

**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-T&  
IT-96-23/1-T  
Date: 22 February 2001  
Original: English

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**IN THE TRIAL CHAMBER**

**Before:** Judge Florence Ndepele Mwachande Mumba, Presiding  
Judge David Hunt  
Judge Fausto Pocar

**Registrar:** Mr. Hans Holthuis

**Judgement of:** 22 February 2001

**PROSECUTOR**

v.

**DRAGOLJUB KUNARAC  
RADOMIR KOVAC  
AND  
ZORAN VUKOVIC**

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**JUDGEMENT**

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## I. GLOSSARY OF TERMS, PLACES AND ABBREVIATIONS

### A. Terms and places

Alad`a mosque	The Alad`a mosque was the oldest mosque in Fo-a, located in the Alad`a neighbourhood.
Buk Bijela	Buk Bijela, a settlement south of Fo-a, served as an ad-hoc collection centre for women after their capture in the woods and before they were transferred to Fo-a High School.
^erova Ravan	^erova Ravan is an area about 10 kilometres north-east of Fo-a.
Fo-a High School	Fo-a High School, also situated in the Alad`a neighbourhood, served as a detention centre for women. The captured women who had been collected at Buk Bijela were transferred to Fo-a High School.
Kalinovik High School	Kalinovik is located 34 kilometres west of Fo-a. At Kalinovik High School, women and girls from Gacko, Kalinovik and neighbouring villages were detained.
Karaman's house	Karaman's house was a house in Miljevina, named after its previous Muslim occupant, to which women and girls from Partizan Sports Hall and Kalinovik High School were taken.
Lepa Brena	The Lepa Brena is an apartment block in Fo-a in the Gornje Polje neighbourhood.
Miljevina	Miljevina is a village located about 13 kilometres west of Fo-a.

Partizan	Partizan, a Sports Hall which served as another detention centre to which most women from Foča High School were transferred, was located near the SUP Police Station.
Rogoj Pass	The Rogoj Pass is located between Foča and Sarajevo, in a mountain area, close to Dobro Polje.
SUP	(Sekretarijat Unutrašnjih Poslova) The SUP was the Serb-controlled Ministry of the Interior or Police. The SUP Building or local Police station was located in Foča, close to Partizan Sports Hall.
Trnova-e house	The village of Trnova-e is located 2.5 kilometres south of Foča. The Trnova-e house was a private house where women were kept for several months.
Ulica Osmana \iki}a no 16 (UOD)	The house at Ulica Osmana \iki}a no 16, which was located in the Aladža Settlement of Foča, served as the soldiers' headquarters and meeting point where they lived more or less permanently. Women and girls were taken there on several occasions.
Vele-evo	The village of Vele-evo is located approximately 1.5 kilometres south-east of Foča. The command of the Foča Tactical Group/Brigade was stationed there.

## **B. Briefs of parties and Indictments**

Defence Pre-Trial Brief I	<i>Prosecutor v Kunarac, Kovac</i> , Case IT-96-23-PT, Defence Pre-Trial Brief, 28 Feb 2000
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Defence Pre-Trial Brief II	<i>Prosecutor v Vukovic</i> , Case IT-96-23/1-PT, Defence Pre-Trial Brief, 28 Feb 2000
Indictment IT-96-23	Indictment against Dragoljub Kunarac and Radomir Kova-
Indictment IT-96-23/1	Indictment against Zoran Vukovi}
Prosecutor's Pre-Trial Brief I	<i>Prosecutor v Kunarac and Kovac</i> , Case IT-96-23-PT, Prosecutor's Pre-Trial Brief, 9 Dec 1999
Prosecutor's Pre-Trial Brief II	<i>Prosecutor v Vukovic</i> , Case IT-96-23/1-PT, Prosecutor's Pre-Trial Brief, 21 Feb 2000
Defence Final Trial Brief	<i>Prosecutor v Kunarac, Kovac and Vukovic</i> , Case IT-96-23-T & IT-96-23/1-T, Defence Final Trial Brief, 10 Nov 2000
Prosecutor's Final Trial Brief	<i>Prosecutor v Kunarac, Kovac and Vukovic</i> , Case IT-96-23-T & IT-96-23/1-T, Prosecutor's Final Trial Brief, 8 Nov 2000

### C. Abbreviations

FWS-...	(Fo-a Witness Statements) Prosecution witness pseudonyms
par	Paragraph
pars	Paragraphs
T	Transcript page
Ex P...	Prosecution Exhibit
Ex D...	Defence Exhibit

The trial of Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic ("accused"), before this Trial 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 ("International Tribunal" or "Tribunal"), commenced on 20 March 2000 and came to a close on 22 November 2000.

Having considered all of the evidence presented to it during the course of the trial, along with the written and oral submissions of the Prosecutor (also "Prosecution") and the Defence for the accused, the Trial Chamber

**HEREBY RENDERS ITS JUDGEMENT.**

## II. THE CHARGES AGAINST THE ACCUSED

1. Based upon the third amended Indictment,<sup>1</sup> the withdrawal of Counts 14-17 from that Indictment,<sup>2</sup> and the Trial Chamber's judgement of acquittal in favour of the accused Dragoljub Kunarac on Count 13 and the decision that the accused Zoran Vukovi} has no case to answer regarding alleged offences against FWS-48,<sup>3</sup> the accused are charged as follows.

2. The Prosecution alleges that during the armed conflict between Bosnian Serbs and Bosnian Muslims in the spring of 1992, the city and municipality of Foca were taken over by Serb forces by 16 or 17 April 1992. The surrounding villages continued to be under attack until mid-July 1992.<sup>4</sup> Serbian forces arrested Muslim inhabitants of the town and the villages. Muslim women, children, and elderly people were detained in houses, apartments, and detention centres such as Buk Bijela, Foca High School, and Partizan Sports Hall ("Partizan").<sup>5</sup>

3. With regard to the accused Dragoljub Kunarac, the Prosecution asserts that from at least June 1992 until February 1993 he was the commander of a special reconnaissance unit, which was incorporated into the Foca Tactical Group of the Bosnian Serb Army with its headquarters at Velecevo.

### A. The accused Dragoljub Kunarac

4. Dragoljub Kunarac is charged under COUNTS 1 TO 4 with torture, as a crime against humanity, under Article 5(f) of the Statute of the Tribunal, and as a violation of the laws or customs of war, under Article 3 of the Statute and recognised by common Article 3(1)(a) of the 1949 Geneva Conventions. He is also charged with rape, as a crime against humanity, under Article 5(g) of the Statute and as a violation of the laws or customs of war, under Article 3 of the Statute. These charges are brought pursuant to both Article 7(1) of the Statute (individual criminal responsibility) and Article 7(3) of the Statute (command responsibility).

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<sup>1</sup> Indictment IT-96-23.

<sup>2</sup> T 1482.

<sup>3</sup> Decision on Motion for Acquittal, 3 July 2000.

<sup>4</sup> Indictment IT-96-23, par 1.1

<sup>5</sup> *Ibid*, pars 1.2-1.3.

The Prosecutor alleges that Dragoljub Kunarac, accompanied by his soldiers, removed women from Partizan and took them to Ulica Osmana Đikica no 16, where he either personally raped them or was present in the house while other soldiers raped the women.<sup>6</sup>

5. Under COUNTS 5 TO 8, the accused Dragoljub Kunarac is charged with torture, as a crime against humanity, under Article 5(f) of the Statute, and as a violation of the laws or customs of war, under Article 3 of the Statute and recognised by common Article 3(1)(a) of the 1949 Geneva Conventions. He is also charged with rape, as a crime against humanity, under Article 5(g) of the Statute and as a violation of the laws or customs of war, under Article 3 of the Statute. These charges are brought pursuant to Article 7(1) of the Statute (individual criminal responsibility).

The Prosecutor alleges that on or around 13 July 1992, Dragoljub Kunarac took FWS-48 and two other women to the Hotel Zelengora where FWS-48 was raped by Dragoljub Kunarac.<sup>7</sup> On or around 18 July 1992, Dragoljub Kunarac took FWS-48 and FWS-95 to a house in the Donje Polje neighbourhood where he raped FWS-48.<sup>8</sup>

6. Under COUNTS 9 AND 10, the accused Dragoljub Kunarac is charged with rape, as a crime against humanity, under Article 5(g) of the Statute, and as a violation of the laws or customs of war, under Article 3 of the Statute. These charges are brought pursuant to Article 7(1) of the Statute (individual criminal responsibility).

The Prosecutor alleges that on or about 2 August 1992, Dragoljub Kunarac, together with DP 3, transferred FWS-75, FWS-87, and two other women from Partizan to Miljevina. The women were detained in an abandoned Muslim house. In September or October of 1992, Dragoljub Kunarac raped FWS-87 there.<sup>9</sup> The witnesses and seven other women were detained at that house until about 30 October 1992. They performed household chores and were frequently sexually assaulted.<sup>10</sup>

7. Under COUNTS 11 AND 12, the accused Dragoljub Kunarac is charged with torture, as a violation of the laws or customs of war, under Article 3 of the Statute and recognised by common Article 3(1)(a) of the 1949 Geneva Conventions, and rape, as a

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<sup>6</sup> *Ibid*, par 5.1.

<sup>7</sup> *Ibid*, par 6.1; Indictment IT-96-23/1, par 7.9.

<sup>8</sup> Indictment IT-96-23, par 6.2.

<sup>9</sup> *Ibid*, par 7.1-7.2.

violation of the laws or customs of war, under Article 3 of the Statute. These charges are brought pursuant to Article 7(1) of the Statute (individual criminal responsibility).<sup>11</sup>

The Prosecutor alleges that in mid-July 1992, Dragoljub Kunarac, with two of his soldiers, appeared in the apartment of FWS-183 and accused her of sending messages out over the radio. They then took her to the banks of the Cehotina river in Foca near Velecevo, where the accused questioned the witness regarding money and gold kept in her apartment, threatening her with death and the slaughtering of her son. All three soldiers then raped the witness.<sup>12</sup>

8. Under COUNTS 18 TO 21, the accused Dragoljub Kunarac is charged with enslavement, as a crime against humanity, under Article 5(c) of the Statute. The accused is also charged with rape, as a crime against humanity, under Article 5(g) of the Statute, and as a violation of the laws or customs of war, under Article 3 of the Statute, as well as outrages upon personal dignity as a violation of the laws or customs of war, under Article 3 of the Statute and recognised by common Article 3(1)(c) of the 1949 Geneva Conventions. These charges are brought pursuant to Article 7(1) of the Statute (individual criminal responsibility).

The Prosecutor alleges that on 2 August 1992, Dragoljub Kunarac, with his deputy "Gaga" and DP 6, took FWS-186, FWS-191 and J.G. from Ulica Osmana Đikica no 16 to an abandoned house in Trnovace, where the women were raped. Dragoljub Kunarac raped FWS-191.<sup>13</sup> Witnesses FWS-186 and FWS-191 were kept in this house for approximately six months, while victim J.G. was transferred to the abandoned Muslim house in Miljevina. During the detention, DP 6 constantly raped FWS-186, while for at least two months, the accused Dragoljub Kunarac constantly raped FWS-191. FWS-186 and FWS-191 also had

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<sup>10</sup> *Ibid*, par 11.1.

<sup>11</sup> Decision on Motion for Acquittal, 3 July 2000, par 16. The Trial Chamber entered a judgement of acquittal in favour of the accused Dragoljub Kunarac on Count 13 (plunder of private property, a violation of the laws or customs of war). The word "plunder" was interpreted as unjustified appropriations of property either from more than a small group of persons or from persons over an identifiable area. There was no evidence in the present case that satisfied this interpretation.

<sup>12</sup> Indictment IT-96-23, par 8.1.

<sup>13</sup> *Ibid*, par 10.1.

to perform household chores, and obey all commands. After 6 months, a soldier took both witnesses away from the house.<sup>14</sup>

## **B. The accused Radomir Kovac**

9. Radomir Kovac is charged under COUNTS 22 TO 25 with enslavement, as a crime against humanity, under Article 5(c) of the Statute. He is also charged with rape, as a crime against humanity, under Article 5(g) of the Statute and as a violation of the laws or customs of war, under Article 3 of the Statute and outrages upon personal dignity, as violations of the laws or customs of war, under Article 3 of the Statute and recognised by common Article 3(1)(c) of the 1949 Geneva Conventions. These charges are brought pursuant to Article 7(1) of the Statute (individual criminal responsibility).

The Prosecutor alleges that on or about 30 October 1992, FWS-75, FWS-87, A.S., and the twelve-year old A.B., were handed over to the accused Radomir Kovac.<sup>15</sup> From about 31 October until 20 November 1992, FWS-75 and A.B. were detained by him in an apartment in the Brena block in Fo-a. They had to perform household chores and were sexually assaulted. Radomir Kovac and another soldier, Jagos Kostic, frequently raped them. Radomir Kovac also brought a man to the apartment and ordered FWS-75 to have sexual intercourse with him. When she refused, Radomir Kovac beat her. On or around 20 November 1992, Radomir Kovac took FWS-75 and A.B. from the apartment to a house near the Hotel Zelengora. They were kept there for about twenty days during which time they were frequently sexually assaulted by a group of unknown Serb soldiers from the group to which Radomir Kovac belonged.<sup>16</sup> Around 10 December 1992, FWS-75 and A.B. were moved to an apartment in the Pod Masala neighbourhood of Foca. They stayed there for about fifteen days during which time FWS-75 and A.B. were frequently raped by the same soldiers as at the house near Hotel Zelengora. On or about 25 December 1992, FWS-75 and the other women were brought back to the Brena apartment; Radomir Kovac sold A.B. to an unidentified soldier.<sup>17</sup> FWS-87 and A.S. were detained in the Brena apartment from about 31 October 1992 until about 25 February 1993. During this time, both women were raped by Radomir Kovac and Jagos Kostic.<sup>18</sup> On or about 25 February 1993, Radomir

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<sup>14</sup> *Ibid*, par 10.2.

<sup>15</sup> *Ibid*, par 11.1.

<sup>16</sup> *Ibid*, par 11.2-11.3.

<sup>17</sup> *Ibid*, par 11.3.

<sup>18</sup> *Ibid*, par 11.4.

Kovac sold FWS-87 and A.S. to two unidentified Montenegrin soldiers.<sup>19</sup> On an unknown date between about 31 October 1992 and about 7 November 1992, FWS-75, FWS-87, A.S., and A.B. were forced to take all of their clothes off and dance naked on a table while Radomir Kovac watched.<sup>20</sup>

### C. The accused Zoran Vukovic

10. The accused Zoran Vukovic is charged under COUNTS 21 TO 24 with torture, as a crime against humanity, under Article 5(f) of the Statute, and as a violation of the laws or customs of war, under Article 3 of the Statute and recognised by common Article 3(1)(a) of the 1949 Geneva Conventions. He is also charged with rape, as a crime against humanity, under Article 5(g) of the Statute, and as a violation of the laws or customs of war, under Article 3 of the Statute. These charges are brought pursuant to Article 7(1) of the Statute (individual criminal responsibility).

The Prosecutor alleges that on or about 6 or 7 July 1992, Dragan Zelenovic, DP 1, and the accused Zoran Vukovic selected FWS-50, FWS-75, FWS-87 and FWS-95 from a group of detainees. Dragan Zelenovic raped FWS-75. The accused Zoran Vukovic raped FWS-87 and DP 1 raped FWS-95. One of the other soldiers raped FWS-50.<sup>21</sup> Between or about 8 July and about 13 July 1992, on at least five other occasions, Zoran Vukovic was a member of a group of soldiers, who raped FWS-75 and FWS-87.<sup>22</sup>

11. Under COUNTS 33 TO 36, Zoran Vukovic is charged with torture, as a crime against humanity, under Article 5(f) of the Statute, and as a violation of the laws or customs of war, under Article 3 of the Statute and recognised by common Article 3(1)(a) of the 1949 Geneva Conventions. He is also charged with rape, as a crime against humanity, under Article 5(g) of the Statute, and as a violation of the laws or customs of war, under Article 3 of the Statute. These charges are brought pursuant to Article 7(1) of the Statute (individual criminal responsibility).

The Prosecutor alleges that on or around 14 July 1992, FWS-48, FWS-87, and Z.G. were brought to the Brena apartment block near Hotel Zelengora. DP 1 raped witness Z.G., and

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<sup>19</sup> *Ibid*, par 11.6.

<sup>20</sup> *Ibid*, par 11.5.

<sup>21</sup> Indictment IT-96-23/1, par 6.6.

<sup>22</sup> *Ibid*, par 6.7.

an unidentified soldier raped FWS-87.<sup>23</sup> On or around 14 July 1992, Zoran Vukovic came to Partizan to remove FWS-50 and FWS-87. As FWS-50 hid, Zoran Vukovic threatened to kill the other detainees; she and FWS-87 were taken to an apartment close to Partizan where Zoran Vukovic raped FWS-50 while an unidentified soldier raped FWS-87.<sup>24</sup> On one occasion in July 1992, FWS-87 was raped by four men including Zoran Vukovic.<sup>25</sup>

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<sup>23</sup> *Ibid*, par 7.10.

<sup>24</sup> *Ibid*, par 7.11.

<sup>25</sup> *Ibid*, par 7.13.

### III. EVIDENCE

#### A. General background

12. The parties have agreed that an armed conflict existed between the Serb and Muslim forces in the area of Foca.<sup>26</sup> The Defence submitted, however, that its admission was limited to the municipality of Foca.<sup>27</sup> The existence of an armed conflict is relevant to charges under both Article 3 and Article 5 of the Tribunal's Statute.

13. The three accused denied that the incidents alleged in the Indictment were part of a widespread or systematic attack against the civilian population of the Foca municipality and surrounding municipalities of Gacko and Kalinovik.<sup>28</sup> The requirement of the existence of a "widespread or systematic attack against any civilian population" is relevant to charges brought under Article 5 of the Tribunal's Statute.

14. Several Prosecution witnesses stated that in the months leading up to the attack on Foca on 8 April 1992, Muslim workers stopped receiving their salary and that some others were professionally ostracised or simply told that there was no work for them.<sup>29</sup> One Defence witness said that the working relationship at the hospital remained cordial.<sup>30</sup>

15. Other witnesses said that the freedom of movement of Muslim citizens was increasingly restricted, their communication limited and their gatherings banned.<sup>31</sup> Public announcements prohibiting gatherings and informing the Muslims that they were not free to

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<sup>26</sup> Prosecution Submission Regarding Admissions and Contested Matters, 1 Feb 2000; Prosecution Submission Regarding Admissions and Contested Matters Regarding the Accused Zoran Vukovic, 8 Mar 2000; see pars 1 and 2 of Admissions by the Parties and Other Matters not in Dispute.

<sup>27</sup> Defence Final Trial Brief, pp 196-197.

<sup>28</sup> Prosecution Submission Regarding Admissions and Contested Matters, Matters of Facts and Law Which Remain Contested, 1 Feb 2000, p 10, par 1 and p 11, par 1; and Prosecution Submission Regarding Admissions and Contested Matters Regarding the Accused Zoran Vukovic, 8 Mar 2000; see par 1 of Admissions by the Parties and Matters of Fact and Law Which Remain Contested.

<sup>29</sup> FWS-33, T 485-486; FWS-152, T 1885; A.S., T 2057; FWS-96, T 2498 and FWS-48, T 2614.

<sup>30</sup> Witness DC, T 5015 and 5029.

<sup>31</sup> FWS-33, T 487-489; FWS-52, T 856; A.S., T 1989 and T 1996; FWS-78, T 2096; FWS-132, T 2407; FWS-96, T 2500; FWS-185, T 2841 and 2889; FWS-175, T 3571; FWS-183, T 3661; and FWS-61, T 3738.

move around their villages were made.<sup>32</sup> Roadblocks were set up, Muslim villagers were prevented from moving around town, and were sometimes put under house arrest.<sup>33</sup>

16. Some Defence witnesses stated that the Muslims also set up roadblocks. Defence witness Rajko Markovic said that some of these roadblocks were manned by the "SUP", the Serb-controlled Ministry of the Interior or police.<sup>34</sup> If they wanted to leave their town or village, the Muslims had to obtain an exit permit from the authorities.<sup>35</sup> In the days leading up to the war, Serb families left the region in great numbers, unhindered.<sup>36</sup>

17. The tension was accompanied and prompted by an ever more aggressive nationalistic propaganda, a hardening of the ethnic divide and the organisation of political rallies.<sup>37</sup> Even prior to the war, the two ethnic groups had created independent administrative structures. Thus, the Serbian side had its own Municipal Assembly.<sup>38</sup> Both parties established so-called Crisis Staffs.<sup>39</sup>

18. Both sides were also preparing for war. Various witnesses stated that weapons had begun pouring into the region and were being distributed.<sup>40</sup> The JNA ("Yugoslav People's Army") military depot at Livade was under the control of the Serb authorities, which started handing over weapons to Serb fighters.<sup>41</sup> People started carrying weapons openly and wearing military uniforms. Guards were organised in villages and apartment blocks. Men started organising themselves and Serbs began occupying the strategic high points around Foca. Thus, when the fighting broke out, the parties were ready for battle. In the meantime,

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<sup>32</sup> FWS-78, T 2096; FWS-183, T 3661 and FWS-61, T 3738.

<sup>33</sup> FWS-33, T 462, T 487-489 and T 521; FWS-52, T 851, T 855-856, T 913 and T 916-917; FWS-152, T 1888; A.S., T 1996; FWS-78, T 2077-2078, T 2080 and T 2096; FWS-96, T 2500; FWS-175, T 3567-3571; FWS-183, T 3659-3661; FWS-61, T 3738; Witness Rajko Markovic, T 5078.

<sup>34</sup> T 5079-5080.

<sup>35</sup> FWS-33, T 487, T 489 and T 495; FWS-93, T 1076; FWS-51, T 1160 and FWS-96, T 2557. Ex P40, 41, 42 and 43 are exit permits obtained by FWS-33 for him and his family to be allowed to leave Foca. Ex P47 is an exit permit to leave Foca obtained by FWS-93. Ex P53 is an exit permit to leave Foca obtained by FWS-51. Ex P74 is an exit permit to leave Foca obtained by FWS-96.

<sup>36</sup> FWS-33, T 456, T 455 and T 533; FWS-75, T 1372; FWS-65, T 651; FWS-78, T 2074.

<sup>37</sup> FWS-33, T 447-448 and T 536-554; FWS-65, T 640-641; Witness DA, T 4979; Witness DC, T 5015, 5021-5024 and 5030-5033; Witness Velimir Djurovic, T 5042-5043 and T 5056-5058. See also Ex P25, containing video footage of a parliamentary exchange between Radovan Karadzic and Alija Izetbegovic prior to the conflict. See also Ex D1 and 1/1.

<sup>38</sup> See Ex P1, Request of the Serbian Municipality of Foca to the JNA General Staff in Belgrade for Stationing a Garrison in Foca, 17 March 1992.

<sup>39</sup> See Osman Šubasic, T 4054-4056.

<sup>40</sup> FWS-33, T 457; FWS-93, T 1054 and 1096; Witness Osman Šubasic, T 4049-4050, T 4054 and T 4060-4065; Witness Velimir Djurovic, T 5059; Witness Rajko Markovic, T 5078; Witness Vaso Blagojevic, T 5087.

<sup>41</sup> Dragoljub Kunarac, T 4397-4399 and Witness Vaso Blagojevic, T 5088-5089.

the police had been *de facto* divided along ethnic lines and were no longer in a position to do anything about these developments.

19. Lured by the promise of a peaceful arrangement, many Muslim men accepted to surrender their weapons when asked to do so.<sup>42</sup> Only a few managed to keep their guns or hunting rifles; Muslim houses were often searched.<sup>43</sup> They were sometimes asked to sign a loyalty statement on the understanding that they would then not be attacked.<sup>44</sup> As a consequence, when they were eventually attacked, Muslim civilians were generally unarmed and unable to defend themselves.<sup>45</sup>

20. Shortly before fighting started in Foca, Muslim houses were being set on fire. Sporadic shooting started. Those who could leave the region did so. The others decided to hide in the woods for fear of being burned in their houses while they were sleeping.<sup>46</sup>

21. On 8 April 1992, fighting broke out in Foca. The Serbs used heavy artillery to shell the town and para-militaries to clean out the remaining pockets of resistance.<sup>47</sup> By mid-April, Foca had been taken over by the Serb forces. Fighting continued until mid-July in the surrounding villages and municipalities. In the course of those villages being taken or as soon they had been taken, Muslim inhabitants were systematically subjected to the pattern of abuses described next.

22. The military take-over of villages and towns around Foca was typically achieved without much fighting but did involve futile violence. According to many witnesses, Muslim inhabitants were methodically rounded up and brought to collecting points from

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<sup>42</sup> FWS-52, T 852-855; FWS-48, T 2619; FWS-78, T 2083; FWS-192, T 3025-3026.

<sup>43</sup> FWS-33, T 471; FWS-65, T 670-671; FWS-52, T 851-854 and T 926; FWS-93, T 1051-1054, T 1065 and T 1092; FWS-51, T 1118 and T 1214; FWS-50, T 1337-1339; FWS-75, T 1374-1376; A.S., T 1989; FWS-78, T 2083; FWS-95, T 2185; FWS-132, T 2403-2404 and 2452-2454; FWS-96, T 2500-2501; FWS-48, T 2618-2619; FWS-185, T 2841-2843; FWS-186, T 2917 and T 2990-2991; FWS-192, T 3024-3026, FWS-175, T 3571-3572; FWS-183, T 3662-3664.

<sup>44</sup> See, eg, FWS-75, T 1374-1375.

<sup>45</sup> FWS-50, T 1234-1235.

<sup>46</sup> FWS-52, T 862; FWS-62, T 951; FWS-51, T 1115; FWS-50, T 1235; FWS-75, T 1373; FWS-87, T 1665; FWS-95, T 2187-2188; FWS-96, T 2501; FWS-48, T 2616; FWS-186, T 2918; FWS-175, T 3567 and FWS-105, T 4209.

<sup>47</sup> FWS-65, T 659-661 and T 684-685; FWS-52, T 915; FWS-93, T 1051-1055; FWS-78, T 2088-2093; FWS-190, T 3315-3316. See also Ex P6 and 6/1 concerning the type and use of weapons used to take Foca and surrounding municipalities: Ex P6 is an order of battle instructing the units for further actions and is directed to commanders of basic units and the command of the Trnovo battalion instructing them with respect to the use of artillery weapons. Ex P6/1 are pictures of the weaponry at the disposal of the Serb forces.

which they would then be transported to different buildings or schools and detained there.<sup>48</sup> The villages of Trosanj and Mješaja, for example, were taken in that way on 3 July 1992.<sup>49</sup> FWS-75, who lived in Trosanj, stated that she saw the accused Radomir Kovac during the attack on her village.<sup>50</sup> The village of Jelec had been taken in a like manner on 4 May 1992.<sup>51</sup> Between the end of June and the beginning of July 1992, Gacko and its surrounding villages were attacked in the exact same manner. In some cases, there was no fighting at all, such as in the village of Trnovace and Trbušće, south of Foca, at the end of June 1992,<sup>52</sup> in Kalinovik in early August 1992,<sup>53</sup> or in Miljevina and its surrounding villages at the beginning of September 1992.<sup>54</sup> Muslim civilians were simply removed by soldiers from their homes and kept in various facilities.<sup>55</sup> These brutal methods were not one-sided and Muslim forces used similar violence on Serb villages and villagers.<sup>56</sup>

23. Those who could tried to flee *en masse*. Following the attack on their village, the inhabitants of Gacko, a village located in the municipality of Gacko, fled towards Borac. On their way, they were joined by many other fleeing Muslim civilians. A group of several hundred of them then headed towards the town of Konjic which was believed to be held by the Muslim forces. FWS-185, FWS-186, FWS-192, FWS-191 and FWS-190 were part of the group of fleeing villagers from Gacko. They were also part of the group which was eventually captured in Ulog and placed in the school there, before being transferred to the Kalinovik High School.<sup>57</sup> Other Muslim civilians from Kalinovik and Nevesinje were soon brought to the school and kept with them. FWS-52 described how he fled his village,

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<sup>48</sup> FWS-33, T 471-480; FWS-93, T 1058-1066; FWS-51, T 1119-1123 and T 1125-1132; FWS-62, T 959-974; FWS-75, T 1381-1393; FWS-87, T 1668-1677; FWS-127, T 1857-1865; FWS-152, T 1890-1894; A.S., T 1988-1992; FWS-95, T 2193-2200; FWS-132, T 2408-2410; FWS-96, T 2509-2522; FWS-48, T 2626-2643; FWS-185, T 2854-2857; FWS-186, T 2923-2924; FWS-192, T 3029-3030; FWS-191, T 3126-3130; FWS-190, T 3322-3324; FWS-105, T 4218-4219 and D.B., T 3374-3783.

<sup>49</sup> FWS-52, T 865-872; FWS-51, T 1117-1132; FWS-50, T 1235; FWS-75, T 1381-1393; FWS-87, T 1668-1677; FWS-95, T 2183-2192; FWS-96, T 2509-2522; FWS-48, T 2626-2641; D.B., T 3374-3783 and FWS-105, T 4208-4217.

<sup>50</sup> T 1381-1383 and T 1564.

<sup>51</sup> FWS-78, T 2099-2101.

<sup>52</sup> FWS-93, T 1055-1066.

<sup>53</sup> FWS-205, T 3464-3469. Kalinovik is situated in the Kalinovik municipality, about 30-35 kilometres west of Foca and borders the Foca municipality on the west (Ex P23).

<sup>54</sup> FWS-127, T 1857-1865; FWS-152, T 1890-1894; A.S., T 1988-1991; FWS-132, T 2408-2410; FWS-175, T 3566-3576.

<sup>55</sup> FWS-33, T 471; FWS-93, T 1058-1072; FWS-127, T 1857-1861; FWS-152, T 1885-1894; A.S., 1987-1991; FWS-132, T 2408-2410; FWS-175, 3573-3574; FWS-205, T 3468-3469.

<sup>56</sup> General Radinovic, T 4837-8 and 4787; Gordan Mastilo, T 5125; DJ, T 5521-5522.

<sup>57</sup> FWS-185, T 2853-2857; FWS-186, T 2921-2924; FWS-192, T 3027-3030; FWS-191, T 3121-3129; FWS-190, T 3321-3324.

Mješaja, in a similar fashion through the mountains with a group of 22 villagers and how they joined 1.500-2.000 Muslims who were fleeing the region of Sutjeska.<sup>58</sup>

24. Many Prosecution witnesses stated that, in the course of their capture, civilians were frequently brutalised, beaten and sometimes even killed.<sup>59</sup> FWS-75 stated that when her village was attacked, she was hiding in the woods with other villagers, including her father, mother and brother. None of them had weapons and a lot of children were among this group of people. They were shot at by the arriving soldiers as they tried to flee. Three of the villagers, including the witness's mother, were shot dead when they tried to run away. The soldiers only stopped shooting when they eventually encircled the group of civilians. The soldiers then proceeded to beat the seven male members of the group for about half an hour. The witness was also beaten while another girl was hit with the butt of a rifle.<sup>60</sup> When the exodus of Muslims from the region was almost completed, the Presidency of the Republika Srpska tried to distance itself from the crimes which were still being committed and ordered that the remaining non-Serbs of the Gornje Podrinje area be protected. The order remained unimplemented and without any effect. Several witnesses also recounted that the men were separated from the women as they were captured,<sup>61</sup> and that the former were sometimes killed on the spot.<sup>62</sup>

25. Witnesses FWS-105, D.B., FWS-48, FWS-75 and FWS-87 described the events after their capture in the woods: the men, seven of them, were separated from the women. At some point, while they were being led away, the women were told to lie down and bursts of gunfire were heard coming from the place where the men had been detained. They later learnt that these men had been killed, and these witnesses never saw those men again.<sup>63</sup> Prosecution witness Osman Šubasic, who was responsible for collecting intelligence for the Bosnian Muslim army, also said that he made numerous reports about bodies of Muslim

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<sup>58</sup> T 878-880.

<sup>59</sup> FWS-52, T 874-877; FWS-93, T 1061-1062 and 1079-1080; FWS-51, T 1120-1121; FWS-62, T 967; FWS-75, T 1377-1378; FWS-87, T 1666-1669; FWS-95, T 2192-2193; FWS-96, T 2504-2509; FWS-48, T 2621-2623; FWS-185, T 2845-2846; FWS-186, T 2920; FWS-190, T 3368; D.B., T 3773-3775; FWS-105, T 4210-4211.

<sup>60</sup> T 1377-1381.

<sup>61</sup> FWS-51, T 1121-1122; FWS-93, T 1058; FWS-75, T 1384; FWS-87, T 1669; FWS-95, T 2193; FWS-96, T 2511; FWS-48, T 2626; FWS-185, T 2854-2855; A.S., T 1991-1992; FWS-175, T 3569; FWS-105, T 4213. Some of the men had been detained even prior to their village being attacked: FWS-127, T 1845-1846; FWS-152, T 1885-1886.

<sup>62</sup> FWS-93, T 1062; FWS-75, T 1384; FWS-87, T 1669; FWS-48, T 2629; D.B., T 3774-3776; FWS-105, T 4213-4214.

<sup>63</sup> T 4213-4214. See also D.B., T 3776-3777, FWS-48, T 2629; FWS-75, T 1384-1385; FWS-87, T 1669.

civilians floating in the Drina river, sometimes with their hands tied and a bullet in the back of the skull.<sup>64</sup>

26. Witnesses stated that the men who survived were generally detained at KP Dom prison.<sup>65</sup> Detainees at KP Dom came from a large geographical area covering Foca, Gora`de, Cajnice, Ustikolina, Tjentiste, Miljevina and Jelec.<sup>66</sup> During the relevant period, prisoners numbered between 350 and 500 with peaks at about 750.<sup>67</sup> According to the testimony of some witnesses, none of the detainees was ever charged with a crime or accused of having committed one. Nor were they given any reason for their detention.<sup>68</sup> Muslim men were simply interned as a matter of principle, sometimes for periods of up to two and a half years.<sup>69</sup> Defence witness General Radinovic, however, stated that the men who were kept at the KP Dom had been found to possess weapons and that they had been brought to KP Dom for questioning.<sup>70</sup> Some of the prisoners were taken out for forced labour,<sup>71</sup> while some others were taken out and never seen again.<sup>72</sup> Serb prisoners including, according to FWS-75, for a short period of time, the accused Radomir Kova~,<sup>73</sup> were also detained at KP Dom during the conflict. However, they were kept in a different section of the prison. FWS-78 stated that during his internment at KP Dom, he saw and talked to the accused Zoran Vukovic, whom he knew from before the war.<sup>74</sup> The accused, Zoran Vukovic, had come to have his vehicle repaired.

27. Two Prosecution witnesses described the conditions at KP Dom as precarious.<sup>75</sup> Food was scarce, hygiene facilities were minimal, there were no beds apart from foam mattresses and cover sheets, which were in insufficient number. FWS-65 told the Trial Chamber that in the three months that he spent at KP Dom he lost 40 kilograms.<sup>76</sup> In

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<sup>64</sup> T 4103-4110 and Ex P225-229.

<sup>65</sup> The Trial Chamber emphasises that what follows in this, the following paragraph and the remainder of this Judgement is based solely on the evidence in this case. The Trial Chamber is presently hearing another trial which is concerned more directly with the events at KP Dom, and it is maintaining a completely open mind in relation to the evidence in that case.

<sup>66</sup> FWS-65, T 683; FWS-78, T 2151-2152.

<sup>67</sup> FWS-65, T 686-687.

<sup>68</sup> FWS-78, T 2111; FWS-65, T 676-681; FWS-175, T 3569-3570.

<sup>69</sup> FWS-78 was kept at KP Dom from about 25 May 1992, until sometime in October of 1994 (T 2110). FWS-65 stated that he was kept at KP Dom for 897 days, T 681. See also Witness DQ, T 6008.

<sup>70</sup> T 4854.

<sup>71</sup> FWS-65, T 683 and T 687-689; FWS-78, T 2116-2117.

<sup>72</sup> FWS-52, T 883; FWS-95, T 2192-2193.

<sup>73</sup> FWS-75, T 1599-1601 and T 1660.

<sup>74</sup> T 2102-2104 and T 2108-2109.

<sup>75</sup> FWS-78, T 2113-2115; FWS-65, T 685-687.

<sup>76</sup> T 686.

40 days at KP Dom, FWS-78 said he lost about 15 kilograms.<sup>77</sup> Witness DP said that food could not be brought freely to detainees at KP Dom.<sup>78</sup> Several Defence witnesses mentioned that there were food shortages in Foca.<sup>79</sup> Provocation, insults, beatings and other deprivations were commonplace at KP Dom.<sup>80</sup>

28. Women were kept in various houses, apartments, gymnasiums or schools. Even prior to their being brought to those detention centres, some witnesses who testified before the Trial Chamber said that they had been physically abused or raped by the soldiers who had captured them. Thus, FWS-50, FWS-48, FWS-75 and FWS-87 stated that they were raped at Buk Bijela, a settlement south of Foca where they had been taken after their capture.<sup>81</sup> FWS-75 was taken away from the group by a man of 40-50 years who proceeded to rape her. She was subsequently raped in this very same room by approximately 10 other men. She fainted after the tenth man.<sup>82</sup> FWS-50 was taken by the accused Zoran Vukovic who was armed and in uniform, allegedly for questioning.<sup>83</sup> Zoran Vukovic took her to another room in one of the prefabricated barracks and he raped her.<sup>84</sup> This rape is not charged in Indictment IT-96-23/1. Therefore, the Trial Chamber will not take these facts into account for conviction or sentencing purposes, but it is relevant to the identification of Zoran Vukovi} by FWS-50 in relation to the rape of FWS-50 with which he is charged in the Indictment. Some other women were spared but were either told about those rapes or were able to judge for themselves what had transpired considering the condition in which those girls and women were brought back.<sup>85</sup> Girls, women and some elderly men who were at Buk Bijela were then transported by bus to Foca and kept in the Foca High School, which was situated in the Aladža neighbourhood of Fo-a.

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<sup>77</sup> T 2114.

<sup>78</sup> T 5982 and 5985.

<sup>79</sup> With respect to the shortages of food and electricity, see Witness DJ, T 5545; Witness DK, T 5551-5554; Witness DM, T 5659; Witness DH, T 5707; Witness DO, T 5908-5909. With respect to the fact that shops were open, see Witness DI, T 5748-5750; Witness DQ, T 6013; Witness DR, T 6017-6018.

<sup>80</sup> FWS-78, T 694-695.

<sup>81</sup> FWS-50, T 1241-1244; FWS-75, T 1386-1390; FWS-87, T 1670-1671; FWS-48, T 2637-2640.

<sup>82</sup> T 1389-1390.

<sup>83</sup> T 1242.

<sup>84</sup> T 1243.

<sup>85</sup> FWS-51, T 1126; FWS-52, T 873; FWS-62, T 968 and T 986-987; FWS-95, T 2197; DB, T 3779-3781; FWS-105, T 4217-4218.

29. Living conditions at Foca High School were described by many witnesses as extremely poor.<sup>86</sup> FWS-62 said that detainees were fed only once every three days and in insufficient quantity;<sup>87</sup> there were no washing facilities and no blankets or cushions to sleep on. One old man was also beaten.<sup>88</sup>

30. Several Prosecution witnesses said that the conditions were even worse at Partizan Sports Hall, where most women from Foca High School were transferred next.<sup>89</sup> According to FWS-105, the conditions at Partizan were "90% worse" than at the Foca High School.<sup>90</sup> They were more often provoked, raped and taken out, and there were no hygiene facilities and even less food. Several of the witnesses confirmed that food was scarce, of poor quality and provided erratically.<sup>91</sup> One woman, FWS-95, was occasionally allowed to go to town to buy some food, as she knew one of the guards.<sup>92</sup> Detainees, in particular children, were affected by this regime.<sup>93</sup> Sanitary conditions were almost non-existent and only a few gym mattresses were available to sleep on, with detainees squeezed against each other. Violence, including sexual violence, continued with increased intensity.<sup>94</sup> FWS-62 described how, one night, the woman sleeping next to her was raped in full view of the other detainees and her ten-year old son at her side.<sup>95</sup> FWS-75 summarised the conditions at Partizan as "dreadful".<sup>96</sup>

31. Conditions at the Kalinovik High School, where civilians from Gacko, Kalinovik and neighbouring villages were kept, were, according to several witnesses, appalling.<sup>97</sup> Detainees had to sleep on mattresses infested with lice, and there were almost no hygiene facilities. FWS-192 said that there was just one toilet for all the detainees, approximately 70 people, and that she did not have a bath and could barely wash for about two months.<sup>98</sup>

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<sup>86</sup> FWS-51, T 1132-1133; FWS-75, T 1396-1397; FWS-87, T 1676; FWS-95, T 2204-2205; FWS-96 T 2522-2523; FWS-48, T 2648-2649; D.B., T 3784-3785; FWS-105, T 4219-4220.

<sup>87</sup> T 983.

<sup>88</sup> FWS-51, T 1132-1134; FWS-95, T 2213; FWS-96, T 2529.

<sup>89</sup> FWS-51, T 1142-1143; FWS-62, T 989-990; FWS-75, T 1407-1408; FWS-87, T 1739-1740; FWS-95, T 2214-2216; FWS-96, T 2551; FWS-48, T 2653-2654 and 2818; D.B, T 3790; FWS-105, T 4225-4226.

<sup>90</sup> T 4225.

<sup>91</sup> FWS-51 said that they would only receive a jar of soup and slices of bread, T 1143. See also FWS-62, T 989-990; FWS-75, T 1407; FWS-87, T 1740; FWS-95, T 2215-2217; FWS-48, T 2818.

<sup>92</sup> FWS-95, T 2215-2216.

<sup>93</sup> FWS-51, T 1143.

<sup>94</sup> FWS-62, T 991; FWS-75, T 1485-1490; FWS-95, T 2215-2216; FWS-96, T 2530; FWS-50, who was once beaten up with a rifle butt, T 1255.

<sup>95</sup> T 993-995.

<sup>96</sup> T 1407.

<sup>97</sup> FWS-185, T 2858; FWS-186, T 2925-2926; FWS-192, T 3032; FWS-191, T 3130.

<sup>98</sup> T 3032.

In the initial 10-15 days of their detention, some women were allowed to leave the school to get some food, but this stopped eventually and food became scarce.<sup>99</sup> Some of the detainees were also beaten, while some others were taken out and never brought back.<sup>100</sup>

32. The witnesses said that they could not leave the premises. At Foca High School, there were one or two guards working in shifts who would prevent the detainees from escaping, but they would not prevent soldiers from entering the facilities.<sup>101</sup> The detainees felt at the complete mercy of their captors. When asked why she did not try to escape, FWS-51 described the helpless situation in which they found themselves.<sup>102</sup> FWS-50 described the general climate of extreme fear that had been instilled.<sup>103</sup> Defence expert General Radinovic generally described those facilities where women were kept as “collection centres”, as opposed to “detention centres”, that is, facilities in which supervision is minimal and mainly concentrated on keeping unauthorised persons from entering the premises.<sup>104</sup> This witness also said that his conclusions are based solely on the documents of the Herzegovina Corps, and that he never toured those premises or even talked to former detainees.<sup>105</sup>

33. The same restrictions on the movement of detainees applied at Partizan and Kalinovik High School.<sup>106</sup> FWS-87 said that at Partizan, they were allowed to go in the courtyard in front of the hall but not any further.<sup>107</sup> FWS-95, who knew one of the guards, mentioned, however, that she was sometimes allowed to go to town to do some shopping but that no other woman was allowed to do the same.<sup>108</sup> The same applied at Kalinovik High School apart from the first 10-15 days when some detainees were allowed to go out to buy some food for the people held there.<sup>109</sup>

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<sup>99</sup> FWS-185, T 2858; FWS-186, T 2994; FWS-191, T 3133; FWS-190, T 3325-3326.

<sup>100</sup> FWS-185, T 2860; FWS-192, T 3034-3035; FWS-191, T 3131-3132; FWS-190, T 3327-3328.

<sup>101</sup> FWS-75, T 1397; FWS-87, T 1688; FWS-95, T 2205; FWS-96, T 2523; FWS-48, T 2649-2650.

<sup>102</sup> T 1205.

<sup>103</sup> T 1258.

<sup>104</sup> T 4855 and 4869-4870.

<sup>105</sup> T 4862-4864.

<sup>106</sup> With respect to Partizan, see FWS-75, T 1408; FWS-87, T 1689; FWS-95, T 2217; FWS-48, T 2649. With respect to Kalinovik High School, see FWS-185, T 2857-2858; FWS-186, T 2926; FWS-192, T 3032; FWS-191, T 3134.

<sup>107</sup> T 1741-1742.

<sup>108</sup> T 2216-2217.

<sup>109</sup> FWS-185, T 2857-2858; FWS-186, T 2994; FWS-191, T 3133; FWS-190, T 3325-3326.

34. According to various witnesses, all this was happening in full view and with the knowledge of the local authorities. FWS-192 stated that the chief of the police and the president of the SDS ("Serb Democratic Party") in Kalinovik came to the school to inspect it.<sup>110</sup> Likewise, on their way from Buk Bijela to Foca High School, the buses with the Muslim women stopped for several minutes in front of the SUP, the local police station. Some of the soldiers who were in the bus got off and entered the police station or talked to the chief of Foca's police, Dragan Gagovic, in front of the buses.<sup>111</sup> In addition, several witnesses saw Dragan Gagovic at or in the vicinity of Partizan.<sup>112</sup> When they tried to seek the protection of the police, the women were treated rudely and their complaints were ignored. FWS-95 said that she went twice to the police with FWS-48 and FWS-51 to complain about their treatment.<sup>113</sup> On the second occasion, FWS-48 personally complained to Dragan Gagovic. However, no action was taken to address the women's complaints and the conditions did not improve.<sup>114</sup> One night in mid-July, as she was trying to escape, FWS-183 tried to seek refuge in the police building but as she was approaching it, the policeman standing guard hit her with the butt of his rifle.<sup>115</sup>

35. Numerous witnesses stated that soldiers and policemen would come constantly, sometimes several times a day; they would point at women and girls or call them by their names and take them out for rape. The women had no choice but to obey those men and those who tried to resist were beaten in front of the other women.

36. Witnesses described how, as soon as they arrived at Foca High School, women and girls were either taken out of the school, or into the classrooms where they were raped.<sup>116</sup> They would sometimes be raped together. Each one of them would be assigned to a soldier and raped by him. Thus, in early July, FWS-50, FWS-75, FWS-87 and FWS-95 were taken together from the main room at Foca High School and brought to another classroom where

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<sup>110</sup> T 3080.

<sup>111</sup> FWS-48, T 2641-2642.

<sup>112</sup> FWS-62, T 998-999; FWS-51, T 1160 and T 1218; FWS-50, T 1280-1281; FWS-87, T 1690-1691, FWS-95, T 2249; FWS-96, T 2536; FWS-48, T 2683 and 2692; FWS-105, T 4244.

<sup>113</sup> T 2243-4 and 2304-2305. See also FWS-51, T 1221; FWS-48, T 2683-2684 and FWS-105, T 4244.

<sup>114</sup> T 2250.

<sup>115</sup> T 3676.

<sup>116</sup> FWS-50, T 1249-1254; FWS-75, T 1397-1405; FWS-87, T 1676-1687; FWS-95, T 2206-2211, FWS-48, T 2645-2652 and FWS-105, T 4221-4224. Some other women were not raped but testified about seeing other women being taken out and coming back: FWS-52, T 873; FWS-51, T 1134-1137; FWS-62, T 975-979; FWS-96, T 2524-2529; D.B., T 3786-3790.

they were raped by several soldiers.<sup>117</sup> FWS-50, FWS-75, FWS-87, FWS-95, FWS-48, FWS-105 and many other women recounted being raped at least once or on several occasions during their time at Foca High school.<sup>118</sup> The girls and women were generally taken for a few hours and returned, sometimes overnight, and some of them were taken away every day. After about 10-15 days, most of the women were transferred to Partizan Sports Hall.

37. At Partizan, witnesses testified that the pattern of rapes was similar and the frequency of rapes and number of soldiers even higher. FWS-51, FWS-50, FWS-75, FWS-87, A.S., FWS-95, FWS-48, FWS-105 and D.B. testified that they and many other women and girls were taken out to be raped, most of them many times.<sup>119</sup> Some women who testified before the Trial Chamber had been taken out so often, by so many soldiers, that they were consequently unable to assess with precision the number of times they had been raped. FWS-95 roughly estimated that during the entire period of her detention at both Foca High School and Partizan, that is, about 40 days, she was raped approximately 150 times.<sup>120</sup>

38. Some of the soldiers who came to Partizan to take out women had also been to Foca High School.<sup>121</sup> For example, the chief of Foca's police, Dragan Gagovic, was seen by some witnesses at both locations.<sup>122</sup>

39. The guards at Partizan, as had been the case at Foca High School, did not try to prevent soldiers from entering the hall. FWS-95 stated, however, that one guard once tried without success to stop soldiers from entering the hall. The soldiers told him that they had a document signed by Dragan Gagovic which allowed them to enter the hall and to take women out; the document allegedly stated that soldiers needed to have sexual intercourse to

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<sup>117</sup> FWS-50, T 1250-2; FWS-75, T 1398; FWS-87, T 1678; FWS-95, T 2206-2207.

<sup>118</sup> FWS-50, T 1249-54; FWS-75, T 1397-1405; FWS-87, T 1676-1687; FWS-95, T 2206-2213; FWS-48 T 2645-2652; FWS-105, T 4219-4224.

<sup>119</sup> FWS-51, T 1145-1150 and T 1155-1162; FWS-50, T 1258; FWS-75, T 1405-1429; FWS-87, T 1690-1700; A.S., T 1995-1996; FWS-95, T 2217-2225 and T 2230-2246; FWS-48, T 2659-2713; D.B., T 3790-3815; FWS-105, T 4225-4247. The same women also testified about other women being taken out of Partizan. In addition, some women who had not themselves been taken out, testified about other women being taken from Partizan: FWS-62, T 995-1001; FWS-127, T 1870-1872; FWS-96, T 2530-2534.

<sup>120</sup> T 2208.

<sup>121</sup> FWS-75, T 1410; FWS-95, T 2224. Other witnesses without expressly stating that some soldiers were indeed the same, specifically name some of them as coming both to Foca High School and Partizan; see FWS-96, T 2524 and T 2531 for example.

<sup>122</sup> FWS-51, T 1160-1161 and 1218; FWS-62, T 998-999; FWS-50, T 1280; FWS-87, T 1690-1691; FWS-95, T 2250-2252; FWS-96, T 2536; FWS-48, T 2683 and 2692; FWS-105, T 4244.

improve their fighting spirit.<sup>123</sup> FWS-48 stated that some soldiers told her that they were ordered to rape their victims.<sup>124</sup> The process of selection was similar to that at Foca High School: soldiers entered the hall, pointed at women or called their names, took them out, raped them and brought them back. As their stay at Partizan was drawing to an end, the women and girls continued to be taken out more and more often.<sup>125</sup> FWS-95 stated that the night before she and the other detainees were released from Partizan, she was taken out together with FWS-90, brought to a stadium and raped by many soldiers, mostly by two at the same time.<sup>126</sup>

40. The house at Ulica Osmana Đikica no 16 served as the soldiers' headquarters and meeting point. Some of the men lived there more or less permanently; among them were Dragan or Dragutin/Dragomir Vukovic (aka "Gaga"), Miroslav Kontic (aka "Konta"), DP 7, DP 8, Jure Radovic, Dragan Toljic (aka "Tolja"), Bane, Miga and Puko.<sup>127</sup> FWS-50, FWS-75, FWS-87, FWS-48, FWS-95, D.B. and FWS-105 were all brought to this house at some point and raped.<sup>128</sup> Some other women and girls were also taken to this house on several occasions for similar abuse.

41. Some of the women from Partizan and Kalinovik High School were at some point moved to different houses and apartments where they continued to be raped and mistreated. In particular, at "Karaman's house" in Miljevina, soldiers had easy access to women and girls whom they raped. FWS-75, FWS-87, A.S., FWS-132, FWS-190, D.B. and other women were kept in this house for some time.<sup>129</sup> There, they were raped many times by many different soldiers. On 3 August, FWS-75, FWS-87, D.B. and FWS-190 were taken from Alad' a to Miljevina where they were handed to DP 3, the man who appeared to be in charge of "Karaman's house".<sup>130</sup>

42. Some women were kept in private apartments. Some spent a few days in one place before being moved to another apartment, generally with different soldiers. Thus, for

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<sup>123</sup> T 2217-2219. See also FWS-105, T 4244.

<sup>124</sup> T 2700.

<sup>125</sup> FWS-105, T 4226.

<sup>126</sup> FWS-95, T 2242-2244.

<sup>127</sup> FWS-75, T 1411 and T 1414-1415; FWS-87, T 1694 and T 1698-1699; D.B., T 3797 and T 3801-3802; FWS-190, T 3336-3345; FWS-205, T 3480; Dragoljub Kunarac, T 4517-4520 and T 4667-4669.

<sup>128</sup> FWS-50, T 1272-1278; FWS-75, T 1411-1431; FWS-87, T 1690-1700; FWS-95, T 2236-2240; FWS-48, T 2664-2668 and T 2700-2702; D.B., T 3795-3815; FWS-105, T 4228-4230.

<sup>129</sup> FWS-75, T 1433-1442; FWS-87, T 1702-1707; FWS-AS, T 1995-2005; FWS-132, T 2414-2425; FWS-190, T 3352-3371 and D.B., T 3817-3836.

example, according to their testimony on or about 30 October 1992, FWS-75, FWS-87, A.S. and A.B., a girl aged twelve years at the time, were moved from "Karaman's house" and taken to a apartment in the so-called Lepa-Brena block in Foca.<sup>131</sup> FWS-75 and A.B. spent about 20 days in this apartment during which they were constantly raped by the two occupants of the apartment and by other men who visited.<sup>132</sup> In mid-November, the two women were taken to a house near the Hotel Zelengora. They stayed in this house for approximately 20 days during which they were continually raped by a group of soldiers. This group of soldiers subsequently took them to yet another apartment where they continued to rape them for about two weeks.<sup>133</sup> On or about 25 December 1992, they were brought back to the apartment in the Lepa Brena block. A.B. was sold for 200 DM and never seen again; FWS-75 was handed to DP 1.<sup>134</sup> While in the Lepa Brena apartment, the women were locked in and permitted no contact with the outside world.<sup>135</sup>

43. Similarly, FWS-186 and FWS-191 were kept in a house in Trnovace for several months. On 2 August 1992, they, together with five other women, were taken out of the Kalinovik High School and brought to a house in Alad'a.<sup>136</sup> FWS-191 was told that the women were "rewards" for the Serbs who had captured the Rogoj pass that very day.<sup>137</sup> FWS-186, FWS-191 and J.G. were then transported from that house in the Alad'a neighbourhood to a house in Trnovace.<sup>138</sup> After only three to five days, J.G. was taken to "Karaman's house". The other two women stayed in the Trnovace house for approximately six months. During this period, the women had no control whatsoever over their lives and choices.<sup>139</sup>

44. In the meantime, Muslim houses and apartments in Foca and neighbouring municipalities were targeted, destroyed and burnt down.<sup>140</sup> FWS-52 described how, in the

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<sup>130</sup> FWS-75, T 1433-1435; D.B., T 3815-3818; FWS-87, T 1700; FWS-190, T 3352-3353.

<sup>131</sup> FWS-75, T 1443-1445; FWS-87, T 1707-1708 and A.S., T 2005-2007. See also FWS-190, T 3372-3375.

<sup>132</sup> FWS-75, T 1449-1451.

<sup>133</sup> FWS-75, T 1454-1456.

<sup>134</sup> FWS-75, T 1494.

<sup>135</sup> FWS-75, T 1599; FWS-87, T 1814-1815; A.S., T 2012 and T 2022.

<sup>136</sup> FWS-191, T 3142 and 3154; FWS-186, T 2930-2935; FWS-190, T 3337-3339; FWS-205, T 3470-3477.

<sup>137</sup> FWS-191, T 3155-3156.

<sup>138</sup> FWS-186, T 2938-2940 and FWS-191, T 3160-3166.

<sup>139</sup> See FWS-191, T 3182; FWS-186, T 2952.

<sup>140</sup> FWS-33, T 486-487; FWS-65, T 664 and T 675-676; FWS-52, T 865-866 and T 870-871; FWS-62, T 955-956 and T 1017; FWS-51, T 1119; FWS-75, T 1374 and T 1386; AS, T 1987; FWS-78, T 2081-

course of the attack on her village, Muslim houses were systematically set on fire by Serb soldiers. According to him, out of the 40 Muslim houses in the village, only six remained intact.<sup>141</sup> FWS-33 said that two thirds of the Muslim houses in the Donje Polje area of Foca were burnt,<sup>142</sup> while FWS-65 describes how the fire brigade remained idle whilst a Muslim house was burning.<sup>143</sup> He also said that the burning of Muslim houses continued at least until May 1992, that is, well after the end of the actual fighting in Foca, when he would see one or two houses being set on fire every day.<sup>144</sup> Serb properties were generally spared.<sup>145</sup> FWS-78 stated that the fire brigade was protecting Serb houses from the spreading fire.<sup>146</sup> Witness DA said that Serb houses burned too, in particular in Prijeka Carsija, Alad'a and Sukova,<sup>147</sup> and that entire Muslim villages were burnt down.<sup>148</sup> He stated that he was not aware of any criminal proceedings being initiated against the arsonists.<sup>149</sup> Generally, attacks concentrated on Muslim neighbourhoods and villages,<sup>150</sup> although witness DA said that some ethnically mixed neighbourhoods such as Sukovac and Prijeka Carsija were also targeted.<sup>151</sup>

45. Muslim shops or apartments were looted<sup>152</sup> and valuables were taken away from the Muslims.<sup>153</sup> In addition, several witnesses stated that before they were allowed to leave, Muslim civilians were sometimes forced to relinquish their properties by signing formal title deeds.<sup>154</sup>

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<sup>141</sup> 2082, T 2085 and T 2133; FWS-95, T 2189-2191; FWS-96, T 2522; FWS-48, T 2633; FWS-185, T 2851; FWS-190, T 3367-3368; FWS-61, T 3748-3749; FWS-105, T 4214.

<sup>142</sup> T 865 and 871.

<sup>143</sup> T 486-487.

<sup>144</sup> T 665.

<sup>145</sup> T 674-675.

<sup>146</sup> FWS-65, T 675-676; FWS-52, T 866 and T 871; FWS-51, T 1119-1120; FWS-75, T 1386; FWS-78, T 2099 and T 2133; FWS-96, T 2522.

<sup>147</sup> T 2099.

<sup>148</sup> T 4981-4984 and T 5002-5003. See also Witness Velimir Djurovic, T 5059-5062; Witness Rajko Markovic, T 5076-5077; Witness DK, T 5577. Ex D100 shows the ethnical distribution, by house and the result of the attack on each house in the Prijeka Carsija neighbourhood.

<sup>149</sup> T 4996.

<sup>150</sup> T 5004.

<sup>151</sup> FWS-33 stated that two thirds of the Muslim houses were destroyed in Donje Polje (T 486-487). See also Tejshree Thapa, T 374; FWS-65, T 675-676; Witness Osman Subasic, T 4067-4070. T 5001-5003.

<sup>152</sup> FWS-183, T 3659-3660; FWS-61, T 3743; FWS-78, T 2120-2121 and T 2094.

<sup>153</sup> FWS-93, T 1065; FWS-50, T 1276; FWS-87, T 1668-1669; FWS-127, T 1860; FWS-152, T 1894; FWS-48, T 2644-2645; FWS-192, T 3050-3051; FWS-190, T 3329; FWS-183, T 3710-3711, FWS-61, T 3747-3748; FWS-105, T 4216-4217.

<sup>154</sup> FWS-33, T 495-496.

46. Prosecution witnesses testified that every mosque in Foca was destroyed, one after the other.<sup>155</sup> FWS-65 saw the mosque in Donje Polje burning and the fire brigade doing nothing to stop the fire.<sup>156</sup> The last standing mosque in Foca, the Alad'a mosque, was blown up on 1 August 1992, well after the end of the fighting and at a time when the town was securely under Serb control.<sup>157</sup> Defence witness Velimir Djurovic said that, when this mosque was blown up, there were no Muslim fighters left in town. He suggested that there might have been an ammunition cache in the mosque which would have justified targeting it.<sup>158</sup> Defence witness DQ stated, however, that two mosques were actually still standing in Foca at the time of trial, including one in Donje Polje.<sup>159</sup> The aerial photos taken after the fighting show the destruction of every single mosque during that period.<sup>160</sup> Defence witness Velimir Djurovic said that he heard on Radio Foca that places of worship should not be destroyed and that Muslims should not be expelled; he could not say if anyone was ever prosecuted for their destruction.<sup>161</sup> Likewise, Defence witness DA, who at some point was a member of a commission charged with assessing damages, also mentioned the existence of orders prohibiting arson and damage to religious buildings, but admitted that they were not followed, adding that he could not explain how the mosques were destroyed or burnt.<sup>162</sup>

47. As a consequence of the concerted effect of the attack upon the civilian population of Foca and surrounding municipalities, all traces of Muslim presence in the area were effectively wiped out. Muslim civilians, but for a handful, had been one way or another expelled from the region. According to the 1991 Census, Foca municipality had a pre-war population of about 40,513 inhabitants of whom 52% were Muslim. According to the Prosecutor's evidence, only about ten Muslims remained at the end of the conflict.<sup>163</sup> Witness DR conceded that none of her Muslim friends lived in Foca anymore.<sup>164</sup> In January

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<sup>155</sup> See also FWS-33, T 487; FWS-65, T 669; FWS-78, T 2133.

<sup>156</sup> T 665.

<sup>157</sup> FWS-50, T 1275; FWS-75, T 1429; FWS-87, T 1698; FWS-96, T 2532; D.B., T 3810; Witness Velimir Djurovic, T 5062.

<sup>158</sup> T 5062-5063.

<sup>159</sup> T 6014.

<sup>160</sup> T 369-374. Ex P22 and 22/1-5 are two sets of aerial photos from before (10 Oct 1991) and after (10 Aug 1992) the attack on Foca.

<sup>161</sup> T 5064-5065.

<sup>162</sup> T 5003-5004.

<sup>163</sup> See Ex P18, Ethnic composition of Foca municipality by settlement, according to the results of the 1991 census (from Population of Bosnia and Herzegovina, Republic of Croatia Bureau of Statistics, pp 101-110, Apr 1995).

<sup>164</sup> T 6032. See also Witness Velimir Djurovic, T 5066-5067.

1994, Foca was renamed Srbinje by reference to the fact that it is now almost exclusively inhabited by Serbs.<sup>165</sup> The town is now part of Republika Srpska.

## **B. Role of the accused**

### **1. Background of the accused**

#### **(a) Dragoljub Kunarac**

48. The accused Dragoljub Kunarac, nicknamed “@aga”, was born on 15 May 1960 in Fo-a as the son of Alekso and Stojka Kunarac. Before his surrender to the International Tribunal he lived in Unjaza Nikole 2-5 in Fo-a. For several years before the war in 1992 he had lived in the town of Tivat in Montenegro. He received his nickname, which translates as “saw”, from the fact that as a child he used to play with a saw in the compound of his father, who was a carpenter and woodworker by profession. During his time in the army, prior to the war, he had been trained in mine clearing and the use of explosive devices.

49. The accused Dragoljub Kunarac stipulated that he was the leader of a permanent reconnaissance group of about 15 men (including Montenegrin soldiers), the actual members of which changed, and that he would choose the soldiers for any particular field assignment himself. In addition, he admitted that this group was part of the local Fo-a Tactical Group or brigade. An order by the commander of the Fo-a Tactical Group of 7 July 1992<sup>166</sup> to break the siege of Goražde mentions an instruction to the “Independent @aga Detachment” to participate in the mopping-up of settled areas in the direction of the 5<sup>th</sup> Battalion’s attack.

50. At least four soldiers from Montenegro, among them Dragomir “Gaga” Vukovi}, Jagos Konti}, and DP 7, who were members of this group, lived in the house at Ulica Osmana \ikica no 16 in the Alad`a neighbourhood of Fo-a. The accused Dragoljub Kunarac had free access to it.<sup>167</sup> It is not clear from the evidence, however, that it served as the accused’s headquarters as charged in the Indictment. Dragoljub Kunarac also stipulated

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<sup>165</sup> Defence witness Radovan Radinovic (T 4861). See also Witness Velimir Djurovic, T 5067.

<sup>166</sup> Ex 2a, p 3.

<sup>167</sup> Prosecution Submission Regarding Admissions and Contested Matters, 1 Feb 2000, pars 5 and 6.

that rapes may have occurred at Ulica Osmana \ikica no 16, although he denied having heard about them before 3 August 1992.<sup>168</sup>

(b) Radomir Kova-

51. Radomir Kova- was born on 31 March 1961 in Fo-a as the son of Milenko Kova-. His nickname is "Klanfa". He was a permanent resident of Fo-a, living in Samoborska Street. During the armed conflict, Radomir Kova- was a member of a military unit, formerly know as the "Dragan Nikoli} unit", and led by DP 2.<sup>169</sup>

(c) Zoran Vukovi}

52. Zoran Vukovi}, son of Milojica, was born on 6 September 1955 in Brusna, a village in the municipality of Fo-a. He lived in Fo-a and worked as a waiter and driver before the armed conflict. During the armed conflict, according to witnesses FWS-190, FWS-191 and Osman Šubasi}, he was a member of the same military unit as the accused Radomir Kova-.<sup>170</sup>

2. Evidence related to the charges

(a) FWS-87

(i) Testimony of witness FWS-87

In April 1992, witness FWS-87 was about 15½ years old. She is the sister of witness D.B.<sup>171</sup>

53. On 3 July 1992, FWS-87's village, Trosanj, was attacked by Serb forces and the Muslim villagers were captured by the Serb soldiers. The men were taken to one side and the girls and women, including the witness, were taken from the woods near Trosanj down

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<sup>168</sup> Prosecution Submission Regarding Admissions and Contested Matters of 1 February 2000, Case No IT-96-23-PT at p 7, par 15.

<sup>169</sup> FWS-191, T 3229; FWS-190, T 3385; Witness DA, T 4970 and 5007-5008; Witness DH, T 5724-5725; Witness DO, T 5900-5904.

<sup>170</sup> Osman Šubasi}, T 4081; FWS-190, T 3378; FWS-191, T 3236.

<sup>171</sup> T 1663.

to Buk Bijela.<sup>172</sup> From Buk Bijela, the witness was transferred to the Fo-a High School, and from there to Partizan.<sup>173</sup>

54. FWS-87 could not remember with any precision the dates alleged in paragraph 5.2 of Indictment IT-96-23 (between 13 July and 1 August 1992) during her testimony in court. Nor could she remember the dates of her previous witness statements to the Prosecution, which were introduced by the Defence.<sup>174</sup> FWS-87 testified that she was transported from Buk Bijela to Fo-a High School, on 3 July 1992.<sup>175</sup>

55. She stayed at Fo-a High School for about two weeks from 3 July 1992, and thereafter at Partizan Sports Hall until 2 August 1992.<sup>176</sup> She recalled being taken to the Brena block by Dragan Zelenovi} on one occasion, but that apparently happened while she was still at Fo-a High School, not during her time in Partizan. More importantly, she did not remember the accused Zoran Vukovi} at all in connection with the events that happened during her stay at Partizan.<sup>177</sup>

56. This witness stated that at Fo-a High School girls were taken out very frequently, almost every other night, by soldiers. She recalled being taken out several times herself,<sup>178</sup> including one occasion on which Dragan Zelenovi} took her to the Brena building.<sup>179</sup> On other occasions that she could not identify with more precision, she was taken out with other girls.<sup>180</sup> She could not remember having been raped by the accused Zoran Vukovi} on any occasion when she was taken out.<sup>181</sup>

57. On one occasion, the exact date of which the witness was not able to remember, five soldiers entered the main classroom of the Fo-a High School; among them were Dragan Zelenovi}, Zoran Vukovi} and DP 1. The names of five women were called and those women were taken to another classroom, including FWS-50 who was immediately taken out of the room by one of the soldiers. The witness herself, FWS-75, FWS-88 and D.B were also called out, although D.B. was returned to the large room and replaced by FWS-

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<sup>172</sup> T 1669.

<sup>173</sup> T 1676 and T 1688.

<sup>174</sup> Ex D32 (Statement of 19-20 January 1996) and Ex D33 (Statement of 4-5 May 1998).

<sup>175</sup> T 1665 and 1676.

<sup>176</sup> T 1688 and T 1698.

<sup>177</sup> T 1687 and T 1710.

<sup>178</sup> T 1676-1678.

<sup>179</sup> T 1687.

<sup>180</sup> T 1687.

95. Dragan Zelenovi} ordered each of the girls to go to a certain place in the room, and assigned a soldier to each of them. FWS-87 recalled that she was assigned to Zoran Vukovi}. He ordered her to lie down, took off her clothes and raped her vaginally. The other women were being raped at the same time in that room; the witness could hear sounds of somebody beating someone coming from the corner where FWS-95 had been told to go, and that DP 1 was swearing at her. Afterwards the women were returned to the main classroom.<sup>182</sup>

58. The witness recalled seeing Zoran Vukovi} twice: once when she was raped by him at Fo-a High School and later when he came to Radomir Kova-'s apartment to have Radomir Kova-'s uniform cleaned.<sup>183</sup> FWS-87 did not remember any involvement of the accused Zoran Vukovi} in the rapes apart from the incident mentioned above. She stated that she did not know him from before the war, but that some other women from the group at Fo-a High School knew him and told her who he was.<sup>184</sup> This testimony seems to contradict a previous statement by her to the Prosecution on 19 and 20 January 1996,<sup>185</sup> when she had said that she knew him by sight, as well as his wife who used to work in a tobacco store and news kiosk. In another statement of 4 and 5 May 1998 she had stated that she did not know him personally before the war.<sup>186</sup> When asked in court about this discrepancy she said she did not know what she had meant to say, but that perhaps she had seen him prior to the war.<sup>187</sup>

59. FWS-87 recalled being taken out from Partizan, where she had been transported after her two-week stay in Fo-a High School, to a house situated in the street Ulica Osmana \kica by the accused Dragoljub Kunarac at least twice; once around 2 August 1992, which forms the basis of the charges under paragraph 5.4 of the Indictment, and once prior to that. She was unable to testify with any accuracy as to the latter date but her testimony falls within the period under paragraph 5.2. FWS-87 could not, however, remember what

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<sup>181</sup> T 1688 and T 1709.

<sup>182</sup> T 1678-1684.

<sup>183</sup> T 1684-1685.

<sup>184</sup> T 1681.

<sup>185</sup> Ex D32 at p 3.

<sup>186</sup> Ex D33 at p 3.

<sup>187</sup> T 1682. Several witnesses, including FWS-87, identified the accused in court. However, the Trial Chamber gives no positive probative weight to these "in court" identifications (see pars 561 and 562).

happened on this earlier occasion, with whom she was taken to the house, if she was assaulted and, if so, by whom.<sup>188</sup>

60. FWS-87 stated that she was taken by the accused Dragoljub Kunarac in his car to Ulica Osmana \ikica no 16 about a day or two before she was taken to Miljevina. With her were FWS-75, FWS-50 and D.B. When they arrived at Ulica Osmana \ikica no 16, FWS-190 was already there, as were several Montenegrin soldiers.<sup>189</sup> It appeared to her that the accused Kunarac had authority over the soldiers assembled there.<sup>190</sup>

61. On that night, FWS-87 said, she was raped by the accused Kunarac in a room next to the kitchen, by an older man whose name she did not remember, and by another with the name of Tolji} (nickname "Tolja"). Her testimony did not refer specifically to an event mentioned by FWS-75, namely, the rape of FWS-87 by "Bane" which allegedly took place in the car, nor did FWS-87 mention that she informed FWS-75 about this.<sup>191</sup>

62. The next morning, FWS-87 testified, she was taken from Ulica Osmana \ikica no 16 to Karaman's house in Miljevina by DP 3 and two other men, whose names she did not remember.<sup>192</sup>

63. FWS-87 testified that she stayed at Karaman's house for a period close to two months, and during that time was continuously raped by Serb soldiers, as were the other girls in the house. They were also forced to do household chores like washing, cooking, laundering and cleaning. She recalled that three soldiers lived in the house more or less permanently, namely Radovan Stankovi}, Nedzo Samardzi} and a certain Nikola. DP 3 appeared to be in charge of the house. At the beginning, D.B., FWS-75 and FWS-190 were brought there with her, but FWS-190 was taken away shortly thereafter. Later A.S., A.B., who was about 12 years old at the time, FWS-132 and another woman<sup>193</sup> joined them there.<sup>194</sup>

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<sup>188</sup> T 1694.

<sup>189</sup> T 1691-1698.

<sup>190</sup> T 1699.

<sup>191</sup> T 1699.

<sup>192</sup> T 1700.

<sup>193</sup> Her name was written by FWS-87 on Ex P194.

<sup>194</sup> T 1700-1706.

64. All that the witness could remember in court about the accused Kunarac is that she once saw him at Karaman's house, when he had a cast on his body. On that occasion he took her to a room on the upper floor of the house and raped her vaginally.<sup>195</sup>

65. However, in a statement dated 20 January 1996,<sup>196</sup> she did not mention the accused Dragoljub Kunarac at all with respect to any events in Karaman's house. In another previous statement to the Prosecution dated 5 May 1998,<sup>197</sup> she had explained that the rape occurred not long after she was brought to Karaman's house, and that Dragoljub Kunarac had a plaster on that occasion. In addition, in the same statement she declared that Dragoljub Kunarac was there "very often, less than five times" during her detention.<sup>198</sup>

66. FWS-87 stated that after about two months at Karaman's house she was taken away from there together with FWS-75, A.S. and A.B. by Dragan Zelenovi}, DP 6 and, she believed, DP 1, to a fish restaurant in the Ribarsko settlement, and then the day after to the apartment of Radomir Kova~ in the Lepa Brena building.<sup>199</sup> She recalled that this move took place sometime around the end of September or beginning of October.<sup>200</sup> In an earlier statement dated 20 January 1996,<sup>201</sup> she had placed the events around the middle of October 1992.

67. The witness did not know the accused Dragoljub Kunarac before the war. She first saw him at Partizan when he came to pick up girls.<sup>202</sup> He would come from time to time, every third night, with other soldiers. He would pick up a couple of girls and take them with him. The witness was personally taken by Kunarac on at least two occasions to Ulica Osmana \ikica no 16, and he raped her on both occasions. He also brought her to a house in front of the bus station, before she was ever taken to the house in Ulica Osmana \ikica no 16. She also recalled that "@aga" took her away from Partizan on other occasions but she did not recall whether she was raped by him on those other occasions.<sup>203</sup>

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<sup>195</sup> T 1703-1704 and T 1709.

<sup>196</sup> Ex D32.

<sup>197</sup> Ex D33, p 5.

<sup>198</sup> Ex D33 (Statement of 5 May 1998, at p 5).

<sup>199</sup> T 1707.

<sup>200</sup> T 1707.

<sup>201</sup> Ex D32, p 14.

<sup>202</sup> T 1690.

<sup>203</sup> T 1695.

68. FWS-87 testified that she stayed at the apartment of Radomir Kova~ in the Lepa Brena block for about four months, and had almost daily contact with him. She was raped by him vaginally and orally almost every night, and sometimes also by Jagos Kosti} who lived in the apartment together with the accused Kova~. FWS-75 was also raped by Radomir Kova~, and A.S. would generally be raped by Jagos Kosti}.<sup>204</sup> During her time in the apartment, the girls were frequently threatened with murder; they were locked up and had no contact whatsoever with the outside world.<sup>205</sup> While in the apartment, the girls were obliged to cook, clean and wash clothes.<sup>206</sup>

69. During the Prosecution's case in rebuttal, FWS-87 reaffirmed that apart from A.S. and herself there were two other girls kept in Radomir Kova~'s apartment. She added that these two girls only stayed for a short period, perhaps 7 days.<sup>207</sup>

70. FWS-87 recalled several incidents when she had to strip in front of Radomir Kova~. She stated that on one occasion in Radomir Kova~'s apartment, she, FWS-75, A.S. and A.B. had to undress and stand beside each other, while Radomir Kova~ and Jagos Kosti}, who were both armed at the time, looked at them.<sup>208</sup>

71. On another occasion, Radomir Kova~ forced her alone to undress, climb on a table and dance to music. While he was watching her, he pointed a gun at her. FWS-87 was frightened and ashamed; she had the feeling that Radomir Kova~ owned her.<sup>209</sup>

72. A third incident took place in another apartment, the location and date of which the witness could not remember. She recalled that again the women were made to undress and get on a table. Radomir Kova~ threatened to take them to the river and kill them. He actually walked them to the river, although the witness recalled that they were allowed to put on clothing; he eventually returned them to the apartment.<sup>210</sup>

73. In her evidence in rebuttal, regarding her alleged relationship with Radomir Kova~ FWS-87 stated that she went out to cafés with Kova~ because he wanted her to go, not because she herself enjoyed it. She said that she was never introduced to other people on

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<sup>204</sup> T 1712 and T 1832.

<sup>205</sup> T 1720 and T 1814-1815.

<sup>206</sup> T 1830-1831.

<sup>207</sup> T 6135.

<sup>208</sup> T 1713.

<sup>209</sup> T 1716.

these occasions and could not remember him introducing her as his girlfriend.<sup>211</sup> FWS-87 denied that she ever cried when she heard about Kova-'s injury and that she ever asked to go to see him at the hospital.<sup>212</sup> FWS-87 explicitly rejected all Defence allegations that she told others that she had been saved by Kova-, that she was in love with him and that she had sent him a love letter from Montenegro via a man from Foca nicknamed "Panta" to thank him.<sup>213</sup> FWS-87 underlined that she had no reason to be grateful to Kova- since he and Jagos Kostic, the other resident of Kova-'s apartment had raped her and Kova- had sold her.<sup>214</sup> FWS-87 stressed that there was not much difference between her situation in Karaman's house, in Kova-'s apartment or in Montenegro where she ended up after being sold.<sup>215</sup> To FWS-87, the only difference were the number of people who raped her at each location.<sup>216</sup>

74. As to her alleged freedom of movement, FWS-87 repeated during the rebuttal case that the girls were locked in Kova-'s apartment and that there was no way for them to get out.<sup>217</sup> She stated that she knows FWS-191 but that she never went to any café together with her.<sup>218</sup> She recalled that they received food from Kova-'s neighbour, witness DK, several times.<sup>219</sup> The food was passed to the girls on a rope through the windows of the apartment. FWS-87 denied having told DK that they had lost they keys to the apartment as they never had any keys in the first place.<sup>220</sup> FWS-87 further denied that Kova-'s mother or children came to bring food for the girls.<sup>221</sup> FWS-87 recalled that Kova- would leave some food behind when he would leave for periods of up to 7 or 14 days.<sup>222</sup> FWS-87 further recalled that they had no sanitary supplies and she never received hygiene towels from Kova-.<sup>223</sup>

75. Sometime in February 1993, she and A.S. were sold by Radomir Kova- to two Montenegrin soldiers for 500 Deutschmarks each. Those soldiers took them eventually to

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<sup>210</sup> T 1715-1716.

<sup>211</sup> T 6116.

<sup>212</sup> T 6128.

<sup>213</sup> T 6117; T 6132-6134.

<sup>214</sup> T 6137.

<sup>215</sup> T 6132.

<sup>216</sup> T 6135.

<sup>217</sup> T 6108.

<sup>218</sup> T 6114.

<sup>219</sup> T 6108, T 6125.

<sup>220</sup> T 6108.

<sup>221</sup> T 6109, T 6121-6123.

<sup>222</sup> T 6124-6125.

Niksic and Podgorica in Montenegro where they were also raped and had to work as waitresses in cafés; they managed to escape around 5 April 1993.<sup>224</sup> During the rebuttal case, FWS-87 added that she and A.S. overheard a conversation between Kova- and two Montegrins who had come to Kova-'s apartment, in which they were discussing the sale of the girls. FWS-87 rejected the Defence submission that Radomir Kova- might have paid these men for taking the girls to Montenegro.<sup>225</sup> In particular, FWS-87 stated that Radomir Kova- had not sold his TV before they left for Montenegro.<sup>226</sup>

(ii) Supporting evidence

76. Other witnesses testified about the relevant dates and the events recounted by FWS-87 in her testimony. FWS-105 testified that her village was attacked on 3 July 1992<sup>227</sup> and that FWS-87, along with FWS-75, FWS-88 and D.B., was taken with her to Buk Bijela, from where they were taken to Fo-a High School, where they stayed about 13-15 days before being transferred to Partizan.<sup>228</sup> This sequence of dates and events is confirmed by D.B., who said that she was with FWS-87 for 10-15 days at Fo-a High School before being taken with FWS-87 to Partizan.<sup>229</sup>

77. Several witnesses explained that Fo-a High School served as a facility where Muslim women were housed for a short period after the town of Fo-a had been taken over by the Serbs. Serb soldiers guarded the area outside the school and two guards patrolled the corridors. Among the women held there, according to their testimony before the Trial Chamber, were witnesses FWS-51, FWS-62, FWS-50, FWS-75, FWS-95, FWS-96, FWS-48, D.B. and FWS-105.<sup>230</sup>

78. The incident in Fo-a High School, in which soldiers called women out of the main classroom, took them to another classroom and raped them, was also referred to by FWS-75 and FWS-50 in their respective testimonies. FWS-50 recalled the incident to have taken

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<sup>223</sup> T 6113, T 6129.

<sup>224</sup> T 1721-1727.

<sup>225</sup> T 6130.

<sup>226</sup> T 6113. The importance of the alleged sale of the TV will be dealt with later.

<sup>227</sup> T 4208-4209.

<sup>228</sup> FWS-105, T 4216, T 4219, T 4224-4225 and T 4258-4259.

<sup>229</sup> T 3770, T 3774, T 3778, T 3782-3784, T 3790 and T 3854.

place on her second day at Fo-a High School; she further explicitly mentioned FWS-87 as one of the women who were called out and raped.<sup>231</sup> FWS-75 was not sure of the date when the incident took place but clearly recalled that FWS-87 was among the victims who were raped. FWS-75 testified, however, that FWS-87 was raped by a man unknown to FWS-75. FWS-75 had seen Zoran Vukovic, the man that FWS-87 claimed had raped her in the Fo-a High School, at Buk Bijela when he led her uncle away.<sup>232</sup> FWS-96 recalled that some women were taken to another room during her very first night at Fo-a High School. She testified that FWS-88, FWS-75, FWS-87, FWS-74 and FWS-95 were amongst these women, and that they were in a terrible state when they were returned from the adjacent room. FWS-96 did not mention Zoran Vukovic in this context.

79. FWS-96 testified that FWS-87 was taken out of Fo-a High School almost every day, mostly by DP 1.

80. FWS-75 and D.B. both stated that they were taken by Dragoljub Kunarac and "Gaga" Vukovic to Ulica Osmana \ikica no. 16 together with FWS-87. FWS-50 also recounted this incident but did not mention that it was the accused Kunarac who took the women there. Further, FWS-75 did not mention Kunarac as having raped FWS-87. However, she recalled having seen FWS-87 being raped by a certain "Bane". D.B. recalled seeing Kunarac in the house only before the explosion of the Aladža mosque, when he came to the kitchen.

81. Several witnesses further testified that women and girls who were held at Partizan were assaulted or taken out by Serb soldiers and raped on a regular basis.<sup>233</sup> FWS-75 expressly recalled that she and FWS-87 were very often taken out by soldiers. FWS-62 stated that Serb soldiers would frequently come and take women away.<sup>234</sup> On one particular occasion she saw three soldiers storming into Partizan, one of whom proceeded to rape a woman who was sleeping next to her 10-year-old child.<sup>235</sup> FWS-51 declared that "there

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<sup>230</sup> FWS-62, T 972-974; FWS-51, T 1132-1133; FWS-50, T 1245; FWS-75, T 1396-1397 and 1400; FWS-87, T 1676; FWS-95, T 2204-2205 and 2220; FWS-96 T 2522-2523; FWS-48, T 2648-2649; D.B., T 3784-3785; FWS 105, T 4219-4220.

<sup>231</sup> See below par 237.

<sup>232</sup> T 1388.

<sup>233</sup> See the testimony of FWS-75 (pars 165-166, 168-170); FWS-50 (pars 239 and 241-244); FWS-95 (par 311).

<sup>234</sup> T 995.

<sup>235</sup> T 993-994.

was never any peace for us" and that women were being led away all the time, some of whom never returned.<sup>236</sup> FWS-50 testified that soldiers would come to Partizan almost every day and pick out girls. They were kept for periods ranging from a few hours to several days. She herself was taken out very often, although not necessarily every day, but then sometimes three days in a row.<sup>237</sup> Similar statements were made by FWS-95, FWS-96, D.B. and FWS-105 relating to themselves and to others detained in Partizan.<sup>238</sup> FWS-50, FWS-75, D.B., FWS-95, FWS-48 and FWS-105 further testified that they were taken to the house in Ulica Osmana \ikica no 16 where they were raped.<sup>239</sup>

82. The testimony of FWS-75 further supports the statement of FWS-87 that they were taken together by Dragoljub Kunarac in a car to Miljevina. FWS-75 recalled having seen Kunarac in Karaman's house taking a woman with him to another room but could not remember whether this woman was FWS-87 or D.B.<sup>240</sup> D.B. did not see Kunarac take a woman into a room, but confirmed that she saw him with FWS-87 in the living room.<sup>241</sup>

83. Whereas the testimonies of FWS-87 and FWS-75 differ slightly in respect of the length of their stay in Karaman's house and the approximate dates they were taken to Radomir Kova-'s apartment, both witnesses testified that they were brought to Kova-'s apartment in the Lepa Brena building together with A.S. and A.B. FWS-191 recalled that she saw three girls, including FWS-87, in Kova-'s apartment when she went there, but was not sure about a fourth one.<sup>242</sup>

84. FWS-75 further testified that all four girls were sexually assaulted and raped while in Radomir Kova-'s apartment.<sup>243</sup> A.S. confirmed that FWS-87 had to sleep in a room with Kova~ and that FWS-87 not only had "obviously" been raped, but that she, FWS-87, had confirmed this fact to A.S. later. In addition, A.S. testified that she could hear when Kova~ raped FWS-87, since she herself was sleeping in the next room.<sup>244</sup>

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<sup>236</sup> T 1144.

<sup>237</sup> T 1258 and T 1261.

<sup>238</sup> FWS-95, T 2217, T 2222 and T 2224; FWS-96, T 2530-2531; D.B., T 3791, T 3820-3821 and T 3866; FWS-105, T 4225-4227.

<sup>239</sup> FWS-50, T 1273; FWS-75, T 1411-1419 and T 1423; D.B., T 3795-3809; FWS-95, T 2236 and T 2240; FWS-48, T 2700-2701; FWS-105, T 4229.

<sup>240</sup> See par 175.

<sup>241</sup> See par 226.

<sup>242</sup> See par 271.

<sup>243</sup> See par 178.

<sup>244</sup> See par 210.

85. FWS-191 supports the testimony of FWS-87 as to the girls being locked up in the apartment. FWS-191 clearly denied that she ever went to café Leonardo with FWS-87. She further underlined that it is inconceivable that FWS-87 or for that matter any Muslim girl could have moved around Foca freely and that she herself only felt secure enough to walk about alone at the end of 1993.<sup>245</sup>

86. Like FWS-87, witness A.S. recalled one incident, which she could not tie to an exact date, when she, together with FWS-87 and A.B. was ordered to strip by Radomir Kovač and forced to dance naked. A.S. could not recall, however, whether FWS-75 was amongst this group and whether there were other soldiers besides Kovač and Jago Kostić.<sup>246</sup>

87. The testimony of FWS-87 concerning her sale to other soldiers for 500 Deutschmarks is supported by A.S. who testified that she and FWS-87 were sold by Radomir Kovač to two Montenegrin soldiers and were, eventually, taken to Nikšić and then to Podgorica in Montenegro.<sup>247</sup>

(iii) Defence evidence of the accused Dragoljub Kunarac

The Defence for the accused Kunarac relied upon a defence of alibi for the following periods:<sup>248</sup>

- (a) from 7 July 1992 until 21 July 1992;
- (b) from 23 July 1992 until 26 July 1992;
- (c) for 2 August 1992; and
- (d) from 3 August 1992 from 5 pm until 8 August 1992.

88. The allegations against the accused Kunarac covering this period of time relate to several witnesses but the alibi evidence will be discussed together. The fourth period will be presented below in the context of the evidence given by FWS-191.

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<sup>245</sup> See par 271.

<sup>246</sup> See par 211.

<sup>247</sup> See par 213.

<sup>248</sup> Defence Final Trial Brief, p 88.

a. From 7 July 1992 until 21 July 1992

89. According to the testimony of the accused, he spent the period from 7 July 1992 until 21 July 1992 in and around Cerova Ravan, an area which the Serb side was trying to control. Prosecution Exhibit 2, an Order from Colonel Marko Kovač relating to the liberation of Goražde mentions Kunarac's unit as "Žaga's Independent Detachment" and refers to its involvement in the above-mentioned operation. Prosecution witness Osman Šubasic also said that Dragoljub Kunarac and his unit were involved in military operations in the Cerova Ravan area at the time.<sup>249</sup>

90. During his testimony, Dragoljub Kunarac said that on 7 July 1992, he and his group were ordered to go to Cvilin;<sup>250</sup> he said that he spent that day and the night nearby, in Sorlaci.<sup>251</sup> Apart from his reconnaissance duties, Kunarac said that he also undertook to re-supply the troops with food. As the road had been cut off near Odrina by a landslide due to the rain, Kunarac stated that he could only go that far, and that from there he would load the food in his car and go back again. The truck which was supplying the food from the other side of the slide would return straight away, in the opposite direction.

91. Witness Blagojevic, also a member of the 5<sup>th</sup> Battalion, mentioned that on 7 July 1992, an operation was launched by Serb forces against Cerova Raven which was held by the Muslim forces.<sup>252</sup> On the morning of 7 July, he saw Dragoljub Kunarac in this area.<sup>253</sup> He did not know him prior to this encounter but had already heard about his reputation as a fighter. He also knew that his nickname was "Žaga". Someone from Blagojevic's unit told him who he was. On that occasion, the witness said that Kunarac was with 5 to 6 other men whom the witness did not know.<sup>254</sup> He heard that they were volunteers from Montenegro and was able to hear the names or nicknames of some of them, including "Miga", "Gaga" and Goran Ilindzic.<sup>255</sup> They were dressed in various types of uniforms or civilian clothing, without noticeable insignia. The witness added that they were carrying automatic weapons and bombs and that Kunarac also had a radio transmitter.

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<sup>249</sup> Witness Osman Šubasic, T 4072, 4086-4089 and 4120.

<sup>250</sup> T 4421.

<sup>251</sup> T 4426.

<sup>252</sup> T 5089.

<sup>253</sup> T 5090.

<sup>254</sup> T 5091.

<sup>255</sup> T 5091.

92. Witness Blagojevic recalled that on 7 July 1992, rain poured heavily.<sup>256</sup> At that point they were in Gradina, after which they went to Sorlaci, approximately 3 to 4 kilometres away, to dry their clothes and spend the night there.<sup>257</sup> They all went on foot apart from Dragoljub Kunarac and his men who had a vehicle.<sup>258</sup> However, they too eventually had to proceed on foot due to a problem on the road.<sup>259</sup> On the morning of 8 July 1992, Dragoljub Kunarac stated that he was in Gabelic Kosa.<sup>260</sup> He said that from that day onwards, food was transported by car to the village of Gabelic and from there it was carried to every individual soldier. Kunarac said that he was the one who would generally drive the car to get the food. The first time he did so was on 9 or 10 July 1992.<sup>261</sup> He had also been ordered to check the condition of the section of the road from Gabelic to the stream, near a house known as the house of "Branko" towards Gabelic Kosa; the road was impassable.<sup>262</sup> He then received the order to drive his car along that section as he had done the day before with food and ammunition.

93. Witness Blagojevic said that on 8 July 1992, they went back to the Gabelic Kosa and the Gradina and that they stayed there.<sup>263</sup> Due to the disruption of the road, food and other supplies were brought to Odrina and from there would be taken over and distributed by Dragoljub Kunarac.<sup>264</sup> Dragoljub Kunarac would bring food to Gabelic Kosa.<sup>265</sup> He would do that just before nightfall or early morning and would generally be shot at when doing so.<sup>266</sup>

94. The accused Dragoljub Kunarac said that, because of the heavy rain, the road needed first to be cleared in order for a self-propelled howitzer to reach them and get into action. Clearing and enlargement of the road took place on two sections of the road: first, the bulldozer arrived at Gabelic Kosa between 18 and 19 July 1992 but did not get into action before 21 July 1992.<sup>267</sup> The section of the road up to Gabelic Kosa was cleared on 18 July. Prior to that, the bulldozer had been enlarging a section of the road between Cvilin

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<sup>256</sup> T 5093.  
<sup>257</sup> T 5093.  
<sup>258</sup> T 5094.  
<sup>259</sup> T 5094.  
<sup>260</sup> T 4433.  
<sup>261</sup> T 4433.  
<sup>262</sup> T 4434.  
<sup>263</sup> T 5094.  
<sup>264</sup> T 5095.  
<sup>265</sup> T 5095.  
<sup>266</sup> T 5095-5096.

and the stream.<sup>268</sup> The bulldozer then went on to clear the road towards Cerova Ravan which went round about via Josanica.<sup>269</sup> According to Kunarac, they needed an extra 2 kilometres to connect the two roads together and allow the howitzer to reach Cerova Ravan. The vehicle started coming towards them on 14 or 15 July, it first went to Gabelic Kosa (on 18 July) and then was moved to Cerova Ravan (21 July). On 21 July 1992, the howitzer eventually entered into action and shelled the enemy.<sup>270</sup> Kunarac and 10 volunteers were given an assignment to launch an infantry attack on the bunkers that had been destroyed by the howitzer. Kunarac said that he himself stormed the first of these bunkers.<sup>271</sup>

95. Asked about witness Šubasic's comment that on 19 July 1992, seeing the howitzer arriving, the Muslim fighters left the area, Dragoljub Kunarac conceded that it might have been true as Muslim infantry's resistance was indeed weak. Kunarac also acknowledged that they did not find a single dead enemy.<sup>272</sup> However, he questioned witness Šubasic's testimony regarding the timing of the bulldozer's arrival. Kunarac said that the bulldozer was visible to the Muslim forces only from 15 July until the end of the attack, that is, 21 July.<sup>273</sup>

96. Dragoljub Kunarac claimed that he spent the night of 7 July 1992 in Sorlaci and all the other nights until 21 July at Gabelic Kosa just like all the other men.<sup>274</sup> He asserted that during that period, they tried to attack the enemy's position but that they could do nothing without the howitzer. The attack had started on 9 July but it only ended on 21 July.<sup>275</sup>

97. During the period from 6 to 21 July, Dragoljub Kunarac said that he passed only once through Fo-a.<sup>276</sup> He claimed that on 21 July 1992 he went back to Fo-a for the first time since 23 June.<sup>277</sup> He testified that on that day he brought a soldier named Miletic to the hospital after this man had been injured during the fighting. In order to support this

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<sup>267</sup> T 4436.

<sup>268</sup> T 4436.

<sup>269</sup> T 4437.

<sup>270</sup> See also Witness Vaso Blagojevic, T 5098-5099.

<sup>271</sup> T 4440-4441.

<sup>272</sup> T 4441.

<sup>273</sup> T 4442.

<sup>274</sup> T 4445.

<sup>275</sup> T 4433.

<sup>276</sup> T 4445-4446.

claim, the Defence produced a letter of discharge from the Hospital in Fo-a concerning a soldier named Goran Mirjadic who was hospitalised on 21 July.<sup>278</sup> Witness Blagojevic testified that the man in question was called Goran Ilincic.<sup>279</sup> Kunarac said that after taking the man to the hospital, he went home to his mother's where he spent the night of 21 to 22 July.<sup>280</sup>

98. Witness Blagojevic said that on 21 July, the howitzer went into action and Cerova Ravan was taken.<sup>281</sup> He explained that, before the vehicle could reach them, the road had to be enlarged for the vehicle to pass. He added that the fact that the bulldozer was exposed to enemy fire slowed their action and it took 2 to 3 days to clear it, starting from 17 July.<sup>282</sup> The witness also stated that on that day, Goran Ilincic, one of Kunarac's men was injured<sup>283</sup> and that he was taken away personally by Kunarac in his car to Fo-a.<sup>284</sup>

99. Witness Blagojevic added that he saw Dragoljub Kunarac during the whole period between 7 July and 21 July because Kunarac was attached to his company.<sup>285</sup> He said that sometimes Kunarac would go towards the Muslim positions to reconnoitre, but added that Kunarac could not have gone to Fo-a without the witness noticing.<sup>286</sup> He said that Kunarac was a source of confidence for everyone and that soldiers would have felt insecure if he had left. During that whole period, he said that they would generally spend the nights in tents. Kunarac slept on the terrain with them for the duration of the operation.<sup>287</sup> This witness added that Dragoljub Kunarac's tent was just next to his.<sup>288</sup> He conceded, however, that he could not see what happened in the tent nor did he follow Kunarac while the latter was reconnoitring.<sup>289</sup> He argued nevertheless that there would be guards positioned around the tents, in shifts of 2 to 3 soldiers.<sup>290</sup> He said that before midnight no one would sleep and

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<sup>277</sup> T 4445.

<sup>278</sup> Ex D78.

<sup>279</sup> T 5106.

<sup>280</sup> T 4448.

<sup>281</sup> T 5098-5099.

<sup>282</sup> T 5097.

<sup>283</sup> T 5101.

<sup>284</sup> T 5106.

<sup>285</sup> T 5096.

<sup>286</sup> T 5096-5097.

<sup>287</sup> T 5106; T 5097.

<sup>288</sup> T 5114.

<sup>289</sup> T 5114-5115.

<sup>290</sup> T 5118.

afterwards guards were organised until 4 or 5 am in the morning.<sup>291</sup> After the completion of the operation, on 21 July, the witness rarely saw Kunarac.<sup>292</sup>

100. On 22 July 1992, Dragoljub Kunarac claimed that he went back to the hospital and from there to his headquarters where he was given oral orders by the battalion commander to go to the Dragocava position near Slatine<sup>293</sup> and that he should leave on 23 July. He spent the night from 22 to 23 July at his parents' house again which was located near the church next to the orthodox cemetery in Fo-a.<sup>294</sup>

b. From 23 July 1992 until 26 July 1992

101. The accused Dragoljub Kunarac said that on 23 July a siren sounded calling soldiers to report. He therefore went to the secondary high school where the 5<sup>th</sup> battalion was assembling.<sup>295</sup> On his way, Kunarac said that he came across soldiers and spontaneously volunteered to join them on a reconnaissance mission in the direction of Previla.<sup>296</sup> Together with these men, Kunarac drove to the 2<sup>nd</sup> battalion command in Previla where he arrived at around 8.30 am. That day, Kunarac said that he was operating within the areas of responsibility of the 2<sup>nd</sup> and 3<sup>rd</sup> battalions. Since he was not able to find the commander of the 2<sup>nd</sup> battalion, he decided to act on his own authority but he insisted that he acted in accordance with the orders of the brigade commander.<sup>297</sup>

102. Witness Gordan Mastilo said that he first met Dragan "Žaga" Kunarac on 23 April 1992, between 9 am and 9.30 am in Milotina when he introduced himself to Dragoljub Kunarac.<sup>298</sup> The witness agreed with Defence counsel when it was put to him that the events recounted took place on 23 July rather than on 23 April.<sup>299</sup> He said that Kunarac was with 4 or 5 men who were wearing different types of uniforms and carrying arms. He said that Kunarac could only have come from Previla/ Fo-a.<sup>300</sup> Previla, where the command of the Tactical group Fo-a was located, was just 40 minutes away on foot from the witness's

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<sup>291</sup> T 5118.

<sup>292</sup> T 5106.

<sup>293</sup> T 4449.

<sup>294</sup> T 4450.

<sup>295</sup> T 4451.

<sup>296</sup> T 4452.

<sup>297</sup> T 4454-4455.

<sup>298</sup> T 5126.

<sup>299</sup> T 5129.

<sup>300</sup> T 5128.

village on a macadam road.<sup>301</sup> This witness said that on that day, 23 July, Serb forces, including the accused Kunarac, recovered about 5 to 6 bodies of the Serb villagers that had been killed.<sup>302</sup> He said that Dragoljub Kunarac spent the night of 23 July in Podstijena,<sup>303</sup> whereas the witness himself slept in the nearby village of Kolakovici because it was not possible for all of them to sleep in Podstijena. The witness conceded that between midnight and 6 am he did not see Dragoljub Kunarac.<sup>304</sup>

103. Witness DJ also met Dragoljub Kunarac on 23 July 1992 in Podstijena, in the morning between 9 am and 10 am,<sup>305</sup> when Kunarac introduced himself. On that occasion, the accused Kunarac was with 5 or 6 other men who allegedly came to help the villagers find their dead.<sup>306</sup> They wore different kinds of uniforms; Kunarac had a camouflage uniform and a brown leather jacket. All were armed. On that day, they found about 15 to 16 dead people. Kunarac was with the witness all day, at all times.<sup>307</sup> The witness spent the night in the village of Podstijena.<sup>308</sup> Kunarac and some of his men were there, too. Witness DJ said that he could not sleep that night and claimed that Kunarac did not leave the house they were in that night.<sup>309</sup>

104. During the period from 24 to 26 July 1992, Dragoljub Kunarac claimed that he stayed in the area of Jabuka, about 20 km from Fo-a, with existing connecting roads.<sup>310</sup> There, he and his men spent some time looking for dead villagers. Kunarac said that he spent the night of 23 July in Kosanj.<sup>311</sup> The other two nights he was out on the terrain searching for bodies and sleeping wherever they found themselves at night,<sup>312</sup> somewhere in the Jabuka region.

105. Dragoljub Kunarac said that he did not go to the Hotel Zelengora during that period. He conceded that there were a lot of refugees in this hotel and that it could have been a

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<sup>301</sup> T 5128.

<sup>302</sup> T 5128.

<sup>303</sup> T 5129.

<sup>304</sup> T 5152-5153.

<sup>305</sup> T 5522.

<sup>306</sup> T 5522-5523.

<sup>307</sup> T 5525.

<sup>308</sup> T 5526.

<sup>309</sup> T 5528-5529.

<sup>310</sup> T 4458-4459.

<sup>311</sup> T 4461.

<sup>312</sup> T 4462.

good place to gather information.<sup>313</sup> Nevertheless, Kunarac was adamant in his testimony that he only went there on 3 August with the journalist, Gordana Draskovic.<sup>314</sup>

106. Witness Mastilo said that on 24 July 1992, they moved from Kolakivici up to Podgrade.<sup>315</sup> He said that they found about 15 bodies that day and buried them. They spent the night wherever they found themselves at nightfall; that night in particular they were in Podstijena, near Rosulje field.<sup>316</sup>

107. Witness DJ testified that on 24 July they set out early to continue looking for the dead in the area of Kolakovici, Kozalj, Podstijena and Rosulje.<sup>317</sup> They found about 4 to 5 bodies. Dragoljub Kunarac was present the whole time, checking bodies for booby-traps. According to this witness, Kunarac would be called if a body was found and he would be the first to check it. They finished working late in the evening and spent the night in Rosulje.<sup>318</sup> Kunarac was there with the witness that night.<sup>319</sup>

108. The next day, on 25 July, witness Mastilo claimed that they continued their search for bodies in the direction of Stojkovici and Jamici. Dragoljub Kunarac was still with them.<sup>320</sup> During those four days, they would start their search very early in the morning, about 5 am, and that they would continue all day, apart from a lunch break; they would eat tinned food brought by Kunarac. This witness also confirmed that Kunarac would be the first to turn over the bodies to check them for booby-traps. On the night of 25 July, they slept in woods near the villages of Stojkovici and Tahuljici.<sup>321</sup>

109. Witness DJ confirmed that on the morning of 25 July, the villagers, Dragoljub Kunarac and his men headed towards Jamici and Previla.<sup>322</sup> They found about 10 corpses that day and finished their work at nightfall. He said that they spent the night in that same

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<sup>313</sup> T 4683-4684.

<sup>314</sup> T 4684.

<sup>315</sup> T 5140-5142.

<sup>316</sup> T 5142-5143.

<sup>317</sup> T 5526-5527.

<sup>318</sup> T 5528.

<sup>319</sup> T 5528.

<sup>320</sup> T 5143.

<sup>321</sup> T 5144.

<sup>322</sup> T 5529.

area, in the hamlet of Podjgrade.<sup>323</sup> Again, the witness said that Kunarac was there with him.<sup>324</sup>

110. Finally, Gordan Mastilo said that on 26 July, they headed towards Jamici and at sunset went back towards Podrinje.<sup>325</sup> Witness DJ said that on that day they went to Jamici and its surroundings<sup>326</sup> where they found 7 to 8 bodies, including the body of the witness' brother. Kunarac was with him that day, too.<sup>327</sup> After burying his brother at about 10 pm, they all went back to Previla, and with Kunarac continuing back to Fo-a around midnight.

111. Witness Mastilo concluded that between 23 and 26 July<sup>328</sup> they searched an area of approximately 15 kilometres in length located within the zone of responsibility of the 2<sup>nd</sup> Battalion,<sup>329</sup> it was a hilly and difficult area, with streams and woods.<sup>330</sup> The men were divided into several small groups. The witness said that he was in Kunarac's group but he conceded that Kunarac would have to leave to check the bodies found by other groups for booby-traps; the other groups would mark the place and then Kunarac and his men would inspect them. The witness also confirmed that during this period they would eat tinned food that Kunarac had brought. However, he reiterated his claim that during those four days, apart from the first night (23 July), Kunarac never left his side.<sup>331</sup> He also stated that during this time, not once did he see Kunarac report to or receive any orders from the command.<sup>332</sup>

112. Witness DJ added that Dragoljub Kunarac could not have left the area at night between 23 to 26 July without him noticing it.<sup>333</sup> With respect to the provision of food, the witness stated that during these four days they would either eat tinned food or receive food from villagers.<sup>334</sup> The witness conceded that the group was divided, but he insisted that these groups were next to one another,<sup>335</sup> and that when Kunarac would go to examine a body, the witness would accompany him to help bury the dead. In relation to the sleeping

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<sup>323</sup> T 5531.

<sup>324</sup> T 5531-5533.

<sup>325</sup> T 5144-5145.

<sup>326</sup> T 5531.

<sup>327</sup> T 5531-5532.

<sup>328</sup> T 5141-5142.

<sup>329</sup> T 5156.

<sup>330</sup> T 5154.

<sup>331</sup> T 5155-5156.

<sup>332</sup> T 5149.

<sup>333</sup> T 5532.

<sup>334</sup> T 5531.

<sup>335</sup> T 5541-5543.

arrangements, the witness stated that they would generally spend the night under the open sky as they did not have tents.<sup>336</sup>

113. Dragoljub Kunarac claimed that on 27 July 1992, he went back directly to the brigade headquarters in Foča where he reported to the commander of the brigade.<sup>337</sup> He then went to Dragočevo where he remained until 29 July,<sup>338</sup> spending the nights of 27 and 28 July in the woods near the village of Brusana.<sup>339</sup> In the morning hours of 29 July there was fighting in Preljuca (above Cerova Ravan) and he moved to Godina and was subsequently transported to Velečevo.<sup>340</sup> He remained in Preljuca until 31 July.<sup>341</sup>

114. Preljuca is at a distance of about 12 to 13 kilometres from Foča.<sup>342</sup> When he arrived at Cerova Ravan between 10 am and 11 am, he was told that an attack had taken place at the break of dawn.<sup>343</sup> He continued on and reached Preljuca at noon, when he found that the enemy had in fact taken the village.<sup>344</sup> He received a telegraph ordering him to stay there and was told that a counter-attack would be launched soon. Kunarac and his men started firing at the enemy just after noon on 29 July as they were incensed by Muslim soldiers burning the corpses of dead Serb soldiers.<sup>345</sup> The rest of the forces arrived around 1 pm and the fighting lasted until between 4 pm and 5 pm when the location was recaptured.<sup>346</sup> Kunarac stayed at Preljuca that night and until 31 July.<sup>347</sup> He spent 30 July looking for 2 missing men and the night of 30 July in Preljuca itself.<sup>348</sup>

115. Asked to comment about witness Subasic's assertion that the order from Colonel Marko Kovačević of 7 July 1992<sup>349</sup> was found by Muslim forces on 29 July in Preljuca,

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<sup>336</sup> T 5543.

<sup>337</sup> T 4464.

<sup>338</sup> T 4465.

<sup>339</sup> T 4465.

<sup>340</sup> T 4466.

<sup>341</sup> T 4703.

<sup>342</sup> T 4468.

<sup>343</sup> T 4469-4470.

<sup>344</sup> T 4470.

<sup>345</sup> T 4472.

<sup>346</sup> T 4473.

<sup>347</sup> T 4476 and 4703.

<sup>348</sup> T 4476.

<sup>349</sup> Ex P2.

Dragoljub Kunarac agreed that it was possible that all documentation of the Serb command at Preljuca was removed before they recaptured the area.<sup>350</sup>

116. Dragoljub Kunarac said that he was called to the battalion command on 31 July 1992 and was told that the Rogoj pass had fallen and that he should go to Kalinovik.<sup>351</sup> He therefore set out for Kalinovik with 6 or 7 men and arrived there between 2 pm and 3 pm. He was told that the enemy forces were manning a piece of artillery that had been taken from the Serbs.<sup>352</sup>

117. After reaching Kalinovik on 31 July, he immediately left for Dobro Polje to carry out reconnaissance towards the Rogoj pass.<sup>353</sup> From Dobro Polje, he returned to Kalinovik to report and asked to be assisted by locals who would know the terrain. Kunarac and these locals arrived at Rogoj just after 8 pm, just before dark.<sup>354</sup> Kunarac said that he saw the 6 Howitzers still aimed at the Muslim positions. He was told to carry on with his reconnaissance during the night. In the early hours of 1 August, he reported to his command. He was told that preparations for the counter-attack were under way.<sup>355</sup> On the afternoon of 1 August, between 5 pm and 6 pm, he was told that Serb forces had arrived in Dobro Polje and that he should go back and brief them about the situation in Rogoj. Kunarac spent the night of 1 August in Rogoj<sup>356</sup> and was still there at daybreak on 2 August.

c. 2 August 1992

118. Dragoljub Kunarac said that Serb forces were offered an exchange of prisoners on the morning of 2 August 1992 which was to take place by noon.<sup>357</sup> He was told that if the exchange had not happened by then, the Serb forces were under orders to carry out a counter attack. Fighting broke out around noon.<sup>358</sup> Kunarac participated in the attack which continued until nightfall around the plateau of Rogoj.<sup>359</sup> Serb forces then pursued the

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<sup>350</sup> T 4475-4476.

<sup>351</sup> T 4477-4478.

<sup>352</sup> T 4485.

<sup>353</sup> T 4483-4484.

<sup>354</sup> T 4485.

<sup>355</sup> T 4489.

<sup>356</sup> T 4489-4490.

<sup>357</sup> T 4490-4491.

<sup>358</sup> T 4491.

<sup>359</sup> T 4492-4493.

enemy and took positions below Rogoj Pass to prepare for a possible counter-attack. These activities continued until 4 pm.<sup>360</sup>

119. After Rogoj was recaptured, Dragoljub Kunarac sent a message to inform his command. He was told to secure a position further towards Trnovo. He set out on the anti-aircraft gun, captured from the Muslims, after 8 pm and arrived in Dobro Polje at about 8.30 pm. From Dobro Polje the column continued towards Velecevo, about 2 kilometres away from Fo-a, eventually arriving at approximately 11 pm. Kunarac said that they were not able to use the asphalt road from Dobro Polje to Miljevina because some sections of the road were mined and others were blocked by rocks.<sup>361</sup> In Velecevo, Kunarac immediately went to the brigade headquarters where he was told that he could take a rest and report the next day at 7 am.<sup>362</sup>

120. The command at Velecevo lent him a vehicle to go to Fo-a. On his way to his parents' house, Dragoljub Kunarac heard a powerful explosion when he passed near Livade between 11.30 and 11.45 pm.<sup>363</sup> As he reached the Alad' a settlement, he saw people rushing out of buildings.<sup>364</sup> He continued on his way and passed the Cehotina bridge where he saw glass on the road, then passed by the SUP and asked a police officer what had happened. He went around town again towards Livade where he saw clouds of smoke coming from the Alad' a mosque.<sup>365</sup> He got out of his car and realised that the mosque had been blown up. He therefore decided to go back to the headquarters in Velecevo to return the car in case they needed it to go to Fo-a to investigate the explosion.<sup>366</sup>

121. Back at headquarters, he briefed the commander about what had happened; Dragoljub Kunarac said that he also rang the duty officer at the police station. He was told that an investigation would be carried out.<sup>367</sup> While the investigation was underway, Kunarac stayed at headquarters where he waited for about 45 minutes before the security officer returned from the scene of the explosion. At that point, they had a conversation until about 3 am about what had happened in Rogoj. Kunarac then went to sleep at the

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<sup>360</sup> T 4493.

<sup>361</sup> T 4502.

<sup>362</sup> T 4503.

<sup>363</sup> T 4503.

<sup>364</sup> T 4504.

<sup>365</sup> T 4505.

<sup>366</sup> T 4505.

<sup>367</sup> T 4512.

headquarters' compound.<sup>368</sup> At about 7.30 am the next morning, he had breakfast and then left.

122. Witness DD said that he saw Dragoljub Kunarac on 2 August after the battle of Rogoj in the Velecevo compound as he was in charge of the reception desk.<sup>369</sup> He said that Kunarac arrived between 9.30 pm and 10 pm in the evening.<sup>370</sup> At the time, the witness was on guard duty and he saw Kunarac on an anti-aircraft vehicle.<sup>371</sup> All the soldiers entered the compound for celebration. The witness did not go in with them, as he could not leave his post.

123. Later that evening, between 11 pm and 11.30 pm, the witness saw Dragoljub Kunarac again, leaving in the direction of Fo-a - possibly with another soldier - in a Lada car.<sup>372</sup> This witness testified that there were several vehicles available at the command.<sup>373</sup> He stated that the road taken by Kunarac was the only way out of the compound. A few minutes later, the witness said that he heard a powerful explosion and soon after, Kunarac came back to tell them what had happened.<sup>374</sup>

124. This witness testified that he saw Dragoljub Kunarac again at about midnight when the witness went to sleep in the dormitories.<sup>375</sup> He insisted that Kunarac stayed at Vele-evo that night, but he conceded that during the time he was guarding the door he did not see him, he only saw him later at about 11 pm.<sup>376</sup>

125. In relation to 2 August 1992, witness DE said that he did not see Dragoljub Kunarac fighting in the Rogoj pass that day but that he only saw him after the fighting, during the celebration or, to be more precise, he saw him coming back from Rogoj.<sup>377</sup> The celebration at Dobro Polje lasted about an hour.<sup>378</sup> He said that it may have been 6 pm and 7 pm when they arrived at Dobro Polje, at the crossroads between the roads towards Fo-a and

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<sup>368</sup> T 4513.

<sup>369</sup> T 5193.

<sup>370</sup> T 5179.

<sup>371</sup> T 5180.

<sup>372</sup> T 5181.

<sup>373</sup> T 5209.

<sup>374</sup> T 5182.

<sup>375</sup> T 5182.

<sup>376</sup> T 5200-5201.

<sup>377</sup> T 5227.

<sup>378</sup> T 5238.

Kalinovik where the witness lived.<sup>379</sup> He saw Kunarac between 7 pm and 8 pm.<sup>380</sup> The witness said that they then left and took the forest road towards Kalinovik via Miljevina as the other road was unsafe because of skirmishes.<sup>381</sup>

126. Witness Radosav Djurovic testified that he went towards the Rogoj Pass to take food and cigarettes to the soldiers on 2 August. The witness remembers the date precisely as it is his wedding anniversary and a Muslim and Serb holiday but also because he went to deliver food towards the Rogoj Pass.<sup>382</sup> At about 4 pm, he arrived in Donje Polje. At around 5 pm, the first Serb soldiers arrived from Rogoj saying that they had recaptured the pass.<sup>383</sup> Sometime around 6 pm, he recalled that Kunarac arrived on a truck with an anti-aircraft gun mounted on it.<sup>384</sup> There were another 5 or 6 men with him on the truck. Between 7 pm and 7.30 pm, the column set out for Fo-a via Vele-evo, with Kunarac at the front of the column.<sup>385</sup> The witness stated that they arrived at Vele-evo between 9.30 pm and 10 pm.<sup>386</sup> They went to the parking lot of the compound and then to the building for celebration. Kunarac was still present.<sup>387</sup> The witness went to his room in the compound at around 11 pm, but only went to sleep at midnight.<sup>388</sup> At some point, while in his room, he heard a powerful explosion.<sup>389</sup> He conceded that from 11 pm onwards that night, he did not know where Kunarac was and that he could not have noticed if Kunarac had left Velecevo.<sup>390</sup> This witness also stated that there were several vehicles at the disposal of the command, including a red Lada car.<sup>391</sup>

127. Witness Radivoje Pavlovic, who worked as a driver at the Vele-evo compound,<sup>392</sup> recalled that while on duty on 2 August, he saw Dragoljub Kunarac at about 10 pm approaching the gate on a truck.<sup>393</sup> He recalled this date with precision because 2 August 1992 is an Orthodox holiday for the prophet Alidza and because the Rogoj pass was

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<sup>379</sup> T 5239.

<sup>380</sup> T 5238.

<sup>381</sup> T 5239.

<sup>382</sup> T 5266.

<sup>383</sup> T 5267.

<sup>384</sup> T 5267.

<sup>385</sup> T 5268.

<sup>386</sup> T 5269.

<sup>387</sup> T 5269.

<sup>388</sup> T 5283.

<sup>389</sup> T 5283.

<sup>390</sup> T 5284.

<sup>391</sup> T 5272-5273.

<sup>392</sup> T 5288-5289.

<sup>393</sup> T 5290.

recaptured that day.<sup>394</sup> After that, the witness went to his room where he spent the rest of the evening before sleeping.<sup>395</sup>

128. On 2 August, when he came back from hospital, witness Mirko Przulj saw the refrigerator truck he used to drive before the war by the road side.<sup>396</sup> He stopped and asked the driver of that truck what he was doing with the vehicle; the man told him to mind his own business.<sup>397</sup> The witness left and went to the police to report the theft of the vehicle. The witness suggested that it must have been stolen earlier that day, possibly around noon,<sup>398</sup> but he could not remember when he last saw the truck and conceded that he had not seen it for several days prior to 2 August.

d. From 3 August 1992 from 5 pm until 8 August 1992

129. On the morning of 3 August 1992, whilst still in Vele-evo, Dragoljub Kunarac was offered a car by a man called Drinac, a police officer whom he knew.<sup>399</sup> The accused was seen by both witness DD and witness Radosav Djurovic again at breakfast at around 7 am on 3 August at the Vele-evo compound.<sup>400</sup> Dragoljub Kunarac stayed for about 15 minutes. Later, a colleague of witness DD told him that Kunarac had taken his car and left.<sup>401</sup> On his way to his parents' house, Kunarac saw a car and someone waiving at him. He stopped for a few moments to talk to that person, a journalist called Gordana Draskovic, whom he knew.<sup>402</sup> He declined to give her an interview about the Rogoj pass operation, but accepted an invitation to go to the Hotel Zelengora that was a few hundred meters away.<sup>403</sup>

130. Gordana Draskovic told Kunarac about the rumours that he raped young girls and mentioned Partizan Sports Hall.<sup>404</sup> Kunarac told her that he knew nothing about those stories and denied having ever been to Partizan. Kunarac said that he was upset and asked the journalist to name the persons who spread those rumours; she mentioned the names of

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<sup>394</sup> T 5289.  
<sup>395</sup> T 5290-5291.  
<sup>396</sup> T 5309.  
<sup>397</sup> T 5309.  
<sup>398</sup> T 5317.  
<sup>399</sup> T 4514.  
<sup>400</sup> T 5183 and 5270.  
<sup>401</sup> T 5184.  
<sup>402</sup> T 4514.  
<sup>403</sup> T 4515.  
<sup>404</sup> T 4516.

four girls,<sup>405</sup> namely FWS-75, FWS-87, D.B. and a fourth.<sup>406</sup> Kunarac said that he wrote down those 4 names and went to Alad'a to see these men pretending to be his. Kunarac insisted that he decided to go there because the story mentioned his men and Montenegrin soldiers and because two of the men living in this house actually operated with him in the field.<sup>407</sup> When he arrived at Ulica Osmana \ikica, he sounded his horn in front of the house next to Ulica Osmana \ikica no 16 and three men came out; he asked them if they knew anything about Partizan and about the house next door, Ulica Osmana \ikica no 16. They said they did not. He then went straight to Ulica Osmana \ikica no 16 and asked the men who were there to come out. They said they did not know anything about Partizan or about rumours involving "Žaga" Kunarac.<sup>408</sup>

131. Dragoljub Kunarac and "Gaga", his deputy, who lived at Ulica Osmana \ikica no 16, went to Partizan by car to investigate the report. They arrived there just after 8.30 am. Kunarac said that that was the first time he entered the yard and the hall of Partizan. Prior to that he had had no idea that people were being kept there. Dragoljub Kunarac said that he entered Partizan and told the people there that he wanted to speak with those women who had talked to Gordana Draskovic, the journalist. When no one reacted, he took his notebook and called out the names given to him by the journalist.<sup>409</sup> The girls followed him out to the yard where he asked them whether they knew him. Kunarac said that their answer was negative, but that when they heard a local Serb woman call him "Žaga", the girls blushed.

132. Kunarac said that D.B. and FWS-75 eventually acknowledged that they had talked to the journalist and FWS-75 added that they had indeed been taken to Alad'a where they had been raped. According to Kunarac, the girls said that they would recognise the men who took them there, whom they conceded they still believed to be Žaga's men.<sup>410</sup> Dragoljub Kunarac said that he sent the other two girls, FWS-87 and the fourth girl, back to the hall and that he set out for Alad'a with D.B. and FWS-75 because he wanted these girls to confront the men living there.<sup>411</sup> It was conceded in the Defence Final Brief that they

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<sup>405</sup> T 4517.

<sup>406</sup> T 4517.

<sup>407</sup> T 4519.

<sup>408</sup> T 4522.

<sup>409</sup> T 4525.

<sup>410</sup> T 4536.

<sup>411</sup> T 4532-4533 and 4712.

"did not present evidence which would corroborate allegations of the accused to this effect".<sup>412</sup>

133. According to Dragoljub Kunarac, when they arrived in Alad' a, the girls showed him the house which they had been taken to, Ulica Osmana \ikica no 16. They entered the yard and Kunarac called the men who were there and asked whether they recognised each other.<sup>413</sup> None of them did so. It was Kunarac's second time at the house that day. Kunarac claimed that he then went into the house to talk to those men who were there to discover who the culpable party might have been.<sup>414</sup> The girls were invited to have a shower at the house and were invited to help themselves to clothes that were in the cupboards. Kunarac said that he stayed in one of the rooms where, he claimed, D.B. soon joined him. Kunarac said that D.B. took the initiative, unbuttoning his clothes and kissing him. They eventually had sexual intercourse which, Kunarac said, was completely unexpected for him.<sup>415</sup>

134. Dragoljub Kunarac said that he left the house between 11 am and 11.30 am.<sup>416</sup> He, together with "Gaga", D.B. and FWS-75 went back to Partizan. But before doing so they circled the town twice in order to find Gordana Draskovic to confront her with the girls. Having failed to find her, he said he eventually dropped the girls at Partizan and went back to town. Later, just after noon, he was told that Gordana Draskovic had gone to Miljevina where she had an apartment. Kunarac therefore decided to go back to Partizan where he took FWS-75 and D.B. again and, possibly, another woman.<sup>417</sup> As he arrived in Partizan, he was also told that FWS-87 had already been taken somewhere else. He told the girls that he wanted to confront them with the journalist.<sup>418</sup> So they went to Miljevina together in Kunarac's car. As they reached Miljevina, a guard at a checkpoint told them that DP 3 would be able to tell them where Gordana Draskovic lived and indicated that DP 3 was at a café nearby. That was at about 1 pm-1.30 pm. Kunarac approached DP 3 who told him,

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<sup>412</sup> Defence Final Trial Brief, p 103.

<sup>413</sup> T 4533-4534.

<sup>414</sup> T 4534.

<sup>415</sup> T 4541-4542.

<sup>416</sup> T 4545.

<sup>417</sup> T 4547.

<sup>418</sup> T 4546.

"Gaga" and the girls to sit down while one of his soldiers would go and get Gordana Draskovic.<sup>419</sup>

135. At that point, Dragoljub Kunarac heard a radio communication on DP 3's radio that he, Dragoljub Kunarac, was required to report urgently to his command.<sup>420</sup> He was told that the Rogoj pass had fallen again.<sup>421</sup> He was also told that the commander's driver, a man named Pavlovic, would come to Miljevina to take him back to Fo-a. From Miljevina, they took the old road to Kalinovik where Kunarac reported to the command of the Kalinovik brigade.<sup>422</sup> According to Dragoljub Kunarac, in the car together with him were "Bano", "Miga" and "Puko", three soldiers who had been picked on the way in Alad' a. "Gaga" was also there.<sup>423</sup>

136. Witness Radjove Pavlovic claimed that at about noon on 3 August 1992, he went towards Fo-a with his commander, Colonel Marko Kovac, with a Lada Niva; news had arrived that the Muslims had retaken the Rogoj pass.<sup>424</sup> Colonel Kova- did not tell his driver beforehand where they were going but guided him as they went. They went directly to Alad' a, on a street close to the mosque; the witness believes that the street is called "Ivan Goran Kovacic", a side street of Ulica Osmana \ikica.<sup>425</sup>

137. Radjove Pavlovic and Colonel Kova- stopped in the Alad' a settlement where the anti-aircraft truck was parked. Witness Radjove Pavlovic remembered that he had not seen that vehicle in Velecevo that morning.<sup>426</sup> There were several men with Montenegrin accents around it as they arrived.<sup>427</sup>

138. After picking up these men, they then headed towards Miljevina and stopped in front of a hotel,<sup>428</sup> where they saw Dragoljub Kunarac. According to Radjove Pavlovic, Kunarac came towards them (possibly with another man) and told him they would go towards Kalinovik.<sup>429</sup> The witness cannot remember whether Colonel Kova- gave orders directly to

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<sup>419</sup> T 4549.

<sup>420</sup> T 4550.

<sup>421</sup> T 4550.

<sup>422</sup> T 4552.

<sup>423</sup> T 4552.

<sup>424</sup> T 5291.

<sup>425</sup> T 5296 and 5302.

<sup>426</sup> T 5291 and T 5295.

<sup>427</sup> T 5292.

<sup>428</sup> T 5292.

<sup>429</sup> T 5292.

Dragoljub Kunarac, but stated that he definitely saw them speaking together.<sup>430</sup> The witness insisted that, although he did not mention this man in his earlier statement, another man came in the car with Kunarac in addition to those already inside.<sup>431</sup> They took the macadam road from Miljevina and arrived in Kalinovik at about 4 pm.<sup>432</sup> The soldiers got out and the witness went back on his own.<sup>433</sup> Witness Radijove Pavlovic did not see any girls at the Hotel in Miljevina, but admitted that he did not really pay attention.<sup>434</sup> The witness said that he saw Kunarac again that day when the accused Kunarac had a car accident with his Polonez car about a kilometre from the Vele-evo command.<sup>435</sup> He said that Kunarac slightly injured his ribs on that occasion.<sup>436</sup>

139. Witnesses DE and DD confirmed that on 3 August, the Muslim forces had pushed back the Serb forces in Rogoj.<sup>437</sup> Witness DE said that he thought he saw Dragoljub Kunarac on that day.<sup>438</sup> He said that Kunarac could only have come from Kalinovik as it was the only possible way; he added that Kunarac, accompanied by his men, had asked two villagers to take him towards the Muslim positions, near Boljanovici. The next day, on 4 August, he said that some of Kunarac's men returned to ask for food.<sup>439</sup> Apart from that occasion, he had no further contact with them and only saw Kunarac again on 7 August in the evening when he talked to him.<sup>440</sup>

e. Dragoljub Kunarac's visit at Karaman's house

140. During his testimony, the accused Kunarac conceded that he went to Karaman's house on 21 or 22 September 1992.<sup>441</sup> He said that he came across DP 3 at a funeral and went together with him to Karaman's house. That is where Dragoljub Kunarac claimed he saw D.B. and 87. Only then, Kunarac claimed, did he realise that D.B. had not been returned to Partizan.<sup>442</sup> Kunarac said that he made a sign to FWS-87 and that they went

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<sup>430</sup> T 5294-5295.

<sup>431</sup> T 5298.

<sup>432</sup> T 5293.

<sup>433</sup> T 5293.

<sup>434</sup> T 5301.

<sup>435</sup> T 5293.

<sup>436</sup> T 5293.

<sup>437</sup> T 5243 and 5180.

<sup>438</sup> T 5243.

<sup>439</sup> T 5244-5245.

<sup>440</sup> T 5244.

<sup>441</sup> T 4745.

<sup>442</sup> T 4747.

upstairs where they talked.<sup>443</sup> He insisted, however, that the only reason for him taking her upstairs was to find out who had brought her to this house.<sup>444</sup> Shortly afterwards, D.B. told him that she had been brought there after he had taken them to Miljevina. When he supposedly offered to take her with him, he said that she refused as she said she had a man and that those men in the house were dangerous.<sup>445</sup> According to Kunarac, FWS-87 looked like a "vegetable", depressed. According to the accused, she told him that she did not expect him just to want to talk, but expected to be raped by him like the others did. Kunarac asked her however, to unbutton her shirt a little bit so that if a man came in he would not be suspicious. In fact, Kunarac said that he believed that these men might have wounded "Gaga" when he tried to re-take the girls.<sup>446</sup> Kunarac claimed that he had no sexual intercourse with her at the time, and left the room after a while.

(iv) Defence evidence related to the accused Radomir Kova-

141. The Defence for the accused Radomir Kova- objected to several aspects of FWS-87's testimony concerning her stay at Kova-'s apartment. Concerning FWS-87's relationship with Kova-, the Defence case was that FWS-87 and Radomir Kova- were in love with each other and that FWS-87 stayed with him of her own free will. Secondly, FWS-87 and the other girls were actually free to move about as they wished and, in relation to food, they were not worse off than any other inhabitant of Fo-a. Further, the Defence submitted that the allegations of mistreatments and forced naked dancing were pure fantasy. Finally, the Defence submitted that FWS-87 and A.S. were not sold by Kova- as they claimed, but that instead he paid for their safe transfer to Montenegro.

The accused Radomir Kova- did not testify.

(v) FWS-87's alleged relationship with Kova-

142. Several Defence witnesses testified that they saw the accused Radomir Kova- together with FWS-87. Some of them said that they were even introduced to FWS-87, who was sometimes presented to them as Kova-'s girlfriend. Several Defence witnesses described the way in which Kova- and FWS-87 behaved towards one another, and some

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<sup>443</sup> T 4747.

<sup>444</sup> T 4749-4750.

<sup>445</sup> T 4751-4752.

<sup>446</sup> T 4750.

witnesses mentioned a letter with a heart drawn on it, which FWS-87 allegedly sent to Kova~ after she had been transferred to Montenegro.

143. Witness DK, a cousin of the accused who also worked as an investigator for Radomir Kova~'s Defence team, told the court that FWS-87 looked happy with Kova~.<sup>447</sup> Radomir Kova~ later told her that after FWS-87 had left, she had sent Kova~ a postcard. The witness recalled that sometime in 1994, Kova~'s wife displayed the postcard saying that FWS-87 had written it.<sup>448</sup>

144. Likewise, witness DL, who lived in the same apartment building as Radomir Kova~, stated that the two girls who were staying in Radomir Kova~'s apartment came to her place on several occasions. This witness thought that one of them was Kova~'s girlfriend.<sup>449</sup> The witness first said that FWS-87 told her that she was in love with the accused Kova~, but eventually conceded that it was Kova~, not FWS-87, who had told her about the nature of their relationship.<sup>450</sup>

145. Witness DM, a cousin of the accused's father, claimed that Radomir Kova~ came to visit her with a girl, FWS-87, whom he introduced as his girlfriend.<sup>451</sup> This happened at the end of November 1992. According to the witness, that evening FWS-87 behaved "beautifully, wonderfully, nicely", "like all of us", and danced.<sup>452</sup> The witness said that she was a bit embarrassed when she found out that this girl was a Muslim.<sup>453</sup> She claimed that she saw FWS-87 again on several occasions in the street, at the market or in cafés. In particular, she recalled seeing her at Café Leonardo with two other girls.<sup>454</sup> Finally, she said that Kova~ later told her that he had received a letter from FWS-87 in which she expressed her gratitude for what he had done for her. The witness conceded, however, that she had never seen the letter.<sup>455</sup>

146. Another witness, DH, a cousin of the accused Radomir Kova~ who also lived in the apartment building to which Radomir Kova~ moved in the autumn of 1992 testified that

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<sup>447</sup> T 5619.

<sup>448</sup> T 5581.

<sup>449</sup> T 5643.

<sup>450</sup> T 5649.

<sup>451</sup> T 5663 and 5665.

<sup>452</sup> T 5664.

<sup>453</sup> T 5665.

<sup>454</sup> T 5666-5671.

<sup>455</sup> T 5667 and 5689.

Kova~ lived on the top floor of the block with a girl whom he introduced as his girlfriend.<sup>456</sup> The witness saw the two of them at a party at DM's place. Witnesses DI, a saleswoman who knew Kova~ from before the war and DK, a cousin of the accused who worked as an investigator for the Defence team, were there too, she claimed. She said that judging from Kova~'s and the girl's behaviour, she had no doubt that they were a couple.<sup>457</sup> She did not talk to the girl on that occasion nor did she ask Kova~ how they had met.<sup>458</sup> In late December 1992, the witness went to visit Kova~ after he had been injured. The girl was still there and she came out of the building with the witness, as she had to do some shopping.<sup>459</sup> Finally, the witness referred to a letter which Kova~ claimed to have received from FWS-87 in which she expressed her gratitude. The witness could not remember whether she saw the letter or not.<sup>460</sup>

147. Witness DV was a nurse who worked with Radomir Kova~'s unit during the conflict. She recalled that she once provided medicine and sanitary towels which Kova~ had requested for his girlfriend.<sup>461</sup> Later, on 14 November 1992, she met the girl in question at Café Leonardo, a café where the members of Kova~'s unit would gather. Kova~ arrived with two girls, FWS-87 and FWS-191, whom he introduced to the witness. The next day, the witness saw Kova~ again. He allegedly asked her how she liked his girlfriend, the "little one" as he called her. The witness added that Kova~ looked in love at the time.<sup>462</sup> In mid-December, DV visited Kova~ after he had been injured. She only saw FWS-87 once out of the two occasions when she went to his apartment.<sup>463</sup> She saw the girl on two other occasions, including once when FWS-87 was leaving the block to do some shopping. According to the witness, Kova~ and the girl had a good relationship.<sup>464</sup> She also referred to a letter that Kova~ had received from FWS-87.<sup>465</sup>

148. Witness DI saw Radomir Kova~ during the war at DM's place shortly before or after Archangel's day (ie 21 November).<sup>466</sup> DM and DH were there. She could not remember

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<sup>456</sup> T 5732 and 5713.

<sup>457</sup> T 5722.

<sup>458</sup> T 5731-5732.

<sup>459</sup> T 5717-5718.

<sup>460</sup> T 5719-5720.

<sup>461</sup> T 5770.

<sup>462</sup> T 5771.

<sup>463</sup> T 5772.

<sup>464</sup> T 5777-5778.

<sup>465</sup> T 5774.

<sup>466</sup> T 5742.

DK being at the party or rather she said she was not there. That evening, Kova- arrived at around 7 pm with a girl, FWS-87, whom he introduced as his girlfriend.<sup>467</sup> The witness recalled that Kova- and the girl were in a good mood that night. She said that on the basis of what she saw, she concluded that she indeed must have been his girlfriend.<sup>468</sup> She conceded however that she had no reason to observe FWS-87 as she was behaving like any other person.<sup>469</sup> The witness saw FWS-87 again, about 4 times, in the street or in the Café Leonardo; on two occasions, she said that she was accompanied by her girlfriend,<sup>470</sup> on one she was accompanied by Kova-.<sup>471</sup> However, the witness did not talk to her.

149. Witness DN, the owner of Café Linea and a childhood friend of the accused, said that he once saw Radomir Kova- at his café, Café Linea, during the conflict. On that occasion, he recalled that Radomir Kova- was accompanied by Jagos Kostic, not by witness DO as he had originally claimed in his statement.<sup>472</sup> Two girls accompanied them.<sup>473</sup> The witness sat with them for a while. Kova- introduced one of the girls as his girlfriend. The witness commented that it seemed “incredible” that she could be a Muslim.<sup>474</sup> The witness conceded that having a girlfriend of this ethnic background was highly unusual in those days for a Serb and remarked that the two girls were the only Muslim customers in his café.<sup>475</sup> The witness said that Kova- behaved very nicely towards this girl. The witness saw Kova- again two days later in his café. They talked about the girl and the witness asked him whether it was normal to have that kind of girlfriend, meaning a Muslim girlfriend, to which Kova- answered that it was his own business. The witness claimed that he saw the girls again about 15-20 times at his café, sometimes on their own, sometimes with other company.<sup>476</sup> He said that he paid particular attention to them so that no one would bother them.<sup>477</sup> In particular, the witness recalled seeing Kova- and the girl at the orthodox New Year’s Eve (13<sup>th</sup> January 1993), when they were allegedly dancing at his

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<sup>467</sup> T 5743-5744.

<sup>468</sup> T 5747.

<sup>469</sup> T 5759.

<sup>470</sup> T 5746.

<sup>471</sup> T 5746.

<sup>472</sup> T 5875.

<sup>473</sup> T 5875-5876.

<sup>474</sup> T 5880.

<sup>475</sup> T 5888-5889.

<sup>476</sup> T 5881 and 5889.

<sup>477</sup> T 5892.

café. From the end of December 1992 onwards, he continued to see FWS-87, but not the other girl.<sup>478</sup> He said that she would generally come by herself or with Kova-.<sup>479</sup>

150. Witness DO, a friend of the accused Radomir Kova-, recalled seeing Kova- sometime in November 1992. Kova- told him about his girlfriend and appeared to be very much in love.<sup>480</sup> Kova- had actually told the witness that he was in love with this girl.<sup>481</sup> In December of that same year, the witness met Kova-, his girlfriend and another girl at Café Leonardo.<sup>482</sup> It was the only occasion on which he exchanged a few words with this girl. All were in a good mood, he said. The witness acknowledged that Café Leonardo was a meeting point for young people and soldiers.<sup>483</sup> He saw Kova- again after the accused had been wounded in combat. Kova- asked the witness not to tell FWS-87 about his injury so that she would not be worried.<sup>484</sup> Later, on 8 January 1993, he saw Kova- again. The latter told him that he had had problems with a soldier breaking into his apartment, and that he had to report to the headquarters for disarming him.<sup>485</sup> Kova- also told him that he had received a letter with a heart drawn on it from one of the girls who he had seen off to Montenegro, who was expressing her gratitude to Kova-. The witness said that he actually saw the envelope, which supposedly contained the letter, but he conceded that he did not read the letter.<sup>486</sup>

(vi) Conditions at Radomir Kova-'s apartment

151. The Defence suggested that due to the war, there was a general lack of food in Foca. Although they might not have received all they could wish for, the girls were not worse off than any other person in Fo-a at the time. They were even probably better off considering that Radomir Kova- and several members of his family allegedly made sure that the girls would receive sufficient food.

152. Several Defence witnesses claimed that during the conflict there was a general and widespread lack of supplies: food was difficult to get hold of, electricity was intermittent

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<sup>478</sup> T 5892-5893.

<sup>479</sup> T 5893.

<sup>480</sup> T 5907-5909.

<sup>481</sup> T 5944.

<sup>482</sup> T 5913-5914.

<sup>483</sup> T 5943.

<sup>484</sup> T 5918-5919.

<sup>485</sup> T 5919-5920.

<sup>486</sup> T 5949.

and conditions of living were difficult for everyone, Serbs and Muslims.<sup>487</sup> The Defence argued that the alleged lack of food in Kovač's apartment was not due to his negligence *vis-à-vis* the girls but a consequence of the general shortage of food. During closing arguments, Defence counsel mentioned, however, the existence of a food lifeline from Foca to Montenegro.<sup>488</sup>

153. Witness DI, who worked in a shop, said that although her shop re-opened in the autumn 1992, there was nothing to sell.<sup>489</sup> Witness DM stated, however, that she was able to go to Montenegro to buy supplies for her shop in town.<sup>490</sup> She would simply have to ask for a permit to travel to Montenegro which was easy to obtain.<sup>491</sup>

154. Witness DK, a cousin of the accused who lived in the apartment just below Radomir Kovač's, testified that Kovač would provide the girls with food. She recalled seeing him in front of the building with plastic shopping bags in his hands.<sup>492</sup> In addition, she once provided the girls with some food and medicine, passing them through the window of her apartment. This witness claimed that FWS-87 had told her that they had lost the key to the entrance door and were therefore unable to get out of the apartment.<sup>493</sup> She said that in general, Kovač or his mother would bring food to the girls.<sup>494</sup> Witness DH stated that Kovač was on good terms with the business manager of the army, which made it easier for him to obtain military food supply. Despite Kovač's privileged supply, the witness nevertheless brought food to Kovač as it was of better quality than the food he would receive at the military. Witness DH added that she and Kovač were so close that she would take food from her own children to make sure that Kovač would have sufficient food, and that she would bring food to the girls while Kovač was not there.<sup>495</sup> She said that FWS-87 would generally open the door, take the food and close the door again. The witness would not go inside.<sup>496</sup> Witness DO likewise stated that Kovač would take food for FWS-87 every

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<sup>487</sup> Witness DM, T 5659; Witness DH, T 5707; Witness DO, T 5908-5909; Witness DV, T 5776.

<sup>488</sup> T 6535.

<sup>489</sup> T 5748-5749.

<sup>490</sup> T 5675-5676.

<sup>491</sup> T 5676.

<sup>492</sup> T 5580-5581.

<sup>493</sup> T 5576.

<sup>494</sup> T 5580-5581.

<sup>495</sup> T 5716 and 5737.

<sup>496</sup> T 5717.

time he could. The witness stated that Kova~'s aunt, witness DH, would keep food for him too.<sup>497</sup>

155. Several Defence witnesses stated that the girls were able to leave the apartment and that they would be seen wandering around town on their own. Witness DK stated that the girls continued to use Radomir Kova~'s apartment even when the latter was absent. She added that she did not think that their movement was otherwise restricted and that, on the contrary, they were able to move freely.<sup>498</sup>

156. Likewise, witness DH denied that the girls were locked in.<sup>499</sup> Witness DL testified that the girls came to her apartment on their own on 5 or 6 occasions.<sup>500</sup> Witness DN said that the girls would come to his café sometimes on their own, sometimes with company.<sup>501</sup> Witness DM told the Trial Chamber that she saw FWS-87 about 10 times on her own in the street, in the market place and in cafés.<sup>502</sup> In particular, she recalled seeing three girls on their own, one of which was FWS-87, at Café Leonardo.<sup>503</sup>

157. Regarding the mistreatments other than the rapes, such as threats, constant exposure to fear, psychological pressure, beatings and forced naked dancing, the Defence denied that the girls were ever beaten or mistreated, but it presented no evidence in this respect.

(vii) Removal of FWS-87 and A.S. from Radomir Kova~'s apartment

158. The Defence contended that, contrary to FWS-87's and A.S.'s testimonies, they were not sold to two Montenegrins, but rather helped out of Fo~a by Radomir Kova~ who ensured their safe departure for Montenegro.

159. Several Defence witnesses testified that Radomir Kova~ had sent the girls away to Montenegro. All these witnesses had heard this from Kova~ himself.<sup>504</sup> Witness DK heard rumours that the girls had actually been killed. When she went to see Kova~, he at first did not deny the rumours but eventually said that he had seen them off to Montenegro and that

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<sup>497</sup> T 5909-5912.

<sup>498</sup> T 5582-5583.

<sup>499</sup> T 5732-5733.

<sup>500</sup> T 5643.

<sup>501</sup> T 5881.

<sup>502</sup> T 5666. See also Witness DH, T 5718 and Witness DV, T 5772.

<sup>503</sup> T 5670. See also Witness DI, T 5755.

<sup>504</sup> Witness DK, T 5575; Witness DL, T 5645; Witness DM, T 5666; Witness DH, T 5736; Witness DV, T 5774; Witness DO, T 5921-5925.

he had paid Montenegrins for this service. The witness said that earlier, FWS-87 had told her that Radomir Kova~ promised to move her to Montenegro.<sup>505</sup> Witness DO said that Kova~ started thinking about the security of FWS-87, as his unit was moving further away from Fo-a.<sup>506</sup> The witness said that following his recovery from injury, Kova~ returned to his unit in February 1993. He stayed for about two weeks and left again to take care of the girls.<sup>507</sup> Soon he returned to the frontline. Kova~ told the witness that some Montenegrins had helped him to transfer the girls to Montenegro. Kova~ further told him that it cost him 200-300 Deutschmarks each, and that he had had to sell his TV set and his ski boots to finance it.<sup>508</sup> FWS-87 gave evidence in rebuttal that when she was taken away from Radomir Kova~'s apartment, his TV set was still there.<sup>509</sup> In closing argument, and without presenting any evidence, Defence counsel changed the account given by the witness and said that Kova~ had sold his parents' TV, not his own.<sup>510</sup> Witness DO stated that Kova~ could not have taken them himself because he would have had to ask his commander to leave the area.<sup>511</sup> The witness conceded, however, that some soldiers had been permitted to leave for Montenegro, but he added that it was more difficult to do so for people active at the frontline; he could not recall whether any member of his unit ever received such permission.<sup>512</sup> Likewise, witnesses DH,<sup>513</sup> DM,<sup>514</sup> DL<sup>515</sup> and DV<sup>516</sup> testified that they were told by Radomir Kova~ that he had arranged for these girls to be sent away to Montenegro.

(viii) Defence evidence related to the accused Zoran Vukovi}

The accused Zoran Vukovi} did not testify.

160. The Defence claimed that the identification of the accused Zoran Vukovi} was generally "uncertain".<sup>517</sup> The Defence underlined the fact that there were 11 men named Zoran Vukovi} living in Fo-a at the time.<sup>518</sup> The Defence also pointed at what it considered

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<sup>505</sup> T 5575.

<sup>506</sup> T 5921.

<sup>507</sup> T 5921-5923.

<sup>508</sup> T 5925.

<sup>509</sup> T 6113.

<sup>510</sup> T 6489-6490.

<sup>511</sup> T 5923-5924.

<sup>512</sup> T 5924.

<sup>513</sup> T 5736.

<sup>514</sup> T 5666.

<sup>515</sup> T 5645.

<sup>516</sup> T 5774.

<sup>517</sup> Defence Final Trial Brief, p 270.

<sup>518</sup> Defence Ex D107.

to be discrepancies and contradictions in the testimonies of several Prosecution witnesses with respect to the identification of the accused Zoran Vukovi}.

161. In particular, the Defence suggested that FWS-87 contradicted herself when she identified the accused Zoran Vukovi} as the man who raped her at Fo-a High School on two occasions as described in paragraphs 6.6 and 6.7 of Indictment IT-96-23/1. During her testimony, FWS-87 had said that she learnt Zoran Vukovi}'s name through other detainees at the school who knew him. She did not remember, however, exactly who mentioned his name. The Defence suggested that the name of the accused could only have been suggested by FWS-48 "because no other witness knew ...g Zoran Vukovi} ?from g before the war". Consequently and because of the doubts cast on the reliability of FWS-48's testimony,<sup>519</sup> the Defence suggested that FWS-87's identification of the accused Zoran Vukovi} was unreliable.<sup>520</sup> No evidence supporting the suggestion that FWS-48 mentioned the accused's name to FWS-87 was put forward by the Defence. With respect to paragraph 6.7 of the Indictment, the Defence pointed out that FWS-87 could not remember this event and did not mention it during her testimony.

(b) FWS-75

(i) Testimony of FWS-75

162. When her village was attacked on 3 July 1992, the witness, aged about 25 years at the time,<sup>521</sup> was hiding in the woods with other villagers, including her father, mother and brother. None of them had weapons. They were shot at when trying to flee from the arriving soldiers. Three of them, including the witness's mother, were actually shot while running away. A lot of children were among the group of people being chased. The soldiers pursuing them stopped shooting when they arrived near the group.<sup>522</sup> Once they were captured, men and women were separated, and the women taken downhill to Buk Bijela. That same day, the witness was transported from Buk Bijela to Fo-a High School, where she spent about 15 days, and was frequently sexually assaulted. The first time it happened – the witness was not sure whether it was on the first night or later<sup>523</sup> - Dragan

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<sup>519</sup> Decision on Motion for Acquittal, 3 July 2000, pars 18–26.

<sup>520</sup> Defence Final Trial Brief, p 276.

<sup>521</sup> T 1376-1377.

<sup>522</sup> T 1377-1378.

<sup>523</sup> T 1398.

Zelenovi} came in with his group and took about six women to another classroom. Among them were FWS-87, FWS-95, FWS-51, FWS-74, FWS-88 and another woman; the witness did not mention FWS-50 but her mother, FWS-51. The witness herself remained in the same room together with FWS-87 and FWS-95, while the other women were taken somewhere else. FWS-75 recalls being raped by Dragan Zelenovi} and another man. FWS-95 was held at gunpoint by a certain "Zelja" while DP 1 raped her. FWS-87 was raped by a man the witness did not know. All three of them were raped in the same room at the same time.<sup>524</sup> She did not mention the accused Zoran Vukovi} in this respect.

163. Although FWS-75 did not mention Zoran Vukovi} in connection with the events at Fo-a High School, she recalled that she met Vukovi} for the first time at Buk Bijela in one of the barracks adjacent to the motel. As she came out of the room where she had been questioned, she saw Vukovi} with her uncle who had apparently just been beaten.<sup>525</sup> She described him as: "short, a small man, blond, [...] fair-haired", but she could not remember his face. She did not know him prior to the war and only found out about his name later when he came to Radomir Kova-'s apartment.<sup>526</sup> On that occasion, Radomir Kova- ordered the witness to go into the kitchen with Vukovi}, who locked the door behind them. There Vukovi} and FWS-75 had a conversation during which he admitted to having killed her uncle at Buk Bijela whilst the latter was allegedly trying to flee. She then had to arouse Vukovi} who proceeded to rape her orally.<sup>527</sup> This incident was, however, not charged in the Indictment that is before the Trial Chamber and the Trial Chamber makes no finding on it. FWS-75 also knew another Zoran Vukovi}, nicknamed "Kifla" who lived in Brod and who raped her while she was detained in the apartment of a man named Todovi} sometime in January or February 1993.

164. FWS-75 stated that she stayed at the Fo-a High School for 15 days from 3 July 1992. During her time at the Fo-a High School she was taken out almost every night, with the possible exception of two nights. Usually Dragan Zelenovi} would come, sometimes together with Dragan Stankovi} (nicknamed "Dragic"), and take women out. FWS-75 and FWS-87 would be taken out very often.<sup>528</sup> They were taken to apartments (mostly an

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<sup>524</sup> T 1398-1399.

<sup>525</sup> T 1388.

<sup>526</sup> T 1388.

<sup>527</sup> T 1450-1452.

<sup>528</sup> T 1402.

apartment in the Lepa Brena block or a house in Gornje Polje), where other men would be waiting to rape them. She was raped every time she was taken out.<sup>529</sup> Again, the witness did not mention the accused Zoran Vukovi}.

165. After having been transferred to Partizan Sports Hall, FWS-75 recalled being taken out from Partizan, together with D.B.,<sup>530</sup> by the accused Dragoljub Kunarac, whom she knew by his nickname “@aga”, by Dragomir “Gaga” Vukovi} and a certain “Bane”, and being brought to a house in the Alad`a neighbourhood near the Fo-a High School, where a group of men was already waiting. She identified the house from Prosecution photographs as being the one in Ulica Osmana \ikica no 16.<sup>531</sup> Other soldiers joined them there later. She recalled the date as having been a few days before 2 August 1992.<sup>532</sup>

166. FWS-75 testified to having been taken to a separate room by “Gaga”, who ordered her to have sex with a 16-year-old boy whose nickname she recalled as “Zuca”. However, the boy did not come into the room. Instead, FWS-75 stated that she was gang-raped vaginally and orally by a group of soldiers who were mostly Montenegrins, and amongst whom she recognised Jure Radovi}, DP 7 and DP 8. One of the men threatened to cut off her breasts.<sup>533</sup>

167. D.B. had been taken to another room directly adjacent to the one she was in, by the accused Dragoljub Kunarac.<sup>534</sup> The witness felt that the accused Dragoljub Kunarac appeared to have control over the other soldiers and whatever was happening in that house.<sup>535</sup>

168. The witness identified Dragoljub Kunarac as being the one of the men who took her and D.B. from Fo-a High School to a Muslim house in Alad`a, near the High School and the mosque.<sup>536</sup> She said that at some point while she was being raped by “Bane”, Kunarac entered the room and told her to get dressed because they had to leave.<sup>537</sup> He brought her

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<sup>529</sup> T 1401-1405.

<sup>530</sup> T 1411.

<sup>531</sup> Ex 11, photographs 7394 and 7395.

<sup>532</sup> T 1425.

<sup>533</sup> T 1414-1416.

<sup>534</sup> T 1412.

<sup>535</sup> T 1420.

<sup>536</sup> T 1411.

<sup>537</sup> T 1418-1419.

back to Partizan.<sup>538</sup> She was taken a second time to this house by Kunarac and raped there by his men. The witness actually learnt his name as they were returned to Partizan after her stay at Ulica Osmana \ikica no 16, when she told other people that they had gone there with someone referred to as "Motorka" which is synonymous to "@aga".<sup>539</sup> Therefore, when she was taken by him again to Ulica Osmana \ikica no 16, she knew his name, surname and nickname.<sup>540</sup> The witness says that his soldiers were referring to Kunarac as "@aga".<sup>541</sup> She described him as being "tall, quite slim, ugly. He had sort of curly hair. I know that when I met him, I didn't look at him. He looked so frightening".<sup>542</sup>

169. FWS-75 testified that a few days after the events described above, to her memory on 2 August 1992, she was taken out again from Partizan to Ulica Osmana \ikica no 16 by the accused Dragoljub Kunarac and "Gaga" Vukovi}. She set the date as the day before the Alad`a mosque was blown up.<sup>543</sup> Prior to that, a woman had come to Partizan, posing first as a journalist from Sarajevo but finally admitting that she was from Pale. FWS-75 told the woman what had happened to her previously. Other women also talked to her. Some time after the woman had left, Dragoljub Kunarac and "Gaga" came to Partizan and took those women away who had talked to the alleged journalist, ie, FWS-75 and witnesses FWS-87, FWS-50 and D.B.<sup>544</sup>

170. When she arrived at Ulica Osmana \ikica no 16, three women from Gacko were already there, one of them was FWS-190; another of the women was 8 months pregnant.<sup>545</sup> The accused Dragoljub Kunarac and "Gaga" abandoned the witnesses to the men present there. FWS-75 stated that she was first raped by three Montenegrin soldiers, whom she identified as Jagos Konti} (nicknamed "Konta"), DP 7 and DP 8. DP 8 locked her in a room and raped her the entire night vaginally, anally and orally. The other two soldiers raped her separately at dawn, and finally "Gaga" raped her in the morning.<sup>546</sup>

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<sup>538</sup> T 1419.

<sup>539</sup> T 1420.

<sup>540</sup> T 1420.

<sup>541</sup> T 1420.

<sup>542</sup> T 1421.

<sup>543</sup> T 1425.

<sup>544</sup> T 1423-1425.

<sup>545</sup> T 1425-1426.

<sup>546</sup> T 1427-1428.

171. During that night just before midnight, according to the testimony of FWS-75, the Alad`a mosque was destroyed by an explosion. Witnesses FWS-87, FWS-190 and D.B. were still in the house at that time.<sup>547</sup>

172. FWS-75 saw FWS-87 in a car with "Bane"; FWS-87 later told her that she had been raped by him.<sup>548</sup> Also a certain "Vasiljevic" came into the house at some stage and took away FWS-50 and one of the women from Gacko.<sup>549</sup>

173. On the next morning, Dragan Stankovi} and some other men arrived and wanted to take them away, but eventually the accused Dragoljub Kunarac took them (herself, FWS-87, D.B. and FWS-190) in a car to Miljevina. The witness was not clear as to whether DP 3 was also in the car, but mentioned his presence from the time they arrived at Miljevina. FWS-75 thought they were to be confronted with the journalist there, but the latter never arrived. DP 3 finally ordered their removal to an abandoned Muslim house, called "Karaman's house".<sup>550</sup>

174. FWS-75 was taken to this house<sup>551</sup> in Miljevina by Misko Savi}, and some soldiers were present when she arrived: Radovan Stankovi}, "Rasa", Nedzo Samardzi} and Nikola Brcic, nicknamed "Rodjo".<sup>552</sup> During the stay in the house, the women were repeatedly raped.<sup>553</sup> Other girls were brought in after FWS-75 had arrived, namely FWS-132, A.S., A.B. and J.G.<sup>554</sup>

175. The witness recalled that Dragoljub Kunarac, or "@aga", came to the house two or three times to eat. The first time he came there, he took a woman with him to another room, although the witness did not remember whether it was FWS-87 or D.B.<sup>555</sup>

176. FWS-75 spent about three months at Karaman's house until she left on 30 October 1992, when she was taken away with A.S. and A.B. by DP 6, DP 1 and Dragan Zelenovi}.<sup>556</sup>

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<sup>547</sup> T 1429.

<sup>548</sup> T 1428-1429.

<sup>549</sup> T 1429.

<sup>550</sup> T 1431-1433.

<sup>551</sup> She identified it on Ex P11, photograph 7355, T 1433.

<sup>552</sup> T 1435.

<sup>553</sup> T 1436-1437.

<sup>554</sup> T 1437-1438.

<sup>555</sup> T 1441-1442.

177. FWS-75 testified that she was taken to the Brena apartment block in Foča around 30 October 1992, together with FWS-87, A.S. and A.B., by Radomir Kovač and Jago Kostić. The apartment appeared to be that of Kovač and was located on the fourth floor.<sup>557</sup> The witness had mentioned the same date before in a previous statement to the Prosecution, which was entered into evidence by the Defence.<sup>558</sup> FWS-75 stated that the accused Kovač was one of the men who took part in the attack on her village on 3 July 1992. She did not know him at the time but she recalled him from that occasion and recognised him later when she was brought to his apartment.<sup>559</sup>

178. FWS-75 testified that all four of the girls taken to the apartment of Radomir Kovač were sexually assaulted and raped. FWS-75 herself was raped by Kovač the day after her arrival in the apartment. In addition, she was raped by Kovač every evening of the first week there, on one occasion together with FWS-87 while the Swan Lake was playing.<sup>560</sup>

179. Radomir Kovač also raped A.B. in the apartment, which FWS-75 was told about by A.B. herself.<sup>561</sup>

180. As mentioned above, FWS-75 said that she saw Radomir Kovač, nicknamed "Klanfa", in the vicinity of her village following the attack. The witness described Kovač as being "tall, he had a receding hairline, his hair was dark".<sup>562</sup>

181. FWS-75 described that she was also raped by other men in the apartment, among them, as mentioned earlier, the accused Zoran Vuković, who raped her orally in the kitchen.<sup>563</sup> This incident has not been charged and is not the basis of a conviction by the Trial Chamber. On another occasion, FWS-75 was told to go with a certain Slavo Ivanović, but refused to do so, and Radomir Kovač sent A.B. instead.<sup>564</sup>

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<sup>556</sup> T 1434 and T 1443.

<sup>557</sup> T 1404 and T 1443-1445; the witness identified the Brena block on Ex P11, photograph 7401.

<sup>558</sup> Ex D24 (Statement of 18 Oct 1995, p 14). In another statement, Ex D23, of 6 Mar 1998, the witness did not mention any time frame.

<sup>559</sup> T 1382-1384.

<sup>560</sup> T 1448-1449.

<sup>561</sup> T 1450 and T 1489.

<sup>562</sup> T 1383 and T 1422.

<sup>563</sup> T 1450-1452.

<sup>564</sup> T 1452-1453 and T 1490.

182. FWS-75 and A.B. were told by Vojkan Jadzi} that they would have to go to a house near the Hotel Zelengora, where they would have to cook and clean for some other men. After a few days,<sup>565</sup> FWS-75 and A.B. were taken there and subsequently spent about 15 days in the house near Hotel Zelengora, where they were constantly raped by about 10-15 soldiers from Serbia. Radomir Kova~ would come along from time to time to find out how they were and pretend that he was sorry for them.<sup>566</sup>

183. From that house, FWS-75 and A.B. were taken to another apartment in Pod Masala by Serbian soldiers, where they had to stay for seven to ten days, and where FWS-75 was again sexually abused, but she did not see the accused Radomir Kova~ there.<sup>567</sup>

184. FWS-75 and A.B. were then taken back to the Brena apartment of Radomir Kova~ by Vojkan Jadzi}, and on their arrival they found that FWS-87 and A.S. were still there.<sup>568</sup>

185. The rapes continued after their return. On the evening of their arrival, Vojkan Jadzi} tried to rape FWS-87, which Radomir Kova~ prevented him from doing despite having first promised that he could sleep with her. "Zeljko", another Serb soldier, abused A.B. and Jagos Kostić} raped A.S.<sup>569</sup> During the night, A.B. was taken to the apartment in Pod Masala by "Zeljko", and A.S. was taken to an apartment in Donje Polje by Jagos Kostić}.<sup>570</sup> The next morning, when Kova~ and Vojkan Jadzi} were still asleep after a night of heavy drinking, DP 1 entered the apartment and took FWS-75 and FWS-87 away. Vojkan Jadzi}, who woke up, followed them. They were brought to the apartment of DP 1 on the other side of the Brena block, where Vojkan Jadzi} "was persistent in raping" FWS-87.<sup>571</sup> Around noontime, Kova~ appeared at the apartment with a knife and ordered FWS-87 and FWS-75 to get up and follow him. Neither Vojkan Jadzi} nor DP 1 offered any resistance.<sup>572</sup>

186. FWS-75 and FWS-87 were eventually taken back to the apartment in Pod Masala, where A.B. was waiting.

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<sup>565</sup> T 1717.

<sup>566</sup> T 1454.

<sup>567</sup> T 1455 mentioning "Vojkan Jadzi}, Zeljko, Dzole", and another whose name she did not remember.

<sup>568</sup> T 1456.

<sup>569</sup> T 1456.

<sup>570</sup> T 1456.

<sup>571</sup> T 1457-1458.

<sup>572</sup> T 1458.

187. FWS-75 recalled that after returning to the apartment in Pod Masala, they (FWS-75 and FWS-87) found A.B. there. All three of them had to take off all their clothes and stand on a table for about half an hour while Radomir Kovač was lying on a sofa.<sup>573</sup> Afterwards Radomir Kovač took them, still naked, to the Drina River and threatened to cut their throats and throw them in the river. He was stopped from carrying out this threat by Jagos Kostić<sup>574</sup> and the women were taken back to the apartment.

188. FWS-75 recalled that she spent about a month in the apartment of Radomir Kovač, including the times when she was at the house near Hotel Zelengora and in Pod Masala. During that time, the girls had to perform household work, such as cleaning up, cooking and washing the men's clothes. When the men were not present, they would be locked in the apartment.<sup>575</sup>

189. Eventually one morning, Radomir Kovač announced that A.B. would be sold to a certain "Dragec", and that FWS-75 would be taken away by DP 1 and a certain "Zelja". Dragec came, paid 200 Deutschmarks for A.B. and took her away. Later on that day FWS-75 was taken by DP 1 and Zelja to the apartment of Dragec, who told her that he had saved her life because she was about to be killed. Dragec would rent them to others as prostitutes while they were there. After some time (the witness's evidence varies from 15 days to about two months) at Dragec's apartment, A.B. was taken away by Jasko Gadzić and never seen again. FWS-75 was eventually sold to a certain man named Todović, who kept her in an apartment in the Mahala area of Foča; she was able to flee from Foča with the help of two Serbs on 5 March 1993.<sup>576</sup>

(ii) Supporting evidence

190. FWS-87, FWS-62, FWS-50 and FWS-95, amongst others, recalled that women were taken out and were sexually assaulted very often during their stay at Foča High School.<sup>577</sup> FWS-87 specifically recalled that FWS-75 was amongst the women who were called out and that they were raped in the same classroom of Foča High School during the incident

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<sup>573</sup> T 1459.

<sup>574</sup> T 1461.

<sup>575</sup> T 1491 and T 1598-1599.

<sup>576</sup> T 1494-1498.

<sup>577</sup> FWS-87, see par 56; FWS-50, par 237; FWS-95, par 310; FWS-51, par 178.

described by FWS-87.<sup>578</sup> FWS-95 also recalled that FWS-75 was ordered out on this night but she could not recall what happened to the other women in her classroom while she herself was being raped by DP 1.<sup>579</sup>

191. D.B. recalled being taken out from Partizan and brought to Ulica Osmana \ikica no 16 by Dragoljub Kunarac together with FWS-75.<sup>580</sup> Both witnesses, FWS-75 and D.B., recalled that upon their arrival there was already a group of soldiers waiting. D.B. testified, as FWS-75 did, that Dragoljub Kunarac appeared to have control over the soldiers at the house. D.B. further confirmed the testimony of FWS-75 that the two of them were taken to separate rooms in the house. D.B. also stated that FWS-75 was barely able to walk and that she appeared terrified when the girls were returned to Partizan together after the incident.<sup>581</sup>

192. The testimonies of FWS-87, FWS-50 and D.B. further support FWS-75's statement that the four women were taken again to the house in Ulica Osmana \ikica no 16.<sup>582</sup> While both D.B. and FWS-87 recalled that they were taken there by Dragoljub Kunarac and "Gaga", FWS-50 only referred to Kunarac once they were at the house.<sup>583</sup>

193. D.B. further recalled that she was taken to Miljevina by Dragoljub Kunarac together with FWS-75.<sup>584</sup> FWS-87, A.S., and FWS-132 recalled that FWS-75 stayed with them in Karaman's house.<sup>585</sup> The testimony of FWS-75 as to the continuous rapes she and other women had to endure while held in Karaman's house is reflected in other testimonies.<sup>586</sup> FWS-87 and A.S. recalled that they were continuously raped; D.B. similarly stated that she was constantly raped by Radovan Stankovic.

194. As to the presence of Dragoljub Kunarac at Karaman's house, D.B. recalled that she saw the accused in Karaman's house.<sup>587</sup> D.B. did not confirm that she was taken to a room by Kunarac, but testified, that she saw Kunarac in the living room with FWS-87, her sister.<sup>588</sup> Since FWS-87 testified that she was raped by Kunarac in Karaman's house, the

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<sup>578</sup> See par 57.

<sup>579</sup> See par 310.

<sup>580</sup> See par 216.

<sup>581</sup> See par 219.

<sup>582</sup> FWS-87, par 59 and 60; FWS-50, par 241; D.B., par 216.

<sup>583</sup> FWS-87, par 59; FWS-50, par 241; D.B., par 216.

<sup>584</sup> T 3815.

<sup>585</sup> FWS-87, par 63; A.S., par 205; FWS-132, par 334.

<sup>586</sup> FWS-87, par 63; A.S., par 206; D.B., par 225.

<sup>587</sup> See par 226.

<sup>588</sup> See par 226.

testimony of FWS-87 and D.B. together correspond with the testimony of FWS-75 that she watched Kunarac take either D.B. or FWS-87 to another room in Karaman's house.

195. Whereas the testimony of FWS-75, A.S. and FWS-87 differs with respect to the alleged period of time they spent in Karaman's house and the approximate date on which they were transferred to Radomir Kovac's apartment, the three witnesses congruently described that they were taken together to Kovac's apartment with A.B. and that they were raped continuously during their stay in Kovac's apartment.<sup>589</sup> FWS-87 specifically referred to the fact that FWS-75 was raped by Kovac in her testimony.<sup>590</sup>

196. An incident, during which FWS-75 was forced to stand naked on a table together with FWS-87 and A.B. while Radomir Kovac was lying on the sofa, was similarly mentioned by witnesses FWS-87 and A.S.<sup>591</sup> FWS-87 recalled several incidents of that kind. She recalled one incident in which FWS-75 was amongst the women who had to undress, though she placed the incident in Kovac's apartment,<sup>592</sup> whereas FWS-75 had tied the incident to the apartment in Masala.<sup>593</sup>

197. FWS-87 further recalled witness A.S. as being one of the women who were subjected to this treatment,<sup>594</sup> while FWS-75 did not mention A.S.<sup>595</sup> A.S. herself recalled such an incident, too, but neither could put a certain date to it nor remember if FWS-75 was amongst the women involved.<sup>596</sup>

(iii) Defence evidence related to the accused Dragoljub Kunarac

198. The alibi defence of the accused Dragoljub Kunarac described above also covers the allegations involving FWS-75.

(iv) Defence evidence related to the accused Radomir Kova-

199. The Defence argued that, apart from FWS-75's statement, there was no evidence that the accused Radomir Kova- took part in the attack on the villages of Trosanj and

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<sup>589</sup> FWS-75, par 178; FWS-87, par 68; A.S., par 210.

<sup>590</sup> See par 68.

<sup>591</sup> FWS-87, par 72; A.S., par 211.

<sup>592</sup> See par 70.

<sup>593</sup> See par 187.

<sup>594</sup> See par 70.

<sup>595</sup> See par 187.

<sup>596</sup> See par 211.

Mjesaja on 3 July 1992. The Defence claimed that, from 25 June 1992 onwards and for a period of ten days, Radomir Kovač was on sick leave.

200. Several Defence witnesses stated that they saw or heard that only two girls, namely FWS-87 and A.S., were living in Radomir Kovač's apartment. The Defence does not contest, however, that FWS-75 and A.B. spent some time in Radomir Kovač's apartment, but claims that their stay was extremely brief.

201. Witness DK said that she went to Radomir Kovač's apartment a couple of times during the conflict. She said that two girls resided with him, FWS-87 and another girl, A.S.<sup>597</sup> The witness first saw the girls towards the end of the summer of 1992, when Kovač moved to this apartment in the Lepa Brena Block; she saw them again later.<sup>598</sup> One girl, whom Radomir Kovač introduced as his girlfriend, was tall with dark-brown hair, with a build similar to the witness; the other girl was shorter, more petite, had blonde hair with a short haircut and light coloured eyes.<sup>599</sup> Apart from those two, she said she did not know of any other girl who stayed in this apartment. However, she said that she gathered from her conversation with the two girls that another girl had come to visit from time to time.<sup>600</sup>

202. Witness DH, who testified that she went to Radomir Kovač's apartment several times to bring some food, told the court that she knew that FWS-87 was living with Radomir Kovač but she never heard of any other girl living there too.<sup>601</sup> Witness DO said that Kovač told him that he was living with his girlfriend and another girl. Kovač had told the witness that he could not separate the two of them.<sup>602</sup> This witness never actually went to Kovač's apartment while those women were there, but had met them in a café and described what they looked like.<sup>603</sup>

203. Finally, witness DV declared that she went to Radomir Kovač's apartment in mid-December, after Kovač had been wounded. She actually went there twice. She said that she saw FWS-87 on the first occasion, but that she did not see her on the second visit.<sup>604</sup> The

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<sup>597</sup> T 5567.

<sup>598</sup> T 5568 and 5604.

<sup>599</sup> T 5568.

<sup>600</sup> T 5582-5583.

<sup>601</sup> T 5732.

<sup>602</sup> T 5910.

<sup>603</sup> T 5944-5945.

<sup>604</sup> T 5772-5773.

witness first stated that she also saw another girl at the apartment, but later seemed to retract this statement.<sup>605</sup>

204. The Defence further argued that FWS-75's statement that she was brought back at some point to Radomir Kova-'s apartment and then sold together with A.B. is not credible either. The Defence based its conclusion on the fact that FWS-75 recalled an event which happened the day before they were allegedly sold, an event – namely, being walked naked through town and then forced to stand naked on a table while Kova- was watching - which, according to the Defence, FWS-87 and A.S. could not remember. According to the Defence, the event during which the girls allegedly had to walk through town naked could not have taken place on 24 or 25 December since the accused Kova- was wounded on 24 December, admitted in hospital the next day and discharged on 29 December. This is based on a letter of discharge regarding Kova- issued by the Regional Medical Centre, Fo-a, dated 11 January 1993.<sup>606</sup> The letter states that the accused Radomir Kova- was wounded on 24 December 1992, admitted to the hospital on 25 December and released on 29 December. In addition, the Defence introduced Ex D111a, a certificate issued by the Military Post 7141 Foca on 2 September 1993 (Number 05-1/553) signed for the Commander, Marko Kova-, stating that Kova- had been injured in combat and sent to Fo-a for treatment. Witness DH claimed that Kova- had been wounded sometime after Saint Nikolas Day, possibly on 24 December 1992, that he spent a few days in hospital and that he was released a day or two before the new year.<sup>607</sup> The witness claimed that he went to see Kova- at the hospital.<sup>608</sup> Witness DV stated that she went to his apartment sometime in mid-December after he had been wounded.<sup>609</sup>

(c) A.S.

(i) Testimony of A.S.

205. A.S., who was about 19 years old at the time of the events and who is the daughter of FWS-152,<sup>610</sup> recalls seeing FWS-87, FWS-75, A.B., D.B. and J.G. at Karaman's

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<sup>605</sup> See T 5772, 5827 and 5867.

<sup>606</sup> Defence Ex D110a.

<sup>607</sup> T 5717.

<sup>608</sup> T 5717.

<sup>609</sup> T 5772.

<sup>610</sup> T 1983.

house.<sup>611</sup> A.S. lived a very short distance from that house before the war and identified it from a photograph in court.<sup>612</sup> A.S. did not remember anybody named “@aga” or Dragoljub Kunarac at the house at all.<sup>613</sup>

206. A.S. was continuously raped while she lived at the house. She had to perform household duties and was not free to go where she wanted to.<sup>614</sup>

207. Witness A.S. testified that after she and other women from her village, Miljevina, had been ordered to vacate their houses and had been transported to Partizan sometime in mid-August, she spent about one to three months in Partizan itself; she was not able to be more specific about the time. From there, she, FWS-87 and probably A.B. were taken by DP 1 to an apartment, where he introduced them to two soldiers who they were told they had to stay with. She did not recall whether FWS-75 was also taken on that occasion, and when precisely A.B. arrived. The two men, “Jagos” and “Klanfa”, took them to an apartment in the Lepa Brena building, which she identified from a Prosecution photo.<sup>615</sup>

208. A.S. stayed for about a month or two in Radomir Kova~’s apartment and saw him on an almost daily basis.<sup>616</sup> She would sleep in one room with Jagos Kosti}, while Radomir Kova~ slept with FWS-87 in another room.<sup>617</sup>

209. A.S. recounted before the Trial Chamber that on their first day at the apartment, Jagos Kosti} forced her to go out on the town with him and to take his arm while doing so. She was taken to a café and then returned to the apartment; in the meantime FWS-87 had obviously been raped by Radomir Kova~, as FWS-87 herself confirmed to her later.<sup>618</sup> A.S. herself was also raped by Jagos Kosti} on the first day.<sup>619</sup>

210. A.S. stayed in Radomir Kova~’s apartment for about a month or two. She had the impression that Kova~ had control over what happened in the apartment. During her stay she would sleep in one room with Jagos Kosti}, while FWS-87 would sleep in the same

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<sup>611</sup> T 1998.

<sup>612</sup> T 1996-1997.

<sup>613</sup> T 2003.

<sup>614</sup> T 1999-2002.

<sup>615</sup> T 1990, T 2002-2007, and identifying Lepa Brena on Ex P11, photograph 7401.

<sup>616</sup> T 2011.

<sup>617</sup> T 2015.

<sup>618</sup> T 2009-2011.

<sup>619</sup> T 2011.

room as Kova~; she could hear when he raped FWS-87.<sup>620</sup> Jagos Kostić} would rape her anytime he wanted, orally and vaginally, and she had no choice but to comply with his demands; he would also sometimes beat her and once threatened to cut her throat.<sup>621</sup> Both women had to obey every command, because the two men were armed at all times with knives, rifles or pistols. The apartment was locked and there was no access to the outside world.<sup>622</sup> The women had to do household work like cleaning the apartment and the men's clothes, as well as serving them food and drinks.<sup>623</sup>

211. Witness A.S. recalled one incident, which she could not tie to a certain date, where she, FWS-87 and A.B. were ordered to strip by Radomir Kova~ and Jagos Kostić}, and forced to dance. She was not sure whether there were other soldiers present, nor if FWS-75 was there as well.<sup>624</sup>

212. Radomir Kova~ was not present all the time when she was raped, but he certainly knew what was happening to her.<sup>625</sup> Radomir Kova~ never raped her himself.<sup>626</sup>

213. After a month she and FWS-87 were taken away by a certain "Misko" and another man, both of whom were from Montenegro. She later learnt that they had been sold for 500 Deutschmarks each and a truckload of washing powder. The men who had bought them mocked them for having been bought at such a price. They were taken first to Niksic and then to Podgorica.<sup>627</sup>

(ii) Supporting evidence

214. FWS-87 testified that she was taken to the apartment of Radomir Kovac together with A.S., FWS-75 and A.B.<sup>628</sup> FWS-87 further described that A.S. would be raped by Jagos Kostić} while FWS-87 herself would be raped by Radomir Kovac. FWS-87 also confirmed that the women had to do household chores during their stay in the apartment and that they were locked up in the apartment without any contact to the outside world.<sup>629</sup>

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<sup>620</sup> T 2019.

<sup>621</sup> T 2018.

<sup>622</sup> T 2011-2017 and T 2022.

<sup>623</sup> T 2022.

<sup>624</sup> T 2019-2020.

<sup>625</sup> T 2017.

<sup>626</sup> T 2019.

<sup>627</sup> T 2024.

<sup>628</sup> See par 66.

<sup>629</sup> See par 68.

FWS-87's testimony, also supports A.S.'s statement that the two women were sold together by Radomir Kovac for 500 Deutschmarks each to two Montenegrin soldiers and were subsequently taken to Niksic and Podgorica in Montenegro.<sup>630</sup>

(d) D.B.

(i) Testimony of D.B.

215. D.B. was about 19 years old when the events occurred. She is the sister of FWS-87. Before the war she lived in the village of Trosanj.<sup>631</sup> Her village was attacked in the early morning of 3 July 1992 when she was sleeping in the woods above the village.<sup>632</sup> After D.B. was captured in the forest, she was taken to Buk Bijela.<sup>633</sup> From there, she was transported to Foca High School together, amongst others, with her mother and her sister FWS-87.<sup>634</sup> D.B. stayed in Foca High School for about 10 to 15 days.<sup>635</sup> She recalled having seen soldiers taking girls out of the classroom there. D.B. testified that FWS-87, FWS-75, FWS-50 and FWS-88 were taken out this way.<sup>636</sup> After these 10 to 15 days at Foca High School, D.B. was taken to Partizan.<sup>637</sup>

216. D.B. recalled being taken away from Partizan about 10 days after her arrival there (towards the end of July), together with FWS-75, by the accused Dragoljub Kunarac, whom she heard being addressed by other soldiers as "@aga". She later learnt his real name when he introduced himself to her.<sup>638</sup> With him was "Gaga", Dragomir Vukovi}.<sup>639</sup> They came by Partizan at around 8 pm with a red Lada, which was being driven by the accused Kunarac.<sup>640</sup> The two of them were taken to the house in Ulica Osmana \ikica no 16, which she recognised in the Prosecution photographs.

217. Upon their arrival at Ulica Osmana \ikica no 16, FWS-75 and D.B were taken straight upstairs, where about 10 other soldiers were already waiting.<sup>641</sup> D.B also got the

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<sup>630</sup> See par 75.

<sup>631</sup> T 3769.

<sup>632</sup> T 3770-3771.

<sup>633</sup> T 3774.

<sup>634</sup> T 3782.

<sup>635</sup> T 3784.

<sup>636</sup> T 3787.

<sup>637</sup> T 3790.

<sup>638</sup> T 3795.

<sup>639</sup> T 3795-3797.

<sup>640</sup> T 3797 and T 3799.

<sup>641</sup> T 3801.

impression that “@aga” and “Gaga” were in charge, and she was told by one soldier that the accused Dragoljub Kunarac was in fact their commander. Some of the soldiers had Montenegrin accents, and she remembered the names of some of them, namely “Tolja” and Jure,<sup>642</sup> although it appears that she learned the latter’s name later on from FWS-75, who knew him from before the war.<sup>643</sup>

218. D.B. further testified that she was separated from FWS-75 and taken to a corner room on the left side of the house, that Jure followed her into the room, undressed her and raped her vaginally.<sup>644</sup> Then “Gaga” entered the room and raped her, too. Finally, a boy of 15 or 16 years of age came in and raped her as well.<sup>645</sup>

219. After these events, “Gaga” told her to have a shower because his commander was coming, and he threatened to kill her if she did not satisfy the commander’s desires. He repeated this when the accused Dragoljub Kunarac walked in.<sup>646</sup> D.B. took off the trousers of the accused, kissed him all over the body, and then had vaginal intercourse with the accused. D.B. said she felt terribly humiliated because she had to take an active part in the events,<sup>647</sup> which she did out of fear because of “Gaga’s” threats earlier on; she had the impression that the accused knew that she was not acting of her own free will, but admitted after a question by Defence counsel that she was not sure if there would have been intercourse, had it not been for her taking some kind of initiative.<sup>648</sup> After some time, “Gaga” returned to the room and asked the accused whether he was satisfied, addressing him as “commander”, to which the latter did not reply.<sup>649</sup> Both FWS-75 and D.B. were then returned to Partizan. FWS-75 appeared terrified and was barely able to walk, but apparently did not tell D.B. what had happened to her.<sup>650</sup>

220. D.B. testified that on the day when the Alad`a mosque was blown up, she was again taken to the house in Ulica Osmana \ikica no 16. She hesitated for a while in her testimony whether it was 1 or 2 August 1992, but finally thought that it actually happened

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<sup>642</sup> T 3802.

<sup>643</sup> T 3802.

<sup>644</sup> T 3802.

<sup>645</sup> T 3803.

<sup>646</sup> T 3804-3805.

<sup>647</sup> T 3807-3808.

<sup>648</sup> T 3807-3808 and T 3876.

<sup>649</sup> T 3807.

<sup>650</sup> T 3809.

on 2 August 1992.<sup>651</sup> Together with her were FWS-87, FWS-75 and (probably) FWS-50. They were taken away in a red Lada by Dragoljub Kunarac and "Gaga"; some other soldiers who had come with Dragoljub Kunarac to Partizan did not return with them.<sup>652</sup>

221. D.B. also recounted the previous visit of a female who introduced herself as a journalist who worked for the TV in Bosnia and Herzegovina, and whom D.B. told about what happened to the women in Partizan, including that she had been raped by the accused Dragoljub Kunarac. This conversation made the journalist angry and nervous and, in answer to a specific question of the Prosecution, D.B. stated that she later heard soldiers say that the accused Kunarac had an affair with this woman. On the same day, Kunarac came to Partizan and left with the journalist.<sup>653</sup>

222. When they arrived at Ulica Osmana \ikica no 16, approximately 10 soldiers were already waiting there. She and FWS-75 had to prepare dinner for them. When the explosion occurred, windows in the house were shattered. Some soldiers went out and when they came back reported that the Alad`a mosque had been destroyed.<sup>654</sup>

223. After the explosion, she was taken to another room on the right side of the house by a certain "Jure" and raped by him vaginally.<sup>655</sup> She stayed with him for the rest of the night. She did not see the accused Dragoljub Kunarac in the house later that night, only before the explosion when he came to the kitchen and stayed for about 10 minutes before leaving. In the morning, there were only a few soldiers, FWS-75 and FWS-87 present.<sup>656</sup>

224. Around lunchtime, the accused Dragoljub Kunarac returned with the red Lada. The witness, FWS-87 and FWS-75 were put in the car, and driven by Kunarac and another soldier, whose name she did not remember, to a restaurant in Miljevina. There, DP 3 was already waiting together with some soldiers whom the three girls were told to sit with. Afterwards she was taken to a house in Miljevina.<sup>657</sup>

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<sup>651</sup> T 3809-3810 and T 3877.

<sup>652</sup> T 3810-3811.

<sup>653</sup> T 3823-3826.

<sup>654</sup> T 3810-3812.

<sup>655</sup> T 3813.

<sup>656</sup> T 3813-3814.

<sup>657</sup> T 3815-3817.

225. D.B. recalled that she was brought to the house in Miljevina<sup>658</sup> by a certain "Misko". She knew the daughter of the house's previous owner from school.<sup>659</sup> When she arrived, there were other girls standing in front of the house, who later told her that "@aga" came to the house as well, but she did not see him then.<sup>660</sup> As she later also learned, some soldiers stayed in the house permanently: Radovan Stankovi}, who told her his name, Nedzo Samardzi} and Nikola Brcic. DP 3 came to the house from time to time.<sup>661</sup> Upon her arrival, each soldier took one girl exclusively for himself. The witness herself was selected by Radovan Stankovic, who raped her constantly during her stay in the house.<sup>662</sup> The women could not leave the house and had no choice or control over their fate.<sup>663</sup>

226. D.B. testified that she saw Dragoljub Kunarac at the house at a later stage, when he allegedly came to visit the girls. He sat in the living room with them and talked with them. She remembers that his arm was bandaged and that someone among the soldiers told her that he had had a car accident. She did not see him taking a woman into a room, but confirmed that she saw him with her sister, FWS-87, in the living room.<sup>664</sup> In her testimony in court she did not remember the exact date when this happened, but she thought it was about a month after she had been brought to the house in Miljevina, ie, after 3 August 1992.<sup>665</sup>

227. D.B. did not know Dragoljub Kunarac from before the war, but she heard other soldiers addressing him as "@aga". D.B. said he was wearing a camouflage uniform and was armed the first time she saw him.

228. D.B. was taken away from Karaman's house by Radovan Stankovi} and brought to his apartment in the Lepa Brena block, where she stayed for about 15 days, when on 3 November 1992 Stankovi} helped her across the border and she was able to take a bus to Brod.<sup>666</sup> During her time in the apartment she did not see FWS-75, A.S. or FWS-87.<sup>667</sup> She

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<sup>658</sup> Which she identified on Ex P11, photograph 7355 - T 3818.

<sup>659</sup> T 3818.

<sup>660</sup> T 3818-3820.

<sup>661</sup> T 3826.

<sup>662</sup> T 3830-3832.

<sup>663</sup> T 3832-3833.

<sup>664</sup> T 3833-3835.

<sup>665</sup> T 3826.

<sup>666</sup> T 3836-3838.

<sup>667</sup> T 3837.

agreed under cross-examination by the Defence that she felt protected by Stankovi}, but only insofar as she was safe from being raped by other soldiers, too.<sup>668</sup>

(ii) Supporting evidence

229. The description by FWS-75 matches the description given by D.B. regarding the incident when they taken together to Ulica Osmana Dikica no 16 by Dragoljub Kunarac.<sup>669</sup> FWS-75's testimony could not confirm, however, the rapes inflicted upon D.B. during the night at the house since she herself was in a different room, being gang-raped by a group of soldiers.<sup>670</sup>

(iii) Defence evidence

230. Kunarac testified that he went to the house in Ulica Osmana \ikica no 16 on 3 August 1992, and that he went in one of the rooms upstairs. After 15-20 minutes, D.B. and "Gaga" entered the room. Dragoljub Kunarac told D.B. to sit down on the couch but instead he said that she sat next to him on the bed.<sup>671</sup> D.B. told him what had happened to her during the previous month, her rapes and mistreatments, and that she was with her sister at Partizan.<sup>672</sup>

231. The conversation allegedly continued for 1 ½-2 hours. She then fell on him and put her head on his chest and started kissing him. Dragoljub Kunarac said that he felt very confused<sup>673</sup> and that he tried to repel her, but to no avail. Dragoljub Kunarac insisted, however, that he did nothing to compel her to make such advances. He said the following: "I had sexg against my will ?...g without having a desire for sex";<sup>674</sup> and further, "I cannot say that I was raped. She did not use any kind of force but she did everything".<sup>675</sup>

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<sup>668</sup> T 3892 and T 3896.

<sup>669</sup> See par 165.

<sup>670</sup> See par 166.

<sup>671</sup> T 4539.

<sup>672</sup> T 4540.

<sup>673</sup> T 4541.

<sup>674</sup> T 4542.

<sup>675</sup> T 4543.

232. Dragoljub Kunarac added that she took the initiative, that she unbuttoned his trousers and initiated the intercourse.<sup>676</sup> Dragoljub Kunarac said that he did not understand at the time the reasons for her behaviour.<sup>677</sup>

233. Dragoljub Kunarac claimed that, because he later learnt why she behaved in such a way, he had a guilty conscience and that is why he volunteered to give interviews to the Prosecution after he surrendered.

234. Dragoljub Kunarac insisted that, at the time, he did not know that D.B. had been threatened by "Gaga" or anyone else and that he only learnt that later on 13 August,<sup>678</sup> when he had a discussion with "Gaga" about what FWS-191 had told him.<sup>679</sup> On that occasion, "Gaga" admitted that he was to blame for D.B.'s behaviour<sup>680</sup> and that he had told her that she should please Kunarac and deflect him from trying to find out who was responsible for the rapes. According to Kunarac, "Gaga" wanted to protect Kunarac from finding out who was responsible. Dragoljub Kunarac said that "Gaga" had gone alone to Partizan to fetch D.B. and FWS-75 to free them so as to avoid any altercation with those responsible for their detention. When he learnt that they were in Miljevina, "Gaga" allegedly decided to go there and get them but was wounded in the event. Kunarac said that he talked to "Gaga" again on 13 August, who once again took the blame for all that happened.<sup>681</sup>

(e) FWS-50

(i) Testimony of FWS-50

235. FWS-50 was about 16 years old when the events occurred. Her mother is FWS-51, her father is FWS-52. FWS-62 is FWS-50's grandmother.<sup>682</sup> Before the war, FWS-50 lived in the village of Mjesaja in the Foca municipality.<sup>683</sup> At the beginning of May 1992, FWS-50 and her family began to live in the woods because they were afraid they might be burned in their home, which had started to happen in surrounding villages.<sup>684</sup> When Mjesaja was attacked in the early morning on the 3 July 1992, she was in the shelter in the

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<sup>676</sup> T 4544.

<sup>677</sup> T 4543.

<sup>678</sup> T 4721.

<sup>679</sup> T 4571.

<sup>680</sup> T 4571.

<sup>681</sup> T 4721.

<sup>682</sup> T 1231.

<sup>683</sup> T 1233.

woods.<sup>685</sup> FWS-50 was captured on 5 July in the woods with a group of people, amongst others, her mother, two brothers and her sister.<sup>686</sup> She was then taken to Buk Bijela with a group of women and children and two elderly men.<sup>687</sup>

236. At Buk Bijela, she was raped orally by Zoran Vukovi}.<sup>688</sup> This incident was not mentioned by the witness before and consequently was not charged in the Indictment before the Trial Chamber. The Prosecution chose not to amend the Indictment against the accused Zoran Vukovi}. The Trial Chamber does not base a conviction on this incident.

237. FWS-50 testified that on 5 July 1992 the group of captured civilians she was with was taken from Buk Bijela to Fo-a High School.<sup>689</sup> On her second day at Fo-a High School soldiers came in and took about eight women, including herself, D.B., FWS-87, FWS-75, FWS-95 and FWS-88 and a woman who had the same name as her own mother, to another room adjacent to the main room in which they generally stayed. In that adjacent room each girl was picked by a soldier. One armed soldier told the witness to follow him and took her to yet another room, where she was ordered to undress and lie down. He raped her, whilst swearing at her. Afterwards she was brought back to the main room. She was not taken out again while at Fo-a High School, although she saw other girls being taken out frequently.<sup>690</sup>

238. The witness did not mention any names of the men who raped the women.

239. FWS-50 recalled that she was taken to Partizan about 11 days after she had been brought to Fo-a High School on 5 or 6 July 1992.<sup>691</sup> She was taken out from there by the accused Zoran Vukovi}, whom she already knew from Buk Bijela, and another soldier, both of whom were looking for her about two days after her arrival. She tried to hide in the bathroom, but her mother came to get her because she was afraid of what might happen to the other detainees if she did not come out. Vukovi} took her and FWS-87 to an abandoned

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<sup>684</sup> T 1235.

<sup>685</sup> T 1236.

<sup>686</sup> T 1237-1238.

<sup>687</sup> T 1241.

<sup>688</sup> T 1242-1244 and T 1262-1263.

<sup>689</sup> T 1245.

<sup>690</sup> T 1249-1254.

<sup>691</sup> T 1256.

apartment, where Vukovi} took her to a room and raped her. She did not mention whether FWS-87 was raped by the other soldier at that time.<sup>692</sup>

240. FWS-50 testified that during the second rape, Zoran Vukovi} made a comment about his daughter being of the same age than FWS-50.<sup>693</sup> She said she might have seen him before the war, but could not be sure that she knew him.<sup>694</sup> She was not sure either whether she knew his name before the war, but she heard it several times during the war.<sup>695</sup>

241. FWS-50 testified that on 2 August 1992 she was taken from Partizan to a house in the Alad`a neighbourhood, together with FWS-87, FWS-75 and D.B. She did not mention that the accused Dragoljub Kunarac took her there. According to her, when they arrived there were only soldiers present, no other women or girls.<sup>696</sup> Her first encounter with the accused Dragoljub Kunarac took place at Ulica Osmana \ikica no 16 on 2 August 1992.<sup>697</sup> She saw him again at Partizan when he came to pick up girls.<sup>698</sup>

242. In the house, the accused Dragoljub Kunarac took her away from the others and into another room, where he raped her on a sofa. FWS-50 described him as having been very forceful on that occasion. The Indictment does not charge the accused Dragoljub Kunarac with this particular act of rape. Consequently, the Trial Chamber does not base a conviction on this incident. When Kunarac was finished with her, he took her back to the main room where all the other soldiers were sitting.<sup>699</sup>

243. FWS-50 recounted being raped again on the same night in a workshop attached to the house, by an old Montenegrin soldier who wielded a knife and threatened to draw a cross on her back and to baptise her. FWS-50 said that he raped her "in a beast-like manner".<sup>700</sup>

244. She was returned to Partizan that night, while the other girls stayed at the house.<sup>701</sup>

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<sup>692</sup> T 1262-1263.

<sup>693</sup> T 1263.

<sup>694</sup> T 1242.

<sup>695</sup> T 1242.

<sup>696</sup> T 1272-1273.

<sup>697</sup> T 1274.

<sup>698</sup> T 1283.

<sup>699</sup> T 1274.

<sup>700</sup> T 1277-1278.

<sup>701</sup> T 1278.

(ii) Supporting evidence

245. FWS-87 testified that FWS-50 was amongst the women who were called out and raped during the incident at Foca High School, although neither FWS-75 nor FWS-95 mentioned FWS-50 in this context.<sup>702</sup>

246. FWS-87 was not able to recall an incident described by FWS-50 during which the two women were taken out by Zoran Vukovic to an abandoned apartment where FWS-50 subsequently was raped by the accused Vukovic. FWS-87 recalled seeing Zoran Vukovic only twice: once when she was raped by him at Foca High School and later when he came to Radomir Kovac's apartment.<sup>703</sup>

247. FWS-87 and FWS-75 confirmed that FWS-50 was amongst the women who were taken from Partizan to a house in the Alad' a neighbourhood.<sup>704</sup> D.B. testified that FWS-50 probably was amongst these women.<sup>705</sup>

(iii) Defence evidence

248. Concerning the events described in paragraph 7.11 of Indictment IT-96-23/1 in which Zoran Vukovi} is accused of having taken out FWS-87 together with FWS-50 from Partizan and then of having raped the latter, the Defence emphasised that, contrary to what is alleged in the Indictment, FWS-87 could not remember the accused Zoran Vukovi} with respect to this specific event or, for that matter, any event apart from the one described in paragraph 6.6 of the Indictment. The Defence added that FWS-50, the other alleged victim, did not mention FWS-87 in her recounting of this instance because, the Defence suggested, she was aware of the fact that FWS-87 could not remember being part of it.<sup>706</sup> Furthermore, the Defence contended that FWS-50's recounting of the events before the Trial Chamber were "totally different ?...g" the events described in paragraph 7.11 of the Indictment.

249. The Defence further contended that an injury incurred by the accused Zoran Vukovi} on 15 June 1992 rendered him temporarily impotent for a period of "at least three

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<sup>702</sup> FWS-87, par 57; FWS-75, par 162; FWS-95, par 310.

<sup>703</sup> See par 58.

<sup>704</sup> FWS-87, par 60; FWS-75 par 169.

<sup>705</sup> See par 220.

<sup>706</sup> Defence Final Trial Brief, pp 279-280.

weeks" which made him incapable of having an erection. Consequently, the Defence concluded, he could not have raped anyone during that period of time.

250. Several witnesses testified about the accident or the injury allegedly sustained by Zoran Vukovi}. Witnesses DV and DP said that the accident probably took place in June 1992.<sup>707</sup> Witness DV said that she brought Vukovi} some medicine. However, she conceded that she was unable to assess the long-term effect of such an injury.<sup>708</sup> The witness, a nurse, added that she did not think that these were serious injuries and that Vukovi} might have exaggerated it in order not to be sent to the front.<sup>709</sup> This witness also said that the log book kept at the brigade level concerning the injuries sustained by its members did not contain any reference as to the nature of Vukovi}'s injury.<sup>710</sup> Witness DP claimed that he saw Vukovi}'s injury and that he brought Vukovi} to the hospital that day.<sup>711</sup>

251. Professor Dušan Dunjic, medical expert for the Defence, stated that a rupture of the testis can have lasting effect for 1-2 months and can make it "virtually impossible" for a man to have sexual intercourse.<sup>712</sup> He noted, however, that such an injury would not stop the desire to have sexual intercourse,<sup>713</sup> but it would make it "impossible to reach an erection".

252. Doctor Yvan de Grave, the Registry's appointed medical expert, and Professor Dunjic were later called to give their expert opinion in regard of Zoran Vukovi}'s injury.<sup>714</sup> Doctor de Grave stated that an epididymical cyst such as the one found in Vukovi}'s scrotum was a common feature in about a third of the male population.<sup>715</sup> He said that such a cyst would generally be caused by a disease or could be congenital. He also agreed that it could be the consequence of a traumatic event such as an accident.<sup>716</sup> Considering the case history as described by the accused Zoran Vukovi} and his examination of Vukovi}, Doctor de Grave concluded the following: "Either there is a mistake in the case history or

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<sup>707</sup> Witness DV, T 5786; Witness DP, T 5968-5970 and 5974.

<sup>708</sup> T 5789-5790.

<sup>709</sup> T 5866.

<sup>710</sup> T 5844-5845.

<sup>711</sup> T 5977-5978.

<sup>712</sup> T 5436.

<sup>713</sup> T 5446.

<sup>714</sup> The hearing took place on Friday, 10 Nov 2000.

<sup>715</sup> T 6158.

<sup>716</sup> T 6161 and 6163.

something else is wrong, but the two things don't go together'.<sup>717</sup> He added that if the cyst had been caused by a trauma of the sort and severity described by the accused Vukovi} he would have found other post-traumatic signs of the accident on the accused's testicles and scrotum, which in this case did not exist.<sup>718</sup> The doctor also acknowledged that temporary impotence could result from such a traumatic experience but added that it would not last longer than 3 days and that such impotence could not result from the trauma as described in the medical history.<sup>719</sup>

253. Dušan Dunjic also stated that an epididymical cyst could be congenital or form as a result of a disease or a trauma. He said that each type of cyst had its own characteristics and, depending on the way they occur and where they are localised, they give a certain clinical picture.<sup>720</sup> According to Professor Dunjic, the accident as described by Zoran Vukovi} could have given rise to such a cyst<sup>721</sup> and that, at a minimum, such a causal relationship could not be ruled out. He put forward the four elements which led him to such a conclusion: the very presence of a epididymical cyst, the increased painful sensitivity of the right testicle as described by the accused during examination, the description by the accused of his fainting following the accident and, more generally, the case history.<sup>722</sup> Professor Dunjic stated that on the basis of the information available to him, he could not make definitive conclusions as to whether temporary impotence could have resulted from such an accident. In any case, he said that such a cyst could in theory lead to temporary impotence.<sup>723</sup> In any case, he said that because of the nature of the injury, it would make it extremely painful for someone to have an erection, despite the possibility that the desire might exist. Professor Dunjic conceded that both with respect to the case history and the increased sensitivity of the testicle, his conclusions were based on Zoran Vukovi}'s own statements and thus dependent on the truthfulness of the information he received from the patient.<sup>724</sup> With respect to the fainting, the doctor also conceded that someone witnessing a fainting of the kind described would likewise be able to describe the symptoms of this fainting.<sup>725</sup> Although he insisted that there was scientific evidence that such a cyst could be

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<sup>717</sup> T 6165.

<sup>718</sup> T 6162-6165.

<sup>719</sup> T 6172-6174 and 6177-6179.

<sup>720</sup> T 6188-6189.

<sup>721</sup> T 6198.

<sup>722</sup> T 6204-6205.

<sup>723</sup> T 6200-6202.

<sup>724</sup> T 6205-6207.

<sup>725</sup> T 6208-6209.

caused by a trauma, he conceded that he could not scientifically ascertain that the accident indeed happened.<sup>726</sup>

(f) FWS-191

(i) Testimony of FWS-191

254. Before the war, FWS-191, who is the daughter of FWS-192 and who was about 17 years old when the events occurred,<sup>727</sup> lived with her family in Gacko.<sup>728</sup> They left Gacko around 20 June and went first to Borac and, later, to Zelengora.<sup>729</sup> From Zelengora they fled through the woods in the direction of Konjic but were captured in the area of Ulog on 4 July 1992.<sup>730</sup>

255. FWS-191 stated that she was first taken to a school in Ulog and, after two or three days there, was brought to Kalinovik school on 7 July 1992, where about 130-140 Muslim civilians from Gacko were being held, among them her mother. She stayed there until 2 August 1992. On that day she was taken away from the school, together with about seven or eight other girls, among them J.G., FWS-186 and FWS-190, by soldiers in camouflage uniforms. She later learnt that the men who took her out were Dragoljub Kunarac, nicknamed "@aga", and "Gaga", also nicknamed "Montenegrin". When she asked one of the guards at the school to protect them, the latter said that he could not do anything because "@aga" was in overall control.<sup>731</sup>

256. In the car, "Gaga" and "@aga" sat in front, and all the girls in the back seats. They drove for about 10-15 minutes, passing through Kalinovik, and then were transferred on to a refrigerator truck, which eventually took them to Fo-a. They finally arrived in the Alad`a area, which the witness did not know at the time, but found out when talking to other women afterwards. When they arrived, there were soldiers waiting, but she did not remember if Dragoljub Kunarac was also present at that time. She had the impression that

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<sup>726</sup> T 6214-6215.

<sup>727</sup> T 3119.

<sup>728</sup> T 3119.

<sup>729</sup> T 3123.

<sup>730</sup> T 3126-3127.

<sup>731</sup> T 3144-3145.

the soldiers were Serbs or Montenegrins, and recalled the name of one of them, Jure Ivanovi}.<sup>732</sup>

257. About 30 minutes or an hour later, "@aga" came back with DP 6, and both were greeted with respect by the other soldiers, from which the witness concluded that "@aga" was in charge.<sup>733</sup> They were not mistreated in that house. "@aga" told FWS-191, FWS-186 and J.G. to get in the car again, and took them to Partizan. Dragoljub Kunarac got out of the car and spent some 5-10 minutes talking to one or two girls, after which he returned to the car.<sup>734</sup> From Partizan they drove to a house in Trnovace, which FWS-191 recalled was DP 6's house.<sup>735</sup>

258. "@aga" left for about 40 minutes or an hour and, when he returned, there were the three girls, Dragoljub Kunarac, DP 6 and "Gaga", present in the house. DP 6 told everyone where to sleep. J.G. went with "Gaga" up to the first floor, FWS-186 went to the second floor with DP 6. The girls obeyed any order they were given and did anything they were ordered to do.<sup>736</sup>

259. "@aga" came to the room in which she was and introduced himself to her. FWS-191 told him she was a virgin and Dragoljub Kunarac said that he would then be the first. He undressed and ordered her to do the same, which she did. He had put a bayonet on the table which frightened the witness very much. Kunarac tried to penetrate the vagina of FWS-191 but did not entirely succeed, because she was rigid with fear. They spent the rest of the night together in that room.<sup>737</sup>

260. FWS-186 told her that DP 6 had taken out a pistol and put it next to them, before he raped her. J.G. said that she had not been raped by "Gaga" because she had her period.<sup>738</sup>

261. When "@aga" told FWS-191 his name, he also showed her his tag with his name on it.<sup>739</sup> He boasted to the witness that before the war he went to France where he lived off the

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<sup>732</sup> T 3147-3153.

<sup>733</sup> T 3157.

<sup>734</sup> T 3156-3162. The witness recognised Partizan on Ex P11, photograph 7300.

<sup>735</sup> T 3164-3166.

<sup>736</sup> T 3166-3169.

<sup>737</sup> T 3170-3173.

<sup>738</sup> T 3174-3175.

<sup>739</sup> T 3140-3142.

looting of boutiques.<sup>740</sup> He also told that her he was a drug addict at some point. Before coming to Fo-a, he told her he had fought on the Croatian front. Before the war, he seems to have been employed in a pharmaceutical company.

262. She spent about 5-6 months in a house in Trnovace. During the first 1-1 ½ month, approximately, she was raped by "@aga". She described him in the following terms:<sup>741</sup> "Tall, thin, and his hair was not very short; it was longish. I think he had a rough face, big eyes. His hair was brown."

263. After having been taken away from the house in Trnovace by her future husband, she never spoke to "@aga" again, although on one occasion he asked her husband to see her, which she refused. However, she later saw him in the period after the war, as her children and his were going to the same school in Fo-a. The last time she saw him was just before he surrendered to the Tribunal.<sup>742</sup>

264. FWS-191 testified that "@aga" came to the house in Trnovace until the end of September. Each time he came he would rape her. He tried to rape her anally at one point but had to desist because it was too painful for the witness. She felt like she was his property. FWS-186 had to have sex with DP 6 whenever he was at the house and until the summer of 1993, when they had already left the house. FWS-191 was convinced that "@aga" was also aware of what was going on between DP 6 and FWS-186.<sup>743</sup>

265. Both girls were not free to go where they wanted to, although at some point they were given keys to the house. They were forced to use Serb names and to do household chores. They actually asked DP 6 to be allowed to stay in the house because they were very much afraid of being taken to Karaman's house and what might happen to them there.<sup>744</sup> At some stage FWS-191 was allowed to write a letter to her mother, FWS-192.<sup>745</sup>

266. The soldiers of DP 6 and Dragoljub Kunarac would come to the house. Dragoljub Kunarac admitted to her himself that he was the commander of a reconnaissance unit, but

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<sup>740</sup> T 3306.

<sup>741</sup> T 3141.

<sup>742</sup> T 3224.

<sup>743</sup> T 3178-3182.

<sup>744</sup> T 3181-3184.

<sup>745</sup> T 3188.

she had the impression that DP 6 outranked him, and that his unit was stronger than that of Dragoljub Kunarac.<sup>746</sup>

267. Other girls were brought into the house by “@aga” around the first half of August 1992, namely FWS-175 and MK (RK). Both of them were raped at the house in Trnovace. FWS-190<sup>747</sup> was brought there by DP 1.<sup>748</sup>

268. FWS-191 recalled that “@aga” had an accident, she thought with an armoured carrier, sometime in September 1992. He broke his arm and probably a rib. An acquaintance of Dragoljub Kunarac, a woman named Jadranka, came to the house and took her to the hospital to see “@aga”, and on that occasion he tried to rape her as well, but was stopped by DP 6 or Jadranka. Despite his injuries, he continued to rape her when he came back to the house. FWS-191 estimated that she was raped by Dragoljub Kunarac more than 20 times in the period from August 1992 to September 1992.<sup>749</sup>

269. She was also raped by DP 6 and another soldier called Zoran Nikoli}. The latter raped her twice, once when “@aga” was in the house, while DP 6 raped her once.<sup>750</sup> Other soldiers also attempted to rape her.<sup>751</sup>

270. After about two months, in late September, Dragoljub Kunarac went to Montenegro for 5 to 7 days. During that time her future husband took her and FWS-186 away and to an apartment in Fo-a where he hid her from Kunarac. Although Kunarac tried to find and contact her after that, he never succeeded in speaking to her. Although she could have been exchanged in Pale, she refused because she was pregnant and did not want to leave her husband; she had also heard that she would be forced to have an abortion were she to leave for Sarajevo. She left Trnovace in January 1993, and Fo-a on 23 April 1998.<sup>752</sup>

271. FWS-191 testified that she met Radomir Kova~, nicknamed “Klanfa”, on various occasions while in Fo-a. According to the witness, he was in “DP 2’s Unit”, and the witness had previously been a good friend of DP 2, the leader of that unit.<sup>753</sup> She also knew

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<sup>746</sup> T 3185-3187 and T 3271.

<sup>747</sup> T 3189-3197.

<sup>748</sup> T 3202-3203.

<sup>749</sup> T 3210-3213.

<sup>750</sup> T 3214-3215.

<sup>751</sup> T 3216-3217.

<sup>752</sup> T 3219-3227.

<sup>753</sup> T 3229.

that Radomir Kova- lived in the Brena apartment block. She went to his apartment to get her clothing that had been taken there in October 1992 when she was not with “@aga” anymore.<sup>754</sup> On that occasion, she saw three girls in Radomir Kovac’s apartment, including FWS-87. FWS-191 could not remember if there was a fourth girl.<sup>755</sup> She remembered that prior to this event Kovac once brought FWS-87 to the apartment of his aunt where FWS-191 stayed for a while with her future husband.<sup>756</sup> FWS-191 recalled that DP 1 told her that he had found FWS-87 under a bridge.<sup>757</sup> This event took place in approximately mid-October 1992.<sup>758</sup> In rebuttal, FWS-191 stated that she never was at café Leonardo with FWS-87 on their own and that it is inconceivable that FWS-87 or any Muslim girl could have moved around town freely; everybody knew about her situation.<sup>759</sup> FWS-191 added that despite the fact that she was married to a Serb, she, as a Muslim woman, would never go to a café on her own, let alone café Linea where soldiers would gather. FWS-191 recalled that she was too frightened to even walk alone in Foca because she did not feel safe; only towards the of 1993 did she feel secure enough to walk out alone.<sup>760</sup> She would go to the Brena building to visit FWS-190, who was living with DP 1 in the Brena block.<sup>761</sup> She also went once to Kova-’s apartment with DP 1.<sup>762</sup>

272. Witness FWS-191 knew Zoran Vukovi}.<sup>763</sup> She said he was also in DP 2’s Unit. She saw him frequently and talked to him. She knew his family, children and wife.<sup>764</sup> He was friendly with her.<sup>765</sup>

(ii) Supporting evidence

273. FWS-192, the mother of FWS-191, confirmed that on 2 August 1992 a soldier came to Kalinovik school and took away her daughter. She recalled having learnt from one of the guards that this man was called “Žaga”. FWS-192 further recalled having asked “Žaga”

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<sup>754</sup> T 3230. She recognised the Brena block on photograph 7401 of Ex P11, T 3231.

<sup>755</sup> T 6090.

<sup>756</sup> T 6081.

<sup>757</sup> T 6081.

<sup>758</sup> T 6087, 6103.

<sup>759</sup> T 6083.

<sup>760</sup> T 6085.

<sup>761</sup> T 3232.

<sup>762</sup> T 3233.

<sup>763</sup> T 3236. The witness said that he was not the Zoran Vukovi} referred to with respect to the house in Trnovace. It was another Zoran Vukovic, a young man who was about 25 or 26 years old at the time the events occurred, T 3217.

<sup>764</sup> T 3236.

<sup>765</sup> T 3237.

when she met him again where her daughter was and having heard him answer that FWS-191 was at his place and that he would not bring her back. FWS-192 recalled that she received the letter written by FWS-192 from "Žaga" and DP 6. FWS-192 further testified that she did not see her daughter again before 2 August 1994.<sup>766</sup>

274. FWS-186 recalled in her testimony that she was told by FWS-191 that FWS-191 had been raped by Dragoljub Kunarac during the same night that FWS-186 herself was raped by DP 6 in another room of the Trnovace house.<sup>767</sup> FWS-186 further confirmed that FWS-191 was raped subsequently by Dragoljub Kunarac for about one and a half to two months and that, once, she saw Kunarac with a plaster on his arm.<sup>768</sup>

275. FWS-190 testified that she saw Dragoljub Kunarac raping FWS-191 at Trnovace.<sup>769</sup>

276. FWS-175 testified that she noticed after her return to the house in Trnovace that FWS-191 was with "Žaga" whereas FWS-186 was with DP 6. She further stated that she could see from the expression on her face that FWS-191 was being raped during the time she stayed at the house.<sup>770</sup>

(iii) Defence evidence

277. During his testimony, the accused Dragoljub Kunarac said that he started monitoring Rogoj on 3 August 1992 in the afternoon at about 4.30 pm.<sup>771</sup> On 4 August he was on his way to Dobro Polje where he stayed until the morning of 8 August.<sup>772</sup> During that period, he said that he slept in the woods around Rogoj.<sup>773</sup> On 7 August in the evening, he was told to report to the commander of the brigade. In the early hours of the morning of the 8<sup>th</sup> he and his men started out for Fo-a and arrived in Kalinovik at about 7 am. There, he took a car at the Kalinovik SUP and left the car at the Foca SUP. Dragoljub Kunarac said that he dropped off his men in Alad'a and went on to the brigade headquarters where he arrived at 7.10 am.<sup>774</sup> He was then tasked to go to Papretna.<sup>775</sup> However, he said that he had an

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<sup>766</sup> See pars 358.

<sup>767</sup> See par 288.

<sup>768</sup> See par 290.

<sup>769</sup> See par 302.

<sup>770</sup> See pars 373-374.

<sup>771</sup> T 4554.

<sup>772</sup> T 4554.

<sup>773</sup> T 4554.

<sup>774</sup> T 4556.

<sup>775</sup> T 4557.

accident on his way, sometime around 7.30 am,<sup>776</sup> that he broke his ribs and was bruised and had to go to the hospital. Kunarac said that he left the hospital that very same day and went straight to his parents' house from where he went to a funeral where he saw DP 6.<sup>777</sup>

278. On the night of 9 August, Dragoljub Kunarac claimed that he went to the house in Trnovace with DP 6 and "Gaga" where FWS-191 and FWS-186 were staying.<sup>778</sup> It was also, he said, the first time that he met the men who, together with DP 6, allegedly raped those two girls.<sup>779</sup> Kunarac said that he slept there that night, alone. On the morning of 10 August, he talked to the girls. He said that they told him that DP 6 and "Gaga" had gone. They also recounted their stories to him and said that they had been brought there by "Gaga" and DP 6 on 2 August.<sup>780</sup> Kunarac said that he stayed in this house again between 10 and 11 August, in a room with FWS-191. Kunarac insisted, however, that nothing happened.<sup>781</sup>

279. "Gaga", DP 6 and the man who allegedly also raped FWS-191<sup>782</sup> had come back from Foca with a woman called Jadranka.<sup>783</sup> Kunarac said that after dinner, DP 6 had a heart attack,<sup>784</sup> and because the two other men had gone again, he had to go to the hospital to ask them to come back and take DP 6 as Dragoljub Kunarac could not carry him because of his broken ribs.

280. Dragoljub Kunarac claimed that he talked to FWS-191 about 4 or 5 times, as he claimed she was a good source of information about the situation in Zelengora, but that he never raped her. He said that, on 9 August, he had two broken ribs and was barely able to sit as a consequence.<sup>785</sup> He said that 9 August was the first time he saw her.<sup>786</sup> He continued to see her up to the last day even after she was married.

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<sup>776</sup> T 4557-4558.

<sup>777</sup> T 4559-4560.

<sup>778</sup> T 4561.

<sup>779</sup> T 4562.

<sup>780</sup> T 4562-4563.

<sup>781</sup> T 4564.

<sup>782</sup> His name appears on Ex D83.

<sup>783</sup> T 4568.

<sup>784</sup> T 4568.

<sup>785</sup> T 4758.

<sup>786</sup> T 4758.

281. The accused Dragoljub Kunarac also stated that when he went to Trnovace, only FWS-191 and FWS-186 were at the house; he did not see FWS-190<sup>787</sup> or any other girls who testified that they were there at the time. In particular, he said that he did not see FWS-190, contrary to her assertion that she came to the house with DP 1.<sup>788</sup> He did not see FWS-175 or RK either.<sup>789</sup>

282. Dragoljub Kunarac testified that on 14 August he went to see Dragan Gagovic at the SUP to report about what FWS-191 had told him; Kunarac claimed that he wanted to take FWS-191 and the rest of her family to his family in Tivat, Montenegro.<sup>790</sup> Dragan Gagovic accepted and gave him permits for both FWS-191 and FWS-186. When offered the possibility to leave for Montenegro, FWS-191 said that she had to ask her mother; so she wrote a letter addressed to her which Dragoljub Kunarac, together with DP 6, brought to her mother in Kalinovik school.<sup>791</sup> The authorities at the school said, however, that the mother could not leave because she was to be exchanged. But Kunarac had an opportunity to talk to her and told her how she could get hold of her daughter in Tivat by giving her his private number in Tivat. Kunarac said that the mother wrote a letter to her daughter, saying she had talked to Kunarac and that she would look for her under the Serbian name she had used in the letter. Defence Ex D86 is a newspaper interview given by the mother of FWS-191, mentioning the telephone number in question.

283. According to Dragoljub Kunarac, when he came back from Montenegro sometime in September 1992 to take FWS-191, a Serb soldier who would later become FWS-191's husband told him not to bother and that she was now with him.<sup>792</sup>

(g) FWS-186

(i) Testimony of FWS-186

284. At the beginning of the war in 1992, FWS-186 was about 16 ½ years old. FWS-185 is her mother.<sup>793</sup> Before the war, she lived in Gacko town but in May 1992 she went

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<sup>787</sup> T 4756.

<sup>788</sup> T 4756.

<sup>789</sup> Witness RK is sometimes referred to as MK.

<sup>790</sup> T 4581.

<sup>791</sup> T 4583.

<sup>792</sup> T 4593.

<sup>793</sup> T 2914.

back to her parents who lived in Ravne.<sup>794</sup> Her village was attacked on the 28<sup>th</sup> or 29<sup>th</sup> of June. She was with a group of 200 people, amongst them only 10 to 15 men, in the village of Ulog, when she tried to flee to Konjic.<sup>795</sup> After their surrender, the group was first taken to the school in Ulog where they stayed for one or two nights.<sup>796</sup> On 2 August 1992, all persons under the age of 55 years, including FWS-186, were transported to Kalinovik school whereas older people were released. FWS-185 was not released since she did not want to leave her family.<sup>797</sup>

285. FWS-186 testified that on 2 August 1992, the accused Dragoljub Kunarac and "Gaga" stormed into the Kalinovik school, where she was being held together with other women, and told her to follow them. She went into the hall with FWS-191, FWS-190 and J.G., all of whom were from Gacko.<sup>798</sup> J.G. was about 14 years old at that time.<sup>799</sup>

286. FWS-186 did not know the name of the accused Dragoljub Kunarac at the time, but she later learnt it during her time in the house in Trnovace.<sup>800</sup>

287. Together with three other girls from Kalinovik they were taken in the direction of Fo-a in a red Lada car, by Dragoljub Kunarac and DP 6. In Miljevina, they were transferred onto a refrigerator truck and ultimately brought to a house in Fo-a, where a number of soldiers were present. The witness did not remember whether Dragoljub Kunarac was there, when they arrived, but she stated that she believed he and DP 6 took them to the house in Trnovace later.<sup>801</sup> None of them was abused in Fo-a. After about one or two hours, the witness, FWS-191 and J.G. were taken to a house in Trnovace by Dragoljub Kunarac and DP 6 in a car. FWS-186 identified the house in Trnovace.<sup>802</sup> It appeared to her that DP 6 owned it.<sup>803</sup>

288. On the first evening in the house, the three of them were there with DP 6. They had to prepare food. Later, Dragoljub Kunarac and "Gaga" came at around 1 am or 2 am. DP 6

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<sup>794</sup> T 2915.

<sup>795</sup> T 2923.

<sup>796</sup> T 2923-2924.

<sup>797</sup> T 2924-2925.

<sup>798</sup> T 2930-2931.

<sup>799</sup> FWS-175, T 3591.

<sup>800</sup> T 2931.

<sup>801</sup> T 2933-2936 and T 2999.

<sup>802</sup> T 2936-2939, identifying Ex P210 at T 2940 and describing the layout of the house as well as the sleeping arrangements at T 2941-2942.

<sup>803</sup> T 2944.

told them in which room they would sleep. DP 6 came to the room to which FWS-186 had gone, locked the door from the inside and raped her. J.G. later told her that she had been raped by "Gaga", and FWS-191 said she had been raped by Dragoljub Kunarac.<sup>804</sup>

289. FWS-186 did not know Dragoljub Kunarac from before the war.<sup>805</sup> When he came to take her away from Kalinovik High School, it was the first time she had ever seen him.<sup>806</sup> She learnt his name at the house in Trnovace<sup>807</sup> but recalled that "@aga" only came to that house for 1 ½ to 2 months. She described him as "tall, dark, big eyes, skinny".<sup>808</sup> She would address him as "@aga".<sup>809</sup> She saw his photo in the press when he surrendered to the Tribunal and recognised him immediately.<sup>810</sup> She had not mentioned him in her first statement given on 26 November 1993,<sup>811</sup> a day after her exchange, because she wanted to protect FWS-191 and J.G..<sup>812</sup>

290. FWS-186 testified that she stayed at the house in Trnovace for about five months. During that time she was required to have sexual intercourse with DP 6 continuously, when he was not away in Montenegro or on the frontlines. FWS-191 was raped by Dragoljub Kunarac for about one and a half to two months. At some point she recalled seeing him with a plaster on his arm. J.G. stayed at the house only for a few days.<sup>813</sup> About a month after the departure of Dragoljub Kunarac from the house, Dragan Dzurovi} arrived to live in the house.<sup>814</sup>

291. During her stay, other soldiers would come to the house, which the witness thought were DP 6's and Dragoljub Kunarac's men. However, these soldiers were not allowed to touch the women.<sup>815</sup> She was not able to ascertain the relationship of rank between DP 6 and Dragoljub Kunarac.<sup>816</sup>

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<sup>804</sup> T 2945-2949.

<sup>805</sup> T 2931.

<sup>806</sup> T 2996.

<sup>807</sup> T 2931.

<sup>808</sup> T 2932.

<sup>809</sup> T 2945.

<sup>810</sup> T 2932.

<sup>811</sup> Ex P212.

<sup>812</sup> T 2965.

<sup>813</sup> T 2949 and T 2956-2957.

<sup>814</sup> T 2959.

<sup>815</sup> T 2958-2959.

<sup>816</sup> T 2961.

292. At a later stage, other women were brought to the house, namely FWS-175 and MK (also known as RK), but only stayed for 20 days.<sup>817</sup> At the request of FWS-186, FWS-190 was also brought there some time later, because they were good friends. FWS-190 stayed for about two days, and then was moved to Fo-a to stay with DP 1. FWS-190 told FWS-186 that she had been raped by "Vojvoda" while the two of them were separated.<sup>818</sup>

293. At the beginning of January 1993, FWS-186 and FWS-191 were taken to the apartment of DP 6 in Fo-a, where FWS-186 remained until she was exchanged at Sarajevo Airport on 25 November 1993. During that time she was raped once or twice by DP 6.<sup>819</sup> FWS-191 had in the meantime formed a relationship with Dragan Dzurovi}, whom she married eventually, and did not want to be exchanged.<sup>820</sup> FWS-186 could not remember having seen Radomir Kova- or Zoran Vukovi} in Trnovace.<sup>821</sup>

(ii) Supporting evidence

294. FWS-175 confirmed that FWS-186 was already at the house in Trnovace when she arrived together with RK (MK). She further noticed that FWS-186 was with DP 6. In addition, FWS-175 recalled that FWS-186 and FWS-191 were raped during the time she stayed at the house and explained that although she never saw the rapes themselves she could deduce from the expression on the faces of the girls what had happened.<sup>822</sup>

295. The evidence given by FWS-186 as to being moved with J.G and others from Kalinovik school to a house in Trnovace on 2 August 1992 by Dragoljub Kunarac and "Gaga", and the subsequent incidents is further supported by the testimonies of FWS-190 and FWS-191. FWS-191 confirmed that at the Trnovace house FWS-186 had to go to the second floor with DP 6.<sup>823</sup> She further recalled that FWS-186 had to have sex with DP 6 whenever he was at the house and until the summer of 1993. FWS-191 further recalled, as did FWS-186, that J.G had to go with "Gaga" to a room on the first floor.<sup>824</sup> As to the rape

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<sup>817</sup> T 2970.

<sup>818</sup> T 2971-2973.

<sup>819</sup> T 2974 and 2978.

<sup>820</sup> T 2974-2977.

<sup>821</sup> T 2976.

<sup>822</sup> See par 374.

<sup>823</sup> See par 258.

<sup>824</sup> See par 258.

of J.G., however, FWS-186 recalled that J.G. told her afterwards that she had not been raped by "Gaga" because she had her period.<sup>825</sup>

296. FWS-192, the mother of FWS-191, testified that she was present when DP 6 admitted to FWS-185, the mother of FWS-186, that her daughter was with him and told FWS-185 to give him clothes for her daughter.<sup>826</sup>

(h) FWS-190

(i) Testimony of FWS-190

297. FWS-190, who was about 16 years old when the war started,<sup>827</sup> testified that she was taken by car from Kalinovik school to Miljevina on 2 August 1992 by DP 3, the Samardzi} brothers and another soldier. Whether Dragoljub Kunarac or another girl were also in the car she did not fully remember, because of the state of shock she was in after having been raped. She thought that FWS-87 and D.B. were with her, and possibly FWS-75. In Miljevina, they were taken to a hotel and from there to Karaman's house. At the house two other girls were there, who left when they arrived. During the time of her stay, JB and J.G. were also present. The women were distributed among the soldiers present, who appeared to her to be the favourites of DP 3. She was given to Radovan Stankovi}, who did not mistreat her during her entire stay there. She first testified in court that she was there for about a month, but on cross-examination by Defence counsel conceded that it might have been as short as 7-10 days.<sup>828</sup>

298. She learnt only later that the men who took her away from Kalinovik school were actually "@aga's" men, when she got to know them. Among the persons who took them away was DP 7, whose name she learnt because he introduced himself later.<sup>829</sup>

299. They were taken in a car to Miljevina they changed to a refrigerator truck. DP 7 was with them in the car, but she did not remember any other soldier. When they were transferred to the truck, there were other soldiers present. After their arrival in the Alad`a area of Fo-a she was taken away immediately by DP 7 to another house, near a bus station,

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<sup>825</sup> See par 260.

<sup>826</sup> See par 357.

<sup>827</sup> T 3314.

<sup>828</sup> T 3352-3358 and 3416.

<sup>829</sup> T 3336-3339.

and raped there. When she returned to the first house, the other girls had already disappeared.<sup>830</sup>

300. The house she was brought back to appeared to her to be a base for “@aga’s” soldiers, and he appeared to be in control, as they would obey his orders.<sup>831</sup> When she returned, girls and women from Partizan had been brought into the house and were being raped. Among them were FWS-87 and D.B., possibly also FWS-50.<sup>832</sup> She herself was raped by a man called “Vojvoda”. During that time, the witness recalled that “@aga” was in the main room looking at weapons. She was not quite certain when she first saw him in the house on that day, but she thought it was during the morning and around noontime.<sup>833</sup> She had the impression that he must have been aware of what was going on in the house.<sup>834</sup>

301. On that same day she heard an explosion and saw that the Alad`a mosque had been blown up. DP 7 said that “@aga” had “done it again”.<sup>835</sup>

302. It appears that the witness first met “@aga” when he came to Kalinovik school with the journalist Gordana Draskovic, although it was not clear whether she already knew him at the time.<sup>836</sup> Another encounter with him took place at the house in Alad`a, which the witness described as a gathering place for Dragoljub Kunarac’s soldiers.<sup>837</sup> She was not sure that he was present as she arrived at the house, but saw him after she was brought back by DP 7 who had just raped her.<sup>838</sup> She saw him again after she had been taken out of Karaman’s house by DP 7. “@aga” and a female took her away from DP 7’s place. From there, he brought her to DP 1.<sup>839</sup> At Trnovace she saw Dragoljub Kunarac raping FWS-191.<sup>840</sup> She declared that she did not see him on TV when he was brought to The Hague.<sup>841</sup> However, in an earlier statement she had given to the Prosecution, she had said she saw “Dragan Kunarac” on TV when he was brought to the seat of the Tribunal. When asked to

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<sup>830</sup> T 3337-3346.

<sup>831</sup> T 3345.

<sup>832</sup> T 3346.

<sup>833</sup> T 3348-3350 and T 3414.

<sup>834</sup> T 3350.

<sup>835</sup> T 3344.

<sup>836</sup> T 3333.

<sup>837</sup> T 3345.

<sup>838</sup> T 3345.

<sup>839</sup> T 3363.

<sup>840</sup> T 3388.

<sup>841</sup> T 3351.

comment on this discrepancy, she could not remember with certainty if she had or had not seen him on TV on that occasion.<sup>842</sup>

303. FWS-190 testified that "Klanfa" was the accused Radomir Kova~.<sup>843</sup> He seemed to be in the same unit with DP 1, and would come to DP 1's apartment.

304. Under cross-examination, Defence counsel for the accused Radomir Kova~ questioned her credibility by putting to her that she had not mentioned Radomir Kova~ in an earlier statement dated 1998 given to the Prosecution. The Prosecutor introduced two statements made in 1993<sup>844</sup> into evidence, which had been given to the Bosnian authorities and which dealt about what happened to her, which she mentioned the accused Radomir Kova~. She also testified that she visited Radomir Kova~'s apartment to see FWS-87 and another girl who was there.<sup>845</sup>

305. Witness FWS-190 also met Zoran Vukovi~.<sup>846</sup> According to her memory, he belonged to the same unit as DP 1, whose commander appeared to be DP 2.<sup>847</sup> She described Zoran Vukovi~ as being of "medium height, light brown hair. I don't know about any details".<sup>848</sup> He came to DP 1's place (his family was in the same building and she met his family). She once saw pictures of Fo~a burning, taken at the beginning of the war, which show a man with a cowboy hat whom she thought was the accused. She testified that Zoran Vukovi~ personally admitted to her that it was him in the pictures.<sup>849</sup> Zoran Vukovi~ also came to the apartment of DP 1's aunt while she was there.<sup>850</sup> According to the witness, Radomir Kova~, Zoran Vukovi~ and DP 1 were part of DP 2's unit. The witness did not know any other Zoran Vukovi~.<sup>851</sup>

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<sup>842</sup> T 3400.

<sup>843</sup> T 3373.

<sup>844</sup> Ex P218 and P218a.

<sup>845</sup> T 3372.

<sup>846</sup> T 3378.

<sup>847</sup> T 3378.

<sup>848</sup> T 3378-3379.

<sup>849</sup> T 3381-3382.

<sup>850</sup> T 3452.

<sup>851</sup> T 3385.

(ii) Supporting evidence

306. FWS-87 and FWS-75 both recalled that FWS-190 was already at Ulica Osmana Dikica no 16 when they arrived.<sup>852</sup>

307. FWS-190's testimony regarding her transfer from Kalinovik school on 2 August 1992 to a house in Trnovace is reflected in the testimonies of FWS-191 and FWS-186.<sup>853</sup>

308. FWS-186 further testified that FWS-190 was brought to the Trnovace house again upon request of FWS-186 because the two women were close friends. FWS-186 recalled that, during her two-day stay, FWS-190 told her that she had been raped by a certain "Vojvoda" while the two of them were separated.<sup>854</sup> FWS-191 also recalled that FWS-190 was brought to the house by DP 1.<sup>855</sup>

(i) FWS-95

(i) Testimony of FWS-95

309. FWS-95, who was about 27 years old when the events occurred,<sup>856</sup> stated that after her capture in the woods near her village of Mjesaja, she was brought to Buk Bijela and, after having spent one night there, to Fo-a High School. She did recall being questioned at Buk Bijela on 5 July 1992.<sup>857</sup>

310. On the first night during her stay at Fo-a High School, a man came in and ordered some women to come out. They were FWS-88, D.B., FWS-90, FWS-75, FWS-87 and another woman. Although the witness first mentioned FWS-87, she withdrew that comment when asked by the Prosecution, only to mention FWS-87 again in cross-examination as having been one of the girls taken out with her.<sup>858</sup> FWS-95 said that they were led to another classroom where four men were waiting. Each of them took one woman, and she herself was ordered by DP 1 to take her clothes off. He had to slap her before she obeyed. She was then raped by him, but she could not recall what happened to the other women as

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<sup>852</sup> FWS-87, par 60; FWS-75, par 170.

<sup>853</sup> FWS-191, pars 255-257; FWS-186, pars 285 and 287.

<sup>854</sup> See par 292.

<sup>855</sup> See par 267.

<sup>856</sup> T 2183.

<sup>857</sup> T 2195.

<sup>858</sup> T 2206-2207, T 2282.

she "withdrew into herself". She did not mention the presence of the accused Zoran Vukovi}.<sup>859</sup>

311. FWS-95 was taken to Partizan after about 15 to 20 days at Fo-a High School. From the day of her arrival, women were taken out from Partizan by soldiers on a regular basis to be raped. She recalled that one of the guards at Partizan tried to stop them from doing so, but was told that the soldiers had the authorisation of the local chief of police, Dragan Gagovi}.<sup>860</sup> FWS-95 stated with regard to the sexual relationships that they were forced to have with the soldiers: "It wasn't sex with pleasure, it was with fury. They were taking it out on us".<sup>861</sup>

312. The witness recounted two occasions on which she was taken from Partizan to a house in the Alad`a area, which was situated about 200 metres from the mosque. She did not recall whether Dragoljub Kunarac took her there, but she clearly remembered that she was raped by him on both occasions.<sup>862</sup> In a previous statement to the Prosecution, she had said that he took her out more often, about five or six times.<sup>863</sup> As to the dates, the witness did not state these with precision during her testimony in court, but in an earlier statement she had described the fact that before 2 August 1992, when she was taken for rape to the house in the Alad`a area, she could see the mosque; after that date she could not see it anymore.<sup>864</sup> She was not certain that during her second stay in that house the mosque was still intact.<sup>865</sup>

313. On the first occasion on which she was taken to the house in the Alad`a area, according to her testimony before the Trial Chamber, two other soldiers were present, over whom Kunarac appeared to have control. FWS-105 and FWS-90 were also taken there. The accused Kunarac took FWS-95 to a room where he raped her. While she declared in court that she was not raped by any other man then,<sup>866</sup> this is in conflict with her first witness statement in which she did not mention the accused Kunarac at all as having raped

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<sup>859</sup> T 2206-2207.

<sup>860</sup> T 2293 and T 2213-2224.

<sup>861</sup> T 2222.

<sup>862</sup> T 2236-2237.

<sup>863</sup> Ex D40 (Statement of 25-26 Apr 1998, p 3).

<sup>864</sup> Ex P75 (Statement of 9-11 Feb 1996, p 8).

<sup>865</sup> T 2237.

<sup>866</sup> T 2237-2238.

her or having taken part in the rapes.<sup>867</sup> Furthermore, in her second statement to the Prosecution, which was tendered by the Defence in cross-examination, she declared that every time Dragoljub Kunarac took her out, he and sometimes his soldiers would rape her. In addition, she said that after Kunarac raped her on the first occasion she went to Alad`a, three soldiers came into the room where she and Dragoljub Kunarac were, he left her and the soldiers proceeded to rape her. No other mention is made with respect to the accused Dragoljub Kunarac as far as the house in Alad`a is concerned.<sup>868</sup>

314. The witness could not remember the second occasion on which she was taken to the house in the Alad`a area. She declared that she was taken there with other women, but could not recall the names. Dragoljub Kunarac ordered her to go into a room and raped her again. There is no mention of another rapist in her testimony before the court, as was alleged in the Indictment.<sup>869</sup> In her second statement she mentioned that on both occasions she was raped by two or three soldiers, but it would appear that the accused Dragoljub Kunarac only raped her the first time.<sup>870</sup>

315. The witness testified that Dragoljub Kunarac was one of the men who raped her while she was at Partizan.<sup>871</sup> She said that his first name was "Dragan" and that he was known as "Žaga".<sup>872</sup> She did not know him from before the war. FWS-90, who had relatives who knew Dragoljub Kunarac, told the witness who he was.<sup>873</sup> Because of the poor quality of the photos she was shown by the Prosecution prior to the trial, she could at that time not say whether it was indeed Dragoljub Kunarac who was in the pictures, but said that now she had no doubt about it, stating in court that "it's easier to recognise someone when you see them live than on a photograph. "Kunarac" is the same as he was".<sup>874</sup>

316. The witness did not know Zoran Vukovi} before the war.<sup>875</sup> She learnt his name in the course of her detention, and connected his face and the name as she saw him in the courtroom.<sup>876</sup> She said that she recognised him as soon as she entered the courtroom: "I am

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<sup>867</sup> Ex P75 (Statement of 9-11 Feb 1996).

<sup>868</sup> Ex D40 (Statement of 25-26 Apr 1998, p 3).

<sup>869</sup> T 2240.

<sup>870</sup> Ex D40 (Statement of 25-26 Apr 1998, p 3).

<sup>871</sup> T 2231.

<sup>872</sup> T 2232.

<sup>873</sup> T 2310.

<sup>874</sup> T 2233.

<sup>875</sup> T 2232.

<sup>876</sup> T 2370.

100 per cent certain that it is him", although she thought that he had had longer hair at the time.<sup>877</sup>

(ii) Supporting evidence

317. The incident in the classroom of Foca High School was recalled by several witnesses who were amongst the women called out and raped at night.<sup>878</sup> FWS-95's statement that she was raped by DP 1 was confirmed by FWS-75.<sup>879</sup> FWS-95's memory that DP 1 slapped her before she obeyed is further supported by FWS-87's memory that she heard sounds of somebody beating someone from the corner where FWS-95 had been told to go. She also recalled hearing DP 1 swearing at FWS-95.<sup>880</sup>

318. FWS-105 recalled an incident in which she was taken with FWS-95 to a house in the Alad'a neighbourhood where she saw the accused Dragoljub Kunarac. She could not, however, give any evidence relating to what happened to FWS-95.<sup>881</sup> FWS-105's testimony concerning another incident where she and FWS-95 were gang-raped in the same room did not match the descriptions given by FWS-95.<sup>882</sup>

(j) FWS-48

(i) Testimony of FWS-48

319. Before the war, FWS-48, who in 1992 was about 35 years old and who is related to FWS-75,<sup>883</sup> lived in Trosanj. In the early morning of 3 July 1992, her village was attacked.<sup>884</sup> The villagers who had fled to the nearby woods were soon surrounded, captured and beaten up.<sup>885</sup> From the woods, they were brought to the meadow where men

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<sup>877</sup> T 2231 and T 2233. Several witnesses, including FWS-95, identified the accused in court. However, the Trial Chamber gives no positive probative weight to these "in court" identifications (see pars 561 and 562).

<sup>878</sup> See, for instance, FWS-87, par 57; FWS-75, par 162; D.B., par 215; FWS-50, par 237.

<sup>879</sup> See par 162.

<sup>880</sup> See par 57.

<sup>881</sup> See par 330.

<sup>882</sup> See par 330.

<sup>883</sup> T 2611.

<sup>884</sup> T 2619.

<sup>885</sup> T 2625.

and women were separated.<sup>886</sup> The witness saw many Serb soldiers, including Zoran Vukovic, whom she knew from before the war.<sup>887</sup>

320. From the meadow, the women were taken to Buk Bijela.<sup>888</sup> There, the witness was raped by DP 1.<sup>889</sup> From Buk Bijela, they were transported to Foca High School in Foca.<sup>890</sup>

321. In her testimony in court, FWS-48 did not remember the exact date upon which the incident charged in paragraph 6.1 of Indictment IT-96-23 took place. In a previous witness statement to the Prosecution made in 1995, she had stated that she was brought to Partizan after about 8 days at Fo-a High School. From that statement it appears that this would have been around 11 or 12 July 1992, because she had been brought to the school around 3 July 1992. The events charged in the Indictment thus appear to relate to those she described in her statement as having taken place on her very first night at Partizan.<sup>891</sup> She said that she was taken out from Partizan about 100 times.<sup>892</sup>

322. FWS-48 recalled being called out of a bathroom in Partizan by soldiers that night, and when she arrived in the main hall, she saw the accused Dragoljub Kunarac, who told her to follow him.<sup>893</sup> At first, when examined in-chief by the Prosecution, she said that she thought she had been taken to a house in Donje Polje, but after her previous statement of 1995 was read out by counsel for the Prosecution, she stated that she was actually taken to the Hotel Zelengora.<sup>894</sup> Dragoljub Kunarac allegedly raped her twice and ejaculated on her face, telling her from now on she would be giving birth to Serb babies and that there would be no Muslims left in Fo-a. Dragoljub Kunarac added that there was no need for her to cry and that it was not the first, nor would it be the last time.<sup>895</sup>

323. Although the following evidence refers primarily to the accused Zoran Vukovi}, it is also relevant to the reliability of FWS-48's testimony with respect to the accused Dragoljub Kunarac. FWS-48 could not at first remember whether, after being raped by Kunarac, she had subsequently also been raped by the accused Zoran Vukovi}. Only after the

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<sup>886</sup> T 2626.

<sup>887</sup> T 2628.

<sup>888</sup> T 2634.

<sup>889</sup> T 2636-2638.

<sup>890</sup> T 2641-2642.

<sup>891</sup> Ex P78 (Statement of 1-3 and 6-9 Sept 1995, pp 11-13).

<sup>892</sup> T 2659.

<sup>893</sup> T 2664.

<sup>894</sup> T 2665.

Prosecution had refreshed her memory by reading her previous statement of 1995 did she recall that Zoran Vukovi} entered the room and raped her vaginally as well as orally. She declared that Dragoljub Kunarac came back to the room at some stage but was told by Zoran Vukovi} to wait; she thought that Dragoljub Kunarac most probably knew what had been going on in that room.<sup>896</sup> FWS-48 testified that after having been raped by Zoran Vukovi}, she was taken back to Partizan.<sup>897</sup> She was not able to recognise Zoran Vukovi} in court as the man who had raped her.<sup>898</sup>

324. The Trial Chamber does not regard her evidence as reliable enough to find the accused Zoran Vukovi} guilty of rape on those allegations. In relation to paragraph 7.9 of Indictment IT-96-23/1 against the accused Zoran Vukovi}, the Trial Chamber stated in its Decision on Motion for Acquittal of 3 July 2000 that the co-accused Zoran Vukovi} had no case to answer with regard to the charges based on the evidence of FWS-48, because it was too unreliable to allow a reasonable Trial Chamber to find the accused guilty beyond reasonable doubt and to convict him.<sup>899</sup>

325. FWS-48 testified that she had learned the name of the accused Dragoljub Kunarac and his nickname “@aga” from other soldiers who referred to him by that name. She identified the accused Dragoljub Kunarac in the courtroom, but admitted that she had seen his picture on TV when he was arrested and had identified him earlier on a photograph shown to her by investigators of the Prosecution.<sup>900</sup> When cross-examined, she described the man she believed to be “@aga” as being about 1.77 m tall and 45-46 years old at that time<sup>901</sup> but could not say whether he was taller or smaller than herself. She also declared not to have spoken to him during her confinement, and denied having heard about him at Zelengora, which appears to be in contrast with her previous statement of 1995.<sup>902</sup> This again is in contrast with the interview she gave on 24 September 1998 to the investigators of the Prosecution, in which she stated categorically that she saw “@aga” and Zoran Vukovi}

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<sup>895</sup> T 2665-2667.

<sup>896</sup> T 2670-2672.

<sup>897</sup> T 2673.

<sup>898</sup> T 2673.

<sup>899</sup> Decision on Motion for Acquittal, 3 July 2000, pars 18-26 and par 28.

<sup>900</sup> T 2668-2669.

<sup>901</sup> This is also mentioned in Ex P78 (Statement of 1-3 and 6-9 Sept 1995, p 14).

<sup>902</sup> T 2786-2792 and Ex 78 (Statement of 1-3 and 6-9 Sept 1995, p 14).

at the Hotel Zelengora at the time she was raped there.<sup>903</sup> Furthermore, while she mentioned in the 1995 statement that Dragoljub Kunarac spoke with a Montenegrin accent, she did not remember in court having said that, nor, as was already said, did she recall that she had ever spoken to him during her imprisonment.<sup>904</sup> The latter is also not consistent with her 1995 statement, in which she mentioned that she had asked Kunarac for how long he intended to mistreat her.<sup>905</sup>

326. FWS-48 was not able to put a date to the events charged under paragraph 6.2 of Indictment IT-96-23 in court. However, in her previous statement of 1995 she had mentioned that on 16 July 1992, or the fourth day after she had been taken to Partizan, she and some other women went to see Dragan Gagovi}, the local police chief, to complain about the treatment they received. The witness testified that the events set out in the charge related to paragraph 6.2 took place on the night of the next day, 17 July 1992. The witness also described the attack on her village on 3 July 1992, being brought to Fo-a High School on the same day, staying there for about 8 days and then being taken to Partizan, from which point onward she gives a day-to-day narrative of the events, which puts this charge on the night of the fifth day at Partizan, which could be 16 or 17 July 1992, depending on whether the 8 days at the High School include the day of arrival.<sup>906</sup>

327. In court, FWS-48 testified that on the night after her visit to Gagovi}, DP 6 took herself, FWS-95 and FWS-105 to a house near a bus station in Fo-a. Three other soldiers came and discussed who should go with whom. Dragoljub Kunarac was one of them. She did not remember whether they went to another house or whether they stayed where they were, but she did recall being taken into a room by the accused Dragoljub Kunarac. She was not able to recall if she was actually raped that night by the accused Dragoljub Kunarac. She only recalled one incident in a house in Donje Polje when he raped her.<sup>907</sup>

328. In her previous 1995 statement, however, she described being raped by Dragoljub Kunarac after having been taken by him to another house, which was about a 15-20 minute walk away. FWS-105 and FWS-95 had been taken out as well, but were left at the first location. The house was in Donje Polje and looked partially burnt. He took her into a room

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<sup>903</sup> Ex D47 (Investigator's notes of 24 Sept 1998, p 3).

<sup>904</sup> Ex P78 (Statement of 1-3 and 6-9 Sept 1995, p 14) and T 2787-2788.

<sup>905</sup> Ex P78 (Statement of 1-3 and 6-9 Sept 1995, p 14).

<sup>906</sup> Ex P78 (Statement of 1-3 and 6-9 Sept 1995, at pp 3, 7, 10-11, 18-19).

<sup>907</sup> T 2687-2688.

and raped her orally and vaginally, he bit her neck so that she suffered bruises, and he pinched her nipples, which were still sore from a prior occasion when a soldier, allegedly the accused Zoran Vukovi}, had bitten her.<sup>908</sup>

(ii) Supporting evidence

329. Neither FWS-105 nor FWS-95 were able to put a date to the event mentioned by FWS-48.<sup>909</sup>

(k) FWS-105

(i) Testimony of FWS-105

330. FWS-105 recalled an instance when she was taken with FWS-95 to a house in the Alad`a neighbourhood, but could not put a time to it, apart from the fact that she thought it happened between 2 am and 3 am. She saw the accused Dragoljub Kunarac there, but did not give any evidence as to what happened to FWS-95.<sup>910</sup> She testified about another incident when she was taken to another house in the Alad`a area, which had an apartment on the ground floor. FWS-95 was also present and they were gang-raped in the same room.<sup>911</sup> This event does not, however, match the evidence of FWS-95 herself, nor the description in Indictment IT-96-23.

331. The witness said that she first saw Dragoljub Kunarac when she was taken to a house in the Alad`a neighbourhood; she heard the other men addressing him as “@aga”.<sup>912</sup> She had heard his nickname while she was at Fo~a High School from the other girls. She did not see him at the school, but she heard that “@aga” came to the High School from FWS-75, FWS-50, FWS-87 and D.B.<sup>913</sup> Referring to an earlier photograph identification, she thought she had recognised “@aga” on that occasion, but she was not told by the investigators whether she had positively identified him or not.<sup>914</sup> She stated that he had no Montenegrin accent, but that they said he was from Montenegro.<sup>915</sup>

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<sup>908</sup> Ex P78 (Statement of 1-3 and 6-9 Sept 1995, p 19).

<sup>909</sup> FWS-105, par 330; FWS-95, par 312.

<sup>910</sup> T 4230.

<sup>911</sup> T 4231.

<sup>912</sup> T 4229.

<sup>913</sup> T 4266-4267.

<sup>914</sup> T 4234.

<sup>915</sup> T 4232.

(ii) Supporting evidence

332. FWS-95 recalled that she had been taken out once by Dragoljub Kunarac together with FWS-105 but could not tie the incident to any date or recall details as to what happened to FWS-105.<sup>916</sup> The incident described by FWS-105 as a gang-rape of her and FWS-95 in the same room in another house in the Alad'a area is neither matched by the evidence given by FWS-95 nor by the description of Indictment IT-96-23.<sup>917</sup>

(I) FWS-132

(i) Testimony of FWS-132

333. In 1992, FWS-132 was about 15 years old.<sup>918</sup> She recalled that on 18 or 19 August 1992, soldiers came to FWS-132's house in Miljevina and took her and her father away.<sup>919</sup> On that occasion, they beat her father with an electric cable and took him to the Miljevina police and subsequently to KP Dom where he stayed until January 1993.<sup>920</sup>

334. FWS-132 testified that on that day, the 18 or 19 of August 1992, she was taken to a house where she stayed for a while. Serb soldiers then transferred her to Karaman's house.<sup>921</sup> She spent several hours in this house before being taken for interrogation to the police station in Miljevina.<sup>922</sup> Afterwards, she was returned to Karaman's house where she spent the rest of the day. In Karaman's house, there were already seven other girls: D.B., FWS-87, FWS-75, A.S., A.B., JB and J.G.<sup>923</sup> After spending that night at Karaman's house, FWS-132 was taken back to her home.<sup>924</sup> She stayed there until the beginning of September when she was taken out of the house by three soldiers and transferred back to Karaman's house where she stayed until 21 March 1993.<sup>925</sup> The witness said that DB, FWS-87, FWS-75, AS, AB, J.G. and JB were still there.<sup>926</sup>

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<sup>916</sup> See pars 312-313.

<sup>917</sup> See pars 312-313.

<sup>918</sup> T 2400.

<sup>919</sup> T 2407-2408.

<sup>920</sup> T 2410.

<sup>921</sup> T 2411.

<sup>922</sup> T 2412.

<sup>923</sup> T 2414.

<sup>924</sup> T 2417-2418.

<sup>925</sup> T 2418-2421.

<sup>926</sup> T 2422.

335. FWS-132 was continuously raped while she lived at Karaman's house.<sup>927</sup>

336. FWS-132 recalled seeing "@aga" come to the house on a number of occasions, amongst other soldiers.<sup>928</sup> FWS-132 described "Žaga" as "tall, well-built. He had a bony face, with high cheekbones, prominent cheekbones. The colour of his hair and eyes, I just cannot remember",<sup>929</sup> and she said that she had heard about the nickname from the other girls.<sup>930</sup> She saw him at Karaman's house a few times.<sup>931</sup> Once he came to take cattle away from a nearby place.<sup>932</sup>

337. FWS-132 stated that at some stage during her own stay at Karaman's house, although not being able to recall the exact time, she saw FWS-75, FWS-87, A.B. and A.S. being taken away. She thought that when that happened, DP 3, a man referred to as Kova~, "@aga", DP 1 and a man named Janko Jankovi} were present, although she admitted in cross-examination by the Defence that she was not altogether certain about "@aga's" presence.<sup>933</sup>

338. The witness recalled hearing about a person named Kova~ as a man of authority or high rank<sup>934</sup> but never met that person herself. She was thus not asked to identify the accused Radomir Kova~ in court.

(ii) Supporting evidence

339. The evidence given by witness A.S. supports the testimony of FWS-132 since the descriptions of the general living conditions of the girls correspond. Like FWS-132, A.S. recalled that the women were continuously raped and that they had to perform household duties while they were staying at Karaman's house.<sup>935</sup> A.S. further testified that the girls were not free to go where they wanted while they were kept in the house.<sup>936</sup>

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<sup>927</sup> T 2422-2425.

<sup>928</sup> T 2426-2428.

<sup>929</sup> T 2427.

<sup>930</sup> T 2428.

<sup>931</sup> T 2428.

<sup>932</sup> T 2428.

<sup>933</sup> T 2436-2437 and T 2464.

<sup>934</sup> T 2439. It is possible that she had heard about the commander of the Fo-a Tactical Group, Colonel Kova~, because the accused Radomir Kova~ was undisputedly not holding any higher rank at all.

<sup>935</sup> See par 206.

<sup>936</sup> A.S. par 206.

(m) FWS-183

(i) Testimony of FWS-183

340. FWS-183 was born in 1954 and was the neighbour of witness FWS-61. She testified that around 15 July 1992, when she was in her neighbour's apartment, three Serb soldiers came knocking on her door and that of FWS-61. When FWS-61 opened the door, one of them asked who was the wife of a certain man and FWS-183 replied that it was her. She was then accused of transmitting radio messages and that because of her activities men had been killed. One of the soldiers grabbed her and took her downstairs. She later realised that this soldier was "@aga", as she was told the name by FWS-61, who in turn had heard it from a Serb friend. FWS-183 tried to flee to the police station but was hit by a policeman or soldier there with a rifle butt. "@aga" then put her in a red Lada, where both of them waited for the other two soldiers to return to the car. These two soldiers had been looting her apartment in the meantime. When they returned to the car, all four of them set off in the direction of Vele-evo and finally stopped at the Cehotina river, near a small forest.<sup>937</sup>

341. There the soldier who had put her in the car, who introduced himself as the son of Lekso Kunarac, threatened her and said that he knew her very well. He took 100.000 Dinars from her and asked her how many Deutschmarks she had; he also told her that if she had lied, he would have cut her head off and killed her son.<sup>938</sup>

342. He then told her to undress and forced her to touch his penis with her hand, telling her she should enjoy being "fucked by a Serb". She complied and he raped her vaginally. She put her hands across her eyes out of shame and fear, but he told her to look at him. She was very afraid for her son. While she was being raped, the other two soldiers watched from the car, laughing. Dragoljub Kunarac told them to wait for their turn. When he had finished, the next soldier raped her orally and vaginally. After he had had his way with the witness, Kunarac told her that she would carry a Serb baby, but never know who the father was. The third soldier then raped her as well.<sup>939</sup>

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<sup>937</sup> T 3674-3679 and T 3680.

<sup>938</sup> T 3679.

<sup>939</sup> T 3681-3684.

343. FWS-183 did not offer resistance because she was afraid, especially for the well being of her son. “@aga” had told her that if she did not tell the truth, she would have to drink the blood of her son.<sup>940</sup>

344. She was then brought back to the apartment and required to give all her valuables to them. She had hidden 800 Deutschmarks and about \$200-300 in her son’s trousers, which she told Dragoljub Kunarac, who proceeded to rip the trousers open. He also took her jewellery, camera, fur coat, leather jacket, and the jewellery of FWS-61 and another refugee. He told her to make some coffee and finally left between 2 am and 3 am.<sup>941</sup> She was left with nothing but roughly 200 Deutschmarks.

345. She left Fo-a on 13 August 1992 with a permit from the local police station out of fear for her life; she was forced to work as a waitress in Montenegro to earn some money in order to go to another area.<sup>942</sup>

346. In addition to the soldier identifying himself as the son of Lekso Kunarac, witness FWS-183 said that she knew Dragoljub Kunarac’s father who had done some woodwork in her cottage. The witness stated that Dragoljub Kunarac’s father lived in Cohodor Mahala, and that she had at once gone to his house.<sup>943</sup> The witness was not sure she would recognise the man who raped her as she only saw him once.<sup>944</sup> She identified the accused Dragoljub Kunarac in the courtroom saying that she *thought* he was “@aga”, firmly pointing at the accused.<sup>945</sup>

347. The accused Dragoljub Kunarac was found not guilty of plunder under Count 13 by the Trial Chamber’s Decision on Motion for Acquittal of 3 July 2000.<sup>946</sup> The acquittal was based on legal issues relating to the definition of plunder, not on the evaluation of the facts.

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<sup>940</sup> T 3679 and 3683.

<sup>941</sup> T 3685-3686.

<sup>942</sup> T 3657, T 3698 and T 3710-3711.

<sup>943</sup> T 3713.

<sup>944</sup> T 3686.

<sup>945</sup> T 3696. Several witnesses, including FWS-183, identified the accused in court. However, the Trial Chamber gives no positive probative weight to these “in court” identifications (see pars 561 and 562).

<sup>946</sup> Decision on Motion for Acquittal, 3 July 2000, par 28(1).

(ii) Supporting evidence

348. The evidence given by FWS-183 is supported by FWS-61's testimony. FWS-61 testified that a soldier told her that the man who had taken FWS-183 away was called "Žaga".<sup>947</sup> She testified that FWS-183 looked confused and as if she had been crying when she was returned. FWS-61 further recalled that FWS-183 told her that she had been threatened by the soldiers with a knife, that she had to touch them sexually and that she had to do "impossible things".<sup>948</sup>

(iii) Defence evidence

349. The Defence for the accused Dragoljub Kunarac claimed that Dragoljub Kunarac did not see FWS-183 during the period from 7 July to 21 July 1992. As outlined above under the testimony of FWS-87, the Defence claimed that Dragoljub Kunarac had an alibi during the period when the acts were alleged to have taken place. Dragoljub Kunarac pointed out during his testimony that FWS-183 said that she only knew his family, not him personally. In addition, Dragoljub Kunarac suggested that FWS-183 chose to mention the individual named Tadic as a witness to these alleged events because she knew that he had been killed on 8 August and was therefore unable to contradict her statements.<sup>949</sup>

(n) FWS-61

(i) Testimony of witness FWS-61

350. FWS-61, who was born in 1957, testified that when the three soldiers came to her apartment, which she thought might have been towards the end of July, they asked for the name of FWS-183's husband. They then went together into the apartment of FWS-183, where two other women and children were already present. One soldier took FWS-183 to a room, while the second stayed with the three women and the third with the two children. They stayed for about 30 to 40 minutes, during which time they searched her handbag under the pretence of looking for a radio transmitter. The soldiers then began to take jewellery,

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<sup>947</sup> See par 351.

<sup>948</sup> See par 352.

<sup>949</sup> T 4686.

household appliances (stereo and radio) and money from her apartment and that of FWS-183. FWS-183 was then taken from the apartment at around 1 am.<sup>950</sup>

351. FWS-61 went back to the apartment and was told by a Serb soldier named Tadi} that the man who had taken FWS-183 off was called "@aga". She thought that this soldier had actually warned them before that "@aga" might come to their place.<sup>951</sup>

352. Between 2 am and 2.30 am, FWS-183 was returned to the apartment by the same three soldiers, who stayed for another 20 to 30 minutes. FWS-183 looked confused and as if she had been crying. FWS-183 told FWS-61 that she had had to give all her valuables to them. Later she told FWS-61 that they had held a knife to her throat and asked where her money was. She also told her that she had to touch them at their "shameful places" and that she had to do "impossible things, things that are difficult to do".<sup>952</sup>

353. Judging by the way that they behaved towards him, FWS-61 had the impression that one of the soldiers was superior to the others. He was the man whom the Serb soldier named Tadi} identified as "@aga".<sup>953</sup>

354. FWS-61 also left Fo-a on 13 August 1992, having obtained an exit permit and been asked to leave. She had some jewellery and about 200 Deutschmarks left. While still in Fo-a, her house was burnt down.<sup>954</sup>

355. As was mentioned above, FWS-61 had been told by the Serb soldier Tadic that the man who took FWS-183 away was "@aga".<sup>955</sup> She had never heard of "@aga" before. She described him as "very tall".<sup>956</sup> The witness did not know of anyone called Dragoljub Kunarac from before the war.<sup>957</sup> She had been shown a photo spread (black and white photographs) in 1998<sup>958</sup> and recalled that she pointed at one of the photos.<sup>959</sup>

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<sup>950</sup> T 3740-3743.

<sup>951</sup> T 3744 and T 3760.

<sup>952</sup> T 3745-3747 and T 3762-3763.

<sup>953</sup> T 3745.

<sup>954</sup> T 3748 and T 3752.

<sup>955</sup> T 3744.

<sup>956</sup> T 3745.

<sup>957</sup> T 3739.

<sup>958</sup> T 3749.

<sup>959</sup> T 3749.

(ii) Supporting evidence

356. The testimonies of FWS-61 and FWS-183 support each other in all substantial aspects.<sup>960</sup>

(o) FWS-192

(i) Testimony of FWS-192

357. FWS-192, who was about 37 years old at the time the events occurred and who is the mother of FWS-191,<sup>961</sup> confirmed that on 2 August 1992 a soldier came to Kalinovik School and took away her daughter. She learnt from one of the guards that this man was called "@aga", whose real name the guard did not know, and that he was a member of the "White Eagles" (Beli Orlovi) from Fo-a.<sup>962</sup> The witness saw "@aga" twice over the next week, first when he came to Kalinovik school with DP 6 and some other soldiers, and the second time with "Gaga".<sup>963</sup> On that occasion she asked "@aga" where her daughter was, and he replied that she was at his place and that he would not bring her back.<sup>964</sup> On one occasion - the witness did not remember whether it was one of the two just mentioned - she was called to another room, where "@aga" and DP 6 showed her a letter from her daughter. She wrote that she was fine and that FWS-192 should send her some clothes through the two men, which FWS-192 did, along with some money.<sup>965</sup> She was also present when DP 6 admitted to FWS-185, the mother of FWS-186, that her daughter was with him and that she should give him clothes for her daughter.<sup>966</sup> "@aga" also gave her a telephone number at some stage, which appeared to be that of his family's house in Tivat, Montenegro.<sup>967</sup>

358. FWS-192 did not meet her daughter again until 2 August 1994, when she appeared to be still in detention. They were not reunited until after the Dayton Agreement had been signed.<sup>968</sup>

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<sup>960</sup> FWS-183, see pars 340-345.

<sup>961</sup> T 3119.

<sup>962</sup> T 3037 and T 3042.

<sup>963</sup> T 3045-3046.

<sup>964</sup> T 3046.

<sup>965</sup> T 3047-3048.

<sup>966</sup> T 3049.

<sup>967</sup> T 3105 and Ex D56 and D57.

<sup>968</sup> T 3092.

359. The witness saw “@aga” on TV when he was brought to The Hague and recognised him, remembering his face and eyes.<sup>969</sup>

(ii) Supporting Evidence

360. FWS-191 testified that FWS-192 was amongst the civilians who were brought to Kalinovik School. FWS-191 further confirmed that Dragoljub Kunarac and “Gaga” took her away from the school and from FWS-192 on 2 August 1992.<sup>970</sup> FWS-191 recalled that she once was allowed to write a letter to her mother while she was kept in the house.<sup>971</sup>

(p) FWS-205

(i) Testimony of FWS-205

361. FWS-205, who was about 22 years old when the war started in 1992,<sup>972</sup> lived in the village of Jelasca in the municipality of Kalinovik before the war.<sup>973</sup> On 25 June 1992, her father and about 70 other Muslim men were detained in the Kalinovik High School.<sup>974</sup> They were subsequently moved to other places. On 1 August 1992, FWS-205 and the women from the Kalinovik area were taken and detained in the Kalinovik High School.<sup>975</sup> Women and girls from Gacko were already in the school.<sup>976</sup> FWS-205 stayed there until 2 August.

362. FWS-205 was one of three women from Kalinovik, together with FWS-101 and JB, and four women from Gacko who were taken out from Kalinovik School. On 2 August 1992, all seven of them were taken out by three armed men with Montenegrin accents; one of the men was addressed by the name “@aga”.<sup>977</sup>

363. From Kalinovik school they were taken to a gas station in Kalinovik, where they were transferred to a refrigerator truck. They then stopped again in Miljevina, where JB was taken away. She recalled only “@aga” from that time. They finally stopped at a house

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<sup>969</sup> T 3091.

<sup>970</sup> See par 255.

<sup>971</sup> See par 265.

<sup>972</sup> T 3462.

<sup>973</sup> T 3462.

<sup>974</sup> T 3463-3464.

<sup>975</sup> T 3468.

<sup>976</sup> T 3469.

<sup>977</sup> T 3468-3471.

in Fo-a, next to a mosque, where they got out of the truck, lined up and were taken into the house. “@aga” was there when they arrived. She was taken into a kitchen by “@aga” and some soldiers when she heard a loud explosion; some of the soldiers said that the last mosque in Fo-a had been blown up.<sup>978</sup>

364. FWS-205 was not quite certain what happened to the four girls from Gacko, who had been brought there together with her, but she recalled that they were taken away, and referring to a previous statement she had given to the Prosecution and the fact that she thought her memory had been fresher then, she testified that it was actually “@aga” who took them away.<sup>979</sup>

365. FWS-205 recalled that “@aga” was present at the house, although not necessarily continuously, until the day after her third night at the house, when she was taken away by a man called “Gica” to an apartment in Brod, with the consent of “@aga”. Before that, she had been raped several times, although never personally by “@aga”. On the first and third night, girls from Partizan had been brought to the house.<sup>980</sup> FWS-205 was convinced that “@aga” knew about the rapes.<sup>981</sup>

366. Apart from the witness learning “@aga’s” name, which is described above, she testified that she saw him on TV when he was brought to The Hague and immediately recognised him.<sup>982</sup>

(ii) Supporting evidence

367. There is no supporting evidence specifically referring to FWS-205.

(q) FWS-175

(i) Testimony of FWS-175

368. FWS-175 was aged about 16 years old when the events occurred.<sup>983</sup> Before the war, FWS-175 lived in Miljevina.<sup>984</sup> The witness recalled DP 3 and a man named Orlovic who

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<sup>978</sup> T 3474-3479.

<sup>979</sup> T 3533-3535 and T 3539.

<sup>980</sup> T 3483-3489.

<sup>981</sup> T 3488.

<sup>982</sup> T 3489.

<sup>983</sup> T 3565.

<sup>984</sup> T 3566.

was the chief of police of Miljevina coming to pick her up at her house in Miljevina. FWS-175's mother had asked DP 3 to protect her daughter. They brought her to another house in Miljevina about 10 meters away from Karaman's house.<sup>985</sup> When she arrived, another girl, RK, her aunt and uncle, two children and the old grandmother were already there.<sup>986</sup> FWS-175 stayed in the house until the beginning of August when the cellar of the house was broken into.<sup>987</sup>

369. As a result of this, they were brought to Karaman's house.<sup>988</sup> When she arrived at Karaman's house, FWS-175 saw several men including the accused Dragoljub Kunarac and several girls and women: FWS-87, D.B., FWS-190 and a fourth one she did not know.<sup>989</sup>

370. FWS-175 testified that she was taken to the house in Trnovace by "@aga" right away, at the beginning of August, together with RK (MK), in an old Lada car. She identified the house from a Prosecution photograph.<sup>990</sup> She did not know "@aga" from before the war, but learned his nickname later, and his full name after the war, when her uncle's wife told her.<sup>991</sup>

371. When they arrived, FWS-186, FWS-191 and J.G. were already there, together with DP 6. The latter was referred to as "major" and she had the impression that he and "@aga" were of the same rank and would "agree on everything".<sup>992</sup> FWS-175 and RK only stayed in the house for a short while and were then taken to a house in Brod by a certain "Puso", where he raped RK,<sup>993</sup> and from there she was transferred to the apartment of a certain "Gica", where she stayed for about two or three days; she was raped there, too.<sup>994</sup>

372. FWS-175 and RK were then taken to a cottage by two men nicknamed "Veso" and "Aco", but as there was no warm water or electricity, DP 6, who had come there in the

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<sup>985</sup> T 3573.

<sup>986</sup> T 3573-3574.

<sup>987</sup> T 3574.

<sup>988</sup> T 3575-3576.

<sup>989</sup> T 3576.

<sup>990</sup> T 3580 and Ex 210.

<sup>991</sup> T 3577.

<sup>992</sup> T 3581-3583.

<sup>993</sup> T 3583-3585.

<sup>994</sup> T 3583-3589.

meantime, told them that they could have a bath at his place and thus both women were returned to the house in Trnovace about three days after they had first been there.<sup>995</sup>

373. When they arrived, FWS-186, FWS-191 and J.G. were still there, as were DP 6, "@aga", "Gaga", "Aco" and "Veso".<sup>996</sup> FWS-175 noticed that FWS-186 was with DP 6, FWS-191 with "@aga" and J.G. with "Gaga", although she was not quite sure about that anymore. FWS-175 and RK (MK) were also women for "Gaga".<sup>997</sup> She stayed there for about five or six days.<sup>998</sup> On the evening of her arrival and for at least the evenings of the entire following week, "@aga", "Gaga" and DP were at the house.<sup>999</sup>

374. During the first night, FWS-175 and RK were not molested. However, on the second evening, "Gaga" told FWS-175 that he had been with J.G. the previous night, and that he would now be with her. She was raped orally and vaginally, at times in the presence of RK (MK), and had to spend the night in the same room as "Gaga", who raped her again in the morning.<sup>1000</sup> She testified that FWS-191 and FWS-186 were also raped during her time at the house, although she never saw anything but the expression of those girls, from which she deduced what had happened.<sup>1001</sup> FWS-175, after being asked specifically by the Prosecution, confirmed that "@aga" was aware of what was happening at the house.<sup>1002</sup>

375. Sometime around the middle to the end of August 1992, she was taken to another house, the Hrbini} house, and from there to Titovo Usice in Serbia, where she had to work in cafés, until she returned to Bosnia on 9 April 1997.<sup>1003</sup>

376. FWS-175 did not know "@aga" from before the war but learnt his nickname later, and after the war she was told his full name by her uncle's wife,<sup>1004</sup> because the latter knew him from a time when "@aga's" father had worked as a builder in her house.<sup>1005</sup> She saw him on TV when he surrendered and recognised him, underlining his eyes when asked by

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<sup>995</sup> T 3590 and 3629.

<sup>996</sup> T 3591.

<sup>997</sup> T 3594.

<sup>998</sup> T 3591-3592 and T 3634-3635.

<sup>999</sup> T 3592.

<sup>1000</sup> T 3596-3598.

<sup>1001</sup> T 3598 and 3637.

<sup>1002</sup> T 3598.

<sup>1003</sup> T 3604-3605.

<sup>1004</sup> T 3577.

<sup>1005</sup> T 3628.

the Prosecutor if there was anything outstanding in his appearance.<sup>1006</sup> She described him as “tall, thin, with brown curly hair. He then had longish hair. He had a deep voice and big eyes”.<sup>1007</sup>

(ii) Supporting evidence

377. FWS-186 recalled that FWS-175 together with RK (MK) was brought to the house in Trnovace while she, FWS-186, was staying in this house.<sup>1008</sup>

(r) FWS-51

(i) Testimony of FWS-51

378. FWS-51, the mother of FWS-50 and daughter of FWS-62, who was 35 years old in 1992,<sup>1009</sup> stated that her daughter was taken out from Fo-a High School on several occasions and was once beaten up.<sup>1010</sup>

379. When asked whether anyone in the courtroom seemed familiar to her, witness FWS-51 pointed at the accused Zoran Vukovi},<sup>1011</sup> saying she thought she had seen him somewhere before. However, she did not identify him as a perpetrator of any crime that she would have witnessed. The witness said that she probably recalled him from Fo-a High School:<sup>1012</sup> “I know his face. I know that I saw him, but I only could have seen him in Fo-a while we were detained, this Zoran Vukovi}”, but maintained that she was not 100 per cent sure that the Zoran Vukovi} present in court was the Zoran Vukovi} referred to in her previous statement to the Prosecution.<sup>1013</sup>

(ii) Supporting evidence

380. In contrast to FWS-51’s testimony, FWS-50 recalled that she was taken out only once while being at Foca High School, namely, on her second day at the High School when

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<sup>1006</sup> T 3577.

<sup>1007</sup> T 3577.

<sup>1008</sup> See par 292.

<sup>1009</sup> T 1110-1111.

<sup>1010</sup> T 1137.

<sup>1011</sup> T 1163 and T 1168.

<sup>1012</sup> T 1170.

<sup>1013</sup> T 1170.

soldiers came in and took out several women, including D.B., FWS-87, FWS-75, FWS-95, FWS-88 and another woman.<sup>1014</sup>

(s) FWS-96

(i) Testimony of FWS-96

381. FWS-96, who was born in 1948, testified that she was taken to Buk Bijela and from there, via a stop at Partizan, to Fo-a High School in the afternoon of 3 July 1992.<sup>1015</sup> On that night, soldiers entered the school, among them DP 1, Slavo Ivanovi} and DP 6, and took some women out to another room. She recalled that FWS-88 was taken away by DP 1; FWS-88 did not return all night. The other women were FWS-75, FWS-87, FWS-74 and FWS-95. When they returned from the adjacent room they were in a horrible state.<sup>1016</sup> The witness did not mention the accused Zoran Vukovi}.

382. FWS-96 further testified that FWS-87 would be taken out almost every day or every other day, generally by DP 1.<sup>1017</sup>

(ii) Supporting evidence

383. The incident in Fo-a High School mentioned above, when soldiers called women out of the main classroom, took them to another classroom and raped them there, was also referred to by FWS-87, FWS-75 and FWS-50 in their testimonies.<sup>1018</sup> FWS-87 testified that among the women who were called out and raped were herself, FWS-75, FWS-88, D.B. and also FWS-50.<sup>1019</sup> FWS-50 recalled the incident to have taken place on her second day at Fo-a High School, she further explicitly mentioned FWS-87 as one of the women who were called out and raped.<sup>1020</sup> FWS-75 was not sure whether it happened on the first or a later night at Fo-a High School but clearly recalled that FWS-87 was amongst the raped women that night.<sup>1021</sup> Like FWS-96, FWS-75 did not mention the accused Zoran Vukovic in this context but testified that FWS-87 was raped by a man unknown to FWS-75.<sup>1022</sup> As was

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<sup>1014</sup> See par 237.

<sup>1015</sup> T 2504, T 2516, T 2518 and T 2522.

<sup>1016</sup> T 2525.

<sup>1017</sup> T 2527.

<sup>1018</sup> FWS-87, par 57; FWS-75, par 162; FWS-50, par 237.

<sup>1019</sup> See par 57.

<sup>1020</sup> See par 237.

<sup>1021</sup> See par 162.

<sup>1022</sup> See par 162.

also mentioned above, FWS-75 had seen Zoran Vukovic at Buk Bijela.<sup>1023</sup> FWS-87 herself testified that she was taken out of Foca High School several times.<sup>1024</sup>

(t) FWS-62

(i) Testimony of FWS-62

384. When the war broke out, FWS-62 was living in Mjesaja.<sup>1025</sup> On 3 July 1992, following the attack on her village, villagers were rounded up and brought to Buk Bijela. The witness testified that in Buk Bijela she saw Zoran Vukovi} taking her husband away.<sup>1026</sup> The witness knew Zoran Vukovi} from sight from before the war.<sup>1027</sup> However, when asked to say if she recognised him in the courtroom, she was not able to do so.<sup>1028</sup>

(u) Osman Šubasi}

(i) Testimony of Osman Šubasi}

385. Witness Osman Šubasi} stated that there were three main roads leading up to Cerova Ravan and that, depending which road is used, it takes from an hour and a half to two hours to go from Cerova Ravan to Foca.<sup>1029</sup>

386. Witness Osman Šubasi} testified that Zoran Vukovi} was a member of DP 2's Unit, and that he knew Zoran Vukovic from before the war as a friend; he said he was a "nice person".<sup>1030</sup> The witness, however, never saw him in the unit but the information he received from refugees from Fo~a indicated that he was there. Numerous refugees knew Zoran Vukovi} personally, were aware of his professional background as a waiter and then as a driver, and mentioned one of his nicknames, "Mikser".<sup>1031</sup> He knew that there were 10 to 11 other men named Zoran Vukovi} in Fo~a at the time, but he confirmed that it was the accused Zoran Vukovi} who was in DP 2's unit.<sup>1032</sup>

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<sup>1023</sup> See par 163.

<sup>1024</sup> See par 56.

<sup>1025</sup> T 949.

<sup>1026</sup> T 964.

<sup>1027</sup> T 964.

<sup>1028</sup> T 965.

<sup>1029</sup> T 4092-4093.

<sup>1030</sup> T 4081.

<sup>1031</sup> T 4085.

<sup>1032</sup> T 4082.

## IV. APPLICABLE LAW

### A. Individual criminal responsibility and superior responsibility: Article 7(1) and Article 7(3) of the Statute

#### 1. Individual criminal responsibility under Article 7(1) of the Statute

387. Article 7(1) of the Tribunal's Statute provides that:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

388. Because the Prosecution failed to identify the precise basis on which it wanted the Trial Chamber to convict the accused, the Trial Chamber has proceeded to make findings upon those parts of Article 7(1) which it considers to be relevant.<sup>1033</sup> The Trial Chamber has not discussed the law with regard to common purpose because it is not necessary to do so in this case. Where it has found an accused not guilty of a particular charge, it has done so either because the witnesses could not recall the incident described in the Indictment or because it was not satisfied beyond a reasonable doubt that the accused had been reliably identified with respect to a specific incident.

389. Having reviewed the evidence, the Trial Chamber is of the view that the following heads of responsibility could apply to the acts charged in the Indictment: "committing" as a form of perpetration and "aiding and abetting". Those heads of responsibility will be reviewed in turn.

#### (a) Perpetration by "committing" the crime

390. An individual can be said to have "committed" a crime when he or she physically perpetrates the relevant criminal act or engenders a culpable omission in violation of a rule of criminal law.<sup>1034</sup> There can be several perpetrators in relation to the same crime where the conduct of each one of them fulfills the requisite elements of the definition of the substantive offence.

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<sup>1033</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 189. See also *Prosecutor v Kupreškic and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, par 746.

<sup>1034</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999, par 188.

(b) Aiding and abetting

391. As opposed to the “commission” of a crime, aiding and abetting is a form of accessory liability. The contribution of an aider and abettor may take the form of practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime.<sup>1035</sup> The act of assistance need not have caused the act of the principal.<sup>1036</sup> It may consist of an act or an omission and take place before, during or after the commission of the crime.<sup>1037</sup>

392. The *mens rea* of aiding and abetting consists of the knowledge that the acts performed by the aider and abettor assist in the commission of a specific crime by the principal.<sup>1038</sup> The aider and abettor need not share the *mens rea* of the principal but he must know of the essential elements of the crime (including the perpetrator’s *mens rea*) and take the conscious decision to act in the knowledge that he thereby supports the commission of the crime.<sup>1039</sup>

393. Presence alone at the scene of the crime is not conclusive of aiding and abetting unless it is shown to have a significant legitimising or encouraging effect on the principal.<sup>1040</sup>

2. Command responsibility under Article 7(3) of the Statute

394. Article 7(3) of the Tribunal’s Statute provides that:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

395. This Trial Chamber concurs with the Judgement in the *Delalic* case in respect of the constitutive elements of individual criminal responsibility under Article 7(3) of the

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<sup>1035</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, pars 235 and 249.

<sup>1036</sup> *Ibid*, pars 233, 234 and 249.

<sup>1037</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-T, Judgement, 25 June 1999, par 62 and *Prosecutor v Blaškić*, Case IT-95-14-T, Judgement, 3 Mar 2000, par 285.

<sup>1038</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, pars 162-165; *Prosecutor v Tadić*, Case IT-94-1-A, Judgement, 15 July 1999, par 229.

<sup>1039</sup> *Ibid*.

<sup>1040</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 232; *Prosecutor v Tadić*, Case IT-94-1-A, Opinion and Judgement, 7 May 1997, par 689.

Statute.<sup>1041</sup> The following three conditions must be met before a commander can be held responsible for the acts of his or her subordinates:

- (i) the existence of a superior-subordinate relationship;
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

396. Because of the findings of the Trial Chamber, it need only deal with the first of those elements. A superior-subordinate relationship must exist for the recognition of this kind of responsibility. However, such a relationship cannot be determined by reference to formal status alone.<sup>1042</sup> Accordingly, formal designation as a commander is not necessary for establishing command responsibility, as such responsibility may be recognised by virtue of a person's *de facto*, as well as *de jure*, position as a commander.<sup>1043</sup> What must be established is that the superior had effective control over subordinates.<sup>1044</sup> That means that he must have had the material ability to exercise his powers to prevent and punish the commission of the subordinates' offences.<sup>1045</sup>

397. The relationship between the commander and his subordinates need not have been formalized; a tacit or implicit understanding between them as to their positioning *vis-à-vis* one another is sufficient. The giving of orders or the exercise of powers generally attached to a military command are strong indications that an individual is indeed a commander. But these are not the sole relevant factors.

398. Depending on the circumstances, a commander with superior responsibility under Article 7(3) may be a colonel commanding a brigade, a corporal commanding a platoon or

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<sup>1041</sup> *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 346 and *Prosecutor v Delalic and Other*, Case IT-96-21-A, Judgement, 20 Feb 2001, pars 189-198, 225-226, 238-239, 256, 263 (The Trial Chamber's conclusions as to the first two elements were essentially confirmed by the Appeals Chamber. The third element was not in issue in this Appeal); *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 72.

<sup>1042</sup> *Prosecutor v Delalic and Other*, Case IT-96-21-A, Judgement, 20 Feb 2001, pars 193 and 197.

<sup>1043</sup> *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, pars 370 and 354.

<sup>1044</sup> *Prosecutor v Delalic and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 198.

<sup>1045</sup> *Ibid*, pars 198 and 256; *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 76. See also *Prosecutor v Delalic and Others*, Judgement, 16 Nov 1998, par 378.

even a rankless individual commanding a small group of men. The Commentary to the two Additional Protocols of 1977 to the Geneva Conventions of 1949 states that:<sup>1046</sup>

As there is no part of the army which is not subordinated to a military commander at whatever level, this responsibility applies from the highest to the lowest level of the hierarchy, from the Commander-in-Chief down to the common soldier who takes over as head of the platoon.

This conclusion is also supported by the legislation in force at the time in the relevant area, namely, the former SFRY and later the Republika Srpska.<sup>1047</sup>

399. Both those permanently under an individual's command and those who are so only temporarily or on an *ad hoc* basis can be regarded as being under the effective control of that particular individual.<sup>1048</sup> The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander. To be held liable for the acts of men who operated under him on an *ad hoc* or temporary basis, it must be shown that, *at the time when the acts charged in the Indictment were committed*, these persons were under the effective control of that particular individual.<sup>1049</sup>

## **B. Crimes under Article 3 of the Statute: common elements**

### **1. Background**

400. The three accused are charged with certain offences under Article 3 of the Statute ("Article 3"),<sup>1050</sup> namely outrages upon personal dignity,<sup>1051</sup> rape<sup>1052</sup> and torture.<sup>1053</sup> In

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<sup>1046</sup> Sandoz, Swinarski and Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), p 1019.

<sup>1047</sup> In the SFRY, Art 5 Law on the Service in the Armed Forces distinguishes between the function of the superior and the ranks and classes of junior or senior officers. While the law proceeds on the basic assumption that normally officers will be the superiors, it provides under Art 6 par 2 that a person holding no rank or class may perform the duties of an officer and Art 5 par 3 regulates the relationship of precedence between different officers or superiors. Ranks and classes are defined by Art 11. In the Republika Srpska, the Law on the Army of 1 June 1992, in its Art 4 par 2 combines the concepts of superior and officer by defining the meaning of a "superior officer" as being a person in command of or managing a military unit or institution. Paragraph 3 and Art 5 again provide for the assignment of command positions to persons of lower or no rank or class.

<sup>1048</sup> Sandoz, Swinarski and Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), p 1019.

<sup>1049</sup> *Prosecutor v Delalic and Other*, Case IT-96-21-A, Judgement, 20 Feb 2001, pars 197-198 and 256.

<sup>1050</sup> Art 3 of the Statute, entitled "Violations of the laws or customs of war", states that: "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations

relation to the torture charges under Article 3, the Prosecutor, in the Indictments, expressly charged torture on the basis of common Article 3 of the four Geneva Conventions of 1949 ("common Article 3").<sup>1054</sup> The outrages upon personal dignity charges under Article 3 are submitted by the Prosecutor to be based on common Article 3.<sup>1055</sup> The Prosecutor also submitted that the basis for the rape charges under Article 3 lies in both treaty and customary international law, including common Article 3.<sup>1056</sup> The Trial Chamber must ascertain what the general requirements are for both the application of common Article 3 and the specific offences charged under common Article 3 in the present case.

## 2. The law

### (a) Scope of the law

401. On its face, Article 3 is based on the 1907 Hague Convention and the Regulations annexed to that Convention.<sup>1057</sup> However, the Appeals Chamber in the *Tadić* case, in the Jurisdiction Decision, interpreted Article 3 to encompass other violations of international humanitarian law as well:

[I]t can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5 [of the Statute of the Tribunal], more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 [of the Geneva Conventions] and other customary rules on internal conflicts; (iv) violations of

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shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property."

<sup>1051</sup> Count 21 against Dragoljub Kunarac (Indictment IT-96-23) and Count 25 against Radomir Kovač (*ibid*).

<sup>1052</sup> Counts 4, 8, 10, 12, 20 against Dragoljub Kunarac (Indictment IT-96-23), Count 24 against Radomir Kovač (*ibid*) and Counts 24 and 36 against Zoran Vuković (Indictment IT-96-23/1).

<sup>1053</sup> Counts 3, 7, 11 against Dragoljub Kunarac (Indictment IT-96-23) and Counts 23 and 35 against Zoran Vuković (Indictment IT-96-23/1).

<sup>1054</sup> The Prosecutor formulated those charges in these terms: "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." The Prosecutor's Pre-Trial Brief I essentially repeats the formulation of Indictment IT-96-23 (par 141).

<sup>1055</sup> Prosecutor's Pre-Trial Brief I, par 154.

<sup>1056</sup> *Ibid*, pars 114-119.

<sup>1057</sup> The 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and Annexed Regulations Respecting the Laws and Customs of War on Land.

agreements binding upon the parties to the conflict, considered *qua* treaty law, *i.e.*, agreements which have not turned into customary international law [...].<sup>1058</sup>

In the view of the Appeals Chamber, Article 3 therefore “functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal.”<sup>1059</sup>

(b) General requirements for the application of Article 3

402. The Appeals Chamber in the Jurisdiction Decision identified two preliminary requirements for the application of certain Articles of the Statute, including Article 3.<sup>1060</sup> That Chamber held, first, that for there to be a violation of Article 3, there must be an armed conflict.<sup>1061</sup> An “armed conflict” was defined to “[exist] whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>1062</sup> The Appeals Chamber held that Article 3 applies to both internal and international armed conflicts.<sup>1063</sup> The second preliminary requirement is that of a close nexus between the alleged offence and the armed conflict.<sup>1064</sup> The Appeals Chamber deemed the “required relationship” to be satisfied where the alleged crimes were “closely related to the hostilities”.<sup>1065</sup>

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<sup>1058</sup> *Prosecutor v Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 89 (“Jurisdiction Decision”); confirmed in *Prosecutor v Delalić and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, pars 125 and 136.

<sup>1059</sup> *Prosecutor v Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 91.

<sup>1060</sup> *Ibid*, pars 65 and 67.

<sup>1061</sup> *Ibid*, par 67.

<sup>1062</sup> *Ibid*, par 70.

<sup>1063</sup> *Ibid*, par 137; confirmed in *Prosecutor v Delalić and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, pars 140 and 150. Also see *Prosecutor v Delalić and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 184; *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 132; *Prosecutor v Blaškić*, Case IT-95-14-T, Judgement, 3 Mar 2000, par 161.

<sup>1064</sup> *Prosecutor v Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 70; Prosecutor’s Pre-Trial Brief I, pars 98-101; Prosecutor’s Final Trial Brief, pars 690-696. Also see *Prosecutor v Delalić and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 193; and *Prosecutor v Blaškić*, Case IT-95-14-T, Judgement, 3 Mar 2000, pars 65 and 69.

<sup>1065</sup> *Prosecutor v Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 70. The Trial Chamber in the *Delalić* case, required “an obvious link” (*Prosecutor v Delalić and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 193), “a clear nexus” (*Prosecutor v Delalić and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 197) between the alleged crimes and the armed conflict. The Trial Chamber in the *Blaškić* case, referred to this requirement as finding an “evident nexus between the alleged crimes and the armed conflict as a whole.” (*Prosecutor v Blaškić*, Case IT-95-14-T, Judgement, 3 Mar 2000, par 69).

403. The Appeals Chamber in the Jurisdiction Decision further identified four requirements specific to Article 3:<sup>1066</sup>

(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. [...]; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>1067</sup>

404. It is apparent from these requirements that the general requirements for the application of Article 3 will differ, depending on the specific basis of the relevant charges brought under Article 3. For example, a specific charge based on treaty law would not have the same requirements as customary law relevant to violations of common Article 3, Hague law or violations of the Geneva Conventions other than common Article 3 and the grave breaches provisions. Such a charge would necessitate that two additional requirements be met, namely, that the agreements (i) were unquestionably binding on the parties at the time of the alleged offence and (ii) are not in conflict with or derogate from peremptory norms of international law.<sup>1068</sup>

(c) General requirements for the application of Article 3 based on common Article 3

405. As explained above, the Prosecutor has based the Article 3 charges of torture and outrages upon personal dignity on common Article 3, with the rape charges based in part on common Article 3. Common Article 3 of the Geneva Conventions provides in relevant part that:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of

<sup>1066</sup> *Prosecutor v Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 94.

<sup>1067</sup> *Ibid*, par 94. The Appeals Chamber in *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 20, endorsed these requirements.

<sup>1068</sup> *Prosecutor v Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 143.

sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples. (2) The wounded and the sick shall be collected and cared for. [...].

406. It is well established in the jurisprudence of the Tribunal that common Article 3 as set out in the Geneva Conventions has acquired the status of customary international law.<sup>1069</sup> As the application of common Article 3 would be the same under treaty law as it is under customary international law, and as there are no binding agreements between the relevant parties which purport to vary common Article 3 for the purposes of this case, the Chamber considers it sufficient to focus on the general requirements for the application of common Article 3 under customary international law. The Chamber further considers that it is unnecessary to discuss any additional requirements for the application of rape charges based on treaty law, since common Article 3 alone is sufficient in principle to form the basis of these charges under Article 3, as is observed below.<sup>1070</sup>

407. In summary, the general requirements for both the application of common Article 3 and the specific offences charged under common Article 3 are as follows:

- (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.
- (iv) The violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.
- (v) There must be a close nexus between the violations and the armed conflict.

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<sup>1069</sup> *Ibid*, pars 98 and 134; *Prosecutor v Delali} and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 143.

<sup>1070</sup> At par 407-408 and 436.

(vi) The violations must be committed against persons taking no active part in the hostilities.<sup>1071</sup>

It would appear to the Trial Chamber that common Article 3 may also require some relationship to exist between a perpetrator and a party to the conflict. Since, in the present case, the three accused fought on behalf of one of the parties to the conflict, the Trial Chamber does not need to determine whether such a relationship is required, and if so, what the required relationship should be.<sup>1072</sup>

408. The Trial Chamber is satisfied that common Article 3 and the specific offences charged on that basis comply with the first four general requirements set out above. In particular, with respect to the second general requirement, the Appeals Chamber in the Jurisdiction Decision held that common Article 3 is part of customary international law.<sup>1073</sup> As to the third general requirement, it is not clear from the Appeals Chamber's Jurisdiction Decision in the *Tadić* case whether all violations of common Article 3 would be serious. It stated that "customary international law imposes criminal liability for serious violations of common Article 3 [...]".<sup>1074</sup> However, there can be no doubt whatsoever that rape, torture and outrages upon personal dignity, as charged in the present case, are serious offences. As to the fourth general requirement, the Appeals Chamber in the Jurisdiction Decision in the *Tadić* case held that "customary international law imposes criminal liability for serious violations of common Article 3 [...]".<sup>1075</sup> In particular, rape, torture and outrages upon

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<sup>1071</sup> *Prosecutor v Delalić and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 420.

<sup>1072</sup> See pars 567-569.

<sup>1073</sup> *Prosecutor v Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 98; confirmed in *Prosecutor v Delalić and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, pars 143 and 150. Also see *Prosecutor v Blaškić*, Case IT-95-14-T, Judgement, 3 Mar 2000, par 166; and the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, S/25704, par 35. Yugoslavia ratified both Additional Protocols (Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I") and Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II")) on 11 June 1979 and Bosnia and Herzegovina succeeded to both Additional Protocols on 31 December 1992. Yugoslavia ratified the four Geneva Conventions (including Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 Aug 1949, which is most relevant to the present case) on 21 April 1950 and Bosnia and Herzegovina succeeded to the Geneva Conventions on 31 December 1992.

<sup>1074</sup> *Prosecutor v Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 134 (emphasis added). Also see *Prosecutor v Blaškić*, Case IT-95-14-T, Judgement, 3 Mar 2000, par 134.

<sup>1075</sup> *Prosecutor v Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 134; confirmed in *Prosecutor v Delalić and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 174. Also see *Prosecutor v Blaškić*, Case IT-95-14-T, Judgement, 3 Mar 2000, par 134.

personal dignity, no doubt constituting serious violations of common Article 3, entail criminal responsibility under customary international law.

409. The Trial Chamber considers whether the last three requirements have been met later in this judgement when the evidence is assessed.

### **C. Crimes under Article 5 of the Statute: common elements**

410. Article 5 of the Tribunal's Statute provides a list of offences which, if committed in the context of an armed conflict and as part of "an attack directed against any civilian population", will amount to crimes against humanity. The expression "an attack directed against any civilian population" is commonly regarded as encompassing the following five sub-elements:

- (i) There must be an attack.<sup>1076</sup>
- (ii) The acts of the perpetrator must be part of the attack.<sup>1077</sup>
- (iii) The attack must be "directed against any civilian population".<sup>1078</sup>
- (iv) The attack must be "widespread or systematic".<sup>1079</sup>
- (v) The perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack.<sup>1080</sup>

411. In addition, the Statute provides that the crime must have been "committed in armed conflict" in order for the Tribunal to have jurisdiction under Article 5.<sup>1081</sup>

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<sup>1076</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999, par 251.

<sup>1077</sup> *Ibid*, par 248.

<sup>1078</sup> Art 5 of the Statute expressly uses the expression "directed against any civilian population". See also *Prosecutor v Tadic*, Case IT-94-1-T, Opinion and Judgement, 7 May 1997, pars 635-644.

<sup>1079</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999, par 248; see also *Prosecutor v Mrkšić and Others*, Case IT-95-13-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 Apr 1996, par 30.

<sup>1080</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999, par 248.

<sup>1081</sup> *Ibid*, par 249. See also *Prosecutor v Kupreškic and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, par 546.

## 1. Existence of an armed conflict

412. An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.<sup>1082</sup>

413. The existence of an armed conflict with respect to crimes against humanity goes beyond the stipulations of customary international law. It has been interpreted by the Appeals Chamber as a general pre-requisite – peculiar to the Tribunal’s Statute – which supposes the *existence* of an armed conflict at the time and place relevant to the Indictment.<sup>1083</sup> The requirement that there exists an armed conflict does not necessitate any substantive relationship between the acts of the accused and the armed conflict whereby the accused should have intended to participate in the armed conflict.<sup>1084</sup> The Appeals Chamber has held that a nexus between the acts of the accused and the armed conflict is not required. The armed conflict requirement is satisfied by proof that there was an armed conflict at the relevant time and place.<sup>1085</sup>

414. Once the existence of an armed conflict has been established, international humanitarian law, including the law on crimes against humanity, continues to apply beyond the cessation of hostilities.<sup>1086</sup>

## 2. Existence of an attack and the requirement that the acts be part of the attack

415. An “attack” can be described as a course of conduct involving the commission of acts of violence. The Trial Chamber in the *Tadic* case stated that:<sup>1087</sup>

The very nature of the criminal acts in respect of which competence is conferred upon the International Tribunal by Article 5, that they be “directed against any civilian population”, ensures that what is to be alleged will not be one particular act but, instead, a course of conduct.

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<sup>1082</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 70.

<sup>1083</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999, par 249. See also *Prosecutor v Kupreskic and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, par 546.

<sup>1084</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999, pars 249 and 272. See also *Prosecutor v Blaskic*, Case IT-95-14-T, Judgement, 3 Mar 2000, par 71.

<sup>1085</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999, pars 249 and 251.

<sup>1086</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 70.

<sup>1087</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Decision on the Form of the Indictment, 14 Nov 1995, par 11.

416. The term “attack” in the context of a crime against humanity carries a slightly different meaning than in the laws of war.<sup>1088</sup> In the context of a crime against humanity, “attack” is not limited to the conduct of hostilities. It may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention. However, both terms are based on a similar assumption, namely that war should be a matter between armed forces or armed groups and that the civilian population cannot be a legitimate target.

417. The underlying offence does not need to constitute the attack but only to form a part of the attack or, as it was put by the Appeals Chamber, to “comprise[s] part of a pattern of widespread and systematic crimes directed against a civilian population.”<sup>1089</sup> As was stated in the *Mrksic* proceedings:<sup>1090</sup>

Crimes against humanity?...g must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context of an attack against a civilian population.

418. There must exist a nexus between the acts of the accused and the attack, which consists of:

- (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with
- (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part of the attack.<sup>1091</sup>

419. It is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity.

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<sup>1088</sup> Art 49(1) of Additional Protocol I to the Geneva Conventions of 12 Aug 1949, eg, defines “attacks” as “acts of violence against the adversary, whether in offence or in defence.”

<sup>1089</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999, pars 248 and 255.

<sup>1090</sup> *Prosecutor v Mrksic and Others*, Case IT-95-13-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 Apr 1996, par 30.

<sup>1091</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999, pars 248, 251 and 271; *Prosecutor v Tadic*, Case IT-94-1-T, Opinion and Judgement, 7 May 1997, par 659; and *Prosecutor v Mrksic and Others*, Case IT-95-13-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 Apr 1996, par 30. See also *Prosecutor v Kunarac and Others*, Case IT-96-23 and IT-96-23/1, Decision on Prosecution’s Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000, par 6(b).

420. Finally, the Trial Chamber notes that, although the attack must be part of the armed conflict, it can also outlast it.<sup>1092</sup>

3. The attack must be “directed against any civilian population”

421. The expression “directed against” specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.

422. The desire to exclude isolated or random acts from the scope of crimes against humanity led to the inclusion of the requirement that the acts be directed against a civilian “population”.<sup>1093</sup> In the words of the Trial Chamber in the *Tadic* case, the expression “directed against any civilian population” ensures that generally, the attack will not consist of one particular act but of a course of conduct.<sup>1094</sup>

423. The protection of Article 5 extends to “any” civilian population including, if a state takes part in the attack, that state’s population.<sup>1095</sup> It is therefore unnecessary to demonstrate that the victims are linked to any particular side of the conflict.<sup>1096</sup>

424. The expression “population” does not mean that the *entire* population of the geographical entity in which the attack is taking place (a state, a municipality or another circumscribed area) must be subject to the attack.<sup>1097</sup>

425. The “civilian population” comprises, as suggested by the Commentary to the two Additional Protocols of 1977 to the Geneva Conventions of 1949, all persons who are civilians as opposed to members of the armed forces and other legitimate combatants.<sup>1098</sup>

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<sup>1092</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999, par 251. See also *Prosecutor v Kupreskic and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, par 546; and *Prosecutor v Tadic*, Case IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 69.

<sup>1093</sup> *Prosecutor v Tadic*, Case IT-94-1-T, Opinion and Judgement, 7 May 1997, par 648 and case law referred to. See also *History of the United Nations War Crimes Commission* (1948), p 193: “the word population appears to indicate that a larger body of victims is visualised, and that single or isolated acts against individuals may be considered to fall outside the scope of the concept.”

<sup>1094</sup> *Prosecutor v Tadic*, Case IT-94-1-T, Decision on the Form of the Indictment, 14 Nov 1995, par 11.

<sup>1095</sup> *Prosecutor v Tadic*, Case IT-94-1-T, Opinion and Judgement, 7 May 1997, par 635. See also *History of the United Nations War Crimes Commission* (1948), p 193.

<sup>1096</sup> See, eg, *Attorney General of the State of Israel v Yehezkel Ben Alish Enigster*, District Court of Tel-Aviv, 4 Jan 1952.

<sup>1097</sup> *Prosecutor v Tadic*, Case IT-94-1-T, Opinion and Judgement, 7 May 1997, par 644.

<sup>1098</sup> Sandoz, Swinarski and Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), pp 611 and 1451-1452.

The targeted population must be of a predominantly civilian nature.<sup>1099</sup> However, the presence of certain non-civilians in its midst does not change the character of the population.<sup>1100</sup>

426. Individually, a person shall be considered to be a civilian for as long as there is a doubt as to his or her status.<sup>1101</sup> As a group, the civilian population shall never be attacked as such.<sup>1102</sup> Additionally, customary international law obliges parties to the conflict to distinguish at all times between the civilian population and combatants, and obliges them not to attack a military objective if the attack is likely to cause civilian casualties or damage which would be excessive in relation to the military advantage anticipated.<sup>1103</sup>

427. The attack must be either “widespread” or “systematic”, thereby excluding isolated and random acts.<sup>1104</sup>

428. The adjective “widespread” connotes the large-scale nature of the attack and the number of its victims.<sup>1105</sup> The Commentary of the International Law Commission in its Draft Code of Crimes against Peace and Security of Mankind describes this as follows:<sup>1106</sup>

Inhumane acts must be committed on a large scale meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim.

429. The adjective “systematic” signifies the organised nature of the acts of violence and the improbability of their random occurrence.<sup>1107</sup> 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.

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<sup>1099</sup> *Prosecutor v Tadic*, Case IT-94-1-T, Opinion and Judgement, 7 May 1997, par 638.

<sup>1100</sup> *Prosecutor v Kupreskic and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, par 549.

<sup>1101</sup> See Art 50 (1) of Additional Protocol I.

<sup>1102</sup> See Art 51, alinéas (2), (3), (4), (5) and (6) of Additional Protocol I.

<sup>1103</sup> See, eg, Arts 43, 48 and 57 of Additional Protocol I. As is stated by the Commentary to the two Additional Protocols, the entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 is founded on this rule of customary law (Sandoz, Swinarski and Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), p 598).

<sup>1104</sup> *Prosecutor v Tadic*, Case IT-94-1-T, Opinion and Judgement, 7 May 1997, par 648.

<sup>1105</sup> *Prosecutor v Tadic*, Case IT-94-1-T, Opinion and Judgement, 7 May 1997, par 648; and *Prosecutor v Blaskic*, Case IT-95-14-T, Judgement, 3 Mar 2000, par 206. See also *Prosecutor v Akayesu*, ICTR-96-4-T, Judgement, 2 Sept 1998, par 580.

<sup>1106</sup> *Report of the International Law Commission on the Work of its Forty-Eighth Session* (1996) GAOR, 51<sup>st</sup> Sess, Supp No 10, UN Doc A/51/10, pp 94-95.

430. The widespread or systematic nature of the attack is essentially a relative notion. The Trial Chamber must 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 this population, ascertain whether the attack was indeed widespread or systematic.

431. Only the attack, not the individual acts of the accused, must be “widespread or systematic”. A single act could therefore be regarded as a crime against humanity if it takes place in the relevant context:<sup>1108</sup>

For example, the act of denouncing a Jewish neighbour to the Nazi authorities – if committed against a background of widespread persecution – has been regarded as amounting to a crime against humanity. An *isolated act*, however, - i.e. an atrocity which did not occur within such a context – cannot.

432. The Trial Chamber notes that there has been some difference of approach in the jurisprudence of the ICTY and ICTR, and in that of other courts, as well as in the history of the drafting of international instruments, as to whether a policy element is required under existing customary law.<sup>1109</sup> The Trial Chamber does not have to decide that point because even if there is such a requirement, it has been fulfilled in this case.

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<sup>1107</sup> *Prosecutor v Blaškić*, Judgement, 3 Mar 2000, par 203; and *Prosecutor v Tadić*, Opinion and Judgement, 7 May 1997, par 648. See also *Prosecutor v Akayesu*, Judgement, 2 Sept 1998, par 580.

<sup>1108</sup> *Prosecutor v Kupreškić and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, par 550. See also *Prosecutor v Tadić*, Case IT-94-1-T, Opinion and Judgement, 7 May 1997, par 649.

<sup>1109</sup> It is open to question whether the original sources often cited by Chambers of this Tribunal and of the ICTR support the existence of such a requirement. See *Prosecutor v Nikolić*, Case IT-94-2-I, Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 Oct 1995, par 26; *Prosecutor v Tadić*, Case IT-94-1-T, Opinion and Judgement, 7 May 1997, pars 644 and 653; *Prosecutor v Kupreškić and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, pars 551-552; *Prosecutor v Blaškić*, Case IT-95-14-T, Judgement, 3 Mar 2000, pars 203-205, 254 and 257; *Prosecutor v Akayesu*, Case ICTR-96-4-T, Judgement, 2 Sept 1998, par 580; *Prosecutor v Kayishema and Ruzindana*, Case ICTR-95-1-T, Judgement, 21 May 1999, par 124; and compare the Nuremberg Judgement, reprinted in *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945–1 October 1946, Vol 1, pp 84, 254, 304 (with respect to Streicher) and pp 318-319 (with respect to Von Schirach); Arts 9 and 10 of the Nuremberg Charter; the Control Council Law No 10 case of the court at Stade (Germany), ILR 14/1947, pp 100-102; Supreme Court of the British Zone, OGH br Z, Vol I, p 19 and Vol II, p 231; *In re Altstötter*, ILR 14/1947, pp 278 and 284; the Dutch case *In re Ahlbrecht*, ILR 16/1949, p 396; the Australian case *Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor*, (1991) 172 CLR 501, Case FC 91/026 at 1991 Aust Highct LEXIS 63, BC9102602; Yearbook of the International Law Commission (“ILC”) (1954), Vol II, p 150; *Report of the ILC on the Work of its 43<sup>rd</sup> Sess*, 29 Apr–19 July 1991, Supp No 10 (UN Doc No A/46/10), pp 265-266, of its 46<sup>th</sup> sess, 2 May–22 July 1994, Supp No 10 (UN Doc No A/49/10), pp 75-76, of its 47<sup>th</sup> sess, 2 May–21 July 1995, pp 47, 49 and 50, and of its 48<sup>th</sup> sess, 6 May–26 July 1996, Supp No 10 (UN Doc No A/51/10), pp 93 and 95-96.

4. The mental element: the perpetrator knows of the broader criminal context in which his acts occur

433. The Appeals Chamber in the *Tadic* case made it clear that the motives of the accused for taking part in the attack are irrelevant and that a crime against humanity may be committed for purely personal reasons.<sup>1110</sup>

434. In addition to the intent to commit the underlying offence, the perpetrator needs to know that there is an attack on the civilian population and that his acts comprise part of the attack,<sup>1111</sup> or at least to take the risk that his act is part of the attack.<sup>1112</sup> This, however, does not entail knowledge of the details of the attack.

435. Finally, as the Trial Chamber pointed out above, Article 5 of the Statute protects civilians as opposed to members of the armed forces and other legitimate combatants,<sup>1113</sup> but the Prosecution does not need to prove that the accused chose his victims for their civilian status. However, and as a minimum, the perpetrator must have known or considered the possibility that the victim of his crime was a civilian. The Trial Chamber stresses that, in case of doubt as to whether a person is a civilian, that person shall be considered to be civilian. The Prosecution must show that the perpetrator could not reasonably have believed that the victim was a member of the armed forces.

#### D. Rape

436. Rape has been charged against the three accused as a violation of the laws or customs of war under Article 3 and as a crime against humanity under Article 5 of the Statute. The Statute refers explicitly to rape as a crime against humanity within the Tribunal's jurisdiction in Article 5(g). The jurisdiction to prosecute rape as an outrage against personal dignity, in violation of the laws or customs of war pursuant to Article 3 of the Statute, including upon the basis of common Article 3 to the 1949 Geneva Conventions,

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<sup>1110</sup> *Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999, pars 248 and 252.

<sup>1111</sup> *Ibid*, par 248; *Prosecutor v Tadic*, Case IT-94-1-T, Opinion and Judgement, 7 May 1997, par 659; *Prosecutor v Kupreskic and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, par 556.

<sup>1112</sup> *Prosecutor v Blaskic*, Case IT-95-14-T, Judgement, 3 Mar 2000, pars 247 and 251.

<sup>1113</sup> *History of the United Nations War Crimes Commission* (1948), p 193.

is also clearly established.<sup>1114</sup> The elements common to each of those Articles are set out above.

437. The specific elements of the crime of rape, which are neither set out in the Statute nor in international humanitarian law or human rights instruments, were the subject of consideration by the Trial Chamber in the *Furundžija* case.<sup>1115</sup> There the Trial Chamber noted that in the International Criminal Tribunal for Rwanda judgement in the *Akayesu* proceedings the Trial Chamber had defined rape as “a physical invasion of a sexual nature, committed under circumstances which are coercive”.<sup>1116</sup> It then reviewed the various sources of international law and found that it was not possible to discern the elements of the crime of rape from international treaty or customary law, nor from the “general principles of international criminal law or [...] general principles of international law”. It concluded that “to arrive at an accurate definition of rape based on the criminal law principle of specificity (*Bestimmtheitsgrundsatz*”, also referred to by the maxim *nullem crimen sine lege stricta*”), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws”.<sup>1117</sup> The Trial Chamber found that, based on its review of the national legislation of a number of states, the *actus reus* of the crime of rape is:

- (i) 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) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>1118</sup>

438. This Trial Chamber agrees that these elements, if proved, constitute the *actus reus* of the crime of rape in international law. However, in the circumstances of the present case the Trial Chamber considers that it is necessary to clarify its understanding of the element in

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<sup>1114</sup> See the section on the common elements to Art 3 above (pars 400-409). See, in particular, par (1)(c) of common Article 3 to the Geneva Conventions: “outrages upon personal dignity, in particular humiliating and degrading treatment” which includes rape. See also *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 173.

<sup>1115</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998.

<sup>1116</sup> *Prosecutor v Akayesu*, Case ICTR-96-4-T, Judgement, 2 Sept 1998, par 597. This definition of the elements of rape was adopted by a Trial Chamber of the ICTY in *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, pars 478-9.

<sup>1117</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 177.

<sup>1118</sup> *Ibid*, par 185 (“*Furundžija* definition”).

paragraph (ii) of the *Furundžija* definition. The Trial Chamber considers that the *Furundžija* definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by international law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundžija* definition does not refer to other factors which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim,<sup>1119</sup> which, as foreshadowed in the hearing<sup>1120</sup> and as discussed below, is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.

439. As observed in the *Furundžija* case, the identification of the relevant international law on the nature of the circumstances in which the defined acts of sexual penetration will constitute rape is assisted, in the absence of customary or conventional international law on the subject, by reference to the general principles of law common to the major national legal systems of the world.<sup>1121</sup> The value of these sources is that they may disclose “general concepts and legal institutions” which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject. In considering these national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles, or in the words of the *Furundžija* judgement, “common denominators”,<sup>1122</sup> in those legal systems which embody the *principles* which must be adopted in the international context.

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<sup>1119</sup> The Prosecution, by its emphasis on the need to prove “coercion, force or threats” in the Final Trial Brief (par 754) also apparently favours a narrower definition of what constitutes rape than is indicated by the sources of international law surveyed in this judgement. The submissions, however, appear to misconceive absence of consent as being some sort of “further element” or “additional” factor rather than a matter which encompasses the narrower range of factors which it cites. (see Prosecutor’s Final Trial Brief, pars 755 and 760). As will become apparent, the Trial Chamber does not agree with the Prosecution’s submission that proof of force, threat of force or coercion is an element imposed by international law.

<sup>1120</sup> T, 19 Apr 2000, p 1980-1982.

<sup>1121</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 177. See also *Prosecutor v Tadic*, Case IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, par 15: “It is otherwise of assistance to look to the general principles of law common to the major legal systems of the world, as developed and refined (where applicable) in international jurisprudence.”

<sup>1122</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 178.

440. As noted above, the Trial Chamber in the *Furundžija* case considered a range of national legal systems for assistance in relation to the elements of rape. In the view of the present Trial Chamber, the legal systems there surveyed, looked at as a whole, indicated that the basic underlying *principle* common to them was that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim. The matters identified in the *Furundžija* definition – force, threat of force or coercion – are certainly the relevant considerations in many legal systems but the full range of provisions referred to in that judgement suggest that the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual *autonomy*. The relevance not only of force, threat of force, and coercion but also of absence of consent or voluntary participation is suggested in the *Furundžija* judgement itself where it is observed that:

[...] all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, *or acting without the consent of the victim*: force is given a broad interpretation and includes rendering the victim helpless.<sup>1123</sup>

441. A further consideration of the legal systems surveyed in the *Furundžija* judgement and of the relevant provisions of a number of other jurisdictions indicates that the interpretation suggested above, which focuses on serious violations of sexual autonomy, is correct.

442. In general, domestic statutes and judicial decisions which define the crime of rape specify the nature of the sexual acts which potentially constitute rape, and the circumstances which will render those sexual acts criminal. The relevant law in force in different jurisdictions at the time relevant to these proceedings identifies a large range of different factors which will classify the relevant sexual acts as the crime of rape. These factors for the most part can be considered as falling within three broad categories:

- (i) the sexual activity is accompanied by force or threat of force to the victim or a third party;
- (ii) the sexual activity is accompanied by force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or

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<sup>1123</sup> *Ibid*, par 80.

(iii) the sexual activity occurs without the consent of the victim.

### 1. Force or threat of force

443. The definition of rape in a number of jurisdictions requires that the sexual act occurs by force or is accompanied by force or threat of force. Typical provisions of this nature include the Penal Code of Bosnia and Herzegovina, which provided relevantly:

[...w]hoever coerces a female not his wife into sexual intercourse by force or threat of imminent attack upon her life or body or the life or body of a person close to her, shall be sentenced to a prison term of one to ten years.<sup>1124</sup>

In Germany, the Criminal Code in force at the relevant time provided:

Rape (1) Whoever compels a woman to have extramarital intercourse with him, or with a third person, by force or the threat of present danger to life or limb, shall be punished by not less than two years' imprisonment.<sup>1125</sup>

444. The Criminal Code of Korea defines rape as sexual intercourse with a female "through violence or intimidation".<sup>1126</sup> Other jurisdictions with definitions of rape similarly requiring violence, force or a threat of force include China,<sup>1127</sup> Norway,<sup>1128</sup> Austria,<sup>1129</sup> Spain<sup>1130</sup> and Brazil.<sup>1131</sup>

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<sup>1124</sup> Penal Code of the Socialist Republic of Bosnia and Herzegovina (1991), Ch XI, Art 88(1). Art 90 also penalises sexual intercourse coerced by taking advantage of the victim's mental illness, temporary insanity, incapacity or any other condition which has rendered her unable to resist.

<sup>1125</sup> Strafgesetzbuch, Art 177(1). Art 177 of the German Criminal Code was amended with effect from 1 April 1998 to provide that the crime of sexual coercion or rape is also committed when a perpetrator "tak[es] advantage of the situation in which the victim is defencelessly exposed to the offender's impact". Although this provision is not relevant to the determination of the state of the international law at the time of the crimes alleged in the indictments, it serves as an indication of the trend in national legal systems to a broader range of circumstances which will classify sexual activity as rape.

<sup>1126</sup> Criminal Code of Korea, Ch XXXII, Art 297. Translation from Korean government website [http://www.dci.sppo.go.kr/laws/crimco\\_e.htm](http://www.dci.sppo.go.kr/laws/crimco_e.htm) (site accessed 18 Mar 1999).

<sup>1127</sup> *Criminal Law* (1979), Art 139: "Whoever by violence, coercion or other means rapes a woman is to be sentenced to not less than three years and not less than ten years of fixed-term imprisonment". (This law, which was in force at the time relevant to these proceedings, has been replaced by the 1997 Criminal Code. Section 236 of that Code contains the same prohibition).

<sup>1128</sup> General Civil Penal Code, Ch 19, Art 192: "Any person who by force or by inducing fear for any person's life or health compels any person to commit an act of indecency or is accessory thereto shall be guilty of rape [...]". Translation from Norwegian Ministry of Justice, *The General Civil Penal Code* (1995).

<sup>1129</sup> Strafgesetzbuch, Art 201: "[...] by use of severe force or threat of present severe danger of life or limb directed against the victim or a third person [...]" (as in force 1989-1997).

<sup>1130</sup> Código Penal, Art 178: "The assault on the sexual liberty of another person, with violence or intimidation, will be punishable as a sexual aggression [...]". "Sexual abuses", which are defined as acts of assault on the sexual liberty of another without consent, are punishable by lesser terms of imprisonment: Art 181.

<sup>1131</sup> Código Penal, Art 213 ("[...] violence or serious threat [...]").

445. Certain jurisdictions require proof of force or threat of force (or equivalent concepts) *and* that the act was non-consensual or against the will of the victim.<sup>1132</sup> This includes some jurisdictions in the United States of America.<sup>1133</sup>

2. Specific circumstances which go to the vulnerability or deception of the victim

446. A number of jurisdictions provide that specified sexual acts will constitute rape not only where accompanied by force or threat of force but also in the presence of other specified circumstances. These circumstances include that the victim was put in a state of being unable to resist, was particularly vulnerable or incapable of resisting because of physical or mental incapacity, or was induced into the act by surprise or misrepresentation.

447. The penal codes of a number of continental European jurisdictions contain provisions of this type. The Swiss Penal Code provides that anyone who compels a woman to have sexual intercourse “notably by threat or by violence, by putting *psychological pressure on the victim or rendering her unable to resist*” commits rape.<sup>1134</sup> The provision on rape in the Portuguese Penal Code contains a similar reference to the perpetrator making it impossible for the victim to resist<sup>1135</sup>. The relevant provision of the French Penal Code defines rape as “[a]ny act of sexual penetration of whatever nature, committed through violence, coercion, threat or *surprise* [...]”.<sup>1136</sup> The Italian Penal Code contains the crime of compelling a person to have sexual intercourse by violence or threats but applies the same punishment to anyone who has intercourse with any person who, *inter alia*, was

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<sup>1132</sup> Eg, Sierra Leone, where rape is defined by common law (other than rape of minors, which is governed by statutory provisions). Rape is defined by common law in Sierra Leone as “having unlawful sexual intercourse with a woman without her consent by force, fear or fraud”: see Thompson, *The Criminal Law of Sierra Leone* (1999), pp 68-69.

<sup>1133</sup> New York Penal Law, s 130.05; s 130.35: rape in the first degree involves sexual intercourse without the consent of the victim and which occurs by forcible compulsion, or with a victim who is “incapable of consent by reason of being physically helpless” or is less than eleven years old. Maryland Ann Code (1957), Art 27, 463(a)(1) (“[b]y force or threat of force against the will and without the consent of the other person”). Massachusetts General Laws Ann, c 265, s 22; the definitions of rape and aggravated rape refer to a perpetrator who “compels a person to submit by force and against his will, or compels a person to submit by threat of bodily injury”.

<sup>1134</sup> Code Pénal, Art 190. Emphasis added.

<sup>1135</sup> Código Penal, Art 164 (as in force in 1992): “Whoever has intercourse with a woman, by means of violence, serious threat or, after, in order to have intercourse, having made her unconscious or has made it impossible for her to resist, or, by the same means constrain her to have intercourse with a third person, shall be punished with imprisonment from 2 to 8 years.” (unofficial translation).

<sup>1136</sup> Code Pénal, Art 222 (unofficial translation). Emphasis added. A commentary to this provision states that rape consists of sexually abusing someone against their will when the absence of will results from the use of physical/psychological violence or from other coercive measures or tricks to bend the will of the victim. Dalloz, *Code Pénal, Nouveau Code Pénal - Ancien Code Pénal* (1996-7).

“mentally ill, or unable to resist by reason of a condition of physical or mental inferiority, even though this was independent of the act of the offender” or “was deceived because the offender impersonated another person”.<sup>1137</sup>

448. In Denmark, section 216 of the Criminal Code provides that rape is committed by any person who “enforces sexual intercourse by violence or under threat of violence”, but specifies that “the placing of a person in such a position that that person is *unable to resist the act* shall be equivalent to violence.”<sup>1138</sup> The Penal Codes of Sweden<sup>1139</sup> and Finland<sup>1140</sup>, contain similar provisions. In Estonia, rape is defined in the Criminal Code as sexual intercourse “by violence or threat of violence or by taking advantage of the helpless situation of the victim”.<sup>1141</sup>

449. The Japanese Criminal Code provides that “[a] person who by violence or threat, obtains carnal knowledge of a female person of thirteen years or over shall be guilty of rape [...]”.<sup>1142</sup> Article 178 of the Code however, effectively widens the conduct which will be considered to amount to rape by providing that where a person “by *taking advantage of loss of reason or incapacity to resist or by causing such loss of reason or incapacity to resist*, commits an indecent act or obtains carnal knowledge of a woman”<sup>1143</sup> is to be punished in the same way as provided for in the article relating to rape.

450. The Criminal Code of Argentina defines rape as sexual penetration where there is force or intimidation, where the victim is “*of unsound mind or effect, or when due to illness*

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<sup>1137</sup> Codice Penale, Art 519; see particularly subpars (3) and (4) (as in force in 1992). Translation from New York University, *The Italian Penal Code* (1978).

<sup>1138</sup> Danish Criminal Code, Ch 24, Art 216(1). Emphasis added. Translation from Hoyer, Spencer and Greve, *The Danish Criminal Code* (1997).

<sup>1139</sup> Penal Code, Ch 6, s 1 provides that rape is committed where a person “by violence or threat which involves or appears to the threatened person to involve an imminent danger, forces another person to have sexual intercourse or to engage in a comparable sexual act” and that “[c]ausing helplessness or a similar state of incapacitation shall be regarded as equivalent to violence”. Translation from Ministry of Justice, *The Swedish Penal Code* (1999).

<sup>1140</sup> Penal Code of Finland, Ch 20, s 1(1) (“A person who forces a woman to sexual intercourse by violence or by threat of an imminent danger shall be sentenced for *rape* [...]. The impairment of the power of the woman to control her conduct or to offer resistance shall be deemed equivalent to violence or a threat”. Unofficial translation on file with ICTY library).

<sup>1141</sup> Kriminaalkoodeks 1992, s 115(1).

<sup>1142</sup> Criminal Code, Art 177. Translation from EHS Law Bulletin Series, *The Penal Code of Japan* (1996), Vol II.

<sup>1143</sup> Emphasis added.

or whatever other reason, they are incapable of resisting" or where the victim is under twelve.<sup>1144</sup> Similar provisions apply in Costa Rica,<sup>1145</sup> Uruguay<sup>1146</sup> and the Philippines.<sup>1147</sup>

451. Some States of the United States of America provide in their criminal codes that sexual intercourse constitutes rape if committed in the presence of various factors as an alternative to force, such as that the victim is drugged or unconscious, has been fraudulently induced to believe the perpetrator is the victim's spouse, or is incapable of giving legal consent because of a mental disorder or developmental or physical disability.<sup>1148</sup>

452. The emphasis of such provisions is that the victim, because of an incapacity of an enduring or qualitative nature (eg mental or physical illness, or the age of minority) or of a temporary or circumstantial nature (eg being subjected to psychological pressure or otherwise in a state of inability to resist) was unable to refuse to be subjected to the sexual acts. The key effect of factors such as surprise, fraud or misrepresentation is that the victim was subjected to the act without the opportunity for an informed or reasoned refusal. The common denominator underlying these different circumstances is that they have the effect that the victim's will was overcome or that her ability freely to refuse the sexual acts was temporarily or more permanently negated.

### 3. Absence of consent or voluntary participation

453. In most common law systems, it is the absence of the victim's free and genuine consent to sexual penetration which is the defining characteristic of rape.<sup>1149</sup> The English

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<sup>1144</sup> Código Penal, Art 119. Emphasis added.

<sup>1145</sup> Código Penal, Art 156.

<sup>1146</sup> Código Penal, Art 272. The definition in the Uruguay Code also refers expressly to sexual intercourse being presumed to be violently imposed when imposed on an arrested or detained person by the person having power over the victim's detention.

<sup>1147</sup> The Revised Penal Code of the Philippines provides by Art 335 that rape is carnal knowledge of a woman committed by "using force or intimidation", "when the woman is deprived of reason or otherwise unconscious" or when the victim is under twelve.

<sup>1148</sup> California Penal Code, s 261(a)(1), (3), (4) and (5). See also the Model Penal Code, s 213.1 which refers to sexual intercourse with a person not the perpetrator's wife where the victim was compelled "to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone", the perpetrator "substantially impaired [the victim's] power to control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance" or that the victim is unconscious or less than ten years old.

<sup>1149</sup> See Smith, *Smith & Hogan Criminal Law* (1999), p 457: "The essence of rape is the absence of consent [...]. At one time it was stated that the intercourse must have been procured through force, fear or fraud. Some books continued to state the law in those terms until very recently but they have been out-of-date for well over a century."

common law defined rape as sexual intercourse with a woman without her consent.<sup>1150</sup> In 1976 rape was also defined by statute. Under the provision in force at the time relevant to these proceedings, a man committed rape where “(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it [...]”.<sup>1151</sup> Force or threat or fear of force need not be proven; however where apparent consent is induced by such factors it is not real consent.<sup>1152</sup> Similar definitions apply in other Commonwealth countries including Canada,<sup>1153</sup> New Zealand<sup>1154</sup> and Australia.<sup>1155</sup> In these jurisdictions it is also clear that the consent must be genuine and voluntarily given. In Canada, consent is defined in the Criminal Code as “the voluntary agreement of the complainant to engage in the sexual activity in question”.<sup>1156</sup> The Code also explicitly identifies circumstances in which no consent will be considered to have been obtained, including that “the agreement is expressed by the words or conduct of a person other than the complainant” or that the accused “induces the complainant to engage in the

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<sup>1150</sup> See, eg, Report of the Advisory Group on the Law of Rape (1975), Cmnd 6352, pars 18-22, cited in *R v Olugboja* [1982] QB 320. The English common law definition of rape is reflected in the Hong Kong Crimes Ordinance, s 118: “A man commits rape if-(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not (b) consent to it; [...]”.

<sup>1151</sup> Sexual Offences (Amendment) Act 1976, amending s 1 of the Sexual Offences Act 1956. The definition in the Sexual Offences Act 1956 was again amended in 1994 by the Criminal Justice and Public Order Act 1994, s 142 which makes it an offence for a man to rape a woman or a man and specifies that the sexual intercourse may be vaginal or anal.

<sup>1152</sup> *R v Olugboja*, [1982] QB 320.

<sup>1153</sup> In Canada, rape falls within the statutory crime of sexual assault under s 271 of the Criminal Code. This is any assault of a sexual nature, and assault is defined by s 265 as, in effect, a touching without the consent of the victim.

<sup>1154</sup> The New Zealand Crimes Act, 1961 penalises “sexual violation” which is defined as the act of a male raping a female or of any person having “unlawful sexual connection” with another: s 128 (1). Rape is defined as penetration of the woman “(a) Without her consent; and (b) Without believing on reasonable grounds that she consents to that sexual connection”. Section 128A defines matters that do *not* constitute consent to sexual connection, including the submission or acquiescence of the victim by reason of “the actual or threatened application of force to that person or some other person”, the fear of such application of force, or a mistake as to the identity of the person or the nature and quality of the act to which consent was given.

<sup>1155</sup> In New South Wales, where the common law offence of rape has been repealed by statute, rape is encompassed within the crime of sexual assault under s 611 of the Crimes Act 1900 (NSW) which provides that: “Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to penal servitude for 14 years.” See also Crimes Act, 1958 (Vic), s 38(2) which provides in part that: “A person commits rape if- (a) he or she intentionally sexually penetrates another person without that person’s consent while (b) being aware that the person is not consenting or might not be consenting; [...]”. Sexual intercourse or penetration without consent is an offence in the legislation of other states and territories. See Crimes Act 1900 (ACT), s 92D; Criminal Code (WA), s 325; Criminal Law Consolidation Act 1935 (SA), s 48.

<sup>1156</sup> Criminal Code, s 273.1(1).

activity by abusing a position of trust, power or authority".<sup>1157</sup> In Victoria, Australia, consent is defined as "free agreement" and the statute defines circumstances in which free agreement is not given, including where a person submits because of the use of force, fear of force or harm, or because the person is in unlawful detention; where the person is asleep or unconscious or is mistaken as to, or is incapable of understanding, the nature of the act.<sup>1158</sup>

454. The Indian Penal Code provides that sexual intercourse with a woman will constitute rape in any of six defined circumstances. These include that it occurs "[a]gainst her will"; "without her consent", or with her consent if such consent is negated by various circumstances including that it was "obtained by putting her or any person in whom she is interested in fear of death or being hurt".<sup>1159</sup> The provision on rape in the Bangladesh Penal Code is materially almost identical.<sup>1160</sup>

455. Rape is defined in South Africa at common law as a man intentionally having unlawful sexual intercourse with a woman without her consent.<sup>1161</sup> The Zambian Penal Code provides that rape is committed by any person

[...] who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in the case of a married woman, by impersonating her husband.<sup>1162</sup>

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<sup>1157</sup> Criminal Code, s 273.1(2).

<sup>1158</sup> Crimes Act 1958 (Vic), s 36.

<sup>1159</sup> Section 375, Penal Code. The section provides: "Rape. - A man is said to commit 'rape' who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: -*First*.- Against her will. *Secondly*.- Without her consent. *Thirdly*.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. *Fourthly*.- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. *Fifthly*.- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. *Sixthly*.- With or without her consent, when she is under sixteen years of age."

<sup>1160</sup> Bangladesh Penal Code, s 375. (Abdul Matin, *The Penal Code* (1994), p 718). The fifth circumstance enumerated in the Indian Penal Code is absent from the Bangladesh Code. The Pakistan Penal Code contained an almost identical provision until its repeal in 1979.

<sup>1161</sup> See, eg, the decision of *K 1958 3 SA 429 (A) 421F*. Consent is not established by mere submission: *F 1990 1 SACR 238 (A) 249* and a number of different factors such as fear induced by violence or threats will exclude any genuine consent: *S 1971 2 SA 591 (A)*.

<sup>1162</sup> Zambian Penal Code, Cap 87, s 132 of The Laws of Zambia.

456. Certain non-common law jurisdictions also define rape in terms of non-consensual sexual intercourse. The Belgian Penal Code provides: “Any act of sexual penetration, whatever its nature, and by whatever means, committed on someone who does not consent to it, constitutes the crime of rape.” There is no consent in particular when the act has been imposed through violence, coercion or ruse, or was made possible by the infirmity or the mental or physical incapacity of the victim.<sup>1163</sup>

#### 4. The basic principle underlying the crime of rape in national jurisdictions

457. An examination of the above provisions indicates that the factors referred to under the first two headings are matters which result in the will of the victim being overcome or in the victim’s submission to the act being non-voluntary. The basic principle which is truly common to these legal systems is that serious violations of sexual *autonomy* are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.

458. In practice, the absence of genuine and freely given consent or voluntary participation may be *evidenced* by the presence of the various factors specified in other jurisdictions – such as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator.<sup>1164</sup>

459. Given that it is evident from the *Furundžija* case that the terms coercion, force, or threat of force were not to be interpreted narrowly and that coercion in particular would encompass *most* conduct which negates consent, this understanding of the international law on the subject does not differ substantially from the *Furundžija* definition.

460. In light of the above considerations, the Trial Chamber understands that 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) of the mouth of the victim by the penis of the

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<sup>1163</sup> Code Pénale, Art 375. See also the Nicaraguan Código Penal, Art 195.

<sup>1164</sup> See, eg, Canadian Criminal Code, s 273; Crimes Act 1958 (Vic), s 36.

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.

## 5. The effect of Rule 96: evidence in cases of sexual assault

461. The Prosecution submits that

[I]ack of consent is not an element of the offence of rape (or any other sexual assault) as defined by the law and rules of the Tribunal, and the existence of force, threat of force, or coercion vitiates consent as a defence.<sup>1165</sup>

It refers to Rule 96 of the Rules of Procedure and Evidence in support of its view that the relevance of consent is only as a *defence* in limited circumstances.

462. Rule 96 provides:

In cases of sexual assault:

- (i) no corroboration of the victim's testimony shall be required;
- (ii) consent shall not be allowed as a defence if the victim
  - (a) has been subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression, or
  - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
- (iv) prior sexual conduct of the victim shall not be admitted into evidence.

463. The reference in the Rule to consent as a "defence" is not entirely consistent with traditional legal understandings of the concept of consent in rape. Where consent is an aspect of the definition of rape in national jurisdictions, it is generally understood (as demonstrated by many of the provisions referred to above) to be *absence of consent* which is an *element* of the crime. The use of the word "defence", which in its technical sense carries an implication of the shifting of the burden of proof to the accused, is inconsistent

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<sup>1165</sup> Prosecutor's Pre-Trial Brief I, par 128.

with this understanding. The Trial Chamber does not understand the reference to consent as a “defence” in Rule 96 to have been used in this technical way. The reference in Rule 67(A)(ii)(a) to the “defence of alibi” is another example of the use of the word “defence” in a non-technical sense. An alibi is not a defence in the sense that it must be proved by the defendant. A defendant who raises an alibi is merely denying that he was in a position to commit the crime with which he was charged, and by raising that issue, the defendant simply requires the Prosecution to eliminate the reasonable possibility that the alibi is true.

464. As emphasised by the Appeals Chamber, the Trial Chamber must interpret the Rules of Procedure and Evidence in the light of the relevant international law.<sup>1166</sup> Consistently with its understanding of the definition of rape in international law, the Trial Chamber does not interpret the reference to consent as a “defence” as a reference to a defence in its technical sense. It understands the reference to consent as a “defence” in Rule 96 as an indication of the understanding of the judges who adopted the rule of those matters which would be considered to *negate* any apparent consent. It is consistent with the jurisprudence considered above and with a common sense understanding of the meaning of genuine consent that where the victim is “subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression” or “reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear”, any apparent consent which might be expressed by the victim is not freely given and the second limb of the Trial Chamber’s definition would be satisfied. The factors referred to in Rule 96 are also obviously not the only factors which may negate consent. However, the reference to them in the Rule serves to reinforce the requirement that consent will be considered to be absent in those circumstances unless freely given.

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<sup>1166</sup> *Prosecutor v Tadic*, Case IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, par 25: “Sub-rule (A) to (D) [of Rule 77] are statements of what was seen by the judges at Plenary meetings of the Tribunal to reflect the jurisprudence upon those aspects of the law of contempt as are applicable to the Tribunal. Those statements do not displace the underlying law; both the Tribunal and the parties remain bound by that underlying law”. Rule 96 was explicitly referred to by the Appeals Chamber as another example of the application of that principle (see fn 26 to par 25).

## E. Torture

465. Torture has been charged against the three accused as a violation of the laws or customs of war under Article 3 of the Statute and as a crime against humanity under Article 5 of the Statute. The elements common to each of those Articles are set out above.

466. Torture is prohibited under both conventional and customary international law and it is prohibited both in times of peace and during an armed conflict.<sup>1167</sup> The prohibition can be said to constitute a norm of *jus cogens*.<sup>1168</sup> However, relatively few attempts have been made at defining the offence of torture. This has been done in Article 1 of the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Declaration on Torture"),<sup>1169</sup> Article 1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention")<sup>1170</sup> and Article 2 of the Inter-American Convention to Prevent and Punish Torture of 9 December 1985 ("Inter-American Torture Convention").<sup>1171</sup> All three are, as is obvious, human rights instruments.

467. Because of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law.

468. The Trial Chamber in *Furundžija* held that "international law, while outlawing torture in armed conflict, does not provide a definition of the prohibition."<sup>1172</sup> That Trial Chamber consequently turned to human rights law to determine the definition of torture under customary international law. The Trial Chamber, however, pointed out that it should

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<sup>1167</sup> *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, pars 452-454; *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, pars 139 and 143.

<sup>1168</sup> *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 454.

<sup>1169</sup> Adopted by UN General Assembly resolution 3452 of 9 Dec 1975.

<sup>1170</sup> Adopted and opened for signature, ratification and accession by UN General Assembly resolution 39/46 of 10 Dec 1984. Entered into force on 26 June 1987.

<sup>1171</sup> The Convention was signed on 9 Dec 1985 and entered into force on 28 Feb 1987. See OAS Treaty Series No 67, OEA/Ser.A/42 (SEPF).

<sup>1172</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 159.

"identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts."<sup>1173</sup>

469. The Trial Chamber agrees with this approach. The absence of an express definition of torture under international humanitarian law does not mean that this body of law should be ignored altogether. The definition of an offence is largely a function of the environment in which it develops. Although it may not provide its own explicit definition of torture, international humanitarian law does provide some important definitional aspects of this offence.

470. In attempting to define an offence under international humanitarian law, the Trial Chamber must be mindful of the specificity of this body of law.<sup>1174</sup> In particular, when referring to definitions which have been given in the context of human rights law, the Trial Chamber will have to consider two crucial structural differences between these two bodies of law:

(i) Firstly, the role and position of the state as an actor is completely different in both regimes. Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities.

In the human rights context, the state is the ultimate guarantor of the rights protected and has both duties and a responsibility for the observance of those rights. In the event that the state violates those rights or fails in its responsibility to protect the rights, it can be called to account and asked to take appropriate measures to put an end to the infringements.

In the field of international humanitarian law, and in particular in the context of international prosecutions, the role of the state is, when it comes to accountability, peripheral. Individual criminal responsibility for violation of international humanitarian law does not depend on the participation of the state and, conversely, its participation in the

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<sup>1173</sup> *Ibid*, par 162.

<sup>1174</sup> *Ibid*, par 162.

commission of the offence is no defence to the perpetrator.<sup>1175</sup> Moreover, international humanitarian law purports to apply equally to and expressly bind all parties to the armed conflict whereas, in contrast, human rights law generally applies to only one party, namely the state involved, and its agents.

This distinction can be illustrated by two recent American decisions of the Court of Appeals for the Second Circuit rendered under the Alien Torts Claims Act. The Act gives jurisdiction to American district courts for any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States. In the first decision, *In re Filártiga*, the Court of Appeals of the Second Circuit held that “deliberate torture perpetrated under colour of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties”.<sup>1176</sup> This decision was only concerned with the situation of an individual *vis-à-vis* a state, either his national state or a foreign state.<sup>1177</sup> In a later decision in *Kadic v Karadžić*,<sup>1178</sup> the same court made it clear that the body of law which it applied in the *Filártiga* case was customary international law of human rights and that, according to the Court of Appeals, in the human rights context torture is proscribed by international law only when committed by state officials or under the colour of the law.<sup>1179</sup> The court added, however, that atrocities including torture are actionable under the Alien Tort Claims Act regardless of state participation to the extent that the criminal acts were committed in pursuit of genocide or war crimes.<sup>1180</sup>

(ii) Secondly, that part of international criminal law applied by the Tribunal is a penal law regime. It sets one party, the prosecutor, against another, the defendant. In the field of international human rights, the respondent is the state. Structurally, this has been expressed by the fact that human rights law establishes lists of protected rights whereas international criminal law establishes lists of offences.

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<sup>1175</sup> Art 7(2) of the Statute states that: “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

<sup>1176</sup> *Filártiga v Peña-Irala*, 630 F.2d 876, 878-879 (1980).

<sup>1177</sup> *Ibid*, 878-879 and 885.

<sup>1178</sup> *Kadic v Karadžić*, 70 F.3d 232 (2d Cir 1995), *cert Denied*, 64 US 3832 (18 June 1996).

<sup>1179</sup> *Ibid*, 240-241 and 244-245.

<sup>1180</sup> *Ibid*, 243-245: “It suffices to hold at this stage that the alleged atrocities are actionable under the Alien Tort Act, without regard to State action, to the extent that they were committed in pursuit of genocide or war crimes”.

471. The Trial Chamber is therefore wary not to embrace too quickly and too easily concepts and notions developed in a different legal context. The Trial Chamber is of the view that notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law. The Trial Chamber now turns more specifically to the definition of the crime of torture.

472. The Trial Chamber in the *Delalic* case, considered that the definition contained in the Torture Convention “reflects a consensus which the Trial Chamber considers to be representative of customary international law.”<sup>1181</sup> The Trial Chamber in the *Furundžija* case shared that view and held that there was general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention.<sup>1182</sup>

473. This Trial Chamber notes, however, that Article 1 of the Torture Convention makes it abundantly clear that its definition of torture is limited in scope and was meant to apply only “for the purposes of this Convention”.<sup>1183</sup> In addition, paragraph 2 of Article 1 of the Torture Convention states that this Article is “without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.” Therefore, insofar as other international instruments or national laws give the individual broader protection, he or she shall be entitled to benefit from it. This, and the fact that the definition was meant to apply only in the context of the Convention are elements which should be kept in mind when considering the possibility that the definition of the Torture Convention produced an extra-conventional effect.

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<sup>1181</sup> *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 459.

<sup>1182</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, pars 160-161. See UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/RES/39/46 (1984) (“Torture Convention”). Art 1(1) of the Torture Convention reads as follows: “For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted upon 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 party has 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.”

<sup>1183</sup> Art 1 of the Torture Convention. See also *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 160.

474. The 1975 Declaration on Torture contained a definition broadly similar to, but narrower than, the one contained in the Torture Convention.<sup>1184</sup> The Declaration was non-binding but it certainly served as a basis for the definition eventually included in the Torture Convention. Article 2 of the Inter-American Torture Convention contains the following definition of torture:<sup>1185</sup>

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. ?...g

475. Article 3 of the Inter-American Torture Convention limits the applicability of this definition of torture in the context of the Convention to two broad categories of people. Article 3 provides:

The following shall be held guilty of the crime of torture: (a) A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so. (b) A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

476. This definition is broader than the one contained in the Torture Convention. Firstly, the definition of the Inter-American Convention does not specify a threshold level of pain or suffering which is necessary for ill treatment to constitute torture.<sup>1186</sup> It actually removes any requirement of physical or mental suffering if the intent of the perpetrator is "to obliterate the personality of the victim or to diminish his physical or mental capacities". Secondly, this definition does not contain an exhaustive list of purposes that can be pursued by the perpetrator but instead provides examples of such purposes and adds "or for any other purpose."

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<sup>1184</sup> Art 1(1) of the Declaration reads as follows: "For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners." See also *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 457.

<sup>1185</sup> See Office of the UN High Commissioner for Human Rights, *A Compilation of International Instruments*, Vol II: Regional Instruments (1997), pp 48 *et seq.*

<sup>1186</sup> *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 457.

477. Other international human rights instruments prohibit the act of torture without providing an express definition of the offence. Article 5 of the 1948 Universal Declaration of Human Rights provides that no one shall be subjected to torture or to cruel treatment. Article 30 of that Declaration in turn holds that “Nothing in this Declaration may be interpreted as implying for any State, *group or person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”<sup>1187</sup> This general statement is also valid with respect to the principle of freedom of torture expressed in Article 5.

478. Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention” or “Convention”) provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The European Court of Human Rights (“ECHR”) held that the concept of torture attaches a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.<sup>1188</sup> The European Commission of Human Rights held that torture constitutes an aggravated and deliberate form of inhuman treatment which is directed at obtaining information or confessions, or at inflicting a punishment.<sup>1189</sup> The three main elements of the definition of torture under the European Convention are thus the level of severity of the ill-treatment, the deliberate nature of the act and the specific purpose behind the act. The requirement that the state or one of its officials take part in the act is a general requirement of the Convention - not a definitional element of the act of torture - which applies to each and every prohibition contained in the Convention. Article 1 of the Convention, which provides that the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention, is clearly addressed to member states, not to individuals. The ECHR is not a criminal court which determines individual criminal responsibility, but an organ whose mandate is to determine state compliance with its obligations under the Convention.

479. The Trial Chamber notes, however, the ECHR’s jurisprudence which has held that Article 3 of the Convention may also apply in situations where organs or agents of the state

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<sup>1187</sup> Emphasis added.

<sup>1188</sup> *Ireland v UK*, 18 Jan 1978, Series A, No 25, par 167.

<sup>1189</sup> *Greek case*, 1969, YB Eur Conv on HR 12, p 186.

are *not* involved in the violation of the rights protected under Article 3.<sup>1190</sup> For example, in *HLR v France*, the Court held that

Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials.<sup>1191</sup>

480. Article 7 of the 1966 International Covenant on Civil and Political Rights (“ICCPR”) provides that no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. The Human Rights Committee held that the protection offered by Article 7 of the ICCPR was not limited to acts committed by or at the instigation of public officials but that it also possessed horizontal effects, and that states should therefore protect individuals from interference by private parties. The Committee stated the following: “It is also the duty of public authorities to ensure protection by law against such treatment even when committed by persons acting outside or without any official authority”.<sup>1192</sup>

481. In a later Comment of 3 April 1992, the Human Rights Committee stated that

It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.<sup>1193</sup>

482. The Trial Chamber in *Furundžija* held that a conventional provision could have an extra-conventional effect to the extent that it codifies or contributes to developing or crystallising customary international law.<sup>1194</sup> In view of the international instruments and jurisprudence reviewed above, the Trial Chamber is of the view that the definition of torture contained in the Torture Convention cannot be regarded as the definition of torture under customary international law which is binding regardless of the context in which it is applied. The definition of the Torture Convention was meant to apply at an inter-state level and was, for that reason, directed at the states’ obligations. The definition was also meant to apply only in the context of that Convention, and only to the extent that other international instruments or national laws did not give the individual a broader or better protection. The Trial Chamber, therefore, holds that the definition of torture contained in

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<sup>1190</sup> See, eg, *Costello-Roberts v UK*, 25 Mar 1993, Series A, No 247-C, pars 27-28; *HLR v France*, 29 Apr 1997, Reports 1997-III, p 758, par 40; and *A v UK*, 23 Sept 1998, Reports of Judgements and Decisions 1998-VI, p 2692, par 22.

<sup>1191</sup> *HLR V France*, 29 Apr 1997, Reports 1997-III, p 758, par 40.

<sup>1192</sup> General Comment 7/16 of 27 July 1982 ?Prohibition of Tortureg, par 2.

<sup>1193</sup> General Comment 20/44 of 3 April 1992 ?Prohibition of Tortureg, par 2.

Article 1 of the Torture Convention can only serve, for present purposes, as an interpretational aid.

483. Three elements of the definition of torture contained in the Torture Convention are, however, uncontroversial and are accepted as representing the status of customary international law on the subject:

- (i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental.<sup>1195</sup>
- (ii) This act or omission must be intentional.<sup>1196</sup>
- (iii) The act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal.<sup>1197</sup>

484. On the other hand, three elements remain contentious:

- (i) The list of purposes the pursuit of which could be regarded as illegitimate and coming within the realm of the definition of torture.
- (ii) The necessity, if any, for the act to be committed in connection with an armed conflict.
- (iii) The requirement, if any, that the act be 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.

485. The Trial Chamber is satisfied that the following purposes have become part of customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person. There are some doubts as to whether other purposes have come to be recognised under customary international law. The issue does not need to

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<sup>1194</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 160.

<sup>1195</sup> *Ibid*, par 162; *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 468.

<sup>1196</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 162; *Prosecutor v Akayesu*, Judgement, 2 Sept 1998, par 594.

<sup>1197</sup> *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, pars 470-472; *Prosecutor v Akayesu*, Case ICTR-96-4-T, Judgement, 2 Sept 1998, par 594.

be resolved here, because the conduct of the accused is appropriately subsumable under the above-mentioned purposes.

486. There is no requirement under customary international law that the conduct must be solely perpetrated for one of the prohibited purposes. As was stated by the Trial Chamber in the *Delalic* case, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.<sup>1198</sup>

487. Secondly, the nature of the relationship between the underlying offence – torture – and the armed conflict depends, under the Tribunal’s Statute, on the qualification of the offence, as a grave breach, a war crime or a crime against humanity.<sup>1199</sup> If, for example, torture is charged as a violation of the laws or customs of war under Article 3 of the Statute, the Trial Chamber will have to be satisfied that the act was closely related to the hostilities.<sup>1200</sup> If, on the other hand, torture is charged as a crime against humanity under Article 5 of the Statute, the Trial Chamber will have to be convinced beyond reasonable doubt that there existed an armed conflict at the relevant time and place.

488. Thirdly, the Torture Convention requires that the pain or suffering be 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. As was already mentioned, the Trial Chamber must consider each element of the definition “from the specific viewpoint of international criminal law relating to armed conflicts.”<sup>1201</sup> In practice, this means that the Trial Chamber must identify those elements of the definition of torture under human rights law which are extraneous to international criminal law as well as those which are present in the latter body of law but possibly absent from the human rights regime.

489. The Trial Chamber draws a clear distinction between those provisions which are addressed to states and their agents and those provisions which are addressed to individuals. Violations of the former provisions result exclusively in the responsibility of the state to take the necessary steps to redress or make reparation for the negative consequences of the criminal actions of its agents. On the other hand, violations of the second set of provisions

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<sup>1198</sup> *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 470.

<sup>1199</sup> See, eg, *Prosecutor v Akayesu*, Case ICTR-96-4-T, Judgement, 2 Sept 1998, par 595.

<sup>1200</sup> *Prosecutor v Tadic*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 70.

<sup>1201</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 162.

may provide for individual criminal responsibility, regardless of an individual's official status. While human rights norms are almost exclusively of the first sort, humanitarian provisions can be of both or sometimes of mixed nature. This has been pointed out by the Trial Chamber in the *Furundžija* case:<sup>1202</sup>

Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to prevent torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly wrongful act generating State responsibility.

490. Several humanitarian law provisions fall within the first category of legal norms, expressly providing for the possibility of state responsibility for the acts of its agents: thus, Article 75 ("Fundamental Guarantees") of Additional Protocol I provides that acts of violence to the life, health, or physical or mental well-being of persons such as murder, torture, corporal punishment and mutilation, outrages upon personal dignity, the taking of hostages, collective punishments and threats to commit any of those acts when committed by civilian or by military agents of the state could engage the state's responsibility.<sup>1203</sup> The requirement that the acts be committed by an agent of the state applies equally to any of the offences provided under paragraph 2 of Article 75 and in particular, but no differently, to the crime of torture.

491. This provision should be contrasted with Article 4 ("Fundamental Guarantees") of Additional Protocol II. The latter provision provides for a list of offences broadly similar to that contained in Article 75 of Additional Protocol I but does not contain any reference to agents of the state. The offences provided for in this Article can, therefore, be committed by any individual, regardless of his official status, although, if the perpetrator is an agent of the state he could additionally engage the responsibility of the state. The Commentary to Additional Protocol II dealing specifically with the offences mentioned in Article 4(2)(a) namely, violence to the life, health, or physical or mental well being of persons in particular murder and cruel treatment such as torture, states:<sup>1204</sup>

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<sup>1202</sup> *Ibid*, par 142.

<sup>1203</sup> See also Art 32 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

<sup>1204</sup> Sandoz, Swinarski and Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), pp 1373-1374.

The most widespread form of torture is practised by public officials for the purpose of obtaining confessions, but torture is not only condemned as a judicial institution; *the act of torture is reprehensible in itself, regardless of its perpetrator*, and cannot be justified in any circumstances.<sup>1205</sup>

492. The Trial Chamber also notes Article 12 (“Protection and Care”) of 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, which provides that members of the armed forces and other defined persons who are wounded or sick shall be respected and protected in all circumstances.<sup>1206</sup> In particular, paragraph 2 of this Article provides that the wounded or sick shall not be tortured. The Commentary to this paragraph adds the following:

The obligation of respect and protection mentioned in paragraph 1g applies to all combatants in an army, whoever they may be, and also to non-combatants. *It applies also to civilians*, in regard to whom Article 18 specifically states: ‘The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence.’ A clear statement to that effect was essential in view of the special character which modern warfare is liable to assume (dispersion of combatants, isolation of units, mobility of fronts, etc) and which may lead to closer and more frequent contacts between military and civilians. It was necessary, therefore, and more necessary today than in the past, that the principle of the inviolability of wounded combatants should be brought home, *not only to the fighting forces, but also to the general public*. That principle is one of the fine flowers of civilization, and should be implanted firmly in public morals and in the public conscience.<sup>1207</sup>

493. A violation of one of the relevant articles of the Statute will engage the perpetrator’s individual criminal responsibility. In this context, the participation of the state becomes secondary and, generally, peripheral. With or without the involvement of the state, the crime committed remains of the same nature and bears the same consequences. The involvement of the state in a criminal enterprise generally results in the availability of extensive resources to carry out the criminal activities in question and therefore greater risk for the potential victims. It may also trigger the application of a different set of rules, in the event that its involvement renders the armed conflict international. However, the involvement of the state does not modify or limit the guilt or responsibility of the individual who carried out the crimes in question. This principle was clearly stated in the *Flick* judgement:<sup>1208</sup>

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<sup>1205</sup> Emphasis added.

<sup>1206</sup> Art 12 of Geneva Convention II is similar in content to Art 12 of Geneva Convention I.

<sup>1207</sup> Pictet (gnl ed), *Commentary to 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field* (1952), p 135. Emphasis added.

<sup>1208</sup> *Trial of Friedrich Flick and Five Others* (“Flick Trial”), US Military Tribunal, 20 Apr-22 Dec 1947, LRTWC, Vol IX, p 1, 18.

But the International Military Tribunal was dealing with officials and agencies of the State, and it is argued that individuals holding no public offices and not representing the State, do not, and should not, come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in *propria persona*. The application of international law to individuals is no novelty. . . .g There is no justification for a limitation of responsibility to public officials.

494. Likewise, the doctrine of “act of State”, by which an individual would be shielded from criminal responsibility for an act he or she committed in the name of or as an agent of a state, is no defence under international criminal law. This has been the case since the Second World War, if not before.<sup>1209</sup> Articles 1 and 7 of the Statute make it clear that the identity and official status of the perpetrator is irrelevant insofar as it relates to accountability. Neither can obedience to orders be relied upon as a defence playing a mitigating role only at the sentencing stage. In short, there is no privilege under international criminal law which would shield state representatives or agents from the reach of individual criminal responsibility. On the contrary, acting in an official capacity could constitute an aggravating circumstance when it comes to sentencing, because the official illegitimately used and abused a power which was conferred upon him or her for legitimate purposes.

495. The Trial Chamber also points out that those conventions, in particular the human rights conventions, consider torture *per se* while the Tribunal’s Statute criminalises it as a form of war crime, crime against humanity or grave breach. The characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it.<sup>1210</sup>

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<sup>1209</sup> Nuremberg Judgement, pp 222-223. See also Principle No 3 of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, 1950: “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.” See also Art 227 and 228 of the Treaty of Versailles.

<sup>1210</sup> The Trial Chamber also notes the definition of torture contained in Art 7(e) of the International Criminal Court Statute, Rome Statute of the International Criminal Tribunal, 17 July 1998, PCNICC/1999/INF/3, (“ICC Statute”), which provides: ““Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” See also Arts 7(1)(f) (crimes against humanity) and 8(2)(a)(ii)-1 (war crimes), of the Finalised Draft Text of the Elements of the Crimes for the International Criminal Court, Report of the

496. The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.

497. On the basis of what has been said, the Trial Chamber holds that, in the field of international humanitarian law, the elements of the offence of torture, under customary international law are as follows:

- (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.<sup>1211</sup>
- (ii) The act or omission must be intentional.<sup>1212</sup>
- (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.<sup>1213</sup>

#### F. Outrages upon personal dignity

498. As has been observed above,<sup>1214</sup> the Prosecutor charged outrages upon personal dignity under Article 3 of the Statute on the basis of common Article 3 of the 1949 Geneva

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Preparatory Commission for the International Criminal Court, 6 July 2000, PCNICC/2000/INF/3/Add.2. Article 27(1) ("Irrelevance of the official capacity") of the ICC Statute further states that the Statute shall apply "equally to all persons without any distinction based on official capacity". Although the ICC Statute does not necessarily represent the present status of international customary law, it is a useful instrument in confirming the content of customary international law. These provisions obviously do not *necessarily* indicate what the state of the relevant law was at the time relevant to this case. However they do provide some evidence of state *opinio juris* as to the relevant customary international law at the time at which the recommendations were adopted. See, eg, *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 227; *Prosecutor v Tadic*, Case No IT-94-A, Judgement, 15 July 1999, par 223.

<sup>1211</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 162; *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 468.

<sup>1212</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 162; *Prosecutor v Akayesu*, ICTR-96-4-T, Judgement, 2 Sept 1998, par 594.

<sup>1213</sup> *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, pars 470-472; *Prosecutor v Akayesu*, ICTR-96-4-T, Judgement, 2 Sept 1998, par 594.

Conventions. It is clearly established in the Tribunal's jurisprudence that Article 3 of the Statute permits the prosecution of offences falling under common Article 3 of the Geneva Conventions of 1949.<sup>1215</sup> The specific offence of outrages upon personal dignity is found in common Article 3(1)(c)<sup>1216</sup> which prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment". This specific offence of outrages upon personal dignity has been recognised at both Appeals Chamber and Trial Chamber level to constitute an offence which may be prosecuted pursuant to Article 3 of the Statute.<sup>1217</sup>

499. The precise elements of the offence of outrages upon personal dignity have not been the subject of a definitive statement by the Appeals Chamber. In the *Aleksovski* case,<sup>1218</sup> in which the accused was charged with and convicted of outrages upon personal dignity under Article 3 of the Statute, the definition of the offence is discussed in the Trial Chamber's judgement. On appeal, the Appeals Chamber was not called upon to define or consider in general terms the Trial Chamber's definition of the elements of the offence. The specific issues before the Appeals Chamber in that case were the appellant's contentions that the acts upon which the charges were based were not sufficiently serious and that to prove this crime it must be established that the perpetrator had a discriminatory intent. In dealing with these issues the Appeals Chamber did make a number of observations which are relevant for present purposes and are referred to below.

500. The Trial Chamber in the *Aleksovski* case discussed the elements of outrages upon personal dignity but did not seek to define the offence exhaustively. It observed first that the purpose of paragraph (1) of common Article 3 is to uphold the inherent human dignity of the individual.<sup>1219</sup> It noted that the general proscription in common Article 3 is against inhuman treatment and that "[a]n outrage against personal dignity within Article 3 of the

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<sup>1214</sup> See section dealing with common elements to Article 3 of the Statute (pars 400-409).

<sup>1215</sup> *Prosecutor v Tadic*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 89: "Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically [...] (iii) violations of common Article 3 and other customary rules on internal conflicts; [...]". See also *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 21; *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, pars 132-133.

<sup>1216</sup> It is also found in Art 75(2)(b) of Additional Protocol I and Art 4(2)(e) of Additional Protocol II.

<sup>1217</sup> See *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, pars 21-22, implicitly affirming, in its discussion of the mental element of the offence of outrages against personal dignity, the Trial Chamber's conviction of the accused on a count of outrages against personal dignity under Art 3 on the basis of common Art 3(1)(c).

<sup>1218</sup> *Prosecutor v Aleksovski*, Case No IT-95-14/1.

Statute is a *species* of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within the *genus*".<sup>1220</sup> It observed, in relation to the *actus reus* of the offence, that:

An outrage against personal dignity is an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule.<sup>1221</sup>

501. Insofar as this definition provides that an outrage upon personal dignity is an act which "cause[s] serious humiliation or degradation to the victim", the Trial Chamber agrees with it. However, the Trial Chamber would not agree with any indication from the passage above that this humiliation or degradation must cause "lasting suffering"<sup>1222</sup> to the victim. So long as the humiliation or degradation is real and serious, the Trial Chamber can see no reason why it would also have to be "lasting". In the view of the Trial Chamber, it is not open to regard the fact that a victim has recovered or is overcoming the effects of such an offence as indicating of itself that the relevant acts did not constitute an outrage upon personal dignity. Obviously, if the humiliation and suffering caused is only fleeting in nature, it may be difficult to accept that it is real and serious. However this does not suggest that any sort of minimum temporal requirement of the effects of an outrage upon personal dignity is an *element* of the offence.

502. As noted by the Trial and Appeals Chambers in the *Aleksovski* case, the prohibition of the offence of outrages upon personal dignity is a category of the broader proscription of inhuman treatment in common Article 3.<sup>1223</sup> Inhuman treatment had been described in the Trial Chamber's judgement in the *Delalic* proceedings as constituted by:

[...] an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes *serious mental or physical suffering or injury or constitutes a serious attack on human dignity*.<sup>1224</sup>

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<sup>1219</sup> *Prosecutor v Aleksovski*, Case No IT-95-14/1-T, Judgement, 25 June 1999, par 49.

<sup>1220</sup> *Ibid*, pars 51 and 54.

<sup>1221</sup> *Ibid*, par 56.

<sup>1222</sup> The original French version of the judgement refers to "une souffrance ... durable".

<sup>1223</sup> *Prosecutor v Aleksovski*, Case No IT-95-14/1-T, Judgement, 25 June 1999, par 54; *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 26.

<sup>1224</sup> *Prosecutor v Delalic and Others*, Case No 96-21-T, Judgement, 16 Nov 1998, par 543. See also *Prosecutor v Blaskic*, Case No IT-95-14-T, Judgement, 3 Mar 2000, pars 154-155 where Trial Chamber I

503. This reinforces the key aspect of the definition of the *actus reus* of the offence of outrages upon personal dignity, as set out by the Trial Chamber in the *Aleksovski* case – that the relevant act or omission must cause *serious* suffering or humiliation. The absence of any suggestion that the suffering caused by the inhuman treatment must have a lasting quality confirms the Trial Chamber’s conclusion that there is no such requirement in relation to the offence of outrages upon personal dignity.<sup>1225</sup>

504. The Trial Chamber in the *Aleksovski* case also considered the question of how the existence of humiliation or degradation could be measured and concluded that a purely subjective assessment would be unfair to the accused because the accused’s culpability would be made to depend not on the gravity of the act but on the sensitivity of the victim. Therefore it was concluded that “[...] an objective component to the *actus reus* is apposite: the humiliation to the victim must be so intense that the reasonable person would be outraged”.<sup>1226</sup>

505. On appeal, in relation to the appellant’s contention that the relevant conduct was not of adequate gravity to constitute outrages upon personal dignity, the Appeals Chamber found that the conduct of the appellant upon which the charges were founded – aiding and abetting in “excessive and cruel interrogation, physical and psychological harm, forced labour (digging trenches), in hazardous circumstances, being used as human shields”<sup>1227</sup> – was of a sufficient level of gravity to support convictions for outrages against personal

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adopts the conclusions of the judgement in the *Delalić* case (Case No 96-21-T, Judgement, 16 Nov 1998) in relation to the offence of inhuman treatment.

<sup>1225</sup> In relation to the crime of outrages upon personal dignity in the Statute of the International Criminal Court adopted at Rome on 17 July 1998, PCNICC/1999/INF/3, 17 Aug 1999, the Preparatory Commission has made a final recommendation as to the elements of the crime which makes no reference to any requirement of a lasting quality to the humiliation or degradation caused. The Report of the Preparatory Commission for the International Criminal Court, *Addendum*, Finalized Draft Text of the Elements of Crimes, PCNICC/2000/INF/3/Add.2, 6 July 2000 describes the elements of the offence (Art 8(2)(b)(xxi), p 33) as: “(1) The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons. (2) The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.” These recommendations, adopted in July 2000 obviously do not *necessarily* indicate what the state of the relevant law was at the time relevant to this case. However they do provide some evidence of state *opinio juris* as to the relevant customary international law at the time at which the recommendations were adopted. See, eg, *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 227; *Prosecutor v Tadić*, Case No IT-94-A, Judgement, 15 July 1999, par 223.

<sup>1226</sup> *Prosecutor v Aleksovski*, Case No IT-95-14/1-T, Judgement, 25 June 1999, par 54.

<sup>1227</sup> For the indictment against Aleksovski, see *Prosecutor v Kordić and Others*, Indictment, 10 Nov 1995, par 31 supporting, *inter alia*, Count 10 of the indictment which charged “[...] a VIOLATION OF THE

dignity. While not commenting on the definition of the offence, the Appeals Chamber stated:

The victims were not merely inconvenienced or made uncomfortable – what they had to endure, under the prevailing circumstances, were physical and psychological abuse and outrages *that any human being would have experienced as such*.<sup>1228</sup>

506. Again, this requirement of an objective assessment of the relevant act is reinforced by reference to the definition of inhuman treatment in the judgement of the Trial Chamber in the *Delalic* case, quoted above.<sup>1229</sup>

507. Taking into account the above considerations, this Trial Chamber understands an outrage upon personal dignity to be any act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity.

508. The Trial Chamber's observations in the *Aleksovski* case on the mental element of the offence of outrages upon personal dignity do not provide an unambiguous statement of what it considered the relevant *mens rea* to be.<sup>1230</sup> The judgement first notes that "the Commentary indicates that the accused must have committed the act with the intent to humiliate or ridicule the victim", an apparent reference to the ICRC Commentary to the relevant provision of one of the Additional Protocols, as the ICRC Commentaries to the Geneva Conventions do not make reference to the *mens rea* for outrages against personal dignity. The judgement then observes, in relation to the offence of inhuman treatment under the Additional Protocols:

The ICRC, in proposing the mental element for the offence of "inhuman treatment" accepted a lower degree of *mens rea*, requiring the perpetrator to act wilfully. Recklessness cannot suffice; the perpetrator must have acted deliberately or deliberately omitted to act but deliberation alone is insufficient. While the perpetrator need not have

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LAWS OR CUSTOMS OF WAR (outrages against personal dignity) as recognised by Articles 3, 7(1) and 7(3) of the Statute of the Tribunal".

<sup>1228</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 37 (emphasis added).

<sup>1229</sup> Paragraph 502. The inclusion in the recommended elements of the offence for the purposes of the ICC Statute of a requirement that the "severity of the humiliation, degradation or other violation [be] of such degree *as to be generally recognised* as an outrage upon personal dignity" is consistent with this conclusion. (See Finalized Draft Text of the Elements of the Crimes, Art 8(2)(b)(xxi), par 2).

<sup>1230</sup> The Appeals Chamber noted: "the Trial Chamber's reasoning in relation to the mental element of the offence of outrages upon personal dignity [...] is not always entirely clear.": *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 27.

had the specific intent to humiliate or degrade the victim, he must have been able to perceive this to be the foreseeable and reasonable consequence of his actions.<sup>1231</sup>

509. Because the distinction in the judgement between references to the views of the ICRC and expression of the Trial Chamber's own understanding of the *mens rea* requirement is not always easy to identify, the precise scope of the relevant *mens rea* for the crime of outrages upon personal dignity is left somewhat open.<sup>1232</sup> It is apparent from the Appeals Chamber's judgement that it did not regard the mental element of the offence as involving any *specific intent* to humiliate, ridicule or degrade the victims.<sup>1233</sup> It noted particularly that it did not interpret the ICRC Commentaries' statement that the term "outrages upon personal dignity" refers to acts "aimed at humiliating and ridiculing" the victim<sup>1234</sup> as suggesting a requirement of a *specific intent* to humiliate, ridicule or degrade, but as seeking "simply to describe the conduct which the provision seeks to prevent".<sup>1235</sup>

510. The Appeals Chamber did not comment on the alternative indication in the Trial Chamber's judgement that, as well as deliberately committing the relevant act or omission, the perpetrator must have "been able to perceive" that the humiliation or degradation of the victim was a foreseeable and reasonable consequence of his actions.<sup>1236</sup> In its discussion of the facts of the case, the Appeals Chamber stated that it was "satisfied that the Trial Chamber found that the Appellant deliberately participated in or accepted the acts which gave rise to his liability under Articles 7(1) and 7(3) of the Statute for outrages upon personal dignity and was therefore guilty of those offences",<sup>1237</sup> which leaves open the question of whether there is any requirement of knowledge of the foreseeable consequences.

511. In the discussion of the offence of inhuman treatment in the judgement of the Trial Chamber in the *Delalic* case, reference to the mental element is limited to the requirement that the relevant act or omission be intentional:

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<sup>1231</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-T, Judgement, 25 June 1999, par 56.

<sup>1232</sup> The Trial Chamber's factual findings as to the mental state of the accused in relation to the relevant acts appear to support a finding of a specific intent to humiliate as well as of knowledge of the trauma and humiliation caused by the acts – see pars 224 and 237 and *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 27.

<sup>1233</sup> "The Trial Chamber's indication that the *mens rea* of the offence is the "intent to humiliate or ridicule" the victim may therefore impose a requirement that the Prosecution was not obliged to prove and the Appeals Chamber does not, by rejecting this ground of appeal, endorse that particular conclusion.": *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 27.

<sup>1234</sup> *Sandoz and Others, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, par 3047. This statement was referred to by the Trial Chamber at pars 55 and 56.

<sup>1235</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 27.

[...] inhuman treatment is *an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.*<sup>1238</sup>

No reference is made to a requirement of specific intent or of knowledge of the effect on the victim of the intentional act.

512. The Trial Chamber has considered the jurisprudence referred to above in relation to the question of whether there must be, in addition to the intention to commit the particular act or omission, some knowledge of the consequences of that action. The Trial Chamber is of the view that the requirement of an intent to commit the specific act or omission which gives rise to criminal liability in this context involves a requirement that the perpetrator be aware of the objective character of the relevant act or omission. It is a necessary aspect of a true intention to undertake a particular action that there is an awareness of the nature of that act. 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 – ie, 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.

513. In practice, the question of knowledge of the *nature* of the act is unlikely to be of great significance. When the objective threshold of the offence is met – ie the acts or omissions would be generally considered to be seriously humiliating, degrading or otherwise a serious attack on human dignity – it would be rare that a perpetrator would not also know that the acts could have that effect.

514. In the view of the Trial Chamber, the offence of outrages upon personal dignity requires

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<sup>1236</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-T, Judgement, 25 June 1999, par 56.

<sup>1237</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 27.

<sup>1238</sup> *Prosecutor v Delalic and Others*, Case No 96-21-T, Judgement, 16 Nov 1998, par 543. See also later in that par: "Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity[...]".

(i) that the accused intentionally committed or participated in an act or 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.

## **G. Enslavement**

### **1. Background**

515. The Indictment charges both Dragoljub Kunarac and Radomir Kovač with enslavement as a crime against humanity under Article 5(c) of the Statute.<sup>1239</sup> The common elements of crimes against humanity under this Article are set out above. What falls to be determined here is what constitutes “enslavement” as a crime against humanity; in particular, the customary international law content of this offence at the time relevant to the Indictment.

516. What follows is not intended to be an exhaustive pronouncement on the law of enslavement. The enslavement charges in the present case relate solely to the treatment of women and children and certain allegations of forced or compulsory labour or service.

517. The Prosecutor made submissions on enslavement in her briefs<sup>1240</sup> and during closing arguments.<sup>1241</sup> The Defence made submissions on enslavement in their final trial brief<sup>1242</sup> and during closing arguments.<sup>1243</sup>

### **2. The law**

518. The Statute does not define “enslavement”. It is therefore necessary to look to various sources that deal with the same or similar subject matter, including international humanitarian law and human rights law.

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<sup>1239</sup> Indictment IT-96-23 (Counts 18 and 22 respectively).

<sup>1240</sup> Prosecutor’s Pre-Trial Brief I, pars 198-221; Prosecutor’s Final Trial Brief, pars 796-872.

<sup>1241</sup> T 6286-6288.

<sup>1242</sup> Defence Final Trial Brief, pars N.3.1-N.3.8.

<sup>1243</sup> T 6428-6441 (in relation to Dragoljub Kunarac); T 6520-6525 (in relation to Radomir Kovač).

519. Although the international legal struggle against slavery – dating back more than a century and a half - was one of the most important forerunners to the international protection of human rights, it is only in 1926 that the Slavery Convention provided the first basic definition. That definition - “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”<sup>1244</sup> – proved to be abiding. The Slavery Convention also prohibits the slave trade:

The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of slaves.<sup>1245</sup>

With respect to forced or compulsory labour, the state parties to that Convention furthermore recognised

that recourse to compulsory or forced labour may have grave consequences and undertake [...] to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.<sup>1246</sup>

520. The customary international law status of these substantive provisions is evinced by the almost universal acceptance of that Convention and the central role that the definition of slavery in particular has come to play in subsequent international law developments in this field. The 1956 Supplementary Slavery Convention<sup>1247</sup> augments the Slavery Convention and defines slavery and the slave trade<sup>1248</sup> in essentially the same terms as used in the Slavery Convention. In particular, “slavery” and “slave” are defined as follows:

[...] ‘slavery’ means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and ‘slave’ means a person in such condition or status.<sup>1249</sup>

521. Just before the Second World War, the 1930 Forced and Compulsory Labour Convention<sup>1250</sup> was drafted under the auspices of the International Labour Organisation

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<sup>1244</sup> Art 1(1) of the Slavery Convention. Yugoslavia ratified the Slavery Convention on 28 Sept 1929.

<sup>1245</sup> Art 1(2) of the Slavery Convention.

<sup>1246</sup> Art 5 of the Slavery Convention.

<sup>1247</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Yugoslavia ratified the Supplementary Slavery Convention on 20 May 1958. Bosnia and Herzegovina succeeded to the same Convention on 1 Sept 1993.

<sup>1248</sup> Art 7(c) of the Supplementary Slavery Convention (“[...] ‘slave trade’ means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves by whatever means of conveyance.”).

("ILO"). That Convention defines forced or compulsory labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".<sup>1251</sup> Excluded from the definition is, *inter alia*, any work or service exacted in the event of war that endangers the existence or the well-being of the whole or part of the population,<sup>1252</sup> and minor communal services that can be considered as normal civic obligations.<sup>1253</sup> The 1957 Convention Concerning the Abolition of Forced Labour ("Forced Labour Convention")<sup>1254</sup> was also drafted under the auspices of the ILO and was intended to complement the Slavery Convention, the Supplementary Slavery Convention and the Forced and Compulsory Labour Convention. It provides that

Each member of the International Labour Organization which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour (a) As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; [...] (e) As a means of racial, social, national or religious discrimination.<sup>1255</sup>

522. The end of the Second World War saw the first codification of crimes against humanity in the Charter of the International Military Tribunal of 1945 ("Nuremberg Charter"),<sup>1256</sup> which provides that the Nuremberg Tribunal

[...] shall have the power to try and punish persons who [...] committed any of the following crimes: The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes against Peace [...]; (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, [...] *deportation to slave labor* [...]; (c) *Crimes against Humanity*: namely, murder, extermination, *enslavement*, deportation and other inhumane acts committed against any civilian population [...].<sup>1257</sup>

The Nuremberg Charter did not, however, provide a definition of enslavement.

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<sup>1249</sup> Art 7(a) of the Supplementary Slavery Convention.

<sup>1250</sup> The Convention Concerning Forced or Compulsory Labour. Yugoslavia ratified the Forced and Compulsory Labour Convention on 4 Mar 1933. Bosnia and Herzegovina ratified the same Convention on 2 June 1993. The Forced and Compulsory Labour Convention has received more than 150 ratifications.

<sup>1251</sup> Art 2(1) of the Forced and Compulsory Labour Convention.

<sup>1252</sup> Art 2(2)(d) of the Forced and Compulsory Labour Convention.

<sup>1253</sup> Art 2(2)(e) of the Forced and Compulsory Labour Convention.

<sup>1254</sup> This Convention has been ratified by more than 140 states.

<sup>1255</sup> Art 1 of the Forced Labour Convention.

<sup>1256</sup> Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 Aug 1945 (signed by Britain, France, the USA and the USSR, and acceded to by 19 other states (Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece,

523. The Nuremberg indictment<sup>1258</sup> included deportation to slave labour and enslavement charges.<sup>1259</sup> The Nuremberg judgement,<sup>1260</sup> however, made no attempt to define these concepts or to draw a systematic distinction between deportation to slave labour and enslavement.<sup>1261</sup> In the section of that judgement dealing with the legal findings in relation to each individual defendant, reference was made to the involvement in one way or another in the slave labour program of thirteen defendants.<sup>1262</sup> The Nuremberg Tribunal, however, did not indicate whether that conduct went to the convictions entered for war crimes or for crimes against humanity, except in the case of the defendant Von Schirach, who was only convicted of a crime against humanity in relation to his involvement in forced labour.<sup>1263</sup> From Von Schirach's conviction, at least, it is clear that that Tribunal interpreted slave or

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Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia)).

<sup>1257</sup> Art 6 of the Nuremberg Charter. Emphasis added.

<sup>1258</sup> Reprinted in *Trial of Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Vol 1 (1947), pp 27-92.

<sup>1259</sup> *Ibid*, Count One (The Common Plan or Conspiracy), pp 29 *et seq*; Count Three (War Crimes), (B) Deportation for slave labor and for other purposes of the civilian populations of and in occupied territories, pp 51-52 ("During the whole period of the occupation by Germany of both the Western and Eastern Countries it was the policy of the German Government and of the German High Command to deport able-bodied citizens from such occupied countries to Germany and to other occupied countries for the purpose of slave labor upon defense works, in factories, and in other tasks connected with the German war effort. [...]": at p 51); (H) Conscription of civilian labour, p 62 ("Throughout the occupied territories the defendants conscripted and forced the inhabitants to labour and requisitioned their services for purposes other than meeting the needs of the armies of occupation and to an extent far out of proportion to the resources of the countries involved. All the civilians so conscripted were forced to work for the German war effort. [...]": at p 62); Count Four (Crimes against Humanity), (A) Murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations before and during the war, p 66 ("[...] [The defendants] subjected them to [...] enslavement [...]. At these and other camps the civilians were put to slave labor [...]": at p 66).

<sup>1260</sup> Reprinted in *Trial of Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Vol 22 (1947), pp 411-589 (rendered on 30 Sept and 1 Oct 1946).

<sup>1261</sup> *Ibid*, p 470 (slave labour); pp 477-478 and pp 480-481 (slave labour); pp 486-491 (The Nuremberg Tribunal found Germany's deportation and slave labour policies to be in flagrant violation of not only Article 6(b) of the Nuremberg Charter, but also of Article 52 of the Hague Convention. (*Ibid*, p 486). Art 52 of the Regulations Respecting the Laws and Customs of War on Land, Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land ("Hague Convention") provides that "Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.").

<sup>1262</sup> Deportation to slave labour, slave and forced labour and enslavement, are referred to in relation to the convictions of the following defendants: Goering (*ibid*, pp 526-527); Keitel (*ibid*, p 536); Kaltenbrunner (*ibid*, pp 537-538); Rosenberg (*ibid*, pp 540-541); Frank (*ibid*, pp 542-544); Frick (*ibid*, p 546); Funk (*ibid*, p 552); Von Schirach (*ibid*, pp 565-566); Sauckel (*ibid*, 566-568); Jodl (*ibid*, pp 570-571); Seyss-Inquart (*ibid*, pp 575-576); Speer (*ibid*, pp 577-579); Bormann (*ibid*, pp. 586-587).

<sup>1263</sup> *Ibid*, pp 565-566.

forced labour to constitute not only a war crime, but also enslavement as a crime against humanity. Other specific aspects of the Nuremberg judgement deserve mention here. With respect to the so-called voluntary recruiting of forced labourers, the Tribunal, in relation to the defendant Sauckel, appointed by Hitler as Plenipotentiary General for the Utilisation of Labour, said that he “[...] described so-called “voluntary” recruiting by “a whole batch of male and female agents just as was done in the olden times for shanghaiing. [...]”.<sup>1264</sup> The defendant Speer was convicted for his participation in the slave labour program, even though he “insisted that the slave labourers be given adequate food and working conditions so that they could work efficiently”.<sup>1265</sup> Last, the Nuremberg Tribunal referred to “female domestic workers” in the context of the slave labour program, specifically, the transfer of 500 000 female domestic workers from the eastern occupied territories to Germany over whom the defendants Sauckel, Himmler and Bormann had control.<sup>1266</sup> According to the transcripts of the proceedings before the Nuremberg Tribunal, these domestic workers were procured to relieve German housewives and the wives of German farmers.<sup>1267</sup> They had no claim to free time, although, as a reward for good work, they could be given leave to stay outside the assigned home for three hours once a week.<sup>1268</sup>

524. The Allied Control Council Law No 10 of 1945 (“CCL 10”)<sup>1269</sup> also codified crimes against humanity, including enslavement, in terms similar to the Nuremberg Charter.<sup>1270</sup> Some CCL 10 judgements, notwithstanding the general failure to distinguish between war crimes and crimes against humanity and enslavement and related concepts, indicate which factors were considered in determining whether enslavement was committed.

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<sup>1264</sup> *Ibid*, p 567.

<sup>1265</sup> *Ibid*, p 579.

<sup>1266</sup> *Ibid*, p 586.

<sup>1267</sup> Reprinted in *Trial of Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Vol 3 (1947), Proceedings, 1 December 1945 – 14 Dec 1945, p 451.

<sup>1268</sup> *Ibid*, p 452.

<sup>1269</sup> Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity, 20 Dec 1945. CCL 10 was enacted by the Allied Control Council of Germany, composed of Great Britain, France, the USA and the USSR. The aim was to establish a uniform legal basis in Germany for the prosecution, by the Allies in their respective zones of occupation, of war criminals and other similar offenders other than those dealt with by the Nuremberg Tribunal.

<sup>1270</sup> CCL 10 defines crimes against humanity as “Atrocities and offences, including but not limited to murder, extermination, *enslavement*, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population [...]” (Art II(c) of CCL 10 (emphasis added)).

525. The accused in the *Milch* case before the US Military Tribunal was charged with slave labour and deportation to slave labour of German nationals and nationals of other countries as a crime against humanity.<sup>1271</sup> The Tribunal held that:

Does anyone believe that the vast hordes of Slavic Jews who laboured in Germany's war industries were accorded the rights of contracting parties? They were slaves, nothing less - kidnapped, regimented, herded under armed guards, and worked until they died from disease, hunger, exhaustion. [...]. As to non-Jewish foreign labour, with few exceptions they were deprived of the basic civil rights of free men; they were deprived of the right to move freely or to choose their place of residence; to live in a household with their families; to rear and educate their children; to marry; to visit public places of their own choosing; to negotiate, either individually or through representatives of their own choice, the conditions of their own employment; to organize in trade unions; to exercise free speech or other free expression of opinion; to gather in peaceful assembly; and they were frequently deprived of their right to worship according to their own conscience. All these are the sign-marks of slavery, not free employment under contract.<sup>1272</sup>

The US Military Tribunal in the *Pohl* case, in considering war crimes and crimes against humanity charges, succinctly held as follows:

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.<sup>1273</sup>

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<sup>1271</sup> *US vMilch*, Judgement of 31 July 1948, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol II (1997), p 773.

<sup>1272</sup> *Ibid*, p 789. Milch was found guilty of war crimes charged in Countone of the indictment in that he was responsible for the "slave labor and deportation to slave labor of the civilian populations of countries and territories occupied by the German armed forces, and in the enslavement, deportation, ill-treatment and terrorization of such persons. [...]." (*ibid*, p 790). Milch was also found guilty of crimes against humanity (count three) for the same war crimes insofar as they related to foreign nations (*ibid*, pp 790-791). With reference to the definition of the crimes in CCL 10, Judge Fitzroy D Phillips in his concurring opinion stated that CCL 10 treats as separate crimes and different types of crime deportation to slave labour (as a war crime) and enslavement (as a crime against humanity) (*ibid*, Concurring Opinion, p 860 at p 866). In the *Krupp* case (*US v Krupp and Others*, Judgement of 31 July 1948, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No 10*, Vol IX, Part 2 (1997), p 1327), the US Military Tribunal adopted the statement of the law applicable to the deportation to slave labour and enslavement of the *Milch* case made by Judge Phillips (*ibid*, pp 1432-1433). In that case, the Tribunal also held that the employment of concentration camp inmates under the circumstances disclosed was a crime (*ibid*, pp 1433-1435).

<sup>1273</sup> *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 Law No 10*, Vol V, (1997), p 958 at p 970. Other CCL 10 cases in which enslavement and related aspects were considered, include *IG Farben (US v Carl Krauch and Others)*, summarised in *Law Reports of Trials of War Criminals*, The UN War Crimes Commission, Vol X (1997), pp 1-68 at 53; and *Flick (US v Friedrich Flick and Others)*, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No 10*, Vol VI (1997).

526. The Charter of the International Military Tribunal for the Far East of 1946 ("Tokyo Charter"),<sup>1274</sup> in terms similar to the Nuremberg Charter, provided that Tribunal with jurisdiction over

[...] (a) Crimes against Peace [...]; (b) Conventional War Crimes: Namely, violations of the laws or customs of war; (c) *Crimes against Humanity*: Namely, murder, extermination, *enslavement*, deportation and other inhumane acts [...].<sup>1275</sup>

527. The Tokyo indictment,<sup>1276</sup> in the part of the indictment dealing with conventional war crimes and crimes against humanity,<sup>1277</sup> included references to war labour, forced labour and enslavement, without distinguishing between war crimes and crimes against humanity.<sup>1278</sup> The Tokyo judgement<sup>1279</sup> also did not systematically distinguish between deportation to slave labour, slave labour and enslavement, nor did it attempt to define them in any detail.<sup>1280</sup> With respect to the use of labour by civilians from occupied territories, the following was stated:

Having decided upon a policy of employing prisoners of war and civilian internees on work directly contributing to the prosecution of the war, and having established a system to carry that policy into execution, the Japanese went further and supplemented this

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<sup>1274</sup> "Special Proclamation: Establishment of an International Military Tribunal for the Far East", Order of the Supreme Commander for the Allied Powers, Tokyo, Jan 19, 1946, as amended, Apr 26, 1946.

<sup>1275</sup> Art 5 of the Tokyo Charter.

<sup>1276</sup> Reprinted in Pritchard, *The Tokyo Major War Crimes Trial, The Records of the International Military Tribunal for the Far East With an Authoritative Commentary and Comprehensive Guide*, Vol 2 (1998).

<sup>1277</sup> "Group Three: Conventional War Crimes and Crimes against Humanity" (Counts 53-55), *ibid*, pp 12-14 of the indictment.

<sup>1278</sup> Count 53 obliquely contained a conspiracy charge, also referring to "persons in charge of each of the camps and labour units for prisoners of war and civilian internees [...]" (*ibid*, p 13 of the indictment). Appendix D to the indictment was incorporated under Group Three of the charges in the indictment. Section Two of Appendix D referred to "Illegal employment of prisoner of war labour [...]" (at p iii). Section Twelve of Appendix D referred to "Failure to respect family honour and rights, individual life, [...], and deportation and enslavement of the inhabitants [...], contrary to [Article 46 of Annex III ("Military Authority over the Territory of the Hostile State") of the 1907 Hague Convention] and to the Laws and Customs of War: Large numbers of the inhabitants of [occupied] territories were murdered, tortured, raped and otherwise ill-treated, arrested and interned without justification, sent to forced labour, and their property destroyed or confiscated." (at p vi).

<sup>1279</sup> Reprinted in Röling and Rüter, *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE) 29 April 1946-12 November 1948*, Vol I (1977), pp 1-466 (rendered on 4-12 Nov 1948).

<sup>1280</sup> References to forced labour and slave labour in the Tokyo judgement include, in Chapter VIII ("Conventional War Crimes (Atrocities)": *ibid*, p 388 ("Many of the captured Chinese were [...] placed in labour units to work for the Japanese Army [...]. Some of these captives [...] were transported to Japan to relieve the labor shortage in the munitions industries."); *ibid*, pp 403-406 (use of forced labour to construct Burma-Siam railway, including use of conscripted "native labourers"); *ibid*, pp 413-414 (labour of prisoners of war and civilian internees); *ibid*, p 416 (use of prisoners of war and internees to work on war-related projects); *ibid*, pp 416-417 (use of forced "native" labour). References to forced labour and slave labour in relation to individual defendants include: Kimura (*ibid*, p 452, use of prisoners of war in forced labour, including work on the Burma-Siam railway); and Tojo (*ibid*, pp 462-463, ill-treatment of prisoners of war and internees, including use of prisoners of war in construction of Burma-Siam railway).

source of manpower by recruiting labourers from the native population of the occupied territories. This recruiting of labourers was accomplished by false promises, and by force. After being recruited, the labourers were transported to and confined in camps. Little or no distinction appears to have been made between these conscripted labourers on the one hand and prisoners of war and civilian internees on the other hand. They were all regarded as slave labourers to be used to the limit of their endurance. For this reason, we have included these conscripted labourers in the term "civilian internees" whenever that term is used in this chapter.<sup>1281</sup>

528. Some of the provisions of the 1977 Additional Protocol II<sup>1282</sup> and the 1949 Geneva Convention IV<sup>1283</sup> are of assistance for current purposes. They give some indication as to who may be required to perform what kinds of work under what conditions in armed conflicts. Some indication is also given as to minimum protections to be extended to civilians, in particular women and children, to whom special protection is consistently granted.

529. Of particular importance in this regard is Article 4 ("Fundamental guarantees") of Additional Protocol II, which Protocol "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949".<sup>1284</sup> Article 4 provides that in non-international conflicts:

(1) All persons who do not take a direct part [...] in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. [...] (2) Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; [...] (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; [...] (h) threats to commit any or the foregoing acts. [...].<sup>1285</sup>

The reference to slavery and the slave trade is based on Article 1 of the Slavery Convention of 1926. In a commentary to the Additional Protocol, it is said that:

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<sup>1281</sup> *Ibid*, pp 416-417 (the Chapter referred to is Chapter VIII ("Conventional War Crimes (Atrocities)") of the judgement.

<sup>1282</sup> Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II"). Yugoslavia ratified both Additional Protocols on 11 June 1979. Bosnia and Herzegovina succeeded to both Additional Protocols on 31 Dec 1992.

<sup>1283</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949 of 12 Aug 1949. Yugoslavia ratified the Geneva Conventions on 21 April 1950. Bosnia and Herzegovina succeeded to the Geneva Conventions on 31 Dec 1992.

<sup>1284</sup> Art 1(1) of Additional Protocol II.

<sup>1285</sup> Art 4 falls under Part II ("Humane Treatment") of Additional Protocol II.

This sub-paragraph reiterates the tenor of Article 8, paragraph 1, of the [ICCPR]. It is one of the “hard-core” fundamental guarantees, now reaffirmed in the Protocol. The prohibition of slavery is now universally accepted; therefore the adoption of the sub-paragraph did not give rise to any discussion. However, the question may arise what is meant by the phrase “slavery and the slave trade in all their forms”. It was taken from the Slavery Convention, the first universal instrument on this subject, adopted in 1926 (Article 1). A Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, was adopted in 1956, and supplements and reinforces the prohibition; certain institutions and practices comparable to slavery, such as servitude for the payment of debts, serfdom, the purchase of wives and the exploitation of child labour are prohibited. [...] <sup>1286</sup>

Other provisions of Additional Protocol II that are of general relevance for present purposes are those relating to children, <sup>1287</sup> persons whose liberty has been restricted and who are made to work, <sup>1288</sup> and the prohibition of the forced movement of civilians. The last mentioned prohibition is aimed against the displacement of the civilian population, something which “shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand.” <sup>1289</sup>

530. Geneva Convention IV similarly underlines the basic protections to be extended to civilians. Article 3, common to all four Geneva Conventions, which relates to non-international conflicts and finds application through Article 3 of the ICTY Statute, provides that persons taking no active part in the hostilities shall in all circumstances be treated humanely. Other noteworthy provisions of Geneva Convention IV, despite applying only to

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<sup>1286</sup> Sandoz, Swinarski and Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), p 1376.

<sup>1287</sup> Art 4 of Additional Protocol II.

<sup>1288</sup> Art 5 of Additional Protocol II, which falls under Part II (“Humane Treatment”) of Additional Protocol II. Art 5(1) specifically provides as follows, with respect to work: “(1) In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained; [...] (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.”

<sup>1289</sup> Art 17 of Additional Protocol II provides in full: “(1) The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. (2) Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.” Art 17 falls under Part IV (“Civilian Population”) of Additional Protocol II. Various provisions of Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (“Additional Protocol I”), although relating to international armed conflicts, also underline the basic protection to be extended in particular to women and children. This includes a provision relating to fundamental guarantees, which is similar in part to that of Additional Protocol II, without the express reference to slavery (Art 75). Another provision on the protection of women states that women “shall be the subject of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”. (Art 76(1)). A provision on the protection of children states that children “shall be the object of special respect and shall be protected against any form of indecent assault.” (Art 77).

international armed conflicts, include Article 24 (special consideration for children),<sup>1290</sup> Article 27 (humane treatment of protected persons),<sup>1291</sup> Article 31 (protection from coercion),<sup>1292</sup> Article 32 (prohibition of any measure causing physical suffering or extermination),<sup>1293</sup> Article 42 (assigned residence and internment),<sup>1294</sup> Article 51 (prohibition of work and requisitioning of labour) and various Articles relating to the treatment of internees.<sup>1295</sup> Article 95, one of the Articles relating to the treatment of internees, sets out the conditions under which a detaining power may require internees to work. It is worth quoting in some detail:

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<sup>1290</sup> Art 24 falls under Part II (“General Protection of Populations Against Certain Consequences of War”) of Geneva Convention IV.

<sup>1291</sup> Art 27 provides: “Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion. However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.” This Article falls under Part III (“Status and Treatment of Protected Persons”), Section I (“Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories”) of Geneva Convention IV.

<sup>1292</sup> Art 31 falls under Part III (“Status and Treatment of Protected Persons”), Section I (“Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories”) of Geneva Convention IV.

<sup>1293</sup> Art 32 falls under Part III (“Status and Treatment of Protected Persons”), Section I (“Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories”) of Geneva Convention IV.

<sup>1294</sup> Art 42 provides: “The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary. If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.” Art 42 falls under Part III (“Status and Treatment of Protected Persons”), Section II (“Aliens in the Territory of a Party to the Conflict”) of Geneva Convention IV.

<sup>1295</sup> These provisions fall under Part III (“Status and Treatment of Protected Persons”), Section IV (“Regulations for the Treatment of Internees”) of Geneva Convention IV and include: Art 80 (“Internees shall retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status.”); Art 82 (“The Detaining Power shall, as far as possible, accommodate the internees according to their nationality, language and customs. [...] Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes of enforcement of the provisions of Chapter IX of the present Section. Internees may request that their children who are left at liberty without parental care shall be interned with them. Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life.”); Art 95; and Art 96 (“All labour detachments shall remain part of and dependent upon a place of internment. The competent authorities of the Detaining Power and the commandant of a place of internment shall be responsible for the observance in a labour detachment of the provisions of the present Convention. The commandant shall keep an up-to-date list of the labour detachments subordinate to him and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross and of other humanitarian organisations who may visit the places of internment.”).

The Detaining Power shall not employ internees as workers, unless they so desire. Employment which, if undertaken under compulsion by a protected person not in internment, would involve a breach of Articles 40 or 51 of the present Convention, and employment on work which is of a degrading or humiliating character are in any case prohibited. [...] These provisions constitute no obstacle to the right of the Detaining Power to employ [...] internees for administrative and maintenance work in places of internment and to detail such persons for work in the kitchens or for other domestic tasks [...].<sup>1296</sup> No internee may, however, be required to perform tasks for which he is, in the opinion of a medical officer, physically unsuited. The Detaining Power shall take entire responsibility for all working conditions, for medical attention, for the payment of wages, and for ensuring that all employed internees receive compensation for occupational accidents and diseases. [...].

Article 40 concerns the treatment of aliens in the territory of a party to the conflict.<sup>1297</sup> It provides as follows:

Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are. If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations. In the cases mentioned in the two preceding paragraphs, protected persons compelled to work shall have the benefit of the same working conditions and of the same safeguards as national workers in particular as regards wages, hours of labour, clothing and equipment [...].

Article 51 concerns the treatment of protected persons in occupied territories.<sup>1298</sup> In the relevant part it provides that an occupying power

may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. [...] Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. [...]

531. Article 27 of Geneva Convention IV, for example, provides for special consideration for women, in that women shall be “especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. [...]”<sup>1299</sup>

The quoted provision

[...] denounces certain practices which occurred, for example, during the last World War, when innumerable women of all ages, and even children, were subjected to outrages of the worst kind: rape committed in occupied territories, brutal treatment of

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<sup>1296</sup> Internees permanently detailed for such work shall be paid fair wages by the detaining power (Art 95 of Geneva Convention IV).

<sup>1297</sup> Art 40 falls under Part III (“Status and Treatment of Protected Persons”), Section II (“Aliens in the Territory of a Party to the Conflict”) of Geneva Convention IV.

<sup>1298</sup> Art 51 falls under Part III (“Status and Treatment of Protected Persons”), Section III (“Occupied Territories”) of Geneva Convention IV.

<sup>1299</sup> The Trial Chamber interprets “honour” in the sense of “dignity”, without thereby detracting from its view that these are violent crimes.

every sort, mutilations etc. In areas where troops were stationed, or through which they passed, thousands of women were made to enter brothels against their will or were contaminated with venereal diseases, the incidence of which often increased on an alarming scale.<sup>1300</sup>

532. The Trial Chamber notes that in the present case no assertion has been made that the victims relevant to the enslavement counts were interned or residentially assigned; such assertions, if made, could not have been valid.<sup>1301</sup>

533. Various international human rights treaties refer to slavery or related concepts without explicitly providing any definition. These include the Universal Declaration of Human Rights of 1948 ("UDHR"),<sup>1302</sup> the International Covenant on Civil and Political Rights of 1966 ("ICCPR"),<sup>1303</sup> the European Convention on Human Rights and Fundamental Freedoms of 1950 ("European Convention"),<sup>1304</sup> the American Convention on

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<sup>1300</sup> Pictet (gnl ed), *Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), p 205, with reference to *Commission of Government Experts for the Study of the Convention for the Protection of War Victims (Geneva, Apr 14-26, 1947). Preliminary Documents*, Vol III, p 47.

<sup>1301</sup> See Art 42 of Geneva Convention IV, quoted above. Also see Arts 41, 43 and Part III, Section IV ("Regulations for the treatment of internees", Arts 79-141) of Geneva Convention IV and Art 17 of Additional Protocol II, quoted above. With respect to Art 42 of Geneva Convention IV, Pictet (gnl ed), *Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), p 258, states as follows: "[...] the mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security. [...] Henceforward only absolute necessity, based on the requirements of state security, can justify recourse to these two measures, and only then if security cannot be safeguarded by other, less severe means."

<sup>1302</sup> The UDHR provides that "No one shall be held in slavery or servitude: slavery and the slave trade shall be prohibited in all their forms." (Art 4 of the UDHR).

<sup>1303</sup> The ICCPR provides that "(1) No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. (2) No one shall be held in servitude. (3)(a) No one shall be required to perform forced or compulsory labour; [...] (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include: [...] (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community [...]" (Art 8 of the ICCPR; no derogation from Arts 8(1) and (2) may be made: Art 4(2) of the ICCPR). The *travaux préparatoires* shows that the term "slavery" implied the destruction of the juridical personality, a relatively limited and technical notion, whereas servitude was a more general idea covering all possible forms of man's domination of man (Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), pp 164-165, 167-168; Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), p148). Furthermore, *involuntariness* is the fundamental definition feature of "forced or compulsory labour", whereas slavery and servitude are prohibited even in event of voluntariness (Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), p 167).

<sup>1304</sup> Art 4 of the European Convention provides: "(1) No one shall be held in slavery or servitude. (2) No one shall be required to perform forced or compulsory labour. (3) For the purposes of this Article the term 'forced or compulsory labour' shall not include: (a) any work required to be done in the ordinary course of detention [...] or during conditional release from such detention; (b) any service of a military character [...]; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations." Under Art 15(2) of

Human Rights of 1969 (“American Convention”)<sup>1305</sup> and the African Charter on Human and Peoples’ Rights of 1981 (“African Charter”).<sup>1306</sup>

534. The European Commission and Court of Human Rights (“European Commission” and “ECHR” respectively) have not yet had to decide a case even remotely similar to the present. Some of their remarks and findings on the interpretation of the relevant provisions of the European Convention are, however, of some assistance for current purposes. In the *Van Droogenbroeck v Belgium* case,<sup>1307</sup> the European Commission observed *obiter dictum*, that the distinction between servitude and forced labour is not explicitly stated in the European Convention and that

It may be considered, however, that in addition to the obligation to perform certain services for others, the notion of servitude embraces the obligation for the “serf” to live on another person’s property and the impossibility of altering his condition.<sup>1308</sup>

The European Commission was chiefly guided in this interpretation by Article 1 of the Supplementary Slavery Convention.<sup>1309</sup>

535. The ECHR, in the case of *Van der Musselle v Belgium*<sup>1310</sup> had to consider a complaint by a lawyer who had been required to defend a person without receiving remuneration or being reimbursed for his expenses. The applicant claimed, *inter alia*, that these circumstances amounted to forced or compulsory labour contrary to Article 4(2) of the European Convention. The Court noted that “forced or compulsory labour” is not defined in the European Convention and that no guidance on this point is to be found in various Council of Europe documents relating to the preparatory work of the European

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the European Convention, no derogation from the first par of Art 4 is permitted under any circumstances.

<sup>1305</sup> The American Convention provides that “No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.” (Art 6(1)). It further provides that no one shall be required to perform forced or compulsory labour (Art 6(2)), except for certain limited exceptions (Art 6(3)). Art 6 may in no circumstance be suspended (Art 27).

<sup>1306</sup> The African Charter provides that “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” (Art 5 of the African Charter).

<sup>1307</sup> Application No 7906/77, Decision of 5 July 1979 on the admissibility of the application, European Commission of Human Rights, D/R 17, 59.

<sup>1308</sup> *Ibid*, p 72.

<sup>1309</sup> *Ibid*.

<sup>1310</sup> Application No 8919/80, Judgment (merits) of 23 November 1983, European Court of Human Rights, A 70.

Convention.<sup>1311</sup> The drafters of that Convention, like the drafters of Article 8 of the ICCPR, based their work to a large extent on the 1930 Forced and Compulsory Labour Convention.<sup>1312</sup> The Court expressly took account of the 1930 Forced and Compulsory Labour Convention and the 1957 Forced Labour Convention in interpreting “forced or compulsory labour” as used in the European Convention.<sup>1313</sup> It found that the word “labour” is not limited to manual labour.<sup>1314</sup> Concerning the adjective “forced”, the Court stated that “it brings to mind the idea of physical or mental constraint [...].”<sup>1315</sup> As to “compulsory”, there has to be work ““exacted [...] under the menace of any penalty” and also performed against the will of the person concerned, that is work for which he “has not offered himself voluntarily””.<sup>1316</sup> The Court also referred to the jurisprudence of the European Commission, which has consistently considered the elements of forced or compulsory labour to be that the work or service is performed against the will of the person concerned and that the requirement that the work or service is performed is unjust or oppressive or the work or service itself involves unavoidable hardship.<sup>1317</sup> The Court expressly distanced itself from the second element identified by the Commission,<sup>1318</sup> and adopted a different approach,<sup>1319</sup> eventually holding that there was no compulsory labour for the purposes of Article 4(2) of the European Convention.<sup>1320</sup>

536. The Trial Chamber also notes the 1979 Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), which includes the obligation that states parties suppress “all forms of traffic in women and exploitation of prostitution of women.”<sup>1321</sup> The 1989 Convention on the Rights of the Child also specifically forbids trafficking in children.<sup>1322</sup> Unlike the 1949 Convention for the Suppression of the Traffic in

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<sup>1311</sup> *Ibid*, par 32.

<sup>1312</sup> *Ibid*.

<sup>1313</sup> *Ibid*.

<sup>1314</sup> *Ibid*, par 33.

<sup>1315</sup> *Ibid*, par 34.

<sup>1316</sup> *Ibid*.

<sup>1317</sup> *Ibid*, par 37.

<sup>1318</sup> Observing that it derives not from Article 2(1) of the 1930 Forced and Compulsory Labour Convention but from other unrelated Articles of that Convention concerned with transitional arrangements (*ibid*, par 40).

<sup>1319</sup> *Ibid*.

<sup>1320</sup> *Ibid*, par 40.

<sup>1321</sup> Art 6 of the CEDAW. Yugoslavia ratified the CEDAW on 26 Feb 1982. Bosnia and Herzegovina succeeded to the CEDAW on 1 Sept 1993. More than 160 states are party to the CEDAW.

<sup>1322</sup> Art 11(1) of the Convention on the Rights of the Child (“States Parties shall take measures to combat the illicit transfer and non-return of children abroad.”) Yugoslavia ratified the Convention on the Rights of

Persons and of the Exploitation of the Prostitution of Others, the afore-mentioned treaties do not require a link between trafficking and prostitution.<sup>1323</sup>

537. The UN International Law Commission (“ILC”) has consistently included enslavement as a crime against humanity in its draft codes of crimes against the peace and security of mankind.<sup>1324</sup> The 1991 Draft Code of Crimes Against the Peace and Security of Mankind included “establishing or maintaining over persons a status of slavery, servitude or forced labour” as a violation of systematic or mass violations of human rights, a category which corresponds to crimes against humanity.<sup>1325</sup> The commentary to that draft provision states that this part of the draft is based on some of the conventions that define those crimes, namely, the Slavery Convention, the Supplementary Slavery Convention, the ICCPR and the two ILO Conventions.<sup>1326</sup> The 1996 Draft Code of Crimes Against the Peace and Security of Mankind, includes enslavement as a crime against humanity.<sup>1327</sup> “Enslavement” was defined to mean

establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely-recognized standards of international law, such as: the 1926 Slavery Convention (slavery); the 1956 [Supplementary Slavery Convention] (slavery and servitude); the [ICCPR] (slavery and servitude); and the 1957 [Forced Labour Convention] (forced labour).<sup>1328</sup>

The Draft Code also included “rape, enforced prostitution and other forms of sexual abuse” as a crime against humanity.<sup>1329</sup> As a body consisting of experts in international law, including government legal advisers, elected by the UN General Assembly, the work of the

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the Child on 3 Jan 1991. Bosnia and Herzegovina succeeded to that Convention on 1 Sept 1993. More than 190 states are party to this Convention.

<sup>1323</sup> The Working Group on Contemporary Forms of Slavery also recently adopted a recommendation stating that “transborder trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights.” (Report of the Working Group on Contemporary Forms of Slavery on its twenty-third session (E/CN.4/Sub.2/1998/14), recommendation 4).

<sup>1324</sup> See Art 2, par 11 of the 1954 Draft Code of Crimes Against the Peace and Security of Mankind, Yearbook of the International Law Commission (1954), Vol II, Documents of the sixth session including the report of the Commission to the General Assembly, p 150.

<sup>1325</sup> Report of the International Law Commission on the work of its forty-third session, 29 April-19 July 1991, GA, Supplement No 10 (A/46/10), p 265 (Art 21).

<sup>1326</sup> *Ibid*, pp 267-268.

<sup>1327</sup> Report of the International Law Commission on the work of its forty-eight session, 6 May-26 July 1996, GA, Supplement No 10 (A/51/10), p 93 (Art 18 (Crimes against Humanity) of the Draft Code).

<sup>1328</sup> *Ibid*, par 10, p 98.

<sup>1329</sup> *Ibid*, p 93.

ILC, at least in relation to this issue, may be considered as evidence of customary international law.<sup>1330</sup>

538. With respect to the geographical area relevant to the current case, the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY Criminal Code") criminalised war crimes against the civilian population, which included the ordering or commissioning of forcible prostitution, rape and forcible labour.<sup>1331</sup> It furthermore criminalised establishing "slavery relations" and transporting people in "slavery relation", as follows:

(1) Whoever brings another person in slavery relation, or engages in the trade with persons who are in slavery relation, or who incites another person to sell his freedom or freedom of persons he supports, shall be punished by imprisonment for a term exceeding one year but not exceeding 10 years. (2) Whoever transports persons in slavery relation from one country to another, shall be punished by imprisonment for a term exceeding six months but not exceeding five years.<sup>1332</sup>

### 3. Conclusion

539. In summary, the Trial Chamber finds 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.

540. Thus, the Trial Chamber finds 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. The *mens rea* of the violation consists in the intentional exercise of such powers.

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<sup>1330</sup> *Prosecutor v Furundžija*, Judgement, Case IT-95-17/1-T, 10 Dec 1998, par 227.

<sup>1331</sup> Art 142 of the SFRY Criminal Code ("Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to [...] inhuman treatment [...], immense suffering or violation of bodily integrity or health [...]; forcible prostitution or rape; [...] other illegal arrests and detention [...]; forcible labour [...] or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.") Art 154 of the Criminal Code of the Federation of Bosnia and Herzegovina of 28 Nov 1998 is similar to Art 142 of the SFRY Criminal Code.

<sup>1332</sup> Art 155 of the SFRY Criminal Code. Art 167 of the Criminal Code of the Federation of Bosnia and Herzegovina of 1998 provides: "(1) Whoever, in violation of the rules of international law, enslaves another person or puts him/her in similar position, or keeps him/her in such position, buys, sells or hands him/her over to another person, or whoever mediates in the buying, selling or handing over of such a person, or whoever incites another person to sell his/her freedom or freedom of persons he/she supports or takes care of, shall be punished with a sentence of imprisonment for a term between one year and ten years. (2) Whoever transports persons in slavery or similar relation from one country to another, shall be punished with a sentence of imprisonment for a term between six months and five years. (3) Whoever commits the act described in paragraphs 1 and 2 of this Article against a juvenile, shall be punished with a sentence of imprisonment for not less than five years."

541. This definition definition may be broader than the traditional and sometimes apparently distinct definitions of either slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law. This is evidenced in particular by the various cases from the Second World War referred to above, which have included forced or compulsory labour under enslavement as a crime against humanity. The work of the ILC, discussed above, further supports this conclusion.<sup>1333</sup>

542. Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, international law, including some of the provisions of Geneva

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<sup>1333</sup> Also see the Rome Statute of the International Criminal Court of 1998 ("ICC Statute"), adopted at Rome on 17 July 1998, PCNICC/1999/INF/3 (17 Aug 1999) (as of early February 2001, 27 states have ratified the ICC Statute, and 139 states signed it, including Bosnia and Herzegovina, which signed it on 17 July 2000. The ICC Statute requires 60 ratifications before it enters into force). Art 30 ("Mental element") of the ICC Statute provides: "(1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. (2) For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. (3) For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly." The ICC Statute makes numerous references to enslavement. As a crime against humanity (Art 7), "[e]nslavement" as well as "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity" (Art 7(1)(g)) are prohibited. "Enslavement" "[...] means 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." (Art 7(2)(c)). "Forced pregnancy" is defined as "the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. [...]" (Art 7(2)(f)). The setting out of the violations in separate sub-paragraphs of the ICC Statute is not to be interpreted as meaning, for example, that sexual slavery is not a form of enslavement. This separation is to be explained by the fact that the sexual violence violations were considered best to be grouped together. These provisions obviously do not *necessarily* indicate what the state of the relevant law was at the time relevant to this case. However they do provide some evidence of state *opinio juris* as to the relevant customary international law at the time at which the recommendations were adopted. See, eg,

Convention IV and the Additional Protocols, make clear that not all labour or service by protected persons, including civilians, in armed conflicts, is prohibited – strict conditions are, however, set for such labour or service. The “acquisition” or “disposal” of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement.

543. The Trial Chamber is therefore in general agreement with the factors put forward by the Prosecutor, to be taken into consideration in determining whether enslavement was committed. These are the control of someone’s movement,<sup>1334</sup> control of physical environment,<sup>1335</sup> psychological control,<sup>1336</sup> measures taken to prevent or deter escape,<sup>1337</sup> force, threat of force or coercion,<sup>1338</sup> duration,<sup>1339</sup> assertion of exclusivity,<sup>1340</sup> subjection to cruel treatment and abuse,<sup>1341</sup> control of sexuality and<sup>1342</sup> forced labour.<sup>1343</sup> 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.<sup>1344</sup> The Trial Chamber considers that the *mere ability* to do so is insufficient, such actions actually occurring could be a relevant factor.

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*Prosecutor vFurundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 227; *Prosecutor vTadic*, Case No IT-94-A, Judgement, 15 July 1999, par 223.

<sup>1334</sup> Prosecutor’s Pre-Trial Brief I, par 205.

<sup>1335</sup> *Ibid*, par 207.

<sup>1336</sup> *Ibid*, par 208.

<sup>1337</sup> *Ibid*, par 209.

<sup>1338</sup> *Ibid*, par 210.

<sup>1339</sup> *Ibid*, par 211.

<sup>1340</sup> *Ibid*, par 212.

<sup>1341</sup> *Ibid*, par 213.

<sup>1342</sup> *Ibid*, par 214.

<sup>1343</sup> *Ibid*, par 216.

<sup>1344</sup> *Ibid*, par 220.

## H. Cumulative convictions

### 1. Background

544. The issue of cumulative convictions centres on the question whether an accused may be convicted of more than one offence for the same conduct.

545. With respect to the present case, in several instances the accused are charged with more than one offence under a single Article, like torture and rape under Article 5 of the Statute, based on the same conduct. The accused are also charged with offences under two Articles, like torture under Article 5 and torture and/or rape under Article 3 of the Statute, again based on the same conduct.

546. The Prosecutor submits that an accused may be indicted, convicted and sentenced on cumulative charges emanating from the same conduct under the following circumstances: where the offences have different elements; where the provisions creating the offences protect different interests; or where it is necessary to record a conviction for both offences in order to fully describe what the accused did.<sup>1345</sup> The Defence submits that an accused cannot be indicted and convicted for more than one offence for the same act.<sup>1346</sup>

547. Although the Appeals Chamber in the *Delali}* case rendered its judgement only very recently,<sup>1347</sup> this Trial Chamber applies the approach of the majority in that judgement to the issue of cumulative convictions, without the assistance of the parties, in the present case.

### 2. The law

#### (a) Cumulative charges

548. The Appeals Chamber in the *Delali}* case held that cumulative charging is to be allowed.<sup>1348</sup> The primary reason is that it is impossible for the Prosecutor to determine with certainty, prior to the presentation of all the evidence, which of the charges brought against

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<sup>1345</sup> *Ibid*, par 926.

<sup>1346</sup> Defence Final Trial Brief, pars N.1.2, N.2.1 and N.4.6.

<sup>1347</sup> *Prosecutor v Delali} and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001.

<sup>1348</sup> *Ibid*, par 400.

an accused will be proved. A Trial Chamber is in a better position, after the parties' presentation of the evidence, to evaluate which charges should be retained.<sup>1349</sup>

(b) Cumulative convictions

(i) The approach laid down by the Appeals Chamber in the *Delali* case

549. The Appeals Chamber in the *Delali* case held that cumulative convictions are permissible only in certain circumstances.<sup>1350</sup> It is worth quoting the relevant section of that judgement in full:

412. [...] [t]his Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may 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.

413. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.<sup>1351</sup>

550. Accordingly, once all the evidence has been assessed, before deciding which convictions, if any, to enter against an accused, a Trial Chamber first has to determine whether an accused is charged with more than one statutory offence based upon the same conduct. Secondly, if there is evidence to establish both offences, but the underlying conduct is the same, the Trial Chamber has to determine whether each relevant statutory provision has a materially distinct element not contained in the other. This involves a comparison of the elements of the relevant statutory provisions – the facts of a specific case play no role in this determination. Thirdly, if the relevant provisions do not each have a materially distinct element, the Trial Chamber should select the more specific provision.

551. As to the impact that cumulative convictions based on the same conduct will have on sentencing, the Appeals Chamber in the *Delali* case held that it must be ensured that the final or aggregate sentence reflects the totality of the criminal conduct and overall

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<sup>1349</sup> *Ibid.*

<sup>1350</sup> *Ibid.*, pars 412-413.

<sup>1351</sup> *Ibid.*

culpability of the offender.<sup>1352</sup> The prejudice that an offender will or may suffer because of cumulative convictions based on the same conduct has to be taken into account when imposing the sentence.

(ii) The application of the identified approach to the present case

552. The Appeals Chamber in the *Delalić* case dealt with the matter of cumulative convictions in the context of Articles 2 and 3 of the Statute. This Trial Chamber considers the approach identified in that judgement must also be applied in the present case, which relates to Articles 3 and 5 of the Statute. It would be inappropriate to apply different approaches to different cumulations of charges.

553. The Prosecutor charges Dragoljub Kunarac for torture under Articles 5 and 3<sup>1353</sup> and for rape under Articles 5 and 3, based upon the same criminal conduct.<sup>1354</sup> She also charges Dragoljub Kunarac and Radomir Kovač with enslavement under Article 5 and outrages upon personal dignity under Article 3 based upon the same conduct.<sup>1355</sup> Based upon the same criminal conduct, Zoran Vuković has been indicted under Articles 5 and 3 on counts of torture and counts of rape.<sup>1356</sup>

554. The Prosecutor does not submit that convictions for rape and enslavement under Article 5 based on the same conduct should be entered against the accused. The alleged repeated violations of the sexual integrity of the victims, by various means, is one of the main factors to be considered when determining whether enslavement was committed.<sup>1357</sup> She states that

The main characteristic of the enslavement exercised by the accused Kunarac and Kovač was the sexual exploitation of the girls and women. All the controls exerted served that purpose. Repeated violations of the victim's sexual integrity, through rape and other sexual violence, were some of the most obvious exercises of the powers of ownership by the accused.<sup>1358</sup>

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<sup>1352</sup> *Ibid*, pars 429 and 430.

<sup>1353</sup> Prosecutor's Final Trial Brief, par 925 and fn 1979 (Counts 1 and 3 and 5 and 7 of Indictment IT-96-23).

<sup>1354</sup> Prosecutor's Final Trial Brief, par 925 and fn 1979 (Counts 1 and 3 and 5 and 7 of Indictment IT-96-23).

<sup>1355</sup> Prosecutor's Final Trial Brief, par 925 and fn 1981 (Counts 18 and 21 of Indictment IT-96-23).

<sup>1356</sup> Prosecutor's Final Trial Brief, par 925 and fn 1982 (Counts 21 to 24 of Indictment IT-96-23/1). The Trial Chamber considers that the Prosecutor mistakenly left out a reference to Counts 33-36 in this context.

<sup>1357</sup> Prosecutor's Final Trial Brief, pars 800-807.

<sup>1358</sup> Prosecutor's Final Trial Brief, par 801.

Furthermore, with regards to rape and outrages upon personal dignity, the Prosecutor charges rape and outrages upon personal dignity separately in this case, although, in her view, rape clearly could have and has been classified as an outrage upon personal dignity.<sup>1359</sup> In view of these submissions, the cumulative convictions problem in relation to rape and enslavement and rape and outrages upon personal dignity does not arise, because these charges are not based on the same conduct.

555. Having regard to the Indictments and the Prosecutor's submissions, what is to be determined here, therefore, are the following questions. First, would convictions for an Article 3 offence and an Article 5 offence, based on the same conduct, be permissible? Secondly, would convictions for rape and torture under one Article based on the same conduct be permissible?

a. Convictions under Articles 3 and 5 of the Statute

556. Applying the approach adopted by the Appeals Chamber in the *Delali* case, convictions for both an Article 3 offence and an Article 5 offence based on the same conduct would be permissible. That is so because each Article has at least one materially distinct element that does not appear in the other. A materially distinct element in Article 3 *vis-à-vis* Article 5 is the nexus requirement, which holds that there must be a close link between the acts of an accused and the armed conflict.<sup>1360</sup> A materially distinct element in Article 5 *vis-à-vis* Article 3 is the requirement of a widespread or systematic attack directed against a civilian population. In other words, regardless of the enumerated or specific offences charged under Articles 3 and 5, convictions under both Articles based on the same conduct will be permissible. With reference to the present case, convictions based on the same conduct would be permissible: convictions for rape under both Articles; convictions for torture under both Articles; convictions for enslavement under Article 5 and outrages upon personal dignity under Article 3; convictions for rape under Article 5 and torture under

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<sup>1359</sup> Prosecutor's Final Trial Brief, par 772.

<sup>1360</sup> Prosecutor's Final Trial Brief, pars 690-696; Prosecutor's Pre-Trial Brief I, pars 98-105; *Prosecutor v Tadi*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 70 ("closely related"); *Prosecutor v Delali and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, pars 193 (referring to an "obvious link", "closely related"), 197 ("clear nexus") and 295. This nexus requirement was not considered in *Prosecutor v Kupreki and Others*, Case IT-95-16, Judgement, 14 Jan 2000, pars 699 *et seq.*

Article 3; convictions for rape under Article 3 and torture under Article 5; and convictions for enslavement under Article 5 and rape under Article 3.

b. Torture and rape under Articles 3 or 5 of the Statute

557. Applying the approach adopted by the Appeals Chamber in the *Delali* case, convictions for rape and torture under either Article 3 or Article 5 based on the same conduct would be permissible. Comparing the elements of rape and torture under either Article 3 or Article 5, a materially distinct element of rape *vis-à-vis* torture is the sexual penetration element. A materially distinct element of torture *vis-à-vis* rape is the severe infliction of pain or suffering aimed at obtaining information or a confession, punishing, intimidating, coercing or discriminating against the victim or a third person.

## V. FINDINGS OF THE TRIAL CHAMBER

### A. General considerations regarding the evaluation of evidence

558. The Trial Chamber has assessed the evidence in this case in accordance with the Tribunal's Statute and its Rules of Procedure and Evidence and, where no guidance is given by those sources, in such a way as will best favour a fair determination of the case and which is consonant with the spirit of the Statute and the general principles of law.<sup>1361</sup>

559. The Trial Chamber has applied to the accused the presumption of innocence stated in Article 21(3) of the Statute, which embodies a general principle of law, so that the Prosecution bears the onus of establishing the guilt of the accused, and – in accordance with Rule 87(A), which also embodies a general principle of law – the Prosecution must do so beyond reasonable doubt.

560. As Article 21(4)(g) of the Statute provides that no accused may be compelled to testify against himself, no unfavourable inference has been drawn from the fact that the accused Radomir Kovac and Zoran Vukovic did not testify. The Trial Chamber has taken the evidence given by Dragoljub Kunarac into account in determining whether or not the Prosecution case should be accepted. His election to give evidence does not mean that Dragoljub Kunarac accepted any onus to prove his innocence. The approach taken by the Trial Chamber has been to determine whether the evidence of the Prosecution witnesses should be accepted as establishing beyond reasonable doubt the facts alleged, notwithstanding the evidence which Dragoljub Kunarac and the Defence witnesses gave.

561. The Trial Chamber has made a careful evaluation of the evidence of identification adduced during the trial, exercising particular caution in relation to it. The Trial Chamber accepts that identification evidence involves inherent uncertainties. This is because of the many difficulties inherent in the identification process, resulting from the vagaries of human perception and recollection.<sup>1362</sup> It is insufficient that the evidence of identification given by the witnesses has been honestly given; the true issue in relation to identification evidence is not whether it has been honestly given but rather whether it is reliable. In the turbulent and often traumatising circumstances in which these witnesses found themselves, the Trial

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<sup>1361</sup> Rule 89(B).

Chamber is acutely aware of the possibility of error in making an identification later of a person previously unknown to the witness. The Trial Chamber also recognises the possibility that men other than the accused may falsely have used the name of the accused, or that what they said to the witnesses may have been misunderstood.

562. The Trial Chamber has accordingly placed considerable weight upon the descriptions which the witnesses gave of the men who they said had raped them, and it has considered carefully whether the evidence from the other witnesses supports the descriptions given. Each of these witnesses was asked whether she could identify any of the persons in the courtroom as the man who raped her. 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 resembles the man who committed the offence charged), no positive probative weight has been given by the Trial Chamber to these "in court" identifications.<sup>1363</sup>

563. There are other considerations which the Trial Chamber has taken into account in relation to the evidence of these witnesses.

564. By their very nature, the experiences which the witnesses underwent were traumatic for them at the time, and they cannot reasonably be expected to recall the minutiae of the particular incidents charged, such as the precise sequence, or the exact dates and times, of the events they have described.<sup>1364</sup> The fact that these witnesses were detained over weeks and months without knowledge of dates or access to clocks, and without the opportunity to record their experiences, only exacerbated their difficulties in recalling the detail of those incidents later. In general, the Trial Chamber has not treated minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness has nevertheless recounted the essence of the incident charged in acceptable detail. Such an approach varied according to the circumstances of each witness, and in particular according to the quality of that witness's evidence in relation to the essence of the particular incident

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<sup>1362</sup> The frailty of identification evidence is discussed generally in a decision given during the course of the trial in this case: Decision on Motion for Acquittal, 3 July 2000, par 8.

<sup>1363</sup> The effect of the failure by such a witness to make an "in court" identification is discussed in the same decision: *ibid*, par 19.

<sup>1364</sup> *Prosecutor v Anto Furundžija*, IT-95-17/1-T, Judgement, 10 Dec 1998, par 113.

charged. The Trial Chamber has also taken into account the fact that these events took place some eight years before the witnesses gave evidence in determining whether any minor discrepancies should be treated as discrediting their evidence as a whole.

565. Many of these witnesses were minors at the time of the events which they described, some of them as young as fifteen years. The level of detail which such witnesses could be expected to recall is different to that expected of witnesses who were more mature at the relevant time. That is not to suggest that the Trial Chamber has required any lower level of satisfaction before accepting the evidence of these young witnesses. At all times, the Trial Chamber has applied the test of proof beyond reasonable doubt. Although the absence of a detailed memory on the part of these witnesses did make the task of the Prosecution in providing proof to that degree of satisfaction more difficult, its absence in relation to peripheral details was in general not regarded as discrediting their evidence.

566. In some cases, only one witness has given evidence of an incident with which one or other of the accused has been charged. Rule 96 specifically overrules the requirement which exists or which used to exist in some domestic systems of law that the evidence of a complainant who alleges rape must be corroborated – a requirement which has indeed been removed in most of those domestic systems.<sup>1365</sup> Nevertheless, the fact remains that only one witness has given evidence of that incident, usually because she has been the only person present other than the particular accused when the incident charged is alleged to have taken place. In such a situation, the Trial Chamber has scrutinised the evidence of the Prosecution witness with great care before accepting it as sufficient to make a finding of guilt against any of the accused. The Trial Chamber has considered the evidence upon the issue of rape given by the three professional witnesses called by the Defence, but has rejected their opinions upon the basis that they assumed either legal requirements which do not exist in international law or the need for factual consequences which the Trial Chamber does not accept.<sup>1366</sup>

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<sup>1365</sup> The Appeals Chamber has, moreover, held that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration: *Prosecutor v Zlatko Aleksovski*, Case IT-95-14/1-A, 24 Mar 2000, par 62.

<sup>1366</sup> T 5326-5363 (Aleksandar Jovanovic); T 5412-5448 (Dusan Dunjic); T 5449-5477 (Sanda Raskovic-Ivic).

## **B. The existence of an armed conflict and related requirements**

567. On 8 April 1992, an armed conflict between the Serb and Muslim forces broke out in Foca. It took about a week for the Serb forces to secure Foca town and about ten more days for them to be in complete control of Foca municipality. The fighting went on around Foca. The Trial Chamber notes that the parties agreed that, from April 1992 until at least February 1993, there was an armed conflict in the area of Foca. The Trial Chamber is satisfied that the armed conflict has been established beyond reasonable doubt with respect to all three municipalities mentioned above.

568. The Trial Chamber is also satisfied that the underlying crimes with which the Indictments were concerned were closely related to the armed conflict. Not only were the many underlying crimes made possible by the armed conflict, but they were very much a part of it. Muslim civilians were killed, raped or otherwise abused as a direct result of the armed conflict and because the armed conflict apparently offered blanket impunity to the perpetrators. It is irrelevant that the actual fighting had shifted from Foca town once it was safely in Serb hands to the surrounding areas by the time the events charged occurred, because the criterion of a nexus with the armed conflict under Article 3 of the Statute does not require that the offences be directly committed whilst fighting is actually taking place, or at the scene of combat. Humanitarian law continues to apply in the whole of the territory under the control of one of the parties, whether or not actual combat continues at the place where the events in question took place. It is therefore sufficient that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. The requirement that the act be closely related to the armed conflict is satisfied if, as in the present case, the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting. These requirements are squarely met by the offences under both Indictments, insofar as the Trial Chamber finds the evidence to be sufficient to establish those offences.

569. The Trial Chamber also notes that the three accused, in their capacity as soldiers, took an active part in carrying out military tasks during the conflict, fighting on behalf of

one of the parties to the armed conflict,<sup>1367</sup> namely the Serb side and that they therefore knew that an armed conflict was taking place. The evidence also shows that none of their victims took any part in the hostilities.

### **C. The attack against the civilian population and related requirements**

570. The Trial Chamber is satisfied beyond reasonable doubt that there was an extensive attack by the Serb forces targeting the Muslim civilian population in the area and for the period covered by Indictments IT-96-23 and IT-96-23/1. The attack encompassed the municipalities of Foca, Gacko and Kalinovik.

571. Before the armed conflict had started, Muslim civilians were removed from their social and professional lives, their salaries remained unpaid or they were told that their services were no longer needed. Most Muslim men were disarmed. Complete ostracism soon followed with their freedom to move about and to gather critically curtailed.

572. The SDS political propaganda grew more aggressive, and the outbursts of violence and house-burning more frequent. Many Muslim villagers from the area around Foca were so scared that they decided to sleep in the woods rather than risk being burned alive in their houses, or otherwise being caught in the attack on their towns.

573. Once towns and villages were securely in their hands, the Serb forces - the military, the police, the paramilitaries and, sometimes, even Serb villagers – applied the same pattern: Muslim houses and apartments were systematically ransacked or burnt down, Muslim villagers were rounded up or captured, and sometimes beaten or killed in the process. Men and women were separated, with many of the men detained in the former KP Dom prison.

574. The women were kept in various detention centres where they had to live in intolerably unhygienic conditions, where they were mistreated in many ways including, for many of them, being raped repeatedly. Serb soldiers or policemen would come to these detention centres, select one or more women, take them out and rape them. Many women and girls, including 16 of the Prosecution witnesses, were raped in that way. Some of these women were taken out of these detention centres to privately owned apartments and houses

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<sup>1367</sup> See par 407 where the Trial Chamber referred to the possible requirement under common Article 3 that

where they had to cook, clean and serve the residents, who were Serb soldiers. They were also subjected to sexual assaults.

575. In particular, the Trial Chamber finds that the Muslim civilians held at Kalinovik School, Foca High School and Partizan Sports Hall were kept in unhygienic conditions and without hot water. They were provided with insufficient food. Their freedom of movement was curtailed; they were not allowed to go to any other territory or to go back to their houses. Most of their houses were burnt down or ransacked. They were guarded and lived in an atmosphere of intimidation. The Trial Chamber is satisfied that Kalinovik School, Foca High School and Partizan Sports Hall served as detention centres at the relevant time.

576. All this was done in full view, in complete knowledge and sometimes with the direct involvement of the local authorities, particularly the police forces. The head of Foca police forces, Dragan Gagovic, was personally identified as one of the men who came to these detention centres to take women out and rape them.

577. After months of captivity, many women were expelled or exchanged. Some men spent as much as two years and a half in detention for no reason other than their being Muslims. All traces of Muslim presence and culture were wiped out of the area. Almost no Muslims remained in Foca. All the mosques of Foca were destroyed. In January 1994, the Serb authorities crowned their complete victory - their "gaining supremacy" over the Muslims as was candidly stated by the Defence<sup>1368</sup> - by renaming Foca "Srbinje", literally "the town of the Serbs".<sup>1369</sup> Almost all the remaining Muslim men and women from all three municipalities were arrested, rounded up, separated and imprisoned or detained at several detention centres like Buk Bijela, Kalinovik High School, Partizan and Fo-a High School, as well as the KP Dom in Fo-a, in accordance with a recurring pattern. Some of them were killed, raped or severely beaten. The sole reason for this treatment of the civilians was their Muslim ethnicity.

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the perpetrator may have to have some relationship to one of the parties to the conflict.

<sup>1368</sup> Defence Final Trial Brief, par B22.

<sup>1369</sup> Prosecution Submission Regarding Admissions and Contested Matters, 1 Feb 2000, p 4, point 3; Prosecution Submission Regarding Admissions and Contested Matters Regarding the Accused Zoran Vukovic, 8 Mar 2000, p 4, point 3.

578. In view of these facts, the Trial Chamber is satisfied that there was a systematic attack by the Bosnian Serb Army and paramilitary groups on the Muslim civilian population of the municipalities of Foča, Gacko and Kalinovik.

579. The Defence submitted that the aim of the Serb aggression was to gain supremacy over the Muslims in the region.<sup>1370</sup> It is irrelevant that the Serb aggression also pursued military goals and the objective of territorial gain, because the criteria of “armed conflict” and “attack upon a civilian population” are not synonymous. If one is of the opinion that such an element does form part of the general requirements of crimes against humanity, the policy behind the Serb attack was to gain total supremacy over the Muslims in the area and finally a homogenous Serb region. To this end, that policy also encompassed expulsion through terror, ie inducing other Muslims to leave the area for fear of being mistreated, imprisoned or even killed by the Serbs, should they fall into the latter’s hands.

580. As the Defence was reminded many times during the trial, the fact that the Muslim side may have committed similar atrocities against Serb civilians, an argument brought up *mutatis mutandis* by almost every Serb accused and Defence counsel before the Tribunal, is irrelevant in the context of this case.

581. The Trial Chamber is also satisfied that it has been proved beyond reasonable doubt that the three accused knew that an attack against the Muslim civilian population was taking place and that they knew that their criminal acts fitted in with or were part of this attack.

582. Dragoljub Kunarac was, in his own words, responsible for collecting information about the enemy. He was a well-informed soldier with access to the highest military command in the area. Considering his role and position, Dragoljub Kunarac obviously knew of the authorities’ intention to overcome the Muslims in any possible ways, including through criminal means. He himself volunteered and took important responsibilities in the carrying out of this plan, taking part in many military operations in the area of Foca. He was therefore aware of the way in which these villages were attacked and their Muslim inhabitants treated.

583. Dragoljub Kunarac also knew that Muslim women were specifically targeted, as he himself took several of them to his men and raped some of them himself. In the course of

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<sup>1370</sup> Defence Final Trial Brief, p 30.

one of these rapes, he expressed with verbal and physical aggression his view that the rapes against the Muslim women were one of the many ways in which the Serbs could assert their superiority and victory over the Muslims. While raping FWS-183, the accused Dragoljub Kunarac told her that she should enjoy being “fucked by a Serb”. After he and another soldier had finished, Dragoljub Kunarac laughed at her and added that she would now carry a Serb baby and would not know who the father would be. In addition, the accused Dragoljub Kunarac removed many Muslim girls from various detention centres and kept some of them for various periods of time for him or his soldiers to rape.

584. The Trial Chamber also notes that the consistency of these occurrences and the predictability of the women’s fate were particularly evident with respect to the accused Dragoljub Kunarac and his group of soldiers. The girls and women, who were selected by Dragoljub Kunarac or by his men, were systematically taken to the soldiers’ base, a house located in Ulica Osmana Đikica no 16. There, the girls and women, whom he knew were civilians,<sup>1371</sup> were raped by Dragoljub Kunarac’s men or by the accused himself.

585. Through these acts, the accused Dragoljub Kunarac not only showed that he knew of the attack and knew that his crimes fitted in with or were part of the attack, but he also clearly showed that he intended them to be so. He demonstrated a total disregard for Muslims in general, and Muslim women in particular. The accused Dragoljub Kunarac used his bravery in combat to gain the respect of his men, and he maintained it by providing them with women.

586. The accused Radomir Kovac, too, was fully aware of the attack against the Muslim villagers and aware of the fact that his acts were part of the attack. According to several Defence witnesses, Kovac himself said that Muslims, in particular Muslim women, were in danger or at risk in Foca. Kovac personally took part in the violent take-over of Trosanj on 3 July 1992, an undefended village whose inhabitants had taken to the woods in fear. During the attack, several villagers were killed or beaten up and the women were rounded up. The Trial Chamber notes that two of the women who were later kept in Kovac’s apartment, FWS-87 and FWS-75, had actually been captured in this village that very day. Kovac knew and conceded that the four women were civilians.<sup>1372</sup>

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<sup>1371</sup> Prosecution Submission Regarding Admissions and Contested Matters, 1 Feb 2000, pars 22-23.

<sup>1372</sup> Prosecution Submission Regarding Admissions and Contested Matters, 1 Feb 2000, par 5.

587. While four girls, FWS-75, FWS-87, A.B. and A.S., were kept in his apartment, the accused Radomir Kovac abused them and raped three of them many times, thereby perpetuating the attack upon the Muslim civilian population. Kovac would also invite his friends to his apartment, and he sometimes allowed them to rape one of the girls. Kovac also sold three of the girls, A.S., A.B. and FWS-87. Prior to their being sold, Kovac had given two of these girls, FWS-75 and A.B., to other Serb soldiers who abused them for more than three weeks before taking them back to Kovac, who proceeded to sell one and give the other away to acquaintances of his.

588. The accused Radomir Kovac knew of the attack against the Muslim civilian population, and he also perpetuated it by prolonging the ordeal of these girls by selling or giving them to men whom he knew would rape them and abuse them.

589. The accused Zoran Vukovic also knew about the attack and willingly took part in it. Vukovic was present at Buk Bijela on 3 July 1992 when the villagers from the area, mainly women and children, were brought to this settlement. He knew of the beatings which took place there, as he was seen leading away FWS-75's uncle who was covered in blood. Vukovic also knew of the rapes which were being perpetrated, as he himself raped FWS-50 that very day in Buk Bijela. Although this rape is not charged in Indictment IT-96-23/1 and will not be considered for conviction or sentencing purposes, it shows Vukovic's knowledge of and willing participation in the attack upon the Muslim civilians.

590. The accused Zoran Vukovic was aware of the dangers facing Muslims in Foca, because, during the armed conflict, he actually helped some Muslim citizens whom he knew to be in danger.

591. Zoran Vukovic also perpetuated the attack by personally raping at least two Muslim girls, FWS-75 and FWS-50. While raping FWS-50, a girl whom he knew was of the same age as his own daughter, Zoran Vukovic boasted that he could have done much worse to her and that she was lucky about this coincidence. Although the rape of FWS-75 is not charged in Indictment IT-96-23/1, and will therefore not be taken into consideration with respect to Vukovic's conviction and sentencing, it remains an important indicator of the accused's state of mind and knowledge of the circumstances existing during this period of time.

592. The Trial Chamber is satisfied that the crimes committed by all three accused were part of the attack against the Muslim civilian population and that all three accused had the

*mens rea* required under Article 5 of the Statute. The Trial Chamber is satisfied that the three accused knew about the attack, and that they committed the offences charged by directly taking advantage of the situation created. It is inconceivable that the situation could have been otherwise. Likewise, judging by their individual conduct as charged and proved on the evidence before the Trial Chamber, they were aware that there was an attack on the Muslim civilian population going on, and they willingly took an active part in it. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković} mistreated Muslim girls and women, and only Muslim girls and women, *because* they were Muslims. They therefore fully embraced the ethnicity-based aggression of the Serbs against the Muslim civilians, and all their criminal actions were clearly part of and had the effect of perpetuating the attack against the Muslim civilian population.

#### **D. Charges against the accused**

##### **1. Dragoljub Kunarac (Indictment IT-96-23)**

###### **(a) Dragoljub Kunarac's alibi defence**

593. The accused Dragoljub Kunarac relied upon a "defence" of alibi for the following periods: from 7 July 1992 until 21 July 1992; from 23 July 1992 until 26 July 1992; for 2 August 1992; and from 3 August 1992 from 5 pm until 8 August 1992.

594. When assessing the evidence, the Trial Chamber is aware of the difficulty for the Defence where an alibi is put forward for a period as long as one month. The Trial Chamber notes, however, the many gaps and contradictions which exist in the alibi presented by the accused.

595. The Trial Chamber notes that the allegations against the accused Dragoljub Kunarac contained in the Indictment cover a period running from about 13 July 1992 until sometime in October 1992. The Prosecution must prove each element of the offence charged, but the date of the events is in general not a material element of the crime, and its proof is not material to the charge unless the discrepancies between indictment and evidence become too wide, or, in the particular case, it is an essential part of the offence.

596. The Trial Chamber notes that the alibi advanced by the Defence only partly covers the time relevant to the Indictment. First, the alibi ends on 8 August 1992 and does therefore not cover some of the acts charged under Counts 18 to 21 of the Indictment.

597. Secondly, the Trial Chamber notes that, with respect to 22 July, 27 to 31 July and 1 August, no witness other than the accused Dragoljub Kunarac gave evidence as to his whereabouts during those periods.

598. Thirdly, even for the periods for which other witnesses have given evidence, the alibi provided by these other witnesses generally covered limited periods: hours, sometimes even a few minutes. In particular with respect to the evenings - apart from one Defence witness, witness Vaso Blagojevic, who claimed that he knew, at all times, where Dragoljub Kunarac was from 23 July to 26 July - no other witness claimed that he could ascertain where Dragoljub Kunarac was during the other nights covered by the alibi advanced.

599. Fourthly, even with respect to daytime, Dragoljub Kunarac's whereabouts and occupation remain unclear and the alibi sketchy. Although several witnesses testified that they saw the accused at some point during the relevant time in a given area, none - apart again from witness Blagojevic with respect to the period from 23 July until 27 July, and to a certain extent witness Gordan Mastilo for the same period - stated that they followed Kunarac all day or knew where he went from the place where they had seen him. The Trial Chamber notes, in that respect, the flexibility of Dragoljub Kunarac's assignments, his ability to move about and change locations easily and the availability of a motor vehicle most of the time.

600. According to the accused Dragoljub Kunarac, he spent the period from 7 July 1992 until 21 July 1992 in and around Cerova Ravan, which Serb forces were trying to control. According to the accused Kunarac and witness Osman Šubasic, nothing happened there until 21 July when the Serb attack was launched and Cerova Ravan was taken by the Serb forces. The Trial Chamber accepts that Kunarac and his men might have been involved in some aspects of the operations leading to the re-taking of Cerova Ravan. The Trial Chamber notes, however, the improbability that one of the most highly specialised units, unique in the area, stayed for two weeks in an area where there was almost no military activity taking place. Kunarac himself conceded that they were aware that they could not take the area without the backing of a self-propelled howitzer vehicle which only arrived on 21 July. The Trial Chamber also observes that Kunarac made no mention of the events in and around Cerova Ravan or of his participation therein in his first statement given to the investigators of the Prosecutor, dated 13 March 1998, Ex P67. Yet, the Indictment served on him already covered this period.

601. The accused Dragoljub Kunarac also claimed that there was a landslide which cut off the road near Odrina towards Gabelic Cosa which allegedly made it impossible for him to go to Foca during that period.

602. The Trial Chamber first notes that, from maps which have been entered into evidence,<sup>1373</sup> there exist not one road, but three roads, going from Cerova Ravan to Foca, and that it would take at most two hours with a car to go from Cerova Ravan to Foca by any of these roads. Witness Osman Šubasic stated that none of them was blocked to traffic. At most, the traffic might have been slowed down on one of these roads by a bulldozer which was enlarging the road for the howitzer self-propelled vehicle to be able to pass and reach Cerova Ravan. The distance between Cerova Ravan and Foca is about 20 kilometres as the crow flies.

603. Secondly, the Trial Chamber notes that it is highly improbable that a crucial assertion such as the alleged physical impossibility of going to Foca should, if true, have been omitted in his first statement dated 13 March 1998, Ex P67, given by the accused to the Prosecutor's investigators, because it forms a large part of the accused's alibi.

604. Dragoljub Kunarac claimed that during this period he took care of the food supplies for his men. He claimed that he would drive down to the landslide and that a supply truck would come on the other side of this 7-metre landslide. They would carry the food over the landslide and he would then drive back towards Cerova Ravan. Even if the Trial Chamber accepted that there was a landslide on the road, nothing would have stopped Kunarac, if he so wished, from passing the landslide on foot, as he acknowledged he did to transport food and to go back to Foca with the supply truck.

605. Witness Vaso Blagojevic testified that he saw the accused Dragoljub Kunarac in and around Cerova Ravan from 7 July to 21 July. He conceded, however, that he did not spend all his time with Kunarac, as the latter would sometimes go towards the Muslim position to reconnoitre. He conceded too that, once in his tent, he might not have noticed if Kunarac had left.

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<sup>1373</sup> Ex P21 is a map of Sarajevo, Gorazde, Foca, Kalinovik and Gacko municipalities (from UNPROFOR map series 1002, 1995).

606. Dragoljub Kunarac claimed that he went back to Foca on 21 July for the first time since the start of the Cerova Ravan operation on 7 July. He testified that, on that day, he took a soldier named Miletic who had been wounded during the fighting to the hospital in Foca. The Trial Chamber notes the discrepancies between the name of the wounded soldier given by the accused Dragoljub Kunarac ("Miletic"), the name of the wounded soldier given by witness Vaso Blagojevic ("Goran Ilincic") and the name appearing on Ex D78<sup>1374</sup> ("Goran Mirjacic") which the Defence adduced as evidence of Kunarac's claim that he indeed took this soldier to the hospital on 21 July. The Trial Chamber also notes that Ex D78 refers to the nature of the injury sustained by the soldier and the date at which he was hospitalised, but it does not mention the location where he had been injured, the circumstances in which the injury was incurred or the name of the person who took him to the hospital.

607. Dragoljub Kunarac stated that he spent the nights between 21 July and 22 July and the night between 22 July and 23 July at his parents' house in Foca. There is nothing in the Defence evidence to support that statement. The Trial Chamber notes that the house of Dragoljub Kunarac's parents is located about one kilometre away from Ulica Osmana Đikica no 16.<sup>1375</sup>

608. Dragoljub Kunarac claimed that, on 23 July, he went with some of his men to the region of Jabuka where he stayed until 26 July and searched for the dead bodies of Serb civilians. The Trial Chamber notes once again the improbability of a highly specialised group of soldiers spending four days searching for bodies while fighting was going on in other areas. The Trial Chamber also notes that the area of Jabuka is about 20 kilometres from Foca, and that Dragoljub Kunarac had a car at his disposal at all times so that he could easily reach Foca.

609. Witness Gordan Mastilo said that he was in the field with Dragoljub Kunarac from 23 until 26 July and that, apart from the night from 24 July to 25 July, he slept on the same locations as Kunarac. Witness DJ stated that he spent every day and every night of those four same days with Dragoljub Kunarac.

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<sup>1374</sup> Ex D78 is a letter of discharge from Foca's Hospital regarding Goran Miletic, numbered 3396.

<sup>1375</sup> T 4743.

610. Witness DJ said that he was in a state of shock during that period to the point of sleeplessness. He was worried for his brother who had disappeared and, as such, was able to know of Dragoljub Kunarac's presence during the night. Witness DJ claimed that, despite his distress, he was still able to see at all times and, eight years later, remember every act and whereabouts of a man he did not know before and whom he had never seen before. This claim is highly incredible.

611. Witness DJ claimed that he and Dragoljub Kunarac were never more than 500 meters apart on the terrain, and that, when Kunarac went to check bodies for booby traps, he would accompany him - although he had no expertise in explosive devices and no reason to go with him. Witness DJ went as far as saying that he also knew of Kunarac's movement at night, as he would be on the same location and, unable to sleep as he was, he would have seen him leave if he had done so. Gordan Mastilo added that Kunarac was in charge of the food supply, which implies that he had to leave the area to get some food and come back. This was not mentioned by witness DJ during his testimony, where he claimed to have remained with or in the vicinity of Kunarac at all times.

612. The Trial Chamber finally notes that all the locations where Dragoljub Kunarac allegedly slept during that period were within a 20 kilometre radius of Foca.

613. Dragoljub Kunarac claimed that the search for bodies ended in the evening hours of 26 July. He testified that he then went to Previla where he spent the night at the schoolhouse.<sup>1376</sup> On 27 July, he was ordered to go towards Dragocevo, where he stayed from 27 July until 31 July, reconnoitring. These localities are all within 12-20 kilometres from Foca. The fighting in these localities was actually over on 29 July, but Kunarac claimed that he remained there searching for two missing soldiers. The Trial Chamber notes once again the improbability of a unit specialised in collecting intelligence spending two full days in search of two missing men. Kunarac testified that he then headed for the Rogoj pass where he reconnoitred until 2 August. No other witness supported Kunarac's allegations with respect to this period of six and a half days from 27 July until 2 August late afternoon, in particular with respect to the evenings and nights of this period.

614. The Indictment alleges that, on 2 August 1992, the accused Dragoljub Kunarac took FWS-75, FWS-87, FWS-50 and D.B. from Partizan Sports Hall to Ulica Osmana Đikica

no 16. The Indictment also alleges that the accused Kunarac, together with his deputy "Gaga", took three other women (namely, FWS-186, FWS-191 and J.G., who were already at Ulica Osmana Đikica no 16) to a house in Trnova-e.

615. The Trial Chamber accepts that, during the night between 1 and 2 August 1992 or early in the morning of 2 August, Serb forces started attacking the Rogoj pass. Sometime in early afternoon of 2 August 1992, the Rogoj pass was re-taken by the Serb forces and most fighting was over by then. The accused Dragoljub Kunarac probably took part in the preparation of the attack and, possibly, in the re-taking of the pass itself.

616. Dragoljub Kunarac did not dispute that he went back to Foca later that day. Nor did he deny passing in the Aladža neighbourhood near the mosque and Ulica Osmana Đikica no 16. He actually conceded that he saw the damage done to the houses around the Aladža mosque following its destruction.<sup>1377</sup> The Trial Chamber notes that the house located in Ulica Osmana Đikica no 16 is actually on the road allegedly taken by Dragoljub Kunarac towards Velecevo next to the mosque. Dragoljub Kunarac claimed, however, that he did not check whether his men whom he knew lived there, had been hurt by the explosion of the mosque.<sup>1378</sup>

617. Instead, Dragoljub Kunarac stated that he went straight back to the Velecevo barracks in order to report and hand the car back to the commander, in case the latter needed it to go to the Aladža neighbourhood to investigate the blowing-up of the mosque. The Trial Chamber observes that at least three Defence witnesses stated that there were several cars at the disposal of the command. There was therefore no need at all for Dragoljub Kunarac to bring back this particular car.<sup>1379</sup> In addition, Kunarac could have called his commander on the radio to tell him what had happened and could have asked him whether he needed the car.

618. The Trial Chamber also notes that it would only have taken between half an hour to one hour to go from the Rogoj pass to Foca. The Trial Chamber observes that the roads between Rogoj and Foca, Trnova-e and Kalinovik were securely in Serb hands. Kalinovik

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<sup>1376</sup> T 4463.

<sup>1377</sup> T 4740.

<sup>1378</sup> T 4742-4743.

<sup>1379</sup> Witness DD, T 5209; Witness Radosav Djurovic, T 5272-5273; Witness Radijove Pavlovic, T 5304.

and Miljevina are both about half an hour to one hour away from Rogoj. Miljevina is about twenty minutes away from Foca. The accused Dragoljub Kunarac could thus have gone from the Rogoj Pass to Miljevina via Kalinovik in about an hour and a half at most. He could then have returned to Velecevo, which is about one and a half kilometres from Foca, in less than half an hour. The Trial Chamber takes note of the fact that the accused Dragoljub Kunarac conceded that he had "free access to Kalinovik School".<sup>1380</sup>

619. The Trial Chamber also notes that Dragoljub Kunarac did not dispute that he took FWS-87, D.B., FWS-50 and another girl from Partizan Sports Hall, but that he stated that it happened on 3 August, not on 2 August as alleged in the Indictment

620. During his testimony, the accused Dragoljub Kunarac conceded that, on 3 August 1992, he took two, possibly three, women, including D.B. and FWS-75, from Partizan Sports Hall to Miljevina and that he left them with DP 3's soldiers. The Trial Chamber notes that, in his earlier statement, Ex P67, the accused Kunarac admitted that he took four women to Miljevina on that occasion,<sup>1381</sup> not two or three.

621. Dragoljub Kunarac testified that he wanted to confront the girls with a journalist, Gordana Draskovic, who had told Kunarac that these girls were spreading rumours to the effect that he and his men were taking women out and raping them. Kunarac testified that he was hurt and offended by such claims.

622. The Trial Chamber notes that FWS-75 had already told Dragoljub Kunarac that she had talked to the journalist. There was therefore no need for Kunarac to confront her with the journalist.

623. Dragoljub Kunarac conceded that he left the girls with DP 3 and his men. He also conceded that these men were dangerous people.<sup>1382</sup> He claimed, however, that he heard on DP 3's radio that Rogoj pass had been re-taken and that he had to report to the command in Kalinovik. Dragoljub Kunarac claimed that Commandant Marko Kovac and his driver, witness Radjove Pavlovic, came from Velecevo with a jeep-type vehicle, picked up three of Dragoljub Kunarac's men on the way at Ulica Osmana Đikica no 16 and picked Kunarac

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<sup>1380</sup> Prosecution Submission Regarding Admissions and Contested Matters, 1 Feb 2000, point 7.

<sup>1381</sup> Ex P67, tape 2, side A, pp 6 and 7.

<sup>1382</sup> T 4730.

up in Miljevina. According to the Defence evidence, they all got in the car and headed off towards Kalinovik.

624. The Trial Chamber notes that Dragoljub Kunarac had his own car and that he therefore did not need to be picked up. Radijove Pavlovic, Marko Kovac's driver, admitted that with three men already in the back, that is even prior to the alleged picking up of Kunarac, his car would have been crowded, "one too many".<sup>1383</sup> In addition, Radijove Pavlovic also stated that another man who was not picked up in Ulica Osmana Đikica no 16 got in the car together with Kunarac in Miljevina.<sup>1384</sup>

625. The Prosecution bore the onus of establishing the facts alleged in the Indictment. Having raised the issue of alibi, the accused bore no onus of establishing that alibi. It was for the Prosecution to establish that, despite the evidence of the alibi, the facts alleged in the Indictment were nevertheless true. The Trial Chamber does not accept that there is any reasonable possibility that Dragoljub Kunarac was away from the places where and when the rapes took place. In particular, it does not accept Kunarac's evidence with respect to 3 August. The Trial Chamber rejects the alibi raised by Kunarac, and it holds that, on 3 August, Kunarac went back from Trnova-e to the house in Ulica Osmana Đikica no 16 where he took four women, FWS-87, FWS-75, FWS-190 and D.B. and that, possibly in the company of DP 3, he drove them to Miljevina. There, the women were handed over to DP 3's men and brought to "Karaman's house". While kept in this house, the girls were constantly raped.

(b) Dragoljub Kunarac's position as a commander

626. Concerning Dragoljub Kunarac's alleged role as a commander, the Trial Chamber takes note of the accused's admission that he was the leader of a group of soldiers.<sup>1385</sup> Paragraph 5 of the Matters agreed to by the accused Kunarac states that: "This was a permanent group consisting of approximately 15 soldiers, but the actual members were subject to change. For each specific task, the accused Kunarac would take four or five soldiers."

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<sup>1383</sup> T 5299.

<sup>1384</sup> T 5298-5299.

<sup>1385</sup> Prosecution Submission Regarding Admissions and Contested Matters, 1 Feb 2000, p 6, point 5

627. The evidence has shown that the composition of the unit would indeed change, depending on the mission to which Dragoljub Kunarac was assigned. Kunarac would request the men he would need on an *ad hoc* basis and, once the mission was completed, they would return to their respective units.

628. Some soldiers operated with Dragoljub Kunarac on several occasions and sometimes over a prolonged period of time including overnight. The Trial Chamber is satisfied that these soldiers went back to their respective brigades or detachments when the specific task for which they had been assigned to the accused had been carried out. During *those* periods where the operations continued overnight, these soldiers may have been under the effective control of the accused. The Prosecutor has failed however to show that the soldiers who committed the offences charged in the Indictment were under the effective control of Kunarac *at the time they committed the offences*.

629. The Trial Chamber is therefore not satisfied that Dragoljub Kunarac is responsible as a superior under Article 7(3) of the Statute.

(c) Counts 1 to 4

(i) The rapes of FWS-87<sup>1386</sup>

630. Paragraph 5.2 of the Indictment charges the accused Dragoljub Kunarac with having taken FWS-87 to the house at Ulica Osmana Điki-a no 16 on at least two occasions between 13 July and 1 August 1992. On both occasions, FWS-87 was allegedly raped by two Montenegrin soldiers who were commanded by the accused.

631. The Trial Chamber finds that the incidents described under paragraph 5.2 of the Indictment have not been proved beyond reasonable doubt.

632. The Trial Chamber accepts the testimony of FWS-87 when she recounted having been taken out of Partizan Sports Hall by Dragoljub Kunarac several times. The Trial Chamber further accepts the testimony of FWS-87 that she was taken by Dragoljub Kunarac to the place which she described as "having something do to with sewing", ie the former tailor's house in Ulica Osmana Đikica no 16. FWS-87 said that there were always

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<sup>1386</sup> Indictment IT-96-23, par 5.2.

Montenegrin soldiers in the house, most of them from Niksic, and that she herself and other girls brought to this house would subsequently be raped by these soldiers.

633. The Trial Chamber notes, however, that FWS-87 was able to testify with clarity in relation to only one occasion on which she was taken out to the house in Alad'a. This incident took place around 2 August 1992, and it is described in paragraph 5.4 of the Indictment. She was, however, able to testify in relation to another incident there which took place prior to this incident on 2 August 1992. The Trial Chamber therefore is satisfied that this other incident which the witness was able to recall falls within the temporal limits of the charges under paragraph 5.2 of the Indictment. The Trial Chamber notes, however, that FWS-87 was incapable of recounting any details as to what had happened to her during this other incident. In particular, FWS-87 was not able to recount if and by whom she was raped during this incident. Nor is there any supporting evidence that could fill in the gaps of FWS-87's testimony with regard to this event.

634. The Trial Chamber therefore finds that the two incidents mentioned in paragraph 5.2 of the Indictment have not been proved. The other incident mentioned by FWS-87 during her testimony is the one charged under paragraph 5.4 of the Indictment, and it will be dealt with later. As to the second incident, FWS-87 could not even say whether she had been raped on this occasion at all.

635. On the evidence before it, the Trial Chamber is not satisfied that the acts as described in paragraph 5.2 of the Indictment have been established beyond reasonable doubt.

(ii) The rapes of FWS-75 and D.B.<sup>1387</sup>

636. Paragraph 5.3 of the Indictment alleges that Dragoljub Kunarac took FWS-75 and D.B. to Ulica Osmana Đikica no 16 together with "Gaga", and raped D.B. there, while FWS-75 was gang-raped by at least 15 soldiers. Paragraph 5.3 further alleges that FWS-75 was raped on the other occasions in Ulica Osmana Đikica no 16 by up to three soldiers.

637. The Trial Chamber is satisfied that the rapes of FWS-75 and D.B. as described in paragraph 5.3 have been proved beyond reasonable doubt. The testimonies of both FWS-75

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<sup>1387</sup> Indictment IT-96-23, par 5.3.

and D.B. place the incident at the end of July rather than on or around 16 July 1992. FWS-75 said that it took place "a few days before 2 August 1992", and D.B. placed it about 10 days after her arrival in Partizan, which, according to her memories of the sequence of events, was around the 13<sup>th</sup> to 15<sup>th</sup> July. The Trial Chamber is satisfied that this incident is the one charged under paragraph 5.3 of the Indictment.

638. The Trial Chamber accepts the testimonies of both FWS-75 and D.B. as to being taken out of Partizan by Dragoljub Kunarac and "Gaga", and to being brought to Ulica Osmana Đikica no 16 where a group of soldiers was already waiting. The Trial Chamber notes that both D.B. and FWS-75 clearly recognised and identified the house from the Prosecution photographs.

639. Both witnesses further identified the accused Dragoljub Kunarac to the Trial Chamber's satisfaction as being the man who took them out of Partizan, drove them to Ulica Osmana Đikica no 16 and who later took D.B. to a room.

640. D.B. heard him being addressed by other soldiers by his accepted nickname "Žaga", and she later learnt his real name when he introduced himself to her. He was wearing a camouflage uniform, and he was armed the first time she saw him. D.B. saw Dragoljub Kunarac again at the house in Miljevina at a later stage when he came to visit the girls. She saw him there with his arm bandaged, and a soldier told her that Kunarac had been involved in a car accident. This re-identification of Kunarac by D.B. at the house in Miljevina is particularly reliable, since she recounted having seen him sit in the living room of the house with her own sister, FWS-87.

641. Dragoljub Kunarac entered the room while FWS-75 was being raped by "Bane", a soldier who sometimes went on mission with him, and Kunarac told her to get dressed and he took her back to Partizan. She learnt his name upon their return to Partizan after that night. FWS-75 heard his soldiers refer to Kunarac as "Žaga". She described him as being "tall, quite slim, ugly with a sort of curly hair, looking frightening".

642. The accused Dragoljub Kunarac himself had admitted in his interview with the Prosecution, conducted in March 1998, Ex P67, that he took FWS-75 and D.B. out of Partizan to Ulica Osmana Đikica no 16, and that he spent two and half to three hours with D.B. behind closed doors there.

643. The Trial Chamber is satisfied that, upon D.B.'s arrival at Ulica Osmana Đikica no 16, she was separated from FWS-75, taken to a room and raped first by Jure, then by "Gaga" and next by a young boy of 15 or 16 years of age.

644. The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that D.B. subsequently also had sexual intercourse with Dragoljub Kunarac in which she took an active part by taking of the trousers of the accused and kissing him all over the body before having vaginal intercourse with him. The accused Kunarac admitted having had intercourse with D.B. in Ulica Osmana Đikica no 16 on this occasion, during his interview with the Prosecution in March 1998, Ex P67. In this same interview, Kunarac had put forward that he was not aware of the fact that D.B. did not have sex with him on her own free will but that she had only complied out of fear.

645. The Trial Chamber, however, accepts the testimony of D.B. who testified that, prior to the intercourse, she had been threatened by "Gaga" that he would kill her if she did not satisfy the desires of his commander, the accused Dragoljub Kunarac. The Trial Chamber accepts D.B.'s evidence that she only initiated sexual intercourse with Kunarac because she was afraid of being killed by "Gaga" if she did not do so.

646. The Trial Chamber rejects the evidence of the accused Dragoljub Kunarac that he was not aware of the fact that D.B. only initiated sexual intercourse with him for reasons of fear for her life. The Trial Chamber regards it as highly improbable that the accused Kunarac could realistically have been "confused" by the behaviour of D.B., given the general context of the existing war-time situation and the specifically delicate situation of the Muslim girls detained in Partizan or elsewhere in the Foca region during that time. As to whether or not he was aware of the threat by "Gaga" against D.B., the Trial Chambers finds it irrelevant as to whether or not Kunarac heard "Gaga" repeat this threat against D.B. when he walked into the room, as D.B. testified. The Trial Chamber is satisfied that D.B. did not freely consent to any sexual intercourse with Kunarac. She was in captivity and in fear for her life after the threats uttered by "Gaga".

647. On the evidence accepted, the Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that the accused Dragoljub Kunarac took D.B. out of Partizan and drove her to Ulica Osmana Đikica no 16 together with "Gaga". The Trial Chamber accepts that D.B. was raped there first by "Gaga" and two other men and then forced to have sexual

intercourse with Dragoljub Kunarac because she had been threatened with death by "Gaga". The Trial Chamber is satisfied beyond reasonable doubt that Dragoljub Kunarac had sexual intercourse with D.B. in the full knowledge that she did not freely consent. The Trial Chamber also accepts that the accused Kunarac was fully aware of the rapes inflicted upon D.B. by the other soldiers.

648. The Trial Chamber further accepts the testimony of FWS-75 as to having been gang-raped in the same house, while D.B. was being raped by the three soldiers and Dragoljub Kunarac. FWS-75 was taken to a separate room by "Gaga" who ordered her to have sex with a 16-year-old boy nicknamed "Zuca".

649. The Trial Chamber is satisfied beyond reasonable doubt that FWS-75 was subsequently gang-raped by a group of soldiers, vaginally and orally. She identified most of the rapists as Montenegrins, and she also identified several individuals amongst them, eg Jure Radovic, DP 7 and DP 8.

650. Whereas the Trial Chamber finds that the testimony of FWS-75 already proves the gang-rape of herself charged under paragraph 5.3 to their satisfaction, D.B. stated that, upon their return to Partizan, FWS-75 appeared to be terrified and that she was barely able to walk.

651. The Trial Chamber is also satisfied that Dragoljub Kunarac was aware of the gang-rape of FWS-75 during her stay in the house. Firstly, the Trial Chamber accepts the evidence provided by FWS-75 as to Kunarac entering the room while she was still being raped by "Bane" and telling her to get dressed because they had to go. Secondly, the witnesses as well as Kunarac in his statement of March 1998, Ex P67, said that the sexual intercourse of D.B. and Kunarac and the gang-rape of FWS-75 by a group of soldiers took place in adjacent rooms. The Trial Chamber is satisfied that Kunarac must have heard sounds caused by this incident. Thirdly, the fact that the accused Kunarac and "Gaga" took the girls to Ulica Osmana Đikica no 16 in concert makes it highly unlikely, and therefore incredible, that Dragoljub Kunarac would not have known that FWS-75 was brought to the house for the purposes of rape, as was D.B.

652. Finally, the Trial Chamber further accepts as proved that FWS-75 was taken to the house in Ulica Osmana Đikica by Dragoljub Kunarac and raped there by soldiers at least one other time, as was testified by FWS-75. The Trial Chamber is satisfied beyond

reasonable doubt that Dragoljub Kunarac was aware that FWS-75 would be subject to rapes and sexual assaults by soldiers at the house in Ulica Osmana Đikica when he took her there.

653. The Trial Chamber is therefore satisfied that the allegations made in paragraph 5.3 of the Indictment have been proved beyond reasonable doubt, namely that Dragoljub Kunarac took FWS-75 and D.B. to Ulica Osmana \ikica no 16 for them to be raped. On this occasion, Kunarac personally had sexual intercourse with D.B. in the knowledge that she did not consent and aided and abetted the gang-rape of FWS-75 at the hands of several of his soldiers by taking her to the house in the knowledge that she would be raped there and that she did not consent to the sexual intercourse.

654. The accused acted intentionally and with the aim of discriminating between the members of his ethnic group and the Muslims, in particular its women and girls. The treatment reserved by Dragoljub Kunarac for his victims was motivated by their being Muslims, as is evidenced by the occasions when the accused told women, that they would give birth to Serb babies, or that they should "enjoy being fucked by a Serb". The law does not require that the purpose of discrimination be the only purpose pursued by the offender; it is enough that it forms a substantial part of his *mens rea*. Such was the case with the accused Kunarac.

655. The acts of the accused caused his victims severe mental and physical pain and suffering. Rape is one of the worst sufferings a human being can inflict upon another. This was abundantly clear to the accused Dragoljub Kunarac, as he stated during his testimony concerning the rape of D.B., when he admitted the fact that he had done something terrible, even though he maintained that it had happened with the consent of D.B.

656. By raping D.B. himself and bringing her and FWS-75 to Ulica Osmana \ikica no 16, the latter at least twice, to be raped by other men, the accused Dragoljub Kunarac thus committed the crimes of torture and rape as a principal perpetrator, and he aided and abetted the other soldiers in their role as principal perpetrators by bringing the two women to Ulica Osmana \ikica no 16.

(iii) The rapes of FWS-87, FWS-75 and FWS-50<sup>1388</sup>

657. Paragraph 54 alleges that on 2 August 1992, Dragoljub Kunarac took FWS-75, FWS-87, FWS-50 and D.B. to Ulica Osmana Đikica no 16 where he and three other soldiers raped FWS-87, while FWS-75 and FWS-50 were raped by other soldiers.

658. For the reasons set out in detail above, the Trial Chamber does not accept that Dragoljub Kunarac's evidence of his whereabouts and timing of the events on 2 August could reasonably have been true.

659. As to the identification of the accused by the witnesses, reference is made to the findings under paragraph 5.3 above as far as witnesses FWS-75 and D.B. are concerned. There, the Trial Chamber found that both witnesses sufficiently identified Dragoljub Kunarac.

660. FWS-50's first encounter with the accused took place at Ulica Osmana Đikica no 16 on the very day the events occurred. At that time, she did not know his name. FWS-50 saw him again at Partizan when he went there to pick up girls.

661. The Trial Chamber finds that the accused Dragoljub Kunarac has been identified beyond reasonable doubt with regard to the incidents charged under paragraph 5.4.

662. The Trial Chamber notes that at least two witnesses, FWS-186 and FWS-191, testified that they saw Dragoljub Kunarac at the Kalinovik School that day when he came to take women out. The accused Kunarac, together with his deputy "Gaga", drove these women whom he had taken out of Kalinovik School and stopped after 10-15 minutes, transferring them in a refrigerator truck driven by other men.

663. The Trial Chamber is satisfied that Dragoljub Kunarac then went to Partizan Sports Hall where he took four women out, FWS-87, FWS-75, FWS-50 and D.B. FWS-75 and FWS-87 were taken out by Kunarac that day and driven to Ulica Osmana Đikica no 16, together with FWS-50 and D.B. FWS-50 and D.B. could not recall whether Kunarac personally took them to Ulica Osmana Đikica no 16, but FWS-50 as well as D.B. saw him at the house that day. FWS-96 and FWS-48 saw Kunarac take these four women out on that

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<sup>1388</sup> Indictment IT-96-23, par 5.4.

day. FWS-190, who in the meantime had been brought to the house with the other women from the Kalinovik School, saw the arrival of the girls at Ulica Osmana Đikica no 16.

664. The Trial Chamber accepts the evidence of FWS-87, that she was raped by Dragoljub Kunarac that night in a room next to the kitchen of the house. She was also raped during the night by an older man, whose name she could not recall, and by a certain Toljic. FWS-87 described the accused Kunarac as "not very tall, not too skinny or too fat and having dark brown hair". She saw him come to Partizan every third night with other soldiers. She also noticed that he had a cast on his body when he came to "Karaman's house" and raped her. Apart from the credible identification by FWS-87, the Trial Chamber further notes that the accused admitted having met FWS-87 at Partizan on 3 August and having seen her again at "Karaman's house".

665. The Trial Chamber further accepts the evidence of FWS-50, FWS-75 and D.B. who testified that, in the meantime and during the rest of the night, they were raped by Dragoljub Kunarac's men.

666. Upon their arrival at Ulica Osmana Đikica no 16, Dragoljub Kunarac and "Gaga" abandoned FWS-75 and the other women to the soldiers present there. FWS-75 was first raped by three Montenegrin soldiers, whom she was able to identify as Kontic (nicknamed "Konta"), DP 7 and DP 8, and she was then locked in a room by DP 8 where he continued to rape her for the rest of the night vaginally, anally and orally. "Gaga" raped her the next morning. The Trial Chamber does not, however, make a finding with regard to FWS-75's testimony that she was also raped by Kunarac himself the next morning, since that specific rape has not been charged under paragraph 5.4, nor is it the subject of any other charge in the Indictment.

667. The Trial Chamber further accepts FWS-50's testimony about her being raped "in a beast-like manner" by an old Montenegrin soldier that night who wielded a knife and threatened to draw a cross on her back and to baptise her. However, the Trial Chamber does not make a finding which could be the subject of a conviction with regard to FWS-50's testimony that she was also raped by Dragoljub Kunarac personally on a sofa in the house. Again, this particular incident has neither been charged under paragraph 5.4 or elsewhere in the Indictment.

668. Whereas D.B. recounted to the Trial Chamber's persuasion that she was raped during this incident by a certain "Jure" with whom she had to stay for the rest of the night, the Trial Chamber notes that paragraph 5.4 does not allege any rapes against D.B. The Trial Chamber therefore does not find it appropriate to make any finding on this event which could lead to a conviction.

669. The rapes resulted in severe mental and physical pain and suffering for the victims. The Trial Chamber is satisfied that the victims were taken to Ulica Osmana Đikica no 16 by Dragoljub Kunarac for the very purpose of rape and that they were chosen for this purpose on the basis only of their Muslim ethnicity.

670. The Trial Chamber is satisfied that, on 2 August 1992, Dragoljub Kunarac went to Partizan Sports Hall where he took out FWS-75, FWS-87, FWS-50 and D.B. and drove them to the house in Ulica Osmana Đikica no 16, where some women who had been taken out of the Kalinovik school had already arrived. The Trial Chamber is also satisfied that Kunarac took these women to this house in the knowledge that they would be raped by soldiers during the night. The Trial Chamber finds that Kunarac took FWS-87 to one of the rooms of the house and forced her to have sexual intercourse in the knowledge that she did not consent. The Trial Chamber also finds that, on that occasion, FWS-75 and FWS-50 were repeatedly raped by other soldiers while Kunarac raped FWS-87. The Trial Chamber further finds that FWS-87 was also raped by other soldiers that same night. The fact that Kunarac took the girls to the house and left them to his men in the knowledge that they would rape them constituted an act of assistance which had a substantial effect on the acts of torture and rape later committed by his men. He therefore aided and abetted in that torture and rape.

(iv) The rapes of FWS-95<sup>1389</sup>

671. Paragraph 5.5 of the Indictment charges the accused Dragoljub Kunarac with having taken FWS-95 out of Partizan to Ulica Osmana Đikica no 16 on at least two occasions and that, on the first occasion, she was personally raped by Kunarac and three other soldiers. During the second incident, she was allegedly raped by two or three soldiers but not by the accused himself.

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<sup>1389</sup> Indictment IT-96-23, par 5.5.

672. The Trial Chamber finds that it has been proved beyond reasonable doubt that, during the first incident described under paragraph 5.5, the accused Dragoljub Kunarac raped FWS-95 at Ulica Osmana Đikica no 16. The second incident has not been proved.

673. FWS-95 was taken from Partizan to the house in the Alad'a area on two occasions. She did not remember who took her there. She was taken out together with FWS-105 and FWS-90 on the first occasion. Whereas neither FWS-95 nor FWS-105 were able to put a certain date to the incident in question, FWS-95 in her previous statement dated 9-11 February 1996, Ex P75, had stated that she was taken there before the mosque was blown up, ie before 2 August 1992. FWS-95 further testified in court that she was taken from Foca High School to Partizan 15 to 20 days after her arrival in Foca High School to which she had been transferred from Buk Bijela on 5 July 1992.

674. The Trial Chamber is therefore satisfied that the event in question took place between 20 July and 2 August 1992, and it regards this time frame as falling within the temporal limits established by the charges related to paragraph 5.5 of the Indictment.

675. The Trial Chamber is satisfied that Dragoljub Kunarac has been positively identified as the perpetrator of this specific rape by FWS-95 herself, as well as by the supporting testimony of FWS-105.

676. FWS-95 did not know Dragoljub Kunarac before the war, but FWS-90, who had relatives who knew Dragoljub Kunarac and who was taken out together with her to Ulica Osmana Đikica no 16, told her who he was. FWS-95 recounted the first name of the accused as being "Dragan" and that he had the nickname "Žaga". Confronted with her inability to identify the accused on a photograph shown to her by the Prosecution prior to the trial, the witness plausibly explained that this was the result of the poor quality of the photos shown to her. The Trial Chamber accepts the explanation of FWS-95 that "it's easier to recognise someone when you see them live than on a photograph." FWS-95 was able to identify Kunarac in the courtroom, and she stated that Kunarac is the same as he was then.<sup>1390</sup> In her first statement to the Prosecution of 9-11 February 1996, Ex P75, FWS-95 had described Kunarac as tall, with brown hair, thin, with long hair and a beard and moustache. In court, FWS-95 explained that, at the time the incident occurred, the soldiers were not shaven. Kunarac himself had stated in his interview that he would not shave for

days when he was out on missions. The Trial Chamber therefore does not regard the previous description of FWS-95 in her first statement as having had a beard and moustache as contradicting her identification of Kunarac.

677. The identification of Dragoljub Kunarac by FWS-95 is supported by evidence provided by FWS-105. Whereas this witness could not remember having been taken out by him, she recounted having seen Kunarac at the house in the Alad' a neighbourhood and that there she heard the other men addressing him as "Žaga". She had already heard his nickname while she was at Foca High School from the other girls. FWS-105 never saw Dragoljub Kunarac at Foca High School, but she heard from FWS-75, FWS-50, FWS-87 and D.B. that "Žaga" came to Foca High School. FWS-105 said that Kunarac had no Montenegrin accent, but that it had been said that he was from Montenegro.

678. Upon their arrival at Ulica Osmana Đikica no 16, FWS-95 was separated from FWS-105 and FWS-90, taken to a room and raped there by the accused Dragoljub Kunarac. FWS-105 testified that she and FWS-95 were taken to different rooms during the incident.

679. 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. The Trial Chamber notes that FWS-95 could not remember in court having been subsequently raped by three other soldiers as is indicted under paragraph 5.5. However, in the light of the afore-mentioned principles with regard to the reliability of testimony, the Trial Chamber regards this lapse of memory as being an insignificant inconsistency as far as the act of rape committed by the accused Kunarac is concerned. 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 during the first incident described under paragraph 5.5. As already elaborated above, the Trial Chamber recognises the difficulties which survivors of such traumatic events have in remembering every particular detail and

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<sup>1390</sup> The Trial Chamber has not relied upon the identification made in court.

precise minutiae of these events and does not regard their existence as necessarily destroying the credibility of other evidence as to the essence of the events themselves.

680. The testimony of FWS-95 as to the specific role of Dragoljub Kunarac in the first incident in Ulika Osmana Đikica no 16, charged in paragraph 5.5 of the Indictment, is sufficient to enable the Trial Chamber to reach a conviction on this particular rape.

681. The Trial Chamber is not satisfied, however, that the second incident described in paragraph 5.5 of the Indictment has been proved beyond reasonable doubt. With regard to this incident, Dragoljub Kunarac has been charged only with taking FWS-95 to Ulica Osmana Đikica no 16 where she was allegedly raped by two or three soldiers.

682. FWS-95, however, gave evidence that she was raped by Dragoljub Kunarac himself during this second event, an incident which has not been pleaded in the Indictment. She testified that she was taken to the house with other women, but she could not recall with whom. She was not able to say who took her out of Partizan on this occasion. Neither did she mention any other assailants apart from Dragoljub Kunarac with regard to this event, notwithstanding that, in her second statement to the Prosecution dated 25-26 April 1998, Ex D40, she had mentioned that she was raped by two or three soldiers both times she was taken to Ulica Osmana Đikica, ie, also during the second event.

683. The Trial Chamber is not satisfied on the evidence adduced that FWS-95 was taken out by Dragoljub Kunarac and then raped by three soldiers as alleged in the Indictment. The second rape by Dragoljub Kunarac of which FWS-95 gave evidence has not been charged by the Prosecution. On the contrary, the Indictment explicitly alleges under paragraph 5.5 with regard to the second incident that FWS-95 was not raped by the accused himself. The Trial Chamber cannot therefore find the accused guilty of that second rape under this paragraph of the Indictment.

684. The allegations made under paragraph 5.5 of the Indictment have therefore only been partially proved. The Trial Chamber is satisfied that Dragoljub Kunarac himself had sexual intercourse with FWS-95 without her consent on the first incident described under paragraph 5.5 of the Indictment while he knew that FWS-95 did not consent. However, the Trial Chamber is not satisfied that she was also raped by three other men, as pleaded in the Indictment.

685. In conclusion, the Trial Chamber finds as follows:

(i) The allegations made under paragraph 5.2 of Indictment IT-96-23 have not been proved beyond reasonable doubt.

(ii) The allegations made under paragraph 5.3 of Indictment IT-96-23 have been proved beyond reasonable doubt. Dragoljub Kunarac took FWS-75 and D.B. to Ulica Osmana Đikica no 16 where they were raped by several soldiers. Dragoljub Kunarac personally raped D.B. on that occasion.

(iii) The allegations made under paragraph 5.4 of Indictment IT-96-23 have been proved beyond reasonable doubt. On 2 August 1992, Dragoljub Kunarac took four girls, FWS-87, FWS-75, FWS-50 and D.B., to Ulica Osmana Đikica no 16. FWS-75 and FWS-50 were raped by several soldiers. Dragoljub Kunarac and three other soldiers raped FWS-87.

(iv) The allegations made under paragraph 5.5 of Indictment IT-96-23 have been partly proved. It has been established beyond reasonable doubt that Dragoljub Kunarac personally raped FWS-95 on one occasion, but it was not established that FWS-95 was raped by any other men during the second incident as was alleged in the Indictment.

686. As far as the girls were raped and tortured by other men, Dragoljub Kunarac was aiding and abetting the latter by taking the girls to them in the knowledge that they would rape them and by encouraging them to do so.

687. The Trial Chamber therefore finds the accused Dragoljub Kunarac GUILTY of torture under Counts 1 and 3 and GUILTY of rape under Counts 2 and 4.

(d) Counts 5 to 8

688. Counts 5 to 8 charge Dragoljub Kunarac with two rapes inflicted upon witness FWS-48 in the middle of July 1992.

689. Concerning the rape charged under paragraph 6.1 of Indictment IT-96-23, which Dragoljub Kunarac is alleged to have committed together with the co-accused Zoran Vukovic, the Trial Chamber held earlier that the accused Zoran Vukovic had no case to answer with regard to the allegations made by FWS-48, since the totality of the evidence

could not, as a matter of law, prove beyond reasonable doubt his identification concerning those allegations.

690. As to the rape of FWS-48 by Dragoljub Kunarac and Zoran Vukovic in Hotel Zelengora, the Trial Chamber finds that the testimony of FWS-48 was not sufficiently credible to establish what is alleged. Not only could FWS-48 no longer remember the subsequent rape allegedly committed by Zoran Vukovic in court, but her testimony as to her identification of Kunarac and her description of the particular event also shows substantial discrepancies.

691. FWS-48 identified Dragoljub Kunarac in the courtroom. She confirmed, however, that prior to her testimony she had seen his picture on TV when he was arrested, and that she had been shown his picture by investigators of the Prosecution. Under cross-examination, she described the man she believed being "Žaga" as being 45-46 years old at the time the event occurred. She also thought that he was about 1.77 meters tall but could not say whether he was taller or shorter than herself. FWS-48 could not remember clearly in court whether she was taken to a house in Donje Polje or to the Zelengora Hotel. In a previous interview, FWS-48 had stated that Kunarac spoke with a Montenegrin accent, but she did not remember in court having said so. Furthermore, during the examination-in-chief, FWS-48 testified that at Hotel Zelengora Kunarac had told her that she looked like a Montenegrin woman and that she would give birth to Serb babies. Under cross-examination, however, FWS-48 testified that she did not speak with Kunarac at all. She further denied in court having heard about him being "Žaga" at Zelengora, but in the primary school, which appears to be in conflict with the interview she gave on 24 September 1998, Ex D47,<sup>1391</sup> to the investigators of the Prosecution. There is no supporting evidence which could remove the effect of these substantial inconsistencies. Whereas FWS-48 testified that FWS-95 and FWS-75 were also present in Hotel Zelengora with her during the incident, neither of these witnesses could recall this specific incident. FWS-95 testified that she was never taken to Hotel Zelengora at any time.

692. In evaluating the credibility of the witness's testimony, the Trial Chamber also has to take into account the substantial inconsistencies in FWS-48's testimony with regard to the allegations against the accused Zoran Vukovic, which raised general concerns with

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<sup>1391</sup> Investigator's notes, 24 Sept 1998.

regard to the credibility of the testimony of the witness generally. There was no supporting evidence to dispel the Trial Chamber's doubts.

693. The Trial Chamber further holds that the rapes described in paragraphs 6.1 and 6.2 of the Indictment, which charged Dragoljub Kunarac with having committed them against FWS-48, have not been proved during trial beyond reasonable doubt.

694. In a statement dated September 1995, Ex P78, prior to the trial, FWS-48 had stated that she was taken by DP 6 together with FWS-95 and FWS-105 to a house near the station, from where she then was taken by Dragoljub Kunarac to another house in the Donje Polje neighbourhood, where he raped her.

695. During her testimony in court, however, the witness was unable to recount the incident with any precision. In contrast to her earlier allegations, she testified that Dragoljub Kunarac did not take her away to rape her, on the night when she and the other girls were taken out of Partizan by DP 6. FWS-48 said that Kunarac had once taken her to a burnt-out house in Donje Polje for the purpose of rape, but this incident does not constitute the rape which is charged under paragraph 6.2. FWS-48 testified that, on that occasion, it was the accused Kunarac himself who took her out of Partizan, not DP 6.

696. FWS-95 testified that she was once taken to a burnt-out house together with FWS-48 for the purpose of rape. This specific incident, where the women were taken by Dragoljub Kunarac himself directly to the burnt-out house has, however, not been charged in the Indictment, and the Trial Chamber therefore does not need to make any findings with regard to it. As to the incident charged under 6.2, FWS-48 clearly stated in court that, on the night she was taken away from Partizan by DP 6, the accused Kunarac did not rape her.

697. On the basis of the evidence before it, the Trial Chamber is not satisfied beyond reasonable doubt that the events as charged under Counts 5 to 8, based upon paragraphs 6.1 and 6.2 of Indictment IT-96-23, have been proved. The Trial Chamber also notes that the Prosecutor conceded in her Final Trial Brief that these incidents described in paragraphs 6.1 and 6.2 of the Indictment had not been proved beyond reasonable doubt.

698. The Trial Chamber therefore finds the accused Dragoljub Kunarac NOT GUILTY under Counts 5, 6, 7 and 8.

(e) Counts 9 and 10

699. Paragraph 7.1 of Indictment IT-96-23 alleges that, on or about 2 August 1992, Dragoljub Kunarac transferred four women, including FWS-75 and FWS-87, from Partizan Sports Hall to "Karaman's house" in Miljevina. Counts 9 and 10 charge the accused Dragoljub Kunarac with raping FWS-87 on one occasion while she was kept at "Karaman's house", as described in paragraph 7.2 of the Indictment.

700. The Trial Chamber is satisfied that the allegations contained in paragraph 7.1 of the Indictment have been proved beyond reasonable doubt. The Trial Chamber finds that, on or about 2 August 1992, FWS-87, together with FWS-75, D.B. and FWS-50 were taken by the accused Dragoljub Kunarac from the house in Ulica Osmana Đikica no 16 in Foca to Miljevina, where they were handed over to DP 3 and his men who, in turn, transferred them to "Karaman's house".<sup>1392</sup>

701. The Trial Chamber is also satisfied beyond reasonable doubt that, sometime in either September or October 1992, Dragoljub Kunarac went to "Karaman's house" and took FWS-87 to a room on the upper floor of the house where he forced her to have sexual intercourse in the knowledge that she did not consent. The accused Kunarac did not dispute that he went to this house at the end of September, nor that he took FWS-87 to a room upstairs.<sup>1393</sup> Kunarac claimed, however, that he did not have sexual intercourse with her.

702. The Trial Chamber is of the view that Dragoljub Kunarac's assertion that he simply talked to her is highly improbable, in the light of his total disregard for Muslim women in general, those he raped in particular, and FWS-87 most specifically, whom he had raped on at least one occasion prior to those events while in Ulica Osmana Đikica no 16.

703. The Trial Chamber accepts the evidence of FWS-87. It does not accept that Dragoljub Kunarac's version of events could reasonably have been true, and it holds that the allegations made in paragraph 7.2 of the Indictment have been proved beyond reasonable doubt.

704. The Trial Chamber therefore finds Dragoljub Kunarac GUILTY of rape under Counts 9 and 10.

(f) Counts 11 and 12

705. Counts 11 and 12 charge Dragoljub Kunarac with the rape of FWS-183 as described in paragraph 8.1 of Indictment IT-96-23.

706. The Trial Chamber is satisfied beyond reasonable doubt that the accused Dragoljub Kunarac raped FWS-183 as described under paragraph 8.1 of the Indictment.

707. As already explained above, the Trial Chamber rejects the alibi of Dragoljub Kunarac for the time period related to this charge.

708. The Trial Chamber is satisfied that the accused Dragoljub Kunarac has been positively identified by FWS-183 and FWS-61 beyond reasonable doubt in relation to this incident. The soldier who put FWS-183 in the car introduced himself as the son of Lekso Kunarac. FWS-183 knew Kunarac's father because he had done some woodwork in her cottage. She had once gone to his house in Cohodor Mahala.

709. FWS-61 testified that, upon return to her apartment after FWS-183 had been taken away by the soldiers, a Serb soldier named Tadic told her that the man who had taken away FWS-183 was called "Žaga".

710. The Trial Chamber accepts the testimony of FWS-183 that, in the second half of July 1992, while she was in FWS-61's apartment, three Serb soldiers came and accused her of transmitting radio messages. The Trial Chamber accepts that a soldier she later realised to be "Žaga" put her in a red Lada, where she had to wait with him for the two other soldiers to return, and who had in the meantime looted her apartment.

711. The three soldiers then took her to the banks of the Cehotina river in Foca near Velecevo, where the accused 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 while he threatened to kill her and her son. By his attempt to intimidate her, Dragoljub Kunarac also showed his hatred for Muslims, his intention to intimidate her, and his intention to discriminate against Muslims in general, and FWS-183

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<sup>1392</sup> See pars 593-625, section on Dragoljub Kunarac's alibi defence with respect to these events.

<sup>1393</sup> Prosecution Submission Regarding Admissions and Contested Matters, 1 Feb 2000, p 6, point 8.

in particular. All three soldiers raped FWS-183. In the course of the rapes, Kunarac forced her to touch his penis and to look at him. He cursed her. The other two soldiers watched from the car, laughing. While she was raped by Dragoljub Kunarac, FWS-183 heard him tell the other soldiers to wait for their turn. Subsequently, she was raped vaginally and orally by the other soldiers. The rapes resulted in severe mental and physical pain for FWS-183.

712. The description of the events by FWS-183 is supported by the testimony of FWS-61, who was present when the soldiers stormed into her apartment. This is so despite the fact that FWS-61 recounted the incident as having taken place towards the end of July instead of around 15 July. As set out above, the Trial Chamber does not require proof of the exact time of the incident as long as there is evidence to establish the essence of the incident pleaded.

713. FWS-61 testified that FWS-183 was taken out from the apartment and that both her apartment and FWS-183's apartment were looted by the soldiers. She saw FWS-183 returned by the same three soldiers who had taken her away. She said that FWS-183 looked confused upon her arrival, as if she had been crying. She further testified that FWS-183 told her that she had to give all her valuables to the soldiers, and that she had been forced to touch them at their "shameful places" and do "impossible things".

714. The Trial Chamber is satisfied that the incident described in paragraph 8.1 of the Indictment has been proved beyond reasonable doubt. The accused Dragoljub Kunarac and the other two soldiers acted as principal co-perpetrators.

715. For these acts, the Trial Chamber finds the accused Dragoljub Kunarac GUILTY of torture under Count 11. Likewise, the Trial Chamber finds the accused Dragoljub Kunarac GUILTY of rape under Count 12.

(g) Counts 18 to 21

716. Counts 18 to 21 charge the accused Dragoljub Kunarac with the rape, enslavement and outrages upon personal dignity of FWS-186, FWS-191 and J.G.

(i) The rape of FWS-191, FWS-186 and J.G.<sup>1394</sup>

717. Paragraph 10.2 of Indictment IT-96-23 charges the accused Dragoljub Kunarac with having taken FWS-186, FWS-191 and J.G. out of Ulica Osmana Đikica no 16, and that, together with "Gaga" and DP6, of having taken them to an abandoned house in Trnova-e, where Dragoljub Kunarac raped FWS-191 while the other girls were raped by the other two men.

718. The Trial Chamber is satisfied, on the evidence of FWS-191 and FWS-186, that Dragoljub Kunarac, together with "Gaga" and DP 6, took FWS-186, FWS-191 and J.G. from the house Ulica Osmana Đikica no 16 on 2 August 1992 to an abandoned house in Trnova-e, where FWS-186 was raped by DP 6 and FWS-191 was raped by Dragoljub Kunarac. As to the alleged rape of J.G., the Trial Chamber finds that it has not been proved beyond reasonable doubt that she was raped by "Gaga" during this incident.

719. As already stated, the Trial Chamber does not accept the alibi of the accused Dragoljub Kunarac with regard to all incidents on 2 August 1992.

720. The Trial Chamber finds that Dragoljub Kunarac has been reliably identified by both FWS-191 and FWS-186. FWS-191 testified that Kunarac introduced himself to her before he raped her in the room in the Trnova-e house. Not only did he tell her his name but he also showed her his tag with the name on it. Furthermore, he boasted to the witness about his eventful past in France and elsewhere.

721. FWS-186 testified that she did not know Dragoljub Kunarac before the war but that she saw him for the first time when he came to take the girls away from Kalinovik Primary School. She had learnt his name at the house in Trnova-e. She saw his photo in the press when he surrendered to the Tribunal and she recognised him immediately. In court, FWS-186 plausibly explained why she had not mentioned Kunarac in her first statement (dated 9 May 1998, Ex P90, given to the Prosecution in November 1993) as an attempt to protect J.G. who, according to FWS-186's testimony, had also been raped by him.

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<sup>1394</sup> Indictment IT-96-23, par 10.1.

722. Both FWS-191 and FWS-186 described obvious characteristic features of Dragoljub Kunarac's appearance. FWS-191 described "Žaga" as being tall, thin, brown hair, with a rough face and big eyes. FWS-186 recounted "Žaga" being tall, dark, skinny, with big eyes.

723. The Trial Chamber notes that there is additional supporting evidence for the identification. FWS-192, the mother of FWS-191, testified that, on 2 August 1992, her daughter was taken away from Kalinovik school by a soldier whose nickname she later came to learn was "Žaga".

724. FWS-191 and FWS-186 were taken out of Kalinovik School together by Dragoljub Kunarac and "Gaga" on 2 August 1992, driven by them to a house in the Alad' a area and, from there, to the house in Trnova-e. Upon arrival, the girls were told where to sleep. FWS-191 was assigned to Kunarac, he ordered her to undress and he tried to rape her while his bayonet was placed on the table. Kunarac did not entirely succeed penetrating FWS-191 because, as FWS-191 was still a virgin, she was rigid with fear. He succeeded in taking away her virginity the next day. Kunarac knew that she did not consent, and he rejoiced at the idea of being her "first", thereby degrading her more. The Trial Chamber notes that the testimony of FWS-191 was also supported by the testimony of FWS-186, who said that FWS-191 had told her that she was raped by Kunarac during that night.

725. FWS-186 was raped during this night by DP 6 on the second floor of the Trnova-e house. FWS-186 identified the house in Trnova-e and recounted her impression that it was owned by DP 6. FWS-186 was sent to a room on the second floor. DP 6 then came, locked the door from the inside and raped her. The evidence provided by FWS-186 is supported by FWS-191, who testified that, while she was assigned to Dragoljub Kunarac, FWS-186 had to go to the second floor of the house with DP 6.

726. Whereas both FWS-191 and FWS-186 testified that J.G. was assigned to "Gaga" and taken by him to the first floor of the Trnova-e house, their memories differ as to whether "Gaga" actually raped J.G. during the night of 2 August 1992. While FWS-191 said that fourteen-year old J.G. told her that she had not been raped by "Gaga" because she had her period, FWS-186 testified that J.G. later told her that she had been raped by "Gaga". Since J.G. herself has not testified in court, the Trial Chamber finds that there remain reasonable doubts as to the alleged rape of J.G. by "Gaga" during the incident described

under paragraph 10.1. The Trial Chamber therefore finds that this specific rape has not been proved beyond reasonable doubt.

727. The Trial Chamber finds that the incident described under paragraph 10.1 of the Indictment, apart from the alleged rape of J.G., has been proved beyond reasonable doubt. The Trial Chamber is satisfied that Dragoljub Kunarac was fully aware that the other girls, whom he took out of Ulica Osmana Đikica together with "Gaga" and DP 6, ie FWS-191, FWS-186 and J.G., were taken to the abandoned house also for the purpose of rape.

(ii) The rape, enslavement and outrages upon personal dignity of FWS-191 and FWS-186<sup>1395</sup>

728. Paragraph 10.2 of Indictment IT-96-23 alleges that FWS-186 and FWS-191 were kept in the abandoned house in Trnova-e for approximately 6 months starting on 2 August 1992. It further alleges that, during the time of their detention, FWS-191 was constantly raped by the accused Dragoljub Kunarac while FWS-186 was constantly raped by DP 6. Dragoljub Kunarac reserved FWS-191 for himself. According to paragraph 10.3, the girls were treated as personal property of the accused Kunarac and DP 6, they had to do household chores and they had to obey all demands.

729. The Trial Chamber is satisfied that the incidents charged under paragraphs 10.2 and 10.3 have been proved beyond reasonable doubt.

730. As to the alibi of Dragoljub Kunarac, the Trial Chamber refers to its findings above on the grounds of which it rejects the Defence arguments also with regard to the incidents described in paragraphs 10.2 and 10.3. The Trial Chamber notes that, in any case, Kunarac did not provide any alibi for the period after 8 August 1992.

731. As set out above with regard to the incident charged under paragraph 10.1, both FWS-191 and FWS-186 reliably identified the accused Dragoljub Kunarac.

732. The Trial Chamber is satisfied that FWS-191 and FWS-186 were kept in the Trnova-e house for five to six months, a period that the Trial Chamber accepts as falling under the time frame set out in the Indictment as "approximately 6 months".

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<sup>1395</sup> Indictment IT-96-23, pars 10.2 and 10.3.

733. The Trial Chamber accepts the testimony of FWS-191 that she was kept in the Trnova-e house for about five to six months. As already discussed, the Trial Chamber reiterates that specific dates and exact time periods do not require to be proved beyond reasonable doubt due to the specific war context wherein the crimes concerned occurred. The Trial Chamber therefore accepts the testimony of FWS-186 that she stayed in the house in Trnova-e for about five months as supporting evidence of FWS-191. The Trial Chamber further finds that J.G. stayed only for a few days in the house in Trnova-e, as alleged in the Indictment and as was stated by FWS-186.

734. The Trial Chamber is satisfied that Dragoljub Kunarac constantly raped FWS-191 for about two months while she was kept in the house. Kunarac came to the Trnova-e house until the end of September, and that each time he came he would rape FWS-191. Although Kunarac broke his arm in an accident sometime in September 1992, he nevertheless continued to rape her. The testimony of FWS-191 is supported by that of FWS-186, who said that FWS-191 was raped by Kunarac for about one and a half to two months while the girls stayed at the house. She further remembered having seen Dragoljub Kunarac at some point with a plaster cast on his arm.

735. FWS-186 was raped by DP 6 continuously during her five-month stay at the Trnova-e house. She was obliged to have sexual intercourse with DP 6 whenever he returned to the house from Montenegro or from the frontlines. The Trial Chamber regards the testimony of FWS-186 as sufficient to prove the rapes by DP 6 in the Trnova-e house beyond reasonable doubt. Her testimony is supported by the testimony of FWS-191, who testified that FWS-186 was forced to have intercourse with DP 6 at the Trnova-e house whenever he was at the house until the summer of 1993.

736. The evidence provided by both witnesses is reliable and supported by the testimonies of other witnesses. FWS-175 who, as FWS-191 confirmed in her testimony, was also brought to the Trnova-e house, testified that FWS-186 was already there when she arrived and that she, FWS-175, noticed that FWS-186 was with DP 6.

737. FWS-192, the mother of FWS-191, testified that "Žaga" told her that her daughter was with him and that he would not bring her back. In addition to the testimony of FWS-191, who recounted having been allowed to write a letter to her mother at some point, FWS-192 testified that she received this letter from "Žaga" and DP 6. With regard to FWS-186,

FWS-192 further recounted that she was present when DP 6 admitted to FWS-185, the mother of FWS-186, that her daughter was with him. She recounted DP 6 having ordered FWS-185 to give him clothes for her daughter.

738. The Trial Chamber accepts the evidence of FWS-191 and FWS-186, and finds that both witnesses were treated as the personal property of Dragoljub Kunarac and DP 6 during their stay in the Trnova-e house as described in paragraph 10.3 of the Indictment.

739. The Trial Chamber accepts from FWS-191 that the girls at Trnova-e did anything they were ordered to do by the soldiers while being kept there. The testimonies of both FWS-191 and FWS-186 substantiated convincingly that the girls were kept in the house to be used by Dragoljub Kunarac and DP 6 for sexual services whenever the soldiers returned to the house.

740. The Trial Chamber further accepts that the witnesses 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. Referring to the factual findings with regard to the general background, the Trial Chamber accepts 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. The Trial Chamber is satisfied that Kunarac and DP 6, both being Serb soldiers in the Foca area, were fully aware of this fact. The Trial Chamber accepts the evidence of FWS-191 and FWS-186 that the girls performed household chores for the soldiers whilst under captivity.

741. The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that FWS-191 was raped by Dragoljub Kunarac and that FWS-186 was raped by DP 6, continuously and constantly whilst they were kept in the house in Trnova-e. Kunarac in fact asserted his exclusivity over FWS-191 by forbidding any other soldier to rape her. The Trial Chamber is satisfied that Kunarac was aware of the fact that DP 6 constantly and continuously raped FWS-186 during this period, as he himself did to FWS-191. It has not been established however that Kunarac provided DP 6 with any form of assistance, encouragement or moral support which had a substantial effect on the perpetration of the individual rapes. Kunarac continued to come to the house for about two months, but it has not been established, apart from the incident charged and described in paragraph 10.1, that he was present while DP 6 raped FWS-186. It has not been shown either how Kunarac's

presence or actions would have assisted DP 6 in his raping FWS-186; so loose is the connection between the events at the house and his sporadic presence there, it would stretch the concept of aiding and abetting beyond its limits with respect to the actual rapes by DP 6.

742. The Trial Chamber is satisfied that FWS-191 and FWS-186 were denied any control over their lives by Dragoljub Kunarac and DP 6 during their stay there. They had to obey all orders, they had to do household chores and they had no realistic option whatsoever to flee the house in Trnova-e or to escape their assailants. They were subjected to other mistreatments, such as Kunarac inviting a soldier into the house so that he could rape FWS-191 for 100 Deutschmark if he so wished. On another occasion, Kunarac tried to rape FWS-191 while in his hospital bed, in front of other soldiers. The two women were treated as the personal property of Kunarac and DP 6. The Trial Chamber is satisfied that Kunarac established these living conditions for the victims in concert with DP 6. Both men 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.

743. There is no evidence upon which it would be appropriate to convict the accused for outrages upon personal dignity that is not already covered by other convictions.

744. In summary, the Trial Chamber finds that:

(i) The allegations made in paragraph 10.1 of Indictment IT-96-23 have partly been proved beyond reasonable doubt. On 2 August, Dragoljub Kunarac personally raped FWS-191 and aided and abetted the rape of FWS-186 by DP 6.

(ii) The allegations made in paragraph 10.2 of Indictment IT-96-23 have been proved beyond reasonable doubt. For a period of about 6 months, FWS-186 and FWS-191 were kept in the house in Trnova-e. For a period of about 2 months, Dragoljub Kunarac sporadically visited the house and raped FWS-191 on those occasions.

(iii) The allegations made in paragraph 10.3 of Indictment IT-96-23 have been proved beyond reasonable doubt. While they were kept in the house in Trnovace, FWS-191 and FWS-186 were treated as the property of Dragoljub Kunarac and DP 6.

745. The Trial Chamber consequently finds the accused Dragoljub Kunarac GUILTY of rape under Counts 19 and 20, GUILTY of enslavement under Count 18 and NOT GUILTY of outrages upon personal dignity under Count 21.

2. Radomir Kovac (Indictment IT-96-23)

746. Counts 22 to 25 of Indictment IT-96-23 charge the accused Radomir Kovac with the rape, enslavement and outrages upon personal dignity of FWS-75, FWS-87, A.B. and A.S., as described in paragraphs 11.1 to 11.6 of the Indictment.

(a) The arrival of the girls at Radomir Kovac's apartment

747. Paragraph 11.1 of the Indictment alleges that, on or about 30 October 1992, FWS-75, FWS-87, A.S. and A.B. were taken from "Karaman's house" in Miljevina to Foca by Dragan Zelenovic, DP 1 and DP 6, and that they were subsequently handed over to the accused Radomir Kovac. Paragraph 11.2 alleges that Radomir Kovac detained FWS-75 and A.B. - between about 31 October 1992 until December 1992 - and FWS-87 and A.S. - from the same date until February 1993 - in a apartment over which he had control. The Indictment alleges that, while being so kept, the girls had to perform household chores, that they were frequently sexually assaulted and that they were beaten, threatened, psychologically oppressed and kept in constant fear.

748. The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that, on or about 30 October 1992, FWS-75, FWS-87, A.S. and A.B. were taken from "Karaman's house" and brought by Dragan Zelenovic, DP 6 and DP 1 to the Lepa Brena building block in Foca. There, they were handed over to the accused Radomir Kovac. Another man named Jagos Kostic lived in Radomir Kovac's apartment.

749. The Trial Chamber is also satisfied that, while kept in Radomir Kovac's apartment, these girls were constantly raped, humiliated and degraded. They were sometimes beaten, slapped or threatened by one of the occupants of the apartment. The accused Kovac once slapped FWS-75 because she refused to sleep with a soldier whom he had brought in. Twelve-year old A.B. was sent in her place. Kovac also beat FWS-75 up on other occasions.

750. The Trial Chamber is satisfied that the girls could not and did not leave the apartment without one of the men accompanying them. When the men were away, they

would be locked inside the apartment with no way to get out. Only when the men were there would the door of the apartment be left open. Notwithstanding the fact that the door may have been open while the men were there, the Trial Chamber is satisfied that the girls were also psychologically unable to leave, as they would have had nowhere to go had they attempted to flee. They were also aware of the risks involved if they were re-captured.

751. While they were detained in Radomir Kovac's apartment, the girls were required to take care of the household chores, the cooking and the cleaning.

752. The Trial Chamber is satisfied that the girls' diet and hygiene was completely neglected by Radomir Kovac. When the men were in the apartment, the girls would get their left-over food. But Kovac sometimes left the girls behind without making sure that they would have sufficient food while he was away. On some occasions, witness DK, a cousin of the accused Radomir Kovac who lived on the floor below the accused's apartment, passed some food to the girls through the window. Considering that people were organising parties where food and drinks were served, that cafés and shops were open, that supply would be available from Montenegro, and that Kovac received food from the army, the Trial Chamber does not accept that the hunger of the girls while detained in Kovac's apartment was due to general shortage of food in Foca.

(b) FWS-75 and A.B.

753. Paragraph 11.3 of the Indictment alleges that FWS-75 and A.B. were detained in Radomir Kovac's apartment from about 31 October 1992 until about 20 November 1992, during which time they had to do household chores and sexually please soldiers, including Radomir Kovac. The Indictment alleges that Radomir Kovac and Jagos Kostić frequently raped them. In addition, on an unknown date during this period, Kovac is alleged to have brought a soldier named Slavo Ivanović to the apartment and ordered FWS-75 to have sexual intercourse with him; when she refused, Kovac beat her. Paragraph 11.3 further alleges that, around 20 November 1992, Kovac took FWS-75 and A.B. from his apartment to a house near Hotel Zelengora where he handed them to other Serb soldiers. The two girls were kept in this house, which Kovac visited for about two weeks. Thereafter, they were taken to an apartment in Pod Masala, where they remained for about fifteen days before being eventually taken back to Kovac's apartment on or about 25 December 1992. The Indictment states that, during the whole period, the two girls were raped. Finally, paragraph

11.3 alleges that, on or about 25 December, when FWS-75 and A.B. were brought back to Kovac's apartment, Kovac sold A.B. to an unidentified soldier for 200 Deutschmark and that, on about 26 December, FWS-75 was handed over to DP 1.

754. The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that FWS-75 and A.B. stayed for a few days in Radomir Kovac's apartment before being taken away by a Serb soldier named Vojkan Jadzic to another apartment in the vicinity of Hotel Zelengora. The two girls stayed at that apartment for about 15 days, during which they were constantly raped by at least ten or fifteen Serb soldiers. Kovac would come to this apartment from time to time, asking the girls how they were doing and if they had been abused, despite being aware that they were being raped. The two girls were then taken to another apartment near Pod Masala by Serb soldiers, including Vojkan Jadzic. They stayed in that other apartment for about 7-10 days, during which time they continued to be raped.

755. One evening, Vojkan Jadzic took the girls back to Radomir Kovac's apartment where FWS-87 and A.S. were still being kept. The exact date of their being brought back to Kovac's apartment has not been established with precision. On the basis of the evidence, the Trial Chamber finds that FWS-75 and A.B. were taken back sometime between the first and the second week of December 1992. The Trial Chamber notes once again, for the reasons given above, that a discrepancy in the evidence given as to the exact date would not in itself be sufficient to discredit the evidence. The Trial Chamber also notes that as there has been no attempt to provide an alibi for this period, the precise date is of no importance.

756. The day after they had returned, A.B. and FWS-75 were taken from Radomir Kovac's apartment. A.B. was taken by a man called "Dragec", who gave Kovac 200 Deutschmarks in the process, while FWS-75 was handed over to DP 1 and Dragan "Zelja" Zelenovic. The Trial Chamber finds that this sexual exploitation of A.B. and FWS-75, in particular their sale, constitutes a particularly degrading attack on their dignity.

757. The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that, while she was in Radomir Kovac's apartment, FWS-75 was raped by both Kovac and Jagos Kostic. She was once raped together with FWS-87 by Kovac while "Swan Lake" was playing in the background. In addition, she was raped by several other soldiers who would come to Kovac's apartment, including Vojkan Jadzic and the accused Zoran Vukovic. It

should be noted, however, that this latter rape was not charged against the accused Zoran Vukovic, and that the Trial Chamber will therefore not take it into consideration with respect to the accused Zoran Vukovic's conviction and sentencing, but will do so for purposes of identification and as circumstantial evidence for the required *mens rea* necessary to commit the other crimes against humanity with which he is charged.

758. While in Radomir Kovac's apartment, twelve-year old A.B. was raped by, among others, the accused Kovac, Slavo Ivanovic and "Zeljko".

759. The Trial Chamber is satisfied that the allegations made in paragraphs 11.3 of the Indictment have all been proved beyond reasonable doubt. The Trial Chamber finds that FWS-75 and A.B. were detained in Radomir Kovac's apartment for about a week, starting sometime at the end of October or early November 1992. The Trial Chamber finds that the accused Radomir Kovac had sexual intercourse with the two women in the knowledge that they did not consent, and that he substantially assisted other soldiers in raping the two women. He did this by allowing other soldiers to visit his apartment and to rape the women 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 and that the girls did not consent to the sexual intercourse. Finally, the Trial Chamber is satisfied that it has been proven beyond reasonable doubt that, after about a week, Kovac handed the two women over to other soldiers whom he knew would most likely continue to rape and abuse them. Kovac eventually sold A.B. to an unidentified soldier, and handed over FWS-75 to DP 1, in the almost certain knowledge that they would be raped again.

(c) FWS-87 and A.S.

760. Paragraph 11.4 of the Indictment alleges that FWS-87 and A.S. were taken to Radomir Kovac's apartment together with FWS-75 and A.B., on or around 31 October 1992, and that they were kept in this apartment for a period of approximately four months. Paragraph 11.4 of the Indictment alleges that, during the entire period, both girls were raped by Radomir Kovac and Jagos Kosti}.

761. The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that, while in Radomir Kovac's apartment, FWS-87 was raped by both Kovac and Jagos Kosti}. Kovac reserved FWS-87 for himself and raped her almost every night he spent in the apartment. Jagos Kosti} constantly raped A.S., and he took advantage of Kovac's absence

to rape FWS-87 too. He threatened her that if she reported this to Radomir Kovac he would kill her. Kova- knew at all times that the girls did not consent to the sexual intercourse. Jagos Kostić} could rape A.S. because she was held by Kova- in his apartment. Kova- therefore also substantially assisted Jagos Kostić} in raping A.S., by allowing Jagos Kostić} to stay in his apartment and to rape A.S. there. The Trial Chamber notes that it has not been established beyond reasonable doubt that the accused Kova- aided and abetted the rape of FWS-87 by Jagos Kostić. The evidence indicates that the fact that Jagos Kostić} raped FWS-87 was hidden from Kovac. Considering the two men's relationship and Jagos Kostić's threats to FWS-87, it seems very unlikely that Kovac could have envisaged the possibility that Jagos Kostić would rape FWS-87.

762. FWS-87 consistently denied any emotional relationship with the accused Radomir Kovac. The Trial Chamber notes that several Defence witnesses mentioned a letter with a heart drawn on the envelope which was allegedly sent by FWS-87 to Kovac. The Trial Chamber accepts, however, that FWS-87 did not send such a letter, and it notes the fact that, even by their own account, none of the Defence witnesses actually read the content of the letter, but only heard about it from Kovac. The relationship between FWS-87 and Kovac was not one of love as the Defence suggested, but rather one of cruel opportunism on Kovac's part, of constant abuses and domination over a girl who, at the relevant time, was only about 15 years old.

763. Radomir Kovac forced FWS-87 to go to cafés with him, at least once forcing her to wear an insignia of the VRS.

764. The Trial Chamber is also satisfied beyond reasonable doubt that, while in Radomir Kovac's apartment, A.S. was constantly raped by Jagos Kostić}.

765. The Trial Chamber is satisfied that FWS-87 and A.S. were held in Radomir Kovac's apartment for a period of about 4 months. Apart from the exact date of their departure, the allegations in paragraph 11.4 of the Indictment have been proved beyond reasonable doubt.

(d) The naked dancing

766. Paragraph 11.5 of the Indictment alleges that, on an unknown date between about 31 October 1992 and about 7 November 1992, while they were kept in Radomir Kovac's

apartment, FWS-75, FWS-87, A.S. and A.B. were forced to take off their clothes and to dance naked on a table while Kovac watched them.

767. The witnesses have described three instances when they, together or individually, were forced to dance or to stand naked on a table while Radomir Kovac would watch them. Only one of them was expressly charged in the indictment. The Trial Chamber is satisfied that this one instance has been proved beyond reasonable doubt.

768. FWS-87 testified, and the Trial Chamber accepts, that, on one of these occasions, the four girls, FWS-75, A.S., A.B. and herself, were there and that they were made to dance on a table while Radomir Kovac and Jagos Kostic were watching and pointing weapons at them.

769. A.S. testified, and the Trial Chamber accepts, that she, together with A.B. and FWS-87, were once made to strip and dance. Radomir Kovac, Jagos Kostic and possibly a third soldier watched them. Although she did not recall FWS-75 being present, A.S.'s testimony fully supports FWS-87's evidence of these events.

770. FWS-87 mentioned that the four girls, FWS-75, A.S., A.B. and herself were present on that occasion. The Trial Chamber notes that FWS-75 did not seem to recall this event, testifying instead about another incident when she, together with FWS-87 and A.B. were forced to stand naked on a table and then marched naked by Radomir Kovac in the streets of Foca.

771. Although FWS-75 may have been present on the first occasion too, as FWS-87's testimony suggests, the Trial Chamber is not satisfied beyond reasonable doubt that this was the case.

772. The Trial Chamber therefore holds that the events described in paragraph 11.5 of the Indictment have been proved beyond reasonable doubt with respect to FWS-87, A.S. and A.B., but not with respect to FWS-75. The Trial Chamber therefore finds that, sometime between about 31 October 1992 and about 7 November 1992, while in Radomir Kovac's apartment, FWS-87, A.S. and A.B. were forced to strip and dance naked on a table while Kovac watched them from the sofa, pointing weapons at them.

773. The accused Radomir Kovac certainly knew that, having to stand naked on a table, while the accused watched them, was a painful and humiliating experience for the three

women involved, even more so because of their young age. The Trial Chamber is satisfied that Kovac must have been aware of that fact, but he nevertheless ordered them to gratify him by dancing naked for him.

774. The Statute does not require that the perpetrator must intend to humiliate his victim, that is that he perpetrated the act for that very reason. It is sufficient that he knew that his act or omission could have that effect. This was certainly the case here.

(e) The selling of FWS-87 and A.S.

775. Paragraph 11. 6 of the Indictment alleges that, on or about 25 February 1993, FWS-87 and A.S. were sold by Radomir Kovac for 500 Deutschmarks each to two unidentified Montenegrin soldiers.

776. The Trial Chamber first notes that the Defence did not deny that a financial transaction took place between the accused Radomir Kovac and two Montenegrins shortly before the girls were taken away by these two Montenegrins. They submitted that the transaction was of a different sort, and claimed that it was Kovac who actually paid for the girls to be taken away to Montenegro.

777. In view of the treatment reserved by the accused Radomir Kovac for FWS-87 and A.S., which included an almost daily regime of rapes and other abuses, it is not credible to suggest that, after four months of constant intimidation and mistreatment, the accused suddenly decided to shield these two girls from the risks involved for a Muslim girl to live in Foca at the time and so to pay for them to be taken away. The Trial Chamber does not accept the accused's account.

778. The Trial Chamber is aware of one specific discrepancy in the accounts of the witnesses. FWS-87 said that 500 Deutschmarks was paid for each girl, whereas A.S. referred to 500 Deutschmarks for each girl plus a truckload of washing powder. But both agreed that they had been sold to two Montenegrins by Radomir Kovac. The Trial Chamber does not regard this discrepancy as destroying the credibility of the two witnesses.

779. The Trial Chamber finds that, sometime in February 1993, two Montenegrins came to Radomir Kovac's apartment. They went together with the accused to the living room while FWS-87 and A.S. were told to go to the kitchen. The two girls crept out of the kitchen into the corridor from where they listened to the conversation before rushing back to

the kitchen when they heard the men moving. FWS-87 heard that the two girls were being sold for 500 Deutschmarks each, but A.S. did not hear the exact words of the conversation. Not long after the transaction, possibly the next day, the two Montenegrins came back to take the girls away. While they were in the car with the two Montenegrins, these two men laughed at their being sold for such a small amount of money and, as A.S. recounted, also for a truck-load of washing powder.

780. Apart from this minor discrepancy concerning the precise amount for which the girls were sold, the Trial Chamber is satisfied that the events described in paragraph 11.6 of the Indictment have been proved beyond reasonable doubt. Radomir Kovac detained FWS-75 and A.B. for about a week, and FWS-87 and A.S. for about four months in his apartment, by locking them up and by psychologically imprisoning them, and thereby depriving them of their freedom of movement. During that time, he had complete control over their movements, privacy and labour. He made them cook for him, serve him and do the household chores for him. He subjected them to degrading treatments, including beatings and other humiliating treatments.

781. The Trial Chamber finds that Radomir Kova-'s conduct towards the two women was wanton in abusing and humiliating the four women and in exercising his *de facto* power of ownership as it pleased him. Kovac disposed of them in the same manner. For all practical purposes, he possessed them, owned them and had complete control over their fate, and he treated them as his property. The Trial Chamber is also satisfied that Kova-exercised the above powers over the girls intentionally. The Trial Chamber is satisfied that many of the acts caused serious humiliation, of which the accused was aware.

782. For these acts, the Trial Chamber finds the accused Radomir Kova- GUILTY of enslavement under Count 22; GUILTY of rape under Counts 23 and 24; and, finally, GUILTY of outrages upon personal dignity under Count 25.

### 3. Zoran Vukovic (Indictment IT-96-23/1)

783. The Trial Chamber first notes that the Defence of the accused Zoran Vukovi} seemed to suggest that he had not pleaded to the amended Indictment.<sup>1396</sup> Vukovi} had already pleaded to the original Indictment in which he was joined with other defendants not

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<sup>1396</sup> Defence Final Trial Brief, p 272.

currently before the Tribunal. The amended Indictment was no more than an extract from that Indictment, done in order that Vukovic could be tried, at his own request, with Dragoljub Kunarac and Radomir Kovac. The Trial Chamber notes that, during its closing argument, the Defence clearly stated that it did not intend to raise this issue of pleading as an objection to the procedure in relation to the accused Vukovic and his entering of a plea.<sup>1397</sup>

(a) Counts 21 to 24

784. Counts 21 to 24 charge the accused Zoran Vukovic with the rape of FWS-87 and of FWS-75 in Foca High School.

(i) The rape of FWS-87<sup>1398</sup>

785. Paragraph 6.6 of the Indictment charges the accused Zoran Vukovic with having selected FWS-50, FWS-75, FWS-87 and FWS-95 out of a group of detainees at Foca High School, in concert with DP 1 and Dragan Zelenovi}, and with having personally raped FWS-87 while the other women were raped by the other men.

786. Several witnesses have testified with regard to the incident described in paragraph 6.6 of the Indictment. Taking into consideration the reliable testimonies of FWS-87 herself, FWS-75, FWS-50 and FWS-95, the Trial Chamber is satisfied that a group of women, including the afore-mentioned and FWS-88, were called out to be subsequently raped in another classroom during one of their first nights in Foca High School. With respect to the exact date of this incident, the Trial Chamber underlines that the exact time and day during which an incident occurred is immaterial, unless it is an element of the crime.

787. The Trial Chamber is satisfied that FWS-87 was raped in the course of this particular incident. The Trial Chamber, however, is not convinced that this rape was committed by the accused Zoran Vukovic as alleged in paragraph 6.6 of the Indictment. FWS-87 herself testified that she was assigned to Vukovic after being called out, that he ordered her to lie down, took off her clothes and raped her. The Trial Chamber has no doubt with regard to the credibility of the witness, but it has doubts as to the reliability of the identification of the accused Vukovic as the perpetrator of this particular rape.

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<sup>1397</sup> T 6546.

788. In court, FWS-87 identified Zoran Vukovic, but with hesitation. In her testimony, she stated that she did not know Vukovic from before the war, and that she got to know his name from some other women in Foca High School who knew him. Similarly, she had stated in her statement to the Prosecution dated 4-5 May 1998, Ex P62, that she did not know Vukovic personally prior to the war. This contradicts, however, her statement to the Prosecution, dated 19-20 January 1996, Ex D32, when she recounted having known him and his wife by sight. When asked in court about the discrepancies, FWS-87 explained that she might have seen Vukovic prior to the war.

789. These doubts as to the identification of Zoran Vukovic by FWS-87 are considerably aggravated when the testimonies of other witnesses are taken into account. In particular, the testimony of FWS-75 contradicts the assumption that FWS-87 was indeed raped by the accused Vukovic. FWS-75 recounted having seen Vukovic for the first time at Buk Bijela when he led away her uncle, who apparently had just been beaten up. FWS-75 further testified that she saw Vukovic again in Radomir Kovac's apartment, where Zoran Vukovic admitted having killed her uncle and where he subsequently raped her. Although this rape has not been charged in the Indictment, and will therefore not be the subject of a conviction, the Trial Chamber accepts the testimony of FWS-75 that this rape was committed by Vukovic as being credible and reliable. The Trial Chamber has taken this incident into account as far as it supports the identification of Vukovic by FWS-75. FWS-75 further described Vukovic as "short, a small man, blond, [...] fair-haired". The Trial Chamber attaches much weight to the identification of Vukovic by FWS-75 because of the traumatic context during which the witness was confronted with Vukovic in Buk Bijela as well as in Radomir Kovac's apartment. The Trial Chamber is therefore satisfied that the identification of Vukovic by FWS-75 was a reliable one.

790. FWS-75 testified that FWS-87 was raped at Foca High School that night by a man whom FWS-75 did not know. The Trial Chamber notes that FWS-75 did know Zoran Vukovic at that time as being the soldier who, very few days before the rape in Foca High School occurred, had led her uncle away at Buk Bijela, but she did not mention him with respect to the incident at the school. At a later time, she got to know Zoran Vukovic as

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<sup>1398</sup> Indictment IT-96-23/1, par 6.6.

being the murderer of her uncle, since he expressly admitted the killing to her in Radomir Kovac's apartment.

791. In the context of all the evidence of the other witnesses who would have recognised him had he been there, FWS-87's evidence of the accused Zoran Vukovic as raping her on that occasion is not reliable. The Trial Chamber finds that these uncertainties as to the proper identification of Vukovic caused by the inconsistency of FWS-87's testimony and, in particular, the contradicting testimony of FWS-75, are not removed by the testimony of other witnesses who were present when the rape of FWS-87 occurred. FWS-50 was not raped in the same room as FWS-87, nor did she testify about any names of the men who called the women out and raped them. FWS-95 testified that she herself was raped by DP 1, but she did not mention Vukovic. FWS-51 testified that she probably had seen Vukovic at Foca High School, but she could not identify him as perpetrator of any specific crime committed there.

792. The Trial Chamber finds that there remains reasonable doubt as to the identification of Zoran Vukovic as the perpetrator of the rape of FWS-87 in Foca High School as charged in paragraph 6.6. The Trial Chamber further finds that it has not been proved beyond reasonable doubt that Zoran Vukovic participated in the specific incident charged under paragraph 6.6 at all or that he was present at Foca High School while it occurred.

(ii) The rape of FWS-75 and FWS-87<sup>1399</sup>

793. Paragraph 6.7 of the Indictment alleges the rape of FWS-75 and FWS-87 committed by Zoran Vukovic and Dragan Zelenovic in a classroom of Foca High School between or about 8 July and about 13 July 1992.

794. The Trial Chamber finds that there was no evidence adduced during trial that would establish the incident. Neither of the alleged victims could remember the particular event.

795. FWS-87 recounted having seen Zoran Vukovic only twice. The first time, she recounted having seen him during the incident charged under paragraph 6.6 of the Indictment where Vukovic, according to her, had raped her. The second time, she recounted having seen Vukovic at Radomir Kovac's apartment. FWS-87 testified that she

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<sup>1399</sup> Indictment IT-96-23/1, par 6.7.

did not remember Vukovic being involved in any other rapes apart from the one charged under paragraph 6.6 of the Indictment. The testimony of FWS-87 therefore does not establish the alleged rape of her by Vukovic as charged in paragraph 6.7.

796. Moreover, FWS-75 did not mention Zoran Vukovic in connection with the incidents at Foca High School at all. According to her testimony, the only incident during which she recounted being raped by the accused Vukovic appeared to have been behind the locked kitchen door in Radomir Kovac's apartment, where FWS-75 said that she had to sexually arouse Vukovic and that she subsequently was raped orally by him. This rape, however, is not charged in the Indictment. Since this particular rape of FWS-75 in Radomir Kovac's kitchen was not charged by the Prosecution, it cannot be the subject of a conviction by the Trial Chamber. In conclusion, the testimony of FWS-75 does not provide any evidence upon which the Trial Chamber could find that the incident charged under paragraph 6.7 of the Indictment took place.

797. The Trial Chamber notes that the Prosecutor conceded that the incident described in paragraph 6.7 of the Indictment had not been proved beyond reasonable doubt.

798. The Trial Chamber concludes that none of the acts alleged to have been committed by the accused Zoran Vukovic in paragraphs 6.6 and 6.7 have been proved beyond reasonable doubt. It therefore finds the accused Zoran Vukovic NOT GUILTY under Counts 21, 22, 23 and 24.

(b) Counts 33 to 36

799. Counts 33 to 36 charge Zoran Vukovic with several incidents of rape of FWS-48 (as described in paragraphs 7.9, 7.10, 7.15, 7.18 and 7.21 of the Indictment),<sup>1400</sup> of FWS-50 (as described in paragraph 7.11) and of FWS-87 (as described in paragraph 7.13).

(i) The defence of the accused

800. The Defence suggested that an injury which Zoran Vukovic allegedly sustained on 15 June 1992 led to temporary impotence which made it impossible for him to have sexual intercourse.

801. The Defence added in its Final Trial Brief that such an accident could have led to a temporary impotence of up to three weeks.<sup>1401</sup> Even if such a proposition were to be accepted by the Trial Chamber, this would mean that the accused Zoran Vukovic was temporarily impotent from 15 June 1992 onwards until 5 or 6 July 1992 at the latest. The Trial Chamber notes that the first allegation of rape raised against the accused mentions the 6 or 7 July 1992 as the date of the event, a time at which, even if the proposition of the Defence were to be accepted, the accused would have recovered from his injury.

802. However, the Trial Chamber finds 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. Witness DV said that Zoran Vukovic injured his testicle in June 1992, and that she had to bandage him as a result. The same witness added that Vukovic might have exaggerated the gravity of the injury in order not to be sent back to the frontline. The witness referred to a logbook which contained the list of medical injuries sustained by soldiers of the unit of which Vukovic was a member. It said that Vukovic was injured on 15 June 1992 in Okoliste, but it did not refer to the nature or the gravity of the injury, or to the part of the body which was injured. Witness DP, who was a confidant of Vukovic and had known him for more than 20 years, said that Vukovic was injured on 15 or 16 June 1992 and that Vukovic showed him his injury. The witness said that he took Vukovic to the hospital for treatment on 4 or 5 occasions, but he said nothing about the nature, the gravity or the consequences of the injury.

803. Professor Dusan Dunjic testified that a temporary impotence could result as a consequence of an accident of the type described by the accused and that such an injury would make it very painful for a man to have sexual intercourse. He was unable, however, to conclude that such impotence actually occurred. He also noted a cyst on Zoran Vukovic's scrotum and the increased sensitivity of his right testicle. Professor Dunjic concluded that the trauma described by Vukovic during his examination of the accused could not be ruled out as the cause of the cyst.

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<sup>1400</sup> The Trial Chamber held in the Decision on Motion for Acquittal, 3 July, 2000, that the accused Zoran Vukovic had no case to answer in relation to the allegations made by Witness FWS-48 in support of Counts 33 to 36.

<sup>1401</sup> Defence Final Trial Brief, p 284.

804. Doctor Ivan de Grave testified that a cyst could be caused by a traumatic accident. He said that temporary impotence could occur as a result, but that it would not last longer than 3 days. He noted that Zoran Vukovic's cyst was a fairly common feature found in about a third of the male population. He added that he did not find the signs or marks on Vukovic's body which he should have found if the kind of accident described by the accused had indeed happened. He said that the case history and the conclusions he drew from the examination of Vukovic did not match, and he concluded that nothing had been shown to support Vukovic's description of the accident and its consequences.

805. The Trial Chamber does not accept that there is any 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. The Trial Chamber rejects any suggestion that Vukovic was unable to have sexual intercourse at the relevant time.

(ii) Rape of FWS-48, FWS-87 and Z.G.

806. Paragraph 7.9 of the Indictment alleges that, on or around 13 July 1992, Dragoljub Kunarac took three women including FWS-48 to the Hotel Zelengora. At Hotel Zelengora, the Indictment alleges, FWS-48 was raped by both Dragoljub Kunarac and the accused Zoran Vukovic. Paragraph 7.10 alleges that, on or around 14 July 1992, DP 1 took FWS-87, Z.G. and FWS-48 to the Brena apartment block where Zoran Vukovic and another soldier were waiting. According to paragraph 7.10 of the Indictment, Zoran Vukovic took FWS-48 and raped her while the unidentified soldier raped FWS-87 and DP 1 raped Z.G.

807. The Trial Chamber held, in its Decision on Motion for Acquittal, that the accused Zoran Vukovic had no case to answer in relation to the allegations made by witness FWS-48 in support of Counts 33 to 36.<sup>1402</sup> This referred to the allegations made in paragraphs 7.9, 7.10, 7.15, 7.18 and 7.21 of the Indictment in respect of FWS-48.

808. That decision therefore also covers the allegations contained in paragraphs 7.9 and 7.10 of the Indictment with respect to FWS-48.

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<sup>1402</sup> Decision on Motion for Acquittal, 3 July 2000.

809. In respect of paragraph 7.10 of the Indictment, the Trial Chamber notes that FWS-87, who is mentioned as one of the victims, did not recall these events. The third woman mentioned in paragraph 7.10, namely, Z.G., did not testify at all.

810. The Trial Chamber therefore finds that it has not been proved beyond reasonable doubt that the accused Zoran Vukovic committed the acts described in paragraph 7.10 of the Indictment also with respect to FWS-87 and Z.G.

(iii) Rape of FWS-50

811. Paragraph 7.11 of the Indictment alleges that, on or around 14 July 1992, Zoran Vukovic came to Partizan Sports Hall to remove FWS-50 and FWS-87, and that he took them to an apartment near Partizan. There, it is alleged, Zoran Vukovic raped FWS-50 while an unidentified soldier raped FWS-87.

812. FWS-50 testified, and the Trial Chamber accepts, that a day or two after she arrived at Partizan Sports Hall she was taken out of Partizan Sports Hall together with FWS-87 by the accused Zoran Vukovic and another soldier, and that they were taken to an abandoned apartment. Her mother came to look for her in the toilet of Partizan where she was hiding. FWS-50 testified that the accused Vukovic took her to one room of the apartment and raped her.

813. The Trial Chamber notes that FWS-87 said that she was taken out of Partizan on many occasions but she did not say that she was taken out of Partizan by Zoran Vukovic.

814. FWS-50 gave evidence that she saw the accused Zoran Vukovic at Buk Bijela where he had raped her for the first time. This event in Buk Bijela was not charged in the Indictment, and the Trial Chamber will therefore not take it into account for convicting and sentencing, but it does take that event into account for matters of identification. FWS-50 also stated that, when he raped her, Vukovic told her that she was lucky in that she was the same age as his daughter, otherwise he would have done much worse things to her. The Trial Chamber notes that Vukovic's daughter was approximately of the same age as FWS-50 at the relevant time.<sup>1403</sup>

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<sup>1403</sup> Witness DV, T 5853-5856; Witness DQ, T 5994 and 6006; Witness DR, T 6027.

815. The Trial Chamber notes that this incident was the second time that Zoran Vukovic raped FWS-50 within a fortnight. He knew of her situation as a Muslim refugee since he had seen her at Buk Bijela, and he knew that she was about 16 years old at the time, as he told her that she was about the same age as his daughter. The rape led to serious mental and physical pain for the victim.

816. In the Final Trial Brief of the Defence, the accused Zoran Vukovic argued that, even if it were proved that he had raped a woman, the accused would have done so out of a sexual urge, not out of hatred. However, all that matters in this context is his awareness of an attack against the Muslim civilian population of which his victim was a member and, for the purpose of torture, that he intended to discriminate between the group of which he is a member and the group of his victim. There is no requirement under international customary law that the conduct must be *solely* perpetrated for one of the prohibited purposes of torture, such as discrimination. The prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose. The Trial Chamber has no doubt that it was at least a predominant purpose, as the accused obviously intended to discriminate against the group of which his victim was a member, ie the Muslims, and against his victim in particular.

817. The Trial Chamber is therefore satisfied on the basis of the testimony of FWS-50 that the allegations contained in paragraph 7.11 of the Indictment have been proved beyond reasonable doubt as far as FWS-50 is concerned. The Trial Chamber finds that, sometime in mid-July 1992, the accused Zoran Vukovic and another soldier came to Partizan Sports Hall looking for FWS-50. She was taken out of Partizan Sports Hall to an apartment and taken to a room by Vukovic where he forced her to have sexual intercourse with full knowledge that she did not consent. The Trial Chamber is not satisfied, however, that FWS-87 was taken out by Vukovic and was also raped by an unknown soldiers during this same incident.

(iv) Rape of FWS-87

818. Paragraph 7.13 of the Indictment alleges that, in July 1992, FWS-87 was frequently taken out of Partizan and that, on one of these occasions, she was gang-raped by 4 men including the accused Zoran Vukovic.

819. The Trial Chamber notes that the Prosecution conceded that the allegations made in paragraph 7.13 of the Indictment had not been proved beyond reasonable doubt.<sup>1404</sup> The Trial Chamber concurs in this conclusion. Although FWS-87 could recall being taken out of Partizan Sports Hall and being raped on many occasions, she did not recall being taken out of Partizan Sports Hall by Zoran Vukovic or being raped by him other than on the occasion referred to in paragraph 6.6 of the Indictment.

820. The Trial Chamber finds that the allegations made in paragraph 7.13 have not been proved beyond reasonable doubt.

(v) Rapes of FWS-48

821. Paragraphs 7.15, 7.18 and 7.21 allege that Zoran Vukovic raped or aided and abetted in raping FWS-48. As stated above, the Trial Chamber held in the earlier Decision on Motion for Acquittal that the accused Zoran Vukovic had no case to answer in relation to the allegations made by witness FWS-48 in support of Counts 33 to 36.<sup>1405</sup>

822. On the evidence adduced, the Trial Chamber therefore finds the accused Zoran Vukovic GUILTY of torture under Counts 33 and 35 and GUILTY of rape under Counts 34 and 36.

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<sup>1404</sup> Prosecutor's Final Trial Brief, par 198.

<sup>1405</sup> Decision on Motion for Acquittal, 3 July 2000.

## VI. SENTENCING

823. In determining the sentence to be imposed with respect to each accused, the Trial Chamber must consider the relevant provisions of the Statute and Rules,<sup>1406</sup> the general sentencing practice in the former Yugoslavia and the sentencing practice of the Tribunal.

824. The Prosecutor made sentencing submissions in her briefs<sup>1407</sup> and during closing arguments.<sup>1408</sup> The Defence also made sentencing submissions in their respective briefs<sup>1409</sup> and during closing arguments.<sup>1410</sup> Pursuant to Rule 94*bis* the Defence furthermore jointly submitted a written expert opinion of Prof Dr Stanko Bejatovic;<sup>1411</sup> he testified on 11 September 2000.<sup>1412</sup>

### A. Sentencing provisions of the Statute and the Rules

825. Article 23(1) of the Statute provides that “[t]he Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.” Article 24(1) of the Statute provides 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 courts of the former Yugoslavia.

Article 24(2) states that the Trial Chamber in imposing the sentences “should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”

826. Rule 101, dealing with penalties, provides in full:

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<sup>1406</sup> IT/32/Rev 19 of 12 Jan 2001. The Trial Chamber is satisfied that the rights of the three accused are not prejudiced by the application of the latest amended version of the Rules of Procedure and Evidence, in accordance with Rule 6.

<sup>1407</sup> Prosecutor’s Pre-Trial Brief I, pars 226-240; Prosecutor’s Final Trial Brief, pars 937-993.

<sup>1408</sup> T 6329-6343.

<sup>1409</sup> Defence Pre-Trial Brief I, pp 31-32 (in relation to Dragoljub Kunarac and Radomir Kova-); Defence Final Trial Brief, pars K.h.1-K.h.8 (in relation to Dragoljub Kunarac); pars L.h.1-L.h.14 (in relation to Radomir Kova-); par M.g.1 (in relation to Zoran Vukovi); and pars P.1-P.11 (joint submissions).

<sup>1410</sup> T 6447-6457 (in relation to Dragoljub Kunarac); T6527-6532 (in relation to Radomir Kova-); and T 6553-6554 (in relation to Zoran Vukovi).

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life. (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute. (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

827. Read together, Article 24 and Rule 101 allow for factors other than those expressly mentioned to be considered when determining the proper sentences to be imposed.

828. Rule 87(C) deals with the manner in which sentences should be imposed:

If the Trial Chamber finds the accused guilty on one or more 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.

#### **B. General sentencing practice in the former Yugoslavia**

829. The wording of Article 24(1) of the Statute and Rule 101(B)(iii) - in particular the phrases "have recourse to" and "take into account" - suggests that the Trial Chamber is not *bound* to follow the sentencing practice of the former Yugoslavia. In this regard, the Appeals Chamber has stated:

The jurisprudence of this Tribunal has consistently held that, while the law and practice of the former Yugoslavia shall be taken into account by the Trial Chambers for the purposes of sentencing, 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.<sup>1413</sup>

Clearly, recourse must be had to the sentencing practice of the former Yugoslavia as an aid in determining the sentence to be imposed.<sup>1414</sup> Although the Trial Chamber is not bound to

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<sup>1411</sup> Defence Submission of Expert Witness Statement under Rule 94*bis*(A), 4 July 2000 (RP D5255-D5239) on "The criminal act rape in Yugoslav legislature and legal practice". (T 4733-4734; T4619-4624; T 4692-4695); admitted into evidence: 11 Sept 2000 (T 5380-5382, as Ex D147)).

<sup>1412</sup> T 5364-5409.

<sup>1413</sup> *Prosecutor v Tadić*, Case IT-94-1-A & IT-94-1-Abis, Judgement in Sentencing Appeals, 26 Jan 2000, par 21; *Prosecutor v Delalić and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 813.

<sup>1414</sup> *Prosecutor v Delalić and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 820 ("[...] the Tribunal is not bound by the practice of the courts of the former Yugoslavia, but it may simply turn to them for guidance.")

apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice. The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia.

830. The relevant provisions of the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY Criminal Code")<sup>1415</sup> are the following. Article 41 ("General principles in fixing punishment") of the SFRY Criminal Code sets out the various factors to be taken into account in the determination of sentences. In particular, Article 41(1) provides:

The court shall fix the punishment for a criminal act within the limits provided by statute for such an act, taking into account all the circumstances bearing on the magnitude of punishment (extenuating and aggravating circumstances), and, in particular, the degree of criminal responsibility, the motives from which the act was committed, the degree of danger or injury to the protected object, the circumstances in which the act was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal act, as well as other circumstances relating to the personality of the offender.

This Article is largely similar to the sentencing provisions of Article 24(2) of the Statute and Rule 101(B) of the Rules of the International Tribunal.

831. Articles 38, 48 and 142 of the SFRY Criminal Code must also be considered. Article 38 ("Imprisonment") reads in part:

(1) The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years. (2) The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty. (3) For criminal acts committed with intent for which the punishment of fifteen years imprisonment may be imposed under statute, and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences, a punishment of imprisonment for a term of 20 years may be imposed when so provided by statute. [...] (6) A convicted person who has served half of his term of imprisonment, and exceptionally a convicted person who has served a third of his term, may be exempted from serving the rest of his term on the condition that he does not commit a new criminal act by the end of the period encompassed by his sentence (parole).

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<sup>1415</sup> Adopted on 28 Sept 1976, entered into force on 1 July 1977 (unofficial translation).

Capital punishment was abolished by constitutional amendment in 1977 in some of the republics of the SFRY other than Bosnia and Herzegovina, the new maximum sentence being 20 years imprisonment<sup>1416</sup> for the most serious offences.<sup>1417</sup>

832. Article 48 ("Combination of criminal acts") of the SFRY Criminal Code deals with the question of punishment of offenders found guilty of several offences; it provides:

(1) If an offender by one deed or several deeds has committed several criminal acts, and if he is tried for all of the acts at the same time (none of which has yet been adjudicated), the court shall first assess the punishment for each of the acts, and then proceed with the determination of the integrated punishment (compounded sentence) for all the acts taken together. (2) The court shall impose the integrated punishment by the following rules: (1) if capital punishment has been inflicted by the court for one of the combined criminal acts, it shall pronounce that punishment only; (2) if the court has decided upon a punishment of 20 years' imprisonment for one of the combined criminal acts, it shall impose that punishment only; (3) if the court has decided upon punishments of imprisonment for the combined criminal acts, the integrated punishment shall consist of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments, and may not exceed a period of 15 years' imprisonment; (4) if for the combined criminal acts several punishments of imprisonment have been decided upon which taken together do not exceed three years, the integrated punishment may not exceed a period of eight years of imprisonment.

833. Chapter Sixteen of the SFRY Criminal Code is entitled "Criminal Acts Against Humanity and International Law". Article 142(1) ("War crimes against the civilian population") of the SFRY Criminal Code falls within the said Chapter, and it provides as follows:

Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture; inhuman treatment [...], immense suffering or violation of bodily integrity or health [...]; forcible prostitution or rape; application of measures of intimidation and terror, [...] other illegal arrests and detention [...]; forcible labour [...] or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

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<sup>1416</sup> Official Gazette of the FRY, No 37, 16 July 1993, p 817.

<sup>1417</sup> *Prosecutor v Delali} and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 1206. From Nov 1998 the law in Bosnia and Herzegovina may prescribe the death penalty only in exceptional circumstances: Art 34 of the Criminal Code of the Federation of Bosnia and Herzegovina, which came into force on 28 Nov 1998, reads as follows: "[...] (2) On an exceptional basis, for the more severe forms of criminal offences punished with long term imprisonment which were committed during the state of war or of imminent war danger, the law may exceptionally prescribe capital punishment. (3) In the case defined in paragraph 2 of this Article, the capital punishment may be pronounced and executed only during the state of war or imminent war danger." (Criminal Code of the Federation of Bosnia and Herzegovina published by "Official Gazette of Federation of Bosnia and Herzegovina", No 43-98, Nov 20, 1998). That Criminal Code also now provides for the imposition of "long term imprisonment" ranging from 20 to 40 years for the "the gravest forms of criminal offences [...] committed with intention". (Art 38).

As has been held by the Trial Chamber in the *Tadić* case, this Article gives effect to the provisions of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and its Protocols, which is incorporated into the jurisdiction of the International Tribunal by Article 2 of the Statute;<sup>1418</sup> certain of the provisions of the Geneva Conventions are also incorporated through Article 3 of the Statute.<sup>1419</sup> There appears to be no provision of the SFRY Criminal Code which gives specific effect to Article 5 of the Statute. However, genocide is itself a specific category of crimes against humanity, and it is dealt with in Article 141 of the SFRY Criminal Code.<sup>1420</sup> Article 141 also prescribes imprisonment for not less than five years or the death penalty.

834. Article 33 of the SFRY Criminal Code provides for three reasons for the imposition of sentences, namely,

[...] (1) preventing the offender from committing criminal acts and his rehabilitation; (2) deterrent effect upon others not to commit criminal acts; (3) strengthening the moral fibre of a socialist self-managing society and influence on the development of the citizens' social responsibility and discipline.

835. Prof Dr Bejatovic intimated that there have been no cases relating to Article 142 of the SFRY Criminal Code in the former Yugoslavia.<sup>1421</sup> The Trial Chamber has already, during the hearings, refused to consider a case because it had been tried by a post-1992 Bosnia and Herzegovinian court, and not a court of the former Yugoslavia, and was thus irrelevant.<sup>1422</sup> Furthermore, Prof Dr Bejatovic's testimony largely centred on rape committed during peacetime and is therefore of little relevance. However, his testimony relating to what was considered to be aggravating circumstances in the former Yugoslavia, unopposed by the Prosecutor,<sup>1423</sup> may be considered, where applicable. The following were considered as aggravating circumstances: the youthful age of victims of sexual crimes,<sup>1424</sup> rapes committed with ethnically based motives,<sup>1425</sup> rapes committed against detainees,<sup>1426</sup>

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<sup>1418</sup> *Prosecutor v Tadić*, Case IT-94-1-T, Sentencing Judgement, 14 July 1997, par 8.

<sup>1419</sup> *Prosecutor v Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 89 (the Appeals Chamber stated that Art 3 of the Statute *inter alia* covers infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by the Geneva Conventions, violations of Art 3 common to the Geneva Conventions and other customary rules on internal conflicts).

<sup>1420</sup> *Ibid.*

<sup>1421</sup> T 5390.

<sup>1422</sup> T 5402-5404.

<sup>1423</sup> Prosecutor's Final Trial Brief, pars 955-956.

<sup>1424</sup> T 5391-5392.

<sup>1425</sup> T 5387.

<sup>1426</sup> T 5391.

rapes committed against physically weak persons who could not defend themselves,<sup>1427</sup> rapes entailing multiple victims<sup>1428</sup> and rapes at gunpoint.<sup>1429</sup>

### C. Sentencing practice of the International Tribunal

#### 1. General sentencing factors

836. The Trial and Appeals Chambers of the International Tribunal generally consider what is variously and often interchangeably referred to, for example, as sentencing “objectives”, “purposes”, “principles”, “functions” or “policy” in the assessment of the term of actual imprisonment for convicted persons.<sup>1430</sup> These are considered in addition to the gravity of the offence and mitigating and aggravating circumstances. What appear to be justifications for imprisoning convicted persons, or theories of punishment, actually are treated as or resemble sentencing factors, in the sense that these considerations are consistently said to affect, usually in an unspecified manner, the length of imprisonment. In the present case, the Prosecutor submits that the Trial Chamber ought to consider the principles of retribution, incapacitation of the dangerous, deterrence, punishment and rehabilitation when determining the sentences to be imposed on each of the accused.<sup>1431</sup> The Trial Chamber will deal only with the principles submitted by the Prosecutor.

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<sup>1427</sup> T 5391.

<sup>1428</sup> T 5404.

<sup>1429</sup> T 5404-5405.

<sup>1430</sup> Eg, *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 185 (deterrence as “purpose” and deterrence and retribution as “factor” used in “overall assessment of sentences”); *Prosecutor v Tadić*, Case IT-94-1-A & IT-94-1-Abis, Judgement in Sentencing Appeal, 26 Jan 2000, par 48 (deterrence as “principle” and “factor” used in the “overall assessment of the sentences”); *Prosecutor v Blaškić*, Case IT-95-14-T, Judgement, 3 Mar 2000, pars 761-763 (under the heading “Purposes and objectives of the sentence”, retribution, protection of society, rehabilitation, deterrence, putting an end to serious violations of international humanitarian law and contribution towards restoration and maintenance of peace in the former Yugoslavia as “parameters” and “objectives” when fixing the length of a sentence); *Prosecutor v Kupreškić and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, pars 848 and 849 (under the respective heading and sub-heading of “Factors to be considered in sentencing” and “General sentencing policy of the International Tribunal”, deterrence, retribution, what appears to be a positive general prevention theory and rehabilitation are referred to as “purposes”); *Prosecutor v Jelisić*, Case IT-95-10-T, Judgement, 14 Dec 1999, par 133 (as an aggravating circumstance the contribution of the International Tribunal to the restoration of peace in the former Yugoslavia); *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, pars 288-291 (under the heading “Sentencing Policy of the Chamber”, deterrence and retribution as “functions”, rehabilitation, public reprobation and stigmatisation used as guidance in determination of sentence); *Prosecutor v Delalić and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, pars 1230-1235 (retribution, deterrence, protection of society, rehabilitation and motives for the commission of offences as “factors” to be taken into consideration in determination of sentence).

<sup>1431</sup> T 6330.

837. By whatever name they go, these considerations are of real and considerable importance. Which of them may legitimately be considered as factors impacting on the assessment of the terms of imprisonment – referred to here as “general sentencing factors” – of the three convicted persons in this case, deserves careful consideration.

838. The jurisprudence of the International Tribunal seems to support deterrence and retribution as the main general sentencing factors.<sup>1432</sup>

839. Generally, deterrence aims at deterring the specific accused from again committing similar crimes in future (special deterrence), and/or at deterring others from committing similar crimes (general deterrence).<sup>1433</sup> In the *Tadic* case, the Appeals Chamber was faced with a ground of appeal alleging that the Trial Chamber had erred in placing excessive weight on deterrence as a factor in the assessment of appropriate sentences for violations of humanitarian law.<sup>1434</sup> The Appeals Chamber, held, without further elaboration, that the “principle of deterrence [...] is a consideration that may legitimately be considered in sentencing”.<sup>1435</sup> It did say, however, that “this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.”<sup>1436</sup> The Appeals Chamber did not indicate whether its remarks concerned special or general deterrence or both.<sup>1437</sup> The Appeals Chamber in the *Aleksovski* case considered a submission by the Prosecutor that a manifestly disproportionate sentence defeats one of the purposes of sentencing for international crimes, namely to deter others from committing similar crimes,<sup>1438</sup> and that the sentence imposed by the Trial Chamber was too lenient.<sup>1439</sup> That Appeals Chamber accepted the “general importance of deterrence as a consideration in sentencing for international crimes”.<sup>1440</sup> It also concurred with the Appeals Chamber in the *Tadić* case that this factor should not be

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<sup>1432</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 185; *Prosecutor v Kupreški and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, par 848; and *Prosecutor v Delalić and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 806.

<sup>1433</sup> *Prosecutor v Delalić and Others*, Case IT-96-21-T, Judgement, 16 Nov. 1998, par 1234; *Prosecutor v Furundžija*, Case 95-17/1-T, Judgement, 10 Dec 1998, par 288.

<sup>1434</sup> *Prosecutor v Tadić*, Case IT-94-1-A & IT-94-1-Abis, Judgement in Sentencing Appeal, 26 Jan 2000, pars 41-50.

<sup>1435</sup> *Ibid*, par 48.

<sup>1436</sup> *Ibid*.

<sup>1437</sup> The Appeals Chamber found that in the circumstances of that case the Trial Chamber did not give undue weight to deterrence as a factor in the determination of the appropriate sentence (*ibid*).

<sup>1438</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 185.

<sup>1439</sup> *Ibid*, par 179.

<sup>1440</sup> *Ibid*, par 185.

accorded undue prominence in the overall assessment of sentences to be imposed by the International Tribunal.<sup>1441</sup> The Appeals Chamber in the *Aleksovski* case appears to have been concerned with general deterrence only. The Appeals Chamber in the *Delali}* case similarly appears to have remarked – endorsing deterrence as an important sentencing factor, although not according it undue prominence - on general deterrence only.<sup>1442</sup>

840. Whether the Appeals Chamber considers special or general deterrence or both to be a main general sentencing factor is therefore not entirely clear. Given that uncertainty, this Trial Chamber considers it appropriate to express its view that special deterrence, as a general sentencing factor, is generally of little significance before this jurisdiction. The main reason is that the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair. As to general deterrence, in line with the view of the Appeals Chamber, it is not to be accorded undue prominence in the assessment of an overall sentence to be imposed. The reason is that a sentence should in principle be imposed on an offender for *his* culpable conduct - it may be unfair to impose a sentence on an offender greater than is appropriate to that conduct solely in the *belief* that it will deter others.

841. As to retribution, the Appeals Chamber in the *Aleksovski* case, immediately after having expressed its view on deterrence as set out above, stated:

An equally important factor is retribution. This is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes. This factor has been widely recognised by Trial Chambers of this International Tribunal as well as Trial Chambers of the International Criminal Tribunal for Rwanda. Accordingly, a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question and show that the international community was not ready to tolerate serious violations of international humanitarian law and human rights.<sup>1443</sup>

What the Appeals Chamber appears to have concluded is that retribution is as important a general sentencing factor as general deterrence. The provisions of the Statute and the Rules support retribution – interpreted by this Chamber as punishment of an offender for his specific criminal conduct - as a main general sentencing factor. Article 24 and Rule 101(B) largely focus on sentencing factors relating to the individual accused and his criminal

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<sup>1441</sup> *Ibid.*

<sup>1442</sup> *Prosecutor v Delali} and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 803.

<sup>1443</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 185.

conduct, including the gravity of the offence. In the *Aleksovski* case, the Appeals Chamber explicitly endorsed the statement of the Trial Chamber in the *Delalić* case, that “[the] most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence.”<sup>1444</sup> It also endorsed the following statement of the Trial Chamber in the *Kupreškić* case:

The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.<sup>1445</sup>

These provisions essentially require an enquiry into the conduct of the accused in order to determine the just punishment for his crime.

842. With respect to Security Council resolution 827, the Trial Chamber is of the view that it is inappropriate to have recourse to that resolution for guidance on what the general sentencing factors of the International Tribunal should be, whether they be deterrence, retribution or another factor.<sup>1446</sup> The relevant part of that resolution reads:

[...] Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of “ethnic cleansing”, including for the acquisition and the holding of territory, Determining that this situation continues to constitute a threat to international peace and security, Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace, Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed [...].<sup>1447</sup>

It cannot be said that the Security Council intended this passage to serve as a guide on general sentencing factors. The passage should rather be seen against the background of the Security Council’s need to justify the establishment of the International Tribunal and the

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<sup>1444</sup> *Ibid*, par 182 (with reference to *Prosecutor v Delalić and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 1225).

<sup>1445</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 182 (with reference to *Prosecutor v Kupreškić and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, par 852).

<sup>1446</sup> See, eg, *Prosecutor v Blaškić*, Case IT-95-14-T, Judgement, 3 Mar 2000, par 762; *Prosecutor v Tadić*, Case IT-94-1-Tbis-R117, Sentencing Judgement, 11 Nov 1999, par 7.

<sup>1447</sup> S/Res/827 (1993), 25 May 1993.

prosecution of individuals as a measure under Chapter VII - in accordance with Articles 39 and 41 in particular - of the UN Charter.<sup>1448</sup> Even ignoring that context, the passage clearly refers to the deterrence of such crimes during that particular armed conflict, which was still raging at that point. To use the passage to support deterrence as a general sentencing factor at this point, *after the termination of that conflict*, would be inappropriate.

843. With respect to the protection of society, or the incapacitation of the dangerous,<sup>1449</sup> as the Prosecutor refers to it, the Trial Chamber considers that in this jurisdiction it would rarely play a role as a general sentencing factor. Protection from society or incapacitation as a general sentencing factor basically means that a convicted person receives a lengthier term of imprisonment to “remove” him from society because the crime for which he has been convicted is thought to show him to be dangerous to society. A convicted person, under this approach, is preventively detained, so to speak. In many, if not most cases before the International Tribunal, the convicted persons would have no record of previous criminal conduct *relevant to those committed during the armed conflict*. In practically all cases before the International Tribunal, the convicted persons would be first time offenders *in relation to international crimes*. Unless it can be shown that a particular convicted person has the propensity to commit violations of international humanitarian law, or, possibly, crimes relevant to such violations, such as “hate” crimes or discriminatory crimes, it may not be fair and reasonable to use protection of society, or preventive detention, as a general sentencing factor. Violations of international humanitarian law, by their very nature, can be committed only in certain contexts which may not arise again in the society where the convicted person, once released, may eventually settle.

844. The Trial Chamber fully supports rehabilitative programmes, if any, in which the accused may participate while serving their sentences.<sup>1450</sup> But that is an entirely different

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<sup>1448</sup> Art 39 of the UN Charter reads as follows: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Art 41 of the UN Charter, the legal basis for the establishment of the International Tribunal, reads as follows: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions [...]” Both these articles are part of Chapter VII (“Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”) of the UN Charter.

<sup>1449</sup> See, eg, *Prosecutor v Delalić and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 1232; *Prosecutor v Blaškić*, Case IT-95-14-T, Judgement, 3 Mar 2000, par 761.

<sup>1450</sup> *Prosecutor v Furundžija*, Case IT-95-17/1-T, 10 Dec 1998, par 291. On rehabilitation, see, in general, *Prosecutor v Blaškić*, Case IT-95-14-T, Judgement, 3 Mar 2000, par 761; *Prosecutor v Kupreškić and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, par 849; *Prosecutor v Furundžija*, Case IT-95-17/1-

matter to saying that rehabilitation remains a significant sentencing objective. The scope of such national rehabilitative programmes, if any, depends on the states in which convicted persons will serve their sentences, not on the International Tribunal.<sup>1451</sup> Experience the world over has shown that it is a controversial proposition that imprisonment alone – which is the only penalty that a Trial Chamber may impose – can have a rehabilitative effect on a convicted person. The Trial Chamber is therefore not convinced that rehabilitation is a significant relevant sentencing objective in this jurisdiction.<sup>1452</sup>

## 2. The consideration of particular submissions made by the Prosecutor

845. The Trial Chamber must consider certain submissions made by the Prosecutor.

### (a) Burden of proof with respect to mitigating and aggravating factors

846. During the Pre-trial Conference on 2 March 2000, the Prosecutor was given fair warning by the Trial Chamber that it was

[...] a fundamental rule [...] of sentencing that matters of aggravation must be established beyond reasonable doubt. There is no other way in which [such matters] could be taken into account.<sup>1453</sup>

The Prosecutor intimated that national jurisdictions differ on the burden of proof with respect to aggravating factors.<sup>1454</sup> In her Final Trial Brief, the Prosecutor stated that the Statutes, Rules and jurisprudence on sentencing of the ICTY and ICTR do not discuss the burden of proof for aggravating or mitigating circumstances:<sup>1455</sup>

Some national jurisdictions require the Prosecutor to prove aggravating circumstances beyond a reasonable doubt and the defendant to prove any mitigating factors on the balance of probabilities.<sup>1456</sup>

It is not clear whether the Prosecutor, by these statements, submitted that these burdens should apply before the International Tribunal.

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T, 10 Dec 1998, par 291; *Prosecutor v Delali} and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 1233.

<sup>1451</sup> See Art 27 of the Statute and Rules 103 and 104.

<sup>1452</sup> *Prosecutor v Delali} and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 806.

<sup>1453</sup> T 273-274.

<sup>1454</sup> T 274.

<sup>1455</sup> Prosecutor's Final Trial Brief, par 979.

<sup>1456</sup> *Ibid.*

847. The Trial Chamber underlines its view that fairness requires the Prosecutor to prove aggravating circumstances beyond a reasonable doubt,<sup>1457</sup> and that the Defence needs to prove mitigating circumstances only on the balance of probabilities.

(b) Consideration of conduct not described in the indictment

848. Related to the matter of the burden of proof for mitigating and aggravating circumstances are the following submissions made by the Prosecutor in her Final Trial Brief. The Prosecutor contends that “any evidence” presented to the Trial Chamber of the accused’s conduct can be used for sentencing purposes.<sup>1458</sup> The Trial Chamber should consider “all acts and omissions that were part of the same course of conduct or common scheme or plan as the offence of conviction to be relevant for purposes of sentencing.”<sup>1459</sup> Thus, even conduct not described in the indictment was a relevant sentencing factor.<sup>1460</sup> It was submitted that

Unlike cases in domestic jurisdictions, the multiplicity of humanitarian law violations, committed during an armed conflict as part of a common criminal scheme, often cannot be succinctly captured in an Indictment.<sup>1461</sup>

Accordingly, the Prosecutor submitted that, in order to expedite the proceedings, she decided not to amend the Indictment in mid-trial, “despite relevant and credible evidence which arose during trial” which shows beyond a reasonable doubt that Zoran Vuković committed additional rapes against FWS-50 and FWS-75.<sup>1462</sup> The Prosecutor asserts that this “evidence is credible, relevant and illustrates Vuković’s hostile behaviour against Muslim girls and indicates his violence and criminal energy against defenceless and vulnerable victims”.<sup>1463</sup> This evidence, it was submitted, should therefore be considered in aggravation of Zoran Vuković’s crimes.

849. Before addressing the Prosecutor’s argument with respect to these submissions, it is necessary to recall a related discussion during the Pre-trial Conference on 2 March 2000. At that Conference, a discussion took place as to whether an incident that

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<sup>1457</sup> *Prosecutor v Delalić and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 763 (“The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be [...] taken into account in aggravation of that sentence.”)

<sup>1458</sup> Prosecutor’s Final Trial Brief, par 976.

<sup>1459</sup> *Ibid.*

<sup>1460</sup> *Ibid.*, par 978.

<sup>1461</sup> *Ibid.*, par 980.

<sup>1462</sup> *Ibid.*, par 981.

the Prosecutor at that stage felt she could not prove beyond a reasonable doubt could be considered for the purposes of sentencing.<sup>1464</sup> The specific incident related to the alleged participation of Zoran Vukovi} in the killing of one of the older men at Buk Bijela, an allegation made in the Prosecutor's Pre-Trial Brief.<sup>1465</sup> This incident was not charged in the Indictment. The Trial Chamber ordered the sentence and the accompanying footnote in the Pre-Trial Brief referring to the Prosecutor's view of using that incident as an aggravating circumstance to be deleted.<sup>1466</sup> The Trial Chamber made it clear that an accused "can only be sentenced for what [he has] been convicted for, and if [he has not] been convicted, [he] can't be sentenced for it."<sup>1467</sup> It was in the context of this discussion that the Trial Chamber also made clear its view that only circumstances that have been proved beyond reasonable doubt may be used in aggravation of a sentence.<sup>1468</sup>

850. Turning to the Prosecutor's closing arguments on 20 November 2000 with respect to her submissions on the alleged rapes of FWS-50 and FWS-75, the Prosecutor appears to have withdrawn her submission that the evidence relating to uncharged alleged rapes could be used in aggravation of Zoran Vukovi}'s sentence.<sup>1469</sup> Had she not done so, however, the view of the Trial Chamber is as follows. The Prosecutor does not appear to have argued that *any* uncharged criminal conduct should be considered in aggravation. She appeared rather to have argued that only uncharged acts and omissions that were part of the same course of conduct or common scheme or plan as the offence of conviction would be relevant for sentencing purposes. Even assuming, however, that the Defence was put on notice to put its case with respect to such uncharged acts and omissions, that those uncharged offences were established beyond reasonable doubt and that they can be said to be part of the same plan as the offence of conviction, the Trial Chamber would not allow such an uncharged crime being used as an aggravating circumstance. The reason is this: an offender can only be sentenced for conduct for which he has been convicted.<sup>1470</sup> Mitigating

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<sup>1463</sup> *Ibid.*

<sup>1464</sup> T 271-274.

<sup>1465</sup> T 271.

<sup>1466</sup> T 271-272; and Decision on Prosecutor's Motion to Withdraw One Sentence From the Prosecutor's Pre-trial Brief on Zoran Vukovi} Filed on 21 February 2000, 8 Mar 2000.

<sup>1467</sup> T 273.

<sup>1468</sup> T 274.

<sup>1469</sup> T 6226, 6227-6228, 6264 and 6338.

<sup>1470</sup> *Prosecutor v Delali} and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 763 ("The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence.")

and aggravating circumstances should of course also be considered when imposing sentence. Mitigating circumstances not directly related to the offence, such as co-operation with the Prosecutor, an honest showing of remorse and a guilty plea, may be considered. However, the position with respect to aggravating circumstances is quite different. Only those circumstances directly related to the commission of the offence charged and to the offender himself when he committed the offence, such as the manner in which the offence was committed, may be considered in aggravation. In other words, circumstances not directly related to an offence may not be used in aggravation of an offender's sentence for that offence. To permit otherwise would be to whittle away the purpose and import of an indictment. Either the Prosecutor should charge such conduct as an offence, or, where it is not directly related to another charged offence, she should desist from citing such conduct as an aggravating factor. The Trial Chamber understands that the multiplicity of humanitarian law violations committed during an armed conflict as part of a common criminal scheme often cannot be succinctly captured in an indictment. Considerations of fairness to the accused and judicial economy, however, outweigh the wish to have each and every crime committed during a war brought to light and adjudged in whatever way – that is something which this International Tribunal simply cannot do.

(c) Comparison of “per se gravity” of offences

851. The Trial Chamber considers it wrong to resort to some abstract comparison of the “per se gravity of the crimes”, comparing the severity of crimes against humanity and violations of the laws or customs of war as suggested by the Prosecutor.<sup>1471</sup> The Prosecutor relies on a ruling in the *Tadić* case in support of such an exercise.<sup>1472</sup> In that judgement, the Trial Chamber, solely on the basis that a crime against humanity, all else being equal, is a more serious offence than a war crime, considered that a heavier penalty should be imposed for the former crime.<sup>1473</sup> However, the Appeals Chamber in that case concluded that there is “in law no distinction between the seriousness of a crime against humanity and that of a war crime”, finding that the Trial Chamber committed an error in determining that crimes against humanity should attract a higher sentence than war crimes.<sup>1474</sup> The Appeals Chamber in the *Aleksovski* case also held that there is in law no distinction between the

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<sup>1471</sup> Prosecutor's Pre-Trial Brief I, par 230.

<sup>1472</sup> *Ibid*, fn 146.

<sup>1473</sup> *Prosecutor v Tadić*, Case IT-94-1-Tbis-R117, Sentencing Judgement, 11 Nov 1999, pars 27-29.

seriousness of a crime against humanity and that of a war crime.<sup>1475</sup> The authorised penalties for these crimes are also the same, “the level in any particular case being fixed by reference to the circumstances of the case”.<sup>1476</sup> The Appeals Chamber in the *Furund`ija* case followed the pronouncements in the *Tadi}* and *Aleksovski* cases on the same issue.<sup>1477</sup> This submission by the Prosecutor is therefore rejected.

(d) Effect of offence on third parties as a sentencing factor

852. The Trial Chamber is unable to accept that a so-called *in personam* evaluation of the gravity of the crime could or should also concern the effect of that crime on third persons, as submitted by the Prosecutor.<sup>1478</sup> Such effects are irrelevant to the culpability of the offender, and it would be unfair to consider such effects in determining the sentence to be imposed. Consideration of the consequences of a crime upon the victim who is *directly* injured by it is, however, always relevant to the sentencing of the offender. Where such consequences are part and parcel of the definition of the offence, though, care should be taken to avoid considering them separately in imposing sentence. For example, the fact that an offender took someone’s life cannot be considered as a *separate* sentencing circumstance when imposing a sentence for a murder conviction – it is part and parcel of the crime charged.

(e) False defences, perjury and disrespectful courtroom behaviour

853. With respect to Dragoljub Kunarac, the Prosecutor contends that his false defences – his alibi and his assertion that he was seduced by a 19-year old girl – should be viewed as aggravating factors.<sup>1479</sup> With respect to Radomir Kova~, the Prosecutor submits that his false defence in relation to his alleged relationship with FWS-87 should be viewed as an aggravating factor.<sup>1480</sup> This Chamber finds that an alibi raised by an accused but rejected by the Trial Chamber, is part of the legitimate conduct of the accused’s defence, unless the

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<sup>1474</sup> *Prosecutor v Tadi}*, Case IT-94-1-A & IT-94-1-Abis, Judgement in Sentencing Appeals, 26 Jan 2000, par 69.

<sup>1475</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 69.

<sup>1476</sup> *Ibid*, par 69.

<sup>1477</sup> *Prosecutor v Furund`ija*, Case IT-95-17/1-A, Judgement, 21 July 2000, par 243.

<sup>1478</sup> Prosecutor’s Pre-Trial Brief I, par 230 (with reference to *Prosecutor v Delali}* and *Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, par 1226, which is not wholly unambiguous).

<sup>1479</sup> Prosecutor’s Final Trial Brief, par 970.

<sup>1480</sup> *Ibid*, par 975.

Prosecutor can establish that it was not legitimately raised. With regard to D.B. and FWS-87, the Trial Chamber can make no such finding. In order to prove that Kova- raised a false defence by mocking a witness, saying that she was in love with the rapist and that she even sent a letter expressing her gratitude – especially if there is the suspicion that Defence counsel deliberately put forward false evidence – the Prosecutor would have to show that Defence counsel and the accused acted in collusion, for example, that the accused instructed or counselled that line of defence. To hold otherwise would mean the attribution of counsel's conduct to the accused. The Trial Chamber makes no such finding.

854. With respect to Zoran Vukovi}, the Prosecutor submits that his alleged disrespectful courtroom behaviour should be considered as an aggravating factor.<sup>1481</sup> This behaviour, in the view of the Trial Chamber, actually shows a lack of remorse; it will be treated as negating remorse as a possible mitigating factor rather than as an aggravating factor.

#### **D. Determination of sentences in respect of each convicted person**

##### **1. General considerations**

855. In determining the sentence to be imposed with respect to each accused, the Trial Chamber proposes to impose a single sentence reflecting the totality of the respective criminal conduct of each accused in accordance with Rule 87(C). The Trial Chamber will consider any cumulative convictions entered with respect to the three accused and ensure that they are not penalised more than once for the same conduct, in accordance with the ruling by the Appeals Chamber in the *Delali}* case:

The fact that an accused's conduct may legitimately be legally characterised as constituting different crimes would not overcome the fundamental principle that he should not be punished more than once in respect of the same conduct. In the case of two legally distinct crimes arising from the same incident, care would have to be taken that the sentence does not doubly punish in respect of the same act which is relied on as satisfying the elements common to the two crimes, but only that conduct which is relied on only to satisfy the *distinct* elements of the relevant crimes.<sup>1482</sup>

856. Consideration of the gravity of the conduct of the accused is the starting point for reaching an appropriate sentence.<sup>1483</sup> The following statement of the Trial Chamber in the

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<sup>1481</sup> *Ibid*, pars 984 and 985.

<sup>1482</sup> *Prosecutor v Delali} and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 769.

<sup>1483</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 182 ("Consideration of the gravity of the conduct of the accused is normally the starting point for consideration of an appropriate sentence. The practice of the International Tribunal provides no exception. The Statute provides that in

*Kupreški* case, endorsed by the Appeals Chamber in the *Delali*},<sup>1484</sup> *Aleksovski*,<sup>1485</sup> *Furund`ija*<sup>1486</sup> and *Kambanda*<sup>1487</sup> cases, sets out the approach to be adopted:

The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.<sup>1488</sup>

The guilty findings in relation to each of the accused have already been set out above. The Trial Chamber has considered the inherent gravity of the offences as well as the particular circumstances surrounding the commission of those offences, including the degree of participation with respect to each offence.

857. The Trial Chamber has considered retribution - interpreted by this Chamber as punishment of an offender for his specific criminal conduct – as an important general sentencing factor. In addition, general deterrence, another important general sentencing factor, has also been considered. However, in the circumstances of the present case, the Trial Chamber considers that increasing the terms of imprisonment because of general deterrence is unnecessary in light of the length of the sentences dictated by the inherent gravity of the offences.

858. The Appeals Chamber in the *Tadi*} case held that a Trial Chamber also has to consider adequately the need for sentences to reflect the relative significance of the role of the accused in the broader context of the conflict in the former Yugoslavia.<sup>1489</sup> The Appeals Chamber in the *Delali*} case interpreted that consideration as follows:

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imposing sentence the Trial Chambers should take into account such factors as the gravity of the offence. This has been followed by Trial Chambers. Thus, in the *^elebi}i* Judgement, the Trial Chamber said that “[t]he most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence”. In the *Kupreški*} judgement, the Trial Chamber stated that “[t]he sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime”. The Appeals Chamber endorses these statements.”)

<sup>1484</sup> *Prosecutor v Delali} and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 731.

<sup>1485</sup> *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 182.

<sup>1486</sup> *Prosecutor v Furund`ija*, Case IT-95-17/1-A, Judgement, 21 July 2000, par 249.

<sup>1487</sup> *Kambanda v Prosecutor*, Case ICTR-97-23-A, Judgement, 19 Oct 2000, par 125.

<sup>1488</sup> *Prosecutor v Kupreški} and Others*, Case IT-95-16-T, Judgement, 14 Jan 2000, par 852.

<sup>1489</sup> *Prosecutor v Tadi}*, Case IT-94-1-A & IT-94-1-Abis, Judgement in Sentencing Appeal, 26 Jan 2000, par 55.

That judgement did not purport to require that, in every case before it, an accused's level in the overall hierarchy in the conflict in the former Yugoslavia should be compared with those at the highest level, such that if the accused's place was by comparison low, a low sentence should automatically be imposed. Establishing a gradation does not entail a low sentence for all those in a low level of the overall command structure. On the contrary, a sentence must always reflect the inherent level of gravity of a crime [...].<sup>1490</sup>

It cannot be said that any of the accused played relatively significant roles in the broader context of the conflict in the former Yugoslavia. None of them were commanders, their crimes were geographically relatively limited and there is no evidence that their specific offences affected other perpetrators of violations of international humanitarian law or other victims of such crimes within that broader context. That said, the three accused committed, by any measure, particularly serious offences against the most vulnerable of persons in any conflict, namely, women and girls, in the Fo- a region of Bosnia and Herzegovina. The Trial Chamber considered this fact in the context of the consideration of the gravity of the offences.

859. As explained above, although the Trial Chamber is not bound to follow the general sentencing practice in the former Yugoslavia when determining the sentence to be imposed, it must have recourse to that practice. At the time of the commissioning of the offences in the present case, the death penalty could have been imposed in Bosnia and Herzegovina for violations of Articles 141 and 142(1) of the SFRY Criminal Code. Those provisions respectively deal with war crimes and genocide, the latter being a specific category of crimes against humanity. A 20-year sentence could also be substituted for the death penalty. The Trial Chamber is mindful of the punishment that could have been imposed at the time, but considers that, in particular in relation to Dragoljub Kunarac and Radomir Kova~, the scale of their offences calls for a consideration of sentences of higher than 20 years to be imposed.

860. In line with recent Appeals Chamber determinations, the Trial Chamber does not consider that crimes against humanity should in principle attract a higher sentence than war crimes.<sup>1491</sup>

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<sup>1490</sup> *Prosecutor v Delali} and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001, par 847.

<sup>1491</sup> *Prosecutor v Tadi}*, Case IT-94-1-A & IT-94-1-Abis, Judgement in Sentencing Appeals, 26 Jan. 2000, par 69 ("The Appeals Chamber has taken account of the arguments of the parties and the authorities to which they refer, inclusive of previous judgments of the Trial Chambers and the Appeals Chamber of the International Tribunal. 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

861. The Trial Chamber will lastly consider any aggravating and mitigating circumstances with respect to each accused.

## 2. Dragoljub Kunarac

862. Dragoljub Kunarac has been found guilty on Counts 1 (torture), 2 (rape), 3 (torture), 4 (rape), 9 (rape), 10 (rape), 11 (torture), 12 (rape), 18 (enslavement), 19 (rape) and 20 (rape).<sup>1492</sup> The relevant aggravating and mitigating circumstances with respect to the offences committed by Dragoljub Kunarac are as follows.

### (a) Aggravating circumstances

863. The Trial Chamber found that Dragoljub Kunarac cannot be held responsible as a commander under Article 7(3) of the Statute. Nonetheless, the evidence clearly shows that this accused played a leading organisational role and that he had substantial influence over some of the other perpetrators.<sup>1493</sup> This fact is considered in aggravation - the criminal culpability of those leading others is higher than those who follow.

864. The youthful age of certain of the victims of the offences committed by Dragoljub Kunarac is considered as an aggravating factor. At the time of the commission of the offences against them, FWS-87 was about fifteen and a half years old, A.S. and D.B were about nineteen years old, FWS-50 was about sixteen years old, FWS-191 was about seventeen years old and FWS-186 was about sixteen and a half years old.

865. He committed these offences over an extended period of time in relation to certain of his victims, for example, two months in relation to the enslavement of FWS-191 and FWS-186. This fact is also considered in aggravation.<sup>1494</sup>

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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. The position is similar under the Statute of the International Criminal Court, Article 8(1) of the Statute, in the opinion of the Appeals Chamber, not importing a difference. [...].”); and *Prosecutor v Furund`ija*, Case IT-95-17/1-A, Judgement, 21 July 2000, pars 243 and 247.

<sup>1492</sup> In relation to Counts 1-4 (pars 630-687), Counts 9-10 (pars 699-704), Counts 11-12 (pars 705-715), Counts 18-20 (pars 716-745).

<sup>1493</sup> Eg, pars 647, 670 and 710-711.

<sup>1494</sup> Eg, par 744.

866. The involvement of more than one victim in his offences is also considered in aggravation.<sup>1495</sup> The commission of some of the offences by more than one perpetrator at the same time is also considered in aggravation, like Dragoljub Kunarac's co-perpetration of the rape of FWS-183,<sup>1496</sup> and his aiding and abetting of the rape of FWS-75 by about fifteen soldiers<sup>1497</sup> and the rape of FWS-87 by three soldiers.<sup>1498</sup>

867. The Trial Chamber considers the discriminatory grounds – ethnic and gender discrimination - upon which Dragoljub Kunarac committed those offences other than torture, which was committed for discriminatory purposes, in aggravation.<sup>1499</sup> Lastly, that these offences were committed against particularly vulnerable and defenceless women and girls is also considered in aggravation.

(b) Mitigating circumstances

868. The fact that Dragoljub Kunarac voluntarily surrendered to the International Tribunal is a factor in mitigation of his sentence. That an accused may be said to be under an obligation to surrender to the Tribunal does not mean that doing so should not be considered in mitigation. Treating such voluntary surrender as a mitigating factor may inspire other indictees to similarly surrender themselves, thus enhancing the effectiveness of the work of the Tribunal. Furthermore, his substantial co-operation with the Prosecutor in giving two statements is also considered in mitigation.

869. The Trial Chamber does not consider the statement by Dragoljub Kunarac that, in retrospect, he understands that D.B. was not acting of her own free will to indicate remorse. His subsequent testimony to the effect that she supposedly seduced him does not speak of remorse. However, his statement that he felt guilty about the fact that FWS-75 was gang-raped while he was raping D.B. in an adjoining room may be interpreted as a statement of remorse, and is considered in mitigation.

870. The Trial Chamber is satisfied that there are no other relevant mitigating circumstances to be considered with respect to Dragoljub Kunarac.

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<sup>1495</sup> Eg, pars 685, 727 and 742.

<sup>1496</sup> At par 714.

<sup>1497</sup> At pars 636 and 656.

<sup>1498</sup> At par 670.

<sup>1499</sup> At par 583, 654 and 669.

(c) Sentence

871. The sentence to be imposed on Dragoljub Kunarac is 28 (twenty-eight) years.

3. Radomir Kova-

872. Radomir Kova- has been found guilty on Counts 22 (enslavement), 23 (rape), 24 (rape) and 25 (outrages upon personal dignity).<sup>1500</sup> The relevant aggravating and mitigating circumstances with respect to the offences committed by Radomir Kova- are as follows.

(a) A preliminary issue

873. Radomir Kova- appears to raise an issue as to the legality of his arrest, in the sentencing part of the Final Trial Brief Submissions by the Defence.<sup>1501</sup> No evidence is adduced to support the claim. The Trial Chamber rejects this assertion. Throughout the proceedings, including the pre-trial proceedings, the Trial Chamber has not heard a single word about this claim. To casually raise it only in the final trial brief highlights the spurious nature of this claim.

(b) Aggravating circumstances

874. The relatively youthful age of A.S. (about twenty years) and the very young age of A.B. (about twelve years) when the said offences were committed against them, are aggravating circumstances. That Radomir Kova- committed enslavement, rape and outrages upon personal dignity with respect to FWS-87 and A.S. for a period of about four months, and with respect to FWS-75 and A.B. for a period of about a month are also considered as aggravating circumstances. The sadistic manner in which the accused committed these offences has been considered as part of the determination whether these offences were in fact committed, and it is therefore not considered in aggravation. The fact that his offences were committed against particularly vulnerable and defenceless girls and a woman is a matter considered in aggravation.

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<sup>1500</sup> In relation to Counts 22-25 (pars 746-782).

<sup>1501</sup> 10 Nov 2000, par L.h.2.

875. The involvement of more than one victim in his offences is also considered in aggravation.<sup>1502</sup>

(c) Mitigating circumstances

876. The Trial Chamber is satisfied that there are no relevant mitigating circumstances to be considered with respect to Radomir Kova-.

(d) Sentence

877. The sentence to be imposed on Radomir Kova- is 20 (twenty) years.

4. Zoran Vukovi}

878. Zoran Vukovi} has been found guilty on Counts 33 (torture), 34 (rape), 35 (torture) and 36 (rape).<sup>1503</sup> The relevant aggravating and mitigating circumstances with respect to the offences committed by Zoran Vukovi} are as follows.

(a) Aggravating circumstances

879. The youthful age of FWS-50 – about fifteen and a half years - when she was raped and tortured by Zoran Vukovi}, is an aggravating circumstance. The serious nature of the rape is not considered in aggravation because it is considered with respect to the torture convictions. The discriminatory purpose of the torture committed is also not considered in aggravation as this is already encompassed in that conviction. That his offences were committed against a particularly vulnerable and defenceless girl is considered in aggravation.

(b) Mitigating circumstances

880. The fact that the accused apparently relented from carrying out worse crimes against FWS-50 because she was about the same age as his daughter,<sup>1504</sup> cannot be considered in mitigation, for the same reason that the possibility that any accused might have committed more or worse offences should not be so considered.

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<sup>1502</sup> Eg, pars 757, 759, 772 and 780.

<sup>1503</sup> In relation to Counts 33-36 (pars 799-822).

<sup>1504</sup> T 6340.

881. The Trial Chamber is satisfied that there are no relevant mitigating circumstances to be considered with respect to Zoran Vukovi}.

(c) Sentence

882. The sentence to be imposed on Zoran Vukovi} is 12 (twelve) years.

## VII. DISPOSITION

### A. Sentences

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, the Statute and the Rules, the Trial Chamber finds, and imposes sentence, as follows.

#### 1. Dragoljub Kunarac

883. Dragoljub Kunarac has been found guilty on the following counts:<sup>1505</sup>

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 (violation 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)).

884. Dragoljub Kunarac has been acquitted on the following counts:

Count 5 (crime against humanity (torture)).

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<sup>1505</sup> Indictment IT-96-23.

Count 6 (crime against humanity (rape)).

Count 7 (violation of the laws or customs of war (torture)).

Count 8 (violation of the laws or customs of war (rape)).

Count 13 (violation of the laws or customs of war (plunder)).<sup>1506</sup>

Count 21 (violation of the laws or customs of war (outrages upon personal dignity)).

885. The Trial Chamber hereby sentences Dragoljub Kunarac to a single sentence of 28 (twenty-eight) years imprisonment.

## 2. Radomir Kova-

886. Radomir Kova- has been found guilty on the following counts:<sup>1507</sup>

Count 22 (crime against humanity (enslavement)).

Count 23 (crime against humanity (rape)).

Count 24 (violation of the laws or customs of war (rape)).

Count 25 (violation of the laws or customs of war (outrages upon personal dignity)).

887. The Trial Chamber hereby sentences Radomir Kova- to a single sentence of 20 (twenty) years imprisonment.

## 3. Zoran Vukovi}

888. Zoran Vukovi} has been found guilty on the following counts:<sup>1508</sup>

Count 33 (crime against humanity (torture)).

Count 34 (crime against humanity (rape)).

Count 35 (violation of the laws or customs of war (torture)).

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<sup>1506</sup> Decision on Motion for Acquittal, 3 July 2000.

<sup>1507</sup> Indictment IT-96-23.

<sup>1508</sup> Indictment IT-96-23/1.

Count 36 (violation of the laws or customs of war (rape)).

889. Zoran Vukovi} has been acquitted on the following counts:

Count 21 (crime against humanity (torture)).

Count 22 (crime against humanity (rape)).

Count 23 (violation of the laws or customs of war (torture)).

Count 24 (violation of the laws or customs of war (rape)).

890. The Trial Chamber hereby sentences Zoran Vukovi} to a single sentence of 12 (twelve) years imprisonment.

#### **B. Credit for Time Served**

Dragoljub Kunarac surrendered to the International Tribunal on 4 March 1998; Radomir Kova- was arrested on 2 August 1999; and Zoran Vukovi} was arrested on 23 December 1999. Pursuant to Rules 101(C) and 102, the sentences of the three accused shall begin to run from today.

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

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Florence Ndepele Mwachande Mumba  
Presiding

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David Hunt

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Fausto Pocar

Dated this the twenty-second day of February 2001,  
At The Hague,  
The Netherlands.

**[Seal of the Tribunal]**

## ANNEX I - MAP OF FOCA



## ANNEX II - MAP OF FOCA AND SURROUNDING OPŠTINAS



## ANNEX III - PROCEDURAL BACKGROUND

### Pre-trial proceedings

891. The International Tribunal confirmed an Indictment against Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, (“co-accused”) as well as five other accused on 26 June 1996 (“original Indictment”).<sup>1509</sup> In relation to the co-accused, the Indictment charged rape and torture as crimes against humanity, torture as a grave breach and as a violation of the laws and customs of war and enslavement as a crime against humanity.

892. Dragoljub Kunarac surrendered to the Tribunal on 4 March 1998. On 5 March 1998 President Gabrielle Kirk McDonald assigned the case to Trial Chamber II, then composed of Judge Antonio Cassese (Presiding), Judge Richard George May, and Judge Florence Ndepele Mwachande Mumba.<sup>1510</sup> Dragoljub Kunarac made his initial appearance before the Tribunal on 9, 10 and 13 March 1998. On 9 March 1998 he pleaded guilty to Count 41 of the original Indictment – rape as a crime against humanity – and not guilty to all other Counts. On 13 March 1998 he withdrew this guilty plea.<sup>1511</sup>

893. At the request of the Prosecutor, on 29 April 1998, the Trial Chamber ordered protective measures for certain victims and witnesses.<sup>1512</sup>

894. On 18 June 1998 Judge Florence Ndepele Mwachande Mumba was appointed Pre-Trial Judge<sup>1513</sup> and on 15 July 1998 Presiding Judge for this case.<sup>1514</sup>

895. A Status Conference was held on 16 July 1998 at which potential amendments to the Indictment against Dragoljub Kunarac were considered.<sup>1515</sup> The original Indictment was

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<sup>1509</sup> Indictment Against Dragan Gagovic and Others, Case IT-96-23-I, 26 June 1996.

<sup>1510</sup> Order of the President Assigning a Case to a Trial Chamber, Case IT-96-23-I, 5 Mar 1998.

<sup>1511</sup> T 42-44, Case IT-96-23-I, 13 Mar 1998.

<sup>1512</sup> Decision on the Prosecution Motion to Protect Victims and Witnesses, Case IT-96-23-PT, 29 Apr 1998. Other decisions on victim and witness protection include Order on Prosecutor’s Motion Requesting Protection for Witnesses at Trial, Case IT-96-23-PT, 5 Oct 1998 and Order on Protective Measures, Case IT-96-23-PT & IT-96-23/1-PT, 20 Mar 2000.

<sup>1513</sup> Order Appointing a Pre-trial Judge, Case IT-96-23-PT, 18 June 1998.

<sup>1514</sup> Order, Case IT-96-23-PT, 15 July 1998.

<sup>1515</sup> T 69-75, Case IT-96-23-PT, 16 July 1998.

subsequently amended on 19 August 1998, consolidating the charges against Dragoljub Kunarac, and leaving out references to the seven other accused (“first amended Indictment”).<sup>1516</sup> The Prosecutor also withdrew the charges under Article 2 of the Statute and added charges under Article 3. On 28 August 1998, Dragoljub Kunarac made a further appearance before the Tribunal, pleading not guilty to the new charges of the first amended Indictment.<sup>1517</sup>

896. On 6 October 1998 Dragoljub Kunarac’s Defence filed a Preliminary Motion on the Form of the Indictment.<sup>1518</sup> The Trial Chamber dismissed the motion on 21 October 1998, upholding the Indictment.<sup>1519</sup>

897. On 16 November 1998, Judge David Anthony Hunt replaced Judge Richard George May in the Trial Chamber.<sup>1520</sup>

898. On 8 February 1999, the Prosecutor filed a Pre-Trial Brief, a Submission Related to Admissions Made by the Defence, a Submission Related to Rule 73bis (B)(IV) and (V) and a confidential and *ex parte* Addendum to Prosecutor’s Submission Related to Rule 73bis (B)(IV) and (V).<sup>1521</sup> On 28 February 1999, the Defence filed a Pre-Trial Brief Addressing the Factual and Legal Issues.<sup>1522</sup>

899. A Status Conference was held on 5 March 1999 at which issues of disclosure, trial dates, and protective measures were discussed.<sup>1523</sup> Thereafter on 26 March 1999 the Trial Chamber ordered that unredacted statements of witnesses FWS-191 and FWS-192 be disclosed to the Defence at least 30 days before trial.

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<sup>1516</sup> Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, Case IT-96-23-PT, 19 Aug 1998.

<sup>1517</sup> T 79-81, Case IT-96-23-PT, 28 Aug 1998.

<sup>1518</sup> Defence Preliminary Motions on the Form of the Amended Indictment, Case IT-96-23-PT, 6 Oct 1998

<sup>1519</sup> Decision on the Defence Preliminary Motion on the Form of the Amended Indictment, Case IT-96-23-PT, 21 Oct 1998.

<sup>1520</sup> Order of the President for the Assignment of a Judge to a Trial Chamber, Case IT-96-23-PT, 16 Nov 1998.

<sup>1521</sup> Prosecutor’s Submission Related to Admissions Made by the Defence, Case IT-96-23-PT, 8 Feb 1999; Prosecutor’s Pre-Trial Brief, Case IT-96-23-PT, 8 Feb 1999; Prosecutor’s Submission Related to Rule 73bis (B)(IV) and (V), Case IT-96-23-PT, 8 Feb 1999.

<sup>1522</sup> Pre-Trial Brief Addressing the Factual and Legal Issues, Case IT-96-23-PT, 28 Feb 1999.

<sup>1523</sup> T 123-136, Case IT-96-23-PT, 5 Mar 2000.

900. On 30 July 1999, the Prosecutor withdrew the Indictment against one of the co-accused, Dragan Gagovi}, who had died in the meantime.<sup>1524</sup>

901. On 2 August 1999 Radomir Kova~ was arrested and transferred to the Tribunal. At his initial appearance of 4 August 1999, he pleaded not guilty to the counts of the original Indictment, including both rape and enslavement as crimes against humanity.<sup>1525</sup>

902. A second amended Indictment against Dragoljub Kunarac and Radomir Kova~ was confirmed on 3 September 1999.<sup>1526</sup> It added two new Counts under Article 3 (violations of the laws or customs of war), namely Count 24 (rape) and Count 25 (outrages upon personal dignity), against Radomir Kova~. Both Radomir Kova~ and Dragoljub Kunarac pleaded not guilty to the second amended Indictment on 24 September 1999.<sup>1527</sup> The Prosecutor redacted the charges against the five other accused, including Zoran Vukovi}, and merged them into a separate Indictment of 5 October 1999.<sup>1528</sup>

903. On 10 October 1999 the Defence filed a Request for Provisional Release of the accused Dragoljub Kunarac, which the Trial Chamber denied on 11 November 1999, noting that Dragoljub Kunarac had not shown "exceptional circumstances justifying his provisional release" and that his voluntary surrender to the Tribunal did not justify release.<sup>1529</sup> Despite a letter from the Government of the Republika Srpska, indicating its willingness to comply with the orders of the Tribunal should Dragoljub Kunarac be released, the Trial Chamber denied Dragoljub Kunarac's fresh application for provisional release on 17 November 1999.<sup>1530</sup> Dragoljub Kunarac then filed an Application for Leave to Appeal against both decisions. A bench of the Appeals Chamber rejected the application on 25 November 1999.<sup>1531</sup>

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<sup>1524</sup> Order Granting Leave to Withdraw Indictment, Case IT-96-23-I, 30 July 1999.

<sup>1525</sup> T 161-62, Case IT-96-23-I, 4 Aug 1999.

<sup>1526</sup> Order Granting Leave to File a Second Amended Indictment and Confirming the Second Amended Indictment, Case IT-96-23-PT, 3 Sept 1999.

<sup>1527</sup> T 170-71, Case IT-96-23-PT, 24 Sept 1999.

<sup>1528</sup> Amended Indictment, Case IT-96-23-I, 5 Oct 1999.

<sup>1529</sup> Decision on Defence Request for Provisional Release of Dragoljub Kunarac, Case IT-96-23-PT, 11 Nov 1999.

<sup>1530</sup> Further Decision on Request for Provisional Release of Dragoljub Kunarac, Case IT-96-23-PT, 17 Nov 1999.

<sup>1531</sup> Order Rejecting Application for Leave to Appeal, Case IT-96-23-AR65, 25 Nov 1999.

904. On 4 November 1999, the Trial Chamber granted in part Defence motions on the form of the Indictment.<sup>1532</sup> The confirmation of the third amended Indictment followed on 1 December 1999.<sup>1533</sup>

905. After a Status Conference on 15 November 1999, the Trial Chamber set the date for the start of trial as 1 February 2000.<sup>1534</sup>

906. On 30 November 1999, the accused Radomir Kova~, with the agreement of Dragoljub Kunarac, sought to postpone the trial.<sup>1535</sup> At a Status Conference on 14 December 1999, the start of the trial was postponed until 20 March 2000 to give Radomir Kova~ time to prepare his case.<sup>1536</sup>

907. The accused Zoran Vukovi} was arrested on 23 December 1999 and transferred to the Tribunal the following day. He made his initial appearance on 29 December 1999, pleading not guilty to charges of rape and torture as crimes against humanity and violations of the laws and customs of war.<sup>1537</sup> On 31 January 2000, he sought a joint trial with Dragoljub Kunarac and Radomir Kova~, which he requested to commence on 2 May 2000.<sup>1538</sup> On 9 February 2000 the Trial Chamber denied the request, but noted Zoran Vukovi} could approach the Trial Chamber for joinder again if he could be ready for trial by 20 March 2000.<sup>1539</sup>

908. On 1 February 2000 Judge Fausto Pocar was assigned to the Trial Chamber, replacing Judge Antonio Cassese who had resigned as of 31 January 2000.<sup>1540</sup> Also on 1 February 2000, the Prosecutor filed a Submission Regarding Admissions and Contested Matters with regard to Dragoljub Kunarac and Radomir Kova~, followed on 8 March 2000 by a similar submission relating to Zoran Vukovi}.

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<sup>1532</sup> Decision on the Form of the Indictment, Case IT-96-23-PT, 4 Nov 1999.

<sup>1533</sup> Order Granting Leave to File a Third Amended Indictment and Confirming the Third Amended Indictment, Case IT-23-96-PT, 1 Dec 1999.

<sup>1534</sup> Scheduling Order for a Trial Date, Case IT-96-23-PT, 18 Nov 1999.

<sup>1535</sup> Request for Postponment [sic] of the Commensment [sic] of Trial, Case IT-96-23-PT, 30 Nov 1999.

<sup>1536</sup> Record of Rulings Made in Status Conference, Case IT-96-23-PT, 16 Dec 1999.

<sup>1537</sup> T 237-238, Case IT-96-23-I, 29 Dec 1999.

<sup>1538</sup> Defence Request for Joint [sic] of Trial, Case IT-96-23-PT, 31 Jan 2000.

<sup>1539</sup> Decision on Joinder of Trials, Case IT-96-23-PT, 9 Feb 2000. The proceedings against Dragoljub Kunarac, Radomir Kova~ and Zoran Vukovi} were assigned the combined case number IT-96-23 & IT-96-23/1. All further footnotes refer to this combined number, unless otherwise stated.

<sup>1540</sup> Order of the President Assigning a Judge to a Trial Chamber, Case IT-96-23-PT, 1 Feb 2000.

909. On 10 February 2000, counsel for Zoran Vukovi} again requested a joint trial with Dragoljub Kunarac and Radomir Kova- and indicated readiness for a 20 March 2000 start date.<sup>1541</sup> The Trial Chamber granted the request and ordered compliance with the protective orders in place with respect to the other two accused.<sup>1542</sup> Consequently on 16 February 2000, the Trial Chamber ordered the severance of the case against Zoran Vukovi} from a separate Indictment against DP 6, DP 1, Dragan Zelenovi}, and Radovan Stankovi}.<sup>1543</sup> A redacted indictment pertaining only to Zoran Vukovi} was confirmed on 16 February 2000.<sup>1544</sup>

910. The pre-trial conference was held on 2 March 2000.<sup>1545</sup> In this conference the counsel for the accused Vukovi} and the accused himself confirmed that they were prepared to start the trial on the 20<sup>th</sup> of March 2000, regardless of the short time left for preparation.<sup>1546</sup>

911. On 11 March 2000 counsel for Radomir Kova- requested permission for Mr Milan Vujin, former Defence counsel to Dusko Tadi}, who had been found guilty of contempt of the Tribunal by the Appeals Chamber on 31 January 2000,<sup>1547</sup> to act as pro bono counsel for Radomir Kova-.<sup>1548</sup> In its decision of 14 March 2000, the Trial Chamber denied Milan

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<sup>1541</sup> Defence of the Accused Mr Zoran Vukovi} Approves for Joint Trial to Start on 20 March 2000, Case IT-96-23-PT, 10 Feb 2000.

<sup>1542</sup> Decision on Joinder of Trials, Case IT-96-23-PT, 15 Feb 2000.

<sup>1543</sup> Order for Severance and Combined Case Number, 16 Feb 2000.

<sup>1544</sup> Order for Severance and Combined Case Number, 16 Feb 2000.

<sup>1545</sup> T 244-89, Case IT-96-23-PT, 2 Mar 2000. At the Status Conference the Prosecutor sought to withdraw one sentence and the accompanying footnote from the Prosecutor's Pre-Trial Brief II relating to Zoran Vukovi}'s alleged participation in the killing of an elderly man at Buk Bijela, which could not be proved beyond a reasonable doubt. However, the Prosecutor sought instead to use Zoran Vukovi}'s participation as a sentencing factor (which according to the Prosecutor need not be proved beyond a reasonable doubt under the Rules), without charging it as a separate Count of the Indictment. The Trial Chamber rejected this line of argument, stipulating that matters of aggravation for sentencing must be established beyond a reasonable doubt (T 274). On 8 Mar 2000 the Trial Chamber granted leave to withdraw the sentence and ordered that it be struck from the brief (Decision on Prosecutor's Motion to Withdraw One Sentence from the Prosecutor's Pre-trial Brief on Zoran Vukovic filed on 21 Feb 2000, 8 Mar 2000).

<sup>1546</sup> T 247, 248

<sup>1547</sup> *Prosecutor v Tadi}*, Case IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000.

<sup>1548</sup> Decision on the Request of the Accused, Radomir Kovac to allow Mr Milan Vujin to Appear as Co-counsel Acting Pro Bono, 14 Mar 2000.

Vujin the right of audience in the present case, citing his interference “with the orderly and lawful conduct of the proceedings before the Tribunal” in the *Tadić* case.<sup>1549</sup>

912. On 14 March 2000, the Defence requested the exclusion of the press and public from the Trial Chamber’s proceedings during the testimony of protected Prosecution witnesses.<sup>1550</sup> The Trial Chamber denied the request on 22 March 2000, noting sufficient protective measures were already in place and the Tribunal’s proceedings should remain public as far as possible.<sup>1551</sup>

### Trial phase

913. The trial commenced on 20 March 2000. The Prosecution case lasted until Tuesday, 13 June 2000; the Defence case commenced on 4 July 2000 and closed on 10 November 2000. The Prosecution led evidence in rebuttal on 23 October 2000.

914. On 20 March 2000, the Defence filed a joint request for the presence of medical experts at trial.<sup>1552</sup> After oral arguments, the request was substantially amended, seeking to permit three medical experts access to statements by five protected witnesses and to permit expert examination of those witnesses. On 29 March 2000 the Trial Chamber ruled the statements of the five protected witnesses may be disclosed to the Defence’s three medical experts who may be called to testify under Rule 94*bis*.<sup>1553</sup> In the same decision of 29 March 2000, the Trial Chamber held that applications for physical examination of witnesses had to be made individually and, if such examinations were granted, protective orders in force would bind medical experts and their assistants.

915. On 3 April 2000 the Trial Chamber granted the Prosecutor’s oral application to withdraw Counts 14-17 of the third amended Indictment (enslavement and rape of witness FWS-101 as crimes against humanity and violations of the laws and customs of war)

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<sup>1549</sup> Judge Hunt appended a separate opinion: Separate Opinion of Judge David Hunt on Request by Radomir Kovac to Allow Milan Vujin to Appear as Counsel Acting Without Payment by the Tribunal, 24 Mar 2000.

<sup>1550</sup> Motion Pursuant to Rule 79(i) (ii) (iii), 14 Mar 2000.

<sup>1551</sup> Order on Defence Motion Pursuant to Rule 79, 22 Mar 2000.

<sup>1552</sup> Confidential Defence Joint Request for Presence of Defence Experts During the Trial, 20 Mar. 2000.

<sup>1553</sup> Order on Defence Experts, 29 Mar. 2000.

pertaining to Dragoljub Kunarac and Radomir Kova~.<sup>1554</sup> On 6 April the Trial Chamber also granted leave to call witness D.B.<sup>1555</sup>

916. On 20 June 2000, the Defence submitted a motion for acquittal pursuant to Rule 98*bis*.<sup>1556</sup> In its decision of 2 July 2000, the Trial Chamber acquitted Dragoljub Kunarac on Count 13 (plunder), noting that there was no evidence to suggest that the ordinary meaning of plunder in Article 3(e) of the Statute - "unjustified appropriations of property either from more than a small group of persons or from persons over an identifiable area" - had been satisfied.<sup>1557</sup> The Trial Chamber further decided Zoran Vukovi} had no case to answer in relation to the rape of witness FWS-48 in support of Counts 33-36 as the totality of the evidence did not provide a "sufficient basis upon which a reasonable tribunal of fact could be satisfied beyond a reasonable doubt that it was the accused Zoran Vukovi} who raped witness FWS 148".<sup>1558</sup> The Trial Chamber dismissed all other complaints in the Defence motion.

917. On 11 July 2000, the Trial Chamber denied in a confidential decision<sup>1559</sup> the request of the Defence to order the medical and psychological examination of certain witnesses.<sup>1560</sup> It stated that the Defence had failed to satisfy the Trial Chamber that these examinations would be reasonably likely to assist the accused and that the likelihood that they could verify that the alleged crimes were committed was too remote to justify those highly intrusive examinations.

918. On 21 September 2000, the Trial Chamber ordered the medical examination of the accused Zoran Vukovi},<sup>1561</sup> thereby granting a confidential Defence Motion.<sup>1562</sup> In that motion the Defence had requested that the accused Zoran Vukovi} should be medically examined in order to establish that he suffered an injury to his testicles on 15 June 1992. The Trial Chamber ordered that the confidentiality of the Motion was lifted and that in addition to the Defence expert the Prosecutor was to nominate an expert of her own.

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<sup>1554</sup> T 1482.

<sup>1555</sup> T 1920-21.

<sup>1556</sup> Defence Motion of the Accused Mr Dragoljub Kunarac, Mr Radomir Kova~, and Mr Zoran Vukovi} for Judgement of Acquittal Pursuant to Rule 98*bis*, 20 June 2000.

<sup>1557</sup> *Ibid*, par 16.

<sup>1558</sup> *Ibid*, par 25.

<sup>1559</sup> Confidential Decision on Medical and Psychiatric Examination, 11 Jul 2000.

<sup>1560</sup> Confidential Defence Motion to Grant Forensic Medical and Forensic Psychiatric Examination of the Witnesses, 21 June 2000.

919. On the same day, Defence counsel for the accused Vukovic withdrew the witnesses who were designated for testifying by video link, because it was impossible for the defence to organise their witnesses' appearance in a location suitable for the testimony.<sup>1563</sup>

920. On 28 September 2000, the Trial Chamber issued a Decision on the Rebuttal Case,<sup>1564</sup> permitting the Prosecutor to call FWS-87 and FWS-191 in rebuttal.

921. On 16 October 2000, an agreement was reached during trial that the rebuttal case of the prosecution would start in the next session, regardless of the fact that the final results of the medical examination of the accused Zoran Vukovi} had not yet been filed. The rule that the rebuttal may not begin before the Defence case has been closed completely was waived by consent of the parties.<sup>1565</sup>

922. The Chamber's scheduling order of 17 October 2000<sup>1566</sup> set the dates for closing briefs and arguments, thereby revising all previous scheduling orders in that matter due to the fact that the final results of the examination of Zoran Vukovic had not been filed yet.

923. On 23 October 2000, the rebuttal case for the Prosecution was heard.

924. On 31 October the Trial Chamber rejected the motion by the accused Radomir Kova~ for rejoinder.<sup>1567</sup>

925. The next scheduling order of 31 October 2000<sup>1568</sup> revised all previous scheduling orders for closing briefs and arguments. The additional change became necessary because the Trial Chamber granted the request by the Defence to hear the medical expert witnesses in court. The hearing was held on 10 November 2000.

926. The Prosecutor filed her closing brief on 8 November 2000, the Defence filed theirs on 13 November 2000.

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<sup>1561</sup> Order for Medical Examination of the Accused Zoran Vukovi}, 21 Sept 2000

<sup>1562</sup> Confidential Defence Motion for Medical Examination of the Accused Zoran Vukovi}, 21 Sept 2000.

<sup>1563</sup> T 6051.

<sup>1564</sup> Decision on Rebuttal Case, 28 Sept 2000.

<sup>1565</sup> T 6071.

<sup>1566</sup> Revised Scheduling Order for Closing Argument, 17 Oct 2000.

<sup>1567</sup> Decision on Defence Motion for Rejoinder, 31 Oct 2000.

<sup>1568</sup> Second Revised Scheduling Order for Closing Briefs and Arguments, 31 Oct 2000.

927. Closing arguments were held on 20, 21 and 22 November 2000. In their closing arguments the parties were given the opportunity to make oral submissions on the evidence presented by the medical experts on 10 November 2000, which they could not have addressed in the final briefs.

928. The Trial Chamber sat for a total of 58 days, heard 63 witnesses (1 court witness, 33 Prosecution witnesses and 29 Defence witnesses) and admitted 132 Prosecution and 130 Defence exhibits.

## ANNEX IV - THIRD AMENDED INDICTMENT (IT-96-23)

Preliminary Note:

Withdrawal of Counts and Acquittal on Certain Counts of the Indictment

### Indictment IT-96-23

The Prosecution formally withdrew Counts 14 to 17, which charged the accused Dragoljub Kunarac with enslavement and rape of FWS-101.<sup>1569</sup> Paragraph 9.2 and the last sentence of paragraph 9.1 which relate to these counts were also removed.<sup>1570</sup> In its Decision on Motion for Acquittal, the Trial Chamber acquitted the accused Dragoljub Kunarac under Count 13, which had charged him with plunder of the property of FWS-183.<sup>1571</sup> These Counts (13-17) have been marked as struck out for the reasons given.

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<sup>1569</sup> T 1466, 3Apr 2000.

<sup>1570</sup> T 2824-2827.

<sup>1571</sup> Decision on Motion for Acquittal, 3 July 2000, pars 14-16.

**THE INTERNATIONAL CRIMINAL TRIBUNAL**  
**FOR THE FORMER YUGOSLAVIA**

CASE NO.: IT-96-23-PT

**THE PROSECUTOR  
OF THE TRIBUNAL**

**AGAINST**

**DRAGOLJUB KUNARAC  
RADOMIR KOVA^**

AMENDED INDICTMENT

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, pursuant to her authority under article 18 of the Statute of the Tribunal charges:

**DRAGOLJUB KUNARAC  
RADOMIR KOVA^**

with **CRIMES AGAINST HUMANITY** and **VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR**, as set forth below:

**BACKGROUND**

1.1 The city and municipality of Fo-a are located south-east of Sarajevo, in the Republic of Bosnia-Herzegovina and borders Serbia and Montenegro. According to the 1991 census, the population of Fo-a consisting of 40,513 persons was 51.6 % Muslim, 45.3 % Serbian and 3.1% others. The political and military take-over of the municipality of Fo-a started with the first military actions in the town of Fo-a on 7 April 1992. The Serb forces, supported by artillery and heavy weapons, proceeded to take over Fo-a, section by section. The take-over of Fo-a town was complete by 16 or 17 April 1992. The surrounding villages continued to be under siege until mid- July 1992.

1.2 As soon as the Serb forces had taken over parts of Fo-a town, military police accompanied by local and non-local soldiers started arresting Muslim and Croat inhabitants. Until mid-July 1992 they continued to round up and arrest Muslim villagers from the surrounding villages in the municipality. The Serb forces separated men and women and unlawfully confined thousands of Muslims and Croats in various short and long-term detention facilities or kept them essentially under house arrest. During the arrests many civilians were killed, beaten or subjected to sexual assault.

1.3 The Fo-a Kazneno-popravni Dom ( "KP Dom" ), one of the largest prison facilities in the former Republic of Yugoslavia, was the primary detention facility for men. Muslim women, children and the elderly were detained in houses, apartments and motels in the town of Fo-a or in surrounding villages, or at short and long-term detention centres such as Buk Bijela, Fo-a High School and Partizan Sports Hall, respectively. Many of the detained

women were subjected to humiliating and degrading conditions of life, to brutal beatings and to sexual assaults, including rapes.

1.4 Partizan Sports Hall ( "Partizan") functioned as a detention centre for women, children and the elderly from at least on or about 13 July 1992 until at least 13 August 1992. The detainees held at Partizan, during this time period, numbered at least 72. The detainees were all civilian Muslim women, children and a few elderly persons from villages in the municipality of Fo-a.

1.5 Living conditions in Partizan were brutal. The detention was characterised by inhumane treatment, unhygienic facilities, overcrowding, starvation, physical and psychological torture, including sexual assaults.

1.6 Immediately after the transfer of women to Partizan, a pattern of sexual assaults commenced. Armed soldiers, mostly in groups of three to five, entered Partizan, usually in the evenings, and removed women. When the women resisted or hid, the soldiers beat or threatened the women to force them to obey. The soldiers took the women from Partizan to houses, apartments or hotels for the purpose of sexual assault and rape.

1.7 Three witnesses, identified by the pseudonyms FWS-48, FWS-95 and FWS-50, a 16 year old girl, were detained at Partizan from about 13 July until 13 August 1992. Two others, identified by the pseudonyms FWS-75 and FWS-87, a 15 year old girl, were detained in Partizan from about 13 July until 2 August 1992. Almost every night during their detention, Serb soldiers took FWS-48, FWS-95, FWS-50, FWS-75 and FWS-87 out of Partizan and sexually abused them (vaginal and anal penetration and fellatio).

1.8 On or around 13 August 1992, most detainees were released from Partizan and deported to Montenegro. The women who left on the 13 August convoy received medical care for the first time in Montenegro. Many women suffered permanent gynaecological harm due to the sexual assaults. At least one woman can no longer have children. All the women who were sexually assaulted suffered psychological and emotional harm; some remain traumatised.

1.9 The Kalinovik municipality is located some 20 km to the south of Sarajevo and borders the Fo-a municipality. From mid-May onwards, the Serb forces were in control of Kalinovik municipality. The take-over was followed by measures against the non-Serb population including arrest. While the male non-Serb population was detained in the military warehouse called Barotni, the women and children were detained in the Kalinovik Primary School, which is located in the centre of Kalinovik near the police station. At the end of June/beginning of July, citizens from the municipality of Gacko, captured while crossing the Kalinovik municipality on their flight to Central Bosnia, were also detained in the Kalinovik Primary School.

1.10 **DRAGOLJUB KUNARAC** and soldiers under his command had unfettered access to the detention facilities Partizan Sports Hall and Kalinovik Primary School.

1.11 Besides the above mentioned detention places, several women were detained in houses and apartments used as brothels, operated by groups of soldiers, mostly paramilitary. The ICRC and other organisations, unaware of these detention facilities, did not intervene. Therefore those detainees had no possibility of release or exchange.

## THE ACCUSED

2.1 **DRAGOLJUB KUNARAC** also known as “**Žaga**” and “**Dragan**”, son of Aleksa and Stojka, was born on 15 May 1960 in Fo-a. He lives at Unjaza Nikole 2-5 in Fo-a, now renamed Srbinje. For several years before the war he lived in Tivat, Montenegro.

2.2 **RADOMIR KOVA^**, also known as “**Klanfa**,” son of Milenko, born on 31 March 1961 in Fo-a, was a permanent resident of Fo-a at Samoborska Street. **RADOMIR KOVA^** was one of the sub-commanders of the military police and a paramilitary leader in Fo-a. He was involved in the attack on Fo-a and its surrounding villages and the arrest of civilians.

## SUPERIOR AUTHORITY

3.1 From at least June 1992 until February 1993, **DRAGOLJUB KUNARAC** was the commander of a special unit for reconnaissance of the Bosnian Serb Army. During the time relevant to this indictment, this special unit consisted of volunteers, mainly from Montenegro, some of them recruited by the accused himself. **DRAGOLJUB KUNARAC** had his headquarters in a house in the Alad`a neighbourhood in Fo-a at Ulica Osmana \iki}a no. 16. He stayed in the house with about 10 to 15 soldiers after the take-over of Fo-a. In his capacity as commander of these soldiers, **DRAGOLJUB KUNARAC** was responsible for the acts of the soldiers subordinate to him and knew or had reason to know that his subordinates sexually assaulted Muslim women. He was personally involved in sexual assaults and rape of women.

## GENERAL ALLEGATIONS

4.1 At all times relevant to this indictment, an armed conflict existed in the Republic of Bosnia-Herzegovina in the territory of the former Yugoslavia.

4.2 At all times relevant to this indictment, the accused were required to abide by the laws or customs governing the conduct of war.

4.3 Unless otherwise set forth below, all acts and omissions set forth in this indictment took place between July 1992 and February 1993.

4.4 In each count charging crimes against humanity, a crime recognised by Article 5 of the Statute of the Tribunal, the acts or omissions were part of a widespread, large-scale or systematic attack against a civilian population, specifically the Muslim population of the municipality of Fo-a and Kalinovik.

4.5 Witnesses and victims are identified in this indictment using code names or pseudonyms, such as FWS-95 or initials, for example, D.B.

4.6 The accused **DRAGOLJUB KUNARAC** and **RADOMIR KOVA^** are individually responsible for the crimes charged against them in this indictment, pursuant to

Article 7 (1) of the Statute of the Tribunal. Individual criminal responsibility includes committing, planning, initiating, ordering or aiding and abetting in the planning, preparation or execution of any acts or omissions set forth below.

4.7 **DRAGOLJUB KUNARAC** in respect of counts 1 to 4 ~~and counts 14 to 17~~ is also, or alternatively, criminally responsible as a superior for his subordinates pursuant to Article 7 (3) of the Statute of the Tribunal. Superior criminal responsibility is the responsibility of a superior officer for the acts of his subordinate if the superior knew or had reason to know that his subordinate was about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent such further acts or to punish the subordinate thereof. By failing to take the actions required of a person in superior authority, **DRAGOLJUB KUNARAC** is responsible for all the crimes set out in the respective counts pursuant to Article 7(3) of the Statute of the Tribunal.

4.8 In all counts charging sexual assault, the victim was subjected to or threatened with or had reason to fear violence, duress, detention or psychological oppression, or reasonably believed that if she did not submit, another might be so subjected, threatened or put in fear.

## THE CHARGES

### **COUNTS 1 to 4**

**Rape of FWS-48, FWS-50, FWS-75, FWS-87, FWS-95 and other women at the house Ulica Osmana \iki}a no. 16**

5.1 Several groups of perpetrators assaulted women detained at Partizan. One group, under the command of **DRAGOLJUB KUNARAC**, was a special unit for reconnaissance detail comprising mostly Serb soldiers from Montenegro. This group maintained their headquarters in a house in the Alad`a neighbourhood in Fo-a at Ulica Osmana \iki}a no. 16. Usually at nights, **DRAGOLJUB KUNARAC**, accompanied by some of his soldiers, removed women from Partizan and took them to the house Ulica Osmana \iki}a no. 16, knowing that they would be sexually assaulted there by soldiers under his command. After taking the women to his headquarters, **DRAGOLJUB KUNARAC** would sometimes stay and take one of the women to a room and rape her personally. Even when **DRAGOLJUB KUNARAC** did not personally rape one of the women, he often remained at the headquarters or visited it periodically while other soldiers raped and sexually assaulted the women in the house.

5.2 On at least two occasions between 13 July and 1 August 1992, **DRAGOLJUB KUNARAC** took FWS-87 to his headquarters at Ulica Osmana \ikica no. 16. On both occasions, two Montenegrin soldiers commanded by the accused were present and raped FWS-87.

5.3 **DRAGOLJUB KUNARAC** took FWS-75 and D. B. several times to his headquarters at Ulica Osmana \ikica no. 16, where his soldiers were housed. On or around 16 July 1992, **DRAGOLJUB KUNARAC**, together with his deputy "GAGA", took FWS-75 and D. B. to this house for the first time. When they arrived at the headquarters, a group of soldiers were waiting. **DRAGOLJUB KUNARAC** took D. B. to a separate room and raped her, while FWS-75 was left behind together with the other soldiers. For about 3 hours, FWS-75 was gang-raped by at least 15 soldiers (vaginal and anal penetration and

fellatio). They sexually abused her in all possible ways. On other occasions in the headquarters, one to three soldiers, in turn, raped her.

5.4 On 2 August 1992, **DRAGOLJUB KUNARAC** took FWS-75, FWS-87, FWS-50 and D. B. to the headquarters at Ulica Osmana \ikica no. 16. Some women from the Kalinovik women's detention camp were also present. On this occasion, **DRAGOLJUB KUNARAC** and three other soldiers raped FWS-87. Several soldiers raped FWS-75 during the entire night. A Montenegrin soldier raped FWS-50 (vaginal penetration) and threatened to cut her arms and legs and to take her to church to baptise her.

5.5 On at least two occasions between 13 July and 2 August 1992, **DRAGOLJUB KUNARAC** took FWS-95 out of Partizan to the headquarters at Ulica Osmana \ikica no. 16 for the purpose of rape. The first time, **DRAGOLJUB KUNARAC** took FWS-95 to his headquarters together with two other women. He took her in a room and raped her personally. Then FWS-95 was raped by three more soldiers in this same room. The second time, after **DRAGOLJUB KUNARAC** had taken her to Ulica Osmana \ikica no. 16, FWS-95 was raped by two or three soldiers, but not by the accused himself.

5.6 By the foregoing acts and omissions in relation to the witnesses FWS-50, FWS-75, FWS-87, FWS-95, and the other women specified above, described in paragraphs 5.1 to 5.5, **DRAGOLJUB KUNARAC** committed:

#### **COUNT 1**

(Torture)

**Count 1:** Torture, a **CRIME AGAINST HUMANITY** punishable under Article 5 (f) of the Statute of the Tribunal.

#### **COUNT 2**

(Rape)

**Count 2:** Rape, a **CRIME AGAINST HUMANITY** punishable under Article 5 (g) of the Statute of the Tribunal.

#### **COUNT 3**

(Torture)

**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)

**Count 4:** Rape, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal.

**COUNTS 5 to 8**  
**Rape of FWS-48**

6.1 On or around 13 July 1992, **DRAGOLJUB KUNARAC** took FWS-48 and two other women to the Hotel Zelengora. FWS-48 refused to go with him and **DRAGOLJUB KUNARAC** kicked her and dragged her out. At Hotel Zelengora, FWS-48 was placed in a separate room and **DRAGOLJUB KUNARAC** and ZORAN VUKOVI], a local military commander, raped her (vaginal penetration and fellatio). Both perpetrators told her that she would now give birth to Serb babies.

6.2 On or around 18 July 1992, GOJKO JANKOVI], the military commander of another local unit, took FWS-48, FWS-95 and another woman to a house near the bus station. From there, **DRAGOLJUB KUNARAC** took FWS-48 to another house in the Donje Polje neighbourhood where he raped her (vaginal penetration and fellatio).

6.3 By the foregoing acts and omissions in relation to the witness FWS-48, described in paragraphs 6.1 and 6.2, **DRAGOLJUB KUNARAC** committed:

**COUNT 5**  
(Torture)

**Count 5:** Torture, a **CRIME AGAINST HUMANITY** punishable under Article 5 (f) of the Statute of the Tribunal.

**COUNT 6**  
(Rape)

**Count 6:** Rape, a **CRIME AGAINST HUMANITY** punishable under Article 5 (g) of the Statute of the Tribunal.

**COUNT 7**  
(Torture)

**Count 7:** 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 8**  
(Rape)

**Count 8:** Rape, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal.

## COUNTS 9 and 10

### Rape of FWS-87 in Karaman's House in Miljevina

7.1 On or about 2 August 1992, **DRAGOLJUB KUNARAC**, together with Pero Elez, the military commander of a Serb unit based in Miljevina, municipality of Foča, transferred FWS-75, FWS-87 and two other women from Partizan to Miljevina, where they were detained in an abandoned Muslim house called Karaman's house, a place maintained by PERO ELEZ and his soldiers.

7.2 Sometime in either September or October 1992, **DRAGOLJUB KUNARAC** visited Karaman's house and raped FWS-87 ( vaginal penetration ).

7.3 By the foregoing acts in relation to the witness FWS-87, described in paragraphs 7.1 and 7.2, **DRAGOLJUB KUNARAC** committed:

## COUNT 9

(Rape)

**Count 9:** Rape, a **CRIME AGAINST HUMANITY** punishable under Article 5 (g) of the Statute of the Tribunal.

## COUNT 10

(Rape)

**Count 10:** Rape, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal.

## COUNTS 11 to 13

### Rape of FWS-183 and ~~Plunder of Property~~

8.1. One night in mid-July 1992, **DRAGOLJUB KUNARAC**, together with two of his soldiers, accused the witness FWS-183 of sending messages out over radio. They looted the witness' apartment and took her to the banks of the Cehotina river in Foča near Vele-evo. There, the accused questioned the witness about the money and gold she and other Muslims in her apartment were keeping. During the questioning, the witness was threatened with death and that her son would be slaughtered. After the threats, the witness was raped vaginally by all three soldiers. During the rapes, **DRAGOLJUB KUNARAC** humiliated the witness by saying that they (the soldiers) would never know whose son this was. After returning the witness to her apartment, the accused robbed her of all the gold and money she had hidden.

8.2 By the foregoing acts in relation to the witness FWS-183, described in paragraph 8.1, **DRAGOLJUB KUNARAC** committed:

## COUNT 11

(Torture)

**Count 11:** 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 12**  
(Rape)

**Count 12:** Rape, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal.

~~**COUNT 13**  
(Plunder)~~

~~**Count 13:** Plunder of private property, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 (e) of the Statute of the Tribunal.~~

**COUNTS 14 to 17**  
**Enslavement and Rape of FWS-101**

9.1 On 2 August 1992, in the presence of officials of the Kalinovik municipality, **DRAGOLJUB KUNARAC**, together with Pero Elez and some of their soldiers, took FWS-101, FWS-186, FWS-191 and 5 other young girls and women from the Primary School in Kalinovik and drove them to **DRAGOLJUB KUNARAC**'s headquarters at Ulica Osmana \iki}a no. 16 in Fo-a. There the girls and young women, four of them from Gacko and 4 of them from Kalinovik, some of them as young as twelve and fifteen years of age, were divided among the soldiers present for the purpose of sexual assault. ~~While the other girls and women were taken away to different places the same night, FWS 101 remained in the house Ulica Osmana \iki}a no. 16.~~

9.2 ~~Between 2 August 1992 and at least 9 August 1992, FWS 101, who at that time was 7 months pregnant, was detained in **DRAGOLJUB KUNARAC**'s headquarters at Ulica Osmana \iki}a no. 16. During the entire period of her detention at this house, FWS 101 was subjected to repeated rapes. In addition to being repeatedly raped, the witness was beaten. She also had to clean the house and obey each order given to her by the accused and his subordinates. FWS 101 was treated as the personal property of **DRAGOLJUB KUNARAC** and his unit. Finally, a soldier who took pity on her, took FWS 101 to the Partizan Sports Hall, from where on 13 August 1992, she was transported to Montenegro.~~

9.3 ~~By the foregoing acts and omissions in relation to the witness FWS 101, described in paragraphs 9.1 and 9.2, **DRAGOLJUB KUNARAC** committed:~~

~~**COUNT 14**  
(Enslavement)~~

~~Count 14: Enslavement, a **CRIME AGAINST HUMANITY** punishable under Article 5 (c) of the Statute of the Tribunal.~~

~~**COUNT 15**~~

~~(Rape)~~

~~Count 15: Rape, a **CRIME AGAINST HUMANITY** punishable under Article 5 (g) of the Statute of the Tribunal.~~

~~**COUNT 16**~~

~~(Rape)~~

~~Count 16: Rape, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal.~~

~~**COUNT 17**~~

~~(Outrages Upon Personal Dignity)~~

~~Count 17: Outrages upon personal dignity, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal.~~

**COUNTS 18 to 21**

**Enslavement and Rape of FWS-186, FWS-191 and J. G.**

10.1 On 2 August 1992, the accused **DRAGOLJUB KUNARAC**, together with his deputy "GAGA" and GOJKO JANKOVI], the commander of another Fo-a unit, took FWS-186, FWS-191 and J. G. from the house Ulica Osmana \iki}a no. 16 to the abandoned house of Halid ^edi} in Trnova-e. There the men divided the girls among themselves and raped them the same night. On that occasion, **DRAGOLJUB KUNARAC** raped FWS-191.

10.2 FWS-186 and FWS-191 were kept in this house for approximately 6 months, while J. G. was transferred to Karaman's house in Miljevina for the purpose of rape. During the entire time of her detention in Trnova-e, GOJKO JANKOVI] constantly raped FWS-186, while for at least two months, the accused **DRAGOLJUB KUNARAC** constantly raped FWS-191. Eventually, another soldier protected FWS-191 against further rapes. After 6 months this soldier took both witnesses away from the house.

10.3 FWS-186 and FWS-191 were treated as the personal property of **DRAGOLJUB KUNARAC** and GOJKO JANKOVI]. In addition to the rapes and other sexual assaults, FWS-186 and FWS-191 had to do all household chores and obey all demands.

10.4 By the foregoing acts and omissions in relation to the witnesses FWS-186, FWS-191 and J.G. described in paragraphs 10.1 to 10.3, **DRAGOLJUB KUNARAC** committed:

**COUNT 18**  
(Enslavement)

**Count 18:** Enslavement, a **CRIME AGAINST HUMANITY** punishable under Article 5 (c) of the Statute of the Tribunal.

**COUNT 19**  
(Rape)

**Count 19:** Rape, a **CRIME AGAINST HUMANITY** punishable under Article 5 (g) of the Statute of the Tribunal.

**COUNT 20**  
(Rape)

**Count 20:** Rape, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal.

**COUNT 21**  
(Outrages Upon Personal Dignity)

**Count 21:** Outrages upon personal dignity, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal.

**COUNTS 22-25**  
**Enslavement and Rape of FWS-75 and FWS-87 in the Brena Apartment**

11.1 After the accused **DRAGOLJUB KUNARAC** had transferred the witnesses FWS-75 and FWS-87 to Karaman's house on 2 August 1992, as described in paragraph 7.1, the witnesses together with seven other women were detained there until about 30 October where they had to perform household chores and were frequently sexually assaulted. On or about 30 October 1992, the witnesses FWS-75 and FWS-87 together with two other women, 20-year-old A.S., and 12-year-old A.B., were taken from Karaman's house to Fo-a by **DRAGAN ZELENOVI]**, **GOJKO JANKOVI]** and **JANKO JANJI]** and were subsequently handed over to the accused **RADOMIR KOVA^** near the centre of Fo-a close to the Ribarski fish restaurant.

11.2 **RADOMIR KOVA^** detained, between or about 31 October 1992 until December 1992 witness FWS-75 and A.B., and until February 1993 witness FWS-87 and A.S. **RADOMIR KOVA^** was in charge of an apartment in the Brena block and had taken over the two witnesses together with two other women, A.S., and A.B., whom he had received from **DRAGAN ZELENOVI]**, **GOJKO JANKOVI]** and **JANKO JANJI]**. Their situation was similar to what they had experienced in Karaman's house. They had to perform household chores and were frequently sexually assaulted, as described in paragraphs 11.3,

11.4, and 11.5. During their detention, FWS-75, FWS-87, A.S. and A.B. were also beaten, threatened, psychologically oppressed, and kept in constant fear.

11.3 FWS-75 and A.B. were detained in this apartment from about 31 October until about 20 November 1992. During that time they had to do household chores and sexually please soldiers. **RADOMIR KOVA**^ and another soldier, Jago Kostić, frequently raped them. In addition, on an unknown date during this time, **RADOMIR KOVA**^ brought Slavo Ivanović to the apartment and ordered FWS-75 to have sexual intercourse with him; when she refused, **RADOMIR KOVA**^ beat FWS-75. Around 20 November 1992, **RADOMIR KOVA**^ took FWS-75 and victim A. B. from the apartment to a house near the Hotel Zelengora. They were kept there for about twenty days, during which time they were frequently sexually assaulted by a group of unidentified Serbian soldiers who belonged to the Brane ^osović group, the same group to which **RADOMIR KOVA**^ belonged. Although the two women were no longer in the Brena apartment, **RADOMIR KOVA**^ still was in charge of them. Around 10 December 1992, FWS-75 and victim A.B. were moved from the house near Hotel Zelengora to a apartment in the Pod Masala neighbourhood of Foča. There, they stayed for about fifteen days, together with the same soldiers. FWS-75 and A.B. were frequently raped by these soldiers during those fifteen days. On about 25 December 1992, when FWS-75 and the other women were brought back to the apartment, **RADOMIR KOVA**^ sold A. B. to an unidentified soldier for 200 DM. On about 26 December 1992, FWS-75 was handed over to JANKO JANJIĆ.

11.4 FWS-87 and A.S. were detained in **RADOMIR KOVA**^'s apartment from on or about 31 October until about 25 February, 1993. During this entire time, she and A.S. were raped by **RADOMIR KOVA**^ and Jago Kostić.

11.5 On an unknown date between about 31 October 1992 and about 7 November 1992 during their detention in **RADOMIR KOVA**^'s place, FWS-75, FWS-87, A.S. and A.B. were forced to take all their clothes off and dance naked on a table, while **RADOMIR KOVA**^ watched.

11.6 On or about 25 February, 1993, FWS-87 and A.S. were sold by **RADOMIR KOVA**^ for 500 DM each to two unidentified Montenegrin soldiers, who took them to Montenegro.

11.7 By the foregoing acts and omissions, **RADOMIR KOVA**^ committed:

## **COUNT 22** (Enslavement)

**Count 22:** Enslavement, a **CRIME AGAINST HUMANITY** punishable under Article 5 (c) of the Statute of the Tribunal.

## **COUNT 23** (Rape)

**Count 23:** Rape, a **CRIME AGAINST HUMANITY** punishable under Article 5 (g) of the Statute of the Tribunal.

**COUNT 24**  
(Rape)

**Count 24:** Rape, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal.

**COUNT 25**  
(Outrages Upon Personal Dignity)

**Count 25:** Outrages upon personal dignity, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal.

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Gavin Ruxton  
Senior Legal Adviser  
for the Prosecutor

8 November 1999  
The Hague, The Netherlands

## **ANNEX V – AMENDED INDICTMENT (IT-96-23/1)**

Indictment IT-96-23/1

The Trial Chamber held in its Decision on Motion for Acquittal that the accused Zoran Vukovic had no case to answer in relation to the allegations made by Witness FWS-48 in support of COUNTS 33 through 36.<sup>1572</sup> The parts of this Indictment relevant to that Decision have been struck through.

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<sup>1572</sup> Decision on Motion for Acquittal, 3 July 2000, paras 18-26.

**THE INTERNATIONAL CRIMINAL TRIBUNAL**  
**FOR THE FORMER YUGOSLAVIA**

**CASE NO.: IT-96-23/1-PT**

**THE PROSECUTOR  
OF THE TRIBUNAL**

**AGAINST**

[redacted]  
ZORAN VUKOVI  
[redacted]

*AMENDED INDICTMENT*

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, pursuant to her authority under article 18 of the Statute of the Tribunal charges:

[redacted]  
ZORAN VUKOVI]

with CRIMES AGAINST HUMANITY and VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR, as set forth below:

**BACKGROUND**

1.1 The city and municipality of Fo-a are located south-east of Sarajevo, in the Republic of Bosnia-Herzegovina and borders Serbia and Montenegro. According to the 1991 census, the population of Fo-a consisting of 40,513 persons was 51.6 % Muslim, 45.3 % Serbian and 3.1% others. The political and military take-over of the municipality of Fo-a started with the first military actions in the town of Fo-a on 7 April 1992. The Serb forces, supported by artillery and heavy weapons, proceeded to take over Fo-a, section by section. The take-over of Fo-a town was complete by 16 or 17 April 1992. The surrounding villages continued to be under siege until mid-July 1992.

1.2 As soon as the Serb forces had taken over parts of Fo-a town, military police accompanied by local and non-local soldiers started arresting Muslim and Croat inhabitants. Until mid-July 1992 they continued to round up and arrest Muslim villagers from the surrounding villages in the municipality. The Serb forces separated men and women and unlawfully confined thousands of Muslims and Croats in various short and long-term detention facilities or kept them essentially under house arrest. During the arrests many civilians were killed, beaten or subjected to sexual assault.

1.3 The Fo-a Kazneno-popravni Dom (hereinafter KP Dom), one of the largest prison facilities in the former Republic of Yugoslavia, was the primary detention facility for men. Muslim women, children and the elderly were detained in houses, apartments and motels in the town of Fo-a or in surrounding villages, or at short and long-term detention centres such

as Buk Bijela, Fo-a High School and Partizan Sports Hall, respectively. Many of the detained women were subjected to humiliating and degrading conditions of life, to brutal beatings and to sexual assaults, including rapes.

1.4 Besides the above mentioned detention places, several women were detained in houses and apartments used as brothels, operated by groups of soldiers, mostly paramilitary. The ICRC and other organisations, unaware of these detention facilities, did not intervene. Therefore those detainees had no possibility of release or exchange.

## THE ACCUSED

2.1 [redacted]

2.2 [redacted]

2.3 ZORAN VUKOVI], son of Milojica, born on 6 September 1955 in the village of Brusna, municipality of Fo-a, was a permanent resident of Fo-a. He worked as a waiter and driver before the war. ZORAN VUKOVI] was involved in the attack on Fo-a and its surrounding villages and the arrest of civilians. He was one of the sub-commanders of the military police and a paramilitary leader in Fo-a.

2.4 [redacted]

2.5 [redacted]

## SUPERIOR AUTHORITY

3.1 [redacted]

## GENERAL ALLEGATIONS

4.1 At all times relevant to this indictment, an armed conflict existed in the Republic of Bosnia-Herzegovina in the territory of the former Yugoslavia.

4.2 At all times relevant to this indictment, the accused [was] required to abide by the laws or customs governing the conduct of war.

4.3 Unless otherwise set forth below, all acts and omissions set forth in this indictment took place between April 1992 and February 1993.

4.4 In each count charging crimes against humanity, a crime recognised by Article 5 of the Statute of the Tribunal, the acts or omissions were part of a widespread or large-scale or systematic attack against a civilian population, specifically the Muslim population of the municipality of Fo-a.

4.5 Witnesses and victims are identified in this indictment using code names or pseudonyms such as FWS-95 or initials, for example, D.B.

4.6 The accused is individually responsible for the crimes charged against [him] in this indictment, pursuant to Article 7 (1) of the Statute of the Tribunal. Individual criminal responsibility includes committing, planning, initiating, ordering or aiding and abetting in the planning, preparation or execution of any acts or omissions set forth below.

4.7 [redacted]

## THE CHARGES

### COUNTS 1-12

#### Torture and Rape at Buk Bijela

5.1 Buk Bijela refers to a settlement on a hydro-electric dam construction site on the road from Brod to Miljevina by the river Drina which was turned into a local military headquarters and barracks for Bosnian Serb forces and paramilitary soldiers after the April 1992 take-over of Fo-a and the surrounding villages. The Buk Bijela complex consisted of workers' barracks, where about 200 to 300 soldiers were barracked, and an adjoining motel. Buk Bijela was used as a temporary detention and interrogation facility for civilian women, children and the elderly who were captured in various villages in the municipality of Fo-a in July 1992.

5.2 On 3 July 1992, soldiers commanded by the accused GOJKO JANKOVI], and among them JANKO JANJI], DRAGAN ZELENOVI] and ZORAN VUKOVI], arrested a group of at least 60 Muslim women, children and a few elderly men from Trosanj and Mjesaja, and took them to Buk Bijela. After the attack on Fo-a, the villages of Trosanj and Mjesaja had offered armed resistance.

5.3 While detained at Buk Bijela for several hours, all the Muslim civilians were lined up along the river Drina and guarded by armed soldiers. They were threatened with being either killed or raped and were otherwise humiliated. The soldiers approached each detained civilian, and took him or her to the above-mentioned accused for questioning. The soldiers separated the women from their children. GOJKO JANKOVI], JANKO JANJI], DRAGAN ZELENOVI] and ZORAN VUKOVI] interrogated the women. The interrogations focused on the hiding-places of the male villagers and weapons. The accused threatened the women with murder and sexual assault if they lied. [redacted]

5.4 [redacted]

5.5 [redacted]

5.6 [redacted]

5.7 [redacted]

5.8 [redacted]

### COUNT 1

[redacted]

COUNT 2  
[redacted]

COUNT 3  
[redacted]

COUNT 4  
[redacted]

5.9 [redacted]

COUNT 5  
[redacted]

COUNT 6  
[redacted]

COUNT 7  
[redacted]

COUNT 8  
[redacted]

5.10 [redacted]

COUNT 9  
[redacted]

COUNT 10  
[redacted]

COUNT 11  
[redacted]

COUNT 12  
[redacted]

COUNTS 13-28  
Torture and Rape  
at Fo-a High School

6.1 During the occupation that followed the take-over of the town of Fo-a, the Fo-a High School, situated in the Alad`a area, functioned as a barracks for Serb soldiers, and as a short term detention facility for Muslim women, children and the elderly.

6.2 Between 3 July and about 13 July 1992, at least 72 Muslim inhabitants of the municipality of Foča were detained in two classrooms in the Foča High School, including the women, children and the elderly who had earlier been held at Buk Bijela, mentioned above. On or about 13 July 1992, all detainees were transferred from Foča High School to the Partizan Sports Hall in Foča.

6.3 At the Foča High School, the detainees were surrounded by armed Serb soldiers, who patrolled outside the Foča High School and constantly entered and left the building. There were also two armed police guards from the Foča SUP patrolling the corridor outside of the detention rooms.

6.4 Many of the female detainees were subjected to sexual abuse during their detention at the Foča High School. From the second day of their detention, every evening, groups of Serb soldiers sexually assaulted, including gang-rape, some of the younger women and girls in class-rooms or apartments in neighbouring buildings. Among them were witnesses FWS-50, FWS-75, FWS-87, FWS-95, FWS-74 and FWS-88, as set forth below. The soldiers threatened to kill the women or the women's children if they refused to submit to sexual assaults. Women who dared to resist the sexual assaults were beaten. The above mentioned groups of soldiers consisted of members of the military police. They referred to themselves "Joša's Guards", named for the local commander of the military police Jošovi}. The accused GOJKO JANKOVI], DRAGAN ZELENOVI], JANKO JANJI] and ZORAN VUKOVI] were among these groups of soldiers.

6.5 The physical and psychological health of many female detainees seriously deteriorated as a result of these sexual assaults. Some of the women endured complete exhaustion, vaginal discharges, bladder problems and irregular menstrual bleedings. The detainees lived in constant fear. Some of the sexually abused women became suicidal. Others became indifferent as to what would happen to them and suffered from depression.

6.6 On or about 6 or 7 July 1992, DRAGAN ZELENOVI] in concert with JANKO JANJI] and ZORAN VUKOVI], selected FWS-50, FWS-75, FWS-87, FWS-95 out of the group of detainees. The accused led them to another classroom where unidentified soldiers stood waiting. Then DRAGAN ZELENOVI] decided which woman should go to which man. The women were ordered to remove their clothes. FWS-95 refused to do so and JANKO JANJI] slapped her and held her at gun point. Then DRAGAN ZELENOVI] raped FWS-75 (vaginal penetration). ZORAN VUKOVI] raped FWS-87 (vaginal penetration) and JANKO JANJI] raped FWS-95 (vaginal penetration) within the same room. One of the other soldiers took FWS-50 to another classroom and raped her (vaginal penetration).

6.7 Between or about 8 July and about 13 July 1992, in addition to the sexual assaults described under paragraph 6.6, on at least five other occasions DRAGAN ZELENOVI] led a group of soldiers that sexually abused FWS-75 and FWS-87. First the women were taken into another classroom in the Foča High School. There ZORAN VUKOVI] and DRAGAN ZELENOVI] raped FWS-75 and FWS-87 (vaginal penetration).

6.8 [redacted]

6.9 [redacted]

6.10 [redacted]

6.11 [redacted]

6.12 [redacted]

6.13 [redacted]

6.14 [redacted]

COUNT 13  
[redacted]

COUNT 14  
[redacted]

COUNT 15  
[redacted]

COUNT 16  
[redacted]

6.15 [redacted]

COUNT 17  
[redacted]

COUNT 18  
[redacted]

COUNT 19  
[redacted]

COUNT 20  
[redacted]

6.16 By the foregoing acts and omissions in relation to the victims FWS-50, FWS-95, FWS-75 and FWS-87, ZORAN VUKOVI] committed:

COUNT 21  
(Torture)

Count 21: Torture, a CRIME AGAINST HUMANITY punishable under Article 5 (f) of the Statute of the Tribunal.

COUNT 22  
(Rape)

Count 22: Rape, a CRIME AGAINST HUMANITY punishable under Article 5 (g) of the Statute of the Tribunal.

COUNT 23  
(Torture)

Count 23: 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 24  
(Rape)

Count 24: Rape, a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable under Article 3 of the Statute of the Tribunal.

6.17 [redacted]

COUNT 25  
[redacted]

COUNT 26  
[redacted]

COUNT 27  
[redacted]

COUNT 28  
[redacted]

COUNTS 29-44

Torture and Rape of FWS-48, FWS-50, FWS-75, FWS-87, FWS-95 and other women at Partizan Sports Hall

7.1 Partizan Sports Hall ("Partizan") functioned as a detention centre for women, children and the elderly from at least on or about 13 July 1992 until at least 13 August 1992. The detainees held at Partizan, during this time period, numbered at least 72. The detainees were all civilian Muslim women, children and a few elderly persons from villages in the municipality of Fo-a.

7.2 Partizan was a medium-sized building situated in the centre of Fo-a town close to the Fo-a police ("SUP") building. Partizan was separated from the SUP building by about seventy metres. Partizan was on slightly higher ground than the other buildings in the neighbourhood and could therefore be seen clearly from the surrounding areas, including the SUP building. Partizan was also close to the main municipal building, where the Serb authorities had their principle offices. Partizan consisted of two large halls. All detainees were held in one of the halls only. This hall measured roughly 12 metres by 7 metres.

7.3 Two policemen were stationed as guards outside the main door of Partizan. The guards, who were subordinate to the chief of the SUP were armed at all times with automatic weapons. People who entered Partizan had to pass the guards on their way into the halls. Detainees could not leave Partizan because of the armed guards.

7.4 Living conditions in Partizan were brutal. The detention was characterised by inhumane treatment, unhygienic facilities, overcrowding, starvation, physical and psychological torture, including sexual assaults.

7.5 Immediately after the transfer of women to Partizan, a pattern of sexual assaults commenced. Armed soldiers, mostly in groups of three to five, entered Partizan, usually in the evenings, and removed women. When the women resisted or hid, the soldiers beat or threatened the women to force them to obey. The soldiers took the women from Partizan to houses, apartments or hotels for the purpose of sexual assault and rape.

7.6 Three witnesses, identified by the pseudonyms FWS-48, FWS-95 and FWS-50, a 16 year old girl, were detained at Partizan from about 13 July until 13 August 1992. Two others, identified by the pseudonyms FWS-75 and FWS-87, a 15 year old girl, were detained in Partizan from about 13 July until 2 August 1992. Almost every night during their detention, Serb soldiers took FWS-48, FWS-95, FWS-50, FWS-75 and FWS-87 out of Partizan and sexually abused them (vaginal and anal penetration and fellatio).

7.7 On or around 13 August 1992, most detainees were released from Partizan and deported to Montenegro. The women who left on the 13 August convoy received medical care for the first time in Montenegro. Many women suffered permanent gynaecological harm due to the sexual assaults. At least one woman can no longer have children. All the women who were sexually assaulted suffered psychological and emotional harm; some remain traumatised.

7.8 [redacted]

7.9 ~~The same night [on or around 13 July 1992], after JANKO JANJI] returned the women to Partizan, Dragoljub Kunarac took the same three women to the Hotel Zelengora. FWS 48 refused to go with him and Dragoljub Kunarac kicked her and dragged her out. At Hotel Zelengora, FWS 48 was placed in a separate room and both Dragoljub Kunarac and ZORAN VUKOVI] raped her (vaginal penetration and fellatio). Both perpetrators told her that she would now give birth to Serb babies.~~

7.10 On or around 14 July 1992, JANKO JANJI] again took FWS-48 together with FWS-87 and Z. G. to the Brena apartment block near Hotel Zelengora. When they arrived, ZORAN VUKOVI] and an unidentified soldier were waiting. ~~Then, ZORAN VUKOVI], raped FWS 48 (vaginal penetration) while~~ the unidentified soldier raped FWS-87 (vaginal penetration) and JANKO JANJI] raped Z. G.

7.11 On or around 14 July 1992, ZORAN VUKOVI] came to Partizan to remove FWS-50 and FWS-87. As FWS-50 hid, ZORAN VUKOVI] threatened to kill the other detainees if she did not come out of hiding. FWS-50 then did so. The two girls were taken to an apartment close to Partizan, where an unidentified soldier stood waiting. There ZORAN VUKOVI] raped FWS-50 (vaginal penetration), while the unidentified soldier raped FWS-87.

7.12 [redacted]

7.13 In July 1992, witness FWS-87 was frequently taken out, and raped (vaginal and anal penetration and fellatio). On one occasion witness FWS-87 was gang-raped by 4 men including DRAGAN ZELENOVI] and ZORAN VUKOVI].

7.14 [redacted]

~~7.15 On or around 15 July 1992, GOJKO JANKOVI] led FWS 48 to an empty Muslim house in the Alad`a neighbourhood. When FWS 48 arrived, about 14 Montenegrin soldiers were already present. DRAGAN ZELENOVI] then arrived with about 8 more soldiers, among them ZORAN VUKOVI]. DRAGAN ZELENOVI] took FWS 48 to a room and threatened to slash her throat if she resisted. Then, DRAGAN ZELENOVI] raped FWS 48 (vaginal penetration and fellatio) together with at least other 7 soldiers. ZORAN VUKOVI] was the 6th man who raped her. During the sexual assault, ZORAN VUKOVI] bit her nipples a number of times. Although the witness was bleeding from these bites, the 7th man squeezed and pinched her breasts as he raped her. FWS 48 fainted as a result of the pain.~~

7.16 [redacted]

7.17 [redacted]

~~7.18 The same night [on or around 23 July 1992], after being taken back to Partizan, JANKO JANJI] took FWS 48, together with two other women, to the Brena apartment block, where ZORAN VUKOVI] and a certain Panto were already waiting. Panto raped FWS 48 (vaginal penetration). She heard ZORAN VUKOVI] and JANKO JANJI], at the same time, sexually assaulting the other women in the next room.~~

7.19 [redacted]

7.20 [redacted]

~~7.21 After midnight, on the same night [12 August 1992], JANKO JANJI] took FWS 48 together with other women to the Brena apartments. While leaving Partizan, a group of soldiers approached the women and tried to pull them away. JANKO JANJI] told these soldiers that he needed these women for his own people and that they should go into Partizan and find other women. ZORAN VUKOVI] and Panto joined them at the Brena apartments. That night, JANKO JANJI] raped FWS 48. During the sexual assault, he mentioned that it would be the last time.~~

7.22 [redacted]

7.23 [redacted]

COUNT 29  
[redacted]

COUNT 30  
[redacted]

COUNT 31  
[redacted]

COUNT 32  
[redacted]

7.24 By the foregoing acts and omissions in relation to the victims ~~FWS-48~~, FWS-50 and FWS-87, ZORAN VUKOVI] committed:

COUNT 33  
(Torture)

Count 33: Torture, a CRIME AGAINST HUMANITY punishable under Article 5 (f) of the Statute of the Tribunal.

COUNT 34  
(Rape)

Count 34: Rape, a CRIME AGAINST HUMANITY punishable under Article 5 (g) of the Statute of the Tribunal.

COUNT 35  
(Torture)

Count 35: 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 36  
(Rape)

Count 36: Rape, a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable under Article 3 of the Statute of the Tribunal.

7.25 [redacted]

COUNT 37  
[redacted]

COUNT 38  
[redacted]

COUNT 39  
[redacted]

COUNT 40  
[redacted]

7.26 [redacted]

COUNT 41  
[redacted]

COUNT 42  
[redacted]

COUNT 43  
[redacted]

COUNT 44  
[redacted]

COUNTS 45-48  
[redacted]

8.1 [redacted]

8.2 [redacted]

8.3 [redacted]

8.4 [redacted]

8.5 [redacted]

8.6 [redacted]

8.7 [redacted]

8.8 [redacted]

COUNT 45  
[redacted]

COUNT 46  
[redacted]

COUNT 47  
[redacted]

COUNT 48  
[redacted]

COUNT 49 - 50  
[redacted]

9.1 [redacted]

9.2 [redacted]

9.3 [redacted]

COUNT 49  
[redacted]

COUNT 50  
[redacted]

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Carla Del Ponte  
Prosecutor

Dated this 5<sup>th</sup> day of October 1999  
At The Hague  
The Netherlands