

PROSECUTOR v. DRAGOLJUB KUNARAC, ET AL.
Case No. IT-96-23-T & IT-96-23/1-T
International Criminal Tribunal for the Former Yugoslavia
Trial Chamber Judgment
February 22, 2001

Judges:

Judge Florence Ndepele Mwachande Mumba
Judge David Hunt
Judge Fausto Pocar

Prosecution:

Mr. Dirk Ryneveld
Mrs. Hildegard Uertz-Retzlaff
Ms. Peggy Kuo
Mr. Daryl Mundis

Defense:

Mr. Stavića Prodanovic and Ms. Maja Pilipovic
for the accused Dragoljub Kunarac;

Mr. Momir Kolesar and Mr. Vladimir Rajic
for the accused Radomir Kovac;

Mr. Goran Jovanovic and Ms. Jelena Lopovic
for the accused Zoran Vukovic

Gender Keyword(s): Consent; Corroboration; Credibility or Character of the Victim; Detention Centers; Enslavement; Gang Rape; Household Duties; Outrages Upon Personal Dignity; Penis; Rape; Rape, Systematic; Rape, Torture; Rape, Physical and Mental Harm; Sexual Exploitation; Torture, Rape for a Discriminatory Purpose

Procedural History: On June 26, 1996, the International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed an indictment against Dragoljub Kunarac, Radomir Kovać, Zoran Vuković, and five other accused (¶ 891). The indictment charged the accused with 62 counts of crimes against humanity, war crimes, and grave breaches of the Geneva Conventions for alleged acts they committed in the context of the Serb political and military takeover of the city of Foča in Bosnia-Herzegovina in April of 1992.¹ On March 4, 1998, Dragoljub Kunarac surrendered to the ICTY and on March 9, 1998, he made his initial appearance at which he pled guilty to one count of rape as a crime against humanity and not guilty to the remaining charges, which included numerous counts of rape as a crime against humanity, torture as a crime against humanity, torture as a grave breach of the Geneva Conventions, and torture as a war crime, as well as persecution as a crime against humanity, willfully causing great suffering as a grave breach, enslavement as a crime against humanity, inhuman treatment as a grave breach, and

¹ *Prosecutor v. Gagovic, et al.*, Indictment of June 26, 1996, ¶¶ 1.1-12.6.

outrages upon personal dignity as a war crime (¶ 892).² On March 13, 1998, the Chamber questioned Kunarac and concluded that his guilty plea did not satisfy the rules because, *inter alia*, Kunarac did not believe that his criminal conduct was part of a widespread and systematic attack on the Muslim population.³ As a result, Kunarac withdrew his guilty plea, and the Chamber entered a plea of not guilty to the charge of rape as a crime against humanity on his behalf.⁴ On August 19, 1998, the Trial Chamber confirmed an amended indictment of July 13, 1998, that concerned only the charges against Kunarac, removed the charge of torture as a grave breach of the Geneva Conventions, and added charges of rape, plunder of private property, and outrages upon personal dignity as war crimes and enslavement as a crime against humanity (¶ 895).⁵ On August 28, 1998, Kunarac appeared before the Tribunal and pled not guilty to all of the new charges (*id.*). On August 2, 1999, Radomir Kovać was arrested, and on August 4, 1999, he made his initial appearance before the ICTY and pled not guilty to all of the charges of the original indictment, including rape and enslavement as crimes against humanity (¶ 901). On September 3, 1999, a second amended indictment was confirmed that merged the two cases and added charges of rape and outrages upon personal dignity as war crimes against Kovać (¶ 902). On September 24, 1999, Kunarac and Kovać pled not guilty to all of the charges of the second amended indictment (*id.*). On December 1, 1999, a third amended indictment was confirmed, which was filed in response to a Trial Chamber order directing the Prosecutor to clarify several issues in the indictment relating to allegations of sexual assaults (¶ 904).⁶ On December 23, 1999, Zoran Vuković was arrested, and he made his initial appearance before the Tribunal on December 29, 1999, wherein he pled not guilty to the charges of rape and torture as crimes against humanity and war crimes (¶ 907). On February 10, 2000, Vuković requested his case be joined with the Kunarac and Kovać case, and a redacted indictment relating only to Vuković was confirmed on February 16, 2000 (¶ 909).⁷

The third amended indictment alleged that in the context of the take-over of Foča in April of 1992, Serb soldiers and military police arrested and relocated Muslim and Croat residents to detention facilities, including Foča Kazneno-popravani Dom (KP Dom), Buk Bijela, Foča High School, and Partizan Sports Hall.⁸ The indictment alleged that the conditions at the detention centers were brutal, and many detainees were humiliated, beaten, tortured, sexually assaulted, or killed by Serb forces.⁹ The indictment alleged further that some women were also taken out of the detention centers, raped in other locations, and kept in houses and apartments for extended periods of time where they were repeatedly raped by soldiers.¹⁰

The third amended indictment alleged that from around June 1992 to February 1993, Kunarac was headquartered in Foča as the commander of a special reconnaissance unit for the Bosnian Serb Army with 10 to 15 soldiers under his command (¶ 3). Kunarac allegedly participated in

² *Id.* ¶ 9.23.

³ *Kunarac case: Trial Chamber enters a not-guilty plea for the accused*, Press Release CC/PIO/303-E, <http://www.icty.org/sid/7682> of March 13, 1998.

⁴ *Id.*

⁵ *Prosecutor v. Kunarac*, Amended Indictment, July 13, 1998, ¶¶ 5.6, 6.3, 7.3, 8.2, 9.3, 10.4.

⁶ *Prosecutor v. Kunarac, et al.*, Decision on the Form of the Indictment, November 4, 1999.

⁷ *Prosecutor v. Vukovic*, Amended Indictment, October 5, 1999.

⁸ *Prosecutor v. Kunarac and Kovac*, Third Amended Indictment, November 8, 1999, ¶¶ 1.1-1.3.

⁹ *Id.* ¶¶ 1.2, 1.3, 1.5, 1.8, 5.1.

¹⁰ *Id.* ¶¶ 5.2-11.7.

frequent rapes and sexual assaults of female Muslim detainees at his headquarters in Ulica Osmana Dikica no. 16, Hotel Zelegnora, and Donje Polje (¶¶ 4-5). Kunarac also allegedly transferred women to a house in Miljevina, where they were forced to perform household chores and were frequently sexually assaulted by him and others; interrogated and raped a woman suspected of sending messages over the radio to Muslim rebels; and detained three women in an abandoned house in Trnovace for approximately six months, during which time he subjected the women to constant rape and sexual assault, and forced them to perform household chores (¶¶ 6-9). These allegations supported 21 counts of rape and torture as crimes against humanity and war crimes, enslavement as a crime against humanity, and outrages upon personal dignity as a war crime (¶¶ 4-8). The third amended indictment also alleged that Kovać, a sub-commander of the military police and a paramilitary leader, detained four Muslim women and girls (including a 12-year-old girl and a 15-year-old girl) for several months in various locations, during which time he subjected them to frequent rapes and beatings, and forced them to perform household chores (¶¶ 9, 42, 864, 874). On one occasion, Kovać allegedly forced the women and girls to dance naked on a table while he and others watched (¶ 9). The indictment alleged that Kovać ultimately sold two of the women to other soldiers (*id.*). These allegations supported four counts of rape and enslavement as crimes against humanity and rape and outrages upon personal dignity as war crimes (*id.*). The amended indictment against Vuković alleged that he was among a group of soldiers who routinely beat, raped, and sexually assaulted female Muslim detainees at Foča High School (¶¶ 10-11, 795-98). Vuković was also allegedly involved in a pattern of nightly rapes and sexual assaults of female detainees from Partizan Sports Hall (¶¶ 811-14). These allegations supported eight counts of rape and torture as crimes against humanity and war crimes (¶¶ 10-11).

On March 20, 2000, the trial of Kunarac, Kovać, and Vuković began (¶ 913). On April 3, 2000, the Chamber granted the Prosecutor's request to withdraw the charges against Kunarac and Kovać for enslavement and rape as crimes against humanity and war crimes relating to witness FWS-101 (¶ 915). On July 2, 2000, the Chamber granted in part the Defense's motion for acquittal as it found that Vuković did not have to answer to the allegations of rape supporting several counts because "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 Vuković who raped witness FWS 148'" (¶ 916). In response to the same motion, the Chamber also acquitted Kunarac of the sole count of plunder of private property as a war crime (*id.*). On November 22, 2000, trial on the remaining charges concluded (¶ 927). This is a digest of the Trial Chamber's judgment.

Disposition: The Trial Chamber finds Kunarac guilty of torture, enslavement, and multiple counts of rape as crimes against humanity, as well as multiple counts of rape and torture as war crimes (¶ 883). The Trial Chamber acquits Kunarac of several other counts of torture and rape as crimes against humanity, as well as war crimes of torture, rape, outrages upon personal dignity, and plunder (¶ 884). The Chamber sentences Kunarac to a single sentence of 28 years of imprisonment (¶ 885). The Chamber finds Kovać guilty of rape and enslavement as crimes against humanity and rape and outrages upon personal dignity as war crimes (¶ 886). The Chamber sentences Kovać to a single sentence of 20 years of imprisonment (¶ 887). The Chamber finds Vuković guilty of rape and torture as crimes against humanity and rape and

torture as war crimes (¶ 888). Vuković is acquitted of other counts of rape and torture as crimes against humanity and rape and torture as war crimes (¶ 889). The Chamber sentences Vuković to a single sentence of 12 years of imprisonment (¶ 890).

Key Gender-Based Holdings:

CONSENT:

- All three of the accused were charged with rape as a crime against humanity and as a war crime. The Trial Chamber looks at previous ICTY jurisprudence, as well as national legal systems to define rape, explaining: “[T]he Trial Chamber in the *Furundzija* 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 *Furundzija* 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 *Furundzija* judgement itself.” (¶¶ 440-41). “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
- (iii) the sexual activity occurs without the consent of the victim” (¶ 442).

“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” (¶ 453). “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. 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” (¶¶ 457-58). “[T]he 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 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” (¶ 460).

- The Trial Chamber also considers the issue of consent in the context of Rule 96 of the ICTY’s Rules of Procedure and Evidence, which provides in relevant part: “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” (¶ 462).

The Trial Chamber finds that this Rule does not make consent an affirmative defense that must be proven by the accused, but rather “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” (¶ 463). It continues: “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” (*id.*).

- The Trial Chamber considers the issue of consent with regard to Kunarac’s alleged rape of witness D.B. because Kunarac did not deny having sexual intercourse with D.B., but stated that he did not know she did not have sex with him of her own free will and only complied out of fear (¶ 644). D.B. testified that another soldier had threatened to kill her if she did not satisfy Kunarac and for that reason she 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” (*id.*). The Trial Chamber accepts D.B.’s testimony that she had been threatened and “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” (¶¶ 645-46). Regardless of whether or not Kunarac heard the soldier threaten D.B., “[the] Trial Chamber is satisfied that D.B. did not freely consent to any sexual intercourse with Kunarac” and

that Kunarac had sexual intercourse with D.B. “in the full knowledge that she did not freely consent” (¶¶ 646-47)

- Additionally, the Trial Chamber finds that all three accused forced victims to engage in sexual intercourse with full knowledge that they did not consent, and convicts each of them of rape as a crime against humanity and as a war crime (¶¶ 646, 647, 653, 670, 684, 701, 724, 759, 761, 817, 883, 886, 888).

CORROBORATION:

- The Chamber notes that ICTY 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” (¶ 566). The Chamber submits that often in cases of rape, “only one witness has given evidence of that incident, usually because she has been the only person present other than the particular accused” and that 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” (*id.*)

CREDIBILITY OR CHARACTER OF THE VICTIM:

- The Chamber notes that it has “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” (¶ 562). The Chamber further notes that it has not placed any probative weight on in-court identifications as it feels that the circumstances of the trial necessarily lead a witness to identify the person currently on trial (*id.*). However, due to the traumatic nature of the alleged events, the Chamber does not generally treat minor discrepancies in witness testimony as discrediting the value of their evidence when the witness “has nevertheless recounted the essence of the incident charged in acceptable detail” (¶ 564). Rather, “the Trial Chamber recognises the difficulties which survivors of such traumatic events have in remembering every particular detail and 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” (¶ 679). Nevertheless, where the Trial Chamber finds that witnesses were unable to recall each of the alleged rapes or to reliably identify the accused who committed them, the Trial Chamber finds some witnesses credible yet unreliable and acquits the accused of the relevant charges (¶¶ 690-93, 787).

DETENTION CENTERS:

- The Chamber finds that during the takeover, Bosnian Serb forces targeted Muslim civilians and placed many in detention facilities (¶¶ 573, 577). Women were kept in unhygienic conditions and subjected to physical and sexual assault by Serb soldiers (¶ 574). Some of the detained women were also taken to private apartments, hotels, and houses for the purposes of rape and were also forced to perform household chores (*id.*). As discussed below in the sections on “Enslavement,” “Outrages Upon Personal Dignity,” and “Rape,” these are among the facts supporting the charges and convictions for rape and torture as war crimes and crimes against humanity, outrages upon personal dignity as a war crime, and enslavement as a crime against humanity.

ENSLAVEMENT:

- The Chamber notes that the Statute of the ICTY does not define “enslavement,” and therefore it derives its understanding of the elements of the crime from “various sources that deal with the same of similar subject matter, including international humanitarian law and human rights law” (¶ 518). After reviewing a range of sources, the Chamber ultimately defines the crime of enslavement as a crime against humanity as “the [intentional] exercise of any or all of the powers attaching to the right of ownership over a person” (¶ 540).
- Kunarac and Kovać were both charged and convicted of enslavement as a crime against humanity for their participation in the following events (¶¶ 8-9):
 - **Enslavement of FWS-186 and FWS-191 in Trnovace (Kunarac):** As described below in the section on “Rape,” Kunarac detained FWS-186 and FWS-191 in a house in Trnovace for approximately five to six months, subjecting them to frequent sexual assault, and forcing them to perform household chores (¶¶ 735-740, 744). The Chamber finds that “FWS-191 and FWS-186 were treated as personal property, denied any control over their lives,” and that despite the fact that they had keys to the house where they were kept, they “had no realistic option whatsoever to flee the house in Trnovace or to escape their assailants” (¶ 740, 742). Additionally, Kunarac invited a soldier to the house to rape the women in exchange for money (¶ 742). These facts support the charge and conviction of Kunarac for enslavement as a crime against humanity (¶ 745).
 - **Enslavement and Rape of FWS-75 and FWS-87 in the Brena Apartment: (Kovać):** As described below in the section on “Rape,” Kovać confined FWS-87, FWS-75, A.S., and A.B. to his apartment in Brena for periods of time of up to four months, where they were subjected to humiliation, beatings, and constant sexual abuse (¶¶ 746-65). Kovać neglected their diet by leaving only left-over food for the women to eat or keeping them locked in the apartment with insufficient food (¶ 752). The Chamber finds that the women were “psychologically unable to leave” for fear of punishment and because they had nowhere to go (¶ 750). It also finds that Kovać deprived the women of their “freedom of movement” and “had complete control over their movement, privacy and labour” (¶ 780). Furthermore, Kovać sold two of the women to Montenegrin soldiers (¶ 779). Based on this evidence, the Trial Chamber convicts Kovać of enslavement as a crime against humanity (¶ 782).

GANG RAPE:

- In its judgment, the Chamber uses the term “gang rape” to describe rapes committed against witness FWS-75, including one incident in which she was raped by approximately 15 soldiers (¶¶ 648-53). The Chamber finds that Kunarac took FWS-75 to his headquarters for the purpose of rape and was aware that she was being sexually assaulted by others during this time (¶ 651). These facts support the charges and conviction of Kunarac for rape and torture as both crimes against humanity and war crimes both as a principal perpetrator and in aiding and abetting rapes perpetrated by the other soldiers (¶ 656).

HOUSEHOLD DUTIES:

- As noted above under “Enslavement,” the Trial Chamber finds that some of the women detained in Foča were taken to private apartments, hotels, and houses to be sexually abused and forced to perform household chores for up to six months (¶¶ 574, 735, 740, 744). The Chamber finds that the women detained by Kunarac in the Trnovace house were not free to leave and did everything they were ordered to do out of fear of punishment (¶ 740). This finding supports Kunarac’s conviction for enslavement as a crime against humanity (¶ 745).
- The Trial Chamber also finds that Kovać kept girls and women in his apartment for up to four months where he forced them to cook and do household chores for him; this evidence supports the Chamber’s conviction of Kovać for enslavement as a crime against humanity (¶¶ 747, 780, 782).

OUTRAGES UPON PERSONAL DIGNITY:

- The Chamber notes that “the precise elements of the offence of outrages upon personal dignity have not been the subject of a definitive statement by the Appeals Chamber” (¶ 499). Drawing in large part from the ICTY Appeals Chamber judgment in *Aleksovski*, it ultimately defines the *actus reus* of the crime 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” (¶ 507). The crime also requires that the accused know that “[his act or omission] could cause serious humiliation, degradation, or affront to human dignity” but it is not necessarily required that the accused be aware of the “*actual* consequences of the act” (¶ 512) (emphasis in original). However, the Chamber notes that “the question of knowledge of the *nature* of the act is unlikely to be of great significance” because once the *actus reus* has been met “it would be rare that a perpetrator would not also know that the act could have that effect” (¶ 513) (emphasis in original). Kovać and Kunarac were both charged with outrages upon personal dignity as a war crime for their participation in the following events (¶¶ 8-9):
 - **Forced Naked Dancing of Detained Women (Kovać):** The third amended indictment charged Kovać with outrages against personal dignity as a war crime for forcing several detained women to dance naked on a table while he and other soldiers watched.¹¹ At trial, FWS-87 and A.S. testified about this occasion in which Kovać forced the women to dance naked on a table while he and another soldier watched from the sofa and pointed weapons at them (¶¶ 768-69). Although there were discrepancies in testimony as to how many women danced and which soldiers watched, the Chamber is satisfied that the incident has been proven beyond a reasonable doubt (¶¶ 767-72). It finds that Kovać “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” (¶ 773). The Chamber finds that 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” (¶ 774). The Chamber finds that this factor was met in this case and these findings support the Chamber’s conviction of Kovać for outrages upon personal dignity as a war crime (¶¶ 774, 782).

¹¹ *Prosecutor v. Kunarac et al.*, Amended Indictment, November 8, 1999, ¶ 11.5.

- **Sale of FWS-87, FWS-75, A.B., and A.S. (Kovać):** The third amended indictment alleged that after detaining and subjecting the women to months of abuse, Kovać sold FWS-87, FWS-75, A.B., and A.S. to other soldiers (¶¶ 754-56, 779).¹² The Chamber finds that Kovać sold FWS-75 and A.B. to two men after detaining and mistreating them for an extended period of time (¶¶ 754-56). It notes that that “this sexual exploitation of A.B. and FWS-75, in particular their sale, constitutes a particularly degrading attack on their dignity” (¶ 756). The Chamber also finds that Kovać sold FWS-87 and A.S. to two Montenegrin soldiers for 500 Deutchmarks each (¶ 779). A.S. testified that afterward the soldiers laughed about how they had paid for the girls with such a small amount of money as well as a truck load of washing powder (*id.*). The Chamber does not find it dispositive that there were slight discrepancies in the girl’s testimonies as to the exact amount for which the girls were sold (¶¶ 779-80). While he kept the women for several months, the Trial Chamber finds that Kovać “subjected them to degrading treatments, including beatings and other humiliating treatments” and these findings support the the Chamber’s conviction of Kovać for outrages upon personal dignity as a war crime (¶¶ 780, 782).
- **Rape and Detention of Women in Trnovace (Kunarac):** The third amended indictment charged Kunarac with outrages upon personal dignity as a war crime for his participation in the rape and detention of three women in Trnovace.¹³ As noted below in the section on “Rape,” the Chamber convicts Kunarac for rape and enslavement as crimes against humanity and rape as a war crime for his participation in these events (¶ 745). However, the Chamber does not find that there is any additional evidence upon which to convict Kunarac for outrages upon personal dignity “that is not already covered by other convictions” and therefore finds Kunarac not guilty of outrages against personal dignity as a war crime (¶¶ 743, 745).

PENIS:

- The Chamber uses the term “Penis” in its discussion of two rapes committed by Kunarac at the Cehotina River (¶¶ 342, 711). As noted in “Rape” below, the Chamber also defines rape using the term penis.

RAPE:

- The Chamber defines the elements of the crime of rape as:
 [T]he 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; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be... given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens*

¹² *Id.* ¶¶ 11.3-11.6.

¹³ *Id.* ¶¶ 10.1-10.4.

rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim (¶ 460).

- *Rape as a crime against humanity*: The Chamber notes that a violation alleged under Article 5 of the ICTY Statute must be “committed in the context of an armed conflict and as part of an attack directed against any civilian population” (¶ 410). It also notes that the attack must be “widespread or systematic” but the individual offense does not (¶ 431). It further notes that “the motives of the accused for taking part in the attack are irrelevant and that the crime against humanity may be committed for purely personal reasons” (¶ 433). All three accused were charged with rape as a crime against humanity (¶¶ 4-11). Specifically, the accused were charged relating to their participation in the following events:

- **Counts 1-4: Rapes at Ulica Osmana Dikica No. 16 (Kunarac):**

- The third amended indictment alleged that Kunarac participated in the frequent rape and sexual assault of female detainees at his headquarters in Ulica Osmana Dickica no. 16 (¶ 4). He oversaw or participated in the numerous rapes of FWS-87, FWS-95, FWS-75, D.B., and FWS-50, detailed below .
- The third amended indictment alleged that FWS-75 was vaginally, orally, and anally gang-raped and sexually abused “in all possible ways” by at least 15 soldiers at Kunarac’s headquarters.¹⁴ D.B. testified that FWS-75 appeared terrified and could barely walk upon returning to Partizan Sports Hall (¶ 651). The Chamber accepts FWS-75’s testimony that it was Kunarac who took her to the headquarters because she was able to identify the accused and several of the rapists (*id.*). The Chamber is satisfied that Kunarac must have been aware of the sexual assault on FWS-75 (*id.*).
- FWS-50 testified that she was raped at Kunarac’s headquarters “in a beast-like manner” by a Montenegrin soldier who carried a knife and threatened to use it to cut a cross on her back and baptize her (¶ 667). The Chamber accepts her testimony and finds that Kunarac took her to his headquarters with the knowledge that she would be raped (¶¶ 667, 670, 685).
- D.B. testified that Kunarac took her to a private room in his headquarters and that he was one of the four men who gang-raped her there that night (¶¶ 638-39, 644). The Chamber finds that her testimony is reliable because she satisfactorily identified Kunarac as the perpetrator, and recalled seeing him

¹⁴ *Id.* ¶ 5.3.

sitting in the living room of the headquarters with her own sister (¶¶ 638, 640). The Chamber also finds that although D.B. took an active role in undressing Kunarac and initiated sexual intercourse, she only did so out of fear for her own life because she had been threatened earlier by a lower-ranked soldier (¶¶ 644-45). Given the “existing war-time situation and the specifically delicate situation of Muslim girls detained in Partizan...,” the Chamber does not accept Kunarac’s assertion that he did not realize D.B. had not consented to sexual intercourse and finds the question of whether or not he overheard the threat to be irrelevant (¶ 646).

- The third amended indictment also alleged that Kunarac twice took FWS-95 from Partizan Sports Hall and raped her as well as allowed her to be gang-raped by other soldiers.¹⁵ Although FWS-95 was not able to identify Kunarac from a photograph before the trial, the Chamber accepts her explanation that it was the result of the poor quality of the photograph (¶ 679). However, the Chamber finds that the evidence regarding only one out of the two alleged rapes meets the burden of proof (¶¶ 680-85).
- Because she was unable to recall by whom and even if she had been raped during the time period in question, the Chamber finds that the allegations that Kunarac also raped FWS-87 were not proven beyond a reasonable doubt (¶¶ 631, 633, 685).
- These facts support the charges and conviction of Kunarac for both direct perpetration and aiding in abetting rape and torture as crimes against humanity and war crimes (¶¶ 670, 685-87).

▪ **Counts 5-8: Rape of FWS-48 at Hotel Zelengora and Donje Polje (Kunarac):**

- The third amended indictment alleged that Kunarac took FWS-48 to Hotel Zelengora, where he and co-accused Vucović vaginally and orally raped her and that several days later, he again raped her vaginally and orally at a house in the Donje Polje neighborhood.¹⁶ FWS-48 initially testified that during the rape at Hotel Zelengora, Kunarac had told her she would give birth to Serb babies; however, on cross-examination, she neither

¹⁵ *Id.* ¶ 5.5.

¹⁶ *Id.* ¶¶ 6.1-6.2.

remembered the location of the rape nor speaking to Kunarac at all (¶ 691). FWS-48 previously testified in an interview that her rapist had the nickname “Zaga” and a Montenegrin accent, but when questioned in court, she denied ever having provided those details (*id.*). Although FWS-48 testified that other women were present at Hotel Zelengora, none of the alleged witnesses could recall the incident, and in fact, they denied ever having been at the hotel (*id.*). Regarding the second rape in Donje Polje, FWS-48 gave inconsistent testimony as to the order of events and the identity of the person who transported her to the house (¶¶ 694-95). In light of the substantial discrepancies in FWS-48’s testimony and lack of supporting evidence, the Chamber finds Kunarac not guilty of the charges of rape and torture as crimes against humanity and war crimes relating to these events (¶¶ 692-98).

- **Counts 9-10: Rape of FWS-87 in Karaman’s House in Miljevina (Kunarac):**
 - The third amended indictment alleged that Kunarac kept FWS-87 detained in a place called Karaman’s house in Miljevina and raped her some weeks later (¶ 699). The Chamber is satisfied with the testimony of FWS-87 regarding these events (¶ 703). The Chamber finds that Kunarac forced FWS-87 to have sexual intercourse in the knowledge she did not consent (¶ 701). The Chamber finds Kunarac’s assertion that he took FWS-87 to a private room to simply talk and did not have sexual intercourse with her to be “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 Dikica no 16” (¶¶ 700-03). These facts support the charge and conviction of Kunarac for rape as crime against humanity and a war crime (¶ 704).
- **Counts 18-21: Enslavement and Rape of FWS-186, FWS-191, and J.G. in Trnovace and Miljevina (Kunarac):**
 - The third amended indictment alleged that Kunarac and two other soldiers brought FWS-186, FWS-191, and J.G. to a house in Trnovace where they each chose a woman and raped them that night.¹⁷ J.G.

¹⁷ *Id.* ¶10.1.

was transferred to another house in Miljenvina for the purpose of rape while the others were detained in the Trnovace house for approximately six months, subjected to constant rape, and forced to perform household chores.¹⁸ Kunarac claimed FWS-191 as his own personal property and another soldier claimed FWS-186.¹⁹ At trial, FWS-191 testified that on the first night, Kunarac ordered her to undress and attempted to rape her while his bayonet was on the table but was unable to because she was a virgin and too tense for penetration (¶ 724). Kunarac succeeded in raping her the following day; he “knew that she did not consent, and he rejoiced at the idea of being her ‘first’, thereby degrading her more” (*id.*). Kunarac constantly raped FWS-191 for a two-month period during the time she was detained (¶ 734).

- FWS-186 testified that on the first night at the house, she was raped by DP 6 (¶ 725). She remained at the house for five months, during which time she was forced to have sexual intercourse with DP 6 whenever he desired (¶ 735). Her testimony was fully corroborated by FWS-191 (¶ 735). The Chamber is satisfied that Kunarac was aware of the fact that DP 6 sexually assaulted FWS-186 on a constant basis during this time, however, the Chamber finds that “[i]t 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” (¶ 741). Therefore, the Chamber concludes that Kunarac was not responsible for aiding and abetting these rapes, although the Chamber did find he aided and abetted in keeping FWS-186 enslaved by DP 6 (¶ 742).
- J.G. did not testify at trial regarding her alleged rape and detention. Although FWS-186 and FW-191 testified on her behalf, they differed considerably in their recollection of relevant events; therefore, the Chamber finds that the rape and captivity of J.G. has not been proven beyond a reasonable doubt (¶ 726).

▪ **Counts 22-25: Enslavement and Rape of FWS-75 and FWS-87 in the Brena Apartment: (Kovać):**

¹⁸ *Id.* ¶¶ 10.2-10.3.

¹⁹ *Id.*

- The third amended indictment alleged that after they were detained by Kunarac at Karaman's House in Miljevina (see counts 9-10), FWS-87 and FWS-75 were handed over, along with A.S. and A.B., to Radomir Kovać, and detained for months in an apartment in Brena.²⁰ The women were kept in constant fear and were frequently sexually assaulted, threatened, beaten, and forced to perform household duties.²¹ The Chamber finds that FWS-87 and A.S. were kept in the apartment for four months and raped for the entire period of time by Kovać and a man named Kostić (¶ 760). Although Kovać had reserved FWS-87 for himself, Kostić would sometimes secretly rape her and threatened to kill her if she reported the rape to Kovać (¶ 761). The Chamber notes that since these rapes were most likely unknown to Kovać, it cannot be proven beyond a reasonable doubt that Kovać aided and abetted them (*id.*). The Chamber finds that Kovać beat FWS-75 on three occasions, at least once because she refused to have sexual intercourse with another soldier (¶¶ 749, 753). On this occasion, 12-year-old A.B. was sent in her place (¶ 749). The Chamber also finds that FWS-75 and A.B. were taken to two other apartments to be raped and later, Kovać sold A.B. and handed FWS-75 over to other soldiers, in the “almost certain knowledge that they would be raped again” (¶ 759). The facts above support the charges and conviction of Kovać for enslavement and rape as crimes against humanity and rape as a war crime (¶ 782).
- **Rape at Foča High School (Vuković):** The amended indictment alleged that Zoran Vuković selected FWS-50, FWS-75, FWS-87 and FWS-95 out of a group of detainees at Foča High School and personally raped FWS-87 while other soldiers raped the other detainees (¶ 785). Although the Chamber finds that FWS-87 was among the group of women raped on the evening in question, due to inconsistencies in her testimony undermining the reliability of her identification of the perpetrator, it is not convinced that Vuković was the soldier who committed the rape (¶¶ 787-88). The Chamber also finds that no evidence was presented that could prove that Vuković raped either FWS-87 or FWS-75 on the second evening in question (¶¶ 793-97.) Neither witness had any memory of the alleged incident at trial (*id.*). In light of this lack of evidence, the Chamber finds Vuković

²⁰ *Id.* ¶¶ 11.1-11.2.

²¹ *Id.* ¶¶ 11.2-11.3.

not guilty of the charges of rape and torture as crimes against humanity and war crimes relating to the events at Foča High School (¶ 798).

- **Rape at Partizan Sports Hall (Vuković):** The amended indictment alleged that Vuković was among a group of soldiers who took women detained at Partizan Sports Hall and brought them to other locations for the purposes of rape (¶¶ 811-12). Vuković allegedly raped FWS-50 while another man raped FWS-87 (¶ 811). The Chamber accepts the testimony of FWS-50 that Vuković raped her in a room of an abandoned apartment building when she was 16 years old (¶¶ 812, 814-15, 817). She testified that Vuković 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” (¶ 814). At trial, FWS-87 testified that she had been gang raped but she no longer recalled if one of the men was Vuković (¶¶ 818-20). Therefore, based solely on the rape of FWS-50, the Chamber convicts of Vuković rape and torture as crimes against humanity and war crimes (¶ 822). See further discussion under “Rape, Torture” below.
- *Rape as a war crime:*
 - The Chamber is of the view that Article 3 of the Statute of the ICTY “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” (¶ 401). It understands a “serious violation” to mean one that is “a breach of a rule protecting important values... and involve[s] grave consequences for the victim” (¶ 407). The Chamber is of the view that “rape, torture, and outrages upon personal dignity, no doubt constituting serious violations of common Article 3, entail criminal responsibility under customary international law” (¶ 408). All three accused were charged with rape as a war crime (¶¶ 4-11). As noted above in the section on “Rape as a crime against humanity,” the rapes by Kunarac at Ulika Osmana Dikica, Karaman’s House in Milijenvina, and Trnovace; rapes by Kovač at the Brena apartment; and rape by Vuković at Partizan Sports Hall support the charges and convictions of rape as a war crime for all three co-accused (¶¶ 862, 872, 878). In addition, the third amended indictment charged Kunarac with rape as a war crime for his participation in the event described below under Counts 11-12.
 - **Counts 11-12: Rape of FWS-183 at the Cehotina River (Kunarac):** The third amended indictment alleged that Kunarac took FWS-183, a Muslim woman whom he suspected of sending messages over the radio, to the banks of the Cehotina River, where he interrogated and raped her.²² FWS-183 testified that three Serb soldiers, including Kunarac, threw her into a car, took her to a riverbank, interrogated her, threatened to kill her son, and then each raped her (¶¶ 710-11). She testified that Kunarac made her touch his penis and look at him while he was raping and cursing her and the other soldiers looked on (*id.*). The Chamber accepts FWS-183’s identification of Kunarac because she knew his father and had been to his house before the war (¶ 708). Her

²² *Id.* ¶ 8.1.

testimony was also corroborated by FWS-61, who testified that she saw three soldiers take FWS-183 out of the apartment and return her later “as if she had been crying”; she said that FWS-183 later told her that she had been forced to touch the soldiers in “shameful places” and do “impossible things” (¶¶ 712-13). These facts support the charge and conviction of Kunarac for rape and torture as war crimes (¶ 715).

- **Foča High School (Vuković):** Although charged as such, the alleged rapes by Vuković at Foča High School did not lead to a conviction of rape as a war crime due to issues of witness reliability (¶¶ 793-98).

RAPE, SYSTEMATIC:

- In support of the charge and conviction for rape as a crime against humanity and war crime, the Chamber notes that Kunarac systematically selected women and girls for the purposes of rape at his headquarters at Ulica Osmana Dikica (¶ 584). It notes that “the consistency of these occurrences and the predictability of the women’s fate were particularly evident with respect to [Kunarac]”(*id.*).

RAPE, TORTURE:

- The Chamber defines the elements of torture as follows:
 - (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental, (ii) The act or omission must be intentional, and (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 any discriminating, or any ground, against the victim or a third person (¶ 497).

The Trial Chamber finds 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” (¶ 496). The Chamber finds that an accused can be charged with both rape and torture as either crimes against humanity or war crimes for the same conduct because they each have a distinct material element: “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” (¶ 557).

- As noted above in the section on “Rape,” the Chamber finds that Kunarac participated in the rape and sexual assault of multiple women for which he was also charged with torture as a crime against humanity and as a war crime as described below:
 - **Ulica Osmana Dikirica No. 16 (Kunarac):** The Chamber considers whether Kunarac’s participation in the rapes of D.B. and FWS-75 at Ulica Osmana Dikirica No. 16 meet the above definition of torture, including whether Kunarac acted intentionally, whether his acts inflicted severe pain and suffering, and whether they were committed for any of the prohibited purposes listed (¶¶ 654-55). The Chamber finds Kunarac “acted intentionally and with the aim of discriminating between the members of his ethnic group and the Muslims, in particular its women and girls” (¶ 654). The Chamber cites as evidence of his

discriminatory purpose the fact that Kunarac, in the context of rapes, “told women, that they would give birth to Serb babies, or that they should ‘enjoy being fucked by a Serb’” (*id.*). The Chamber holds that “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* (*id.*). The Chamber finds Kunarac met this requirement (*id.*). Further, the Trial Chamber finds that Kunarac’s acts caused his victims severe mental and physical pain and suffering, and concludes that “[r]ape is one of the worst sufferings a human being can inflict upon another” (¶ 655). The Chamber therefore finds that Kunarac committed torture and rape (¶ 656).

- **Cehotina River (Kunarac):** The Chamber also finds that Kunarac caused severe mental and physical pain and suffering when he raped FWS-183 near the Cehotina River and that his actions against her “showed his hatred for Muslims, his intention to intimidate her, and his intention to discriminate against Muslims in general, and FWS-183 in particular” (¶ 711). Based on these findings, the Chamber convicts Kunarac of torture as a crime against humanity and a war crime (¶ 715).
- **Partizan Sports Hall (Vuković):** As noted above in the section on “Rape,” the Chamber finds that Vuković removed sixteen-year-old FWS-50 from Partizan Sports Hall and raped her in an abandoned building (¶ 812). The Trial Chamber finds that this rape “led to serious mental and physical pain for the victim” (¶ 815). Additionally, the Trial Chamber finds that although Vuković argued that “even if it were proved that he had raped a woman,” he would have “done so out of a sexual urge, not out of hatred” (¶ 816). The Trial Chamber dismisses this argument, finding that

[A]ll 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, [i.e.,] the Muslims, and against his victim in particular (¶ 816).

The Trial Chamber therefore convicts Vuković of torture (¶ 817).

- The amended indictments against both Kunarac and Vuković also alleged torture in the context of alleged rapes at Hotel Zelengora, but because the Chamber found these charges were unsubstantiated due to insufficient evidence, the Trial Chamber did not make findings regarding whether the allegations met the definition of torture (¶¶ 697, 806-10). Similarly, the alleged rapes by Vuković at Foča High School did not lead to a conviction of torture as a crime against humanity or as a war crime due to issues of witness reliability (¶ 798).

SEXUAL EXPLOITATION:

- As noted above in the section on “Outrages Upon Personal Dignity,” the Chamber uses this term when describing Kovać’s mistreatment and sale of FWS-87, FWS-75, A.B., and A.S., finding these acts constituted “a particularly degrading attack on their dignity” (¶ 756).

TORTURE, RAPE FOR A DISCRIMINATORY PURPOSE:

- See discussion of the Trial Chamber’s findings regarding the defendants’ discriminatory purpose in committing rapes against Muslim women.

Other Issues:

DEFENSE STRATEGIES TO CHARGES OF SEXUALLY BASED CRIMES:

- As a defense to the charges against Kovać based on the rape of FWS-87 in the Brena apartment, the defense team asserted that FWS-87 had an emotional relationship with Kovać (¶ 762). They relied upon several witnesses who mentioned a letter from FWS-87 to Kovać with a heart drawn on the envelope (*id.*). As FWS-87 consistently denied an emotional relationship with the accused and the witnesses had only heard of the letter’s existence from the accused, the Chamber finds that FWS-87 did not write a love letter to Kovać. (*id.*). They find that that “[t]he relationship... was not one of love as the Defense suggested, but rather one of cruel opportunism on Kovać’s part, of constant abuses and domination over a girl who, at the relevant time, was only about 15 years old” (*id.*).
- As a defense to the charges against Kovać based on the sale of FWS-87 and A.S. to two Montenegrin soldiers, Kovać argued that he altruistically paid for the girls to be taken to Montenegro for their own safety (¶ 776). The Chamber does not find Kovać’s account of the transaction to be credible in light of the “almost daily regime of rapes and other abuses” to which he had subjected the witnesses for the previous four months (¶ 777).
- As a defense to the charges against Vuković for his participation in the rape of detainees from Partizan Sports Hall, the defense asserted that Vuković had sustained an injury to his testicles that rendered him temporarily impotent and therefore unable to have sexual intercourse during that time (¶ 800). Due to the fact that the defense was unable to produce any credible evidence concerning the gravity or consequences of the alleged injury, the Chamber finds that there is no reasonable possibility that Vucović was unable to have sexual intercourse at the relevant time (¶¶ 800-05).

INSUFFICIENT CHARGING BY THE PROSECUTION:

- FWS-75 testified that Kunarac raped her on or around the morning of August 3, 1992; however, as the rape was not charged in the indictment, the Chamber does not make a finding regarding this rape (¶ 666).
- FWS-50 testified that Vuković raped her at Buk Bijela (¶ 814). Because the indictment does not specifically charge Vuković with this rape, the Chamber does not make a finding regarding this rape (*id.*). FWS-50 also testified that Kunarac raped her on the sofa in his headquarters; however, as the rape was not charged in the indictment, the Chamber does not make a finding regarding this rape (¶ 667).
- FWS-95 testified that Kunarac raped her twice at his headquarters; however, as the indictment specifically alleged that the second rape was perpetrated by subordinate soldiers,

the Chamber is unable to find Kunarac liable on the basis of either personal or superior responsibility (¶¶ 681-84).

- FWS-75, FWS-87, and A.S. described three instances in which Kovać forced them to dance naked on a table for him while he watched, and FWS-75 testified that once Kunarac forced them to march naked in the streets of Foča; however, as the indictment only alleges one instance of forced dancing and does not allege any instance of forced public nudity, the Chamber does not make a finding regarding these incidents (¶¶ 767, 770).
- The Chamber is satisfied that FWS-75 was raped by several men at Kovać's apartment, including Vuković, who forced her to arouse him and then orally raped her (¶ 757, 789, 796). However, as the indictment does not charge Vuković with this rape, the Chamber will only consider the finding when establishing the required *mens rea* for the crimes with which he is charged (¶¶ 757, 789).
- The Chamber is satisfied that D.B. was raped at Kunarac's headquarters by a subordinate; however as the rape was not charged in the indictment, the Chamber does not make a finding with regard to this rape (¶ 668).