

**PROSECUTOR v. KVOČKA, ET. AL.**  
Case No. International Criminal Tribunal for the Former Yugoslavia  
Appeals Chamber Judgment  
February 28, 2005

**Judges:**

Presiding Judge Fausto Pocar  
Judge Mohamed Shahabuddeen  
Judge Florence Ndepele Mwachande Mumba  
Judge Mehmet Guney  
Judge Inés Monica Weinberg de Roca

**Prosecution:**

Mr. Anthony Carmona  
Ms. Helen Brady  
Ms. Norul Rashid  
Mr. David Re  
Ms. Kelly Howick

**Defense Counsel:**

Mr. Krstan Simic for Miroslav Kvočka  
Mr. Toma Fila for Mlado Radić  
Mr. Slobodan Stojanovic for Zoran Žigić  
Mr. Goran Rodic for Dragoljub Prać

**Gender Keyword(s):** Attempted Rape; Consent; Credibility or Character of the Victim; Humiliating and Degrading Treatment; Rape; Sexual Threats; Sexual Violence, Persecution; Sexual Violence, Torture

**Procedural History:** On February 13, 1995, the International Criminal Tribunal for the Former Yugoslavia (ICTY) confirmed an indictment against Miroslav Kvočka, Mlado Radić, Milojica Kos, and 16 other co-accused.<sup>1</sup> The indictment charged the accused with war crimes and crimes against humanity for their alleged participation in the mistreatment of Bosnian Muslims, Bosnian Croats, and other non-Serbs in the Omarska, Keraterm, and Trnopolje detention camps in the Prijedor municipality from April 1 to August 30, 1992.<sup>2</sup> On July 21, 1995, the ICTY confirmed an indictment against Zoran Žigić, charging him with war crimes and crimes against humanity in connection with the same events.<sup>3</sup> In April of 1998, Kvočka, Radić, and Žigić were arrested.<sup>4</sup> On November 12, 1998, the Prosecutor submitted an amended indictment joining Kvočka, Radić, Kos, and Žigić.<sup>5</sup> On December 16, 1998, these four co-accused pleaded not guilty to the

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<sup>1</sup> *Prosecutor v. Kvočka, et. al.*, Trial Chamber Judgment, November 2, 2001, ¶ 784.

<sup>2</sup> *Id.* ¶ 771.

<sup>3</sup> *Id.* ¶ 784.

<sup>4</sup> *Id.* ¶ 769.

<sup>5</sup> *Id.* ¶ 785.

charges.<sup>6</sup> On May 31, 1999, the Prosecutor again amended the indictment to address defects in the form of the previous indictment.<sup>7</sup> The amended indictment alleged that in late May 1992, Serb forces began launching violent attacks on the civilian population of Prijedor town, killing many and forcibly transferring the survivors to Omarska, Keraterm, and Trnopolje camps.<sup>8</sup> The Prosecution alleged that living conditions in these camps were inhumane and unhygienic, and that prisoners were severely beaten, tortured, interrogated, sexually assaulted, and psychologically abused.<sup>9</sup> The Prosecution alleged that Kvočka was commander and then deputy commander of Omarska camp;<sup>10</sup> Kos and Radić were shift commanders at Omarska camp;<sup>11</sup> and Žigić was a taxi driver in the Prijedor area who was accused of “enter[ing] all three camps for the purpose of abusing, beating, torturing and/or killing prisoners.”<sup>12</sup> The four co-accused were charged under individual criminal responsibility for the crimes against humanity of persecution and inhumane acts and the war crime of outrages upon personal dignity.<sup>13</sup> Allegations of rapes and sexual assaults committed against Bosnian Muslims, Bosnian Croats, and other non-Serbs in Prijedor municipality, including prisoners detained in the Omarska, Keraterm, and Trnopolje camps, supported the charges against all four defendants.<sup>14</sup> Due to their alleged positions of authority, Kvočka, Kos, and Radić were further charged for these same acts under a theory of superior responsibility for crimes committed by their subordinates.<sup>15</sup> Kvočka, Kos, and Radić were also charged under both individual and superior responsibility for murder as both a crime against humanity and a war crime; torture as both a crime against humanity and a war crime; and cruel treatment as a war crime.<sup>16</sup> Žigić was additionally charged under individual criminal responsibility with murder as a crime against humanity and as a war crime; torture as a crime against humanity and as a war crime; and cruel treatment as a war crime.<sup>17</sup> Žigić’s alleged participation in an incident in which two male detainees were forced to perform *fellatio* on another detainee and were also beaten and abused, resulting in injuries causing death, supported the charges against Žigić of murder as both a crime against humanity and a war crime.<sup>18</sup> Radić was additionally charged under individual criminal responsibility with torture as both a crime against humanity and a war crime, as well as rape as a crime against humanity and outrages upon personal dignity as a war crime in connection with his alleged participation in the rapes and sexual assaults of female detainees at Omarska camp.<sup>19</sup>

On February 28, 2000, the trial of Kvočka, Radić, Kos, and Žigić began.<sup>20</sup> On March 6, 2000, the trial was adjourned following the arrest of Dragoljub Prcać.<sup>21</sup> On the same day, the Prosecutor

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* ¶ 786.

<sup>8</sup> *The Prosecutor v. Kvočka, et. al.*, Amended Indictment, May 31, 1999, ¶¶ 5-6.

<sup>9</sup> *Id.* ¶¶ 8-10.

<sup>10</sup> *Id.* ¶ 19.

<sup>11</sup> *Id.* ¶¶ 20-21.

<sup>12</sup> *Id.* ¶ 22.

<sup>13</sup> *Id.* ¶¶ 16, 23-30.

<sup>14</sup> *Id.* ¶¶ 23, 24(c).

<sup>15</sup> *Id.*, ¶¶ 17, 23-30.

<sup>16</sup> *Id.* ¶¶ 31-33, 35-37.

<sup>17</sup> *Id.* ¶¶ 34, 38.

<sup>18</sup> *Id.* ¶ 34(a).

<sup>19</sup> *Id.* ¶ 39.

<sup>20</sup> *Kvočka, et. al.* Trial Chamber Judgment, *supra* FN 1, ¶ 768.

<sup>21</sup> *Id.*

submitted an uncontested motion for joinder of Prcać's case with that of Kvočka, Radić, Kos, and Žigić.<sup>22</sup> On October 13, 2000, a consolidated amended indictment that incorporated the charges against all five co-accused was confirmed.<sup>23</sup> Based on the same factual allegations, the amended indictment charged Prcać, who allegedly worked as second deputy commander of Omarska camp, with war crimes (outrages upon personal dignity, murder, torture, and cruel treatment) and crimes against humanity (persecution, inhumane acts, murder, and torture) under both individual and superior responsibility in connection with those same counts against all four of his co-defendants.<sup>24</sup> Prcać was not implicated for any of the counts against Žigić individually or the counts related to the rape and sexual assault of female detainees at Omarska camp for which Radić was solely charged.<sup>25</sup> On May 2, 2000, the trial resumed and on July 19, 2001, the trial ended.<sup>26</sup> On November 2, 2001, the Trial Chamber issued its judgment (¶ 726). The Trial Chamber found all five co-accused guilty of co-perpetrating murder and torture as war crimes and persecution as a crime against humanity for committing the alleged acts as part of a joint criminal enterprise (JCE) operated at Omarska camp (¶¶ 2-9). Additionally, the Trial Chamber found Radić guilty of torture as a war crime based on separate allegations of sexual violence he committed against female detainees in Omarska camp (¶ 402). The Trial Chamber also found Žigić guilty of one separate count of murder and one count of cruel treatment as a war crime based on evidence that he beat detainees, finding him guilty of co-perpetration with respect to certain acts against specific victims and guilty of individually committing other acts in respect to other victims (¶¶ 7-9).

In November, 2001, all five co-accused filed notices of appeal against the Trial Chamber judgment (¶ 10). On May 21, 2002, Kos withdrew his appeal, so his grounds for appeal were not considered by the Appeals Chamber (¶ 732). The four remaining Appellants claimed both factual and legal errors (¶¶ 21, 26, 36-39). Among their claims were that the Trial Chamber did not provide sufficient reasons for its findings and that the Trial Chamber erred in convicting them of crimes and based on a mode of liability that were not properly pleaded in the indictment (*id.*). Additionally, the Appellants argued that the Trial Chamber made factual errors in finding that they participated in a JCE (¶ 77). Kvočka and Radić also argued that the Trial Chamber erred in not making factual findings on all allegations contained in the schedules accompanying the indictment (¶ 55). Kvočka argued separately that the Trial Chamber erred in handling evidence of his interview with the Prosecution; erred in finding that he was the *de facto* Deputy Commander of Omarska camp; erred in finding that, through his participation, Kvočka intentionally furthered the criminal system in place in Omarska; and erred in finding him guilty of murder as a war crime (¶¶ 121, 136, 139, 178, 247). Radić separately appealed on the grounds that the Trial Chamber erred in using the testimony of witnesses Nedzija Fazlic and Witness AT as evidence of a consistent pattern of conduct of sexual assault and of trying to coerce women into sexual intercourse in exchange for favors (¶¶ 349, 357).<sup>27</sup> Further, Radić claimed on appeal that the Trial Chamber erred in inferring his discriminatory intent in finding him guilty of persecution as a crime against humanity and argued that, in particular, the acts of rape and sexual violence that he was found to have committed did not entail discrimination based on religion,

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<sup>22</sup> *Id.* ¶ 787.

<sup>23</sup> *Id.* ¶ 788.

*Kvočka, et. al.* Amended Indictment, *supra* FN 8, ¶¶ 20, 24-36, 38-40.

<sup>25</sup> *Id.* ¶¶ 37, 41-42.

<sup>26</sup> *Kvočka, et. al.* Trial Chamber Judgment, *supra* FN 1, ¶ 768.

<sup>27</sup> *Id.* ¶¶ 547, 556.

ethnicity, or political belief (¶¶ 364, 369). Rather, Radić argued, the Trial Chamber found Radić committed these crimes based on personal motives (¶ 369). Radić additionally appealed several factual findings made by the Trial Chamber, including findings related to his position of authority in Omarska camp and findings made on evidence of sexual violence, including how the Trial Chamber defined rape and the credibility of several witnesses who testified that he had raped women and committed other acts of sexual violence (¶¶ 371-72, 387, 393-410). Finally, Radić appealed the Trial Chamber's application of the doctrine of JCE (¶¶ 348, 411). Žigić appealed on additional grounds, including alleged errors in the indictment, alleged bias against him on the part of the Trial Chamber, errors related to evidentiary findings, and errors relating to the Trial Chamber asking witnesses questions directly (¶¶ 429, 446, 449-50, 500). Žigić also appealed the Trial Chamber's findings regarding his discriminatory intent in committing acts of persecution; findings regarding his conviction for beatings, torture, and murders of specific victims; and the Trial Chamber's findings regarding the elements of war crimes (¶¶ 452, 467-68, 508, 531, 535, 541, 544, 555, 558, 560, 562, 566, 568, 578, 581-82, 584, 586, 594). Prcać argued on appeal that the Trial Chamber had accepted all of his arguments at trial and thus should have acquitted him of all the charges; that the Trial Chamber had made several errors related to the indictment and errors in defining his role at Omarska camp; and that the Trial Chamber made several errors with regard to specific factual findings, including findings regarding witnesses' credibility (¶¶ 607, 614, 619, 625-26, 635, 638, 641, 643, 646, 650). Furthermore, Prcać argued that he had been given insufficient time to prepare his defense and that the Trial Chamber had failed to rule on one of his motions, (¶¶ 660, 666). Finally, all four Appellants appealed their sentences (¶¶ 670, 685, 700, 717).

From March 23 to March 26, 2004 and from July 19 to July 21, 2004, the Appeals Chamber heard the appeal (¶ 11). On February 28, 2005, the Appeals Chamber issued its judgment in the matter, which is digested here with a focus on those grounds of appeal related to charges of sexual and gender-based violence.

### **Disposition:**

- *Kvočka*: The Appeals Chamber recalls that Kvočka withdrew his first ground of appeal (p. 242). The Appeals Chamber allows Kvočka's fourth ground of appeal regarding his conviction as a co-perpetrator of persecution as a crime against humanity, reversing his conviction on this count based on allegations of rape and other acts of sexual violence, but affirming the other acts that formed the basis of the persecution charge (*id.*). The Appeals Chamber grants Kvočka's fifth ground of appeal in part, reversing his conviction for murder as a war crime insofar as it relates to the murder of victims Ahil Dedić and Ismet Hodžić, but affirms his conviction for this charge for the murder of Mehmedalija Nasić and Bećir Medunjanin (*id.*). The Appeals Chamber dismisses Kvočka's remaining grounds of appeal, including his appeal against his sentence, and affirms his sentence of seven years of imprisonment (*id.*).
- *Radić*: The Appeals Chamber dismisses all of Radić's grounds of appeal and affirms his sentence of 20 years of imprisonment (p. 243).
- *Žigić*: The Appeals Chamber allows Žigić's grounds of appeal regarding his responsibility for crimes committed in the Omarska camp, reversing his conviction for persecution as a crime against humanity, murder as a war crime, and torture as a war crime insofar as his conviction for these counts is based on acts committed in Omarska

camp “in general” as part of a joint criminal enterprise (*id.*). However, the Appeals Chamber affirms Žigić’s conviction for persecution as a crime against humanity, murder as a war crime, and torture as a war crime for acts he committed against specific victims, including Bećir Medunjanin, Asef Kapetanović, Witnesses AK, AJ, T, Abdulah Brkić, Emir Beganović, Fajzo Mujkanović, Witness AE, Redzep Grabić, Witness V, Edin Ganić, Emsud Bahunjić, Drago Tokmadžić, Sead Jusufagić, and Jasmin Ramadanovic (*id.*). The Appeals Chamber dismisses Žigić’s remaining grounds of appeal, including his appeal against his sentence, and affirms his sentence of 25 years of imprisonment (*id.*).

- *Prcać*: The Appeals Chamber dismisses all of Prcać’s grounds of appeal and affirms his sentence of five years of imprisonment (pp. 243-44).

### **Key Gender-Based Holdings:**

#### **ATTEMPTED RAPE:**

- The Trial Chamber convicted Radić of torture as a war crime and persecution as a crime against humanity based on evidence that he committed several acts of sexual violence against female detainees in Omarska camp, including the attempted rape of Witness J (¶ 402). On appeal, Radić challenged the Trial Chamber’s findings regarding the evidence of sexual violence heard at trial, including evidence that he attempted to rape Witness J (¶ 393). Radić argued that the Trial Chamber’s findings were based on an “incorrect evaluation of the evidence presented” (*id.*). In support of his argument, Radić noted that Witness J recounted a similar incident involving attempted rape by a man nicknamed “Kapitan” and submits that it is “impossible that two individuals would try to rape Witness J in the same manner within a short period of time” (¶ 399). Radić also rejected the Trial Chamber’s finding that this attempted rape amounted to an act of sexual violence against Witness J, arguing that “Witness J’s own testimony precludes his conviction because she testified that during the alleged incident she ‘practically stopped resisting’ Radić’s advances” (*id.*). Based on this testimony, Radić stated that he could have “completed the crime” but “abandoned it voluntarily” (*id.*). Furthermore, Radić pointed out that he was not charged with attempting to rape Witness J, but rather was charged with “sexually attacking” her, thus his conviction for this offense should be reversed due to the inconsistency between the indictment and the Trial Chamber’s judgment (*id.*). In response, the Prosecution argued that Radić was not convicted based on attempted rape but on sexual assault (¶ 400). Thus, regardless of whether or not Radić abandoned his attempt to rape Witness J, he had already completed an act of sexual violence (*id.*). Therefore, according to the Prosecution, there was no inconsistency between the indictment and the Trial Chamber judgment (*id.*). The Appeals Chamber considers Radić’s argument that Witness J testified about two very similar incidents, one involving Radić and one involving a man referred to as “Kapitan,” noting that the Trial Chamber considered this argument at trial and rejected it (¶ 401). After reviewing Witness J’s testimony, the Appeals Chamber finds that Witness J “clearly distinguished between the two incidents” and that “her description of them differed in significant details” (*id.*). The Appeals Chamber thus accepts the Trial Chamber’s finding on this issue, noting that it disagrees with Radić’s argument that the occurrence of two such incidents was impossible because, as the Trial Chamber explained, it was “commonplace

for women to be subjected to sexual intimidation or violence in Omarska” (*id.*).<sup>28</sup> The Appeals Chamber also finds Radić’s argument regarding the discrepancy between the indictment and his ultimate conviction without merit because the Trial Chamber “identified attempted rape as one form of sexual violence, and convicted Radić accordingly for persecution for crimes including sexual violence” (¶ 402). The Trial Chamber rejects Radić’s defense that he abandoned his attempt to rape Witness J for the same reason, finding that “the crime of sexual violence was already completed when Radić finally released Witness J, after he had ejaculated over her thighs and her skirt” (*id.*).

#### CONSENT:

- As discussed under “Rape” below, Radić argued on appeal that the Trial Chamber erred in its definition of rape (¶ 393). The Appeals Chamber dismisses this argument, finding that the Trial Chamber’s definition of rape was consistent with ICTY jurisprudence (¶¶ 395-96). That jurisprudence holds that, for the purpose of defining rape, “consent [must be] given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances” (¶ 395). The Appeals Chamber additionally affirms the Trial Chamber’s finding that a victim’s status of detention will “normally vitiate consent [to sexual intercourse]” (¶ 396).

#### CREDIBILITY OR CHARACTER OF THE VICTIM:

- On appeal, Kvočka argued that Witness A was not reliable (¶ 167). Witness A gave evidence at trial regarding Kvočka’s superior position in Omarska camp on the dates of his alleged crimes and also testified that Kvočka had raped her (*id.*). With regard to her testimony that Kvočka had raped her, the Prosecution points out that the Trial Chamber did not rely on Witness A’s evidence to convict Kvočka because it, too, found that Witness A’s testimony regarding the details of the rape were confusing and insufficiently reliable to establish guilt (*id.*). Yet the Trial Chamber did accept Witness A’s testimony concerning Kvočka’s position of authority during the relevant dates (*id.*). The Prosecution submits that other witnesses corroborated this aspect of Witness A’s testimony (*id.*). The Appeals Chamber remarks that the Trial Chamber did not doubt Witness A’s credibility overall, but simply found her evidence about the rape “insufficient as the factual basis for a conviction” (¶ 168). Given the basis for Witness A’s conclusions regarding Kvočka’s position of authority, the Appeals Chamber finds that a reasonable trier of fact could have relied on Witness A’s testimony as corroborating evidence on this issue (*id.*).
- On appeal, Radić argued that Witness K, who testified at trial that he raped her, was not reliable because there were differences between Witness K’s written statements and her testimony before the Trial Chamber (¶ 403). Radić also argued that, in a separate case before the ICTY—*Prosecutor v. Sikirica et. al.*—Witness K’s allegations of rape against Sikirica were found to be insufficient to establish guilt, thus she is not a credible witness (*id.*). Furthermore, Radić argued that the Trial Chamber wrongly rejected the testimony from Defense witness Vinka Andjic, who “refuted an important part of Witness K’s testimony” (*id.*). The Prosecution argued that the Trial Chamber did consider the

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<sup>28</sup> *Id.* ¶ 98.

inconsistencies between Witness K's written statements and her testimony at trial but found her reliable anyway (¶ 404). The Appeals Chamber agrees with the Prosecution and, after reviewing transcripts of her testimony, the Appeals Chamber finds that a reasonable trier of fact could have accepted Witness K's testimony (¶ 405). With regard to Radić's argument that the Trial Chamber erred by rejecting Defense witness Vinka Andzic's testimony, the Appeals Chamber acknowledges a conflict between Witness K's testimony that Andzic took her to Radić and then Radić raped her and Andzic's testimony that she never took Witness K to Radić's room, but finds that a reasonable trier of fact could disregard Andzic's testimony given the fact that she also stated that "female detainees praised Radić as a fine man who treated them correctly" and that the female detainees were living in Omarska camp in "excellent conditions" (¶ 406). The Appeals Chamber also rejects Radić's argument regarding the Trial Chamber's findings in the *Sikirica et. al.* case, noting that facts stipulated in a plea agreement are not adjudicated facts and that the Trial Chamber in the *Sikirica et. al.* case had not ruled on Witness K's reliability (¶ 407). Regardless, the Appeals Chamber stated, Radić's rape of Witness K in Omarska camp and Sikirica's rape of Witness K in Keraterm camp are two separate incidents, meaning that even if the Trial Chamber in the *Sikirica et. al.* case had found Witness K's evidence unreliable as to Sikirica's alleged commission of rape, this would not preclude another reasonable trier of fact from finding that Witness K's testimony that Radić had raped her in Omarska camp was credible (*id.*).

#### HUMILIATING AND DEGRADING TREATMENT:

- On appeal, Kvočka argued that "acts of harassment, humiliation and psychological abuse do not constitute the crime of persecutions" (¶ 317). Kvočka submitted that the ICTY established in the *Kupreškić, et al.* case that, in order for an act to constitute persecution, "it must be of equal gravity or severity as the criminal acts listed in Article 5 of the [ICTY] Statute," which is the article defining crimes against humanity (*id.*).<sup>29</sup> Kvočka maintained that the acts in question "do not rise to this standard" (*id.*). The Prosecution responded that the ICTY has established in several cases that such acts could constitute acts of persecution (¶ 318). In assessing these arguments, the Appeals Chamber begins by noting that the Trial Chamber defined persecution as:
  - (1) the occurrence of a discriminatory act or omission;
  - (2) a basis for that act or omission founded on race, religion, or politics;and
  - (3) the intent to infringe an individual's enjoyment of a basic or fundamental right (¶ 319).

The Appeals Chamber also states that the Trial Chamber, "in more general terms" defined persecution as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5" (*id.*). The Appeals Chamber finds that the Trial Chamber did not err in defining persecution in this way, but finds that

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<sup>29</sup> Article 5 of the ICTY Statute provides that "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; [and] (i) other inhumane acts." Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, Art. 5.

it prefers the elements of this crime set out by the Appeals Chamber in the *Krnojelac* Appeal Judgement (¶ 320).<sup>30</sup> That judgment defined persecution as:

...an act or omission which:

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and

2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)(*id.*).

The Appeals Chamber notes that, when assessing the gravity of an act to determine whether or not it amounts to persecution, “the acts must not be considered in isolation, but in context, by looking at their cumulative effect” (¶ 321). It also notes that Article 3 Common to the Geneva Conventions prohibits humiliating and degrading treatment and that Additional Protocol I to the Geneva Conventions prohibits harassing and psychological abuse (¶ 323). The Appeals Chamber finds that “in the context in which they were committed and taking into account their cumulative effect, the acts of harassment, humiliation and psychological abuse ascertained by the Trial Chamber are acts which by their gravity constitute material elements of the crime of persecution” (¶ 325). The Appeals Chamber thus finds that the Trial Chamber was reasonable in its finding on this issue and dismisses this ground of appeal (*id.*).

#### RAPE:

- Evidence of rapes and other acts of sexual violence committed in Omarska camp supported the convictions of all of the Appellants for persecution as a crime against humanity, as well as Radić’s conviction for one count of torture as a war crime (¶ 402).<sup>31</sup> The Appellants raised several issues on appeal in relation to these rapes.
  - *Kvočka*: Kvočka argued that the Prosecution did not prove beyond a reasonable doubt that the alleged rapes and sexual assaults that supported his conviction for persecution as a crime against humanity occurred while he was at Omarska camp (¶ 329). Kvočka argued that he was present at the camp during limited dates in June 1992 when the victims of the alleged rapes were present (*id.*). The Prosecution agreed that it did not provide conclusive evidence at trial regarding when exactly the rapes of these witnesses occurred, and thus supported reversing Kvočka’s conviction for persecution as a crime against humanity in respect of these rapes (¶ 330). However, the Prosecution submitted that Kvočka’s conviction for this charge should be affirmed with respect to the other acts that supported this charge and his sentence should not be affected (*id.*). Kvočka argued that, because ICTY jurisprudence has established that the crime of rape as persecution constituting a crime against humanity should be severely punished, a dismissal of this part of his persecution conviction should “substantially” reduce his sentence (¶ 331). The Appeals Chamber notes that, with the exception of one rape committed by another individual against Witness J, the Trial Chamber did not make findings regarding the dates or approximate dates on which the alleged rapes took place (¶ 333). The Appeals Chamber reviewed the transcripts of the witnesses’ testimony and finds that no witness provided dates or approximate

<sup>30</sup> *Prosecutor v. Krnojelac*, Appeals Chamber Judgment, September 17, 2003, ¶ 185.

<sup>31</sup> *Kvočka, et. al.* Trial Chamber Judgment, *supra* FN 1, ¶¶ 752, 755, 761, 764.



dates for the acts of sexual violence committed, thus the Trial Chamber “could not properly rely on this witness testimony to conclude that these crimes were committed during the time that Kvočka was employed in the camp” (*id.*). The Appeals Chamber thus finds that the Trial Chamber erred in finding that these rapes occurred while Kvočka was employed at the camp and upholds this ground of appeal, reversing his conviction for persecution to the extent that it is based on the evidence of these rapes (¶¶ 334, 339, p. 242). The Appeals Chamber’s findings regarding the effect of this error on Kvočka’s sentence is discussed under “Other Issues: Sentencing” below.

- *Radić*: Radić challenges his conviction for rapes that occurred in Omarska camp, appealing the Trial Chamber’s findings that he raped Witness K; attempted to rape Witness J; and committed sexual violence against Witnesses J and K, Sifeta Susic, and Zlata Cikota (¶ 393). First, Radić argued that the Trial Chamber incorrectly evaluated the evidence and committed a legal error in how it defined rape (*id.*). Radić argued that under the Yugoslav Penal Code, “the crime of rape involves permanent and lasting resistance of the victim and simultaneous use of force or threat” (*id.*). Radić submitted that the Trial Chamber erred in holding that “the resistance of victims in Omarska was broken due to conditions of imprisonment and that Radić applied force or threat” (*id.*). The Prosecution responded that domestic rape laws from the former Yugoslavia are irrelevant, that the ICTY Statute defines rape by reference to international law, and that the Trial Chamber correctly applied the definition of rape established by ICTY jurisprudence (¶ 394). The Prosecution cites the Trial Chamber’s application of this definition, as laid out in the *Kunarac, et al.* Trial Chamber Judgment<sup>32</sup> and affirmed by the Appeals Chamber in the same case,<sup>33</sup> which defines the *actus reus* of rape in international law as:

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 (¶ 395).

The Appeals Chamber recalls that the Appeals Chamber in the *Kunarac, et al.* case noted further that the “assertion that nothing short of continuous resistance [by the victim] provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts” (*id.*).<sup>34</sup> The Appeals Chamber concludes that “[a]ny diverging definition of the crime in Yugoslav law is irrelevant” and that Radić’s argument that the ICTY Statute was not in force at the time the crimes occurred is without merit (*id.*). The Appeals Chamber finds that “the prohibition of rape in armed conflicts has been long recognized in international treaty law as well as in customary international law” and that a victim’s status of detention will “normally vitiate consent [to sexual intercourse]

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<sup>32</sup> *Prosecutor v. Kunarac, et al.*, Trial Chamber Judgment, February 22, 2001, ¶ 460.

<sup>33</sup> *Prosecutor v. Kunarac, et al.*, Appeals Chamber Judgment, June 12, 2002, ¶ 128.

<sup>34</sup> *Id.*

in such circumstances” (¶ 396). The Appeals Chamber concludes that the Trial Chamber’s findings on this issue were consistent with ICTY jurisprudence and that Radić has failed to establish that the Trial Chamber erred in its findings (*id.*). Radić also argued that the Trial Chamber erred in finding he attempted to rape Witness J, an assertion which is discussed above under “Attempted Rape” (¶¶ 399-402). Radić also argued that the Trial Chamber erred in relying upon the evidence of Witness K, who he submitted was not credible, an assertion that is discussed above under “Credibility or Character of the Victim” above (¶¶ 403-07). Radić argued further that the Trial Chamber did not provide sufficient reasoning for finding he committed acts of sexual violence, which is discussed under “Sexual Violence” below; that the acts of sexual violence alleged were not committed with the requisite discriminatory intent to constitute persecution as a crime against humanity, an argument discussed under “Sexual Violence, Persecution” below; and that the acts of sexual violence did not constitute grave violations of international humanitarian law, discussed under “Sexual Violence, Torture” below (¶¶ 369, 397, 408).

## SEXUAL THREATS

- On appeal, Kvočka argued that in its judgment, the Trial Chamber failed to establish the constituent elements of the torture charge by evaluating the pain and suffering of each person named in the schedule attached to the indictment (¶ 285). The Prosecution argued that while, the Trial Chamber stated in its findings that it did not intend to “recount every single act of violence and abuse,” it did provide summarized findings relating to torture, including its finding that “beatings alleged in the Indictment, and threats of rape and other forms of sexual violence, amounted to torture”<sup>35</sup> (¶ 287). The Appeals Chamber finds that, although an individualized approach to establishing the pain and suffering of victims would have been preferable, the “generic approach” taken by the Trial Chamber does not render the judgment invalid, as it was reasonable for the Trial Chamber to find that the required pain and suffering of the detainees at Omarska camp was factually established (¶¶ 288-91). Further discussion of the Appeals Chamber’s findings regarding sexual violence and torture are discussed below under “Sexual Violence, Torture.”

## SEXUAL VIOLENCE:

- Radić’s convictions for the charges of persecution as a crime against humanity and torture as a war crime were based in part on evidence of sexual violence committed against female detainees in Omarska camp (¶ 402). Radić appealed on several grounds relevant to his conviction for sexual violence, including on the grounds that the Trial Chamber provided insufficient reasoning for its findings regarding his involvement in sexual violence (¶ 397). In response, the Appeals Chamber states that a Trial Chamber “is not required to articulate every step of its reasoning, nor is a Trial Chamber obliged to

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<sup>35</sup> It should be noted that the relevant count of torture in the indictment of which Kvočka was convicted at trial did not include allegations of sexual violence or threats of such sexual violence in support of that charge. However, such allegations did support the charge of outrages upon personal dignity, which was subsumed by the torture charge of which Kvočka was convicted, as a result of the Trial Chamber’s cumulative convictions analysis. See *Kvočka, et. al. Amended Indictment, supra* FN 8, ¶¶ 38-40. See also *Kvočka, et. al. Trial Chamber Judgment, supra* FN 1, ¶¶ 229-34, 752.

recount and justify its findings in relation to every submission made during trial” (¶ 398). The Appeals Chamber therefore dismisses Radić’s argument that the Trial Chamber failed to provide a “reasoned opinion” regarding his involvement in sexual violence (*id.*).

#### SEXUAL VIOLENCE, PERSECUTION:

- As noted above, in his appeal of his conviction for persecution as a crime against humanity based on evidence of sexual violence committed against female detainees of Omarska camp, Radić argued that the acts of rape and sexual violence charged did not involve “discrimination based on religion, ethnicity, or political belief” (¶ 369). Radić submitted that the Trial Chamber had inferred his discriminatory intent for all of the acts supporting his conviction for persecution, including the acts of sexual violence, and argued that the Trial Chamber had identified personal motives for Radić’s acts of sexual violence but had not established that he committed these acts with discriminatory intent (¶¶ 364, 369). The Appeals Chamber agrees that a Trial Chamber may not infer discriminatory intent based on the general discriminatory nature of the attack (¶ 366). The Appeals Chamber finds, however, that “discriminatory intent may be inferred from the context of the attack, provided it is substantiated by the surrounding circumstances of the crime” (*id.*). Where a crime is committed only against a certain group based on its members’ political or religious affiliation, it is reasonable to conclude that the acts were committed with the requisite discriminatory intent (*id.*). In Radić’s case, almost all of the detainees in Omarska camp were non-Serbs and the Trial Chamber found that the sexual violence was committed only against “women of non-Serb origin,” a finding which Radić did not contest (¶¶ 366, 370). It was therefore reasonable for the Trial Chamber to conclude that Radić possessed the requisite discriminatory intent in committing these acts of sexual violence, notwithstanding his own personal motives for doing so (¶ 370).

#### SEXUAL VIOLENCE, TORTURE:

- On appeal, Kvočka argued that the Trial Chamber erred in convicting him of torture as a war crime based on conditions of the camp such as lack of food and hygiene, which he submitted the security service of which he was a part did not control (¶ 293). The Prosecution responded that this argument is “misconceived” because these camp conditions were not the basis of the Trial Chamber’s finding that Kvočka was guilty of torture as a war crime, rather, the beatings and sexual offenses committed at the camp supported his conviction for this charge (*id.*).<sup>36</sup> The Appeals Chamber notes that Kvočka was convicted of this charge as a co-perpetrator for his participation in a joint criminal enterprise, thus the issue for the Trial Chamber was not what Kvočka could have done or what conditions of detention he had control over; rather, the issue was what he did do that contributed to the joint criminal enterprise (¶ 295). The Trial Chamber established Kvočka’s role in the joint criminal enterprise that committed these acts (*id.*). The Appeals Chamber finds that Kvočka’s argument on this issue therefore fails (*id.*).

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<sup>36</sup> As noted above in FN 35, the relevant count of torture in the indictment of which Kvočka was convicted at trial did not include allegations of sexual violence or threats of such sexual violence in support of that charge. However, such allegations did support the charge of outrages upon personal dignity, which was subsumed by the torture charge of which Kvočka was convicted, as a result of the Trial Chamber’s cumulative convictions analysis. *Kvočka, et. al.* Amended Indictment, *supra* FN 8, ¶¶ 38-40. See also *Kvočka, et. al.* Trial Chamber Judgment, *supra* FN 1, ¶¶ 229-34, 752.

- Radić also contested the Trial Chamber’s findings regarding his charge of torture as a war crime for separate charges against him for the sexual attack upon Witness F, Sifeta Sušić, and Zlata Cikota (¶ 408). Radić argued that these acts of sexual violence “cannot be considered as grave violations of the provisions of international humanitarian law,” and thus are not within the ICTY’s jurisdiction (*id.*). The Appeals Chamber notes that Radić did not contest the Trial Chamber’s factual findings regarding these victims nor the Trial Chamber’s findings that Radić inflicted severe pain and suffering on these victims through these sexual assaults (¶ 409). The Appeals Chamber finds that the Trial Chamber was “justified” in finding that these attacks constituted torture and finds that “torture is, by definition, a serious violation of international humanitarian law,” thus dismissing Radić’s appeal on this ground (¶¶ 409-10).

### Other Issues:

#### PATTERN EVIDENCE:

- At trial, the Trial Chamber heard two witnesses who testified about Radić’s acts of sexual intimidation and violence on whose testimony the Chamber declined to base any of Radić’s convictions (¶ 359). However, the Trial Chamber found that this evidence could be used to establish a pattern of conduct pursuant to Rule 93 of the ICTY’s Rules of Procedure and Evidence (*id.*).<sup>37</sup> First, the Trial Chamber considered the evidence of witness Nedzija Fazlic, who testified that Radić offered to help her in exchange for her having sexual intercourse with Radić (*id.*). Second, the Trial Chamber heard testimony from Witness AT that Radić raped her (*id.*). The Trial Chamber did not use this evidence to support any convictions because neither of these victims were included in the indictment (*id.*). Nonetheless, the Trial Chamber found that these witnesses’ testimony could be used to help establish Radić’s consistent pattern of conduct of such acts (*id.*). Radić submits on appeal that the Trial Chamber erred in admitting this evidence for this purpose without prior disclosure by the Prosecution to the Defense, but the Appeals Chamber finds that, despite making a finding that there was evidence of Radić’s consistent pattern of conduct, the Trial Chamber did not seem to rely on this pattern evidence in convicting Radić of any of the charges (¶¶ 357, 360). Therefore, the Appeals Chamber finds that Radić failed to identify an error on the part of the Trial Chamber by failing to demonstrate how removing this pattern evidence from the record would have impacted the Trial Chamber’s judgment (*id.*).

#### SENTENCING:

- All four Appellants appealed their sentences, but only Kvočka and Radić challenged their sentences on grounds specifically related to their convictions for acts of sexual and gender-based violence (¶¶ 670, 685, 700, 717 ).
  - *Kvočka*: Kvočka argued on appeal that his sentence should be reduced because the Appeals Chamber reversed his convictions for several acts, including murder, rape, and sexual assault charges (¶ 671). With regard to the acts of rape and

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<sup>37</sup> Rule 93 of the ICTY’s Rules of Procedure and Evidence provides: “(A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice. (B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defence pursuant to Rule 66.” Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rev. 49, 22 May 2013, R. 93.

sexual violence that supported the charge of persecution as a crime against humanity in particular, Kvočka argued that, because the Appeals Chamber reversed his conviction with regard to the acts of sexual violence that supported this charge, his sentence should be substantially reduced given the ICTY's practice of punishing sexual violence severely (¶ 331). The Appeals Chamber finds that, while it granted Kvočka's appeals in relation to certain incidents supporting some counts, it did not reverse his conviction on any counts entirely (¶ 684). Therefore, the Appeals Chamber concludes, the "overall picture of [Kvočka's] criminal conduct has not changed so substantially" that a reduction in his sentence is justified, especially given the gravity of the offenses and "Kvočka's important role in supporting and furthering the joint criminal enterprise" (*id.*).

- *Radić*: In appealing his sentence, Radić argued that the Trial Chamber had not adequately considered as a mitigating factor the fact that he had provided assistance to a lot of people (¶ 692). The Prosecution responded that the Trial Chamber had considered these acts of assistance as mitigating factors, but had found that the assistance Radić provided was limited to those from his village and it was sometimes conditioned on the provision of sexual favors (*id.*). The Appeals Chamber finds that the Trial Chamber did consider Radić's assistance to others as a mitigating factor and that it was within the Trial Chamber's discretion to accord as much or as little weight to this factor as it wished (¶ 693). The Appeals Chamber therefore dismisses this argument (*id.*). Radić also argued that his sentence was excessive when compared to those of his co-defendants as well as other defendants tried by the ICTY (¶ 694). Radić claimed that he was given 13 to 14 more years of imprisonment than his co-defendants because of his role in rapes and other acts of sexual violence and argued that this difference in sentencing was excessive (¶ 697). The Appeals Chamber finds that other significant differences between Radić's crimes and those of his co-defendants existed, such as the fact "Kvočka, Kos and Prcać were not convicted of personally committing any of the crimes themselves. Radić, however, was convicted of personally 'committing rape and other forms of sexual violence against several women detained in the camp'" (*id.*). Furthermore, the Appeals Chamber notes the Trial Chamber's observation that while his co-defendants seemed to be professional policemen who "ignored and tolerated" the crimes, Radić appeared to "relish" and actively encourage the commission of crimes committed in the camp and to "regard the abuses as entertainment" (*id.*). The Appeals Chamber recalls that jurisprudence from both the ICTY and the International Criminal Tribunal for Rwanda have established that "the informed, willing or enthusiastic participation" in a crime may be considered an aggravating factor, as can "the sexual, violent, and humiliating nature of the acts" (*id.*). The Appeals Chamber dismisses Radić's appeal on this ground, finding that the Trial Chamber did not err in its determination of his sentence (¶ 698).