ANNEX A

AUTHORITY 41

UNITED NATIONS

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

IN THE APPEALS CHAMBER

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

Registrar: **Mr. Hans Holthuis**

Judgement of: **12 June 2002**

PROSECUTOR
V
DRAGOLJUB KUNARAC
RADOMIR KOVAC
AND
ZORAN VUKOVIC

JUDGEMENT

Counsel for the Prosecutor:

Mr. Anthony Carmona
Ms. Norul Rashid
Ms. Susan Lamb
Ms. Helen Brady

Counsel for the Accused:

Mr. Slavi{a Prodanovic and Mr. Dejan Savatic for the accused Dragoljub Kunarac
Mr. Momir Kolesar and Mr. Vladimir Rajic for the accused Radomir Kovac
Mr. Goran Jovanovic and Ms. Jelena Lopicic for the accused Zoran Vukovic

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

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

B. Discussion

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

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

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

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

---

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

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

[88] Appeal Transcript, T 222.

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

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

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

2. Legal Requirement of an "attack"

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

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

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

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

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

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

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

---

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

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

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

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

3. The Attack must be Directed against any Civilian Population

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

---

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

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

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

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

4. The Attack must be Widespread *or* Systematic

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

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

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

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

6. *Mens rea* for Crimes against Humanity

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

---

[117] The issue of *mens rea* is dealt with below, see paras 102-105.

[118] *Kupreškic* Trial Judgement, para 550.

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

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

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

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

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

---

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

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

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

1. Submissions of the Parties

(a) The Appellants (Kunarac and Kova~)

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

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

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

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

---

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

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

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

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

(b) The Respondent

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

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

---

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

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

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

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

2. Discussion

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

---

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

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

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

B. Definition of the Crime of Rape

1. Submissions of the Parties

(a) The Appellants

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

(b) The Respondent

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

---

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

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

2. Discussion

(a) The Definition of Torture by the Trial Chamber

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

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

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

---

[191] *Ibid.*

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

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

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

[195] Trial Judgement, para 497.

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

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

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

[199] *Furund`ija* Appeal Judgement.

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

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

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

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

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

---

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

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

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

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

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

(b) The Requirement of Pain and Suffering

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

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

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

---

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

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

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

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

AND

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

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

D. Enforcement of Sentences

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

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

(signed)
Claude Jorda
Presiding

(signed)
Mohamed Shahabuddeen

(signed)
Wolfgang Schomburg

(signed)
Mehmet Güney

(signed)
Theodor Meron

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

?Seal of the Tribunalg