief, para 3.31. See also Appeal Transcript, T 218.
40 *Ibid*., paras 3.33-3.35. See also Appeal Transcript, T 221-222.
41 *Ibid*.
42 Prosecution Consolidated Respondent's Brief, paras 2.2-2.5. See also Appeal Transcript, T 213-214.
43 Appeal Transcript, T 213-214.
44 *Tadic* Jurisdiction Decision, paras 67 and 70.
45 *Ibid.,* para 70.

achieved.[46] A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting.[47] It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.[48]

58. What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. The Trial Chamber's finding on that point is unimpeachable.

59. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.

60. The Appellants' proposition that the laws of war only prohibit those acts which are specific to an actual wartime situation is not right. The laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it. The laws of war can apply to both types of acts. The Appeals Chamber understands the Appellants' argument to be that if an act can be prosecuted in peacetime, it cannot be prosecuted in wartime. This betrays a misconception about the relationship between the laws of war and the laws regulating a peacetime

[46] *Ibid*.
[47] See Trial Judgement, para 568.
[48] *Tadic* Jurisdiction Decision, para 70.

situation. The laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation.

61. Concerning the Appellants' argument that they were prevented from disproving that there was an armed conflict in the municipalities of Ga~ko and Kalinovik, the Appeals Chamber makes the following remarks: a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and raise it only in the event of a finding against the party.[49] If a party fails to raise any objection to a particular issue before the Trial Chamber, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal.[50] Likewise, a party should not be permitted to raise an issue which it considers to be of significance to its case at a stage when the issue can no longer be fully litigated by the opposing party.

62. In the present instance, the Appellants raised the question of the existence of an armed conflict in the municipalities of Ga~ko and Kalinovik for the first time in their Defence Final Trial Brief without substantiating their argument, thereby depriving the Prosecutor of her ability to fully litigate the issue.[51] The Appeals Chamber finds this to be unacceptable. If, as the Appellants suggest, the issue was of such importance to their case, the Appellants should have raised it at an earlier stage, thus giving fair notice to the Prosecutor and allowing her to fully and properly litigate the matter in the course of which she could put this issue to her witnesses. This the Appellants failed to do. This ground of appeal could be rejected for that reason alone.

63. In addition, and contrary to what is alleged by the Appellants, the Appeals Chamber finds that the Appellants were never prevented by the Trial Chamber from raising any issue relevant to their case. In support of their argument on that point, the Appellants refer to an incident which occurred on 4 May 2000. According to the Appellants, on that day, the Trial Chamber prevented them from raising issues pertaining to the existence of an armed conflict in the municipalities of Ga~ko and Kalinovik.[52] It is clear from the record of the trial that the Appellants did not attempt to challenge the existence of an armed conflict in Ga~ko and Kalinovik as they alleged in their appeal,

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[49] *Celebici* Appeal Judgement, para 640 and *Kayishema* Appeal Judgement, para 91. See also *Kambanda* Appeal Judgement, para 25 and *Akayesu* Appeal Judgement, para 361.
[50] *Ibid*.
[51] See Trial Judgement, para 12, footnote 27.
[52] See Appeal Transcript, T 47-48.

nor that they were in any way prevented from asking questions about that issue in the course of the trial.[53]

64. Finally, the Appellants conceded that there was an armed conflict "in the area of Foca" at the relevant time and that they knew about that conflict and took part therein.[54] Referring to that armed conflict, the Appellants later said that it existed only in the territory of the "?mgunicipality of Foca".[55] The Appeals Chamber notes that the municipalities of Ga~ko and Kalinovik are contiguous and neighbouring municipalities of Foca. Furthermore, the Appeals Chamber considers that the Prosecutor did not have to prove that there was an armed conflict in each and every square inch of the general area. The state of armed conflict is not limited to the areas of actual military combat but exists across the entire territory under the control of the warring parties. The Appeals Chamber finds that ample evidence was adduced before the Trial Chamber to demonstrate that an armed conflict was taking place in the municipalities of Ga~ko and Kalinovik at the relevant time.[56] The Trial Chamber did not err in concluding that an armed conflict existed in all three municipalities, nor did it err in concluding that the acts of the Appellants were closely related to this armed conflict.[57]

65. The Trial Chamber was therefore correct in finding that there was an armed conflict at the time and place relevant to the Indictments, and that the acts of the Appellants were closely related to that conflict pursuant to Article 3 of the Statute. The Appeals Chamber does not accept the Appellants' contention that the laws of war are limited to those acts which could only be committed in actual combat. Instead, it is sufficient for an act to be shown to have been closely related to the armed conflict, as the Trial Chamber correctly found. This part of the Appellants' common grounds of appeal therefore fails.

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[53] The relevant transcript pages of the hearing show that, when counsel for Kunarac was interrupted by the Presiding Judge who was enquiring about the relevancy of her questions, she was cross-examining a witness about the number of cafés in Ga~ko. When asked what the relevance of her line of questioning was, counsel responded that she was merely testing the credibility of the witness. On the same occasion, counsel was also reminded by one of the Judges that her questions had to be directed to issues relevant to the case, that is, either relevant to a fact that is in issue between the parties or relevant as to the credit of the witness. Counsel responded that she was attempting to determine whether, as the witness claimed in her earlier statement, "nationalistic feelings on the Serb side were burgeoning" in Ga~ko. Despite her failure to explain the relevancy of her line of questioning, counsel was allowed by the Presiding Judge to pursue her line of questioning *as she wished* (Trial Transcript, T 2985-2990).

[54] Appeal Transcript, T 46-47. See also Prosecution Submission Regarding Admissions and Contested Matters, 1 February 2000 and Prosecution Submission Regarding Admissions and Contested Matters Regarding the Accused Zoran Vukovic, 8 March 2000.

[55] Defence Final Trial Brief, paras L.c.1-L.c.3.

[56] See, e.g., Trial Judgement, paras 22, 23, 31, 33 and 44.

[57] *Ibid.*, para 567.

2. Material Scope of Article 3 of the Statute and Common Article 3 of the Geneva Conventions

66. Four conditions must be fulfilled before an offence may be prosecuted under Article 3 of the Statute:[58] (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

67. The determination of what constitutes a war crime is therefore dependent on the development of the laws and customs of war at the time when an act charged in an indictment was committed. As was once noted, the laws of war "are not static, but by continual adaptation follow the needs of a changing world".[59] There is no question that acts such as rape (as explained in paragraph 195), torture and outrages upon personal dignity are prohibited and regarded as criminal under the laws of war and that they were already regarded as such at the time relevant to these Indictments.

68. Article 3 of the Statute is a general and residual clause covering all serious violations of international humanitarian law not falling under Articles 2, 4 or 5 of the Statute.[60] It includes, *inter alia*, serious violations of Common article 3. This provision is indeed regarded as being part of customary international law,[61] and serious violations thereof would at once satisfy the four requirements mentioned above.[62]

69. For the reasons given above, the Appeals Chamber does not accept the Appellants' unsupported assertion that Article 3 of the Statute is restricted in such a way as to be limited to the protection of property and the proper use of permitted weapons, that it does not cover serious violations of Common article 3 and that it is only concerned with the rights of warring parties as opposed to the protection of private individuals. This does not represent the state of the law. Accordingly, this part of the Appellants' common grounds of appeal relating to Article 3 of the Statute is rejected.

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58 *Tadic* Jurisdiction Decision, para 94 and *Aleksovski* Appeal Judgement, para 20.
59 *Trial of the Major War Criminals before the International Military Tribunal*, Nüremberg, 14 November 1945-1 October 1946, vol 1, p 221.
60 *Tadic* Jurisdiction Decision, paras 89-91 and *Celebici* Appeal Judgement, para 125.
61 *Tadic* Jurisdiction Decision, para 98 and Trial Judgement, para 408.
62 *Tadic* Jurisdiction Decision, para 134; *Celebici* Appeal Judgement, para 125 and Trial Judgement, para 408.

70. All three aspects of the common grounds of appeal relating to Article 3 of the Statute are therefore rejected and the appeal related to that provision consequently fails.

IV. COMMON GROUNDS OF APPEAL RELATING TO ARTICLE 5 OF THE STATUTE

A. Submissions of the Parties

1. The Appellants

71. The Appellants raise a number of complaints in respect of the *chapeau* elements of Article 5 of the Statute as established by the Trial Chamber. First, the Appellants reiterate their contention that their acts, even if established, were not sufficiently connected to the armed conflict to qualify as having been "committed in armed conflict" pursuant to Article 5 of the Statute. The Appellants contend that, pursuant to Article 5 of the Statute, such a link supposes the need for a substantive nexus to be established between the acts of an accused and the armed conflict, and for the acts and the conflict to coincide temporally.[63]

72. Secondly, the Appellants contend that the Trial Chamber erred in establishing that there was an attack against the non-Serb civilian population of Foca, as opposed to a purely military confrontation between armed groups, and that, in coming to its conclusion in that respect, the Trial Chamber took into account inappropriate or irrelevant factors or erred when assessing the evidence relating to the alleged attack.[64] The Appellants further claim that the Trial Chamber failed to give due consideration to their argument concerning what they regard as the Muslims' responsibility for starting the conflict and the existence of a Muslim attack upon the Serb population.[65]

73. The third aspect of the Appellants' ground of appeal in respect of Article 5 of the Statute is the contention that the regrettable consequences which may have been borne by non-Serb citizens of the municipality of Foca were not the consequence of an attack directed against the civilian population as such, but the unfortunate result of a legitimate military operation. In other words, these were "collateral damages".[66] The Appellants also challenge the Trial Chamber's conclusion that an attack may be said to have been "directed against" the non-Serb civilian population of Foca and, in view of their limited number, contest that the victims identified by the Trial Chamber may be said to have constituted a "population" pursuant to Article 5 of the Statute.[67]

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63 See, e.g., Appeal Transcript, T 64-65 and 68.
64 *Kunarac* Appeal Brief, paras 16-24; Appeal Transcript, T 45, 54-58 and 167-168; *Vukovi}* Appeal Brief, paras 18-38 and 54-99 and *Kova~* Appeal Brief, paras 10-31 and 41.
65 *Kunarac* Appeal Brief, paras 16-17 and 24; *Vukovi}* Appeal Brief, paras 61-65 and *Kova~* Appeal Brief, para 40.
66 Appeal Transcript, T 58. See also *Kunarac* Appeal Brief, para 19.
67 See, e.g., Appeal Transcript, T 55.

74. Fourthly, the Appellants argue that the evidence of crimes committed against non-Serb civilians, even if accepted, would not be sufficient for the Tribunal to conclude that the attack was either widespread or systematic.[68] In particular, the Appellants claim that the incidents mentioned by the Trial Chamber are too isolated both in scope and number to amount to a fully fledged widespread and systematic attack against the civilian population.[69] In addition, the Appellants argue that, in law, the attack must be both widespread *and* systematic.[70]

75. Finally, in their fifth and sixth complaints, the Appellants claim that the Trial Chamber erred in concluding that the acts of the Appellants were linked to the attack of which, they assert, they did not even know.[71] The Appellants contend that their acts and activities during the relevant time were limited to and purely of a military sort and that they did not in any manner take part in an attack against the civilian population.[72] In particular, the Appellants contend that the required nexus between the acts with which they were charged and the attack requires that there be a plan or a policy to commit those crimes, as well as knowledge on the part of the Appellants of that plan or policy and a demonstrated willingness to participate therein.[73] The Appellants underline the fact that they did not interact during the war, that they were not related by any common plan or common purpose, and that the Prosecutor failed to establish that there was any plan to commit sexual crimes against Muslim women.[74]

2. The Respondent

76. The Respondent submits that the requirement contained in Article 5 of the Statute, that the crimes be "committed in armed conflict", implies a link between the acts of the accused and the armed conflict of a different and lesser sort than that under Article 3 of the Statute.[75] According to the Respondent, there is no requirement under Article 5 of the Statute for a substantial connection between the acts of the Appellants and the armed conflict; they must merely co-exist in either a geographical or temporal sense.[76] This requirement is, the Respondent argues, squarely met in the present case.

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[68] *Ibid.*, T 58-59 and 142-144. See also *Kunarac* Appeal Brief, paras 16-26.
[69] See, e.g., *Vukovic* Appeal Brief, paras 65 and 70. See also Appeal Transcript, T 58-59 and 143-144.
[70] Appeal Transcript, T 58-59.
[71] *Ibid.,* T 57. See also *Kunarac* Appeal Brief, paras 23-26; *Vukovic* Appeal Brief, paras 100-102 and 106-109 and *Kovac* Appeal Brief, paras 43-45.
[72] Appeal Transcript, T 57.
[73] *Ibid.*, T 45, 50-53, 65-66, 68-70 and 168-171. See, e.g., *Vukovic* Appeal Brief, para 100.
[74] Appeal Transcript, T 45, 50-52 and 168-171.
[75] Prosecution Consolidated Respondent's Brief, para 3.38. See also Appeal Transcript, T 222.
[76] *Ibid*.

77. The Respondent further claims that the Appellants' submission that the Muslims should be blamed for causing the attack demonstrates a fundamental misapprehension of the notion of "attack against the civilian population", confusing the legitimacy of resort to armed hostilities with the prohibitions which apply in all types of armed conflicts once under way.[77] According to the Respondent, far from being a device for the attribution of legal responsibility for the outbreak of hostilities, the concept of "attack" is instead an objective contextual element for crimes against humanity.[78] Consequently, the Respondent argues, the issue of which party provoked the attack and the alleged blameworthiness of the Muslims forces in that respect is irrelevant.[79]

78. The Respondent also submits that the Trial Chamber was correct in finding that the notion of "attack against a civilian population" is not negated by the mere fact that a parallel military campaign against the Muslim armed forces might have co-existed alongside the attack against the civilian population.[80] In addition, concerning the Appellants' claim that the victims do not constitute a "population" pursuant to Article 5 of the Statute, the Respondent notes that there is no legal requirement that the population as a whole be subjected to the attack, but merely that the crimes be of a collective nature.[81]

79. The Respondent is of the view that the requirements of "widespreadedness" and "systematicity" apply to the attack and not to the armed conflict or the acts of the accused, and that these requirements are disjunctive in that either or both need to be satisfied.[82] The systematic character of an attack may be inferred, the Respondent claims, from the way in which it was carried out, and from discernible patterns of criminal conduct such as those identified by the Trial Chamber.[83] In the present case, the Respondent submits that the conduct of the Appellants comprised criminal acts on a very large scale and the repeated and continuous commission of associated inhumane acts against civilians.[84]

80. In addition, the Respondent contends that the Trial Chamber correctly stated that the nexus between the acts of the accused and the attack requires proof that the acts comprised part of a pattern of widespread or systematic crimes directed against a civilian population.[85] Furthermore,

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77 Prosecution Consolidated Respondent's Brief, paras 3.8-3.9. See also Appeal Transcript, T 223.
78 Prosecution Consolidated Respondent's Brief, para 3.9.
79 *Ibid*.
80 *Ibid*., para 3.11. See also Appeal Transcript, T 223-224.
81 Appeal Transcript, T 224.
82 Prosecution Consolidated Respondent's Brief, para 3.21. See also Appeal Transcript, T 226-228.
83 Prosecution Consolidated Respondent's Brief, para 3.27.
84 *Ibid*.
85 *Ibid*., para 3.13.

she asserts that, as the Trial Chamber ascertained, the notion of a plan is arguably not an independent requirement for crimes against humanity. [86]

81. Finally, concerning the required *mens rea* for crimes against humanity, the Respondent first points out that the Appellants adduced no credible proof to rebut the factual findings of the Trial Chamber that they knew of the attack and that they were aware that their acts were a part thereof.[87] The Respondent further contends that the alleged perpetrator of a crime against humanity need not approve of a plan to target the civilian population, or personally desire its outcome.[88] According to the Respondent, it was sufficient for the Trial Chamber to establish that the Appellants intentionally carried out the prohibited acts within the context of a widespread or systematic attack against a civilian population, with knowledge of the context into which these crimes fitted and in full awareness that their actions would contribute to the attack.[89]

B. Discussion

1. Nexus with the Armed Conflict under Article 5 of the Statute

82. A crime listed in Article 5 of the Statute constitutes a crime against humanity only when "committed in armed conflict."

83. As pointed out by the Trial Chamber, this requirement is not equivalent to Article 3 of the Statute's exigency that the acts be closely related to the armed conflict.[90] As stated by the Trial Chamber, the requirement contained in Article 5 of the Statute is a purely jurisdictional prerequisite which is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict.[91]

84. The Appeals Chamber agrees with the Trial Chamber's conclusions that there was an armed conflict at the time and place relevant to the Indictments and finds that the Appellants' challenge to the Trial Chamber's finding is not well founded. This part of the Appellants' common grounds of appeal therefore fails.

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[86] *Ibid*., para 3.26. See also Appeal Transcript, T 222. Further, even if such a requirement existed, the Respondent asserts that the policy or plan would not need to be conceived at the highest level of the State machinery, nor would it need to be formalised or even stated precisely. The climate of acquiescence and official condonation of large-scale crimes would satisfy the notion of a plan or policy.

[87] Prosecution Consolidated Respondent's Brief, paras 3.41 and 3.46.

[88] Appeal Transcript, T 222.

[89] Prosecution Consolidated Respondent's Brief, paras 3.44-3.45. See also Appeal Transcript, T 228-230.

[90] See discussion above at paras 57-60.

[91] Trial Judgement para 413. See also *Tadic* Appeal Judgement, paras 249 and 251; *Kupreškic* Trial Judgement, para 546 and *Tadic* Trial Judgement, para 632.

2. Legal Requirement of an "attack"

85. In order to amount to a crime against humanity, the acts of an accused must be part of a widespread or systematic attack "directed against any civilian population". This phrase has been interpreted by the Trial Chamber, and the Appeals Chamber agrees, as encompassing five elements:[92]

(i) There must be an attack.[93]

(ii) The acts of the perpetrator must be part of the attack.[94]

(iii) The attack must be directed against any civilian population.[95]

(iv) The attack must be widespread or systematic.[96]

(v) The perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern.[97]

86. The concepts of "attack" and "armed conflict" are not identical.[98] As the Appeals Chamber has already noted when comparing the content of customary international law to the Tribunal's Statute, "the two – the 'attack on the civilian population' and the 'armed conflict' – must be separate notions, although of course under Article 5 of the Statute the attack on 'any civilian population' may be part of an 'armed conflict'".[99] Under customary international law, the attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it.[100] Also, the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population. The Appeals Chamber recognises, however, that the Tribunal will only have jurisdiction over the acts of an accused pursuant to Article 5 of the Statute where the latter are committed "in armed conflict".

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92 Trial Judgement, para 410.
93 See *Tadic* Appeal Judgement, paras 248 and 251.
94 *Ibid.,* para 248.
95 Article 5 of the Statute expressly uses the expression "directed against any civilian population." See also *Tadic* Trial Judgement, paras 635-644.
96 *Tadic* Appeal Judgement, para 248 and *Mrkšic* Rule 61 Decision, para 30.
97 *Tadic* Appeal Judgement, para 248.
98 *Ibid.*, para 251.
99 *Ibid.* The Appeals Chamber notes that the *Kunarac* Trial Chamber stated as follows: "although the attack must be part of the armed conflict, it can also outlast it" (*Kunarac* Trial Judgement, para 420).
100 See *Tadic* Appeal Judgement, para 251.

87. As noted by the Trial Chamber, when establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent's civilian population.[101] The existence of an attack from one side against the other side's civilian population would neither justify the attack by that other side against the civilian population of its opponent nor displace the conclusion that the other side's forces were in fact targeting a civilian population as such.[102] Each attack against the other's civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity.

88. Evidence of an attack by the other party on the accused's civilian population may not be introduced unless it tends "to prove or disprove any of the allegations made in the indictment",[103] notably to refute the Prosecutor's contention that there was a widespread or systematic attack against a civilian population. A submission that the other side is responsible for starting the hostilities would not, for instance, disprove that there was an attack against a particular civilian population.[104]

89. The Appeals Chamber is satisfied that the Trial Chamber correctly defined and interpreted the concept of "attack" and that it properly identified the elements and factors relevant to the attack. The Appellants have failed to establish that they were in any way prejudiced by the Trial Chamber's limitations on their ability to litigate issues which were irrelevant to the charges against them and which did not tend to disprove any of the allegations made against them in the Indictments. All of the Trial Chamber's legal as well as factual findings in relation to the attack are unimpeachable and the Appeals Chamber therefore rejects this part of the Appellants' common grounds of appeal.

3. The Attack must be Directed against any Civilian Population

90. As was correctly stated by the Trial Chamber, the use of the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack.[105] It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that

[101] Trial Judgement, para 580.
[102] *Kupreškic* Trial Judgement, para 765.
[103] *Kupreškic* Evidence Decision.
[104] The *Kupreškic* Trial Chamber held that, before adducing such evidence, counsel must explain to the Trial Chamber the purpose for which it is submitted and satisfy the court that it goes to prove or disprove one of the allegations contained in the indictment (*Kupreškic* Evidence Decision).
[105] Trial Judgement, para 424. See also *Tadic* Trial Judgement, para 644.

the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.

91. As stated by the Trial Chamber, the expression "directed against" is an expression which "specifies that in the context of a crime against humanity the civilian population is the primary object of the attack".[106] In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.

92. The Appeals Chamber is satisfied that the Trial Chamber correctly defined and identified the "population" which was being attacked and that it correctly interpreted the phrase "directed against" as requiring that the civilian population which is subjected to the attack must be the primary rather than an incidental target of the attack. The Appeals Chamber is further satisfied that the Trial Chamber did not err in concluding that the attack in this case was directed against the non-Serb civilian population of Foca. This part of the Appellants' common grounds of appeal is therefore rejected.

4. The Attack must be Widespread *or* Systematic

93. The requirement that the attack be "widespread" or "systematic" comes in the alternative.[107] Once it is convinced that either requirement is met, the Trial Chamber is not obliged to consider whether the alternative qualifier is also satisfied. Nor is it the role or responsibility of the Appeals Chamber to make supplementary findings in that respect.

94. As stated by the Trial Chamber, the phrase "widespread" refers to the large-scale nature of the attack and the number of victims,[108] while the phrase "systematic" refers to "the organised nature of the acts of violence and the improbability of their random occurrence".[109] The Trial

[106] Trial Judgement, para 421.
[107] *Tadic* Appeal Judgement, para 248 and *Tadic* Trial Judgement, para 648.
[108] *Tadic* Trial Judgement, para 648.
[109] Trial Judgement, para 429. See also *Tadic* Trial Judgement, para 648.

Chamber correctly noted that "patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence".[110]

95. As stated by the Trial Chamber, the assessment of what constitutes a "widespread" or "systematic" attack is essentially a relative exercise in that it depends upon the civilian population which, allegedly, was being attacked.[111] A Trial Chamber must therefore "first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic".[112] The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a "widespread" or "systematic" attack vis-à-vis this civilian population.

96. As correctly stated by the Trial Chamber, "only the attack, not the individual acts of the accused, must be widespread or systematic".[113] In addition, the acts of the accused need only be a part of this attack and, all other conditions being met, a single or relatively limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.

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

5. The Requirement of a Policy or Plan and Nexus with the Attack

98. Contrary to the Appellants' submissions, neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the Statute or in

[110] Trial Judgement, para 429.
[111] *Ibid.*, para 430.
[112] See *Ibid*.
[113] *Ibid.*, para 431.

customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes.[114] As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.

99. The acts of the accused must constitute part of the attack.[115] In effect, as properly identified by the Trial Chamber, the required nexus between the acts of the accused and the attack consists of two elements:[116]

> (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with

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[114] There has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity. The practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such requirement exists under customary international law. See, for instance, Article 6(c) of the Nuremberg Charter; Nuremberg Judgement, Trial of the Major War Criminals before the International Military Tribunal, Nüremberg, 14 November 1945 – 1 October 1945, in particular, pp 84, 254, 304 (*Streicher*) and 318-319 (*von Schirach*); Article II(1)(c) of Control Council Law No 10; *In re Ahlbrecht*, ILR 16/1949, 396; *Ivan Timofeyevich Polyukhovich* v *The Commonwealth of Australia and Anor*, (1991) 172 CLR 501; Case FC 91/026; *Attorney-General* v *Adolph Eichmann*, District Court of Jerusalem, Criminal Case No. 40/61; *Mugesera et al.* v *Minister of Citizenship and Immigration*, IMM-5946-98, 10 May 2001, Federal Court of Canada, Trial Division; *In re Trajkovic*, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), P Nr 68/2000, 6 March 2001; *Moreno* v *Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, ?1994g 1 F.C. 298, 14 September 1993; *Sivakumar* v *Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, ?1994g 1 F.C. 433, 4 November 1993. See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, paras 47-48; Yearbook of the International Law Commission (ILC), 1954, vol. II, 150; Report of the ILC on the work of its 43rd session, 29 April – 19 July 1991, Supplement No 10 (UN Doc No A/46/10), 265-266; its 46th session, 2 May – 22 July 1994, Supplement No 10 (UN Doc No A/49/10), 75-76; its 47th session, 2 May – 21 July 1995, 47, 49 and 50; its 48th session, 6 May – 26 July 1996, Supplement No 10 (UN Doc No A/51/10), 93 and 95-96. The Appeals Chamber reached the same conclusion in relation to the crime of genocide (*Jelisi}* Appeal Judgement, para 48). Some of the decisions which suggest that a plan or policy is required in law went, in that respect, clearly beyond the text of the statute to be applied (see e.g., *Public Prosecutor* v *Menten*, Supreme Court of the Netherlands, 13 January 1981, reprinted in 75 *ILR* 331, 362-363). Other references to a plan or policy which have sometimes been used to support this additional requirement in fact merely highlight the *factual* circumstances of the case at hand, rather than impose an independent constitutive element (see, e.g., Supreme Court of the British Zone, OGH br. Z., vol. I, 19). Finally, another decision, which has often been quoted in support of the plan or policy requirement, has been shown not to constitute an authoritative statement of customary international law (see *In re Altstötter*, ILR 14/1947, 278 and 284 and comment thereupon in *Ivan Timofeyevich Polyukhovich* v *The Commonwealth of Australia and Anor*, (1991) 172 CLR 501, pp 586-587).

[115] See *Tadic* Appeal Judgement, para 248.

[116] Trial Judgement, para 418; *Tadic* Appeal Judgement, paras 248, 251 and 271; *Tadic* Trial Judgement, para 659 and *Mrkšic* Rule 61 Decision, para 30.

(ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.[117]

100. The acts of the accused must be part of the "attack" against the civilian population, but they need not be committed in the midst of that attack. A crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack. The crime must not, however, be an isolated act.[118] A crime would be regarded as an "isolated act" when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.[119]

101. The Appeals Chamber is satisfied that the Trial Chamber identified and applied the proper test for establishing the required nexus between the acts of the accused and the attack and that the Trial Chamber was correct in concluding that there is no requirement in the Statute or in customary international law that crimes against humanity must be supported by a policy or plan to carry them out. The Appeals Chamber is also satisfied that the acts of the Appellants were not merely of a military sort as was claimed, but that they were criminal in kind, and that the Trial Chamber did not err in concluding that these acts comprised part of the attack against the non-Serb civilian population of Foca. This part of the Appellants' common grounds of appeal therefore fails.

6. *Mens rea* for Crimes against Humanity

102. Concerning the required *mens rea* for crimes against humanity, the Trial Chamber correctly held that the accused must have had the intent to commit the underlying offence or offences with which he is charged, and that he must have known "that there is an attack on the civilian population and that his acts comprise part of that attack, or at least [that he took] the risk that his acts were part

[117] The issue of *mens rea* is dealt with below, see paras 102-105.
[118] *Kupreškic* Trial Judgement, para 550.
[119] *Ibid*.; *Tadic* Trial Judgement, para 649 and *Mrkšic* Rule 61 Decision, para 30. On 30 May 1946, the Legal Committee of the United Nations War Crime Commission held that: "Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims" (see, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, Compiled by the United Nations War Crimes Commission, 1948, p 179).

of the attack."[120] This requirement, as pointed out by the Trial Chamber, does not entail knowledge of the details of the attack.[121]

103. For criminal liability pursuant to Article 5 of the Statute, "the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons."[122] Furthermore, the accused need not share the purpose or goal behind the attack.[123] It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.

104. The Appellants' contention that a perpetrator committing crimes against humanity needs to know about a plan or policy to commit such acts and that he needs to know of the details of the attack is not well founded. Accordingly, the Appeals Chamber rejects this part of the common grounds of appeal.

105. In conclusion, the Appeals Chamber is satisfied that the Trial Chamber correctly identified all five elements which constitute the *chapeau* elements or general requirements of crimes against humanity under customary international law, as well as the jurisdictional requirement that the acts be committed in armed conflict, and that it interpreted and applied these various elements correctly in the present instance. The Appellants' common grounds of appeal relating to Article 5 of the Statute are therefore rejected.

[120] Trial Judgement, para 434.
[121] *Ibid.*
[122] *Ibid.*, para 433. See also *Tadic* Appeal Judgement, paras 248 and 252.
[123] See, for a telling illustration of that rule, *Attorney-General of the State of Israel* v *Yehezkel Ben Alish Enigster*, District Court of Tel-Aviv, 4 January 1952, para 13.

V. GROUNDS OF APPEAL RELATING TO THE TRIAL CHAMBER'S DEFINITION OF THE OFFENCES

A. Definition of the Crime of Enslavement (Dragoljub Kunarac and Radomir Kova~)

1. Submissions of the Parties

(a) The Appellants (Kunarac and Kova~)

106. The Appellants Kunarac and Kova~ contend that the Trial Chamber's definition of the crime of enslavement is too broad and does not define clearly the elements of this crime.[124] In particular, the Appellants believe that a clear distinction should be made "between the notion of enslavement (slavery) as interpreted in all the legal sources (…) and the detention as listed in the Indictment".[125] The Appellants put forward the following alternative elements for the crime of enslavement.

107. First, for a person to be found guilty of the crime of enslavement, it must be established that the accused treated the victim "as its own ownership".[126] The Appellants contend that the Prosecutor failed to prove that any of the accused charged with the crime of enslavement behaved in such a way to any of the victims.

108. Secondly, another constitutive element of the crime of enslavement is the constant and clear lack of consent of the victims during the entire time of the detention or the transfer.[127] The Appellants submit that this element has not been proven as the victims testified that they had freedom of movement within and outside the apartment and could therefore have escaped or attempted to change their situation.[128] Similarly, the Appellants contend that the victims were not forced to do household chores but undertook them willingly.[129]

109. Thirdly, the victim must be enslaved for an indefinite or at least for a prolonged period of time.[130] According to the Appellants, the time period must "indicate a clear intention to keep the

[124] *Kunarac* Appeal Brief, para 130.
[125] *Kova~* Appeal Brief, para 160 and Appeal Transcript, T 118.
[126] Appeal Transcript, T 120. See also *Kunarac* and *Kova~* Reply Brief, para 6.39.
[127] Appeal Transcript, T 119 and 125.
[128] *Ibid.,* T 119; *Kova~* Appeal Brief, para 164; *Kunarac* Appeal Brief, para 131 and *Kunarac* and *Kova~* Reply Brief, paras 5.64-5.65 and 6.39.
[129] *Kova~* Appeal Brief, para 164 and *Kunarac* and *Kova~* Reply Brief, paras 5.65 and 6.39.
[130] Appeal Transcript, T 120, 122 and 126 and *Kova~* Appeal Brief, para 165.

victim in that situation for an indefinite period of time. Any other shorter period of time could not support the crime of enslavement".[131]

110. Lastly, as far as the mental element of the crime of enslavement is concerned, the Appellants submit that the required *mens rea* is the intent to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts.[132] The Appellants contend that such an intent has not been proven beyond reasonable doubt by the Prosecutor in respect of any of the Appellants. The Appellant Kova~ argues that such an intent was not proved and did not exist, as he accepted the victims[133] in his apartment in order to organise their transfer outside of the theatre of the armed conflict.[134]

111. The Appellants therefore conclude that the Trial Chamber, by defining enslavement as the exercise of any or all of the powers attaching to the right of ownership, has committed an error of law which renders the decision invalid. They further contend that the Prosecutor has not proved beyond reasonable doubt that the conduct of the Appellants Kunarac and Kova~ satisfied any of the elements of the crime of enslavement as defined in their submission.[135]

(b) The Respondent

112. The Respondent submits that the Trial Chamber has not committed any error of law which would invalidate the decision. She contends that the Trial Chamber's definition of enslavement correctly reflects customary international law at the time relevant to the Indictments.[136] She asserts that, even if some treaties have defined the concept of slavery narrowly, today "enslavement as a crime against humanity must be given a much broader definition because of its diverse contemporary manifestations".[137] The crime of enslavement is "closely tied to the crime of slavery in terms of its basic definition (…) but encompasses other contemporary forms of slavery not contemplated under the 1926 Slavery Convention and similar or subsequent conventions".[138]

113. The Respondent further contends that the Trial Chamber correctly identified the indicia of enslavement to include, among other factors, the absence of consent or free will of the victims.

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[131] Appeal Transcript, T 120.
[132] *Ibid*., T 118-119; *Kunarac* Appeal Brief, paras 129 and 133 and *Kova*~ Appeal Brief, paras 163 and 165.
[133] The victims concerned are FWS-75, FWS-87, A.S. and A.B.
[134] *Kova*~ Appeal Brief, para 165.
[135] Appeal Transcript, T 120 and Appellants' Reply on Prosecution's Consolidated Respondent's Brief, paras 5.67 and 6.39.
[136] Appeal Transcript, T 246 and Prosecution Consolidated Respondent's Brief, paras 5.164- 5.169.
[137] Appeal Transcript, T 246.
[138] *Ibid.*

Such consent is often rendered impossible or irrelevant by a series of influences such as detention, captivity or psychological oppression.[139] She further submits that this series of influences rendered the victims "unable to exert ?theirg freedom and autonomy".[140]

114. In response to the argument put forward by the Appellants that the victim must be enslaved for an indefinite or at least a prolonged period of time, the Respondent contends that duration is only one of the many factors that the Tribunal can look at and that it generally needs to be viewed in the context of other elements.[141]

115. Lastly, the Respondent submits that the *mens rea* element identified by the Trial Chamber is correct and that customary international law does not require any specific intent to enslave but rather the intent to exercise a power attaching to the right of ownership.[142]

2. Discussion

116. After a survey of various sources, the Trial Chamber concluded "that, at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person".[143] It found that "the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person", and the *"mens rea* of the violation consists in the intentional exercise of such powers".[144]

117. The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as "chattel slavery",[145] has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with "chattel slavery", but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical

[139] *Ibid.,* T 256.
[140] *Ibid.,* T 257. See also Prosecution Consolidated Respondent's Brief, para 5.178.
[141] Appeal Transcript, T 254-255 and 272-273.
[142] *Ibid.,* T 254 and Prosecution Consolidated Respondent's Brief, paras 5.180- 5.183.
[143] Trial Judgement, para 539.
[144] *Ibid.,* para 540.
[145] "Chattel slavery" is used to describe slave-like conditions. To be reduced to "chattel" generally refers to a form of movable property as opposed to property in land.

personality;[146] the destruction is greater in the case of "chattel slavery" but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.

118. The Appeals Chamber will however observe that the law does not know of a "right of ownership over a person".[147] Article 1(1) of the 1926 Slavery Convention speaks more guardedly "of a person over whom any or all of the powers attaching to the right of ownership are exercised." That language is to be preferred.

119. The Appeals Chamber considers that the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour".[148] Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea; this Judgement is limited to the case in hand. In this respect, the Appeals Chamber would also like to refer to the finding of the Trial Chamber in paragraph 543 of the Trial Judgement stating:

> The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor. The Trial Chamber considers that the *mere ability* to do so is insufficient, such actions actually occurring could be a relevant factor.

However, this particular aspect of the Trial Chamber's Judgement not having been the subject of argument, the Appeals Chamber does not consider it necessary to determine the point involved.

120. In these respects, the Appeals Chamber rejects the Appellants' contention that lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention can be interpreted as a sign of consent. Indeed, the Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from

[146] It is not suggested that every case in which the juridical personality is destroyed amounts to enslavement; the concern here is only with cases in which the destruction of the victim's juridical personality is the result of the exercise of any of the powers attaching to the right of ownership.

[147] Trial Judgement, para 539. See also Article 7(2)(c) of the Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998 (PCNICC/1999/INF.3, 17 August 1999), which defines enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."

claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. In this respect, the Appeals Chamber considers that circumstances which render it impossible to express consent may be sufficient to presume the absence of consent. In the view of the Appeals Chamber, the circumstances in this case were of this kind.

121. The Appellants contend that another element of the crime of enslavement requires the victims to be enslaved for an indefinite or at least for a prolonged period of time. The Trial Chamber found that the duration of the detention is another factor that can be considered but that its importance will depend on the existence of other indications of enslavement.[149] The Appeals Chamber upholds this finding and observes that the duration of the enslavement is not an element of the crime. The question turns on the quality of the relationship between the accused and the victim. A number of factors determine that quality. One of them is the duration of the relationship. The Appeals Chamber considers that the period of time, which is appropriate, will depend on the particular circumstances of each case.

122. Lastly, as far as the *mens rea* of the crime of enslavement is concerned, the Appeals Chamber concurs with the Trial Chamber that the required *mens rea* consists of the intentional exercise of a power attaching to the right of ownership.[150] It is not required to prove that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts.

123. Aside from the foregoing, the Appeals Chamber considers it appropriate in the circumstances of this case to emphasise the citation by the Trial Chamber of the following excerpt from the *Pohl* case: [151]

> Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery - compulsory uncompensated labour - would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.

[148] Trial Judgement, para 543. See also Trial Judgement, para 542.
[149] *Ibid*., para 542.
[150] *Ibid*., para 540.
[151] *US* v *Oswald Pohl and Others*, Judgement of 3 November 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council No. 10,* Vol 5, (1997), p 958 at p 970.

The passage speaks of slavery; it applies equally to enslavement.

124. For the foregoing reasons, the Appeals Chamber is of the opinion that the Trial Chamber's definition of the crime of enslavement is not too broad and reflects customary international law at the time when the alleged crimes were committed. The Appellants' contentions are therefore rejected; the appeal relating to the definition of the crime of enslavement fails.

B. Definition of the Crime of Rape

1. Submissions of the Parties

(a) The Appellants

125. The Appellants challenge the Trial Chamber's definition of rape. With negligible differences in diction, they propose instead definitions requiring, in addition to penetration, a showing of two additional elements: force or threat of force and the victim's "continuous" or "genuine" resistance.[152] The Appellant Kovac, for example, contends that the latter requirement provides notice to the perpetrator that the sexual intercourse is unwelcome. He argues that "[r]esistance must be real throughout the duration of the sexual intercourse because otherwise it may be concluded that the alleged victim consented to the sexual intercourse".[153]

(b) The Respondent

126. In contrast, the Respondent dismisses the Appellants' resistance requirement and largely accepts the Trial Chamber's definition. In so doing, however, the Respondent emphasises an important principle distilled from the Trial Chamber's survey of international law: "serious violations of sexual autonomy are to be penalised".[154] And she further notes that "force, threats of force, or coercion" nullifies "true consent".[155]

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[152] *Kunarac* Appeal Brief, para 99; *Vukovic* Appeal Brief, para 169 and *Kovac* Appeal Brief, para 105.
[153] *Kovac* Appeal Brief, para 107.
[154] Prosecution Consolidated Respondent's Brief, para 4.15 (quoting Trial Judgement, para 457). Indeed, it is worth noting that the part of the German Criminal Code penalizing rape and other forms of sexual abuse is entitled "Crimes Against Sexual Self-Determination" (German Criminal Code (*Strafgesetzbuch*), Chapter 13, amended by law of 23 November 1973).
[155] Prosecution Consolidated Respondent's Brief, para 4.19.

2. Discussion

127. After an extensive review of the Tribunal's jurisprudence and domestic laws from multiple jurisdictions, the Trial Chamber concluded: [156]

> the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[157]

128. The Appeals Chamber concurs with the Trial Chamber's definition of rape. Nonetheless, the Appeals Chamber believes that it is worth emphasising two points. First, it rejects the Appellants' "resistance" requirement, an addition for which they have offered no basis in customary international law. The Appellants' bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.

129. Secondly, with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal's prior definitions of rape.[158] However, in explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape.[159] In particular, the Trial Chamber wished to explain that there are "factors ?other than force? which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim".[160] A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.

130. The Appeals Chamber notes, for example, that in some domestic jurisdictions, neither the use of a weapon nor the physical overpowering of a victim is necessary to demonstrate force. A threat to retaliate "in the future against the victim or any other person" is a sufficient *indicium* of

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[156] Trial Judgement, paras 447-456.
[157] *Ibid.*, para 460.
[158] See, e.g., *Furund`ija* Trial Judgement, para 185. Prior attention has focused on force as the defining characteristic of rape. Under this line of reasoning, force or threat of force either nullifies the possibility of resistance through physical violence or renders the context so coercive that consent is impossible.
[159] Trial Judgement, para 458.
[160] *Ibid.*, para 438.

force so long as "there is a reasonable possibility that the perpetrator will execute the threat".[161] While it is true that a focus on one aspect gives a different shading to the offence, it is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.

131. Under the chapter entitled "Crimes Against Sexual Self-Determination," German substantive law contains a section penalising sexual acts with prisoners and persons in custody of public authority.[162] The absence of consent is not an element of the crime. Increasingly, the state and national laws of the United States — designed for circumstances far removed from war contexts — support this line of reasoning. For example, it is a federal offence for a prison guard to have sex with an inmate, whether or not the inmate consents. Most states have similar prohibitions in their criminal codes.[163] In *State of New Jersey* v *Martin*, the Appellate Division of the New Jersey Superior Court commented on the purpose of such protections: "?the legislature? reasonably recognised the unequal positions of power and the inherent coerciveness of the situation which could not be overcome by evidence of apparent consent".[164] And, in some jurisdictions, spurred by revelations of pervasive sexual abuse of women prisoners, sexual contact between a correctional officer and an inmate is a felony.[165] That such jurisdictions have established these strict liability provisions to protect prisoners who enjoy substantive legal protections, including access to counsel and the expectation of release after a specified period, highlights the need to presume non-consent here.

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[161] California Penal Code 1999, Title 9, Section 261(a)(6). The section also lists, among the circumstances transforming an act of sexual intercourse into rape, "where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another" (Section 261(a)(2)). Consent is defined as "positive cooperation in act or attitude pursuant to an exercise of free will" (Section 261.6).

[162] Indeed, a more recently enacted German Criminal Code (*Strafgesetzbuch*), Chapter 13, Section 177, which defines sexual coercion and rape, recognizes the special vulnerability of victims in certain situations. It was amended in April 1998 to explicitly add "exploiting a situation in which the victim is unprotected and at the mercy of the perpetrator's influence" as equivalent to "force" or "threat of imminent danger to life or limb".

[163] See, e.g., N.J. Stat. Section 2C: 14-2 (2001) (An actor is guilty of, respectively, aggravated and simple sexual assault…?if? "?t?he actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status" or if "?t?he victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status.").

[164] *State of New Jersey* v *Martin*, 235 N.J. Super. 47, 56, 561 A.2d, 631, 636 (1989). Chapter 13 of the German Criminal Code has similar provisions. Section 174a imposes criminal liability for committing "sexual acts on a prisoner or person in custody upon order of a public authority." Section 174b punishes sexual abuse by means of exploiting a position in public office. In neither instance is the absence of consent an element.

[165] See *Women Prisoners of the District of Columbia Department of Corrections* v *District of Columbia*, 877 F. Supp. 634, 640 (D.D.C. 1994), *rev'd* on other grounds, 93 F.3d 910 (D.C. Cir. 1996) and Prison Litigation Reform Act of 1996, Pub. L. 105-119, 18 U.S.C. Section 3626.

132. For the most part, the Appellants in this case were convicted of raping women held in *de facto* military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality). Such detentions amount to circumstances that were so coercive as to negate any possibility of consent.

133. In conclusion, the Appeals Chamber agrees with the Trial Chamber's determination that the coercive circumstances present in this case made consent to the instant sexual acts by the Appellants impossible. The Appellants' grounds of appeal relating to the definition of the crime of rape therefore fail.

C. Definition of the Crime of Torture (Dragoljub Kunarac and Zoran Vukovi})

1. Submissions of the Parties

(a) The Appellants (Kunarac and Vukovi})

134. Neither Appellant challenges the Trial Chamber's definition of torture.[166] Indeed, the Appellants seem to accept the conclusions of the Trial Chamber identifying the crime of torture on the basis of three elements, these being respectively an intentional act, inflicting suffering, and the existence of a prohibited purpose. Nonetheless, they assert that these three constitutive elements of the crime of torture have not been proven beyond reasonable doubt in relation to either Kunarac[167] or Vukovi}[168] and that their convictions were thus ill-founded.[169]

135. With regard to the first element of the crime of torture, the Appellant Kunarac contends that he committed no act which could inflict severe physical or mental pain or suffering and that the arguments raised by the Prosecutor,[170] as well as the case-law to which she refers, are not sufficient to justify the findings of the Trial Chamber that some of Kunarac's victims experienced such mental pain or suffering.[171] Kunarac states that he never asserted that rape victims, in general, could not suffer, but rather that, in the instant case, no witness showed the effects of physical or mental pain

[166] *Kunarac* Appeal Brief, para 120 and *Vukovic* Appeal Brief, para 163.
[167] *Kunarac* Appeal Brief, paras 120-121.
[168] *Vukovic* Appeal Brief, paras 159 and 164-167.
[169] *Kunarac* Appeal Brief, paras 120-121 and *Vukovic* Appeal Brief, paras 159 and 164-167.
[170] Prosecution Consolidated Respondent's Brief, paras 6.42-6.45.
[171] *Kunarac* and *Kovac* Reply Brief, para 6.23.

or suffering.[172] In Kunarac's view, therefore, the first element of the crime of torture – the infliction of severe pain or suffering – is not met in his case.

136. The Appellant Vukovi}, referring to paragraph 7.11 of Indictment IT-96-23-/1, asserts that he was not charged with any act inflicting severe physical or mental pain or suffering.[173] The Appellant Vukovi} further challenges his conviction for torture through rape in the form of vaginal penetration on the basis that FWS-50, who was allegedly raped by Vukovi}, did not mention the use of force or threats.[174] The Appellant appears to conclude from the absence of evidence of the use of physical force that the alleged rape of FWS-50 could not have resulted in severe *physical* pain or suffering on the part of FWS-50.[175] The Appellant thus asserts that the first element of the crime of torture will only be satisfied if there is evidence that the alleged rape resulted in severe *mental* pain or suffering on the part of FWS-50.[176] In this regard, the Appellant first contends that FWS-50 did not claim to have been inflicted with severe mental pain or suffering. Secondly, the Appellant seems to argue that, objectively, FWS-50 would not have experienced severe mental pain or suffering as a result of the alleged rape, as she had been raped on previous occasions by other perpetrators. Thirdly, the Appellant notes that two Defence expert witnesses testified that they did not find that the victims of the alleged rapes had suffered severe consequences. Finally, the Appellant states that the Prosecutor failed to prove beyond reasonable doubt that FWS-50 was inflicted with severe physical or mental pain or suffering. For these reasons, the Appellant Vukovi} contends that the first element of the crime of torture – the infliction of severe pain or suffering – is not met in his case and that the Trial Chamber erred in its application of the law and in finding him guilty of the crime of torture.[177]

137. The Appellants submit that they did not intend to inflict pain or suffering, rather that their aims were purely sexual in nature.[178] The Appellants, therefore, argue that the second element of the crime of torture – the deliberate nature of the act or omission – has not been proven in either of their cases.[179]

[172] *Ibid.*, para 6.25.
[173] *Vukovic* Appeal Brief, para 164.
[174] *Ibid.*, para 160.
[175] *Ibid.*, para 164.
[176] *Ibid.*
[177] *Ibid.*
[178] *Kunarac* Appeal Brief, para 122 and *Vukovic* Appeal Brief, para 166.
[179] *Vukovic* Appeal Brief, para 165 and *Kunarac* Appeal Brief, para 122.

138. Both Appellants deny having pursued any of the prohibited purposes listed in the definition of the crime of torture, in particular, the discriminatory purpose.[180] Kunarac further states that he did not have sexual relations with any of the victims in order to obtain information or a confession or to punish, intimidate or coerce the victim or a third person, or to discriminate on any ground whatsoever.[181] Vukovi} seeks to demonstrate that the Trial Chamber erred when it established that his acts were committed for a discriminatory purpose because the victim was Muslim.[182] Both Appellants thus conclude that the third constitutive element of the crime of torture – the pursuance of a prohibited purpose – was not established in their cases and that the Trial Chamber erroneously applied the law and committed an error in finding each guilty of the crime of torture.[183]

(b) The Respondent

139. The Respondent claims that the pain and suffering inflicted on FWS-50 through the Appellant Vukovi}'s sexual acts was established.[184] She asserts that, after leaving Fo~a, FWS-50 went to a physician who noted physiological and psychological symptoms resulting from rape,[185] that she felt the need to go to a psychiatrist,[186] and that she testified to having experienced suffering and pain when orally raped by Vukovi} in Buk Bijela.[187]

140. The Respondent asserts that the crime of torture, as defined by customary international law, does not require that the perpetrator committed the act in question with the intent to inflict severe physical or mental suffering, but rather that the perpetrator committed an intentional act for the purpose of obtaining information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate on any ground whatsoever, and that, as a consequence, the victim suffered. There is thus no need to establish that the Appellants committed such acts with the knowledge or intention that those acts would cause severe pain or suffering.[188]

141. According to the Respondent and as noted by the Trial Chamber,[189] there is no requirement under customary international law for the act of the perpetrator to be committed *solely* for one of the prohibited purposes listed in the definition of torture.[190] The Respondent also claims that the

[180] *Kunarac* Appeal Brief, para 123 and *Vukovic* Appeal Brief, para 166.
[181] *Kunarac* Appeal Brief, para 123.
[182] *Vukovic* Appeal Brief, para 166.
[183] *Ibid*., para 167.
[184] Prosecution Respondent's Brief, para 3.5.
[185] *Ibid*., para 3.6.
[186] *Ibid*., para 3.7.
[187] Trial Transcript, T 1294, quoted in Prosecution Respondent's Brief, para 3.8.
[188] Prosecution Respondent's Brief, para 3.10.
[189] Trial Judgement, para 816.
[190] Prosecution Respondent's Brief, para 3.13.

Trial Chamber reasonably concluded that the Appellant Vukovic intended to discriminate against his victim because she was Muslim.[191] She further submits that, in this case, all the acts of torture could be considered to be discriminatory, based on religion, ethnicity or sex.[192] Moreover, all the acts of sexual torture perpetrated on the victims resulted in their intimidation or humiliation.[193]

2. Discussion

(a) The Definition of Torture by the Trial Chamber

142. With reference to the Torture Convention [194] and the case-law of the Tribunal and the ICTR, the Trial Chamber adopted a definition based on the following constitutive elements: [195]

> (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
>
> (ii) The act or omission must be intentional.
>
> (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.

143. The Trial Chamber undertook a comprehensive study of the crime of torture, including the definition which other Chambers had previously given,[196] and found the Appellant Kunarac[197] and the Appellant Vukovi}[198] guilty of the crime of torture. The Trial Chamber did not, however, have recourse to a decision of the Appeals Chamber rendered seven months earlier[199] which addressed the definition of torture.[200]

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[191] *Ibid.*

[192] Prosecution Conso lidated Respondent's Brief, para 6.145. According to the Prosecutor, the evidence, in particular the discriminatory statements, establish that FWS-75 was tortured with the purpose of humiliating her because she was a Muslim woman: see Prosecution Consolidated Respondent's Brief, para 6.146.

[193] Prosecution Consolidated Respondent's Brief, para 6.145.

[194] Article 1 of the Torture Convention: "For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[195] Trial Judgement, para 497.

[196] *Ibid.,* paras 465-497. The Chamber concurs with, in particular, the quite complete review carried out in the ^*elebi}i* and *Furund`ija* cases where torture was not prosecuted as a crime against humanity.

[197] Counts 1 (crime against humanity), 3 and 11 (violation of the laws or customs of war), Trial Judgement, para 883.

[198] Counts 33 (crime against humanity) and 35 (violation of the laws or customs of war), Trial Judgement, para 888.

[199] *Furund`ija* Appeal Judgement.

[200] In the *Aleksovski* Appeal Judgement at para 113 it was stated "that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers."

144. The Appeals Chamber largely concurs with the Trial Chamber's definition but wishes to hold the following.

145. First, the Appeals Chamber wishes to provide further clarification as to the nature of the definition of torture in customary international law as it appears in the Torture Convention, in particular with regard to the participation of a public official or any other person acting in a non-private capacity. Although this point was not raised by the parties, the Appeals Chamber finds that it is important to address this issue in order that no controversy remains about this appeal or its consistency with the jurisprudence of the Tribunal.

146. The definition of the crime of torture, as set out in the Torture Convention, may be considered to reflect customary international law.[201] The Torture Convention was addressed to States and sought to regulate their conduct, and it is only for that purpose and to that extent that the Torture Convention deals with the acts of individuals acting in an official capacity. Consequently, the requirement set out by the Torture Convention that the crime of torture be committed by an individual acting in an official capacity may be considered as a limitation of the engagement of States; they need prosecute acts of torture only when those acts are committed by "a public official...or any other person acting in a non-private capacity." So the Appeals Chamber in the *Furund`ija* case was correct when it said that the definition of torture in the Torture Convention, inclusive of the public official requirement, reflected customary international law.[202]

147. Furthermore, in the *Furund`ija* Trial Judgement, the Trial Chamber noted that the definition provided in the Torture Convention related to "the purposes of ?the? Convention".[203] The accused in that case had not acted in a private capacity, but as a member of armed forces during an armed conflict, and he did not question that the definition of torture in the Torture Convention reflected customary international law. In this context, and with the objectives of the Torture Convention in mind, the Appeals Chamber in the *Furund`ija* case was in a legitimate position to assert that "at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.*, as a de facto organ of a State or any other authority-wielding

[201] See *Furund`ija* Appeal Judgement, para 111; ^*elebi}i* Trial Judgement, para 459; *Furund`ija* Trial Judgement, para 161 and Trial Judgement, para 472. The ICTR comes to the same conclusion: see *Akayesu* Trial Judgement, para 593. It is interesting to note that a similar decision was rendered very recently by the German Supreme Court (BGH St volume 46, p 292, p 303).

[202] *Furund`ija* Appeal Judgement, para 111: "The Appeals Chamber supports the conclusion of the Trial Chamber that "there is now general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention ?*Furund`ija* Trial Judgement, para 161g and takes the view that the definition given in Article 1 ?of the said Conventiong reflects customary international law."

[203] *Furund`ija* Trial Judgement, para 160, quoting Article 1 of the Torture Convention.

entity".[204] This assertion, which is tantamount to a statement that the definition of torture in the Torture Convention reflects customary international law as far as the obligation of States is concerned, must be distinguished from an assertion that this definition wholly reflects customary international law regarding the meaning of the crime of torture generally.

148. The Trial Chamber in the present case was therefore right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention. However, the Appeals Chamber notes that the Appellants in the present case did not raise the issue as to whether a person acting in a private capacity could be found guilty of the crime of torture; nor did the Trial Chamber have the benefit of argument on the issue of whether that question was the subject of previous consideration by the Appeals Chamber.

(b) The Requirement of Pain and Suffering

149. Torture is constituted by an act or an omission giving rise to "severe pain or suffering, whether physical or mental", but there are no more specific requirements which allow an exhaustive classification and enumeration of acts which may constitute torture. Existing case-law has not determined the absolute degree of pain required for an act to amount to torture.

150. The Appeals Chamber holds that the assumption of the Appellants that suffering must be visible, even long after the commission of the crimes in question, is erroneous. Generally speaking, some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.[205]

151. Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.[206] The Appeals Chamber thus holds that the severe pain or suffering, whether physical

[204] *Furund`ija* Appeal Judgement, para 111, citing *Furund`ija* Trial Judgement, para 162.

[205] See Commission on Human Rights, Forty-eighth session, Summary Record of the 21st Meeting, 11 February 1992, Doc. E/CN.4/1992/SR.21, 21 February 1992, para 35: "Since it was clear that rape or other forms of sexual assault against women held in detention were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being, they accordingly constituted an act of torture." Other Chambers of this Tribunal have also noted that in some circumstances rape may constitute an act of torture: *Furund`ija* Trial Judgement, paras 163 and 171 and *^elebi}i* Trial Judgement, paras 475-493.

[206] See *^elebi}i* Trial Judgement, paras 480 and following, which quotes in this sense reports and decisions of organs of the UN and regional bodies, in particular, the Inter-American Commission on Human Rights and the European Court of Human Rights, stating that rape may be a form of torture.

or mental, of the victims cannot be challenged and that the Trial Chamber reasonably concluded that that pain or suffering was sufficient to characterise the acts of the Appellants as acts of torture. The Appellants' grounds of appeal in this respect are unfounded and, therefore, rejected.

152. The argument that the Appellant Vukovic has not been charged with any act inflicting severe pain or suffering, whether physical or mental, is erroneous since he is charged, in paragraph 7.11 of Indictment IT-96-23/1, with the crime of torture arising from rape. Moreover, the fact alleged in the Appeal Brief, that Indictment IT-96-23/1 does not refer to the use of physical force, does not mean that there was none.

(c) Subjective Elements

153. The Appellants argue that the intention of the perpetrator was of a sexual nature, which, in their view, is inconsistent with an intent to commit the crime of torture.[207] In this respect, the Appeals Chamber wishes to assert the important distinction between "intent" and "motivation". The Appeals Chamber holds that, even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims. The Appeals Chamber concurs with the findings of the Trial Chamber that the Appellants did intend to act in such a way as to cause severe pain or suffering, whether physical or mental, to their victims, in pursuance of one of the purposes prohibited by the definition of the crime of torture, in particular the purpose of discrimination.

154. The Appellant Kunarac claims that the requisite intent for torture, alleged by the Prosecutor,[208] has not been proven.[209] Vukovi} also challenges the discriminatory purpose ascribed to his acts.[210] The Appeals Chamber finds that the Appellants have not demonstrated why the conclusions of the Trial Chamber on this point are unreasonable or erroneous. The Appeals Chamber considers that the Trial Chamber rightly concluded that the Appellants deliberately committed the acts of which they were accused and did so with the intent of discriminating against

[207] Kunarac Appeal Brief para 122 and Vukovic Appeal Brief, para 165.
[208] Prosecution Consolidated Respondent's Brief, para 6.145.
[209] *Kunarac* and *Kova~* Reply Brief, paras 6.47-6.48. According to the Appellant Kunarac, it is not because the victim is Muslim or because she is a woman that discrimination was proved in general: see *Kunarac* Appeal Brief, para 123 and *Kunarac* and *Kova}* Reply Brief, para 6.49.

their victims because they were Muslim. Moreover, the Appeals Chamber notes that in addition to a discriminatory purpose, the acts were committed against one of the victims with the purpose of obtaining information.[211] The Appeals Chamber further finds that, in any case, all acts were committed for the purpose of intimidating or coercing the victims.

155. Furthermore, in response to the argument that the Appellant's avowed purpose of sexual gratification is not listed in the definition of torture, the Appeals Chamber restates the conclusions of the Trial Chamber[212] that acts need not have been perpetrated solely for one of the purposes prohibited by international law. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial.

156. The Appeals Chamber thus finds that the legal conclusions and findings of the Trial Chamber are well-founded and rejects all grounds of appeal relating to the crime of torture.

D. Definition of Outrages upon Personal Dignity (Radomir Kova~)

1. Submissions of the Parties

(a) The Appellant (Kovac)

157. The Appellant Kovac submits that, since every humiliating or degrading act is not necessarily an outrage upon personal dignity, the acts likely to be outrages upon personal dignity must be defined, and he further argues that the Trial Chamber did not do so.[213]

158. Moreover, the Appellant asserts that to find a person guilty of outrages upon personal dignity, a specific intent to humiliate or degrade the victim must be established.[214] In his opinion, the Trial Chamber did not prove beyond any reasonable doubt that he acted with the intention to humiliate his victims, as his objective was of an exclusively sexual nature.[215]

(b) The Respondent

159. In response to the Appellant's claim that the Trial Chamber did not state which acts constituted outrages upon personal dignity, the Respondent recalls that the Trial Chamber

[210] *Vukovic* Appeal Brief, para 166.
[211] In the case of FWS-183: see Trial Judgement, paras 341 and 705-715.
[212] Trial Judgement, paras 486 and 654.
[213] *Kovac* Appeal Brief, paras 145 and 150.
[214] *Ibid.*, para 145.

considered that it had been proved beyond any reasonable doubt that, during their detention in Kova~'s apartment, the victims were repeatedly raped, humiliated and degraded.[216] That the victims were made to dance naked on a table, that they were "lent" and sold to other men and that FWS-75 and FWS-87 were raped by Kova~ while he was playing "Swan Lake" were all correctly characterised by the Trial Chamber as outrages upon personal dignity.

160. As to the requirement of specific intent, the Respondent, relying on the case-law of the Tribunal, asserts that the perpetrator of the crime of outrages upon personal dignity must only be aware that his act or omission could be perceived by the victim as humiliating or degrading. The perpetrator need not know the actual consequences of his act, merely the "possible" consequences of the act or omission in question. Therefore, the Respondent submits that the Trial Chamber correctly concluded that it was sufficient that Kova~ knew that his act or omission might have been perceived by his victims as humiliating or degrading.

2. Discussion

161. The Trial Chamber ruled that the crime of outrages upon personal dignity requires:[217]

> (i) that the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and (ii) that he knew that the act or omission could have that effect.

(a) Definition of the Acts which may Constitute Outrages upon Personal Dignity

162. Contrary to the claims of the Appellant, the Appeals Chamber considers that the Trial Chamber was not obliged to define the specific acts which may constitute outrages upon personal dignity. Instead it properly presented the criteria which it used as a basis for measuring the humiliating or degrading character of an act or omission. The Trial Chamber, referring to the *Aleksovski* case, stated that the humiliation of the victim must be so intense that any reasonable person would be outraged.[218] In coming to its conclusion, the Trial Chamber did not rely only on the victim's purely subjective evaluation of the act to establish whether there had been an outrage upon personal dignity, but used objective criteria to determine when an act constitutes a crime of outrages upon personal dignity.

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[215] *Ibid.*, para 146.
[216] Prosecution Consolidated Respondent's Brief, para 5.141.
[217] Trial Judgement, para 514.
[218] *Aleksovski* Trial Judgement, para 56, quoted in Trial Judgement, para 504.

163. In explaining that outrages upon personal dignity are constituted by "any act or omission which would be *generally* considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity",[219] the Trial Chamber correctly defined the objective threshold for an act to constitute an outrage upon personal dignity. It was not obliged to list the acts which constitute outrages upon personal dignity. For this reason, this ground of appeal is dismissed.

(b) *Mens rea* for the Crime of Outrages upon Personal Dignity

164. According to the Trial Chamber, the crime of outrages upon personal dignity requires that the accused knew that his act or omission *could* cause serious humiliation, degradation or otherwise be a serious attack on human dignity.[220] The Appellant, however, asserts that this crime requires that the accused knew that his act or omission *would have* such an effect.[221]

165. The Trial Chamber carried out a detailed review of the case-law relating to the *mens rea* of the crime of outrages upon personal dignity.[222] The Trial Chamber was never directly confronted with the specific question of whether the crime of outrages upon personal dignity requires a specific intent to humiliate or degrade or otherwise seriously attack human dignity. However, after reviewing the case-law, the Trial Chamber properly demonstrated that the crime of outrages upon personal dignity requires only a knowledge of the "possible" consequences of the charged act or omission. The relevant paragraph of the Trial Judgement reads as follows: [223]

> As the relevant act or omission for an outrage upon personal dignity is an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, an accused must know that his act or omission is of that character – i.e., that it could cause serious humiliation, degradation or affront to human dignity. This is not the same as requiring that the accused knew of the *actual* consequences of the act.

166. Since the nature of the acts committed by the Appellant against FWS-75, FWS-87, A.S. and A.B. undeniably reaches the objective threshold for the crime of outrages upon personal dignity set out in the Trial Judgement, the Trial Chamber correctly concluded that any reasonable person would have perceived his acts "to cause serious humiliation, degradation or otherwise be a serious attack on human dignity".[224] Therefore, it appears highly improbable that the Appellant was not, at the very least, aware that his acts could have such an effect. Consequently this ground of appeal is rejected.

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[219] Trial Judgement, para 507 (emphasis added).
[220] *Ibid.*, para 514.
[221] *Kovac* Appeal Brief, para 145.
[222] Trial Judgement, paras 508-514.

VI. CUMULATIVE CHARGING

167. The Appellants argue that they were inappropriately cumulatively charged. The Appeals Chamber has consistently rejected this argument and it is not necessary to rehearse this settled jurisprudence here.[225] These grounds of appeal are, hereby, rejected.

VII. CUMULATIVE CONVICTIONS

A. General Principles

168. The Appeals Chamber accepts the approach articulated in the *Celebici* Appeal Judgement, an approach heavily indebted to the *Blockburger* decision of the Supreme Court of the United States.[226] The Appeals Chamber held that: [227]

> fairness to the accused and the consideration that only distinct crimes justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.
>
> Where this test is not met, the Chamber must decide on the basis of the principle that the conviction under the more specific provision should be upheld.

169. Care, however, is needed in applying the *Celebici* test for, as Judges Hunt and Bennouna observed in their separate and dissenting opinion in the same case, cumulative convictions create "a very real risk of … prejudice" to the accused.[228] At the very least, such persons suffer the stigma inherent in being convicted of an additional crime for the same conduct. In a more tangible sense, there may be such consequences as losing eligibility for early release under the law of the state enforcing the sentence.[229] Nor is such prejudice cured, as the U.S. Supreme Court warned in

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[223] *Ibid*., para 512.
[224] *Ibid.*
[225] ^*elebi}i* Appeal Judgement, para 400.
[226] *Blockburger* v *United States*, 284 U.S. 299, 304 (1931) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.").
[227] ^*elebi}i* Appeal Judgement, paras 412-13. Hereinafter referred to as the ^*elebici* test.
[228] Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, ^*elebici* Appeal Judgement, para 23.
[229] *Ibid*.

Rutledge v *U.S.*,[230] by the fact that the second conviction's concomitant sentence is served concurrently.[231] On the other hand, multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct.[232]

170. Typically, the issue of multiple convictions or cumulative convictions arises in legal systems with a hierarchy of offences in which the more serious offences within a category require proof of an additional element or even require a specific *mens rea.* It is, however, an established principle of both the civil and common law that punishment should not be imposed for both a greater offence and a lesser included offence. Instead, the more serious crime subsumes the less serious (*lex consumens derogat legi consumptae*). The rationale here, of course, is that the greater and the lesser included offence constitute the same core offence, without sufficient distinction between them, even when the same act or transaction violates two distinct statutory provisions.[233] Indeed, it is not possible to commit the more serious offence without also committing the lesser included offence.[234]

171. In national laws, this principle is easier to apply because the relative gravity of a crime can normally be ascertained by the penalty imposed by the law. The Statute, however, does not provide a scale of penalties for the various crimes it proscribes. Nor does the Statute give other indications as to the relative gravity of the crimes. Indeed, the Tribunal has explicitly rejected a hierarchy of crimes, concluding instead that crimes against humanity are not inherently graver than war crimes.[235]

172. The ^e*lebi}i/Blockburger* test serves to identify distinct offences within this constellation of statutory provisions.[236] While subscribing to this test, the Appeals Chamber is aware that it is

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[230] *Rutledge* v *United States*, 517 U.S. 292, 116 S. Ct. 1241, 1248 (1996).
[231] *Ibid.*, citing *Ball* v *United States*, 470 U.S. 856, 865 (1985).
[232] See, e.g., Partial Dissenting Opinion of Judge Shahabuddeen, *Jelisi}* Appeal Judgement, para 34: "To record the full criminality of his conduct, it may be necessary to convict of all the crimes, overlapping in convictions being adjusted through penalty".
[233] See *supra* n 226.
[234] Black's Law Dictionary, s.v. *lesser included offense*: "One which is composed of some, but not all elements of a greater offense and which does not have any element not included in greater offense so that it is impossible to commit greater offense without necessarily committing the lesser offense." (6th ed., St. Paul, Minn. 1990)
[235] *Tadi}* Sentencing Appeal Judgement, para 69: "After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case".
[236] With regard to Articles 3 and 5 of the Statute, the Appeals Chamber held in the *Jelisic* Appeal Judgement that, as each has an element of proof of fact not required by the other, neither was a lesser included offence of the other (para 82).

deceptively simple. In practice, it is difficult to apply in a way that is conceptually coherent and promotes the interests of justice.

173. For this reason, the Appeals Chamber will scrutinise with the greatest caution multiple or cumulative convictions. In so doing, it will be guided by the considerations of justice for the accused: the Appeals Chamber will permit multiple convictions only in cases where the same act or transaction clearly violates two distinct provisions of the Statute and where each statutory provision requires proof of an additional fact which the other does not.

174. The Appeals Chamber wishes to emphasise that whether the same conduct violates two distinct statutory provisions is a question of law. Nevertheless, the Chamber must take into account the entire situation so as to avoid a mechanical or blind application of its guiding principles.

B. The Instant Convictions

1. Inter-Article Convictions under Articles 3 and 5 of the Statute

175. The Appeals Chamber will now consider the argument of the Appellants that the Trial Chamber erred in convicting them for the same conduct under Articles 3 and 5 of the Statute.

176. The Appeals Chamber agrees with the Trial Chamber that convictions for the same conduct under Article 3 of the Statute (violations of the laws or customs of war) and Article 5 of the Statute (crimes against humanity) are permissible and dismisses the appeals on this point.[237] Applying the *^elebi}i* test, subsequent judgements of the Appeals Chamber have consistently held that crimes against humanity constitute crimes distinct from crimes against the laws or customs of war in that each contains an element that does not appear in the other.[238] The Appeals Chamber sees no reason to depart from this settled jurisprudence.

177. As a part of this analysis, the Appeals Chamber reaffirms that the legal prerequisites describing the circumstances of the relevant offences as stated in the *chapeaux* of the relevant Articles of the Statute constitute elements which enter the calculus of permissibility of cumulative convictions.[239] The contrary view would permit anomalous results not intended by the Statute.[240]

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[237] Trial Judgement, para 556.

[238] See, e.g., *Kupre{ki}* Appeal Judgement, para 388 (holding that Trial Chamber erred in acquitting defendants on counts under Article 5 of the Statute) and *Jelisi}* Appeal Judgement, para 82 (noting that each of Articles 3 and 5 of the Statute "has a special ingredient not possessed by the other").

[239] The Appeals Chamber notes that the International Criminal Court's Preparatory Committee's Elements of Crimes incorporates the *chapeaux* into the substantive definitions of the criminal offences. Although the Appeals Chamber

178. The Appeals Chamber notes that the permissibility of multiple convictions ultimately turns on the intentions of the lawmakers.[241] The Appeals Chamber believes that the Security Council intended that convictions for the same conduct constituting distinct offences under several of the Articles of the Statute be entered. Surely the Security Council, in promulgating the Statute and listing in it the principal offences against International Humanitarian Law, did not intend these offences to be mutually exclusive. Rather, the *chapeaux* elements disclose the animating desire that all species of such crimes be adequately described and punished.

2. Intra-Article Convictions under Article 5 of the Statute

(a) Rape and Torture

179. The Appeals Chamber will now consider the Appellants' arguments regarding intra-Article convictions. The Appellants contend that the Trial Chamber erred by entering convictions for both torture under Article 5(f) and rape under Article 5(g) of the Statute on the theory that neither the law nor the facts can reasonably be interpreted to establish distinct crimes. The Trial Chamber found that the crimes of rape and torture each contain one materially distinct element not contained in the other, making convictions under both crimes permissible.[242] As its earlier discussion of the offences of rape and torture make clear, the Appeals Chamber agrees. The issue of cumulative convictions hinges on the definitions of distinct offences under the Statute which are amplified in the jurisprudence of the Tribunal. That torture and rape each contain a materially distinct element not contained by the other disposes of this ground of appeal. That is, that an element of the crime of rape is penetration, whereas an element for the crime of torture is a prohibited purpose, neither element being found in the other crime.

180. Nonetheless, the Appeals Chamber is bound to ascertain that each conviction fits the crime on the facts of the case as found by the Trial Chamber.[243] The Appellants contend that their object

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does not rely on statutory schemes created after the events underlying this case, the Appeals Chamber observes that the ICC definitions were intended to restate customary international law.

[240] For example, were the Appeals Chamber to disregard the *chapeaux*, the murder of prisoners of war charged under Article 2 of the Statute could not also, in special circumstances, be considered a genocidal killing under Article 4 of the Statute. The same is true of convictions for crimes against humanity (Article 5 of the Statute) and convictions for crimes against the laws or customs of war (Article 3 of the Statute). In all of the above, different *chapeaux*-type requirements constitute distinct elements which may permit the Trial Chamber to enter multiple convictions.

[241] See *Blockburger* v *United States*, *supra* n 226. See also *Rutledge* v *United States, supra* n 230 (courts assume, absent specific legislative directive, that lawmakers did not intend to impose two punishments for the same offence); *Missouri* v *Hunter*, 459 U.S. 359, 366 (1983); *Whalen* v *United States*, 445 U.S. 684, 691-2 (1980) and *Ball* v *United States*, *supra* n 231.

[242] See Trial Judgement, para 557.

[243] The Appeals Chamber defers to the Trial Chamber's findings of fact. The Appeals Chamber will disturb these findings only if no reasonable trier of fact could have so found. See *Kupre{ki}* Appeal Judgement, para 41; *Tadi}*

was sexual satisfaction, not infliction of pain or any other prohibited purpose as defined in the offence of torture. As has been discussed,[244] the Appeals Chamber does not agree with the Appellants' limited vision of the crime of torture. It has rejected the argument that a species of specific intent is required.

181. In the ^*elebici* Trial Judgement, the Trial Chamber considered the issue of torture through rape.[245] The Appeals Chamber overturned the Appellant's convictions under Article 3 of the Statute as improperly cumulative in relation to Article 2 of the Statute, but the Trial Chamber's extensive analysis of torture and rape remains persuasive. Grounding its analysis in a thorough survey of the jurisprudence of international bodies, the Trial Chamber concluded that rape may constitute torture. Both the Inter-American Commission on Human Rights and the European Court of Human Rights have found that torture may be committed through rape. And the United Nations Special Rapporteur on Torture listed forms of sexual assault as methods of torture.[246]

182. For rape to be categorised as torture, both the elements of rape and the elements of torture must be present. Summarising the international case-law, the Trial Chamber in the ^*elebici* case concluded that "rape involves the infliction of suffering at a requisite level of severity to place it in the category of torture".[247] By way of illustration, the Trial Chamber discussed the facts of two central cases, *Fernando and Raquel Mejía* v *Peru* from the Inter-American Commission and *Aydin* v *Turkey* from the European Commission for Human Rights.[248]

183. *Mejía* v *Peru* involved the rape of a woman shortly after her husband was abducted by soldiers. Peruvian soldiers entered the Mejías' home and abducted Fernando Mejía.[249] One soldier then re-entered the house, demanded that Raquel Mejía find her husband's identity documents, accused her of being a subversive and then raped her.[250] The Inter-American Commission held that

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Appeal Judgement, para 64 and *Aleksovski* Appeal Judgement, para 63. The Appeals Chamber in the *Kupre{ki}* case recently clarified the burden on those contesting a Trial Chamber's factual findings: "The appellant must establish that the error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in a 'grossly unfair outcome'" (para 29).

244 See *supra* 'Definition of the Crime of Torture (Dragoljub Kunarac and Zoran Vukovi})'.

245 ^*elebi}i* Trial Judgement, paras 475-496.

246 *Ibid.,* para 491, quoting *supra* n 205, para 35. The United Nations Special Rapporteur on Torture introduced his 1992 Report to the Commission on Human Rights by stating: "Since it was clear that rape or other forms of sexual assault against women held in detention were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being, they accordingly constituted an act of torture." (para 35).

247 ^*elebi}i* Trial Judgement, para 489.

248 *Fernando and Raquel Mejía* v *Peru*, Case No. 10,970, Judgement of 1 March 1996, Report No. 5/96, Inter-American Yearbook on Human Rights, 1996, p 1120 and *Aydin* v *Turkey*, Opinion of the European Commission of Human Rights, 7 March 1996, reprinted in European Court of Human Rights, ECHR 1997-VI, p 1937, paras 186 and 189.

249 *Fernando and Raquel Mejía* v *Peru*, *supra* n 248, p 1120.

250 *Ibid.,* p 1124.

Mejía's rape constituted torture. In analysing the case, the Trial Chamber in the ^*elebici* case observed that "one must not only look at the physical consequences, but also at the psychological and social consequences of the rape".[251]

184. In *Aydin* v *Turkey*, the European Commission of Human Rights considered the case of a woman raped in a police station. Prior to referring the case to the European Court of Human Rights, the Commission stated: [252]

> it appears to be the intention that the Convention with its distinction between "torture" and "inhuman and degrading treatment" should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering…
>
> In the Commission's opinion, the nature of such an act, which strikes at the heart of the victim's physical and moral integrity, must be characterised as particularly cruel and involving acute physical and psychological suffering. This is aggravated when committed by a person in authority over the victim. Having regard therefore to the extreme vulnerability of the applicant and the deliberate infliction on her of serious and cruel ill-treatment in a coercive and punitive context, the Commission finds that such ill-treatment must be regarded as torture within the meaning of Article 3 of the Convention.

"Against this background," the European Court of Human Rights concluded in its turn, "the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention".[253]

185. In the circumstances of this case, the Appeals Chamber finds the Appellants' claim entirely unpersuasive. The physical pain, fear, anguish, uncertainty and humiliation to which the Appellants repeatedly subjected their victims elevate their acts to those of torture. These were not isolated instances. Rather, the deliberate and co-ordinated commission of rapes was carried out with breathtaking impunity over a long period of time. Nor did the age of the victims provide any protection from such acts. (Indeed, the Trial Chamber considered the youth of several of the victims as aggravating factors.) Whether rousted from their unquiet rest to endure the grim nightly ritual of selection or passed around in a vicious parody of processing at headquarters, the victims endured repeated rapes, implicating not only the offence of rape but also that of torture under Article 5 of the Statute. In the egregious circumstances of this case, the Appeals Chamber finds that all the elements of rape and torture are met. The Appeals Chamber rejects, therefore, the appeal on this point.

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[251] ^*elebi}i* Trial Judgement, para 486.

[252] *Aydin* v *Turkey*, Opinion of the European Commission of Human Rights, *supra* n 248, paras 186 (footnote omitted) and 189.

[253] *Aydin* v *Turkey*, European Court of Human Rights, no. 57/1996/676/866, Judgement of 22 September 1997, ECHR 1997-VI, para 86.

(b) Rape and Enslavement

186. Equally meritless is the Appellants' contention that Kunarac's and Kovac's convictions for enslavement under Article 5(c) and rape under Article 5(g) of the Statute are impermissibly cumulative. That the Appellants also forced their captives to endure rape as an especially odious form of their domestic servitude does not merge the two convictions. As the Appeals Chamber has previously explained in its discussion of enslavement, it finds that enslavement, even if based on sexual exploitation, is a distinct offence from that of rape.[254] The Appeals Chamber, therefore, rejects this ground of appeal.

3. Article 3 of the Statute

(a) Scope of Article 3 of the Statute

187. The Appellants argue that Article 3 of the Statute does not apply to their actions because it is concerned only with battlefield violations (Hague law) and not with the protection of individual physical security. That Article 3 of the Statute incorporates customary international law, particularly Common article 3 of the Geneva Conventions, is clear from the discussions on the Statute in the Security Council on 25 May 1993, and has since then been confirmed in the consistent jurisprudence of the Tribunal.[255] Alone among the Articles of the Statute, Article 3 is illustrative, serving as a residual clause. It is not necessary to rehearse the arguments here and, therefore, this ground of appeal is rejected.

(b) Intra-Article Convictions under Article 3 of the Statute

188. The Appellants' argument against convictions for rape and torture are made also with regard to intra-Article convictions under Article 3 of the Statute. As with intra-Article convictions for rape and torture under Article 5 of the Statute, the Appellants argue that in the "absence of described distinct infliction of physical or mental pain… the infliction of physical or mental pain is brought down only to the very act of sexual intercourse, without the consent of the victim" and that the convicted person's conduct "can not be deemed to be both the case of a criminal offence of rape and the criminal offence of torture, because one act excludes the other".[256]

[254] See *supra* 'Definition of the Crime of Enslavement'.
[255] *Tadic* Jurisdiction Decision, para 91; ^*elebi}i* Appeal Judgement, para 133 and *Furund`ija* Trial Judgement, paras 131-133.
[256] *Kunarac* Appeal Brief, paras 144-145.

189. The Appeals Chamber has already explained in the context of intra-Article 5 crimes why, in the circumstances of this case, the rapes and sexual abuse also amount to torture and that rape and torture each contain an element that the other does not. This holds true for the present discussion. However, in the context of cumulative convictions under Article 3 of the Statute, which imports Common article 3 of the Geneva Conventions, the Appeals Chamber acknowledges a specific problem, namely that Common article 3 refers to "cruel treatment and torture" (3(1)(a)), and "outrages upon personal dignity, in particular humiliating and degrading treatment" (3(1)(c)), but does not refer to rape.

190. The Appeals Chamber finds the invocation and the application of Common article 3, by way of a *renvoi* through Article 3 of the Statute, entirely appropriate. The Trial Chamber attempted to ground the rape charges in Common article 3 by reference to outrages upon personal dignity.[257] Although the Appeals Chamber agrees that rape may be charged in this manner, it notes that grounding the charge in Common article 3 imposes certain limitations with respect to cumulative convictions. This is because, where it is attempted to charge rape as an outrage upon personal dignity, the rape is only evidence of the outrage; the substantial crime is not rape but the outrage occasioned by the rape. This leaves open the argument that an outrage upon personal dignity is substantially included in torture, with the consequence that convictions for both may not be possible. However, as will be shown below, rape was not in fact charged as an outrage upon personal dignity in this case.

191. Where the Trial Chamber (or indeed the Prosecutor) chooses to invoke Common article 3, it is bound by the text. In other words, each offence must be hanged, as it were, on its own statutory hook. In the present case, a statutory hook for rape is absent in Common article 3. The Indictments acknowledge the absence of an express statutory provision. The Prosecutor charged Kunarac, for instance, with both torture and rape under Article 3 of the Statute but the language of the counts diverges:

> Count 3: Torture, a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable under Article 3 of the Statute of the Tribunal and recognised by Common Article 3(1)(a)(torture) of the Geneva Conventions.
>
> Count 4: Rape, a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable under Article 3 of the Statute of the Tribunal.

In the case of torture, there is an express statutory provision, while in the case of rape, there is not.

[257] Trial Judgement, para 436.

192. Whether rape is considered to constitute torture under Common article 3(1)(a) or an outrage upon personal dignity under Common article 3(1)(c) depends on the egregiousness of the conduct. The Appeals Chamber notes that in the *Furund`ija* Trial Judgement, the Trial Chamber found sexual abuse to constitute an outrage upon personal dignity under Article 3 of the Statute (incorporating Common article 3).[258] The Trial Chamber pronounced the accused guilty of one criminal offence, outrages upon personal dignity, including rape. However, whether one regards rape as an instrument through which torture is committed (Common article 3(1)(a)) or one through which outrages upon personal dignity are committed (Common article 3(1)(c)), in either case, a separate conviction for rape is not permitted under Common article 3, given the absence of a distinct statutory hook for rape.

193. This statutory limitation does not, however, dispose of the matter. As the Appeals Chamber has noted, the Indictments charged Kunarac and Vukovic with rape under Article 3 of the Statute without reference to Common article 3. In its discussion of the charges under Article 3 of the Statute, the Trial Chamber noted that the Prosecutor "submitted that the basis for the rape charges under Article 3 lies in both treaty and customary international law, including common Article 3".[259] Notwithstanding its exhaustive analysis of Common article 3 in connection to the charged offences under Article 3 of the Statute, the Trial Chamber's disposition makes no mention of Common article 3.

194. Article 3 of the Statute, as the Appeals Chamber has previously observed, also prohibits other serious violations of customary international law. The Appeals Chamber in the *Tadi}* Jurisdiction Decision outlined four requirements to trigger Article 3 of the Statute:[260]

> (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature…; (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values…; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

Therefore, so long as rape is a "serious" war crime under customary international law entailing "individual criminal responsibility," separate convictions for rape under Article 3 of the Statute and torture under that Article, by reference to Common article 3(1)(a), are not impermissibly cumulative.

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[258] *Furund`ija* Trial Judgement, paras 272 and 274-275.
[259] Trial Judgement, para 400. On appeal, the Prosecution invoked the *Tadi}* Jurisdiction Decision to explain the broad scope of Article 3 of the Statute. See Prosecution Consolidated Respondent's Brief, para 2.4.
[260] *Tadic* Jurisdiction Decision, para 94.

195. In keeping with the jurisprudence of the Tribunal, the Appeals Chamber concludes that rape meets these requirements and, therefore, constitutes a recognised war crime under customary international law, which is punishable under Article 3 of the Statute.[261] The universal criminalisation of rape in domestic jurisdictions, the explicit prohibitions contained in the fourth Geneva Convention and in the Additional Protocols I and II, and the recognition of the seriousness of the offence in the jurisprudence of international bodies, including the European Commission on Human Rights and the Inter-American Commission on Human Rights, all lead inexorably to this conclusion.[262]

196. In summary, under Article 3 of the Statute, a conviction for rape can be cumulated with a conviction for torture for the same conduct. A question of cumulativeness assumes the validity of each conviction standing independently; it asks only whether both convictions may be made where they relate to the same conduct. The answer to that question will depend on whether each of the two crimes has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. Without being exhaustive and as already noted, an element of the crime of rape is penetration, whereas an element for the crime of torture is a prohibited purpose, neither element being found in the other crime. From this, it follows that cumulative convictions for rape and torture under Article 3 of the Statute are permissible though based on the same conduct. Furthermore, as already explained in

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[261] See *^elebi}i* Trial Judgement, para 476 ("There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law."); *Furund`ija* Trial Judgement, paras 169-170 ("It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators…The right to physical integrity is a fundamental one, and is undeniably part of customary international law.") and Trial Judgement, para 408 ("In particular, rape, torture and outrages upon personal dignity, no doubt constituting serious violations of common Article 3, entail criminal responsibility under customary international law."). See also *Akayesu* Trial Judgement, para 596.

[262] See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted on 8 June 1977, Articles 76(1), 85 and 112; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted on 8 June 1977, Art. 4(2)(e).
After the Second World War, rape was punishable under the Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes and Crimes Against Humanity for Germany. Additionally, high-ranking Japanese officials were prosecuted for permitting widespread rapes: Charter of the International Military Tribunal for the Far East, 19 January 1946, amended 26 April 1946. TIAS No. 1589, 4 Bevans 20. See also *In re Yamashita*, 327 U.S. 1, 16 (1946), denying General Yamashita's petition for writs of habeas corpus and prohibition. In an *aide-memoire* of 3 December 1992, the International Committee of the Red Cross declared that the rape is covered as a grave breach (Article 147 of the fourth Geneva Convention). The United States independently took a comparable position. See also *Cyprus* v *Turkey*, 4 EHHR 482 (1982) (Turkey's failure to prevent and punish rapes of Cypriot woman by its troops).
See *Aydin* v *Turkey*, *supra* n 253, para 83:"?Rgape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally." See also *Mejía* v *Peru*, *supra* n 248, p 1176: "Rape causes physical and mental

paragraphs 180 to 185 of this Judgement relating to the question of cumulation in respect of intra-Article 5 crimes, the rapes and sexual abuses amount to torture in the circumstances of this case. The Appeals Chamber, therefore, dismisses the Appellants' grounds of appeal relating to cumulative convictions with regard to the intra-Article 3 convictions.

4. The Appellant Kovac's Separate Ground of Appeal

197. The Appellant Kovac argues that he was impermissibly convicted of both rape and outrages upon personal dignity under Article 3 of the Statute. The Appeals Chamber rejects the argument, considering that the Trial Chamber did not base its convictions on the same conduct.[263]

198. All other grounds of appeal relating to cumulative convictions are rejected.

suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant".

[263] Trial Judgement, para 554.

VIII. ALLEGED ERRORS OF FACT (DRAGOLJUB KUNARAC)

A. Alibi

1. Submissions of the Parties

(a) The Appellant (Kunarac)

199. The Appellant argues that the Trial Chamber erred in not accepting his alibi presented at trial in connection with the following periods: 7-21 July 1992 ("first period"); 23-26 July 1992 ("second period"); 27 July-1 August 1992 ("third period"); and 3-8 August 1992 ("fourth period").

200. As to the first and second periods, the Appellant alleges that he was "on war tasks" in the areas of Cerova Ravan[264] and Jabuka[265] respectively. As to the third period, the Appellant submits that he was first in the area of Dragocevo and Preljuca, and then, on 31 July, moved to the zone of Rogoj where he stayed until the evening of 2 August 1992 when, around 10 p.m., he arrived in Vele~evo in Foca.[266] Lastly, the Appellant affirms that during the fourth period he was "on the terrain in ?theg zone ?of theg Kalinovik-Rogoj mountain pass".[267]

201. The Appellant asserts that these submissions are supported by a number of Defence witnesses, including Vaso Blagojevic,[268] Gordan Mastilo, D.J., Radoslav Djurovic and D.E., and that the Trial Chamber erred in relying exclusively upon the Prosecutor's witnesses.[269]

202. Lastly, the Appellant adds that the Trial Chamber erred in finding that, on 2 August 1992, he took several women from Kalinovik and other women, namely FWS-75, FWS-87, FWS-50 and D.B., from the Partizan Sports Hall to the house at Ulica Osmana \iki}a no 16.[270] The Appellant asserts that on this day he was at the Rogoj pass.[271]

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[264] *Kunarac* Appeal Brief, para 93.
[265] *Ibid.*
[266] *Ibid.*
[267] *Ibid.*
[268] This witness claimed to have known the whereabouts of Kunarac at all times during the period of 23-26 July (Trial Judgement, para 598) and to have seen Kunarac around Cerova Ravan in the period between 7-21 July (Trial Judgement, para 605). However, the witness never claimed to have seen Kunarac around Cerova Ravan on 27 July, as held by the Trial Chamber (Trial Judgement, para 599).
[269] *Kunarac* Appeal Brief, para 93.
[270] *Ibid.*, para 55.
[271] *Ibid.*, para 54.

(b) The Respondent

203. The Respondent submits that the Trial Chamber correctly rejected Kunarac's alibi. The Respondent explains that the Trial Chamber carefully evaluated the evidence, including the testimony of Kunarac's witnesses and found several deficiencies therein. She recalls, *inter alia*, that the Trial Chamber stressed that Kunarac himself admitted to having had a role in the abduction of women from the Partizan Sports Hall, although he stated that this happened on 3 August and not on 2 August 1992. The Respondent concludes that Kunarac's submissions concerning the Trial Chamber's assessment of his alibi are unfounded and therefore should be rejected.

2. Discussion

204. At the outset, the Appeals Chamber observes that the Trial Chamber thoroughly and comprehensively dealt with the alibi put forward by Kunarac in connection with the aforementioned periods. The Appeals Chamber considers that the Trial Chamber conducted a careful analysis of the evidence before it and provided clearly articulated reasons. The Trial Chamber observed that the alibi did not cover all the periods alleged in Indictment IT-96-23.[272] It further noted that the alibi provided by some Defence witnesses "covered limited periods: hours, sometimes even a few minutes."[273] With regard to the third period, it found that the only witness providing evidence for the Defence was the accused himself.[274] The Trial Chamber stressed that Kunarac himself conceded that "he took FWS-87, D.B., FWS-50 and another girl from Partizan Sports Hall", although he claimed that this happened on 3 August and not 2 August 1992 as alleged in Indictment IT-96-23.[275] In light of the above and even though there were Defence witnesses who claimed to have known Kunarac's whereabouts during longer periods of time, the Trial Chamber came to the conclusion that "there is ?notg any reasonable possibility that Dragoljub Kunarac was away from the places where and when the rapes took place".[276]

205. The Appeals Chamber considers that by rejecting the alibi, the Trial Chamber came to a possible conclusion in the sense of one that a reasonable trier of fact could have come to. On appeal, the Appellant has simply attributed more credibility and importance to his witnesses than to those of the Prosecutor and this cannot form the basis of a successful objection.

[272] Trial Judgement, para 596.
[273] *Ibid.*, para 598.
[274] *Ibid.*, para 597.
[275] *Ibid.*, para 619.
[276] *Ibid.*, para 625.

206. In these circumstances, the Appeals Chamber finds no reason to disturb the findings of the Trial Chamber. Accordingly, this ground of appeal fails.

B. Convictions under Counts 1 to 4

1. Rapes of FWS-75 and D.B.

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

207. The Appellant challenges the Trial Chamber's findings that, at the end of July 1992, he took FWS-75 and D.B. to the house at Ulica Osmana \iki}a no 16, where he raped D.B. while a group of soldiers raped FWS-75.

208. First, the Appellant submits that the conviction against him cannot stand because of a material discrepancy between the date of the incident as found by the Trial Chamber ("at the end of July 1992")[277] and the date set out in paragraph 5.3 of Indictment IT-96-23 ("on or around 16 July 1992"). In particular, the Appellant claims that the date set out in Indictment IT-96-23 is so vague that it cannot be used to test the credibility of witnesses testifying about this incident.[278] He thus challenges the testimony of FWS-75 and D.B. on the basis of inconsistency as to the dates on which the incidents occurred.[279]

209. With regard to FWS-75, the Appellant argues that the witness contradicted herself in her testimony at trial. He asserts that FWS-75 initially declared that she was taken to the house at Ulica Osmana \iki}a no 16 by the Appellant, Gaga and Crnogorac some 5 or 6 days after her arrival at Partizan,[280] but subsequently stated that she was not taken there by the Appellant and raped by him until 15 days after her arrival at Partizan.[281]

210. In relation to D.B., the Appellant recalls that the witness testified that she was in the house in question on two occasions, the first of which was several days before the second occasion on 2 August 1992. The Appellant contends that if, as claimed by D.B., the first rape took place only several days before 2 August 1992, that rape could not have occurred on 16 July 1992 or "around

[277] *Ibid.*, para 637.
[278] Appeal Transcript, T 145.
[279] *Kunarac* Appeal Brief, para 37.
[280] *Ibid.*
[281] *Ibid.*

that date", as claimed by the Prosecutor.[282] Furthermore, based on D.B.'s statement to FWS-75 that she was at Ulica Osmana \iki}a no 16 on two occasions and was not raped on the first of those occasions in July 1992, the Appellant argues that D.B. could only have been raped during her second stay in the house in August 1992. However, if D.B. was raped in August, the incident ascribed to the Appellant under paragraph 5.3 of Indictment IT-96-23 must be the same as that described at paragraph 5.4 of that Indictment, which did indeed occur in August 1992. In this regard, the Appellant recalls that in his first interview he admitted to having had sexual intercourse with D.B. on 3 August 1992.[283]

211. Secondly, the Appellant argues that the Trial Chamber erred in finding that he possessed the requisite *mens rea* in relation to the rape of D.B.. The Appellant concedes that he had sexual intercourse with D.B. but denies being aware that D.B.'s consent was vitiated because of Gaga's threats,[284] and stresses that D.B. initiated the sexual contact with him and not *vice versa*, because, until that moment, he had no interest in having sexual intercourse with her.[285] Further, the Appellant alleges that the Trial Chamber erred in reaching the conclusion that he had committed the crimes with a discriminatory intent solely on the basis of the testimony of a single witness stating that, when he raped women, the Appellant told them that they would give birth to Serb babies or that they should "enjoy being fucked by a Serb".[286]

(ii) The Respondent

212. The Respondent rejects the Appellant's argument concerning the discrepancy between the date of the rape of FWS-75 in Indictment IT-96-23 and the date identified by the Trial Chamber. She contends that minor differences in time are irrelevant because the specific incident referred to in the relevant Indictment was proved and could not be mistaken for another incident on another date. Indeed, the incident described in paragraph 5.3 of the said Indictment relates to two victims and cannot be confused with that at paragraph 5.4 of the same Indictment, which relates to four victims.[287]

213. As to any inconsistencies between FWS-75's statement and her testimony, the Respondent submits that the Appellant has failed to establish that the alleged inconsistencies were so grave that

[282] *Ibid.*
[283] *Ibid.*
[284] *Ibid.*, para 38.
[285] Appeal Transcript, T 146.
[286] *Kunarac* Appeal Brief, para 46.
[287] Prosecution Consolidated Respondent's Brief, paras 6.23 and 6.24 and Appeal Transcript, T 308.

no reasonable Trial Chamber could have relied on FWS-75's evidence.[288] In the Respondent's view, the Trial Chamber correctly determined that any discrepancies were explained by the fact that FWS-75 was referring to events which had occurred 8 years before.[289] Analogously, the Respondent contends that the Trial Chamber's finding that the Appellant was aware that D.B. did not freely consent to the sexual intercourse was entirely reasonable due to the condition of captivity in which she was held.[290] The Respondent notes that the Appellant himself admitted to having had intercourse with D.B. and recalls, *inter alia*, the Appellant saying at trial: "I tried to pacify her, to convince her ?that there wasg no reason to be frightened".[291]

214. Finally, the Respondent recalls FWS-183's testimony that while a soldier was raping her after she had just been raped by the Appellant, "…he - Žaga ?the Appellant? was saying that I would have a son and that I would not know whose it was, but the most important thing was it would be a Serb child".[292] The Respondent submits that the evidence provides a firm basis for the Trial Chamber's finding that the Appellant committed crimes for a discriminatory purpose.

(b) Discussion

215. At the outset, the Appeals Chamber identifies the two core components of the Appellant's argument as follows. First, that there was a failure on the part of the Trial Chamber to indicate the precise dates of the rapes of FWS-75 and D.B., which impacts upon the credibility of those witnesses. Secondly, that the Prosecutor did not prove beyond reasonable doubt that the Appellant raped D.B., because the Appellant was not aware that D.B. had not consented to the sexual intercourse. These contentions will be dealt with in turn.

216. With respect to the dates of the rapes of FWS-75 and D.B., the Trial Chamber found, on the basis of the consistent testimony provided by the victims, that the rapes occurred at the end of July 1992 and not in mid-July 1992 as stated in Indictment IT-96-23. The Trial Chamber was also satisfied that these events were proved beyond reasonable doubt and that they were consistent with the description provided at paragraph 5.3 of Indictment IT-96-23. It found some support for this conclusion, *inter alia*, in the Appellant's own admission to having had sexual intercourse with D.B., made in his statement to the Prosecutor of March 1998 and admitted into evidence as Ex P67.[293]

[288] Prosecution Consolidated Respondent's Brief, paras 6.27-6.29.
[289] Appeal Transcript, T 309.
[290] Prosecution Consolidated Respondent's Brief, paras 6.32-6.35 and Appeal Transcript, T 310.
[291] Appeal Transcript, T 311.
[292] Trial Transcipt, T 3683.
[293] Trial Judgement, para 642 and *Kunarac* Appeal Brief, paras 31-34 and 37.

217. The Appeals Chamber finds that the Trial Chamber's evaluation of the evidence and its findings on these points are reasonable. While the Trial Chamber did not indicate the specific day on which the crimes occurred, it did mention with sufficient precision the relevant period. Moreover, in the view of the Appeals Chamber, minor discrepancies between the dates in the Trial Judgement and those in the Indictment in this case go to prove the difficulty, in the absence of documentary evidence, of reconstructing events several years after they occurred and not, as implied by the Appellant, that the events charged in Indictment IT-96-23 did not occur. This is all the more so in light of the weight that must be attached to eyewitness testimony and to the partial admissions of the Appellant.

218. Turning now to the issue of D.B.'s consent, the Trial Chamber found that, given the circumstances of D.B.'s captivity in Partizan, regardless of whether he knew of the threats by Gaga, the Appellant could not have assumed that D.B. was consenting to sexual intercourse. Analogously, the Trial Chamber correctly inferred that the Appellant had a discriminatory intent on the basis, *inter alia*, of the evidence of FWS-183 regarding comments made by the Appellant during the rapes in which he was involved. Although caution must be exercised when drawing inferences, after having carefully reflected and balanced the details and arguments of the parties, the Appeals Chamber considers these inferences reasonable. The special circumstances and the ethnic selection of victims support the Trial Chamber's conclusions. For these reasons, this part of the grounds of appeal must fail.

2. Rape of FWS-95

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

219. The Appellant submits that the Trial Chamber erred in convicting him for the rape of FWS-95 on the basis of the testimony provided by FWS-95 and FWS-105.

220. First, the Appellant claims that the Trial Chamber erred in relying on FWS-95's identification of him at trial. In this regard, the Appellant recalls that, in a statement rendered on 9-12 February 1996, FWS-95 described him as a man with a beard and moustache, as did FWS-105 in her statement of the same period. However, according to the Appellant, he never had a beard or moustache. The Appellant then submits that, in a statement given on 25-26 April 1998, FWS-95

was unable to describe him. Nor was she able to recognise him from a photo-spread presented by the Prosecutor at trial. The Appellant asserts that the in-court identification by FWS-95 is vitiated by the fact that when both he and FWS-95 were in the courtroom, the Presiding Judge of the Trial Chamber called the Appellant's name to ascertain that he could follow the proceedings, thereby *de facto* identifying him.

221. Secondly, the Appellant contends that, since the Trial Chamber found that FWS-95's evidence with regard to the second of the two rapes lacked credibility, it should likewise have rejected her evidence as to the first rape. In support of this assertion, the Appellant claims that in her first statement to the Prosecutor's investigators in 1996, FWS-95 did not mention his name despite stating that some soldiers had raped her. The Appellant also observes that there is no evidence, other than her testimony, to prove that it was he who raped FWS-95.

(ii) The Respondent

222. The Respondent argues that the Appellant's arguments do not meet the requisite threshold for review. As stated in the *^elebi}i* Appeal Judgement, the Appellant must prove that the "evidence could not reasonably have been accepted by any reasonable person ?andg that the Trial Chamber's evaluation was wholly erroneous".[294] The Prosecutor notes that the Trial Chamber considered the discrepancies between FWS-95's prior statement and her testimony in court as minor and accepted that they could be explained by the psychological trauma suffered by the witness.[295] The Prosecutor recalls that the Trial Chamber did not give any positive probative value to in-court identification and adds that FWS-95 clarified her evidence during her testimony before the Trial Chamber.[296] The Trial Chamber accepted the position that FWS-95 had not recognised the Appellant in the photo-spreads because they were of poor quality, and that inconsistencies in FWS-95's description of the Appellant arose from the simple fact that the soldiers were not shaved at the time the rapes took place.[297] The Respondent contends that these findings by the Trial Chamber were reasonable and should be confirmed by the Appeals Chamber.

[294] *^elebi}i* Appeal Judgement, para 491.
[295] Prosecution Consolidated Respondent's Brief, para 6.77.
[296] Appeal Transcript, T 318.
[297] Prosecution Consolidated Respondent's Brief, para 6.76.

(b) Discussion

223. In view of the submissions tendered by the Appellant on this ground of appeal, the issue before the Appeals Chamber is that of determining whether or not the Trial Chamber erred in relying on the evidence provided by FWS-95.

224. As to the inconsistencies in FWS-95's testimony, the Trial Chamber held that:[298]

> The Trial Chamber does not regard the various discrepancies between the pre-trial statements dated 25-26 April 1998, Ex D40, of FWS-95 and her testimony in court, to which attention was drawn, as grave enough to discredit the evidence that she was raped by Dragoljub Kunarac during the incident in question.

Furthermore, the Trial Chamber stated that:[299]

> In particular, the Trial Chamber is satisfied of the truthfulness and completeness of the testimony of FWS-95 as to the rape by Kunarac because, apart from all noted minor inconsistencies, FWS-95 always testified clearly and without any hesitation that she had been raped by the accused Kunarac.

225. The Trial Chamber was well aware of the inconsistencies in FWS-95's various declarations, but this did not prevent it from relying upon her testimony, in light of the manner in which she gave it before the Trial Chamber. The Appeals Chamber does not have the Trial Chamber's advantage of observing FWS-95 when she testified. It was, however, within the discretion of the Trial Chamber to rely upon the evidence provided at trial by FWS-95 and to reject the Defence's complaint about alleged inconsistencies. Further, in the circumstances of this case, the Appeals Chamber does not see any reason for disturbing the Trial Chamber's findings as to the alleged inconsistencies. These were dealt with at trial and, as correctly held by the Trial Chamber, do not appear so grave as to undermine FWS-95's testimony.

226. With regard to the issue of identification, although the Trial Chamber unnecessarily stated that: "FWS-95 was able to identify Kunarac in the courtroom…."[300] in the Trial Judgement, it also asserted that: "[t]he Trial Chamber has not relied upon the identification made in court" of Kunarac by FWS-95.[301] Moreover, the Trial Chamber explained that:[302]

> Because all of the circumstances of a trial necessarily lead such a witness to identify the person on trial (or, where more than one person is on trial, the particular person on trial who most closely

[298] Trial Judgement, para 679.
[299] *Ibid.*
[300] *Ibid.*, para 676.
[301] *Ibid.*, para 676, footnote 1390.
[302] *Ibid.*, para 562 (emphasis added).

resembles the man who committed the offence charged), *no positive probative weight has been given by the Trial Chamber to these "in court" identifications*.

227. Accordingly, the Trial Chamber accepted FWS-95's identification on the basis of a witness testimony and not on the basis of an in-court identification. Indeed, the Trial Chamber held that: "The identification of Dragoljub Kunarac by FWS-95 is supported by evidence provided by FWS-105".[303] For this reason, the Appellant's allegation appears misplaced.

228. The Appellant was charged only with taking FWS-95 to Ulica Osmana \iki}a no 16, where she was raped by other soldiers. The Appellant was acquitted on the charge contained in Indictment IT-96-23, because FWS-95 "was not able to say who took her out of Partizan on this occasion".[304] Therefore, contrary to what was alleged by the Appellant, the Trial Chamber did not call the credibility of FWS-95 into question. Additionally, it has to be recalled that there is no general rule of evidence which precludes acceptance in part of the statement of a witness if good cause exists for this distinction, as was the case here. This being so, the Appellant's contention appears unfounded.

229. For the foregoing reasons, after careful analysis of the development of FWS-95's testimony in exhibits and transcripts, the Appeals Chamber finds no basis upon which to disturb the Trial Chamber's findings. Accordingly, this ground of appeal must fail.

C. Convictions under Counts 9 and 10 - Rape of FWS-87

1. Submissions of the Parties

(a) The Appellant (Kunarac)

230. The Appellant submits that the Trial Chamber erred in finding that, sometime in September or October 1992, he went to "Karaman's house" and raped FWS-87 in a room on the upper floor of that house.

231. While conceding that he visited Karaman's house on either 21 or 22 September 1992, the Appellant claims that he merely spoke to FWS-87 on that occasion, and that he did not have sexual intercourse with her. In this regard, the Appellant refers to the testimony given at trial by D.B. who, following a precise question by the Prosecutor, recalled having seen the Appellant only once at Karaman's house, on which occasion he was merely talking with D.B.'s sister (FWS-87) in the

[303] *Ibid.*, para 677.
[304] *Ibid.*, para 682.

living room.[305] The Appellant adds that it was unacceptable in criminal law for the Trial Chamber to infer that he would not have been simply talking to FWS-87, but must have raped her, based only on his alleged "total disregard of Muslim women".[306]

232. The Appellant notes, *inter alia*, that FWS-87 did not mention the Appellant in her first statement given to the Prosecutor's investigators on 19-20 January 1996, when naming many of those whom she claimed to have raped her. This was despite the witness's admission at trial that her memory in 1996 when she gave that first statement was much better than when she gave her in-court testimony. Only in her second statement of 4-5 May 1998 did FWS-87 declare having been raped by the Appellant, and then only in response to a leading question by the investigator. The Appellant contends that FWS-87's reliability is further called into question due to the fact that, despite having allegedly been raped by him, she did not remember where he was wounded or on which part of his body he was wearing a cast.[307]

(b) The Respondent

233. The Respondent agrees with the Trial Chamber's findings that the inconsistencies described in the Appellant's submissions were minor and did not invalidate the whole of FWS-87's testimony.[308] Further, the Prosecutor observes that the inconsistencies in FWS-87's prior statements relating to the Appellant's presence at Karaman's house were resolved by the Appellant's own admission that he was at that house on 21 or 22 September 1992.[309] The Prosecutor suggests that it was entirely reasonable for the Trial Chamber to dismiss the Appellant's claim that he only talked to FWS-87 as improbable, in light of the Appellant's total disregard for Muslim women. The Prosecutor submits that FWS-87's failure to recall on which body part the Appellant was wearing a cast can be explained by both the passage of time and the trauma suffered by the witness.[310]

2. Discussion

234. The Appeals Chamber finds that the discrepancies identified by the Appellant in the witnesses' testimony are minor when compared with the consistent statements made regarding the

[305] *Kunarac* Appeal Brief, para 68.
[306] *Kunarac* and *Kovac* Reply Brief, paras 6.32-6.33.
[307] *Kunarac* Appeal Brief, para 68.
[308] Prosecution Consolidated Respondent's Brief, paras 6.89-6.92.
[309] *Ibid.*, para 6.85 and Appeal Transcript, T 307.
[310] Prosecution Consolidated Respondent's Brief, para 6.90.

presence of the Appellant in Karaman's house, including the admission of the Appellant himself.[311] In the circumstances of this case and in light of FWS-87's testimony, the Appeals Chamber considers the Trial Chamber's inference, that the Appellant would not have simply talked to FWS-87 at Karaman's house because of his lack of respect for Muslims and the fact that he had previously raped FWS-87, as reasonable.

235. With regard to the discrepancy between FWS-87's statements in 1996 and 1998, identified by the Appellant, the Appeals Chamber notes that each testimony complements the other, and that the fact that FWS-87 identified the Appellant later rather than sooner does not render that identification incredible.

236. Finally, as to the uncertainty of FWS-87 regarding whether the Appellant was wounded and on which part of his body he was wearing a cast, the Appeals Chamber observes that FWS-87 did declare in her testimony that the Appellant was wounded, that he was wearing a cast and that "[h]e had something bandaged up somewhere."[312] While FWS-87 did not remember the exact position of the cast, this fact cannot be considered sufficient to place in reasonable doubt the recognition of the Appellant by this witness.

237. In view of the foregoing factors, the Appeals Chamber finds no reason to disturb the Trial Chamber's findings. Accordingly, this ground of appeal is rejected.

D. Convictions under Counts 11 and 12 - Rape and Torture of FWS-183

1. Submissions of the Parties

(a) The Appellant (Kunarac)

238. The Appellant submits that the Trial Chamber erred in establishing the facts leading to his conviction for the crimes of torture and rape of FWS-183 in mid-July 1992.

239. The Appellant contends that these facts were established on the basis of testimony given by FWS-183 and FWS-61, which was inconsistent and contradictory regarding the specific time when the incident occurred.[313] The Appellant claims, in particular, that there is a discrepancy in that FWS-183 stated that the incident charged in Indictment IT-96-23 occurred in the middle of July 1992, while FWS-61 declared that it occurred "5 or 6 days" before her departure from Fo~a on

[311] Trial Judgement, paras 699-703.
[312] Trial Transcript, T 1703.
[313] *Kunarac* Appeal Brief, para 76.

13 August 1992. The Appellant asserts that the Trial Chamber incorrectly took the view that it was not necessary to prove the exact date on which the crimes occurred given that there was evidence to establish the essence of the incident pleaded,[314] and that this approach prejudiced the Appellant's defence of alibi.[315]

240. Furthermore, the Appellant submits that FWS-61's contradictory statements discredit her identification of him. FWS-61 stated in her testimony at trial that she had never known the Appellant (referred to in the *Kunarac* Appeal Brief as Žaga) prior to his arrival at the house where she was staying with FWS-183.[316] In addition, FWS-61 declared to the Prosecutor's investigators that she had identified the Appellant upon his arrival because a soldier called Tadi} had told her that a group of soldiers would come to FWS-61's house led by the Appellant. However, at trial FWS-61 admitted that Tadi} did not indicate to her which one of the three soldiers was the Appellant, and that she identified him only because of the respect shown towards him by the other soldiers.[317]

241. Lastly, the Appellant recalls that, although FWS-61 claimed that FWS-183 told her everything of what happened to her, FWS-61 only testified that soldiers forced FWS-183 to touch them on certain parts of their bodies and not that they raped FWS-183, as held by the Trial Chamber. In the view of the Appellant, this fact goes to prove that FWS-183 was not raped.

(b) The Respondent

242. The Respondent points out that the Trial Chamber addressed the alleged inconsistencies as to the dates when events occurred, and established the general proposition that minor inconsistencies do not invalidate a witness's testimony.[318] The Prosecutor stresses that FWS-183 identified the Appellant as the leader among the men at her apartment on the basis of the respect shown towards him by the other soldiers and that, subsequently, FWS-61 confirmed for FWS-183 the identity of the Appellant as the person in command. Lastly, the Prosecutor considers that the argument that FWS-183 would have told FWS-61 about everything that had happened to her is wholly irrelevant, as FWS-183 identified the Appellant as the person who raped her.[319]

[314] *Ibid.*, para 59.
[315] *Ibid.*
[316] *Ibid.*, para 76 (with reference to FWS-183's Statement of 1 April 1998). See also Trial Judgement, para 340.
[317] *Kunarac* Appeal Brief, para 76.
[318] Prosecution Consolidated Respondent's Brief, para 6.98.
[319] *Ibid.*, para 6.99.

2. Discussion

243. Upon review of the supporting material, the Appeals Chamber finds that the discrepancies as to the dates of the events do not suggest any specific error in the evaluation of the evidence by the Trial Chamber. In particular, the Appeals Chamber notes that FWS-61 testified that the torture and rape of FWS-183 occurred at the end of July and not in August 1992, whereas FWS-183 declared that it was around 15 July. On this basis, the Trial Chamber reasonably concluded that the relevant incident occurred in the second part of July. As to the alibi of the Appellant, the Appeals Chamber has already stated its grounds for rejecting this defence and will not reiterate those reasons for each ground of appeal. For the reasons previously stated, the Appeals Chamber therefore finds that the Trial Chamber did all that was possible and necessary to establish the date of the crime, which was undoubtedly committed as described in Indictment IT-96-23, as precisely as possible.

244. As to the identification of the Appellant, the Appeals Chamber considers that it was perfectly reasonable for the Trial Chamber to rely upon the testimony of FWS-183 and FWS-61. Although the Trial Chamber did not dwell on this point, the Appeals Chamber finds it reasonable that, as correctly suggested by the Prosecutor, FWS-183 could have deduced the identity of the Appellant by talking to FWS-61, and, contrary to what the Appellant seems to suggest, a "formal indication" from the soldier Tadi} was not needed.

245. Finally, as to the Appellant's contention that the evidence of FWS-61 establishes that FWS-183 was merely forced to touch soldiers and not raped, the Appeals Chamber concurs with the Prosecutor that this argument is irrelevant in light of the convincing nature of the testimony of FWS-183.

246. Overall, the Appeals Chamber finds that the Appellant has failed to identify any specific error by the Trial Chamber and, for the foregoing reasons, this ground of appeal must fail.

E. Convictions under Counts 18 to 20 - Rapes and Enslavement of FWS-186 and FWS-191

1. Submissions of the Parties

(a) The Appellant (Kunarac)

247. The Appellant submits that the Trial Chamber's findings that, on 2 August 1992, he took FWS-191, FWS-186 and J.G. from the house at Ulica Osmana \ iki}a no.16 to an abandoned house in Trnova~e and that, once there, he raped FWS-191 while the soldier DP 6 raped FWS-186, are

"unacceptable".[320] To prove this point, the Appellant challenges the testimony rendered by FWS-186 and FWS-191.

248. As to FWS-186, the Appellant appears to contend that this witness is not credible because in her first statement, given to the Bosnian government authorities in November 1993, she did not mention his name.[321] The Appellant recalls that FWS-186 stated at trial that this failure to mention his name was due to her embarrassment about speaking in front of three men, and was not, as found by the Trial Chamber, an attempt to protect J.G..[322] The Appellant further alleges, without providing details, that pressure was put on FWS-186, because in her second statement to the Bosnian government authorities she did not confirm that she had been raped.[323]

249. With regard to FWS-191, the Appellant claims that her testimony contradicts that of other witnesses. He notes that FWS-191 stated that, on the night of 2 August 1992, although she was taken from the Kalinovik School with other girls, she was alone at Ulica Osmana \icki}a no.16. However, FWS-87, FWS-75, FWS-50 and D.B. testified that they were present at the house as well, and FWS-87 and FWS-50 testified to having been raped by the Appellant.[324] The Appellant also argues that he had no knowledge that FWS-186 and FWS-191 were likely to be raped in Trnova~e.[325] He merely recalls taking FWS-186 and FWS-191 up to Miljevina with the intention of confronting a journalist on 3 August 1992.[326]

250. Furthermore, the Appellant argues that the conclusions of the Trial Chamber regarding the rapes and enslavement of FWS-191 and FWS-186 during the six month period at the house in Trnova~e are untenable, because both witnesses were staying there voluntarily.[327] As proof of this fact, the Appellant submits that he had obtained passes which enabled both FWS-191 and FWS-186 to leave Trnova~e to go to Tivat in Montenegro to stay with his family,[328] but that both witnesses refused to do so.[329] Furthermore, the Appellant submits that both FWS-186 and FWS-191 confirmed that they were free to move in and around the house and to visit neighbours.

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[320] *Kunarac* Appeal Brief, para 80.
[321] *Ibid.* (with reference to Ex-P 212 and 212a).
[322] Trial Judgement, para 721.
[323] *Kunarac* Appeal Brief, para 80.
[324] *Ibid.*
[325] *Ibid.*, para 82 (with reference to Trial Judgement, paras 727 and 743).
[326] *Ibid.*, para 69.
[327] *Ibid.*, para 83.
[328] Appeal Transcript, T 134-135.
[329] *Kunarac* Appeal Brief, para 86.

251. The Appellant denies that FWS-191 was his personal property. He stresses that FWS-191 stated at trial that the Appellant protected her from being raped by a drunken soldier who had offered money to be with her.[330] Furthermore, the Appellant contends that he did not have any role in keeping FWS-191 at the house in Trnova~e because that house was the property of DP 6.[331] He states that FWS-191 had asked DP 6 if she could stay in the house and that DP 6 had offered her security,[332] explaining that if they left the house she and FWS-186 "would be raped by others".[333]

(b) The Respondent

252. With regard to the inconsistencies in FWS-186's and FWS-191's testimony, the Prosecutor reiterates that this argument was put at trial and that the Trial Chamber reasonably concluded that the identification evidence of FWS-186 was credible and that, in any case, the alleged inconsistencies were minor.

253. As to the crime of enslavement, the Prosecutor argues that the Trial Chamber identified a comprehensive range of acts and omissions demonstrating the Appellant's exercise of the rights of ownership over FWS-186, thus satisfying the criteria of enslavement.[334] The Prosecutor contends that the Appellant's submissions are mere reiterations of his defence arguments which were rejected at trial, and that the Appellant has not demonstrated how or why the Trial Chamber's factual conclusions were erroneous.[335] In the view of the Prosecutor, there is no contradiction in the finding of the Trial Chamber that the Appellant forbade other men to rape FWS-191. Rather, it submits, this fact indicates a level of control and ownership consistent with the crime of enslavement.[336]

2. Discussion

254. As regards the alleged inconsistencies, the Trial Chamber relied on the testimony provided at trial by FWS-186, as confirmed by FWS-191, when coming to the conclusion that the two witnesses were kept in the Trnova~e house for five to six months. Throughout this period, FWS-186 was raped repeatedly by DP 6, while FWS-191 was raped by the Appellant during a period of about two months. The Appellant pointed out some minor differences between the various statements of FWS-186 but, *inter alia*, conceded that FWS-186's failure to mention the name of the

[330] *Ibid.*, para 87 (citing Trial Transcript, T 2972).
[331] *Kunarac* and *Kovac* Reply Brief, para 6.39.
[332] *Kunarac* Appeal Brief, para 89.
[333] Appeal Transcript, T 134.
[334] Prosecution Consolidated Respondent's Brief, paras 6.111-6.112.
[335] *Ibid.*, para 6.119 and Appeal Transcript, T 313-314.

Appellant in her first statement was justified. These minor discrepancies do not cast any doubt on the testimony and thereby on the findings of the Trial Chamber. On the contrary, given that discrepancies may be expected to result from an inability to recall everything in the same way at different times, such discrepancies could be taken as indicative of the credibility of the substance of the statements containing them. In light of these factors, the Appeals Chamber is unable to discern any error in the assessment of the evidence by the Trial Chamber.

255. Lastly, as to the crime of enslavement, the Trial Chamber found that the women at Trnova~e "were not free to go where they wanted to even if, as FWS-191 admitted, they were given the keys to the house at some point".[337] In coming to this finding, the Trial Chamber accepted that "…the girls, as described by FWS-191, had nowhere to go, and had no place to hide from Dragoljub Kunarac and DP 6, even if they had attempted to leave the house…."[338] The Appeals Chamber considers that, in light of the circumstances of the case at bar in which Serb soldiers had exclusive control over the municipality of Fo~a and its inhabitants, and of the consistent testimony of the victims, the findings of the Trial Chamber are entirely reasonable. For the foregoing reasons, this ground of appeal fails.

F. Conclusion

256. For the foregoing reasons, the appeal of the Appellant Kunarac on factual findings is dismissed.

[336] Prosecution Consolidated Respondent's Brief, para 6.105.
[337] Trial Judgement, para 740.
[338] *Ibid.*

IX. ALLEGED ERRORS OF FACT (RADOMIR KOVA^)

A. Identification

1. Submissions of the Parties

(a) The Appellant (Kovac)

257. The Appellant submits that the Trial Chamber erred in relying on the testimony of FWS-75 to establish his participation in the fighting that took place in Mješaja and Trošanj on 3 July 1992.[339] He contends that there are inconsistencies in the descriptions of him given by FWS-75 in her statements.[340] He adds that poor visibility on 3 July 1992 and the fact that she did not know him before the conflict made it difficult for FWS-75 to identify him at the scene, and he suggests that the witness actually saw his brother.[341] The Appellant stresses that he was not involved in the fighting of 3 July 1992, because he was on sick leave from 25 June to 5 July 1992, which was confirmed by DV and recorded in a log book produced by the Defence.[342]

(b) The Respondent

258. As regards the Appellant's involvement in the armed conflict, the Respondent contends that the Trial Chamber was correct in concluding that the Appellant took an active part in the armed conflict in the municipality of Foca from as early as 17 April 1992.[343]

259. With respect to the credibility of FWS-75's evidence identifying the Appellant, the Respondent submits that the Trial Chamber did not err in accepting this evidence, because it was unequivocal and based on FWS-75's detailed description of the Appellant's appearance.[344] The Respondent further claims that there is evidence consistent with that of FWS-75[345] which establishes that the Appellant was involved in combat activities around Mješaja and Trošanj,[346]

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[339] *Kova~* Appeal Brief, para 57.
[340] *Ibid.*
[341] *Ibid.*
[342] *Ibid.*, para 58.
[343] Prosecution Consolidated Respondent's Brief, paras 5.3 and 5.4.
[344] *Ibid.*, para 5.10.
[345] *Ibid.*, para 5.5.
[346] *Ibid.*, para 5.4.

whereas there is no evidence to support the Appellant's claim that he was injured and on military leave at the time in question, as DV's evidence does not confirm that claim.[347]

2. Discussion

260. The Appellant's convictions in this case are based on the acts he committed on female civilians held in his apartment from about 31 October 1992. He contests the credibility of FWS-75's evidence as to his participation in the armed conflict that broke out on 3 July 1992. The findings of the Trial Chamber do not indicate that the Appellant was guilty of acts which took place in the conflict of 3 July 1992. With regard to the Appellant's convictions, this ground of appeal has little relevance, except perhaps for the purpose of showing that the Appellant knew of the context in which his acts against the victims were committed. For this, however, there is ample other evidence.[348] As regards the credibility of FWS-75's evidence, the Appeals Chamber concurs with the arguments of the Respondent and incorporates them in this discussion. This ground of appeal is dismissed.

B. Conditions in Radomir Kova~'s Apartment

1. Submissions of the Parties

(a) The Appellant (Kovac)

261. The Appellant contends that the Trial Chamber erred in not evaluating the evidence as to the *manner* in which, whilst at his apartment, FWS-75, FWS-87, A.S. and A.B. were allegedly subjected to rape and degrading and humiliating treatment, and, at times, slapped and exposed to threats.[349] The Appellant argues that FWS-75 was once slapped on her face, but that this was because he found her drunk and not for other reasons.[350] He submits that the girls were sent to his apartment because normal conditions of life no longer existed in their previous place in Miljevina.[351] He also contends that it was not, as the Trial Chamber has found, proved beyond reasonable doubt that he completely ignored the girls' diet and hygiene and that they were sometimes left without food.[352] He maintains that the girls had access to the whole apartment,[353]

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[347] *Ibid*., para 5.6.
[348] Trial Judgement, para 586. See also para 569.
[349] *Kova~* Appeal Brief, para 59.
[350] *Ibid.*
[351] *Ibid*., para 60.
[352] *Ibid*., paras 63-64 and Appeal Transcript, T 171-2.
[353] *Kova~* Appeal Brief, para 65.

that they could watch television and videos,[354] that they could cook and eat together with him and Jagos Kosti},[355] and that they went to cafés in town.[356]

(b) The Respondent

262. The Respondent argues that it was open to the Trial Chamber, on the basis of the evidence presented at trial, to conclude that FWS-75, FWS-87, A.S. and A.B. were detained in the Appellant's apartment and subjected to assault and rape.[357] The Respondent argues that the Appellant has failed to specify any error on the part of the Trial Chamber, but has merely reiterated his defence at trial.[358] The Respondent argues that the fact that the Trial Chamber chose to believe certain witnesses and not others does not in itself amount to an error of fact.[359] Further, the findings of the Trial Chamber relating to the conditions in the Appellant's apartment and the mistreatment of the girls therein render the claim of the Appellant that he acted with good intentions incredible.[360] The Respondent also points out that the Trial Chamber has found that FWS-75 was slapped on occasion for refusing sexual intercourse and beaten up for having a drink.[361]

2. Discussion

263. The Appeals Chamber notes that the Trial Chamber discussed what the Appellant stated in his defence at trial.[362] Further, the Trial Chamber discussed at length the conditions in the Appellant's apartment,[363] with reference to the specific abuses suffered by the victims.[364] The proof accepted by the Trial Chamber describes in detail the manner in which the lives of the victims unfolded in the Appellant's apartment and in which physically humiliating treatment was meted out to them. The Appeals Chamber considers that the relevant findings of the Trial Chamber were carefully considered and that the correct conclusions were drawn in the Trial Judgement. The ground of appeal is obviously ill-founded and is therefore dismissed.

[354] *Ibid.*, para 66.
[355] *Ibid.*, paras 68-69.
[356] *Ibid.*, para 71.
[357] Prosecution Consolidated Respondent's Brief, para 5.16.
[358] *Ibid.*, para 5.12.
[359] *Ibid.*
[360] *Ibid.*, para 5.14. See also paras 5.20-5.21.
[361] *Ibid.*, para 5.15.
[362] Trial Judgement, paras 151-157.
[363] *Ibid.*, paras 750-752.
[364] *Ibid.*, paras 757-759, 761-765 and 772-773.

C. Offences Committed against FWS-75 and A.B.

1. Submissions of the Parties

(a) The Appellant (Kovac)

264. The Appellant submits that it is necessary to determine with greater precision the time and place of the offences in order to convict him.[365] He questions the credibility of FWS-75's testimony with regard to the times when certain incidents occurred and the fact that no other witnesses corroborated her testimony.[366] Further, he points to discrepancies in her testimony.[367]

(b) The Respondent

265. As regards the alleged need for greater precision, the Respondent argues that, in view of the traumatic experiences of FWS-75 and A.B.[368] and their lack of any reason to notice specific days and the means to measure the passing days,[369] the Trial Chamber was correct in accepting the range of the *approximate* dates which the Prosecution mentioned in Indictment IT-96-23.[370] The Respondent claims that it was never her contention that these dates constituted the *precise* dates when the events took place.[371] Finally, the Respondent contends that an inability to pinpoint the exact date or dates of events was not detrimental to the credibility of FWS-75 and A.B.,[372] nor did it cause prejudice to the Appellant.[373]

266. With respect to the credibility of FWS-75, it is the view of the Respondent that the Trial Chamber was entitled to come to its conclusions in light of the overwhelming evidence presented by FWS-75, FWS-87 and A.S., which supported each other in all material aspects.[374] In this regard, the Respondent recalls that A.B. confided in FWS-75 that the Appellant had raped her,[375] and that

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[365] See *Kova~* Appeal Brief, para 73 where calculations are made by referring to the testimony, and the Appellant concludes that it was impossible that he committed certain acts.
[366] Appeal Transcript, T 174-175 and 186.
[367] *Kova~* Appeal Brief, paras 73-76 and Appeal Transcript, T 174.
[368] Prosecution Consolidated Respondent's Brief, para 5.36.
[369] *Ibid.*, para 5.33.
[370] *Ibid.*, para 5.32.
[371] *Ibid.*, para 5.30.
[372] *Ibid.*, paras 5.28, 5.33 and 5.36.
[373] *Ibid.*, paras 5.29 and 5.34-5.35.
[374] *Ibid.*, paras 5.39 and 5.57. The Respondent notes, however, that there is no legal requirement that the testimony of a single witness on a material fact be corroborated before being accepted as evidence: para 5.58.
[375] *Ibid.*, para 5.44.

FWS-87 further testified that A.B. was obviously affected by the abuse that was inflicted upon her.[376] The Respondent adds that FWS-75 was a careful witness who did not exaggerate.[377]

2. Discussion

267. As to the alleged lack of precision, the Appeals Chamber considers that the Trial Judgement is not vague as to the main place where the Appellant committed his crimes against the victims, namely, his apartment. In respect of the time of the crimes, the Trial Chamber found that FWS-75 and A.B. were kept in the Appellant's apartment "for about a week, starting sometime at the end of October or early November 1992",[378] and FWS-87 and A.S., for about four months from "on or around 31 October 1992".[379] In connection with the abuses of FWS-75 and A.B., the Appellant was found to have raped them, to have let other soldiers into his apartment to rape them, and to have handed them over to other soldiers in the knowledge that they would be raped.[380] In relation to the sufferings of FWS-87 and A.S., the Trial Chamber found that they had been repeatedly raped during the four-month period.[381] Given the continuous or repetitive nature of the offences committed by the Appellant on the four women under his control, it is only human that the victims cannot remember the exact time of each incident. In the case of FWS-87 and A.S., for instance, the Trial Chamber was satisfied that the former was raped "almost every night" by the Appellant when he spent the night at his apartment and that the Appellant's flatmate, Jagos Kosti}, "constantly raped A.S.".[382] More reasoning cannot be expected. This first argument fails.

268. On the issue of corroborating evidence, the Appeals Chamber reaffirms its settled jurisprudence that corroboration is not legally required; corroborative testimony only goes to weight. Subject to this, the Appeals Chamber notes that the Appellant focused on two incidents in particular. First, FWS-75 and A.B. were returned to the Appellant's apartment at a particular time before they were given away to other soldiers by the Appellant. Second, at that time, the Appellant was at his apartment.

269. The first incident, the Appellant argues, ended with the return of the victims not earlier than 22 or 23 December 1992. This runs counter to the finding of the Trial Chamber that the return took place between the first and second weeks of December 1992. This submission of the Appellant

[376] *Ibid.*, para 5.45.
[377] *Ibid.*, para 5.49.
[378] Trial Judgement, para 759.
[379] *Ibid.*, paras 760 and 765.
[380] *Ibid.*, para 759.
[381] *Ibid.*, paras 760 and 765.
[382] *Ibid.*, para 761.

contains a miscalculation:[383] from 16 November 1992, as suggested by the Appellant, the victims stayed in the apartment near Pod Masala for about 7 to 10 days, which would put the time in late November 1992, rather than "at least until December 22, 1992", as proposed by him.[384] This miscalculation also renders pointless the alleged alibi that he was present in his apartment only till 19 December 1992.

270. In addition, the Appeals Chamber accepts and incorporates the Respondent's convincing argument in this discussion.

271. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal.

D. Offences Committed against FWS-87 and A.S.

1. Submissions of the Parties

(a) The Appellant (Kovac)

272. The Appellant questions the credibility of FWS-95's testimony. According to him, the Trial Chamber ought not to have accepted her testimony because she was unable to remember the place where the rapes were committed against her or even some of the perpetrators.[385] He questions the credibility of other witnesses due to their young age and the fact that they experienced traumatic events.[386] He submits that the Trial Chamber erred in rejecting his claim that he was engaged in a mutual, emotional relationship with FWS-87.[387] He raises arguments, which are similar to those he advanced in relation to the offences committed against FWS-75 and A.B., regarding the conditions in his apartment, that the victims enjoyed freedom of movement, that they had sufficient food, and that the hygiene conditions were normal.[388] The Appellant argues that the Trial Chamber erred in not requiring corroborative evidence to be adduced to prove the charges of rape.[389]

[383] *Kovac* Appeal Brief, para 73.
[384] *Ibid.*
[385] *Ibid.*, para 79.
[386] *Ibid.*, para 80. The Appellant Kova~ finds contradictions in FWS-87's evidence which pertain to particular passages of the transcripts where she answered "No" or "I don't know" to the same questions posed by different parties.
[387] *Ibid.*, para 83.
[388] *Ibid.*, paras 85-87.
[389] *Ibid.*, para 79.

(b) The Respondent

273. The Respondent asserts that it was open to the Trial Chamber to accept the testimony of FWS-95 and other witnesses without admitting defence expert evidence relating to rape.[390] In the view of the Respondent, the weight, if any, to be attached to the evidence of an expert is a matter entirely for the trier of fact, and the Appellant has identified no error on the part of the Trial Chamber.[391]

274. As regards the alleged relationship between the Appellant and FWS-87, the Respondent contends that it was open to the Trial Chamber to reject this unsubstantiated claim[392] and to conclude on the basis of the evidence presented at trial that the above relationship was, in reality, one of cruel opportunism, abuse and domination.[393]

275. According to the Respondent, the Trial Chamber correctly concluded that FWS-87 and A.S. could not move about freely.[394] In support of this contention, the Respondent highlights the evidence, presented at trial, that the above witnesses could not leave the locked apartment unless accompanied by the Appellant and/or his associate Kosti},[395] and that on trips to cafés and pubs those witnesses were made to wear hats and other items bearing the Serb army insignias.[396]

276. With regard to the issue of corroborative evidence, the Respondent argues that the Trial Chamber acted in accordance with Rule 96 of the Rules in accepting without corroboration the evidence of FWS-87 and A.S. that sexual assaults occurred.[397]

277. The Respondent concludes by recalling that an appeal is not a trial *de novo*, and that the Appellant has failed to demonstrate that the Trial Chamber erred in the exercise of its discretion.[398] The Respondent states that all the facts disputed by the Appellant were argued and adjudicated at trial, that no good cause has been shown on appeal to justify a re-examination of the Trial Chamber's factual findings, and that the Trial Chamber has not been shown to have been unreasonable in its evaluation of the witnesses' evidence and its factual conclusions.[399]

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[390] Prosecution Consolidated Respondent's Brief, paras 5.69-5.72.
[391] *Ibid.*, para 5.72.
[392] *Ibid.*, paras 5.77 and 5.82.
[393] *Ibid.*, para 5.82 and Appeal Transcript, T 303.
[394] Prosecution Consolidated Respondent's Brief, paras 5.83 and 5.86.
[395] *Ibid.*, para 5.20 and Appeal Transcript, T 257.
[396] Prosecution Consolidated Respondent's Brief, para 5.22.
[397] *Ibid.*, paras 5.66-5.67.
[398] *Ibid.*, para 5.85.
[399] *Ibid.*, para 5.86.

2. Discussion

278. As to the Appellant's claim that FWS-95's testimony was not credible, the Appeals Chamber states that the Appellant was not found guilty of any act committed against FWS-95.

279. As to the effect of age and the degree of suffering upon the credibility of the witnesses, the Appeals Chamber notes that the Trial Chamber has clearly indicated that it was aware of this aspect of the case.[400] The Trial Chamber did not lower the threshold of proof below the standard of beyond reasonable doubt. The Appellant has failed to demonstrate that the Trial Chamber committed an error of fact in admitting evidence from traumatised young victims.

280. As to the alleged relationship between the Appellant and FWS-87, the Appeals Chamber refers to the convincing and exhaustive findings in the Trial Judgement that it "was not one of love as the Defence suggested, but rather one of cruel opportunism on Kova~'s part, of constant abuses and domination over a girl who, at the relevant time, was only about 15 years old".[401]

281. With regard to corroborative evidence, the Appeals Chamber considers that the Trial Chamber was, in accordance with Rule 96 of the Rules, entitled not to require corroboration for the testimony of rape victims. The Trial Chamber, therefore, committed no error in this regard and at the same time was aware of the inherent problems of a decision based solely on the testimony of the victims.

282. For the foregoing reasons, this ground of appeal is dismissed.

E. Outrages upon Personal Dignity

1. Submissions of the Parties

(a) The Appellant (Kovac)

283. The Appellant questions the Trial Chamber's findings of fact with regard to the incidents of naked dancing, by arguing that there were several such incidents and that the witnesses confused them.[402] He also points out alleged discrepancies in the evidence with regard to the time, place

[400] Trial Judgement, paras 564 and 566.
[401] *Ibid.*, para 762.
[402] *Kova~* Appeal Brief, paras 90-91.

(where exactly in the apartment the incidents occurred) and details of the incidents (the type of table upon which the dances occurred) for which he was found responsible.[403]

(b) The Respondent

284. As a general proposition, the Respondent contends that it was open to the Trial Chamber to reach the findings it did in relation to the naked dancing incident.[404] The Respondent specifically submits that the inconsistencies and discrepancies in the witnesses' testimony were not material in the sense that they destroyed the credibility of the witnesses.[405] Further, the Respondent claims that the Trial Chamber took those inconsistencies and discrepancies into account in evaluating the evidence and reaching its findings.[406]

2. Discussion

285. Revisiting the arguments in detail, the Appeals Chamber accepts and incorporates the Respondent's arguments in its discussion of this ground of appeal. The Appeals Chamber is persuaded that the Trial Chamber made no error in this respect. This ground of appeal is dismissed.

F. Sale of FWS-87 and A.S.

1. Submissions of the Parties

(a) The Appellant (Kovac)

286. The Appellant Kova~ argues that the Trial Chamber erred in finding that a sale occurred, because there were discrepancies in the testimony with regard to the price of sale,[407] and there were contradictions between FWS-87's and A.S.'s statements and their testimony at trial.[408] He also submits that the sale as described by the Trial Chamber was highly improbable because of some details of the sale.[409]

(b) The Respondent

287. The Respondent asserts that the Trial Chamber did not err in finding that the Appellant sold FWS-87 and A.S.. The Respondent submits that the alleged differences in the testimonies of the

[403] *Ibid.*, paras 93-94.
[404] Prosecution Consolidated Respondent's Brief, para 5.156.
[405] *Ibid.*, para 5.157.
[406] *Ibid.*, para 5.156.
[407] *Kova~* Appeal Brief, para 96.
[408] *Ibid.*, paras 97-102.

above witnesses are insignificant and have no effect on the credibility of those witnesses.[410] The Respondent also argues that the Appellant's complaints are trivial and do not provide a sufficient basis for challenging the Trial Chamber's findings.[411]

2. Discussion

288. The Appellant has not demonstrated a link between the alleged error and his convictions. This ground of appeal is dismissed as evidently unfounded.

G. The Rape Convictions

289. To the extent that the Appellant tries to demonstrate errors of fact as regards force used in the commission of the crime of rape, his submissions are disposed of by the definition of rape endorsed by the Appeals Chamber in Chapter V, Section B, above.

H. Conclusion

290. For the foregoing reasons, the appeal of the Appellant Kova~ on factual findings is dismissed.

[409] *Ibid.*, para 103.
[410] Prosecution Consolidated Respondent's Brief, para 5.89.
[411] *Ibid.*, para 5.90.

X. ALLEGED ERRORS OF FACT (ZORAN VUKOVI])

A. Alleged Omissions in Indictment IT-96-23/1

1. Submissions of the Parties

(a) The Appellant (Vukovic)

291. In the Appellant's view, the Trial Chamber could not draw any factual conclusions from the following alleged incidents because none of them was charged in Indictment IT-96-23/1 or followed by a conviction.[412] The Appellant argues that the Trial Chamber erred in using the oral rape of FWS-50 in Buk Bijela on 3 July 1992 and FWS-75's testimony indicating that on the same day the Appellant led FWS-75's uncle away covered in blood as evidence of his involvement in the attack against the civilian population of Fo~a.[413] Further, the Appellant claims that the Trial Chamber erred in using FWS-75's testimony alleging her rape by the Appellant for the purposes of identification, [414] notwithstanding that no conviction was entered in relation to this incident.[415]

292. The Appellant adds that he learned about these additional alleged incidents only at trial and therefore did not have an opportunity to prepare his case to meet the charge.[416]

(b) The Respondent

293. First, the Respondent submits that, once admitted into evidence, the Trial Chamber was fully entitled to use the testimony of FWS-50 and FWS-75 to prove the Appellant's knowledge of the widespread or systematic attack against the civilian population and for identification purposes. The Respondent claims that, although she has an obligation to set out the material facts of the case in sufficient detail, she is not required to plead all of her evidence in an indictment.[417]

294. Secondly, the Respondent observes that both FWS-50 and FWS-75's evidence was disclosed to the Appellant before those witnesses testified[418] and that adequate notice was given to

[412] Appeal Transcript, T 199.
[413] Trial Judgement, paras 589 and 591.
[414] *Ibid.*, para 789.
[415] *Vukovic* Appeal Brief, para 131.
[416] *Ibid.*
[417] Prosecution Respondent's Brief, paras 2.15 and 2.48, citing Trial Judgement, paras 589, 789 and 796.
[418] Appeal Transcript, T 286-287.

the Appellant in the form of a memorandum prepared by the Prosecutor's investigators. The Prosecutor remarks that FWS-50 gave evidence in the examination-in-chief and was cross-examined by the Appellant, who did not object to the admission of that evidence.[419]

2. Discussion

295. The Trial Chamber found that the Appellant orally raped FWS-50 in Buk Bijela on 3 July 1992[420] and also accepted FWS-75's testimony stating that the Appellant on that occasion led her uncle away covered in blood. These findings were used for the purpose of demonstrating that the Appellant had knowledge of the attack against the civilian population, one of the necessary elements for entering a conviction for crimes against humanity. The Trial Chamber also accepted, for identification purposes, the testimony of FWS-50 that the Appellant orally raped her in the Appellant Kova~'s apartment.[421]

296. In the *Kupre{ki}* Appeal Judgement, the Appeals Chamber made the following statement with regard to the Prosecutor's obligation, under Article 18(4) of the Statute and Rule 47(C) of the Rules, to set out in that Indictment a concise statement of the facts of the case and of the crimes with which the accused is charged:[422]

> In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.

297. The Appeals Chamber observes that, in the instant case, the testimony of FWS-50 and FWS-75 did not relate to "material facts underpinning the charges in the indictment" which must have been pleaded in Indictment IT-96-23/1. Indeed, the facts established were not used as a basis for conviction but constituted evidence used to prove material facts pleaded in the Indictment. Therefore, on the basis of its case-law, the Appeals Chamber considers that the Trial Chamber did not err in relying upon those facts as evidence.

298. Moreover, as to the alleged inability to prepare his defence, the Appeals Chamber notes that the Appellant has not put forward any discernible error in the application of the Rules governing disclosure and the handling of evidence at trial to justify reconsideration of the Trial Chamber's conclusions.

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[419] *Ibid.*
[420] Trial Judgement, para 589.

299. For the foregoing reasons, the Appeals Chamber sees no error in the Trial Chamber's evaluation of the evidence. This ground of appeal must accordingly fail.

B. Rape of FWS-50

1. Submissions of the Parties

(a) The Appellant (Vukovic)

300. The Appellant submits that the Trial Chamber erred in its evaluation of FWS-50's testimony and that, consequently, the charges relating to the rape and torture of FWS-50 in an apartment in mid-July 1992, alleged in paragraph 7.11 of Indictment IT-96-23/1, were not proven beyond reasonable doubt.

301. First, the Appellant notes that FWS-50 made no reference to him[423] or to the alleged oral rape at Buk Bijela in her first statement to the Prosecutor's investigators,[424] and claims that discrepancies exist between that statement and her testimony at trial.[425] In particular, the Appellant points out inconsistencies between the testimony of FWS-50 and that of FWS-87.[426] At trial, FWS-50 testified that, after threatening her mother (FWS-51), the Appellant and another Serb soldier took her and FWS-87 from Partizan Sports Hall to an abandoned apartment, where the Appellant raped her.[427] For her part, FWS-87 denied being taken out of Partizan Sports Hall with FWS-50. Further, FWS-87 testified to having seen the Appellant "only twice: once when she was raped by him at Fo~a High School and later when he came to Radomir Kova~'s apartment".[428]

302. Secondly, the Appellant contends that FWS-50 did not provide any detail as to the place where she was taken and raped.[429] Given that the Trial Chamber accepted FWS-50's evidence in spite of this omission, the Appellant contends that the Trial Chamber used a different standard when evaluating FWS-50's evidence than when evaluating that of FWS-75 and FWS-87.[430]

303. Lastly, the Appellant claims that FWS-51 (FWS-50's mother) did not confirm that FWS-50 was taken by him from Partizan Sports Hall despite the fact that she was allegedly present when he

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421 *Ibid.*, para 789.
422 *Kupre{ki}* Appeal Judgement, para 88.
423 *Vukovic* Appeal Brief, para 129.
424 *Ibid.*, para 126.
425 *Ibid.*, para 123.
426 *Ibid.*
427 Appeal Transcript, T 202.
428 Trial Judgement, para 246.
429 *Vukovic* Appeal Brief, para 125.

took her daughter.[431] He alleges that FWS-51's inability to properly identify him calls into question FWS-50's credibility.[432]

(b) The Respondent

304. The Respondent contends that FWS-50's failure to refer to the Appellant and to the oral rape at Buk Bijela in her first statement to the Prosecutor's investigators does not diminish her reliability as a witness. Indeed, during cross-examination, FWS-50 explained that she did not mention this rape because she was ashamed of it.[433] The Respondent adds that FWS-50's trial testimony is remarkably consistent with her prior statement to the Prosecutor's investigators, with only insignificant discrepancies due to the passage of time.[434]

305. The Respondent points out that the Appellant erroneously stated that FWS-87 denied that FWS-50 was taken from Partizan Sports Hall and raped by the Appellant, as in fact FWS-87 merely stated that she did not remember this incident. Therefore, the Trial Chamber's decision not to convict the Appellant for the rape of FWS-87 stemmed from that witness's failure to remember the incident in question and not from any denial that it took place.[435] The Respondent submits that, at any rate, the failure by FWS-87 to recall being taken from Partizan Sports Hall and raped is fully understandable, given the frequency with which she was raped by a large number of men.[436] The Respondent claims that the lack of evidence from FWS-87 does not undermine the value of FWS-50's testimony indicating that the Appellant raped her.[437]

306. The Respondent stresses that FWS-50 gave detailed evidence of being taken to an abandoned apartment near Partizan and raped, and that she should not be expected to identify an exact location for that apartment. Therefore, the Appellant's related contention that the Trial Chamber used different standards when evaluating the evidence of FWS-75 and FWS-87 fails due to a lack of support.[438]

307. Finally, with regard to FWS-51, the Respondent recalls that this witness recognised the Appellant in court as "being familiar" and asserts that, even if FWS-51 could not identify the

[430] *Ibid.*
[431] Appeal Transcript, T 203.
[432] *Vukovi}* Appeal Brief, para 126.
[433] Trial Transcript, T 1293-1294.
[434] Prosecution Respondent's Brief, para 2.22. See also Appeal Transcript, T 228.
[435] Appeal Transcript, T 290.
[436] *Ibid.*
[437] Prosecution Respondent's Brief, para 2.26 and Appeal Transcript, T 289.
[438] Prosecution Respondent's Brief, para 2.28.

Appellant with certainty, this fact does not affect FWS-50's ability to identify the Appellant as the man who raped her.[439]

2. Discussion

308. The Appeals Chamber notes that the essential point of the Appellant's submissions is that, due to the unreliability of FWS-50's evidence, the Trial Chamber erred in relying upon that evidence to find him guilty of the charges of rape and torture of FWS-50 in an apartment in mid-July 1992.

309. At trial, FWS-50 explained her failure to mention the first rape at Buk Bijela on earlier occasions. The Appeals Chamber takes the view that, based upon her testimony, it was not unreasonable for the Trial Chamber to conclude that this first rape was particularly painful and frightening for FWS-50,[440] and that this omission in her first statement did not affect her reliability. The alleged inconsistencies between FWS-50's prior statement and her testimony at trial have been reviewed by the Appeals Chamber and are not sufficiently significant to cast any doubt upon the credibility of FWS-50. On the contrary, the absence of such natural discrepancies could form the basis for suspicion as to the credibility of a testimony.

310. With regard to the alleged inconsistency between the evidence of FWS-87 and that of FWS-50, the Appeals Chamber observes that FWS-87 stated simply that she did not recall the particular incident referred to by FWS-50 and not that it did not occur. The mere fact that FWS-87 could not remember being taken out of Partizan with FWS-50 does not cast any doubt upon FWS-50's own credibility.

311. In reply to the Appellant's submission that FWS-50 did not explain where she was taken and where she was raped, the Appeals Chamber observes that the witness testified at trial that she was taken to a room on the left side of the corridor of an abandoned apartment.[441] The Appeals Chamber considers that it would be unreasonable in the circumstances to expect the witness to identify an exact location or a street address for this apartment.

312. Lastly, with regard to FWS-51, the Appeals Chamber observes that she did testify that FWS-50 was taken from Partizan Sports Hall,[442] even though she did not specify who took her.

[439] *Ibid.*, para 2.31.
[440] Trial Transcript, T 1293-1294.
[441] *Ibid.*, T 1262.
[442] *Ibid.*, T 1148.

FWS-51 did not, as the Appellant seems to imply, deny that the incident charged at paragraph 7.11 of Indictment IT-96-23/1 took place. There is no basis for upholding the Appellant's contention.

313. For the foregoing reasons, the Trial Chamber's finding that FWS-50's evidence was a reliable basis on which to convict the Appellant for the crimes alleged in paragraph 7.11 of Indictment IT-96-23/1 remains undisturbed. This ground of appeal accordingly fails.

C. Issue of Identification

1. Submissions of the Parties

(a) The Appellant (Vukovic)

314. The Appellant contends that the Trial Chamber erred in accepting the identification of him provided by FWS-50 and FWS-75.[443] To prove this point, he makes the following submissions.

315. Firstly, the Appellant claims that FWS-50 identified him only at trial and that her courtroom identification was incorrectly performed in violation of criminal law principles.[444]

316. Further, the Appellant submits that, although FWS-62 testified that she saw her husband (FWS-75's uncle) being led away by the Appellant, she was not able to identify him when called to testify at trial.[445] The Appellant claims that the Trial Chamber could not rely on the identification provided by FWS-75, as this witness's unreliability is demonstrated by the fact that the Trial Chamber did not believe her evidence regarding the acts of the alleged rape in the Appellant Kovac's apartment.[446]

317. The Appellant contends that the Trial Chamber's decision to accept FWS-75's identification of him contradicts the position held by the Trial Chamber in the *Kupreski}* case that caution must be exercised when evaluating the evidence of a witness who has suffered intense trauma.[447]

(b) The Respondent

318. The Respondent argues that the Trial Chamber was entitled to place some weight on FWS-50's in-court identification of the Appellant, even though conceding that the Trial Chamber did not

[443] *Vukovic* Appeal Brief, para 129.
[444] *Ibid.*
[445] *Ibid.*, para 130.
[446] *Ibid.*, para 131.
[447] *Ibid.*, para 129, citing *Kupreškic* Trial Judgement, para 768.

attach positive probative weight to that evidence. The Respondent stresses, however, that FWS-50 saw the Appellant in Buk Bijela in early July 1992 when she was orally raped and in mid-July when he took her out of Partizan Sports Hall and raped her. In this regard, the Respondent points out that the Appellant has not indicated any discernible error on the part of the Trial Chamber in relying upon such evidence. Moreover, FWS-50 recognised the Appellant in photos shown to her by the Prosecutor's investigators in September 1999.[448] The Respondent claims that FWS-62's inability to recognise the Appellant at trial does not undermine the credibility of the evidence provided by FWS-50 or FWS-75.[449]

319. Lastly, the Respondent submits that the Trial Chamber examined the evidence concerning identification in a very careful manner and that it was acutely aware of the traumatic circumstances these witnesses faced.[450]

2. Discussion

320. With regard to the probative value of courtroom identifications, the Appeals Chamber reiterates its previous finding that the Trial Chamber was correct in giving no probative weight to in-court identification. [451]

321. As to the alleged inability of FWS-62 to identify the Appellant, the Appeals Chamber observes that the Trial Chamber relied mainly upon the testimony of FWS-50, who indicated with certainty that, *inter alia*, the Appellant was the person who raped her orally at Buk Bijela in an abandoned apartment.[452] Although caution is necessary when relying primarily upon the testimony of a single witness, in the circumstances of this case it was wholly understandable that the Trial Chamber attributed more weight to the evidence provided by FWS-50 than to that of FWS-62.

322. The Appellant's argument that the Trial Chamber erred in accepting FWS-75's identification of the Appellant because it did not accept her evidence that the Appellant raped her[453] misstates the Trial Chamber's position. The Trial Chamber did accept FWS-75's evidence that the Appellant raped her in Kovac's apartment. Its failure to use that evidence for conviction or sentencing purposes stemmed from the fact that this act was not charged in Indictment IT-96-23/1

[448] Prosecution Respondent's Brief, para 2.45.
[449] *Ibid.*, para 2.51.
[450] Appeal Transcript, T 293.
[451] See *supra*, paras 226-227.
[452] Trial Judgement, para 814.
[453] *Vukovic* Appeal Brief, para 129.

and not, as the Appellant suggests, from a belief that FWS-75 was unreliable.[454] The Trial Chamber, however, did use this particular evidence provided by FWS-75 for the purposes of identification, as it was entitled to do.[455] In view of this, the Appeals Chamber cannot find a discernible error on the part of the Trial Chamber.

323. Finally, with regard to the Appellant's contention that the Trial Chamber did not exercise sufficient caution in its use of FWS-75's, the Appeals Chamber takes note of the following finding of the Trial Chamber: [456]

> The Trial Chamber attaches much weight to the identification of Vukovi} by FWS-75 because of the traumatic context during which the witness was confronted with Vukovi} in Buk Bijela as well as in Radomir Kovac's apartment. The Trial Chamber is therefore satisfied that the identification of Vukovi} by FWS-75 was a reliable one.

324. The Appeals Chamber agrees that, in principle, there could be cases in which the trauma experienced by a witness may make her unreliable as a witness and emphasises that a Trial Chamber must be especially rigorous in assessing identification evidence. However, there is no recognised rule of evidence that traumatic circumstances necessarily render a witness's evidence unreliable. It must be demonstrated in *concreto* why "the traumatic context" renders a given witness unreliable. It is the duty of the Trial Chamber to provide a reasoned opinion adequately balancing all the relevant factors. The Appeals Chamber notes that, in the present case, the Trial Chamber has provided relatively short but convincing reasoning.

325. In view of the foregoing reasons, this ground of appeal fails.

D. Discussion of Exculpatory Evidence

1. Submissions of the Parties

(a) The Appellant (Vukovic)

326. The Appellant submits that the Trial Chamber erred in convicting him of the rape of FWS-50 because, as shown by the evidence at trial regarding an "injury" to his testicle, he was impotent at the relevant time and thus could not have committed the crime.[457]

[454] Trial Judgement, paras 789 and 796.
[455] *Ibid.*, para 589.
[456] *Ibid.*, para 789.
[457] *Vukovic* Appeal Brief, paras 141-142.

327. The Appellant contends that the Trial Chamber should have concluded from the evidence given by Defence witnesses DP and DV that he had suffered an injury to his testicle at the relevant time. He argues that the Trial Chamber erred in ruling that a logbook of DV was inadmissible because it failed to mention the nature of Vukovi}'s injury.[458]

328. The Appellant furthermore claims that the Trial Chamber erred in preferring the evidence given by the Prosecution's expert Dr. de Grave to that of the Defence witness Professor Dunjic.[459] Vukovi} submits that both expert witnesses left open the possibility of impotence arising from his injury.[460] The Appellant asserts that Dr. de Grave's expert experience is limited in comparison to that of Professor Dunji}.[461]

329. In the *Vukovi}* Reply Brief, the Appellant reiterates that the Trial Chamber erroneously rejected the evidence of Professor Dunji} in favour of that of Dr. de Grave, who concluded that the impotence resulting from this injury would only last for three days.[462] The Appellant re-emphasises that the Trial Chamber did not determine with certainty the date when the rape alleged in paragraph 7.11 of Indictment IT-96-23/1 occurred, and hence it is not possible to exclude the existence of the Appellant's impotence at the relevant time.[463]

(b) The Respondent

330. The Respondent rejects Vukovi}'s "submissions regarding the Trial Chamber's findings as to Vukovi}'s injury and its impact on his ability to have sexual intercourse at the relevant time".[464] The Respondent notes that the Trial Chamber gave considerable attention to the evidence raised by the Defence.[465] It recalls that the Trial Chamber found that "the Defence adduced no credible evidence concerning the seriousness or even the exact nature of the injury sustained by the accused on that occasion".[466] Finally, the Respondent stresses that Dr. de Grave's testimony revealed that Vukovi}'s alleged impotence would not have lasted longer than 3 days and that the Trial Chamber rightfully rejected Professor Dunji}'s medical opinion on the ground that "he was unable to conclude that such impotence actually occurred".[467]

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[458] *Ibid.*, para 136.
[459] *Ibid.*, paras 137 and 139-140.
[460] *Vukovic* Reply Brief, para 2.32.
[461] *Vukovic* Appeal Brief, paras 139-140.
[462] *Vukovic* Reply Brief, para 2.31.
[463] *Ibid.*, para 2.33.
[464] Prosecution Respondent's Brief, para 2.66.
[465] *Ibid.*, para 2.67, citing Trial Judgement, para 802.
[466] *Ibid.*, para 2.68.
[467] Trial Judgement, para 803.

2. Discussion

331. At the outset, the Appeals Chamber notes that the bulk of the submissions tendered by Vukovi} in this ground of appeal has already been raised during trial and satisfactorily dealt with in the Trial Judgement.

332. The Trial Chamber rejected the defence of impotence put forward by Vukovi} on the following grounds. First, it established that the injury to Vukovi}'s testicle occurred on 15 June 1992 and that the first rape ascribed to him occurred on 6 or 7 July 1992. On this basis, it held that, without excluding the possibility that Vukovi} could have been impotent for a certain period of time, by the date the crime occurred "the accused would have recovered from his injury."[468] As to the seriousness of Vukovi}'s injury, the Trial Chamber referred to the testimony of DV suggesting that the accused might have exaggerated the gravity of his injury in order to avoid being sent back to the frontline.[469] In this regard, it stressed that although indicating that Vukovi} was injured on 15 June 1992, the logbook referred to by DV said nothing about the seriousness of this injury.[470] In addition, the Trial Chamber relied on the testimony of DP, a confidant of the accused, who, although testifying that he had taken the accused to hospital for treatment 4 or 5 times, said nothing about the nature of the consequences of the injury. Finally, the Trial Chamber noted that Professor Dušan Dunjic, the medical expert called by Vukovi}, indicated that an unspecified temporary impotence could result as a consequence of an accident of the sort described by the accused, but that Professor Dunjic was unable to conclude that such impotence actually occurred. On these grounds, the Trial Chamber concluded that: [471]

> …there is no reasonable possibility that any damage to the accused's testis or scrotum led to the consequence that he was rendered impotent during the time material to the charges against him.

333. The Appeals Chamber finds that, on the basis of the evidence presented before it at trial, the conclusion of the Trial Chamber is reasonable. All arguments presented by the Appellant were analysed by the Trial Chamber. The mere assertion that one expert witness is more experienced than another has no value. The Appellant failed to demonstrate in detail and on the basis of a qualified expertise the scientific superiority of Professor Dunjic. Additionally, it must be taken into account that the underlying facts of the expert's opinion are extremely vague and allow for the conclusions which were drawn.

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[468] *Ibid.*, para 801.
[469] *Ibid.*, para 802.

334. In these circumstances, the Appeals Chamber finds no reason to disturb the Trial Chamber's finding and thus this ground of appeal must fail.

E. Conclusion

335. For the foregoing reasons, the appeal of the Appellant Vukovi} on factual findings is dismissed.

[470] *Ibid.*
[471] *Ibid.*, para 805.

XI. GROUNDS OF APPEAL RELATING TO SENTENCING

A. The Appellant Dragoljub Kunarac's Appeal against Sentence

336. The Appellant Kunarac has received a single sentence of 28 years' imprisonment for convictions on five counts of crimes against humanity and six counts of violations of the laws or customs of war. His appeal against the sentence consists of the following grounds: 1) a single sentence is not allowed under the Rules and each convicted crime should receive an individual sentence; 2) the Trial Chamber should follow the sentencing practice in the former Yugoslavia in the sense that the sentence under appeal cannot exceed the maximum sentence prescribed for the courts of the former Yugoslavia; 3) his crimes do not deserve the maximum penalty because certain aggravating factors in relation to his crimes were not properly assessed; 4) two mitigating factors should have been taken into account in the assessment of the sentence; and 5) the Trial Chamber was ambiguous as to which version of the Rule regarding credit for time served was applied.

1. Whether the Single Sentence is in Conformity with the Rules

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

337. The Appellant submits, in effect, that the Trial Chamber should have pronounced an individual sentence for each criminal offence for which he was convicted at the conclusion of the trial, in accordance with the provision of Rule 101(C) of the Rules then in force.[472] He argues that that version of Rule 101(C) "in no case allowed for the single sentence to be pronounced", for if this were not the case, there would have been no need to amend the Rule shortly after the conclusion of the trial.[473] He further contends that the Trial Chamber did not respect the principles that each crime receives one sentence and that a composite sentence for all crimes cannot be equal to the sum of the individual sentences nor be in excess of the highest determined sentence for an individual crime.[474]

(ii) The Respondent

[472] *Kunarac* Appeal Brief, para 149. Rule 101(C) of the 18th edition of the Rules of Procedure and Evidence, 2 August 2000.
[473] *Kunarac* Appeal Brief, para 150.
[474] *Ibid*., para 151.

338. The Respondent submits that the Appellant has not shown, in terms of Rule 6(D) of the Rules, how the application of the Rules in this connection has prejudiced his rights as an accused.[475] She argues that the amendment in question codified the practice of the Tribunal of allowing a global sentence to be imposed for crimes "committed in a geographically limited area over a limited period of time" since "the imposition of a single sentence is therefore more appropriate to reflect the totality of…?the Appellants'g respective conduct."[476] Although citing another relevant rule, Rule 87 of the Rules, the Respondent fails to address the Appellant's arguments concerning Rule 101(C).

(b) Discussion

339. The Trial Chamber merely states that it "is satisfied that the rights of the three accused are not prejudiced by the application of the latest amended version" of the Rules, in accordance with Rule 6 of the Rules,[477] and that it will follow the provision of Rule 87(C) of the Rules in imposing a single sentence.[478]

340. Rule 101(C) of the Rules (18th edition, 2 August 2000) provides:

> The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

This provision was deleted at the Plenary Meetings of the Tribunal held in December 2000. Rule 87(C) of the 18th edition of the Rules provides:

> If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the penalty to be imposed in respect of each finding of guilt.

The version of Rule 87(C) contained in the 19th edition of the Rules (19 January 2001) provides thus:

> If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.

This newer version of Rule 87(C) of the Rules combined the provisions of Rule 87(C) and Rule 101 (C) of the 18th edition of the Rules, in addition to its recognising the power of a Trial Chamber to impose a single sentence. Rule 6(D) of the Rules, the text of which remained unchanged between these two editions, states:

[475] Prosecution Consolidated Respondent's Brief, para 8.5.
[476] *Ibid*., para 8.9.

> An amendment shall enter into force seven days after the date of issue of the official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused in any pending case.

341. The Appeals Chamber interprets this ground of appeal as alleging a legal error. The consequence of applying the newer Rule 87(C) of the Rules by the Trial Chamber was clear: the imposition of a single sentence was within the power of the Chamber. The question to be answered by the Appeals Chamber is whether the imposition of a single sentence in accordance with the newer Rule 87(C) of the Rules prejudiced the rights of the accused at the conclusion of his trial.

342. The Appeals Chamber considers that the version of Rule 101(C) contained in the 18th edition of the Rules did not expressly require a Trial Chamber to impose multiple sentences for multiple convictions. It merely required the Trial Chamber to indicate whether multiple sentences, if imposed at all, would be served consecutively or concurrently. This was a rule intended to provide clarity for the enforcement of sentences. This interpretation is also that implicitly adopted in the *Bla{ki}* Trial Judgement.[479] In that Judgement, the Trial Chamber further reasoned that:[480]

> Here, the crimes ascribed to the accused have been characterised in several distinct ways but form part of a single set of crimes committed in a given geographic region during a relatively extended time-span, the very length of which served to ground their characterisation as a crime against humanity, without its being possible to distinguish criminal intent from motive. The Trial Chamber further observes that crimes other than ?*sic*? the crime of persecution brought against the accused rest fully on the same facts as those specified under the other crimes for which the accused is being prosecuted… In light of this overall consistency, the Trial Chamber finds that there is reason to impose a single sentence for all the crimes of which the accused has been found guilty.

343. In the disposition of the *Bla{ki}* Trial Judgement, it is clear that the accused was convicted on different counts for the same underlying acts for which he was held responsible. It is clear from this Judgement that, in certain cases, a single, composite sentence may be more appropriate than a set of individual sentences for individual convictions. The fundamental consideration in this regard is, according to the *^elebi}i* Appeal Judgement, that "the sentence to be served by an accused must reflect the totality of the accused's criminal conduct".[481]

344. The Appeals Chamber holds that neither Rule 87(C) nor Rule 101(C) of the 18th edition of the Rules prohibited a Trial Chamber from imposing a single sentence, and the precedent of a single sentence was not unknown in the practice of the Tribunal or of the ICTR.[482] The newer version of

[477] Trial Judgement, para 823, footnote 1406.
[478] *Ibid*., para 855.
[479] *Bla{ki}* Trial Judgement (currently under appeal), para 805.
[480] *Ibid*., para 807.
[481] *^elebi}i* Appeal Judgement, para 771.
[482] *Kambanda* Appeal Judgement, paras 100-112.

Rule 87(C) of the Rules, on which the Trial Chamber relied for sentencing purposes in the present matter, simply confirmed the power of a Trial Chamber to impose a single sentence. If the Appellant had no doubt as to the fairness of Rule 101(C) of the 18th edition of the Rules, as is the case here, he could not fault the fairness of Rule 87(C) of the 19th edition of the Rules, which did no more than absorb Rule 101(C) of the earlier edition and codify a precedent in the practice of the Tribunal. This ground of appeal thus fails.

2. The Recourse to the Sentencing Practice in the Courts of the Former Yugoslavia

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

345. The Appellant argues that a Trial Chamber must comply with Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules, which means that "the pronounced sentence or sentences can not exceed the general maximum prescribed by the sentencing practice in the former Yugoslavia, as the courts of the former Yugoslavia can not pronounce sentences in excess to the maximum prescribed sentence".[483] He submits that "the Trial Chamber erred and venture ?*sic*? outside its discretionary framework given in Article 24 of the Statute, since the par 1 of the Article 24 of the Statute is limiting the authority of the Trial Chambers in the Tribunal to pronounce sentences over 20 years of imprisonment, except in cases where they pronounce explicitly regulated sentence of life imprisonment".[484] The maximum sentence the Appellant could foresee was a 20-year imprisonment for war crimes.[485]

(ii) The Respondent

346. The Respondent submits that the fact that the Trial Chamber is not bound by the practice of the courts of the former Yugoslavia is "beyond any serious dispute".[486]

(b) Discussion

347. The Trial Chamber states that the wording of Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules "suggests that the Trial Chamber is not *bound* to follow the sentencing

[483] *Kunarac* Appeal Brief, para 153.
[484] *Kunarac* and *Kova~* Reply Brief, para 6.58.
[485] *Kunarac* Appeal Brief, para 154.
[486] Prosecution Consolidated Respondent's Brief, para 8.12.

practice of the former Yugoslavia."[487] In this context, references are made to the existing case-law, which shows a uniform approach of the Chambers in this connection.[488] There is not "an automatic application of the sentencing practices of the former Yugoslavia".[489]

348. Article 24(1) of the Statute requires that:

> The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the court of the former Yugoslavia.

Rule 101(B)(iii) of the Rules (19th edition) requires a Trial Chamber to "take into account" the general practice regarding prison sentences in the courts of the former Yugoslavia.

349. The case-law of the Tribunal, as noted in the Trial Judgement, has consistently held that this practice is not binding upon the Trial Chambers in determining sentences.[490] Further, in the instant case the Trial Chamber did consider the sentencing practice of the courts of the former Yugoslavia by way of hearing a defence expert witness in this respect, and it thus complied with the provisions of Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules. The question here is whether the Trial Chamber, while considering the practice of the courts of the former Yugoslavia in relation to the sentencing aspect of the present case, ventured outside its discretion by ignoring the sentencing limits set in that practice. Article 24(1) of the Statute prescribes imprisonment, but no gradation of sentence has been laid down. The Chambers have to weigh a variety of factors to decide on the scale of a sentence. In the present case, the Trial Chamber followed all the necessary steps. The Appeals Chamber considers, therefore, that the Trial Chamber did not abuse its power or make an error in this regard. The ground of appeal is rejected.

3. Aggravating Factors

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

350. The Appellant asserts that the Trial Chamber should have satisfied itself first that he deserved the maximum penalty under the 1977 Penal Code of the Socialist Federal Republic of Yugoslavia ("the 1977 Penal Code"), which was one of 20 years' imprisonment (in lieu of the death

[487] Trial Judgement, para 829.
[488] *Ibid*., citing ^*elebi}i* Appeal Judgement, paras 813 and 820.
[489] *Ibid*.
[490] ^*elebi}i* Appeal Judgement, paras 813 and 820 and *Kupre{ki}* Appeals Judgement, para 418.

penalty).[491] His reasoning is that, if various aggravating factors had been assessed properly, he would not have received the maximum term of imprisonment. The Appellant claims that the aggravating factors found by the Trial Chamber are erroneous because: 1) the vulnerability of victims is an element of the crime of rape, not an aggravating factor; 2) there is a contradiction between the findings in paragraphs 858 and 863 of the Trial Judgement; 3) the age of certain victims, all but one younger than 19 years, cannot be an aggravating factor; 4) prolonged detention is an element of the crime of enslavement, not an aggravating factor; and 5) discriminatory grounds are an element of Article 5 offences, not an aggravating factor.

(ii) The Respondent

351. The Respondent submits that vulnerability is not an element of the crime of rape, according to the definition given by the Appellant at the trial, and moreover that considering elements of crimes as aggravating factors is anyway not unknown in the practice of the ICTR.[492] She also opines that the Trial Chamber "was probably referring to the status of women and children who are specifically accorded protection under the Geneva Conventions and other international humanitarian law instruments in times of armed conflicts".[493] In that light, "it was reasonable to conclude that the callous attacks on defenseless women merited specific assessment".[494] The Respondent argues that the Appellant has not shown any discernible errors on the part of the Trial Chamber.[495] She does not comment on the issue of the young age of the victims, but states that the Trial Chamber was correct in its approach.[496] Similarly, she merely states that the prolonged period of detention being used to aggravate the sentence was not unreasonable.[497] Further, she argues that discriminatory motives can constitute an aggravating factor.[498] In her view, there are many aggravating factors in Kunarac's case.[499]

(b) Discussion

352. The Appeals Chamber notes that point 1) of this ground of appeal, regarding the factor of vulnerability of the victims, is raised in reference to the consideration of that factor given by the Trial Chamber. In particular, the Trial Chamber stated "?l?astly, that these offences were committed

[491] *Kunarac* Appeal Brief, para 154.
[492] Prosecution Consolidated Respondent's Brief, paras 8.15 and 8.16.
[493] *Ibid*., para 8.17.
[494] *Ibid*.
[495] *Ibid*., para 8.18.
[496] *Ibid*., para 8.21.
[497] *Ibid*., para 8.22.
[498] *Ibid*.
[499] Appeal Transcript, T 326.

against particularly vulnerable and defenceless women and girls is also considered in aggravation."[500] The Trial Chamber considered the factor of the vulnerability of the victims in terms of the gravity of the offences.[501] Article 24(2) of the Statute requires that Trial Chambers consider the gravity of the offence in imposing sentences. Whether or not the vulnerability of the victim is an element of the crime of rape does not affect its being evidence of the gravity of the crime, which can duly be considered in the course of sentencing as a matter of statutory law. The Trial Chamber committed no error in this regard, and this point of the ground of appeal is thus rejected.

353. As to point 2) of this ground of appeal, the Appellant argues that the Trial Chamber reached contradictory findings with regard to his role in the armed conflict in the former Yugoslavia. In paragraph 858 it makes statements to the effect that none of the accused played relatively significant roles "in the broader context of the conflict in the former Yugoslavia"; whereas it states in paragraph 863 that "the evidence clearly shows that this accused [i.e. Kunarac] played a leading organisational role and that he had substantial influence over some of the other perpetrators". The Appeals Chamber considers that the Appellant has overlooked the different contexts of these two findings. The Trial Chamber found the Appellant not to be in any position of command in the conflict in the former Yugoslavia, thus being low down the hierarchy of power in the territory. This does not, however, contradict the finding of his role in the crimes for which he was held responsible, those crimes being confined to a particular area of the former Yugoslavia. Both paragraphs state clearly that he was not regarded as a commander in relation to the crimes. This particular part of the ground of appeal is thus without merit and is dismissed.

354. As to point 3), the Appellant has not elaborated on his argument that girls of 16-17 years of age might be allowed to marry in the former Yugoslavia. A person may still be regarded as young even if he or she is eligible for marriage according to law. In Article 73 of the 1977 Penal Code, a person between 16-18 years old was considered a "senior juvenile", thus to be treated differently from adults in terms of criminal sanction. Article 1 of the 1989 Convention on the Rights of the Child,[502] effective for the former Yugoslavia since 2 February 1991, defines a child to be a human being under the age of 18 years unless national law provides the child with a younger age of majority. Young as they were (the victims concerned in this part of the appeal were aged between 15 and a half and 19 years), there was no provision in the 1977 Penal Code, or more specifically the

[500] Trial Judgement, para 867.
[501] *Ibid.*, para 858.
[502] U.N. Doc. A/44/25, adopted 20 November 1989.

1977 Penal Code of the Socialist Republic of Bosnia and Herzegovina, that would aggravate the sentence for a convicted rapist due to the age of a victim who might be under 16 years but older than 14 years. Article 91 of the latter code imposed a heavier sentence for the rape of a juvenile under 14 years of age.

355. The Trial Chamber has considered the defence expert witness's evidence with regard to the sentencing practice of the former Yugoslavia for the offence of rape, which shows that the youth of victims of sexual crimes constituted an aggravating circumstance in that practice.[503] The witness confirmed in court that the rape of young girls under 18 years of age led to aggravated sentences in the former Yugoslavia.[504] In the view of the Appeals Chamber, the expert evidence did not contradict the prevailing practice in the former Yugoslav Republic of Bosnia and Herzegovina and was rightly considered by the Trial Chamber in this regard. There still was an inherent discretion of the Trial Chamber to consider a victim's age of 19 years as an aggravating factor by reason of its closeness to the protected age of special vulnerability. No doubt it was for this reason that the Trial Chamber spoke of these different ages as "relatively youthful".[505] Also, the Trial Chamber was right to distinguish between crimes committed in peacetime and in wartime. Young and elderly women need special protection in order to prevent them from becoming easy targets. The Appeals Chamber finds that the Trial Chamber was not in error by taking into account the young age of victims specified in the Trial Judgement. This part of the ground of appeal therefore fails.

356. Point 4) of this ground of appeal concerns the aggravating factor of enslavement over a prolonged period. The Trial Chamber found, in relation to the count of enslavement, that two victims were subject to abuses over a period of two months.[506] The Appellant contends that duration is an element of the crime of enslavement, and therefore cannot be an aggravating factor. However, as previously stated, the Appeals Chamber agrees with the Trial Chamber that duration may be a factor "when considering whether someone was enslaved".[507] This means that duration is not an element of the crime, but a factor in the proof of the elements of the crime. The longer the period of enslavement, the more serious the offence. The Trial Chamber properly exercised its discretion in considering a period of two months to be long enough to aggravate the sentence for the offence. This part of the ground of appeal therefore fails.

[503] Trial Judgement, para 835.
[504] Trial Transcript, T 5392.
[505] Trial Judgement, para 874.
[506] *Ibid.*, para 744.
[507] *Ibid.*, para 542.

357. In point 5) of this ground of appeal it is alleged that the Trial Chamber erred in regarding the discriminatory objective as an aggravating factor, as this constitutes an element of Article 5 crimes. In this context, the Appeals Chamber recalls the *Tadi}* Appeal Judgement, which states that a discriminatory intent "is an indispensable legal ingredient of the offence only with regards to those crimes for which this is expressly required, that is, for Article 5(h) of the Statute, concerning various types of persecution".[508] It is not an element for other offences enumerated in Article 5 of the Statute. This part of the ground of appeal thus fails.

4. Mitigating Factors

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

358. The Appellant claims that the fact that none of the witnesses has suffered any severe consequences at his hands should be considered as a mitigating factor. In his view, the fact that he is a father of three young children should likewise be a mitigating factor, as it would in the practice of the courts of the former Yugoslavia.[509]

(ii) The Respondent

359. The Respondent makes no submission in this respect, except for a remark that "the Trial Chamber is not bound to accept the testimony of experts and more so in the case where the suffering and harmful consequences are so apparent".[510]

(b) Discussion

360. The part on the sentencing of the Appellant in the Trial Judgement contains no mention of either ground being raised by the Appellant, as the Trial Chamber simply states that "there are no other relevant mitigating circumstances to be considered with respect to" the Appellant.[511] The Appeals Chamber takes this ground of appeal to be based on the complaint that the Trial Chamber did not give consideration to the factors in question.

361. The argument regarding an alleged lack of grave consequences was not included in the sentencing section of the Defence Final Trial Brief. Nor was it asserted during the closing

[508] *Tadi}* Appeal Judgement, para 305.
[509] *Kunarac* Appeal Brief, paras 158-159.
[510] Prosecution Consolidated Respondent's Brief, para 8.23.
[511] Trial Judgement, para 870.

arguments. The Trial Chamber, therefore, committed no error in not mentioning this fact. Under Article 47(2) of the 1977 Penal Code, the grave consequences of an offence such as rape would aggravate the sentence. However, that Code contains no provision entitling perpetrators of crimes without grave consequences to mitigation of their punishment. The Trial Chamber, on the other hand, has found that the offences of which the Appellant is convicted are "particularly serious offences." The inherent gravity of those offences, as the starting point for the sentencing procedure, demands severe punishment, which will not be diminished because the offences are claimed to have produced no serious consequences for the victims. This ground of appeal is therefore dismissed.

362. As to the factor that the Appellant is the father of three young children, the Appeals Chamber notes that the Defence raised this point during trial as a matter "significant for sentencing of the Accused Dragoljub Kunarac", and that the Defence actually submitted the point as a significant mitigating circumstance.[512] This point was raised again at the hearing of closing arguments.[513] It is not clear why the Trial Chamber decided not to consider this issue. The Appeals Chamber considers this factor to be a mitigating factor, following the existing case-law of the Tribunal and having recourse to the practice of the courts of the former Yugoslavia. In the *Erdemovi}* Sentencing Judgement, the fact that the accused had a young child was considered as a personal circumstance under the heading of "Mitigating factors".[514] In the *Tadi}* Sentencing Judgement, the personal circumstances of the accused, including his marriage, were considered separately from mitigating factors.[515] Article 24(2) of the Statute requires the Trial Chambers to take into account "the individual circumstances of the convicted person" in the course of determining the sentence. Such circumstances can be either mitigating or aggravating. Family concerns should in principle be a mitigating factor. Article 41(1) of the 1977 Penal Code required the courts of the former Yugoslavia to consider circumstances including the "personal situation" of the convicted person. The Appeals Chamber holds that this should have been considered as a mitigating factor. This ground of appeal is thus partly successful. However, in view of the number and severity of the offences committed, the Appeals Chamber finds that the sentence imposed by the Trial Chamber is the appropriate one and thus upholds the Trial Chamber's decision in this respect.

[512] Defence Final Trial Brief, para K.h.4.
[513] Trial Transcript, T 6447.
[514] *Erdemovi}* Sentencing Judgement, para 16.
[515] *Tadi}* Sentencing Judgement, para 26.

5. Credit for Time Served

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

363. The Appellant submits that, in this regard, the Trial Chamber "gave an ambiguous formulation" in the last paragraph of the Trial Judgement by recalling Rule 101 of the Rules without explaining which version of the Rule was applied. He further asserts that if credit for time served is to be calculated from the date of 4 March 1998, "there is no error of the Trial Chamber regarding the application of law."[516]

(ii) The Respondent

364. The Respondent agrees with the Appellant that "no order has been made" in the last paragraph of the Trial Judgement as to the credit for time served, and invites the Appeals Chamber to clarify this point.[517] However, she points out that the Trial Chamber orally stated on 22 February 2001 that the time spent in custody should be credited towards all three convicted persons.[518]

(b) Discussion

365. The Trial Chamber notes that the Appellant "surrendered to the International Tribunal on 4 March 1998".[519] The Appeals Chamber considers that the issue of credit for time could only be regarded as a ground of appeal if an erroneous reading was made by the Appellant of the Trial Chamber Judgement in this respect. However, the heading of the paragraph of the Trial Judgement in question, "Credit for Time Served", read in conjunction with Rule 101(C) and Rule 102 of the 19th edition of the Rules, referred to in the paragraph in question, is clear enough as to the thrust of the paragraph. The Trial Chamber has already stated clearly in footnote 1406 that it would apply the 19th edition of the Rules in this part of the Judgement. The older version of Rule 101(C) of the Rules would be unrelated to the issue of credit for time served. As the Prosecutor correctly submits, the Trial Chamber did make an oral statement, on 22 February 2001, stating that the time spent in custody should be credited to the sentences of the three convicted persons. If the Appellant had had any doubt, he could have, through his counsel, raised this matter immediately before the Trial Chamber for clarification. That would have been the proper forum. The ground of appeal is thus

[516] *Kunarac* Appeal Brief, para 162.
[517] Prosecution Consolidated Respondent's Brief, para 8.19.
[518] Trial Transcript, T 6568, 6572 and 6574.
[519] Trial Judgement, para 890.

dismissed, provided that the last paragraph of the Trial Judgement be read together with the oral statement of the Trial Chamber of 22 February 2001. In effect, the Appellant will receive credit for his time served in detention as calculated from his surrender into the custody of the Tribunal.

6. Conclusion

366. For the reasons indicated above, the Appeals Chamber dismisses grounds 1 through 5, except for one part of ground 4. Considering, however, the relative weight of the Appellant's family situation as a mitigating factor, the Appeals Chamber decides not to revise the sentence under appeal.

B. The Appellant Radomir Kova~'s Appeal against Sentence

367. The Trial Chamber has sentenced the Appellant Kova~ to a single sentence of imprisonment of 20 years for his convictions on two counts of crimes against humanity and two counts of violations of the laws or customs of war. His appeal against the sentence relies on the following grounds: 1) the retrospective application of the amended Rule 101 of the Rules by the Trial Chamber has prejudiced the Appellant's rights before the Tribunal; 2) the Trial Chamber erroneously applied Article 24(1) of the Statute by disregarding the sentencing practice of the former Yugoslavia; 3) there is a misunderstanding of aggravating factors by the Trial Chamber; 4) the Trial Chamber erred in considering that there was no mitigating factor in relation to the Appellant's case; and 5) the Trial Judgement is not clear as to the credit given for time served by the Appellant. The Appellant states clearly that he will not ask for a clarification of the finding of the Trial Chamber with regard to the issue of the legality of his arrest.[520]

1. The Issue of a Single Sentence and the Severity of the Sentence

(a) Submissions of the Parties

(i) The Appellant (Kova~)

368. The Appellant submits that the retroactive application by the Trial Chamber of the amended Rule 101 of the Rules "prejudiced" his rights. He argues that "it is unacceptable" and "directly opposed to the principle of legality" for crimes to be punished without "prescribed sentences" being designated for those crimes.[521] He explains that, in allowing the imposition of a single sentence for multiple convictions, the amended Rule 101 of the Rules, "seriously breaches the principle that

[520] *Kova~* Appeal Brief, para 179.

each criminal offence must have a prescribed penalty (*nullum crimen nulla poena sine lege*)"[522] and has prejudiced his rights.[523] Along the same line of reasoning, he also questions the application of Rule 87(C) of the 19th edition of the Rules.[524] The Appellant further contends that "in view of the sentencing practice of the former Yugoslavia and the past practices" of the Tribunal, the Trial Chamber should not have imposed "such a high and severe sentence" on him.[525]

(ii) The Respondent

369. The Respondent argues that Rule 87(C) of the Rules (19th edition) codified the pre-existing practice of the Tribunal of allowing single sentences to be imposed for several crimes in situations when to do so would better reflect the totality of the convicted person's conduct.[526]

(b) Discussion

370. As to the propriety of applying Rule 101 and in particular Rule 87(C) of the 19th edition of the Rules, the Appeals Chamber refers to its discussion in paragraphs 339-344, above.

371. As to the argument that Rule 87(C) of the 19th edition of the Rules, in allowing a single sentence to be imposed for multiple convictions, breaches the principle of legality, the Appeals Chamber considers that this argument is premised on a misconception that the Statute should function as a penal code, with prescribed minimum and maximum sentences for specific offences.

372. Ultimately, the Appellant is not challenging the Trial Judgement on the ground of the maxim *nullum crimen sine lege* but that of *nulla poena sine lege*. The former is not in dispute, following the *Tadi}* Jurisdiction Decision and the *Aleksovski* Appeal Judgement. However, the latter principle, as far as penalty is concerned, requires that a person shall not be punished if the law does not prescribe punishment.[527] It does not require that the law prescribes a precise penalty for each offence depending on the degree of gravity. Be it a common law system or a civil law system, it is not the case that national legislation anticipates every possible offence with a prescribed sentence. On the contrary, it is a fact that a penal code frequently prescribes a range for sentencing with regard to an offence; that is, it often sets out both the maximum and minimum sentences.

[521] *Ibid*., para 172 and Appeal Transcript, T 183.
[522] *Kova~* Appeal Brief, para 174. See also Appeal Transcript, T 90 and 179.
[523] Appeal Transcript, T 97-98.
[524] *Ibid*., T 92.
[525] *Kova~* Appeal Brief, para 171.
[526] Prosecution Consolidated Respondent's Brief, para 8.4.
[527] *Cf. S.W.* v *the United Kingdom*, European Court of Human Rights, no. 47/1994/494/576, Judgement of 22 November 1995, ECHR 1995-A/335-B, para 35.

Within the range, judges have the discretion to determine the exact terms of a sentence, subject, of course, to prescribed factors which they have to consider in the exercise of that discretion.

373. The Statute does not set forth a precise tariff of sentences. It does, however, provide for imprisonment and lays down a variety of factors to consider for sentencing purposes. The maximum sentence of life imprisonment is set forth in Rule 101(A) of the Rules (correctly interpreting the Statute) for crimes that are regarded by States as falling within international jurisdiction because of their gravity and international consequences. Thus, the maxim *nulla poena sine lege* is complied with for crimes subject to the jurisdiction of the Tribunal. As the Permanent Court of International Justice once stated in relation to the principles of *nullem crimen sine lege* and *nulla poena sine lege*: [528]

> The law alone determines and defines an offence. The law alone decrees the penalty. A penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case.

374. Moreover, the Statute requires the Trial Chambers to have recourse to the sentencing practice of the former Yugoslavia. In each sentencing matter, parties are given sufficient time to make their submissions. A sentence is reached only after all relevant factors are considered by the Trial Chamber. Such a procedure leaves little risk of the rights of the accused being disrespected. In practice, the Trial Chamber does not, therefore, wield arbitrary powers in the sentencing process, and there is always the safeguard of appeal. This ground of appeal therefore fails.

2. The Recourse to the Sentencing Practice in the Courts of the Former Yugoslavia

(a) Submissions of the Parties

(i) The Appellant (Kova~)

375. The Appellant submits that the Trial Chamber cannot disregard the sentencing practice of the former Yugoslavia, and that "the maximum sentence to be pronounced, notwithstanding the life sentence, is 20 years of imprisonment". [529]

(ii) The Respondent

376. The Respondent asserts that the *Tadi}* Appeal Judgement has settled the question as to whether "the sentence of 20 years is within the discretionary framework provided to the Trial

[528] *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Permanent Court of International Justice, Advisory Opinion, 4 December 1935, Series A/B, Judgments, Orders and Advisory Opinions, 1935, Vol 3, No. 65, p 41 at p 51.

Chambers by the Statute".[530] In the instant case, the Respondent notes, the Trial Chamber took into account the practice of the former Yugoslavia, but it selected a higher sentence because of the gravity of the Appellant's offences.[531]

(b) Discussion

377. As previously stated,[532] a Trial Chamber must consider, but is not bound by, the sentencing practice in the former Yugoslavia. It is only where that sentencing practice is silent or inadequate in light of international law that a Trial Chamber may consider an approach of its own. In the *Tadi}* Sentencing Appeal Judgement, it is stated that "the wording of Sub-rule 101(A) of the Rules, which grants the power to imprison for the remainder of a convicted person's life, itself shows that a Trial Chamber's discretion in imposing sentence is not bound by any maximum term of imprisonment applied in a national system".[533] This statement is even more persuasive given that it was made in considering the appeal of Tadi} in that case against his 20-year jail term, which is equivalent to what the Appellant has received as punishment. Furthermore, the Trial Chamber in the instant case did take into account the sentencing practice of the former Yugoslavia.[534] This ground of appeal is thus dismissed.

3. Aggravating Factors

(a) Submissions of the Parties

(i) The Appellant (Kova~)

378. The Appellant argues that "the absence of all elements of grave physical or mental torture which would be the substance of the criminal offence, indicate that not one single aggravating circumstance could be found in the case of the accused Radomir Kova~ which would be of significance in the sentencing decision justifying the pronounced sentence in the duration of 20 years of incarceration of the accused".[535] This ground of appeal consists of the following points: 1) the relatively young age of certain victims; 2) the duration of mistreatment of certain victims; 3) the vulnerability of victims; 4) the fact of multiple victims; and 5) that retribution as a sentencing purpose is outdated.

[529] *Kova~* Appeal Brief, para 175 and Appeal Transcript, T 181.
[530] Prosecution Consolidated Respondent's Brief, para 8.35.
[531] *Ibid*., paras 8.36, 8.38 and 8.39 and Appeal Transcript, T 327.
[532] *Supra*, paras 347-349.
[533] *Tadi}* Sentencing Appeal Judgement, para 21.
[534] Trial Judgement, paras 829-835.
[535] *Kova~* Appeal Brief, para 181.

379. As to point 1), the Appellant argues that the age of one of the victims, A.S., 20 years, should not have been considered as an aggravating factor.[536] As to point 2), the Appellant submits that, during the period of about four months, FWS-87 and A.S. "practically had the ?*sic*? protection", and that during about one month, FWS-75 and A.B. were not in contact with the Appellant.[537] The Appellant argues in relation to point 3) that vulnerability or defencelessness is an element of the criminal offences of enslavement, rape and outrages upon personal dignity, and is therefore not an aggravating factor.[538] As to point 4), the Appellant contends that "?t?he involvement of more than one victim in the offences of the accused is also considered in aggravation".[539] He submits under point 5) that the Trial Chamber accepted retribution as one of the purposes of sentencing, whereas the international trend is "to consider punishment as general prevention, which ultimately must lead to global prevention".[540]

(ii) The Respondent

380. The Respondent submits in respect of point 1) that even if this argument had some truth in it, the fact would remain that several other victims were younger than 18 years and one, A.B., was only 12 years old.[541] With regard to point 3), the Respondent submits that vulnerability is not an element of the crime of enslavement, rape or outrages on personal dignity. In relation to point 5), she submits that this is a "main, general sentencing factor" in the practice of the Tribunal,[542] and that the Trial Chamber did not place undue weight on this factor.[543]

(b) Discussion

381. Concerning point 1), the Appeals Chamber recalls what it stated in paragraphs 354-355, above. The Trial Chamber was not in error in considering the age of the victim, 20 years, as an aggravating factor. This aspect of the ground of appeal thus fails.

382. As regards point 2), the Appeals Chamber agrees with the Trial Chamber in considering as aggravating factors the duration of the crimes of enslavement, rape and outrages upon personal dignity entered, namely, from about one to four months. The Appeals Chamber finds it absurd to argue that FWS-87 and A.S., both having been subjected to rape, enslavement and outrages upon

536 *Ibid*., para 180.
537 *Ibid*.
538 *Ibid*.
539 *Ibid*.
540 *Ibid*.
541 Prosecution Consolidated Respondent's Brief, para 8.41.
542 *Ibid*., para 8.43.

personal dignity for a long period of time, were in fact being protected. Further, the Appeals Chamber finds that it is not clear why the Appellant claims that he had no contact with the victims over the period in which they were detained at his apartment,[544] or when he visited them from time to time at the other places to which they were moved temporarily.[545] This part of the ground of appeal thus fails.

383. As regards point 3), the Appeals Chamber repeats what it stated in paragraph 352, above. This ground of appeal is therefore dismissed.

384. The Appellant offers no arguments to substantiate point 4). The Appeals Chamber considers that there is no need to pass on this point and rejects this part of the ground of appeal.

385. In respect of point 5), the Trial Chamber relies on the *Aleksovski* Appeal Judgement in considering retribution as a general sentencing factor.[546] The case-law of both this Tribunal and the ICTR is consistent in taking into account the factor of retribution,[547] retribution being "interpreted by ?the Trialg Chamber as punishment of an offender for his specific criminal conduct".[548] The Appellant has failed to substantiate his claim of an alleged trend in international law which speaks differently from the one followed by this Tribunal and the ICTR. This ground of appeal is therefore rejected.

4. Mitigating Factors

(a) Submissions of the Parties

(i) The Appellant (Kova~)

386. The Appellant argues that the Trial Chamber should have taken the following mitigating factors into account: 1) the Appellant had no prior intention to harm Muslims nor the knowledge that his actions formed part of a widespread and systematic attack; 2) the presence of the Appellant "when any harm could be done to any Muslims";[549] and 3) the Appellant's relationship with FWS-87 and the protection he extended to her and to A.S..

(ii) The Respondent

[543] *Ibid*., para 8.44.
[544] Trial Judgement, para 759.
[545] *Ibid*., para 754.
[546] *Ibid*., para 841, citing *Aleksovski* Appeal Judgement, para 185.
[547] *Aleksovski* Appeal Judgement, footnotes 353-355.

387. The Respondent dismisses the above arguments, stating that either they are "encompassing litigated facts and rejected by the Trial Chamber or they do not constitute mitigating factors".[550]

(b) Discussion

388. The Trial Chamber has found that all three accused, "in their capacity as soldiers, took an active part" in the conflict that broke out between the Serb and Muslim forces in Fo~a.[551] It states that the Appellant "was fully aware of the attack against the Muslim villages and aware of the fact that his acts were part of the attack",[552] that he knew that the four women in his control were civilians,[553] and that he "abused them and raped three of them many times, thereby perpetuating the attack upon the Muslim civilian population".[554] The Appeals Chamber finds that these factors should have been argued in relation to the elements of the offences. Before the sentencing proceedings, the Trial Chamber had already accepted these factors as being proved beyond reasonable doubt, resulting in a conviction. The Appellant thus cannot re-litigate this issue in the course of the sentencing appeal. This part of the grounds of appeal is thus dismissed.

389. The second factor is unclearly pleaded and without reasoning. The Appeals Chamber merely notes that the four women the Appellant kept in his apartment and abused were Muslims.[555] This part of the grounds of appeal therefore fails.

390. In relation to the third factor, the Trial Chamber has found that the relationship between the Appellant and FWS-87 was not one of love, "but rather one of cruel opportunism on Kova~'s part, of constant abuses and domination over a girl who, at the relevant time, was only about 15 years old".[556] The Trial Chamber also finds that the Appellant "substantially assisted Jagos Kosti} in raping A.S.".[557] The Appeals Chamber concurs with the findings of the Trial Chamber in this respect, and therefore dismisses this part of the grounds of appeal.

[548] Trial Judgement, para 857.
[549] *Kova~* Appeal Brief, para 184.
[550] Prosecution Consolidated Respondent's Brief, para 8.46.
[551] Trial Judgement, paras 567 and 569.
[552] *Ibid.,* para 586.
[553] *Ibid*.
[554] *Ibid*., para 587.
[555] *Ibid.*
[556] *Ibid*., para 762.
[557] *Ibid*., para 761.

5. Credit for Time Served

(a) Submissions of the Parties

(i) The Appellant (Kova~)

391. The Appellant submits that if credit were not to be given for his time in detention as from 2 August 1999, his rights would be infringed.[558]

(ii) The Respondent

392. The Respondent, while agreeing that no order was made in the last paragraph of the Trial Judgement with regard to credit for time served, submits that the Trial Chamber did state orally on 22 February 2001 that the time spent in custody be credited.[559]

(b) Discussion

393. The Appeals Chamber recalls its reasoning in paragraph 365, above, and dismisses this ground of appeal, provided that the last paragraph of the Trial Judgement be read together with the oral statement of the Trial Chamber of 22 February 2001. In effect, the Appellant will receive credit for his time served in detention as calculated from the moment of his being taken into the custody of the Tribunal.

6. Conclusion

394. For the foregoing reasons, the Appeals Chamber dismisses the Appellant Kova~'s appeal on sentencing in total.

C. The Appellant Zoran Vukovi}'s Appeal against Sentence

395. The Appellant Vukovi} has been sentenced to a single term of imprisonment of 12 years for convictions on two counts of crimes against humanity and two counts of violations of the laws or customs of war. His appeal is based on the following grounds: 1) each conviction should receive a sentence and to impose a single sentence for all convictions is against the Rules; 2) the Tribunal is obligated to have recourse to the sentencing practice of the courts of the former Yugoslavia, under which rape as a war crime does not incur a heavier sentence than rape committed in peacetime; 3) the Trial Chamber has misapplied aggravating factors in relation to FWS-50; 4) the Appellant's

[558] *Kova~* Appeal Brief, para 185 and Appeal Transcript, T 92-93.

help to Muslim families and his family situation should be considered as mitigating factors; and 5) the Trial Chamber has miscalculated the credit for time served.

1. Retroactive Application of the Rules that Resulted in a Single Sentence

(a) Submissions of the Parties

(i) The Appellant (Vukovi}

396. The Appellant submits that the Trial Chamber erred in imposing a single sentence for multiple convictions.[560] He submits that both the 1977 Penal Code and the penal codes of the new countries in the territory of the former Yugoslavia allow for a single sentence for multiple convictions, subject to the condition that this sentence cannot exceed the severity of the heaviest sentence established by law. Nor can it represent the total of all sentences for the convictions.[561] Further, he argues that by not applying Rule 101(C) of the 18th edition of the Rules, the Trial Chamber acted in contravention of the principle against retroactive application of the Rules.[562] The Appellant adds that if it were possible for the Trial Chamber to impose a single sentence in accordance with "the earlier provisions of ICTY then there would not ?be a? need to codify Rule 87(C) of the Rules."[563]

(ii) The Respondent

397. The Respondent submits that "the Appellant's reliance on Rule 101(C) is misplaced", because that Rule referred to the duty of a Trial Chamber to determine "how multiple sentences should be served."[564] She further asserts that the provision did not require the Chamber to impose multiple sentences.[565] The Respondent refers to the *Kambanda* Appeal Judgement, asserting that it expressly endorses the practice of imposing a single sentence for multiple convictions.[566] She also submits that the Appellant has failed to explain "why the Trial Chamber abused its discretion in imposing a single sentence", and "how the imposition of a global sentence prejudices his rights".[567]

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[559] Trial Transcript, T 6568, 6572 and 6574.
[560] *Vukovi}* Appeal Brief, para 177.
[561] *Ibid*.
[562] *Ibid*., para 178.
[563] *Vukovi}* Reply Brief, para 4.2.
[564] Prosecution Respondent's Brief, para 4.6.
[565] *Ibid.*
[566] *Ibid*., para 4.7.
[567] *Ibid*., paras 4.10 and 4.11.

(b) Discussion

398. The Appeals Chamber discerns two parts in this ground of appeal: 1) the allegedly retroactive application of the Rules allowing the imposition of a single sentence; and 2) whether the imposition of a single sentence is subject to similar requirements to those of the 1977 Penal Code. Part 2) will be dealt with in the discussion on the sentencing practice of the former Yugoslavia.

399. As for part 1), the Appeals Chamber refers to the discussion in paragraphs 339-344, above, and repeats that Rule 87(C) of the 19th edition of the Rules simply confirmed the power of a Trial Chamber to impose a single sentence. This ground of appeal therefore fails.

2. The Recourse to the Sentencing Practice in the Courts of the Former Yugoslavia

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

400. The Appellant submits, in effect, that the Trial Chamber was obligated to comply with the requirement in Article 24(1) of the Statute to have recourse to the sentencing practice in the courts of the former Yugoslavia, and that this would mean that the heaviest penalty for criminal offences was 20 years' imprisonment.[568] He argues that the appropriate comparison is not between life imprisonment, allowed under the Statute, and the capital sentence, permitted in the penal codes of the republics of the former Yugoslavia, but between life imprisonment and the sentence of 20 years' imprisonment known at the relevant time.[569] He further argues that the Trial Chamber should have considered the sentencing practice with regard to rape convictions in the former Yugoslavia as presented by the defence expert witness. In relation to that testimony, the Appellant submits that it is not relevant that the witness focused on the peacetime practice, as sexual freedom is protected in peacetime and in armed conflict.[570] He suggests that a sentence of imprisonment of up to three years might be imposed.[571] The Appellant further points out that the practice in the former Yugoslavia, referred to in the Statute, was that of peacetime.[572] He tentatively argues that rape

[568] *Vukovi}* Appeal Brief, paras 180 and 183.
[569] *Ibid*.
[570] *Ibid*., para 181.
[571] *Ibid*.
[572] *Ibid*., para 182.

would be a more severe offence than torture, if both offences contained the same elements.[573] He also argues against retribution as a sentencing purpose.[574]

(ii) The Respondent

401. The Respondent submits that "the Trial Chamber is not bound to apply the law of the former Yugoslavia in matters of sentencing but only to take it into account".[575]

(b) Discussion

402. This ground of appeal essentially repeats Kunarac's and Kovac's arguments. The Appeals Chamber refers to its reasoning in paragraphs 347 to 349 and 377. The Appeals Chamber adds that the Trial Chamber has taken into account the evidence given by the defence expert witness regarding the sentencing practice in the former Yugoslavia, with an emphasis on the crime of rape.[576] However, as the Trial Chamber noted, the expert witness's testimony is "of little relevance" because it centred upon rape during peacetime.[577] Rape as a crime against humanity or a violation of the laws or customs of war requires proof of elements that are not included in national penal codes, such as attack upon any civilian population (in the case of the former) or the existence of an armed conflict (in the case of both). The severity of rape as a crime falling under the jurisdiction of the Tribunal is decidedly greater than that of its national counterpart. This is shown by the difference between the maximum sentences imposed respectively by the Statute and, for instance, the 1977 Penal Code of the Socialist Republic of Bosnia and Herzegovina, upon the offence of rape. This ground of appeal therefore fails.

3. Aggravating Factor

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

403. The Appellant submits that the Trial Chamber erred in finding that FWS-50's age at the time of the offences in question was 15 and a half years, when in fact her age was 17 years. He further asserts that she would have been allowed to enter into marriage, and that her age should not be

[573] *Ibid*., para 184.
[574] *Ibid*., para 185.
[575] Prosecution Respondent's Brief, para 4.14.
[576] Trial Judgement, para 835.
[577] *Ibid*.

considered as an aggravating factor.[578] He also contends that it was not an aggravating circumstance that FWS-50 was especially vulnerable and helpless.[579]

(ii) The Respondent

404. The Respondent contends that the Trial Chamber "did not err in concluding that the victim was youthful and that this was an aggravating factor", even though her age might not have been 15 and a half years.[580] Further, she argues that the vulnerability and defencelessness of the victim are not elements of the crimes,[581] and that there is no error on the part of the Trial Chamber in considering these factors in aggravation.[582]

(b) Discussion

405. As to the question of the age of the victim as an aggravating factor, the Appeals Chamber refers to its reasoning in paragraphs 354-355, above. The Appeals Chamber considers that the slight difference between the age of the victim as found in one part of the Trial Judgement, about 16 years,[583] and that referred to in another part, 15 and a half years,[584] does not negate the fact that the victim was at a young age when the offences in question were committed against her. The Appeals Chamber concurs with the findings of the Trial Chamber that this fact can aggravate the sentence against the Appellant. As to the argument relating to the factor of vulnerability and helplessness, the Appeals Chamber refers to its reasoning in paragraph 352, above. This ground of appeal thus fails.

4. Mitigating Factors

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

406. The Appellant argues that he helped "numerous of ?*sic*? Muslim families", and that this should be considered as a mitigating factor, not, as the Trial Chamber found, as proof that he had knowledge about the attack upon the Muslim population.[585] In addition, the Appellant argues that

[578] *Vukovi}* Appeal Brief, para 186.
[579] *Ibid*.
[580] Prosecution Respondent's Brief, para 4.16.
[581] *Ibid*., para 4.19.
[582] Appeal Transcript, T 328-329.
[583] Trial Judgement, para 235.
[584] *Ibid*., para 879.
[585] *Vukovi}* Appeal Brief, para 188.

the lack of serious consequences arising from his acts and the fact that no force or compulsion was used should be a mitigating factor.[586] Further, he submits that the fact that he is married and has two children should be considered in mitigation.[587]

(ii) The Respondent

407. The Respondent submits that the Trial Chamber did not err in not considering as a mitigating factor that the Appellant provided some help to Muslims, as it was concerned with "what sentence to impose for the rape of this victim, not his acts to persons who he was friendly with previously".[588] However, the Respondent agrees that the Trial Chamber erred in not considering the Appellant's family situation as a mitigating factor, although this factor would not affect the sentence.[589]

(b) Discussion

408. The Appeals Chamber holds that the Appellant's help to other Muslims in the conflict does not change the fact that he committed serious crimes against FWS-50. If he is to be punished for his acts against FWS-50, it is to these acts that any possible mitigating factors should be linked. However, the Appeals Chamber also agrees that the Appellant's family situation should have been considered as a mitigating factor. This particular part of the ground of appeal, therefore, succeeds. However, the Appeals Chamber concurs with the length of the imprisonment decided by the Trial Chamber.

409. As to the Appellant's argument that the lack of consequences arising from his acts should be considered as a mitigating factor, the Appeals Chamber recalls the finding in the Trial Judgement that the rape of FWS-50 "led to serious mental and physical pain for the victim".[590] The Appeals Chamber concurs with the Trial Chamber's findings that the Appellant's acts had serious consequences. In respect of the rape of the same witness, the Trial Judgement states that "[s]he was taken out of Partizan Sports Hall to an apartment and taken to a room by Vukovi} where he forced her to have sexual intercourse with full knowledge that she did not consent".[591] This finding shows that force or compulsion was used prior to rape. In this context, the Appeals Chamber further refers

[586] *Vukovi}* Reply Brief, para 4.3.
[587] *Vukovi}* Appeal Brief, para 188.
[588] Prosecution Respondent's Brief, para 4.20.
[589] *Ibid*., para 4.21.
[590] Trial Judgement, para 815.
[591] *Ibid*., para 817.

back to its finding that the coercive circumstances of this case made consent to the sexual acts by the Appellants impossible.[592] This argument is, therefore, without merit and is rejected.

5. Credit for Time Served

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

410. The Appellant submits that the Trial Judgement is not clear in this respect and that it would be erroneous not to take his period of detention since 23 December 1999 into account when imposing the sentence.[593]

(ii) The Respondent

411. The Respondent notes that, although the last paragraph of the Trial Judgement contains no order with regard to credit for time served, the Trial Chamber did state orally on 22 February 2001 that the time spent in custody by each of the three convicted persons be credited.[594]

(b) Discussion

412. The Appeals Chamber refers to its reasoning in paragraph 365, above. This ground of appeal is dismissed, provided that the last paragraph of the Trial Judgement be read together with the oral statement of the Trial Chamber of 22 February 2001. In effect, the Appellant will receive credit for his time served in detention as calculated from the moment of his being taken into custody of the Tribunal.

6. Conclusion

413. For the foregoing reasons, the Appeals Chamber dismisses the appeal of the Appellant Vukovi}, except the submission that his family concerns should be considered as a mitigating factor. However, in the circumstances of this case, which involves a serious offence, this factor does not change the scale of the sentence imposed in the Trial Judgement.

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[592] See *supra*, para 133.
[593] *Vukovi}* Appeal Brief, para 190.
[594] Trial Transcript, T 6568, 6572 and 6574.

D. Conclusion

414. For the foregoing reasons, the Appeals Chamber dismisses the appeals of the Appellants Kunarac, Kova~ and Vukovi}. For the reasons previously stated, the Appeals Chamber confirms the sentences imposed on the Appellants by the Trial Chamber with appropriate credit for time served.

XII. DISPOSITION

For the foregoing reasons:

A. The Appeals of Dragoljub Kunarac against Convictions and Sentence

1. Convictions

The Appeals Chamber:

DISMISSES the appeal brought by Dragoljub Kunarac against his convictions.

Accordingly, the Appeals Chamber AFFIRMS the convictions entered by the Trial Chamber for Dragoljub Kunarac on Counts 1-4, 9-12 and 18-20 of Indictment IT-96-23.

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Dragoljub Kunarac against his sentence;

CORRECTS the formal disposition of the Trial Judgement to reflect the Oral Statement made by the Trial Chamber that credit should be given for time served and, accordingly, Dragoljub Kunarac is entitled to credit for the time he has spent in custody since his surrender on 4 March 1998;

AND

CONSIDERING the number and severity of the offences committed, FINDS that the sentence imposed by the Trial Chamber is appropriate.

Accordingly, the Appeals Chamber AFFIRMS the sentence of 28 years' imprisonment as imposed by the Trial Chamber.

B. The Appeals of Radomir Kova~ against Convictions and Sentence

1. Convictions

The Appeals Chamber:

DISMISSES the appeal brought by Radomir Kova~ against his convictions.

Accordingly, the Appeals Chamber AFFIRMS the convictions entered by the Trial Chamber for Radomir Kova~ on Counts 22-25 of Indictment IT-96-23.

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Radomir Kova~ against his sentence;

CORRECTS the formal disposition of the Trial Judgement to reflect the Oral Statement made by the Trial Chamber that credit should be given for time served and, accordingly, Radomir Kova~ is entitled to credit for the time he has spent in custody since his arrest on 2 August 1999;

AND

CONSIDERING the number and severity of the offences committed, FINDS that the sentence imposed by the Trial Chamber is appropriate.

Accordingly, the Appeals Chamber AFFIRMS the sentence of 20 years' imprisonment as imposed by the Trial Chamber.

C. The Appeals of Zoran Vukovi} against Convictions and Sentence

1. Convictions

The Appeals Chamber:

DISMISSES the appeal brought by Zoran Vukovi} against his convictions.

Accordingly, the Appeals Chamber AFFIRMS the convictions entered by the Trial Chamber for Zoran Vukovi} on Counts 33-36 of Indictment IT-96-23/1.

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Zoran Vukovi} against his sentence;

CORRECTS the formal disposition of the Trial Judgement to reflect the Oral Statement made by

the Trial Chamber that credit should be given for time served and, accordingly, Zoran Vukovi} is entitled to credit for the time he has spent in custody since his arrest on 23 December 1999;

AND

CONSIDERING the number and severity of the offences committed, FINDS that the sentence imposed by the Trial Chamber is appropriate.

Accordingly, the Appeals Chamber AFFIRMS the sentence of 12 years' imprisonment as imposed by the Trial Chamber.

D. Enforcement of Sentences

In accordance with Rules 103(C) and 107 of the Rules, the Appeals Chamber orders that Dragoljub Kunarac, Radomir Kova~ and Zoran Vukovi} are to remain in the custody of the International Tribunal pending the finalisation of arrangements for their transfers to the State or States where their respective sentences will be served.

Done in both English and French, the French text being authoritative.

(signed)
Claude Jorda
Presiding

(signed)
Mohamed Shahabuddeen

(signed)
Wolfgang Schomburg

(signed)
Mehmet Güney

(signed)
Theodor Meron

Dated this 12th day of June 2002
At The Hague
The Netherlands

?Seal of the Tribunalg

ANNEX A: PROCEDURAL BACKGROUND

A. The Appeals

415. The Trial Judgement was delivered on 22 February 2001. Notices of appeal were filed by the Appellants Kova~[595] and Vukovi}[596] on 6 March 2001, and by the Appellant Kunarac[597] on 7 March 2001.

416. On 18 May 2001, the Appellants filed a joint application for an extension of the time limit for filing their Appellants' Briefs under Rule 111 of the Rules,[598] on the basis that they had not yet received the Trial Judgement in the B/C/S language. The Prosecutor responded to this application.[599] The Appeals Chamber ordered that the Appellants' Briefs be filed within thirty days of the filing of the B/C/S translation of the Trial Judgement.[600]

417. On 28 May 2001, counsel for the Appellant Vukovi} filed a notice of the impossibility of performing his duties as counsel, due to the expiry and non-extension of his Dutch visa.[601]

418. On 25 June 2001, the Appellants filed a joint application for authorisation to exceed page limits of their Appellants' Briefs.[602] The Prosecutor filed a response to this application on 5 July 2001.[603] The Appeals Chamber denied the request on 10 July 2001.[604]

419. The Appellant Vukovi} filed his confidential Appeal Brief on 12 July 2001.[605] The Appeal Briefs of the Appellants Kunarac[606] and Kova~[607] were filed on 16 July 2001.

420. On 10 August 2001, the Prosecutor filed a request: (i) for an extension of time to file its Respondent's Briefs under Rule 112 of the Rules; and (ii) to exceed the page limit for these

[595] Notice of Appeal Against Judgment of 22 February 2001, 6 March 2001.
[596] Notice of Appeal Against Judgment of 22 February 2001, 6 March 2001.
[597] Notice of Appeal Against Judgment of 22 February 2001, 7 March 2001.
[598] Extension of Time Limit for Appelant's (*sic*) Brief, 18 May 2001.
[599] Prosecution Response to Request for Extension of Time Limit for Appellant's Brief, 22 May 2001.
[600] Décision relative à la requête aux fins de prorogation de délai, 25 May 2001.
[601] Impossibility of Performing the Duties as Defense (*sic*) Counsel for Accused Zoran Vukovi} (*sic*), 28 May 2001.
[602] Joint Request for the Authorisation to Exced (*sic*) tha (*sic*) Page Limits for the Appellant's Brief, 25 June 2001.
[603] Prosecution Response to "Joint Request for the Authorisation to Exceed the Page Limits for the Appellant's Brief", 5 July 2001.
[604] Decision on Joint Request for Authorisation to Exceed Prescribed Page Limits, 10 July 2001.
[605] Appelant's (*sic*) Brief for the Acused (*sic*) Zoran Vukovic (*sic*) Against Judgment of 22. February 2001, 12 July 2001 (conf).
[606] Appelant's (*sic*) Brief for the Acused (*sic*) Dragoljub Kunarac Against Judgment of 22. February 2001, 16 July 2001.
[607] Appelant's (*sic*) Brief for the Acused (*sic*) Radomir Kova~ Against Judgment of 22. February 2001, 16 July 2001.

Briefs.[608] The Respondent's Briefs were filed within the time limit. The Prosecutor's Respondent's Brief to the Appellant Vukovi}'s Appeal Brief was filed on 13 August 2001,[609] and its Consolidated Respondent's Brief and book of authorities relating to the Appellants Kunarac and Kova~ were filed on 15 August 2001.[610] However, the Consolidated Respondent's Brief did exceed the page limit. The Appeals Chamber decided that it would deem and accept that Brief as having been validly filed with the authorisation of the Appeals Chamber.[611] On 26 September 2001, the Prosecutor filed a confidential request for clarification of that decision.[612] The Appeals Chamber ordered that: (i) the Prosecutor's Consolidated Respondent's Brief be deemed and accepted as having been validly filed on 15 August 2001 in respect of all three Appellants with the authorisation of the Appeals Chamber; and (ii) the Appellant Vukovi} be given leave to file his Brief in Reply within 15 days of the filing of the order.[613]

421. On 20 August 2001, the Appellants Kunarac and Kova~ filed a request for an extension of time to file their reply to the Prosecution Consolidated Respondent's Brief.[614] The Prosecutor responded to this request.[615] The Appeals Chamber granted the request and ordered that the Briefs in Reply be filed on or before 4 September 2001.

422. The Appellants' Briefs in Reply were filed on the following dates: 28 August 2001 by Vukovi};[616] 4 September 2001 by Kunarac and Kova~.[617] The Brief of the Appellants Kunarac and Kova~ exceeded the page limit, but was authorised retrospectively by the Pre-Appeal Judge.[618]

423. On 19 September 2001, the Appellant Kunarac filed a request for provisional release under Rule 65(I) of the Rules in order that he might undergo medical treatment in Belgrade.[619] The

[608] Prosecution Request for Extension of Time, Notice of Filing Respondent Briefs Over 100 Pages and, If Necessary Motion to Exceed Page Limit of Prosecution's Response Briefs, 10 August 2001.
[609] Prosecution's Respondent's Brief in Relation to "Appellant's Brief for the Accused Zoran Vukovi} against Judgement of 22 February 2001", 13 August 2001 (conf).
[610] Prosecution's Consolidated Respondent's Brief, 15 August 2001 (conf) and Book of Authorities to Prosecution's Consolidated Respondent's Brief, 15 August 2001 (conf).
[611] Decision on Prosecution Request for Extension of Time, Notice of Filing Respondent Briefs Over 100 Pages and, if Necessary Motion to Exceed Page Limit of Prosecution's Response Briefs, 3 September 2001.
[612] Prosecution's Request for Clarification, 26 September 2001.
[613] Decision on Prosecution's Request for Clarification, 11 October 2001.
[614] The Defense's Request for the Extention (*sic*) of Time Limit, 20 August 2001.
[615] Prosecution's Response to the Joint Motion of the Appellants Radomir Kova~ and Dragoljub Kunarac Entitled "The Defense's Request for the Extension of Time Limit" Filed on 20 August 2001, 23 August 2001.
[616] Appellant's Brief in Reply on Prosecutor's Respondent's Brief, 28 August 2001.
[617] Appellants' Reply on Prosecution's Consolidated Respondent's Brief, 4 September 2001 (conf).
[618] Order on Page Limits, 7 September 2001.
[619] The Defense's Request for the Provisional Release of the Accused Dragoljub Kunarac, 19 September 2001.

Prosecutor filed a confidential response to the request on 25 September 2001.[620] The Appeals Chamber rejected the request on 16 October 2001.[621]

424. On 20 September 2001, counsel for the Appellant Vukovi} informed the Appeals Chamber that the Registry had denied him access to meet with his client.[622]

425. On 2 October 2001, the appointed Pre-Appeal Judge issued an order requiring the parties to file redacted public versions of the Appellant Vukovic's Appeal Brief, the Prosecution Respondent's Brief, and the Prosecution Consolidated Respondent's Brief.[623] Public versions of the latter two documents were filed on 9 October 2001. On 11 October 2001, the Appellant Vukovi} informed the Appeals Chamber that his Appeal Brief filed on 12 July 2001 was never marked as confidential and should be considered to be the public version.[624] On 18 October 2001, the Registry lifted the confidentiality of that document.[625] The Appellants Kunarac and Kova~ filed a like document on 22 October 2001 informing the Appeals Chamber that their Appeal Briefs of 16 July 2001 ought also to be considered to be the public versions.[626]

426. On 29 October 2001, the Appeals Chamber made a scheduling order to the effect that presentation of Appeal Briefs would begin on 4 December 2001.[627]

427. On 6 November 2001, the Appellant Vukovi} filed a motion for presentation of additional evidence in accordance with Rule 115 of the Rules,[628] seeking the admission of an excerpt from the Registry of Births of Bosnia and Herzegovina by which to prove the age of his daughter, Marijana

[620] Prosecution's Response to the Motion Entitled "The Defense's Request for the Provisional Release of the Accused Dragoljub Kunarac" Filed on 19 September 2001, 25 September 2001.
[621] Ordonnance de la Chambre d'Appel relative à la requette de Dragoljub Kunarac aux fins de mise en liberté provisoire, 16 October 2001.
[622] Information of (*sic*) Preventing Defense (*sic*) Counsel for Accused Zoran Vukovi} (*sic*) to (*sic*) Visit His Client, 20 September 2001.
[623] Order for Filing Public Versions, 2 October 2001.
[624] Information Regarding the Order for Filing Public Versions of the Appealant's (*sic*) Brief of the Accused Zoran Vukovi} (*sic*), 11 October 2001.
[625] Document entitled "Internal Memorandum", 18 October 2001.
[626] Information Regarding the Order for Filing Public Versions of the Appelants' (*sic*) Briefs of the Accused Dragoljub Kunarac and Radomir Kova~ (*sic*), 20 October 2001.
[627] Ordonnance portant calendrier, 29 October 2001.
[628] Motion of the Defence of the Accused Zoran Vukovi} (*sic*) for Presentation of Additional Evidence, 6 November 2001.

Vukovi}. The Prosecutor filed a response to this request on 16 November 2001.[629] The Appeals Chamber rejected the motion on 30 November 2001.[630]

428. On 6 November 2001, the three Appellants filed a joint statement regarding the schedule of presentation of their Appeal Briefs.[631] The Prosecutor filed its response to that statement on 9 November 2001.[632] On 26 November 2001, the three Appellants filed a joint statement about the division of total time for the presentation of their submissions.[633]

429. On 19 December 2001, the Appellant Kova~ filed a statement informing the Appeals Chamber of the exact references to a case upon which he relied in oral explanations.[634]

B. Assignment of Judges

430. On 21 May 2001, by an order of the President of the International Tribunal, the following Judges were assigned to sit on the appeal: Judge Jorda, President, Judge Vohrah, Judge Shahabuddeen, Judge Nieto-Navia and Judge Liu.[635]

431. On 8 June 2001, Judge Shahabuddeen was appointed as Pre-Appeal Judge to deal with all motions of a procedural nature.[636] On the occasion of departures of Judges and the new composition of Chambers, the President of the International Tribunal reconstituted the Appeals Chamber for the instant appeal on 23 November 2001, assigning Judge Jorda, President, Judge Shahabuddeen, Judge Schomburg, Judge Güney and Judge Meron to sit on the appeal.[637]

C. Status Conferences

432. Status conferences were held in accordance with Rule 65*bis* of the Rules on 25 June 2001[638] and 16 October 2001.[639]

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[629] Prosecution's Response to "Motion of the Defence of the Accused Zoran Vukovi} for Presentation of Additional Evidence", 16 November 2001.
[630] Decision on the Motion of the Defence of the Accused Zoran Vukovi} for Presentation of Additional Evidence, 30 November 2001.
[631] Joint Statement of the Defence Regarding the Schedule of Presentation of the Appellant's Briefs, 6 November 2001.
[632] Prosecution's Statement Regarding the Appellant's Schedule of Presentation, 9 November 2001.
[633] Joint Statement of the Defence about Division of Total Time for Presentation of Appellants' Submissions, 26 November 2001.
[634] Statement of the Defence of the Accused Radomir Kovac (*sic*), 18 December 2001.
[635] Ordonnance du Président portant affectation de Juges à la Chambre d'Appel, 21 May 2001.
[636] Ordonnance portant nomination d'un Juge de la mise en état en appel, 8 June 2001.
[637] Ordonnance du Président relative à la composition de la Chambre d'Appel pour une affaire, 23 November 2001.
[638] Scheduling Order, 11 June 2001.

D. Appeal Hearing

433. On 16 November 2001, the Pre-Appeal Judge issued a scheduling order for the Appeal Hearing,[640] which was held over three days, from 4 to 6 December 2001.

[639] Scheduling Order, 26 September 2001.
[640] Scheduling Order for the Hearing on Appeal, 16 November 2001.

ANNEX B: GLOSSARY

1926 Slavery Convention	Slavery Convention, adopted on 25 September 1926, in force as of 9 March 1927
1977 Penal Code	Code of the Socialist Federal Republic of Yugoslavia (SFRY), adopted by the SFRY Assembly at the session of the Federal Council held on 28 September 1976, amended in 1977 (unofficial translation on file with the Tribunal library)
ABiH	Muslim Army of Bosnia-Herzegovina
Akayesu Appeal Judgement	*Prosecutor* v *Jean-Paul Akayesu,* Case No. ICTR-96-4-A, Judgement, 1 June 2001
Akayesu Trial Judgement	*Prosecutor* v *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998
Aleksovski Appeal Judgement	*Prosecutor* v *Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgement, 24 March 2000
Aleksovski Trial Judgement	*Prosecutor* v *Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999
Appeal Hearing	Appeal hearing of 4 to 6 December 2001 in *Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A
Appeal Transcript	Transcript of Appeal Hearing of 4 to 6 December 2001. All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public.
Appellants	Collective term for Dragoljub Kunarac, Radomir Kovac and Zoran Vukovi}, or any combination thereof, depending upon the context of the discussion.
Blaški} Trial Judgement	*Prosecutor* v *Tihomir Blaški},* Case No. IT-95-14-T, Judgement, 3 March 2000 (currently under appeal)
Br|anin Amended Indictment Decision	*Prosecutor* v *Radoslav Br|anin & Momir Tali}*, Case No. IT-99-36-PT, Decision on Objections by Momir Tali} to the Form of the Amended Indictment, 20 February 2001
Br|anin Amended Indictment Decision II	*Prosecutor* v *Radoslav Br|anin & Momir Tali}*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26

	June 2001
Celebici Appeal Judgement	*Prosecutor* v *Zejnil Delali} et al.,* Case No. IT-96-21-A, Judgement, 20 February 2001
^*elebi}i* Trial Judgement	*Prosecutor* v *Zejnil Delali} et al*., Case No. IT-96-21-T, Judgement, 16 November 1998
Common article 3	Common article 3 of Geneva Conventions I through IV of 12 August 1949
Defence Final Trial Brief	*Prosecutor* v *Dragoljub Kunarac et al*., Case No. IT-96-23-T & IT-96-23/1-T, Defence Final Trial Brief, 10 November 2000
Erdemovi} Sentencing Judgement	*Prosecutor* v *Drazen Erdemovi}*, Case No. IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998
Ex P	Prosecutor exhibit
Ex D	Defence exhibit
Furundžija Appeal Judgement	*Prosecutor* v *Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000
Furund`ija Trial Judgement	*Prosecutor* v *Anto Furund`ija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998
FWS	Prosecution witness pseudonyms (Foca Witness Statements)
Geneva Conventions	The four Geneva Conventions of 12 August 1949: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War
HVO	Croatian Defence Council
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994
Indictment IT-96-23	Indictment against Dragoljub Kunarac and Radomir Kovac

Indictment IT-96-23/1	Indictment against Zoran Vukovic
Indictments	Indictments IT-96-23 and IT-96-23/1
International Tribunal or Tribunal or ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Jelisic Appeal Judgement	*Prosecutor* v *Goran Jelisic*, Case No. IT-95-10-A, Judgement, 5 July 2001
Kambanda Appeal Judgement	*Jean Kambanda* v *Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000
Kayishema Appeal Judgement	*Le Procureur* c/ *Clément Kayishema et Obed Ruzindana*, Affaire No. ICTR-95-1-A, Motifs de l'ârret, 1er juin 2001 (English translation is not yet available)
Kova~	Radomir Kova~
Kova~ Appeal Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A, Appellant's Brief for the Acused [sic] Radomir Kova~ Against Judgement of 22 February 2001, 16 July 2001 (public)
Krnojelac Amended Indictment Decision	*Prosecutor* v *Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000
Krnojelac Indictment Decision	*Prosecutor* v *Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Defence Preliminary Motion on the Form of the Indictment, 24 February 1999
Kunarac	Dragoljub Kunarac
Kunarac and *Kova~* Reply Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A, Appellants' Reply on Prosecutor's Consolidated Respondent's Brief, 4 September 2001 (confidential) (public version filed on 20 October 2001)
Kunarac Appeal Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A, Appellant's Brief for the Acused [sic] Dragoljub Kunarac Against Judgement of 22 February 2001, 16 July 2001 (public)
Kunarac Evidence Decision	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000
Kupre{ki} Appeal Judgement	*Prosecutor* v *Zoran Kupre{ki} et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001

Kupre{ki} Evidence Decision	*Prosecutor* v *Zoran Kupre{ki} et al.*, Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999
Kupre{ki} Trial	*Prosecutor* v *Zoran Kupre{ki} et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000
Kvo~ka Indictment Decision	*Prosecutor* v *Miroslav Kvo~ka et al.*, Case No. IT-98-30/1-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999
Kvo~ka Trial Judgement	*Prosecutor* v *Miroslav Kvo~ka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001 (currently under appeal)
Mrk{i} Rule 61 Decision	*Prosecutor* v *Mile Mrk{i} et al.*, Case No. IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996
Nikoli} Rule 61 Decision	*Prosecutor* v *Dragan Nikoli}*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995
para	Paragraph
paras	Paragraphs
Prosecution Consolidated Respondent's Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23 & 23/1-A, Prosecution's Consolidated Respondent's Brief, 15 August 2001 (confidential) (public version filed on 9 October 2001)
Prosecution Respondent's Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23 & 23/1-A, Prosecution Respondent's Brief in Relation to "Appellant's Brief for the Accused Zoran Vukovic against Judgement of 22 February 2001", 13 August 2001 (confidential) (public version filed on 9 October 2001)
Respondent and Prosecutor	The Office of the Prosecutor
Rules	Rules of Procedure and Evidence of the International Tribunal
SFRY	Socialist Federal Republic of Yugoslavia
Statute	Statute of the International Tribunal
T	Transcript page. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public

Tadi} Appeal Judgement	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A, Judgement, 15 July 1999
Tadi} Contempt Decision	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000
Tadi} Indictment Decision	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995
Tadi} Jurisdiction Decision	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
Tadi} Rule 115 Decision	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998
Tadi} Sentencing Appeal Judgement	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A & IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000
Tadi} Sentencing Judgement	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-T, Sentencing Judgement, 14 July 1997
Tadi} Trial Judgement	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-T, Judgement, 7 May 1997.
Torture Convention	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984 by the United Nations General Assembly, in force as of 26 June 1987
Trial Judgement	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001
Trial Transcript	Transcript of trial in *Prosecutor* v *Dragoljub Kunarac et al*., Case No. IT-96-23 & IT-96-23/1 T.
Vukovi}	Zoran Vukovi}
Vukovi} Appeal Brief	*Prosecutor* v *Dragoljub Kunarac et al*., Case No. IT-96-23-A & IT-23/1-A, Appellant's Brief for the Acused [sic] Zoran Vukovi} Against Judgement of 22 February 2001, 12 July 2001 (confidential) (confidentiality lifted by Registry on 18 October 2001)
Vukovi} Reply Brief	*Prosecutor* v *Dragoljub Kunarac et al*., Case No. IT-96-23-A & IT-23/1-A, Appellant's Brief in Reply on Prosecutor's Respondent's Brief, 28 August 2001 (public)