

The ICTY and Sexual Violence as a Crime Against Humanity

When is an act of sexual violence sentenced under rape as a crime against humanity (Article 5(g) of the ICTY Statute) and when is an act of sexual violence sentenced under enslavement, torture, persecution or other inhumane acts as a crime against humanity (Article 5(c),(f),(h) and (i) of the ICTY Statute)?



January 2012
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Table of Contents

Page:

Table of Abbreviations

Introduction	1
I History of the International Criminal Tribunal for the former Yugoslavia	1
II Main research question and goal of this thesis	2
III The relevance of this topic	4
IV Sub-questions and structure of this thesis	5
Chapter 1 Sexual Violence	8
1.1. Introduction	8
1.2. The Statute of the ICTY and other legal documents about sexual violence	9
1.3. The ICTR and the ICC on sexual violence prohibitions	12
1.4. Enslavement, torture, rape, persecution and other inhumane acts	14
Chapter 2 Cumulative Charges and Convictions	20
2.1. Introduction	20
2.2. Cumulative charges and convictions at the ICTY	20
2.3. Cumulative charges and convictions at the ICTR and ICC	21
2.4. The benefits of cumulative conviction	22
2.5. The disadvantages of cumulative conviction	22
2.6. Conclusion	23
Chapter 3 Relevant Cases	24
3.1. Introduction	24
3.2. Tadić case	25
3.3. Kunarac et al. case	29
3.4. Todorović case	44
3.5. Kvočka et al. case	46
3.6. Sikirica case	57
3.7. Simić case	59
3.8. Plavšić case	60
3.9. Stakić case	62
3.10. Nikolić case	65
3.11. Češić case	67

3.12. Brđanin case	68
3.13. Krajišnik case	74
3.14. Zelenović case	76
Chapter 4 Summary & Conclusion	81
4.1. Introduction	81
4.2. Sexual violence	81
4.3. Cumulative charges and convictions	81
4.4. The answer to the research question	82
4.5. Final observations	92
Bibliography	94

Table of Abbreviations

A. Ch.:	Appeals Chamber
ARK:	Autonomous Region of Krajina
EoC:	Elements of Crimes of the International Criminal Court
ICC:	International Criminal Court
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the former Yugoslavia
JNA:	Yugoslav National Army
JCE:	Joint criminal enterprise
OTP:	Office of the Prosecutor
Res.:	Resolution
SC:	Security Council
SDS:	Serb Democratic Party
SFOR:	Stabilisation Force (NATO-led force deployed in Bosnia)
T. Ch.:	Trial Chamber
UN:	United Nations
VJ:	Yugoslav Army

Introduction

I History of the International Criminal Tribunal for the former Yugoslavia

The Socialist Federal Republic of Yugoslavia (Yugoslavia), once the largest, most developed and diverse country in the Balkans, was a federation comprised of six republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.¹ Within Yugoslavia there was a mix of 'ethnic groups and religions, with Orthodox Christianity, Catholicism and Islam being the main religions.' Although some of the roots of the Yugoslavia breakup go back to the Second World War if not further, intense political developments and the economic crisis during the late 1980s and early 1990s led the country to break up through a number of linked armed conflicts starting in 1991. These conflicts were 'characterized by large-scale violations of international criminal law committed especially against civilians', most notably the extraordinary accounts of systematic sexual violence and the practice of ethnic cleansing.² Especially the reports of sexual violence in Bosnia and Herzegovina and Kosovo have been alarming. The estimated number of women being raped during the conflict in Bosnia and Herzegovina lies between 20.000 and 50.000 of which the majority were Muslim women who were raped by Serbian soldiers.³ It has been estimated that during the conflict in Kosovo as many as 20.000 Kosovo women were raped.⁴ But not only women were victims of sexual violence during this conflict, men were subjected to sexual violence as well.⁵ Many of the Serbs acted on official orders to rape women as sexual violence was strategically used as an instrument of war and a weapon of terror during the conflict.⁶ For example, it was used as 'part of an effort to eliminate an ethnicity by forcibly impregnating women with a different ethnic gene' and to destroy 'the victim or the community group with whom the victim was associated'. But sexual violence was also simply committed by men because the women were vulnerable during the war and thus they were considered theirs for the taking. Sexual violence is considered to be an extremely effective weapon of war and destruction because of the social stigmas, cultural or religious attitudes, emotional traumas, physical abused and reproductive

¹ Within the Republic of Serbia, Kosovo and Vojvodina held the status of autonomous provinces.

² The International Criminal Tribunal for the Former Yugoslavia, *The former Yugoslavia - Conflicts*, <http://www.icty.org/sid/322>; R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 122.

³ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 9.

⁴ 'It is estimated by the World Health Organisation and the US-based Centre for Disease Control that as many as 20,000 Kosovar women (4.4 per cent of the population) were raped in the two years prior to Nato's forces entering the benighted territory. Numbers to match Bosnia, if not more.'; H. Smit, 'Rape victims' babies pay the price of war', *The Guardian* 16 April 2000.

⁵ See Chapter 3 of this thesis for male sexual violence.

⁶ K. D. Askins, 'A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003', *The human rights brief* (vol. 11) 2004, p. 16; A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 10.

manipulations.⁷

Before the conflict in Bosnia and Herzegovina was formally brought to an end in December 1995, the United Nations (UN) established a Commission of Experts in late 1992 to examine the situation on the ground. The UN was motivated to establish this commission because they could not ignore the distributed pictures of the concentration camps in Bosnia or the ‘reports about massacres of thousands of civilians, rape and torture in detention camps, terrible scenes from cities under siege and the suffering of hundreds of thousands expelled from their homes’. The Commission of Experts reported ‘horrific crimes and provided the Secretary-General with evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law’. These findings led the Security Council to formally establish the International Criminal Tribunal for the former Yugoslavia (ICTY) on 25 May 1993. The main goal was to hold the persons responsible that committed or ordered these crimes, in order to stop the violence and safeguard international peace and security. On that day the UN Security Council passed resolution 827, in which they adopted the draft Statute.⁸ It was possible for the Council to set up this tribunal, because Article 39 in conjunction with Article 41 of the UN Charter granted the Council this authority.⁹ Although Article 41 of the UN Charter does not explicitly mention that the Council can set up a tribunal, it was still entitled to do so due to the fact that the list of measures laid down in Article 41 is not exhaustive.¹⁰ Furthermore, Article 1 of the Statute of the ICTY determines the competence of the tribunal by describing that the ‘International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute’. The ICTY was thereby the first war crimes tribunal established by the UN and the first tribunal in prosecuting international war crimes since the Nuremberg and Tokyo Tribunals. 25 May 1993 can therefore be marked as ‘the beginning of the end of impunity for war crimes in the former Yugoslavia’.¹¹

II Main research question and goal of this thesis

Regarding the main topic of this thesis, which is sexual violence, it should be noted that the

⁷ K. D. Askins, *War crimes against women: prosecution in international war crimes tribunals*, The Hague: Martinus Nijhoff 1997, p. 296.

⁸ R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 123-124; The International Criminal Tribunal for the Former Yugoslavia, Establishment, <http://www.icty.org/sid/319>.

⁹ Article 39 of the UN Charter: ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.’; Article 41 of the UN Charter: ‘The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.’

¹⁰ R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 127.

¹¹ The International Criminal Tribunal for the Former Yugoslavia, Establishment, <http://www.icty.org/sid/319>.

ICTY has criminalized acts of sexual violence in its Statute. According to this Statute there are three main crimes: crimes against humanity, genocide and war crimes. A prohibited act of sexual violence can be a crime against humanity, it can be genocide and it can be a war crime.¹² It is important to keep in mind that in this thesis I will only concentrate on sexual violence as a crime against humanity. The crimes against humanity are set out in Article 5 of the ICTY Statute and reads as follows:

'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;*
- (i) other inhumane acts.'*

As can be read in Article 5 of the ICTY Statute above, acts of sexual violence are obviously criminalized under 'g', which entails rape. But because sexual violence can include different kinds of sexual acts and not solely rape, the prosecutor had to find a way to charge acts of sexual violence not containing rape or acts that contained rape, but yet contained more than just rape (for example, rape can be seen as so severe that it can be said that it also amount to torture).¹³ Indictments show that the prosecutor solved this problem by charging certain acts of sexual violence as enslavement, torture, persecution or other inhumane acts. The jurisprudence of the ICTY shows that the judges 'agreed' with this solution of the prosecutor by convicting acts of sexual violence indeed as enslavement, torture, persecution or other inhumane acts.¹⁴ The question that therefore arises is the following: when do certain acts of sexual violence fall under rape (Article 5(g) of the Statute) and when do certain acts of sexual violence fall under enslavement, torture, persecution or the other inhumane acts (Article

¹² The crime of genocide can be found in Article 4 of the ICTY Statute and war crimes can be found in Article 2 (Grave breaches of the Geneva Conventions of 1949) and Article 3 (Violations of the laws or customs of war) of the ICTY Statute. For example case law has shown that acts of sexual violence can be convicted as cruel treatment as a violation of the laws or customs of war (Article 3(a) ICTY Statute; Tadić case), inhuman treatment as a grave breach (Article 2(b) ICTY Statute; Tadić case) and as genocide by causing serious bodily or mental harm to members of the group (Article 4(b) ICTY Statute/Article 2(b) ICTR Statute; Akayesu case). Explanation of what these crimes precisely entail goes beyond the scope of this thesis. See, for a better understanding of these crimes, R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 203-289.

¹³ That means that rape could be prosecuted as rape itself as well as torture (cumulative conviction, see Chapter 2 of this thesis); R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 253; *Čelebići* ICTY (T. Ch. II) 16 November 1998, *Case No. IT-96-21-T*, p. 172-178.

¹⁴ See Chapter 3 of this thesis or for example *Čelebići* ICTY (T. Ch. II) 16 November 1998, *Case No. IT-96-21-T*; *Kunarac* ICTY (A. Ch) 12 June 2002, *Case No. IT-96-23* and *IT-96-23/1* and *Kvočka* ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*.

5(c),(f),(h) and (i) of the Statute)? In other words: is there a underlying logic? The ICTY Statute is not clear on this point, because apart from mentioning rape in the Statute, it does not elaborate on other acts of sexual violence. The Statute of the International Criminal Court (ICC) on the other hand, does elaborate on this issue which makes it a little bit clearer when certain acts of sexual violence fall under which crime against humanity. Namely, the Rome Statute of the ICC includes as crimes against humanity amongst others rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity.¹⁵ It can be said that up till now there is no clear rule given by the ICTY that explains when precisely an act of sexual violence is a crime under Article 5(g) ICTY Statute (rape) and when it is a crime under Article 5(c),(f),(h) or (i) of the Statute (enslavement, torture, persecution or other inhumane acts). In other words, which acts of sexual violence fall under rape, which acts of sexual violence fall under enslavement, which acts of sexual violence fall under torture, which acts of sexual violence fall under persecution and lastly which acts of sexual violence fall under other inhumane acts? It should be kept in mind that only the crimes rape, enslavement, torture, persecution or other inhumane acts as mentioned in Article 5 of the ICTY Statute will be discussed in this thesis. The remaining crimes against humanity of Article 5 of the ICTY Statute ((a) murder, (b) extermination, (d) deportation and (e) imprisonment) will not be discussed in this thesis because it is not plausible that acts of sexual violence are prosecuted under these crimes. In addition to the before mentioned question, it is also interesting to find out whether there is a general rule to distill from the jurisprudence of the ICTY that can clear up this issue. Therefore my main research question in this thesis is:

When is an act of sexual violence sentenced under rape as a crime against humanity (Article 5(g) of the ICTY Statute) and when is an act of sexual violence sentenced under enslavement, torture, persecution or other inhumane acts as a crime against humanity (Article 5(c),(f),(h) and (i) of the ICTY Statute)?

III The relevance of this topic

Finding an answer to this main research question is important because, keeping in mind that the jurisprudence of the ICTY also has its influence on international criminal law and jurisprudence of other tribunals, it would make it clearer for prosecutors to know exactly which charges can be pressed against which acts of sexual violence. Secondly, it will also be

¹⁵ Article 7(1) Rome Statute of the ICC: 'For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.'

clear for the accused under which prohibited act he will be or could be prosecuted and therefore he will know where he stands before and during the trial (legal certainty). Also it will be clearer for civilians who have not committed a crime (yet) to judge what the consequences will be if they would commit the crime. It therefore might have an extra (mental) deterrent effect. Fourthly, it will also contribute to the *ne bis in idem* principle. This principle ensures that no person shall be tried before the tribunal 'with respect to conduct which formed the basis of crimes for which the person has already been convicted or acquitted' by the tribunal.¹⁶ Lastly, it can also be useful for other international tribunals or international courts since it will help them prosecute in a way that shows accordance with other tribunals and courts (legal unity).

If there is no logic or clear rule given by the ICTY that explains when precisely an act of sexual violence is a crime under Article 5(g) ICTY Statute and when it is a crime under one of the aforementioned prohibited crimes against humanity, one of the consequences could be unequal sentencing / unequal law (in general: no legal unity). A further consequence of unequal sentencing could be that civilians and states will not take the tribunals and the courts seriously, which at worst can, in time, result in no more cooperation of the states. The ICTY depends on cooperation of state parties, as Article 29 of the ICTY Statute mentions:

- 1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.*
- 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal.'*

Furthermore, if states do not cooperate with the tribunal, it can also result in non-execution of the imposed prison sentences. Because the tribunal has got no prisons of its own, sentences will be served in the detention facilities of state parties which have indicated to the Security Council their willingness to accept convicted persons.¹⁷ Lastly, this could all finally result in impunity. Which could ultimately bring civilians in danger.

IV Sub-questions and structure of this thesis

To be able to find and form an answer to the main question, a couple of sub question should be discussed and answered first. This results in the following sub-sections and structure of the thesis:

- Chapter 1 Sexual violence: to determine whether an act of sexual violence should be sentenced under rape (Article 5(g) of the ICTY Statute) and when it should be sentenced under enslavement, torture, persecution or other inhumane acts (Article 5(c),(f),(h) and (i) of

¹⁶ Article 10 ICTY Statute and Article 20 Rome Statute of the ICC.

¹⁷ Article 27 of the ICTY Statute.

the ICTY Statute), it firstly is important to discuss the very core. That means that it is necessary to discover what sexual violence entails precisely. To discover what sexual violence precisely entails, I have studied the Statute of the ICTY, legal documents and literature. Furthermore, I have also looked at the Statute of the International Criminal Tribunal of Rwanda (ICTR), the Statute of the International Criminal Court (ICC), the Elements of Crimes of the ICC and jurisprudence of the ICTY and ICTR. These sources will be discussed because this thesis concerns sexual violence in the scope of Article 5 of the ICTY Statute, therefore the Statute itself must be viewed. Jurisprudence will be discussed because jurisprudence can be seen as an elaboration of the provisions in this Article and therefore will provide more information about sexual violence. The Statute and jurisprudence of the ICTR will be discussed because the ICTY and the ICTR view each other's judgements and sometimes implement certain legal reasoning in their own judgements. The case law of the ICTY and ICTR also contributed to the definitions of the crimes against humanity in the Rome Statute of the ICC, which makes it also interesting to see what the Rome Statute of the ICC entails. The Elements of Crimes will be discussed because they foresee in the interpretation and application of the Articles in the Rome Statute of the ICC. Lastly, legal documents and literature will be viewed because they provide more (background) information concerning sexual violence.

- Chapter 2 Cumulative Charges and Convictions: to understand the underlying logic of the judgements, namely, when do they sentence an act of sexual violence under Article 5(g) of the ICTY Statute and when do they sentence under Article 5(c),(f),(h) and (i) of the ICTY Statute, it is important to question whether an accused may be charged and convicted of more than one offence for the same conduct. For this chapter I have studied relevant jurisprudence of the ICTY, the Statute of the ICTY and literature. These sources will be viewed to see if the Statute or jurisprudence give any clarity concerning cumulative conviction or cumulative charging of the ICTY. Furthermore, the Statute and jurisprudence of the ICTR and ICC will be looked at to see if the cumulative convictions and cumulative charging tactics of the ICTY are the standard used tactics. Lastly, literature will be discussed because it provides more information concerning cumulative convictions and cumulative charging.

- Chapter 3 Relevant cases: to understand when an act of sexual violence should be sentenced under rape as a crime against humanity (Article 5(g) of the ICTY Statute) and when it should be sentenced under enslavement, torture, persecution or other inhumane acts as a crime against humanity (Article 5(c),(f),(h) and (i) of the ICTY Statute), it is important to look at the relevant jurisprudence of the ICTY and to distinguish the facts in these cases. Namely, if it is possible to distinguish facts in the cases, it should become possible to see which acts of sexual violence fall under rape and which acts of sexual violence, that might look similar to the former, fall under, torture, enslavement, persecution or other inhumane acts. For this chapter I have also studied literature because it provides more (background) information around and about the cases.

- Chapter 4 Summary & Conclusion: The answer to the main research question will be

discussed in this chapter. The discussion of the relevant cases in Chapter 3 should provide the basis for answering this question. Also, the answer to this question will help in formulating (if possible) a general rule which makes it clear when sexual violence falls under which crime against humanity. The possibility of formulating a general rule will also be discussed in this chapter.

1.1. Introduction

To determine *when an act of sexual violence is sentenced under rape as a crime against humanity (Article 5(g) of the ICTY Statute) and when an act of sexual violence is sentenced under enslavement, torture, persecution or other inhumane acts as a crime against humanity (Article 5(c),(f),(h) and (i) of the ICTY Statute)*, it is important to firstly discuss the very core of the question. That means that it is necessary to discover what sexual violence entails precisely. To define the prohibited act of sexual violence as a crime against humanity it is important to look at the Statute of the ICTY and other legal documents that existed prior to the first judgements of the ICTY. Case law of the ICTY will not be discussed in the first paragraph because it is firstly important to see what the articles in the Statutes and other legal documents state about sexual violence. However, the case law of the ICTY will be discussed in Chapter 3. By discussing case law concerning which acts of sexual violence fall under enslavement, torture, rape, persecution or other inhumane acts in Chapter 3, the definition of sexual violence will eventually become more complete. Also, discussing the Statute of the tribunal and the legal documents first, shows how little the judges had to work with in the beginning. With regard to sexual violence prohibitions, this chapter will furthermore discuss the Statutes of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). Although the ICTR and the ICC do not fall within the scope of this thesis, it is important to briefly discuss this topic since the ICTY and the ICTR view each other's judgements and sometimes implement certain legal reasoning in their own judgements. The case law of the ICTY and ICTR also contributed to the definitions of the crimes against humanity in the Rome Statute of the ICC. Lastly, because the jurisprudence of the ICTY shows that acts of sexual violence can also fall under enslavement, torture, persecution and other inhumane acts, and to get a complete understanding of these provisions and a complete understanding of my research question¹⁸ in this thesis, these provisions and the 'rape' provision will be discussed shortly in the last paragraph.

In short, this chapter will first of all discuss the Statute of the ICTY and other legal documents dealing with sexual violence in paragraph 1.2. The ICTR and the ICC will be discussed with regard to sexual violence prohibitions in paragraph 1.3. and lastly, the provisions enslavement, torture, rape, persecution and other inhumane acts will be discussed in paragraph 1.4.

¹⁸ The research question is: *When is an act of sexual violence sentenced under rape as a crime against humanity (Article 5(g) of the ICTY Statute) and when is an act of sexual violence sentenced under enslavement, torture, persecution or other inhumane acts as a crime against humanity (Article 5(c),(f),(h) and (i) of the ICTY Statute)?*

1.2. The Statute of the ICTY and other legal documents about sexual violence

The charters of the Nuremberg (International Military Tribunal) and Tokyo Tribunals were the first international legal instruments to define crimes against humanity for the purpose of prosecuting individuals responsible for such crimes.¹⁹ The International Criminal Tribunal for the former Yugoslavia (ICTY), which was established in 1993, is an United Nations court of law dealing with the atrocities that took place during the conflicts in the Balkans in the 1990's.²⁰ Article 5 of the ICTY Statute is a codification of Article 6(c) of the Nuremberg Charter.²¹ Although the provisions on crimes against humanity in the Nuremberg (and Tokyo Statute) did not explicitly refer to rape or other forms of sexual violence, the ICTY Statute does explicitly refer to rape as a crime against humanity.²² Furthermore it formed several other additions, namely, imprisonment and torture. Before the establishment of the ICTY, prejudice and lack of understanding kept sexual violence from being tried and criminalized on an international level.²³ Fortunately, this slowly changed over the years. Namely, Article 5 of the ICTY Statute mentions the following:

'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;*
- (i) other inhumane acts.'*

The provisions in the Statute, in which Article 5 is included, are not elaborated with applicable Elements of Crimes that will assist the tribunal in the interpretation and application

¹⁹ M. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, New York: Transnational Publishers, Inc. Irvington-on-Hudson 1996, p. 539; V. Morris & M.P. Scharf, *The International Criminal Tribunal for Rwanda*, New York: Transnational Publishers, Inc. Irvington-on-Hudson 1998, p. 159.

²⁰ UN SC Res. 808 and 827 (1993); The International Criminal Tribunal for the Former Yugoslavia, about the ICTY, <http://www.icty.org/sections/AbouttheICTY>; See the Introduction for a more extensive history of the ICTY.

²¹ Article 6(c) Nuremberg Charter: '*Crimes against humanity.- ' namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'*

²² A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 6 and 8.

²³ M. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, New York: Transnational Publishers, Inc. Irvington-on-Hudson 1996, p. 557.

of the Articles in the Statute.²⁴ In fact, there are no statutory limitations with respect to crimes against humanity, genocide and war crimes. Namely, statutory limitations, ‘if applicable, could lead to impunity for the most heinous international crimes. In order to close this possible ‘technical’ escape from liability, treaties on the non-applicability of statutory limitations to genocide, crimes against humanity and war crimes were adopted’. It can be claimed that the non-applicability of statutory limitations ‘has developed into a norm of customary international law’.²⁵ Therefore it can also be said that the provisions in the Statute are based on both common law and civil law traditions.²⁶ However, a crime against humanity in general, does have to meet certain elements. This means that a crime against humanity can only be charged if it meets the elements of being (a part of) *a widespread or systematic attack directed against a civilian population*.²⁷

With the above being said, it is now possible to discuss the Statute of the ICTY and other legal documents that existed prior to the first judgements of the ICTY, to define the prohibited act of sexual violence as a crime against humanity. First of all it is obvious that *rape* falls within the scope of sexual violence. Namely, Article 5 of the ICTY Statute already mentions rape explicitly. Unfortunately the Statute remains quiet in mentioning other acts of sexual violence. To discover other acts of sexual violence as a crime against humanity it is important to discuss the Secretary-General’s Yugoslav Tribunal Report pursuant to the Security Council resolution 808. In resolution 808 the Secretary-General recommended that it creates a tribunal by resolution. Concerning sexual violence as a crime against humanity he stated that ‘Crimes against humanity refer to inhumane acts of a very serious nature (...). In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so called “ethnic cleansing” and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.’²⁸ This clearly means that Article 5 of the ICTY Statute does not solely prohibit rape, but also *other forms of sexual assault*, including *enforced prostitution*. The Secretary-General’s report, however, does not mention under which provisions of crimes against humanity these other prohibited sexual violence acts are prohibited. Nonetheless it is clear that sexual violence as a crime against humanity entails more than just rape. Furthermore, in discovering what the definition of sexual violence as a crime against humanity entails, the Rules of Procedure and Evidence of the ICTY are important to discuss. This document was adopted by the judges of the ICTY ‘for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the

²⁴ This is in contrast with the Statute of the International Criminal Court where the Elements of Crimes assist the court in the interpretation and application of the Articles in the Rome Statute of the ICC (see paragraph 1.4.1. of this thesis).

²⁵ R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 77.

²⁶ ICTY (Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements) 27 November 1996, *Case No.* IT-94-1-T.

²⁷ Further discussion about these elements do not fall in the reach of this thesis. See for further discussion R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 234-245 and Report of the Secretary-General, *supra* note 15, paras. 47-48.

²⁸ Report of the Secretary-General, U.N. Doc. S/25704 (1993), para. 48; M. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, New York: Transnational Publishers, Inc. Irvington-on-Hudson 1996, p. 593.

protection of victims and witnesses and other appropriate matters'.²⁹ The victim being the one who suffers and/or is harmed by the conduct and the witness being the one who has heard, seen or experienced the conduct which makes him or her able to testify before the Chambers. Indeed, a victim who survived terrible atrocities can also be a witness. Rule 34 of this document, which addresses the regulation of the victims and witnesses section, mentions that under the authority of the Registrar there shall be set up 'a Victims and Witnesses Section consisting of qualified staff to (...) provide counseling and support for them, in particular in cases of rape and sexual assault.' Furthermore, rule 96 mentions that it regulates the 'evidence in cases of sexual assault'. Given the fact that these rules apply to all sexual assault crimes, it can be said that these rules also apply to sexual assaults as a crime against humanity. By using the term sexual assault separately from rape in both rules, it can be said that the definition of sexual violence entails, next to rape, other forms of sexual assault. Unfortunately the Secretary-General's report and the Rules of Procedure and Evidence do not further elaborate on the content of the definition of sexual assault as mentioned in these documents. So far, it can be concluded that the Statute of the ICTY acknowledged that not only rape is punishable, other acts of sexual assault are punishable as well.

While continuing the search for the definition of sexual violence, it is important to discuss the final Report of the Commission of Experts of the United Nations in this chapter. In this report the commission viewed, amongst other things, the legal issues which were of particular significance in the context of the former Yugoslavia. Legal issues such as systematic sexual assaults were viewed. Therefore this report goes deeper into the legal aspects of rape and other sexual assaults. To be more precise, the commission considered rape to be 'a crime of violence of a sexual nature against the person. This characteristic of violence of a sexual nature also applies to other forms of sexual assault against women, men and children, when these activities are performed under coercion or threat of force and include sexual mutilation.'³⁰ Furthermore, the commission emphasized that although 'sexual assaults imply the commission of the crime by a given perpetrator, persons who do not perform the act but are indirectly involved in the commission of this crime, like decision-makers and superiors, are also responsible'.³¹ Thereby the Commission of Experts gave some guidance as to when an act of sexual violence can be defined as rape or another form of sexual assault and as to whom can be held responsible for the sexual assaults. But more importantly it mentioned another act which can be considered as an acts of sexual violence as a crime against humanity, namely, *sexual mutilation*.

After having discussed the relevant legal documents above, it can be said that the above mentioned rape, enforced prostitution and sexual mutilation as crimes of sexual violence do not fully define the term of sexual violence. The definition of sexual violence must be broader than that. But it seems that, prior to the first judgement of the ICTY, it has not been given

²⁹ Article 15 of the ICTY Statute.

³⁰ Final Report of the Commission of Experts of the United Nations, 27 may 1994 S/1994/674, under II J.

³¹ M. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, New York: Transnational Publishers, Inc. Irvington-on-Hudson 1996, p. 544; Final Report of the Commission of Experts of the United Nations, 27 may 1994 S/1994/674, under II J.

much thought which crimes could entail sexual violence. On the other hand, a solid determination of what sexual violence precisely entails is not desirable as acts of sexual violence can always differ and change through time. A specific and exhaustive list can therefore, in a worst case scenario, lead to impunity (*principle of legality*). This being said, it should be noticed that the Statute also remains silent as to answering the question whether an act of sexual violence can be sentenced under enslavement, torture, persecutions on political, racial and religious grounds or other inhumane acts. Therefore it remains unclear when an act of sexual violence should be sentenced under Article 5(g) of the ICTY Statute and when it should be sentenced under Article 5(c),(f),(h) and (i) of the ICTY Statute. Case law, which will be discussed in Chapter 3, will clarify this issue.

To conclude the above, it can be said that acts of sexual violence as a crime against humanity in Article 5 of the ICTY Statute implies rape but also enforced prostitution, sexual mutilation and other forms of sexual assault. The latter remains vague and will become clearer when discussing the available case law of the ICTY in Chapter 3. It must be noted that, in order to charge acts of sexual violence, it does not matter if these prohibited acts are committed against women, men or children. What matters is that the attack must be a widespread or systematic attack directed against a civilian population, performed under coercion or threat of force. For a person to be responsible for the sexual violence act it does not matter whether he is directly or indirectly involved. A small part of sexual violence as a crime against humanity of the ICTY Statute is hereby clarified, but an accurate definition of sexual violence remains absent. Therefore it remains unclear when an act of sexual violence should be sentenced under Article 5(g) of the ICTY Statute and when it should be sentenced under Article 5(c),(f),(h) and (i) of the ICTY Statute.

1.3. The ICTR and the ICC on sexual violence prohibitions

Although the International Criminal Tribunal of Rwanda (ICTR) and the International Criminal Court (ICC) do not fall within the scope of this thesis, it is important to know that the ICTY and the ICTR view each other's judgements and sometimes implement certain legal reasoning in their own judgements. Moreover, case law of the ICTY and ICTR contributed to the definition of sexual violence in the Rome Statute of the ICC. Lastly, the ICTR and ICC may also be mentioned in the upcoming chapters. That is why the ICTR and the ICC will also be discussed in this paragraph.

The ICTR was established in 1994 by resolution of the Security Council.³² The purpose of this measure was to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994 and to maintain the peace in the region.³³ Article 3 of the ICTR Statute deals with crimes against humanity and is also a codification of Article 6(c) of the Nuremberg

³² UN SC Res. 955 (1994); ICTY Statute, p. 1.

³³ The International Criminal Tribunal for Rwanda, general information, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx>.

Charter. Article 3 of the ICTR Statute reads as follows:

'Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;*
- (b) Extermination;*
- (c) Enslavement;*
- (d) Deportation;*
- (e) Imprisonment;*
- (f) Torture;*
- (g) Rape;***
- (h) Persecutions on political, racial and religious grounds;*
- (i) Other inhumane acts.'*

As can be seen, Article 5 of the ICTY Statute was also a source of inspiration to Article 3 of the ICTR. Therefore it can be said that the ICTR shares the opinion that rape can be seen as an act of sexual violence. Besides mentioning rape, the Statute of the ICTR does not provide an accurate definition of sexual violence.³⁴

On 1 July 2002 the Rome Statute of the International Criminal Court (ICC) entered into force.³⁵ The ICC is the first permanent 'international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.' It is an independent international organization and it is not a part of the United Nations system.³⁶ Until now we have seen that the Statutes of the ICTR and ICTY only describe 'rape' as an act of sexual violence falling within the definition of crimes against humanity. The Rome Statute of the ICC deals with crimes against humanity in Article 7 of its Statute. Due to the fact that numerous offences of sexual violence took place during the violence in the former Yugoslavia and Rwanda and because of the highly effective lobbying of woman's interest groups in Rome, the Rome Statute of the ICC included in Article 7(1)(g), next to the act of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity. The lobbying of woman's interest groups persuaded many states that 'rape' alone did not cover the many sexual atrocities perpetrated in times of war. The inclusion was therefore not seen as an expansion but rather as an acknowledgement that these atrocities fall within the definition of crimes against humanity.³⁷ Article 7 of the Rome Statute of the ICC therefore reads as follows:

³⁴ V. Morris & M.P. Scharf, *The International Criminal Tribunal for Rwanda*, New York: Transnational Publishers, Inc. Irvington-on-Hudson 1998, p. 190-191.

³⁵ The Rome Statute of the International Criminal Court, p. 1.

³⁶ International Criminal Court – About the Court, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/>.

³⁷ R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 253-254; D. McGoldrick, P. Rowe & E. Donnelly, *The Permanent International Criminal Court. Legal and Policy Issues*, Oxford and Portland Oregon: Hart Publishing 2004, p. 195.

'Crimes against humanity

1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.'

From the sentence of Article 7(1)(g) one can conclude that sexual violence within the scope of the ICC, holds the act of rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization. But Article 7(1)(g) is not exhaustive, it also mentions 'any other form of sexual violence of comparable gravity'. The information mentioned in the Rome Statute of the ICC is not enough to define the above mentioned prohibited acts of sexual violence. Therefore the ICC developed Elements of Crimes (EoC) which assist the court in the interpretation and application of Article 7 of the Rome Statute of the ICC.³⁸ The court shall apply these EoC, but they are not binding.³⁹ It should be kept in mind that the case law of the ICTY and ICTR contributed to the definitions mentioned in the EoC. It is clear that the Rome Statute of the ICC and thereby the EoC are much more extensive and specified than the ICTY and ICTR Statutes when it comes to prohibited acts of sexual violence and defining these prohibited acts.

1.4. Enslavement, torture, rape, persecution and other inhumane acts

As can be seen above rape is a form of sexual violence prohibited in Article 5(g) of the ICTY Statute. As already mentioned in the Introduction of this thesis, the jurisprudence of the ICTY shows that acts of sexual violence can also fall under enslavement, torture, persecution and other inhumane acts. It should be kept in mind that these prohibited acts are all crimes against humanity, which means that they can only be charged if they meet the elements of being (a

³⁸ Article 9(1) of the Rome Statute of the ICC; Unfortunately a similar document does not exist for the ICTY and ICTR Statute.

³⁹ Article 21(1)(a) of the Rome Statute of the ICC; Article 9(1) of the Rome Statute of the ICC; A.L.M. de Brouwer, 'Het Internationaal Strafhof en de vervolging van seksueel geweld', NJCM-Bulletin (vol. 31) 2006, p. 954.

part of) *a widespread or systematic attack directed against a civilian population*.⁴⁰ To get a complete understanding of these provisions (as laid down in Article 5(c),(f),(g),(h) and (i) ICTY Statute), a complete understanding of sexual violence and a complete understanding of my research question in this thesis, they will be shortly discussed in turn here below.

Enslavement (Article 5(c) ICTY Statute)

Article 1 of the 1926 Slavery Convention defines enslavement as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’. The 1956 Supplementary Slavery Convention adopted this definition of slavery in Article 7(a) and added that “‘slave” means a person in such condition or status’. The ICTY has adopted this definition of enslavement in its jurisprudence.⁴¹ Enslavement can take various forms. For example it includes ‘chattel slavery’. This means that they treat persons as chattels, also known as ‘slave trade’.⁴² The Supplementary Slavery Convention describes in Article 7(c) that “‘Slave trade” means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance.’ Furthermore, enslavement can also include ‘reducing a person to a servile status’, which includes debt bondage, serfdom, forced marriage and child exploitation.⁴³ Another form of enslavement is forced labour⁴⁴, but certain activities can also amount to enslavement, such as the ‘control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel

⁴⁰ Further discussion about these elements do not fall in the reach of this thesis. See for further discussion R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 234-245 and Report of the Secretary-General, *supra* note 15, paras. 47-48.

⁴¹ See Kunarac et al. case ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, paras. 539-540; R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 247.

⁴² R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 247.

⁴³ Article 1 of the 1956 Supplementary Slavery Convention: ‘(a) *Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined; (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status; (c) Any institution or practice whereby: (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) A woman on the death of her husband is liable to be inherited by another person; (d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.’; R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 247.*

⁴⁴ Krnojelac case ICTY (T. Ch.), 13 March 2002, *Case No. IT-97-25-T*, paras. 193-195.

treatment and abuse, control of sexuality and forced labour'.⁴⁵ Such powers have to be exercised intentional.⁴⁶ Lack of consent of the victim does not constitute an element of enslavement as 'enslavement flows from claimed rights of ownership'.⁴⁷ Lastly, it should be mentioned that 'acquisition or disposal of someone for monetary or other compensation, is not a requirement for enslavement'.⁴⁸

Torture (Article 5(f) ICTY Statute)

For the definition of torture the ICTY adopted a large portion of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 1 of this Convention states that 'the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person'. It is not required that the act of torture must be inflicted, instigated, consented or acquiesced by a public official or a other person acting in an official capacity.⁴⁹ A 'purpose' element however is required according to the ICTY jurisprudence.⁵⁰ This purpose does not need to be the sole or predominant purpose, but it must be part of the motivation.⁵¹ Lastly it should be noticed that the afore mentioned pain and suffering arising 'only from, inherent in or incidental to, lawful sanctions' is excluded from the definition.⁵²

Rape (Article 5(g) ICTY Statute)

As seen above, conventions that existed before the ICTY formed a basis for the judges of the ICTY in forming a definition. A definition of rape, however, was never given in a convention or in similar instruments. The definition of rape, therefore, had to be developed through case

⁴⁵ This enumeration is not exhaustive; See Chapter 3 of this thesis for the Kunarac et al. case ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, para. 543; ICTY (A. Ch.) 12 June 2002, *Case No.* IT-96-23 & IT-96-23/1, para. 119; R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 248.

⁴⁶ Kunarac et al. case ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, para. 540.

⁴⁷ Kunarac et al. case ICTY (A. Ch.) 12 June 2002, *Case No.* IT-96-23 & IT-96-23/1, para. 120.

⁴⁸ Kunarac et al. case ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, para. 542.

⁴⁹ Kunarac et al. case ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, paras. 495-496; R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 251-252.

⁵⁰ Article 1 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: '*such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*' This list, however, is not exhaustive. The Furunžija case ICTY (T. Ch.) 10 December 1998, *Case No.* IT -95-17/1-T, para. 162, for example added 'humiliation' to the list.

⁵¹ Kunarac et al. case ICTY (A. Ch.) 12 June 2002, *Case No.* IT-96-23 & IT-96-23/1, para. 155; R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 252.

⁵² R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 253.

law.⁵³ The three most important judgements of the ICTY that have formulated definitions of rape will be discussed. First of all the Čelebići case, secondly the Furunžija case and lastly the Kunarac et al. case.

Regarding the definition of rape, the judges in the Čelebići case agreed in its judgement with the reasoning of the earlier judgement in the Akayesu case of the ICTR.⁵⁴ The judges of the Čelebići case therefore considered rape to constitute ‘a physical invasion of a sexual nature, committed on a person under circumstances that are coercive’.⁵⁵ The judges in the Furunžija case gave clarity to the physical element by defining this element 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’.⁵⁶ Furthermore, the Furunžija case also considered that ‘coercion or force or threat of force against the victim or a third person’ was also an element of rape.⁵⁷ The judges of the third case, the more recent Kunarac et al. case, agreed with the aforementioned physical element but moved away from the ‘coercion’ element and adopted instead ‘the lack of consent of the victim’.⁵⁸ Although criticized by some, the Appeals Chamber upheld this judgement and added that ‘force or threat of force may be relevant, in providing clear evidence of non-consent, but force is not an element per se of rape’.⁵⁹

Although the EoC are meant to assist the ICC and not the ICTY and although the EoC are not binding, the definition of rape given by the EoC is suggested to be the standard definition within supranational criminal law.⁶⁰ Again, it should be kept in mind that the case law of the ICTY and ICTR contributed to the definitions mentioned in the EoC. Consequently, the definition of the EoC falls between the above given definitions and is the closest to recent tribunal jurisprudence, because it is comparably specific and gender neutral.⁶¹ The definition

⁵³ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 103; See for discussion about violating the legality principle (‘according to which punishment is only possible if the crime has been defined in advance, in written law and clearly and unequivocally’) A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 127-128 and footnote 192.

⁵⁴ The Akayesu case was the first case of the ICTR defining rape as a crime against humanity; ICTR (T. Ch. I) 2 September 1998, *Case No.* ICTR-96-4-T.

⁵⁵ ICTY (T. Ch. II) 16 November 1998, *Case No.* IT-96-21-T, paras. 478-479.

⁵⁶ ICTY (T. Ch.) 10 December 1998, *Case No.* IT -95-17/1-T, para. 185; R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 254.

⁵⁷ ICTY (T. Ch.) 10 December 1998, *Case No.* IT -95-17/1-T, para. 185.

⁵⁸ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, paras. 436-460.

⁵⁹ R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 255; Kunarac et al. case ICTY (A. Ch.) 12 June 2002, *Case No.* IT-96-23 & IT-96-23/1, para. 129.

⁶⁰ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 129.

⁶¹ The EoC definition of rape is a mix of the definitions given in the Akayesu and Furundžija case and ‘incorporates domestic law perspectives on the definition of rape.’; A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp:

of the EoC is therefore important in this thesis. According to Article 7(1)(g)-1 of the EoC, rape is an act where the perpetrator invades ‘the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.’⁶² In addition the EoC says ‘that the concept of ‘invasion’ is intended to be broad enough to be gender-neutral’.⁶³ Furthermore, the invasion of the perpetrator has to be ‘committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion had to be committed against a person incapable of giving genuine consent.’⁶⁴ ‘It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.’⁶⁵ Lastly, the perpetrator had to know that ‘the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.’⁶⁶

It is important to notice that the first mentioned ‘any part of the body’ may imply ‘the ears, nose or eyes of the victim.’ The second mentioned ‘any other part of the body’ may imply, for example, ‘the fingers, hands or tongue of the perpetrator.’⁶⁷ Furthermore, it is important to keep in mind that the concept of ‘invasion’ is gender-neutral. This means that it does not matter whether the victim or perpetrator is a man or a woman. Thirdly, the definition speaks of ‘the invasion was committed (...) against such person or another person’. This means that the definition not only covers ‘the situation in which the rape may have been committed if the person herself/himself was subjected to the prevailing circumstances, but also the situation in which another person would have been victimized if the first did not submit to the act(s).’⁶⁸

Persecutions on political, racial and religious grounds (Article 5(h) ICTY Statute)

A definition of persecution was, until the establishment of the ICTY, not well defined. The definition of persecution was therefore developed through tribunal jurisprudence. Tribunal jurisprudence defined persecution by ‘intentional and severe deprivation of fundamental rights, against an identifiable group or collectivity on prohibited discriminatory grounds.’ The requirements for a ‘severe deprivation of fundamental rights’ are ‘(1) a gross or blatant denial, (2) on discriminatory grounds, (3) of fundamental right, laid down in international customary

Intersentia 2005, p. 135; R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 254.

⁶² Article 7(1)(g)-1, element 1 of the ICC EoC.

⁶³ Article 7(1)(g)-1, element 1, footnote 15 of the ICC EoC.

⁶⁴ Article 7(1)(g)-1, element 2 of the ICC EoC.

⁶⁵ Article 7(1)(g)-1, element 2, footnote 16 of the ICC EoC; For example, persons under influence of drugs, children, elderly and disabled people.

⁶⁶ Article 7(1)(g)-1, element 4 of the ICC EoC.

⁶⁷ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 131-132.

⁶⁸ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 134-135.

or treaty law, (4) reaching the same level of gravity as other crimes against humanity.’⁶⁹ However, these requirements remain ‘somewhat open with respect to particular acts that may constitute persecution, as it is impossible to anticipate all future examples.’⁷⁰ For example, acts of persecution can include all the acts that are already prohibited and listed in Article 5 ICTY (the crimes against humanity), when committed with discriminatory intent. But persecution can also include other conduct that severely deprives political, civil, economic or social rights, such as ‘overt violence such as burning of homes and terrorization’.⁷¹

Other inhumane acts (Article 5(i) ICTY Statute)

Although much care has been taken in establishing the above mentioned various forms of crimes against humanity, one would never be able to catch up with the imagination of future crimes against humanity. One should also be careful in wanting to establish a specific and complete list because ‘the more specific and complete a list tries to be, the more restrictive it becomes’. For this very reason the provision ‘other inhumane acts’ has been added to the list. The threshold for this crime is that the conduct requires ‘similar gravity and seriousness’ to other prohibited crimes against humanity. Furthermore, the accused must ‘carry out the conduct intentionally’, he must have been ‘aware of the factual circumstances that established the character of the act’ and he must have had the ‘intend to inflict serious bodily or mental harm’. Acts that have been characterized as other inhumane acts are, for example, mutilation, severe bodily harm, forced nudity, forced marriage, sexual violence and forced prostitution.⁷²

⁶⁹ R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 259.

⁷⁰ R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 259.

⁷¹ R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 262.

⁷² R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 265-266.

Chapter 2 Cumulative Charges and Convictions

2.1. Introduction

To be able to give a full and complete answer to the main question in this thesis, namely, *when is an act of sexual violence sentenced under rape as a crime against humanity (Article 5(g) of the ICTY Statute) and when is an act of sexual violence sentenced under enslavement, torture, persecution or other inhumane acts as a crime against humanity (Article 5(c),(f),(h) and (i) of the ICTY Statute)*, it is important to address the issue of cumulative charges and convictions. To understand the underlying logic of the judgements as to when an act of sexual violence is sentenced under Article 5(g) of the ICTY Statute and when it is sentenced under one of the other aforementioned crimes against humanity in the ICTY Statute, it is important to question whether an accused may be charged and convicted of more than one offence for the same conduct. The doctrine of cumulative conviction has got an important role in understanding why an accused can (or cannot) be convicted of more than one offence for the same conduct. Furthermore, the issue of cumulative charges and convictions is important because when this issue becomes clear, the following chapters will be more comprehensible. Namely, cumulative charges and convictions will occur in certain cases that are being discussed in Chapter 3. Therefore, it is necessary to understand the doctrine first. In short, the discussion on cumulative charges and convictions in this chapter will therefore bring us closer to finding an answer to the main question.

Paragraph 2.2. will discuss the doctrine of cumulative charges and convictions at the ICTY. Paragraph 2.3. will discuss cumulative charges and convictions at the ICTR and ICC. The benefits and disadvantages of cumulative conviction in general will be discussed in paragraph 2.4. and 2.5. and a conclusion will be given in paragraph 2.6.

2.2. Cumulative charges and convictions at the ICTY

The Trial Chamber of the ICTY explains in the Kunarac case that the ‘issue of cumulative convictions centers on the question whether an accused may be convicted of more than one offence for the same conduct’.⁷³ But first of all, it is important to realize that it is allowed by the Appeals Chamber of the ICTY for the prosecutor to charge the accused with more than one offence for the same conduct. Cumulative charging is allowed because, ‘prior to the presentation of all of the evidence, it is not possible for the prosecutor to determine to a certainty which of the charges brought against an accused will be proven’.⁷⁴ Secondly, multiple criminal convictions entered under different statutory provisions, but based on the same conduct, are also permissible if ‘each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it

⁷³ Kunarac case ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, para . 544.

⁷⁴ Čelebići case ICTY (A. Ch.) 20 February 2001, *Case No.* IT-96-21-A, para. 400.

requires proof of a fact not required by the other'.⁷⁵ This decision of the Appeals Chamber in the Čelebići case is also known as the 'Čelebići test' and is used in many cases. If the relevant provisions do not each have a materially distinct element, the Trial Chamber must select the more specific provision.⁷⁶ Lastly, it should be noted that while the accused may be convicted twice, he may not be punished more than once for the same conduct.⁷⁷

2.3. Cumulative charges and convictions at the ICTR and ICC

To find out if the cumulative charging and cumulative conviction tactics of the ICTY are the standard used tactics in international criminal law, this paragraph will discuss the cumulative charging and conviction tactics of the ICTR and ICC. The Appeals Chamber of the ICTR also allows the prosecutor to charge the accused with more than one offence. Cumulative charging is allowed because, 'prior to the presentation of all of the evidence, it is not possible for the prosecutor to determine to a certainty which of the charges brought against an accused will be proven'.⁷⁸ Hereby it can be said that the ICTR maintains the same reasoning as the ICTY (see paragraph 2.2. above). Cumulative convictions are also allowed by the ICTR Appeals Chamber.⁷⁹ The Musema case even confirmed that the 'Čelebići test' should be 'applied with respect to multiple convictions arising under ICTR Statute'.⁸⁰ Again, it should be taken into account that although the accused may be convicted twice, he may not be punished more than once for the same conduct.⁸¹ The Pre-Trial Chamber of the ICC on the other hand, rejects the cumulative charging approach of the prosecutor in the Bemba Gombo case. It says that the prosecutor should 'choose the most appropriate characterization' because 'the prosecutorial practice of cumulative charging is detrimental to the rights of the defence since it places an undue burden on the defence'. The Chamber further considers that, 'as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges'. In addition, it is important to note that the ICC legal framework differs from that of the ICTY and ICTR tribunals because 'the Trial Chamber may re-characterize a crime to give it the most appropriate legal characterization' (Regulation 55 of the Court). Therefore the Pre-Trial Chamber decided that 'before the ICC, there is no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterizations in order to ensure that at least one will be retained by the Chamber'.⁸² Due to Regulation 55 of the Court and because the jurisprudence of the ICC rejects the cumulative charging approach, it is plausible that it therefore also rejects the

⁷⁵ Čelebići case ICTY (A. Ch.) 20 February 2001, *Case No.* IT-96-21-A, para. 412.

⁷⁶ Čelebići case ICTY (A. Ch.) 20 February 2001, *Case No.* IT-96-21-A, para. 413.

⁷⁷ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 375.

⁷⁸ Simba case ICTR (A. Ch.) 27 November 2007, *Case No.* ICTR-01-76-A, para. 276.

⁷⁹ Musema case ICTR (A. Ch.) 16 November 2001, *Case No.* ICTR-96-13-A, para. 369.

⁸⁰ Musema case ICTR (A. Ch.) 16 November 2001, *Case No.* ICTR-96-13-A, para. 363.

⁸¹ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 375.

⁸² Bemba Gombo case ICC (PT. Ch. II) 15 June 2009, *Case No.* ICC-01/05-01/08, paras. 71-72 and 202-203; Regulation 55 of the Regulations of the International Criminal Court.

cumulative conviction approach.⁸³

2.4. The benefits of cumulative conviction

As discussed above, the ICTY allows cumulative conviction. It can be said that cumulative conviction brings certain benefits. One of the main benefits would be that such conviction fully reflects each violation that occurred.⁸⁴ For example, if a victim has been raped whilst being enslaved (one conduct), a conviction of only one of the two would not reflect the totality of the conduct committed by the perpetrator. The use of cumulative conviction is also important because, for instance, in sexual violence cases it recognizes that ‘wartime rape occurs in different contexts, for different reasons, with various impacts’.⁸⁵ Furthermore, cumulative conviction can also be seen as a way to show the victims who survived that the seriousness of the crime is recognized. Reflecting the totality of the defendant’s conduct in the conviction, might have a positive influence on the victim’s idea of ‘justice being served’. But for a lot of victims it is also important that the truth of what really happened will prevail.⁸⁶ Cumulative conviction is therefore a good instrument to achieve those needs.

2.5. The disadvantages of cumulative conviction

Cumulative conviction also has its disadvantages. For example, Judge David Hunt and Judge Mohamed Bennouna of the ICTY Appeals Chamber are of the opinion that ‘prejudice to the rights of the accused – or the very real risk of such prejudice – lies in allowing cumulative convictions’.⁸⁷ They argue that prejudice that may arise from cumulative convictions includes the social stigmatization inherent to being convicted of an additional crime for the same crime.⁸⁸ But also ‘the number of crimes for which a person is convicted may have some impact on the sentence ultimately to be served when national laws as to, for example, early release of various kinds are applied. The risk may therefore be that, under the law of the State enforcing the sentence, the eligibility of a convicted person for early release will depend not only on the sentence passed but also on the number and/or nature of convictions’.⁸⁹ Lastly, cumulative convictions may also ‘expose the convicted person to the risk of increased

⁸³ As the legal framework of the ICC differs to the legal framework of the ICTY and ICTR, it does not fall within the scope of this thesis to compare the ICTY and ICTR on the one hand and the ICC on the other hand and decide which cumulative charging and conviction tactic is preferable. See for a discussion concerning this topic R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 457-460.

⁸⁴ Čelebići case ICTY (A. Ch.) 20 February 2001, *Case No. IT-96-21-A*, para. 406.

⁸⁵ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p.377.

⁸⁶ Report Human Rights Watch, *Struggling to survive. Barriers to Justice for Rape victims in Rwanda*, vol. 16 No. 10(A) 2004, p. 1-4.

⁸⁷ Čelebići case ICTY (A. Ch. Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna) 20 February 2001, *Case No. IT-96-21-A*, para. 23.

⁸⁸ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p.376; Čelebići ICTY (A. Ch. Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna) 20 February 2001, *Case No. IT-96-21-A*, para. 23.

⁸⁹ Čelebići case ICTY (A. Ch. Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna) 20 February 2001, *Case No. IT-96-21-A*, para. 23.

sentencing'.⁹⁰

2.6. Conclusion

Cumulative charging centers around the question whether a prosecutor may charge the accused with more than one offence. The ICTY and the ICTR allow cumulative charging because, prior to the presentation of all of the evidence, it is not possible for the prosecutor to determine to a certainty which of the charges brought against an accused will be proven. The ICC on the other hand rejects the cumulative charging. Cumulative convictions focuses on the question whether an accused may be convicted of more than one offence for the same conduct or not. Multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible if each statutory provision involved has a materially distinct element not contained in the other. As can be read above, the ICC does not allow cumulative conviction but the ICTY and ICTR do allow cumulative conviction, because such convictions fully reflect each violation that occurred. It should be taken into account that prejudice to the rights of the accused may arise from cumulative convictions. Therefore cumulative conviction should mainly be seen and used as an instrument to reflect the total weight of each violation of the accused that occurred. It must not have impact on the sentence ultimately being served.⁹¹ The use of cumulative conviction is a good instrument, mainly because the aforementioned benefits of cumulative conviction outweigh the aforementioned disadvantages. Reflecting the totality of the defendant's conduct in the conviction and thereby showing the victim that the seriousness of the crime is recognized and letting the truth of what really happened prevail, is one of the most important things the judges can grant a victim to help overcome the terrible atrocities that happened. Furthermore, it can be expected of the judges that they will not be influenced by the cumulative convictions because of their professionalism and because they are used to work with cumulative convictions. Because of this, they are already aware of these pitfalls whereby the pitfalls can be taken into account in the sentencing. Therefore prejudice and increased sentencing will not arise that easily. Regarding the concerns of social stigmatization inherent in being convicted of an additional crime for the same crime, I find that these concerns are not justified. Although it is based on the same crime, the defendant has been justly convicted of committing both crimes. If the defendant has been found guilty of both crimes (with distinct elements), he committed both crimes and therefore the fact that he committed both crimes with one conduct does not matter. If people are worried about social stigmatization, they should not have committed these terrible crimes in the first place.

⁹⁰ Čelebići case ICTY (A. Ch. Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna) 20 February 2001, *Case No. IT-96-21-A*, para. 23.

⁹¹ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 377.

3.1. Introduction

As mentioned in the former chapters, the main question of this thesis is: *When is an act of sexual violence sentenced under rape as a crime against humanity (Article 5(g) of the ICTY Statute) and when is an act of sexual violence sentenced under enslavement, torture, persecution or other inhumane acts as a crime against humanity (Article 5(c),(f),(h) and (i) of the ICTY Statute)?* To understand when an act of sexual violence should be sentenced under Article 5(g) of the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute and when it should be sentenced under one of the other mentioned prohibited crimes against humanity, it is important to look at the relevant jurisprudence of the ICTY and to distinguish the facts in these cases. The reason why this is so important is that, when it is possible to distinguish facts in the cases, it should become possible to see which acts of sexual violence fall under rape and which acts of sexual violence, that might look similar to the former, fall under, torture, enslavement, persecution or other inhumane acts.⁹² Because the ICTY Statute and the Rules of Procedure and Evidence of the ICTY are very limited in providing an answer to this main question, case law must provide an answer. The judges of the ICTY must have examined this, because if there would not be some sort of general rule, when an act of sexual violence is sentenced under Article 5(g) of the ICTY Statute and when it is sentenced under one of the other mentioned prohibited crimes against humanity, there would be a risk that people would not be prosecuted equally and a consequence of unequal prosecuting is unequal sentencing. A consequence of unequal sentencing could be that civilians and states will not take the tribunal seriously. Which at worst can make the legal system fail and bring back the danger of impunity. Also, looking at the relevant cases and their facts, is a first step in determining whether there is a general rule to distill, which makes it clear when sexual violence falls under which crime against humanity. Chapter four will take the next step by determining which facts, mentioned in this chapter, fall under which prohibited crime against humanity. Lastly it should be stressed again that only the acts of sexual violence as a crime against humanity will be discussed in this thesis. This means that when the prohibited act of enslavement, torture, rape, persecution or other inhumane acts are being discussed, it should be kept in mind that they refer to Article 5(c),(f),(g),(h) and (i) of the ICTY Statute.

Hereafter I will discuss thirteen sexual violence cases of the ICTY. These are all the cases of the ICTY in which acts of sexual violence were charged as a crime against humanity by the prosecutor and then judged by the Trial Chamber and in some cases also in by the Appeals

⁹² For example, tribunal jurisprudence have recognized that rape (a prohibited act of sexual violence under Article 5(g) ICTY Statute) can also constitute a form of torture (Article 5(f) ICTY Statute) (see paragraph 3 of this chapter); R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 253; *Čelebići* ICTY (T. Ch. II) 16 November 1998, *Case No. IT-96-21-T*, paras. 475-497.

Chamber.⁹³ Of each case I will discuss the indictment of the prosecutor, the judgement of the Trial Chamber and, if relevant for the purpose of this research, the judgement of the Appeals Chamber. I will conclude each case with my findings and an enumeration of which acts of sexual violence fall under which crime against humanity according to the judgement of the case.

3.2. Tadić case

The first case that will be discussed in this chapter, with regard to sexual violence as a crime against humanity, is the Tadić case. The Tadić case was the first trial held by the ICTY in which sexual assault was prosecuted.⁹⁴ As a matter of fact, it was the first international trial ever prosecuting charges of sexual violence.⁹⁵ The accused in this case concerns a man called Dusko Tadić, born in 1955, who was a leading member of the Serb Democratic Party (SDS).⁹⁶ Tadić was arrested on 12 February 1994 by the German authorities and the proceedings at the ICTY involving Tadić commenced on 12 October 1994 when the prosecutor filed an application, ‘seeking a formal request to the Federal Republic of Germany (...), for deferral by the German courts to the competence of the ICTY’.⁹⁷

The initial indictment was confirmed on 13 February 1995 and on 24 April 1995 Tadić was transferred to the ICTY where he initially appeared on 26 April 1995. The indictment was first amended on 1 September 1995 and secondly amended on 14 December 1995.⁹⁸ In the second amended indictment, the prosecutor mentioned that in the Omarska camp, where approximately 40 women were held, ‘both female and male prisoners were beaten, tortured, raped, sexually assaulted, and humiliated’.⁹⁹ With regard to the conditions in the Trnopolje camp, the indictment mentioned that the female detainees were sexually abused.¹⁰⁰ Tadić participated in these terrible atrocities and was therefore accused of the following sexual violence crimes within the scope of crimes against humanity.¹⁰¹ First, *persecution* (count 1), because Serb forces, including Tadić, ‘subjected Muslims and Croats inside and outside the camps to a campaign of terror which included killings, torture, sexual assaults and other

⁹³ Cases whereby acts of sexual violence as a crime against humanity were charged but not further judged by the Trial Chamber, for example because the acts of sexual violence were not included in the guilty plea, are not discussed in this thesis because they are not relevant in finding an answer to the research question. These cases thereby do not fall within the scope of this thesis.

⁹⁴ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 481.

⁹⁵ The International Criminal Tribunal for the Former Yugoslavia, Outreach - Crimes of Sexual Violence – Landmark Cases, <http://www.icty.org/sid/10314>.

⁹⁶ The Serb Democratic Party will be abbreviated with SDS instead of SDP in this thesis because the abbreviation SDS is also used in the case law of the ICTR; ICTY (T. Ch.) 14 July 1997, *Case No. IT-94-1-T*, para. 40.

⁹⁷ ICTY (opinion and judgement), 7 May 1997, *Case No. IT-94-1-T*, paras. 6 -18.

⁹⁸ ICTY (opinion and judgement), 7 May 1997, *Case No. IT-94-1-T*, paras. 6 -18; ICTY (information sheet), *Case No. IT-94-1-T*, p. 1.

⁹⁹ ICTY (second amended indictment) 14 December 1995, *Case No. IT-94-1-T*, paras. 2.3. and 2.6.

¹⁰⁰ ICTY (second amended indictment) 14 December 1995, *Case No. IT-94-1-T*, para. 2.7.

¹⁰¹ ICTY (T. Ch.) 14 July 1997, *Case No. IT-94-1-T*, para. 40.

physical and psychological abuse'.¹⁰² 'During the period between 25 May 1992 and 8 August 1992, Tadić physically took part and otherwise participated in the killing, torture, sexual assault, and beating of many detainees at Omarska camp'.¹⁰³ 'Tadić also physically took part or otherwise participated in the torture of more than 12 female detainees, including several gang rapes, which occurred both in the Trnopolje camp and at a white house adjacent to the camp during the period between September 1992 and December 1992'.¹⁰⁴ Secondly, rape (count 4), because between early June and 3 August 1992 prisoner "F" in the Omarska camp was sometimes taken to the Separacija building at the entrance to the Omarska camp. In this building she was placed in a room where Tadić subjected "F" to forcible sexual intercourse.¹⁰⁵ Lastly, other inhumane acts (count 11), because during the period between 1 June and 31 July 1992, a group of Serbs, including Tadić, forced two prisoners of the Omarska camp, "G" and "H", to commit oral sexual acts on Harambasic (another prisoner at the Omarska camp) and forced "G" to sexually mutilate him.¹⁰⁶

In 1997 the Trial Chamber completed their judgement in this case. Regarding persecution (count 1), as mentioned in the indictment, the Trial Chamber found Tadić guilty only 'for his part in a series of acts including active participation in beatings, forced transfers and killing representing Tadić's persecution of Muslims in opština Prijedor'.¹⁰⁷ The Trial Chamber did not mention the sexual assaults and torture of the 12 female detainees, including several gang-rapes, which were also described in the indictment. In the Opinion and Judgement of the Trial Chamber they mention that 'the prosecution had failed to present any evidence regarding the accused's participation in the sexual assault and torture' and that they therefore did not review these allegations.¹⁰⁸ Regarding the torture of the female detainees, including several gang-rapes, there was only Dragan Opacić's testimony that could support these allegations. However, 'during trial, aspects of his testimony were revealed which led the Prosecution to state in open court that it did not consider Dragan Opacić as a witness of truth and to submit a motion to withdraw these allegations'.¹⁰⁹ Concerning the rape of count 4, the Tadić case was expected to be the first international war crimes trial to prosecute rape separately as a crime against humanity, and not solely in conjunction with other crimes. In the trial proceedings, however, the Office of the Prosecutor (OTP) was compelled to withdraw the rape charges, because the family of witness "F" was threatened and therefore witness "F" was too frightened to testify.¹¹⁰ This resulted in the withdrawal of count 4 and therefore findings regarding count 4 were not mentioned in the Trial Chamber judgement. Due to the evidence

¹⁰² ICTY (second amended indictment) 14 December 1995, *Case No. IT-94-1-T*, para. 4.

¹⁰³ ICTY (second amended indictment) 14 December 1995, *Case No. IT-94-1-T*, para. 4.2.

¹⁰⁴ ICTY (second amended indictment) 14 December 1995, *Case No. IT-94-1-T*, para. 4.3.

¹⁰⁵ ICTY (second amended indictment) 14 December 1995, *Case No. IT-94-1-T*, para. 5.

¹⁰⁶ ICTY (second amended indictment) 14 December 1995, *Case No. IT-94-1-T*, para. 6.

¹⁰⁷ ICTY (T. Ch.) 14 July 1997, *Case No. IT-94-1-T*, para. 36.

¹⁰⁸ ICTY (Opinion and Judgement) 7 May 1997, *Case No. IT-94-1-T*, para. 427.

¹⁰⁹ The testimony of Dragan Opacić was discredited on cross-examination; ICTY (Opinion and Judgement) 7 May 1997, *Case No. IT-94-1-T*, para. 452.

¹¹⁰ K. D. Askins, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', *The American journal of international law* (vol. 93) 1999, p. 101; J. Yaiza, *Gendercide. Internationale strafrechtelijke vervolging van seksuele geweldsmisdaden als gevolg van schadelijke genderrolpatronen* (Thesis University of Gent), 2009-2010, p. 27.

presented at trial regarding count 11 *other inhumane acts* of the indictment, the court accepted at trial that the circumstances of this offence entailed that “G” and witness “H” ‘were ordered to jump down into the inspection pit, then (...) Harambasic, who was naked and bloody from beating, was made to jump into the pit with them and witness “H” was ordered to lick his naked bottom and “G” to suck his penis and then to bite his testicles. Meanwhile a group of men in uniform stood around the inspection pit watching and shouting to bite harder. All three were then made to get out of the pit onto the hangar floor (...). “G” was then made to lie between the naked (...) Harambasic legs and, while the latter struggled, hit and bite his genitals. “G” then bit off one of (...) Harambasic’s testicles and spat it out and was told he was free to leave. Witness “H” was ordered to drag (...) Harambasic to a nearby table, where he then stood beside him and was then ordered to return to his room, which he did.’¹¹¹ Regarding the role of Tadić, the Trial Chamber made clear that ‘a witness placed Tadić at the crime scene during the time when Harambasic was attacked and sexually assaulted. (...) While Tadić may have been present, the Trial Chamber concluded that there was insufficient evidence to conclude that Tadić himself had participated in the attack.’¹¹² Therefore the Trial Chamber found beyond reasonable doubt that ‘Tadić was present on the hangar floor at the time of the assault upon and sexual mutilation of (...) Harambasic, and that, through his presence, (...) Tadić aided and encouraged the group of men actively taking part in the assault’.¹¹³ Both Tadić and the prosecutor appealed against separate aspects of the Trial Chamber judgement, but the judgement of the Appeals Chamber did not change the above discussed part of the verdict of the Trial Chamber.¹¹⁴ Therefore the judgement of the Appeals Chamber is being disregarded in this paragraph.

In evaluating the above Trial Chamber judgement, it is noteworthy that the prosecutor placed the horrible acts of sexual violence mentioned in count 11 under a violation of other inhumane acts (Article 5(i) ICTY Statute). Leaving aside the doctrine of cumulative convictions, it might have been an option to also accuse Tadić, through his presence, of forcing, aiding and encouraging one man to rape another man.¹¹⁵ Which means that the prosecutor might have had the choice to charge these particularly acts of sexual violence under rape as a crime against humanity. As seen in Chapter 1 of this thesis, the prohibited act of rape entails an act where the perpetrator invades ‘the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ’. In addition the EoC says ‘that the concept of ‘invasion’ is intended to be broad enough to be gender-neutral’. Furthermore, the invasion of the perpetrator had to be ‘committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person,

¹¹¹ ICTY (T. Ch.) 14 July 1997, *Case No. IT-94-1-T*, para. 21.

¹¹² ICTY (Opinion and Judgement) 7 May 1997, *Case No. IT-94-1-T*, paras. 222 and 228; K. D. Askins, ‘Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status’, *The American journal of international law* (vol. 93) 1999, p. 102.

¹¹³ ICTY (T. Ch.) 14 July 1997, *Case No. IT-94-1-T*, para. 22.

¹¹⁴ ICTY (A. Ch.) 15 July 1999, *Case No. IT-94-1-A*.

¹¹⁵ K. D. Askins, ‘Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status’, *The American journal of international law* (vol. 93) 1999, p. 102.

or by taking advantage of a coercive environment, or the invasion had to be committed against a person incapable of giving genuine consent.’¹¹⁶ The proven fact that “G” was ordered to suck the penis of Harambasic and then to bite his testicles and his genitals, followed by eventually biting off one of Harambasic’s testicles, could meet the description of rape. Namely, it can be said that the invading of a body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim (mouth) or of the perpetrator with a sexual organ (penis, testicles, genitals), took place. Furthermore, it does not matter that the act concerned two men as the concept of ‘invasion’ is gender-neutral. In addition, it is also clear that the invasion was committed by force. Although the ‘perpetrator’ here is also a victim, it still might be prosecuted as forcing, aiding and encouraging rape as a crime against humanity. Because the definitions of rape given in the Čelebići case, the Furunžija case and the Kunarac et al. case and the EoC definition of rape were formulated later in time, the prosecutor in the Tadić case might not have known what the rape provision could entail exactly and therefore chose the safer path by prosecuting fellatio as other inhumane acts instead of rape as a crime against humanity. Thereby seeing the provision other inhumane acts as a safety net if acts of sexual violence do not fall under the other provisions mentioned in Article 5 of the ICTY Statute. In short, it would have been interesting to see how the Trial Chamber would have judged this. Unfortunately the prosecutor never charged these horrible acts under rape as a crime against humanity.

To conclude this paragraph, a few important issues will be discussed. First of all it can be said that this decision is important, since it is the first case before the ICTY in which male sexual assault was prosecuted and convicted. Male sexual violence is thereby recognized as a serious crime. Secondly, one can conclude that this decision is important because, even though it was not proven that Tadić committed the sexual violence himself, he was still found responsible for his participation in the sexual violence at the Omarska camp. This means that Tadić’s presence and encouragement of the commission of sexual assaults were grounds for finding him individually criminally responsible for the acts themselves.¹¹⁷ Another important issue in this case is Rule 96(i) of the Rules of Procedure and Evidence of the ICTY, which says that ‘in cases of sexual assault no corroboration of the victim's testimony shall be required’. In the Tadić case the Trial Chamber ‘firmly established that corroboration of an alleged sexual assault victim's testimony is neither required by the ICTY nor is a part of customary international law’ and thereby ‘refuses to impede the prosecution of sexual crimes with unfair procedural rules and supports this ruling that accentuates the gravity and nature of these crimes’.¹¹⁸ In line with Rule 96(i), this case also shows that that due to the testimony of one witness, who was not the victim of the incident, the Trial Chamber was satisfied beyond reasonable doubt that Tadić was present on the hangar floor at the time of the assault upon

¹¹⁶ See paragraph 1.4.1. of this thesis.

¹¹⁷ See Article 7 ICTY Statute; J. Campanaro, ‘Women, war, and international law: The historical treatment of gender-based war crimes’, *The Georgetown law journal* (vol. 89) 2001, p. 2577.

¹¹⁸ J. Campanaro, ‘Women, war, and international law: The historical treatment of gender-based war crimes’, *The Georgetown law journal* (vol. 89) 2001, p. 2577-2578; ICTY (Opinion and Judgement) 7 May 1997, *Case No. IT-94-1-T*, paras. 535-539.

and sexual mutilation of Harambasic.¹¹⁹ This means that not only no corroboration of a victim’s testimony shall be required, but also that no corroboration of a witness’s testimony (who is not a victim) shall be required either. Furthermore, in this first case there seems to be a lack in protecting a victim who appeared as a witness of sexual violence (Rule 69)¹²⁰, given that witness “F” was too frightened to testify because her family was threatened. Lastly, considering the torture of the more than 12 female detainees, which included several gang-rapes, as described in the indictment under count 1 (persecution) and leaving aside that this count has been withdrawn, it remains unclear why the prosecutor chose to charge these atrocities solely as an act of persecution and not as an act of rape and/or torture as a crime against humanity. Charging the latter or cumulative charging would have also been an option.

Tadić case		
Charged crimes against humanity	Judgement	Facts/Evidence
Count 1 persecution	-	The sexual acts were withdrawn due to lack of witnesses.
Count 4 rape	-	Whole count withdrawn due to lack of witnesses.
Count 11 other inhumane acts	Guilty	Tadić aided and encouraged men in: <ul style="list-style-type: none"> - licking of naked bottom; - fellatio; - biting testicles and genitals; - hitting of genitals; - biting off a testicle.

3.3. Kunarac et al. case

This paragraph will discuss the Kunarac et al. case. In this case three perpetrators were convicted: Dragoljub Kunarac, Radomir Kovać and Zoran Vuković.¹²¹ Below, all three perpetrators will be discussed individually.

Kunarac

From at least June 1992 until February 1993, Dragoljub Kunarac (born in 1960) ‘was the commander of a special unit for reconnaissance of the Bosnian Serb Army. (...) Kunarac had his headquarters in a house in the Aladza neighbourhood in Foča at Ulica Osmana Dikica no. 16. He stayed in the house with about 10 to 15 soldiers after the take-over of Foča. In his

¹¹⁹ ICTY (Opinion and Judgement) 7 May 1997, *Case No. IT-94-1-T*, para. 237.

¹²⁰ Rule 69 of the Rules of Procedure and Evidence about the protection of victims and witnesses entails: ‘(A) In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. (B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section. (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.’

¹²¹ The initial indictment mentioned eight perpetrators in total. Namely, Dragan Gagović, Gojko Janković, Janko Janjić, Radomir Kovać, Zoran Vuković, Dragan Zelenović, Dragoljub Kunarac and Radovan Stanković. The redacted indictment and the third (last) amended indictment only mentions Dragoljub Kunarac, Radomir Kovać and Zoran Vuković. The other five perpetrators will therefore not be discussed in this paragraph.

capacity as commander of these soldiers, Kunarac was responsible for the acts of the soldiers subordinate to him.¹²² On 18 June 1996 the initial indictment against Kunarac was confirmed and on 4 March 1998 Kunarac voluntarily surrendered to the French Stabilisation Force (SFOR) soldiers at Filipovici. He was transferred to the ICTY the next day where he initially appeared before the tribunal on 9 March 1998.¹²³

In the third amended indictment the prosecutor submitted the following counts concerning sexual violence as a crime against humanity: count 1 *torture* and count 2 *rape*, both based on the same facts (cumulative charges). Namely, on two occasions between 13 July and 1 August 1992, Kunarac took FWS-87 (victim) to his headquarters and on ‘both occasions two Montenegrin soldiers commanded by the accused were present and raped FWS-87’.¹²⁴ Also on or around 16 July 1992, Kunarac and his deputy “Gaga”, took FWS-75 and D.B. to the headquarters for the first time, where a group of soldiers were waiting. ‘Kunarac took D.B. to a separate room and raped her, while FWS-75 was left behind together with the other soldiers. For about 3 hours, FWS-75 was gang-raped by at least 15 soldiers (vaginal and anal penetration and fellatio). They sexually abused her in all possible ways.’ But also ‘on other occasions in the headquarters, one to three soldiers, in turn, raped her’.¹²⁵ Furthermore, on 2 August 1992, Kunarac took FWS-75, FWS-87, FWS-50 and D.B. to the headquarters, where ‘women from the Kalinovik women’s detention camp were also present. On this occasion (...) Kunarac and three other soldiers raped FWS-87’ and ‘several soldiers raped FWS-75 during the entire night. A Montenegrin soldier raped FWS-50 (vaginal penetration) and threatened to cut her arms and legs and to take her to church to baptize her.’¹²⁶ Between 13 July and 2 August 1992, Kunarac took FWS-95 out of Partizan to the headquarters for the purpose of rape on two occasions. ‘The first time, Kunarac took FWS-95 to his headquarters together with two other women’, where he ‘took her into a room and raped her personally. Then FWS-95 was raped by three more soldiers in this same room.’ The second time Kunarac had taken her to the headquarters, ‘FWS-95 was raped by two or three soldiers, but not by the accused himself’.¹²⁷ Secondly, the indictment cumulatively charges count 5 *torture* and count 6 *rape* which are both based on the following facts. ‘Kunarac took FWS-48 and two other women to the Hotel Zelengora’ on or around 13 July 1992. ‘FWS-48 refused to go with him’ but Kunarac ‘kicked her and dragged her out. At Hotel Zelengora, FWS-48 was placed in a separate room’ where Kunarac and Vuković raped her (vaginal penetration and fellatio). ‘Both perpetrators told her that she would now give birth to Serb babies.’¹²⁸ This particular act, is also a crime of forced pregnancy. Although the Rome Statute of the ICC has an explicit provision for the prosecution of forced pregnancy, the ICTY has not. Therefore the prosecutor

¹²² ICTY (Third amended indictment) 8 November 1999, *Case No.* IT-96-23-PT, paras. 2.1. and 3.1.

¹²³ ICTY, ‘Dragoljub Kunarac is the first accused of rape and torture of Bosnian Muslim women to turn himself in’, *press release* (CC/PIO/298-E) 4 March 1998, p. 1; ICTY (Case information sheet), *Case No.* IT-96-23/1, p. 2; The indictment was first amended 19 August 1998, second amended on 3 September 1999 and third amended on 1 December 1999.

¹²⁴ ICTY (Third amended indictment) 8 November 1999, *Case No.* IT-96-23-PT, para. 5.2.

¹²⁵ ICTY (Third amended indictment) 8 November 1999, *Case No.* IT-96-23-PT, para. 5.3.

¹²⁶ ICTY (Third amended indictment) 8 November 1999, *Case No.* IT-96-23-PT, para. 5.4.

¹²⁷ ICTY (Third amended indictment) 8 November 1999, *Case No.* IT-96-23-PT, para. 5.5.

¹²⁸ ICTY (Third amended indictment) 8 November 1999, *Case No.* IT-96-23-PT, para. 6.1.

only charged this act as being torture and rape. Furthermore, on ‘or around 18 July 1992, Gojko Janković, the military commander of another local unit, took FWS-48, FWS-95 and another woman to a house near the bus station. From there, (...) Kunarac took FWS-48 to another house in the Donje Polje neighbourhood where he raped her (vaginal penetration and fellatio).’¹²⁹ Thirdly, the indictment mentioned count 9 *rape* because ‘on or about 2 August 1992, (...) Kunarac, together with Pero Elez, the military commander of a Serb unit in Miljevina, (...) transferred FWS-75, FWS-87 and two other woman from Partizan to Miljevina, where they were detained in an abandoned Muslim house called Karaman’s house, a place maintained by Pero Elez and his soldiers’. In ‘either September or October 1992, (...) Kunarac visited Karaman’s house and raped FWS-87 (vaginal penetration)’.¹³⁰ Lastly, the indictment listed count 18 *enslavement* and count 19 *rape*, again based on the same facts (cumulative charges). Namely, on 2 August 1992, ‘Kunarac, together with his deputy “Gaga” and Gojko Janković, the commander of another Foča unit, took FWS-186, FWS-191 and J.G. from’ Kunarac’s headquarters ‘to the abandoned house of Halid Cedec in Trnovace. There the men divided the girls among themselves and raped them the same night. On that occasion (...) Kunarac raped FWS-191. (...) FWS-186 and FWS-191 were kept in this house for approximately 6 months, while J.G. was transferred to Karaman’s house in Miljevina for the purpose of rape.’ Kunarac raped FWS-191 repeatedly for at least two months. ‘Eventually, another soldier protected FWS-191 against further rapes. (...) FWS-186 and FWS-191 were treated as personal property of (...) Kunarac. (...) In addition to the rapes and other sexual assaults, FWS-186 and FWS-191 had to do all household chores and obey all demands.’¹³¹ This indictment was of ‘major legal significance’ as it was the first time that sexual assaults had been ‘diligently investigated for the purpose of prosecution under the rubric of torture and enslavement as a crime against humanity’.¹³²

The trial of Kunarac before the Trial Chamber of the ICTY ‘commenced on 20 March 2000 and came to a close on 22 November 2000’.¹³³ Regarding count 1 *torture* and count 2 *rape*, the Trial Chamber found that the rape of FWS-87, by Montenegrin soldiers commanded by Kunarac, that took place on two occasions between 13 July and 1 August 1992 in the headquarters, have not been proven beyond reasonable doubt. ‘FWS-87 was incapable of recounting any details as to what had happened to her’ during this incident. To be more specific, she ‘was not able to recount if and by whom she was raped during this incident’. Nor was there ‘any supporting evidence that could fill in the gaps of FWS-87’s testimony with regard to this event’. Concerning ‘the second incident, FWS-87 could not even say whether she had been raped on this occasion at all’.¹³⁴ As to the rapes of FWS-75 and D.B. where Kunarac took D.B. to a separate room in the headquarters and raped her, while FWS-75 was gang-raped and sexually abused in all possible ways by at least 15 soldiers, the Trial Chamber

¹²⁹ ICTY (Third amended indictment) 8 November 1999, *Case No.* IT-96-23-PT, para. 6.2.

¹³⁰ ICTY (Third amended indictment) 8 November 1999, *Case No.* IT-96-23-PT, paras. 7.1. and 7.2.

¹³¹ ICTY (Third amended indictment) 8 November 1999, *Case No.* IT-96-23-PT, paras. 10.1.-10.3.

¹³² ICTY, ‘Gang rape, torture and enslavement of Muslim women charged in ICTY’s first indictment dealing specifically with sexual offences’, *press release* (CC/PIO/093-E) 27 June 1996, p. 1.

¹³³ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, p. 9.

¹³⁴ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, paras. 630-635.

found that these incidents had been proven beyond reasonable doubt. ‘The Trial Chamber accepted the testimonies of both FWS-75 and D.B.’, where ‘D.B. was raped there first by “Gaga” and two other men and then forced to have sexual intercourse with (...) Kunarac’, whereby ‘Kunarac was fully aware of the rapes inflicted upon D.B. by the other soldiers’, and where ‘FWS-75 was subsequently gang-raped by a group of soldiers vaginally and orally’. Moreover, ‘D.B. stated that, upon their return to Partizan, FWS-75 appeared to be terrified and that she was barely able to walk’. The Trial Chamber was, furthermore, satisfied that ‘Kunarac was aware of the gang-rape of FWS-75’ because, amongst others, ‘Kunarac was entering the room while she was still being raped’ and because of ‘telling her to get dressed because they had to go’. Kunarac ‘aided and abetted the gang-rape of FWS-75 at the hands of several of his soldiers by taking her to the house in the knowledge that she would be raped there and that she did not consent to the sexual intercourse’.¹³⁵ The Trial Chamber further accepted as proven beyond reasonable doubt, that on at least one other occasion FWS-75 was taken to the headquarters by Kunarac where one to three soldiers, in turn, raped FWS-75. ‘Kunarac was aware that FWS-75 would be subjected to rapes and sexual assaults by soldiers’ at the headquarters when he took her there.¹³⁶ By raping D.B. himself and bringing her and FWS-75 to the headquarters, the latter at least twice, to be raped by other men, ‘Kunarac thus committed the crimes of torture and rape as a principal perpetrator, and he aided and abetted the other soldiers in their role as principal perpetrators by bringing the two women’ to the headquarters.¹³⁷ Concerning the rapes of FWS-87, FWS-75 and FWS-50, where Kunarac and three other soldiers raped FWS-87, while FWS-75 and FWS-50 were raped by other soldiers, the Trial Chamber found that ‘Kunarac took FWS-87 to one of the rooms of the house and forced her to have sexual intercourse in the knowledge that she did not consent’. The Trial Chamber also found that, ‘on that occasion, FWS-75 and FWS-50 were repeatedly raped by other soldiers while Kunarac raped FWS-87’. ‘FWS-75 was first raped by three Montenegrin soldiers (...) and she was then locked in a room by DP8 where he continued to rape her for the rest of the night’ (vaginally, anally and orally). The next morning she was raped by “Gaga”. The Trial Chamber was satisfied that the victims were taken to the headquarters by Kunarac ‘in the knowledge that they would be raped by soldiers during the night’. The Trial Chamber further found that ‘FWS-87 was also raped by other soldiers that same night. The fact that Kunarac took the girls to the house and left them to his men in the knowledge that they would rape them, constituted an act of assistance which had a substantial effect on the acts of torture and rape later committed by his men. He therefore aided and abetted in that torture and rape.’¹³⁸ Regarding the rapes of FWS-95, where Kunarac took FWS-95 out of Partizan to the headquarters for the purpose of rape on two occasions, the Trial Chamber found that it has been proven beyond reasonable doubt that Kunarac raped FWS-95 while he knew she did not consent. ‘The Trial Chamber noted that FWS-95 could not remember in court having been subsequently raped by three other soldiers’, but ‘regards this lapse of memory as being an insignificant inconsistency as far as the act of rape committed by (...) Kunarac is concerned. It

¹³⁵ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, paras. 636-653.

¹³⁶ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 652.

¹³⁷ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 656.

¹³⁸ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, paras. 666-670.

recognized 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’.¹³⁹ To conclude the above, the Trial Chamber found Kunarac guilty of torture as charged under count 1 and guilty of rape as charged under count 2 as the elements of both provisions were met.¹⁴⁰ The Trial Chamber made it thereby clear that sexual violence amounts to torture as it gives rise to *severe pain or suffering, whether physical or mental*.¹⁴¹

Count 5 *torture* and count 6 *rape* charged Kunarac cumulatively with the two rapes inflicted upon FWS-48. Regarding these rapes of FWS-48 by Kunarac, the Trial Chamber found that the testimony of FWS-48 ‘was not sufficiently credible to establish what is alleged’. ‘Not only could FWS-48 no longer remember the subsequent rape allegedly committed by (...) Vuković in court, but her testimony as to her identification of Kunarac and her description of the particular event also shows substantial discrepancies.’ Therefore the Trial Chamber holds that the rapes were not proven beyond reasonable doubt, which makes Kunarac not guilty of torture and rape as charged under counts 5 and 6.¹⁴²

Count 9 *rape*, concerned the rape of FWS-87 by Kunarac while she was kept at Karaman’s house. The Trial Chamber found that FWS-87, together with FWS-75, D.B. and FWS-50 were taken by Kunarac from the headquarters to Miljevina where they were transferred to Karaman’s house. The Trial Chamber was also satisfied beyond reasonable doubt that Kunarac went to the house and took FWS-87 to a room ‘where he forced her to have sexual intercourse in the knowledge that she did not consent’. Therefore the Trial Chamber decided that Kunarac was guilty of rape as charged under count 9.¹⁴³

Regarding the rape of FWS-191, FWS-186 and J.G., count 18 *enslavement* and count 19 *rape*, the Trial Chamber found that the rape of FWS-191 by Kunarac had been proved beyond reasonable doubt. Kunarac ‘ordered her to undress and he tried to rape her while his bayonet was placed on the table. Kunarac did not entirely succeed penetrating FWS-191 because, as FWS-191 was still a virgin, she was rigid with fear. He succeeded in taking away her virginity the next day. Kunarac knew that she did not consent, and he rejoiced at the idea of being her “first”, thereby degrading her more.’¹⁴⁴ During this same night FWS-186 was raped by DP 6 on the second floor of the house. She was sent to a room on the second floor where ‘DP 6 then came, locked the door from inside and raped her’. This incident has been proved beyond reasonable doubt according to the Trial Chamber.¹⁴⁵ The Trial Chamber furthermore found

¹³⁹ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, paras. 671-684.

¹⁴⁰ See the definition of torture and rape given in paragraph 1.4. for understanding of the elements; ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 687.

¹⁴¹ ‘A medical certificate to prove the suffering inflicted is (...) not necessary’; A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 100.

¹⁴² ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, paras. 688-698.

¹⁴³ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, paras. 699-704.

¹⁴⁴ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 724.

¹⁴⁵ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, paras. 725 and 727.

that the specific rape of J.G. by “Gaga” had not been proved beyond reasonable doubt, because J.G. herself had not testified in court and there were two conflicting testimonies which created reasonable doubts.¹⁴⁶ Lastly, the Trial Chamber was satisfied that Kunarac was fully aware that FWS-191, FWS-186 and J.G, whom he took out of the headquarters together with “Gaga” and DP 6, ‘were taken to the abandoned house also for the purpose of rape’.¹⁴⁷ Concerning the rape and enslavement of FWS-191 and FWS-186, the Trial Chamber is satisfied that these incidents had been proved beyond reasonable doubt.¹⁴⁸ ‘Kunarac constantly raped FWS-191 for about two months while she was kept in the house’, each time he came to the house he raped her.¹⁴⁹ ‘FWS-186 was raped by DP 6 continuously during her five-month stay at the (...) house. She was obliged to have sexual intercourse with DP 6 whenever he returned to the house’.¹⁵⁰ The Trial Chamber found that both FWS-191 and FWS-186 were treated as the personal property of Kunarac and DP 6 during their stay in the house. These girls did anything they were ordered to do by the soldiers, performed household chores for the soldiers and ‘were kept in the house to be used by Kunarac and DP 6 for sexual services whenever the soldiers returned to the house’. They ‘were not free to go where they wanted to, even if (...) they were given the keys to the house at some point’. The girls ‘had nowhere to go and had no place to hide from (...) Kunarac and DP 6, even if they had attempted to leave the house’. Kunarac and DP 6 ‘were fully aware of this fact’. Kunarac ‘asserted his exclusivity over FWS-191 by forbidding any other soldier to rape her’ and Kunarac ‘was aware of the fact that DP 6 constantly and continuously raped FWS-186 during this period’.¹⁵¹ Moreover, the girls were ‘subjected to other mistreatment, such as Kunarac inviting a soldier into the house so that he could rape FWS-191 for 100 Deutschmark if he so wished’ and Kunarac trying to ‘rape FWS-191 while in his hospital bed, in front of other soldiers’. Trial Chamber is satisfied that the two women were ‘treated as personal property of Kunarac and DP 6’ and that ‘Kunarac established these living conditions for the victims in concert with DP 6’. Both men thereby ‘personally committed the act of enslavement’. Although Kunarac did not provide DP 6 with any form of assistance, encouragement or moral support, ‘by assisting in setting up the conditions at the house, Kunarac also aided and abetted DP 6 with respect to his enslavement of FWS-186’.¹⁵² Consequently, the Trial Chamber found Kunarac guilty of rape (count 19) and enslavement (count 18).¹⁵³

Kovać

Radomir Kovać, who was born in 1961, was ‘one of the sub-commanders of the military police and a paramilitary leader in Foča. He was involved in the attack on Foča and its

¹⁴⁶ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 726.

¹⁴⁷ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 727.

¹⁴⁸ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, paras. 728-729.

¹⁴⁹ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 734.

¹⁵⁰ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 735.

¹⁵¹ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 738-741.

¹⁵² ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, paras. 741-742.

¹⁵³ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 745.

surrounding villages and the arrest of civilians.’¹⁵⁴ The initial indictment against Kovać was confirmed on 18 June 1996. On 2 August 1999 Kovać was arrested in Bosnia and Herzegovina and on that same day he was transferred to the ICTY where he initially appeared on 4 August 1999.¹⁵⁵

The third and thereby last amended indictment mentioned in count 22 (*enslavement*) and count 23 (*rape*), which were cumulatively charged, that after Kunarac had ‘transferred witnesses FWS-75 and FWS-87 to Karaman’s house on 2 August 1992, the witnesses together with seven other women were detained there until about 30 October where they had to perform household chores and were frequently sexually assaulted’. ‘On or about 30 October, the witnesses FWS-75 and FWS-87 together with two other women, 20-year-old A.S. and 12-year-old A.B., were taken from Karaman’s house to Foča’ by Zelenović, Janković and Janjić and were subsequently handed over to Kovać near the centre of Foča.¹⁵⁶ Furthermore the indictment mentions that Kovać ‘detained, between or about 31 October 1992 until December 1992 witness FWS-75 and A.B., and until February 1993 witness FWS-87 and A.S.’. Kovać was in charge of an apartment in Brena and ‘had taken over the two witnesses together with two other women, A.S. and A.B., whom he had received from (...) Zelenović, (...) Janković and (...) Janjić. Their situation was similar to what they had experienced in Karaman’s house. They had to perform household chores and were frequently sexually assaulted. (...) During their detention, FWS-75, FWS-87, A.S. and A.B. were also beaten, threatened, psychologically oppressed and kept in constant fear.’¹⁵⁷ ‘FWS-75 and A.B. were detained in this apartment from about 31 October until about 20 November 1992.’ During that time they had to, amongst other things, sexually please soldiers and Kovać and another soldier frequently raped them. In addition, around this same time, ‘Kovać brought Slavo Ivanovic to the flat and ordered FWS-75 to have sexual intercourse with him’. Kovać beat FWS-75 when she refused to have sexual intercourse with him. ‘Around 20 November 1992, Kovać took FWS-75 and victim A.B. from the apartment to a house near the Hotel Zelengora. They were kept there for about twenty days, during which time they were frequently sexually assaulted by a group of unidentified Serbian soldiers who belonged to the Brane Cosovic group, the same group to which (...) Kovać belonged. Although the two women were no longer in the Brena apartment, (...) Kovać still was in charge of them. Around 10 December 1992, FWS-75 and victim A.B. were moved from the house near Hotel Zelengora to a flat in the Pod Masala neighbourhood of Foča. There, they stayed for about fifteen days, together with the same soldiers. FWS-75 and A.B. were frequently raped by these soldiers during those fifteen days. On about 25 December 1992, when FWS-75 and the other women were brought back to the apartment, (...) Kovać sold A.B. to an unidentified soldier for 200 DM’ while FWS-75 was

¹⁵⁴ ICTY (Third amended indictment) 8 November 1999, *Case No. IT-96-23-PT*, para. 2.2.

¹⁵⁵ ICTY, ‘Justice Louise Arbour welcomes the detention by SFOR of Radomir Kovac’, *press release* (JL/P.I.S./426-E) 2 August 1999, p. 1; ICTY (Case information sheet), *Case No. IT-96-23/1*, p. 2; The indictment was first amended on 26 June 1996, second amended on 3 September 1999 and third amended on 1 December 1999.

¹⁵⁶ ICTY (Third amended indictment) 8 November 1999, *Case No. IT-96-23-PT*, para. 11.1.

¹⁵⁷ ICTY (Third amended indictment) 8 November 1999, *Case No. IT-96-23-PT*, para. 11.2.

handed over to DP 1.¹⁵⁸ Lastly, count 22 and 23 of the indictment also entail the fact that FWS-87 and A.S. were detained in Kovać's apartment from on or about 31 October until about 25 February 1993 and that during this entire time, she and A.S. were raped by Kovać and Kostić.¹⁵⁹

On 20 March 2000 the trial of Kovać commenced before the Trial Chamber of the ICTY and came to a close on 22 November 2000.¹⁶⁰ During this trial the facts in count 22 (*enslavement*) and count 23 (*rape*), as cumulatively charged in the indictment, were judged. The following facts were discussed by the Trial Chamber. First of all, regarding the arrival of FWS-75, FWS-87, A.B. and A.S. at Kovać's apartment, the Trial Chamber was satisfied that, while kept in the apartment, 'these girls were constantly raped, humiliated and degraded'. 'They were sometimes beaten, slapped or threatened by one of the occupants of the apartment.' Kovać 'once slapped FWS-75 because she refused to sleep with a soldier whom he had brought in'.¹⁶¹ The girls 'could not and did not leave the apartment without one of the men accompanying them. When the men were away they would be locked inside the apartment with no way to get out. (...) Notwithstanding the fact that the door may have been open while the men were there, (...) the girls were also psychologically unable to leave, as they would have had nowhere to go had they attempted to flee. They were also aware of the risks involved if they were re-captured.'¹⁶² While they were detained in the apartment, the girls were also 'required to take care of the household chores, the cooking and the cleaning'.¹⁶³ The Trial Chamber was also satisfied that it had been proven beyond reasonable doubt that FWS-75 and A.B. 'stayed at the apartment for about 15 days, during which they were constantly raped by at least ten or fifteen Serb soldiers. Kovać would come to this apartment from time to time, asking the girls how they were doing and if they had been abused.' After these 15 days the girls were taken to another apartment near Pod Masala where they stayed for about 7 to 10 days, 'during which time they continued to be raped'.¹⁶⁴ Fourthly, back at Kovać's apartment, the Trial Chamber is satisfied that it had been proven beyond reasonable doubt that 'FWS-75 was raped both by Kovać and Kostić. She was once raped together with FWS-87 by Kovać.' Moreover, 'she was raped by several other soldiers who would come to Kovać's apartment'.¹⁶⁵ Twelve-year old A.B. was also raped by Kovać and two other soldiers in the apartment.¹⁶⁶ The Trial Chamber furthermore found that Kovać 'had sexual intercourse with the two women in the knowledge that they did not consent, and that he substantially assisted other soldiers in raping the two women. He did this by allowing other soldiers to visit the apartment and to rape the women or by encouraging the soldiers to do so, and by handing the girls over to other men in the knowledge that they would rape them and that the girls did not

¹⁵⁸ ICTY (Third amended indictment) 8 November 1999, *Case No. IT-96-23-PT*, para. 11.3.

¹⁵⁹ ICTY (Third amended indictment) 8 November 1999, *Case No. IT-96-23-PT*, para 11.4.

¹⁶⁰ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, p. 9.

¹⁶¹ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 749.

¹⁶² ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 750.

¹⁶³ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 751.

¹⁶⁴ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 754.

¹⁶⁵ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 757.

¹⁶⁶ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 758.

consent to the sexual intercourse.’ The Trial Chamber is also satisfied that ‘it has been proven beyond reasonable doubt that, after about a week, Kovać handed the two women over to other soldiers whom he knew would most likely to continue to rape and abuse them. Kovać eventually sold A.B. to an unidentified soldier, and handed over FWS-75 to DP 1, in the almost certain knowledge that they would be raped again’.¹⁶⁷ The Trial Chamber found that this sexual exploitation of A.B. and FWS-75, in particular the sale of A.B. to an unidentified soldier for 200 Deutschmark by Kovać while FWS-75 was handed over to DP 1, ‘constitutes a particularly degrading attack on their dignity’.¹⁶⁸ As to FWS-87 and A.S., the Trial Chamber is satisfied that it had been proven beyond reasonable doubt that FWS-87, who was about 15 years old at the relevant time, ‘was raped by Kovać in his apartment. Kovać reserved FWS-87 for himself and raped her almost every night he spent in the apartment. (...) He knew at all times that the girls did not consent to the sexual intercourse.’ Moreover, Kostić ‘could rape A.S. because she was held by Kovać in his apartment. Kovać therefore also substantially assisted (...) Kostić in raping A.S., by allowing (...) Kostić to stay in the apartment and to rape A.S. there. The Trial Chamber notes that it has not been established beyond reasonable doubt that (...) Kovać aided and abetted the rape of FWS-87 by (...) Kostić.’ The evidence indicates that the rape of FWS-87 by Kostić was hidden from Kovać. The Trial Chamber considered that because of the two men’s relationship and Kostić threats to FWS-87 (that he would kill her if she reported the rape to Kovać), ‘it seems very unlikely that Kovać could have envisaged the possibility that (...) Kostić would rape FWS-87.’¹⁶⁹ Lastly, the Trial Chamber is satisfied that ‘Kovać detained FWS-75 and A.B. for about a week, and FWS-87 and A.S for about four months in his apartment, by locking them up and psychologically imprisoning them, and thereby depriving them of their freedom of movement. During that time, he had complete control over their movements, privacy and labour. He made them cook for him, serve him and do the household chores for him. He subjected them to degrading treatments, including beatings and other humiliating treatments.’¹⁷⁰ ‘Kovać conduct towards the two women was wanton in abusing and humiliating the four women and in exercising his de facto power of ownership as it pleased him.’ He disposed them in the same manner. ‘For all practical purposes, he possessed them, owned them and had complete control over their fate.’ They were treated as his property and Kovać exercised all these above mentioned powers over these girls intentionally, whereby many of these acts caused serious humiliation, of which Kovać was aware.¹⁷¹ To conclude, the Trial Chamber found Kovać guilty of enslavement and rape as a crime against humanity for all the above mentioned acts.¹⁷²

In the judgement of the Trial Chamber, Kovać was also convicted of outrages upon personal dignity as a violation of the laws or customs of war (Article 3 ICTY Statute). This conviction concerned an incident on an unknown date between about 31 October 1992 and about 7 November 1992 where, during their detention in Kovać’s place, ‘FWS-87, A.S. and A.B.

¹⁶⁷ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, para. 759.

¹⁶⁸ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, para. 756.

¹⁶⁹ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, paras. 761-762.

¹⁷⁰ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, para. 780.

¹⁷¹ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, para. 781.

¹⁷² ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, para. 782.

were forced to take all their clothes off and dance naked on a table'. This all happened while Kovać watched.¹⁷³ FWS-87 testified that on one of these occasions the four girls and herself were made to dance on a table while Kovać and Kostić were watching and pointing weapons at them. A.S. testified that A.B., FWS-87 and herself were once made to strip and dance while being watched by Kovać and Kostić and possibly a third soldier.¹⁷⁴ Kovać knew that, having to stand naked on a table, while they watched them, 'was a painful and humiliating experience for the three women, even more so because of their young age. The Trial Chamber is satisfied that Kovać must have been aware of the fact, but nevertheless ordered them to gratify him by dancing naked for him. (...) The Statute of the ICTY 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, which was certainly the case here.'¹⁷⁵ The reason why this is mentioned, even when it does not fall within the scope of the topic of this thesis (which is crimes against humanity), is because the indictment also cumulatively charged the naked dancing under enslavement as a crime against humanity. Without further explaining whether forcing someone to dance naked constitutes a violation of the laws or customs of war or a crime against humanity, the Trial Chamber automatically assumes, again without explaining, that the prosecutor meant that this act was a violation of the laws or customs of war only.¹⁷⁶ Is it not possible that the coercion to dance naked could also be prosecuted and convicted as enslavement? The accepted definition of enslavement is 'exercising the powers attaching to the right of ownership' over one or more persons.¹⁷⁷ Above we already discussed that the Trial Chamber found it beyond reasonable doubt that the women concerned were indeed being enslaved. But the question whether this particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour'.¹⁷⁸ By depriving women of their freedom and by forcing them to take all their clothes off and dance naked on a table, while men are watching and pointing weapons at them, might be considered as being one or more of the following factors 'control of someone's movement, control of physical environment, psychological control (...), force, threat of force or coercion (...), subjection to cruel treatment and abuse, control of sexuality and forced labour', and therefore might also be a factor that may indicate the presence of enslavement as a crime against humanity and not

¹⁷³ ICTY (Third amended indictment) 8 November 1999, *Case No. IT-96-23-PT*, para. 11.5.

¹⁷⁴ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, paras. 768-769.

¹⁷⁵ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 773.

¹⁷⁶ ICTY (A. Ch.) 12 June 2002, *Case No. IT-96-23 & IT-96-23/1*, para. 16; K. D. Askins, 'A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003', *The human rights brief* (vol. 11) 2004, p. 18.

¹⁷⁷ R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 247.

¹⁷⁸ This enumeration is not exhaustive; ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 543; ICTY (A. Ch.) 12 June 2002, *Case No. IT-96-23 & IT-96-23/1*, para. 119; R. Cryer et al., *An introduction to International Criminal Law and Procedure (Second Edition)*, New York: Cambridge University Press 2010, p. 248.

only outrages upon personal dignity as a violation of the laws or customs of war. Especially since acquisition or disposal of someone for monetary or other compensation, is not a requirement for enslavement.¹⁷⁹ As FWS-87 testified, about an incident where Kovać forced FWS-87 to undress, climb on a table and dance to music on her own while he was pointing a gun at her as he watched her, she ‘was frightened and ashamed; she had the feeling that Radomir Kovać owned her’.¹⁸⁰ Thus, it remains unclear why the nude dancing had not been included as a factor to indicate enslavement.

Vuković

Zoran Vuković, who was born in 1955, worked before the war as a waiter and driver. During the war, Vuković was ‘one of the sub-commanders of the military police and a paramilitary leader in Foča’. He was ‘involved in the attack on Foča and its surrounding villages and the arrest of civilians’.¹⁸¹ The initial indictment against Vuković was confirmed on 18 June 1996. On 23 December 1999 Vuković was arrested in Bosnia and Herzegovina and the next day he was transferred to the ICTY where he initially appeared on 29 December 1999.¹⁸²

The redacted indictment cumulatively charged Vuković in count 21 (*torture*) and count 22 (*rape*) with the following facts. ‘Between 3 July and about 13 July 1992, at least 72 Muslim inhabitants of the municipality of Foča were detained in two classrooms of the Foča High School’. ‘During the occupation that followed the take-over of the town of Foča, the Foča High School (...) functioned as a barracks for Serb soldiers, and as a short term detention facility for Muslim women, children and the elderly.’¹⁸³ In the school building they were ‘surrounded by armed Serb soldiers, who patrolled outside the Foča High School and constantly entered and left the building. There were also two armed police guards from the Foča SUP patrolling the corridor outside of the detention rooms.’¹⁸⁴ ‘Many of the female detainees were subjected to sexual abuse during their detention at the Foča High School. From the second day of their detention, every evening, groups of Serb soldiers sexually assaulted, including gang-rape, some of the younger women and girls in class-rooms or apartments in neighboring buildings. Among them were witnesses FWS-50, FWS-75, FWS-87, FWS-95, FWS-74 and FWS-88 (...). The soldiers threatened to kill the women or the women’s children if they refused to submit to sexual assaults. Women who dared to resist the sexual assaults were beaten.’ The group of soldiers referred to themselves as “Cosa’s Guards”, named for the local commander of the military police Cosovic, and consisted of members of the military police which includes the accused Vuković.¹⁸⁵ ‘The physical and psychological health of

¹⁷⁹ See also Chapter 1 of this thesis; A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 91.

¹⁸⁰ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 71.

¹⁸¹ ICTY (Redacted Indictment) 5 October 1999, *Case No. IT-96-23/1-PT*, para. 2.3.

¹⁸² ICTY, ‘Zoran Vukovic detained by SFOR in Bosnia and Herzegovina’, *press release* (CC/ P.I.S./ 458-e) 24 December 1999, p. 1; ICTY (Case information sheet), *Case No. IT-96-23/1*, p. 3; The indictment was redacted on 16 February 2000.

¹⁸³ ICTY (Redacted Indictment) 5 October 1999, *Case No. IT-96-23/1-PT*, paras. 6.1.-6.2.

¹⁸⁴ ICTY (Redacted Indictment) 5 October 1999, *Case No. IT-96-23/1-PT*, paras. 6.2. and 6.3.

¹⁸⁵ ICTY (Redacted Indictment) 5 October 1999, *Case No. IT-96-23/1-PT*, para. 6.4.

many female detainees seriously deteriorated as a result of these sexual assaults. Some of the women endured complete exhaustion, vaginal discharges, bladder problems and irregular menstrual bleedings. The detainees lived in constant fear. Some of the sexually abused women became suicidal. Others became indifferent as to what would happen to them and suffered from depression.¹⁸⁶ To be more precisely, on or about 6 or 7 July 1992, Zelenović, in concert with Janjić and Vuković, selected FWS-50, FWS-75, FWS-87 and FWS-95 out of the group of detainees. Vuković took them ‘to another classroom where unidentified soldiers stood waiting. Then (...) Zelenović decided which woman should go to which man. The women were ordered to remove their clothes. FWS-95 refused to do so and (...) Janjić slapped her and held her at gun point. Then (...) Zelenović raped FWS-75 (vaginal penetration).’ Within the same room Vuković raped FWS-87 (vaginal penetration) and Janjić raped FWS-95 (vaginal penetration). ‘One of the other soldiers took FWS-50 to another classroom and raped her (vaginal penetration).’¹⁸⁷ In addition to the sexual assaults described above, between or about 8 July and about 13 July 1992, Zelenović led a group of soldiers that sexually abused FWS-75 and FWS-87 on at least five other occasions. The women were taken into another classroom in the school building and there Vuković and Zelenović raped FWS-75 and FWS-87 (vaginal penetration).¹⁸⁸ Secondly the indictment cumulatively charges Vuković with count 33 (*torture*) and count 34 (*rape*). These counts entail the following acts. From at least on or about 13 July 1992 until at least 13 August 1992, the Partizan Sports Hall (Partizan) functioned as a detention centre for women, children and the elderly (72 numbered during that time).¹⁸⁹ ‘Partizan consisted of two large halls. All detainees were held in one of the halls only’, where the living conditions were brutal. ‘The detention was characterized by inhumane treatment, unhygienic facilities, overcrowding, starvation, physical and psychological torture, including sexual assaults.’¹⁹⁰ On or around 14 July 1992, Janjić ‘again took FWS-48 together with FWS-87 and Z.G. to the Brena apartment block near Hotel Zelengora. When they arrived, (...) Vuković and an unidentified soldier were waiting. Then (...) Vuković raped FWS-48 (vaginal penetration) while the unidentified soldier raped FWS-87 (vaginal penetration) and (...) Janjić raped Z.G.’¹⁹¹ On or around 14 July 1992, Vuković ‘came to Partizan to remove FWS-50 and FWS-87. As FWS-50 hid, (...) Vuković threatened to kill the other detainees if she did not come out of hiding. FWS-50 then did so. The two girls were taken to an apartment close to Partizan where an unidentified soldier stood waiting. There (...) Vuković raped FWS-50 (vaginal penetration), while the unidentified soldier raped FWS-87.’¹⁹² Lastly, in July 1992, ‘witness FWS-87 was frequently taken out, and raped (vaginal and anal penetration and fellatio). On one occasion witness FWS-87 was gang-raped by four men including (...) Vuković.’¹⁹³

¹⁸⁶ ICTY (Redacted Indictment) 5 October 1999, *Case No.* IT-96-23/1-PT, para. 6.5.

¹⁸⁷ ICTY (Redacted Indictment) 5 October 1999, *Case No.* IT-96-23/1-PT, para. 6.6.

¹⁸⁸ ICTY (Redacted Indictment) 5 October 1999, *Case No.* IT-96-23/1-PT, para. 6.7.

¹⁸⁹ ICTY (Redacted Indictment) 5 October 1999, *Case No.* IT-96-23/1-PT, para. 7.1.

¹⁹⁰ ICTY (Redacted Indictment) 5 October 1999, *Case No.* IT-96-23/1-PT, paras. 7.2. and 7.4.

¹⁹¹ ICTY (Redacted Indictment) 5 October 1999, *Case No.* IT-96-23/1-PT, para. 7.10.

¹⁹² ICTY (Redacted Indictment) 5 October 1999, *Case No.* IT-96-23/1-PT, para. 7.11.

¹⁹³ ICTY (Redacted Indictment) 5 October 1999, *Case No.* IT-96-23/1-PT, para. 7.13.

The trial of Vukovic before the Trial Chamber of the International Tribunal, commenced on 20 March 2000 and came to a close on 22 November 2000.¹⁹⁴ During this trial count 21 (*torture*) and count 22 (*rape*) as cumulatively charged in the indictment, were discussed. Which reads as follows. Regarding the rape of FWS-87 in the Foča High School, the Trial Chamber is satisfied that she ‘was raped in the course of this particular incident’. However, the Trial Chamber is not convinced that this rape was committed by Vuković. ‘FWS-87 herself testified that she was assigned to Vuković after being called out’ and that ‘he ordered her to lie down, took off her clothes’ and eventually raped her. The Trial Chamber had ‘no doubt with regard to the credibility of the witness, but it had doubts as to the reliability of the identification of (...) Vuković as the perpetrator of this particular rape’.¹⁹⁵ Her statements contradicted and in court she identified Vuković with hesitation, which makes her evidence of Vuković as raping her on that occasion not reliable.¹⁹⁶ As to the rape of FWS-75 and FWS-87 between or about 8 July and about 13 July 1992 by Vuković and Zelenović in the classroom of the Foča High School, the Trial Chamber found that ‘there was no evidence adduced during trial that would establish the incident. Neither of the alleged victims could remember the particular event.’ Therefore the Trial Chamber concluded that none of these acts had been committed by Vuković and found Vuković not guilty under counts 21 and 22.¹⁹⁷ Secondly, during this trial count 33 (*torture*) and count 34 (*rape*) as charged in the indictment, were discussed. Which reads as follows. Considering the incident on or around 14 July 1992, where Vuković raped FWS-48 (vaginal penetration) while an unidentified soldier raped FWS-87 and Janjić raped Z.G., the Trial Chamber found that, also with respect to FWS-87 and Z.G, it has not been proved beyond reasonable doubt that Vuković committed these acts. Namely, FWS-48 did not recognize Vuković in court as the person who raped her, FWS-87 did not recall these events and Z.G. did not testify at all. Witness FWS-48 had been able to identify Vuković ‘only by a name which is shared by others and by a very general description which would fit any number of men’ and which is therefore insufficient.¹⁹⁸ Furthermore, on the basis of the testimony of FWS-50, the Trial Chamber found that the incident sometime in mid-July 1992 where Vuković took FWS-50 out of the Partizan Sports Hall to an apartment where he forced her to have sexual intercourse with full knowledge that she did not consent, had been proved beyond reasonable doubt. Because FWS-87 said that she was taken out of Partizan on many occasions and she did not say that she was taken out of Partizan by Vuković, the Trial Chamber was not satisfied, that FWS-87 was taken out by Vuković and was raped by an unknown soldier during this same incident.¹⁹⁹ Moreover, the indictment alleges that in July 1992, ‘FWS-87 was frequently taken out of Partizan and that, on one of these occasions, she was gang-raped by four men including (...) Vuković’. The Trial Chamber, however, notes that ‘although FWS-87 could recall being taken out of the Partizan Sports Hall and being raped on

¹⁹⁴ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, p. 1.

¹⁹⁵ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, para. 787.

¹⁹⁶ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, paras. 788 and 791.

¹⁹⁷ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, paras. 793-798.

¹⁹⁸ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, paras. 806-810 ; see also Decision on Motion for Acquittal, 3 July 2000, paras. 18-26.

¹⁹⁹ ICTY (T. Ch.) 22 February 2001, *Case No.* IT-96-23-T & IT-96-23/1-T, paras. 811-817.

many occasions, she did not recall being taken out of the Partizan Sports Hall by (...) Vuković or being raped by him' on that occasion. Therefore the Trial Chamber found that these allegations had not been proved beyond reasonable doubt.²⁰⁰ To conclude, on the facts adduced above, the Trial Chamber found Vuković guilty of torture under count 33 and guilty of rape under count 34.²⁰¹

All of the appellants appealed against their conviction by the Trial Chamber. The Appeals Chamber, however, was 'unable to discern any error in the Trial Chamber's assessment of the evidence or its findings in relation to any of the grounds of appeal'.²⁰²

Conclusion

First of all it can be concluded that this decision is very important, because it is the first case before the ICTY where acts of sexual violence are convicted as rape, torture and enslavement as a crime against humanity (Article 5(c),(f) and (g) ICTY Statute). In fact, it was the first international trial in history to adjudicate rape and enslavement for crimes essentially constituting sexual slavery. Since the prime purpose of the enslavement in this case was to rape the women and not to have them perform household chores, the sexual crimes which the women had to endure might have been better charged as sexual slavery. Although the Rome Statute of the ICC specifically enumerates sexual slavery as a crime against humanity (Article 7(g) Rome Statute of the ICC), the ICTY Statute only lists rape and enslavement. Hence, 'these offenses were combined to prosecute the accused for the sexual enslavement of women and girls'. What therefore has been established before this tribunal is that 'enslavement can include sexual slavery'.²⁰³ Thirdly, Kunarac was also convicted of aiding and abetting the 'vaginally and orally' gang-rape of two women. The indictment of the prosecutor makes it clear that the oral rapes mean fellatio. It is interesting to see that in the very first sexual violence case before the ICTY, the Tadić case, the prosecutor did not charge fellatio as an act of rape, instead it charged fellatio under other inhumane acts. The prosecutor in this case on the other hand did not follow this path and charged fellatio as an act of rape. The Trial Chamber followed herein the prosecutor by convicting Kunarac of aiding and abetting the oral gang-rape as an act of rape. Considering the fact that fellatio matches more with the elements of rape than it does with the elements of other inhumane acts, it can be said that the prosecutor in this case made a better choice.²⁰⁴ Lastly, concerning the nude dancing for which Kovać was convicted, the judgement of the Trial Chamber is not clear as to why this particularly act was not prosecuted as enslavement, although it might have been charged as enslavement in

²⁰⁰ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, paras. 818-820.

²⁰¹ ICTY (T. Ch.) 22 February 2001, *Case No. IT-96-23-T & IT-96-23/1-T*, para. 822.

²⁰² ICTY (A. Ch.) 12 June 2002, *Case No. IT-96-23 & IT-96-23/1*, paras. 23 and 32.

²⁰³ K. D. Askins, 'A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003', *The human rights brief* (vol. 11) 2004, p. 18; A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 93.

²⁰⁴ See for the elements of rape and other inhumane acts Chapter 1 of this thesis or the Tadić case in Chapter 3 of this thesis.

the indictment. Lastly, it can be concluded that sexual violence can be convicted as torture when it gives rise to severe pain or suffering, whether physical or mental.

Kunarac et al. case		
<u>Kunarac</u> Charged crimes against humanity	Judgement	Facts/Evidence
Count 1 torture & Count 2 rape	Guilty	<p>Kunarac conducted:</p> <ul style="list-style-type: none"> - rape of D.B.; - rape of FWS-87; - rape of FWS-95. <p>Kunarac aided and abetted the:</p> <ul style="list-style-type: none"> - gang-rape of FWS-75 (vaginally and orally); - other soldiers in their role as principle perpetrators by bringing FWS-75 and D.B. to the headquarters; - multiple rape (vaginally and orally) of FWS-75, FWS-78 and FWS-50 by other soldiers, by bringing the girls to the house and leave them to his men in the knowledge that they would rape them.
Count 5 torture & Count 6 rape	Not Guilty	- It has not been proven beyond reasonable doubt.
Count 9 rape	Guilty	<p>Kunarac conducted:</p> <ul style="list-style-type: none"> - rape of FWS-87 (vaginal penetration).
Count 18 enslavement & Count 19 rape	Guilty	<p>Kunarac conducted:</p> <ul style="list-style-type: none"> - ordering FWS-191 to undress and later on raping FWS-191 while she was still a virgin (thereby degrading her more); - multiple rape of FWS-191 for about two months while she was kept in the house. <p>FWS-191 and FWS-186 were treated as the personal property of Kunarac and DP6 during their stay in the house. They:</p> <ul style="list-style-type: none"> - followed orders from the soldiers; - performed household chores; - were kept in the house to be used by Kunarac and DP 6 for sexual services; - were not free to go where they wanted to; - were subjected to other mistreatment, such as Kunarac inviting a other soldier to the house to rape FWS-191 for 100 Deutschmark and Kunarac trying to rape FWS-191 in front of other soldiers. <p>Kunarac aided and abetted:</p> <ul style="list-style-type: none"> - the rape of FWS-191 by DP 6 on 2 August; - DP 6 with respect to his enslavement of FWS-186. <p>Although Kunarac did not provide DP 6 with any form of assistance, encouragement or moral support, by assisting</p>

		in setting up the living conditions at the house Kunarac aided and abetted the enslavement.
<u>Kovać</u> Charged crimes against humanity	Judgement	Facts/Evidence
Count 22 enslavement & Count 23 rape	Guilty	<ul style="list-style-type: none"> - FWS-75, FWS-87, A.B. and A.S. were constantly raped, humiliated and degraded and sometimes beaten, slapped or threatened by occupants of the apartment. - FWS and A.B. were constantly raped by at least ten or fifteen soldiers during their stay of 15 days. - FWS-75, FWS-87, A.B. and A.S. were not free to go where they wanted to and were required to take care of the household chores, cooking and cleaning. Kovać possessed them, owned them, had complete control and treated them as property. - Kovać slapped FWS-75 because she refused to sleep with a soldier whom he brought in. - Kovać handed FWS-75 and A.B. over to soldiers whom he knew would be most likely to continue to rape and abuse them. - Kovać sold A.B. to an unidentified soldier for 200 Deutschmark while FWS-75 was handed over to DP 1, in the almost certain knowledge they would be raped again. - FWS-75 was raped by Kovać. - A.B. was raped by Kovać. - FWS-87 was raped multiple times by Kovać. - Kovać assisted other soldiers in raping FWS-75 and A.B. - Kovać assisted Kostić in raping A.S.
<u>Vuković</u> Charged crimes against humanity	Judgement	Facts/Evidence
Count 21 torture & Count 22 rape	Not Guilty	- It has not been proven beyond reasonable doubt.
Count 33 torture & Count 34 rape	Guilty	- Vuković took FWS-50 out of the Sports Hall and raped her in the apartment.

3.4. Todorović case

The third case in this chapter regards Stevan Todorović, who was born in 1957. He ‘was appointed Chief of Police for Bosanski Šamac municipality after the 17 April 1992 military take-over. While serving as the Chief Police, (...) Todorović was a member of the Serb Crisis staff and occupied a position of superior authority to all other police officers in Bosanski Šamac.’ Prior to April 1992, he was an executive in a wicker furniture factory.²⁰⁵ A warrant for his arrest had been issued on 21 July 1995. Thereafter Todorović was abducted in Yugoslavia and taken against his will to Bosnia and Herzegovina where he ‘was handed over

²⁰⁵ ICTY (Sec. Amended Indictment) 19 November 1998, *Case No. IT-95-9-PT*, para. 17.

to the Stabilisation Force (SFOR) at the Air Base at Tuzla, Bosnia and Herzegovina, where he was arrested and transferred to the custody of the International Tribunal' on 27 September 1998. He initially appeared on 30 September 1998.²⁰⁶

The initial indictment against Todorovic was confirmed on 21 July 1995. The second amended indictment was filed on 11 December 1998 and was redacted on 25 March 1999.²⁰⁷ In the latter indictment Todorović was charged with the following sexual violence crimes within the scope of crimes against humanity. From on or about 17 April 1992 through 31 December 1993, while serving as Chief of Police and as a member of the Serb Crisis Staff, Todorović committed and aided and abetted the crime of *persecution* (count 1) through his participation in sexual assaults.²⁰⁸ By these actions Todorović 'planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of persecutions on political, racial and religious grounds'.²⁰⁹ Secondly, Todorović was charged with *rape* (count 16, 19 and 22) which included other forms of sexual assault. In the Bosanski Šamac police (SUP) building, Todorović 'planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution' of rape by forcing witness A and B 'to perform acts of fellatio upon each other in the presence of several other prisoners and guards',²¹⁰ by ordering 'witness C and witness D to perform fellatio on each other'²¹¹ and by ordering 'witness E and witness F to perform fellatio on each other'.²¹²

On 29 November 2000 a joint motion was filed on behalf of Todorović with the OTP 'informing the Trial Chamber of an agreement reached between them as to the entry of a guilty plea by the accused to count 1 of the indictment (*persecution*) and the withdrawal of all other counts against him'.²¹³ Regarding the allegations of sexual assault in count 1, Todorović accepted the following account of his conduct:

- Witness A 'was taken to the police station in Bosanski Šamac where (...) Todorović began to beat him and kick him in the genital area. Witness A was then taken over to another man and ordered by Todorović to "bit into his penis". After that he was beaten again and endured further mistreatment.'²¹⁴
- Todorović ordered witness C and D to perform oral sex on each other at the police station in Bosanski Šamac.²¹⁵
- Witness E stated that: 'After the beating Todorović ordered us (witness E and witness F) to do a blow job on each other. He was laughing when we were doing it.' This also took place at the police station in Bosanski Šamac.²¹⁶

²⁰⁶ ICTY (T. Ch.) 31 July 2001, *Case No. IT-95-9/1-S*, paras. 1-2.

²⁰⁷ ICTY (T. Ch.) 31 July 2001, *Case No. IT-95-9/1-S*, paras. 1-3.

²⁰⁸ ICTY (Sec. Amended Indictment) 19 November 1998, *Case No. IT-95-9-PT*, paras. 34-34(b).

²⁰⁹ ICTY (Sec. Amended Indictment) 19 November 1998, *Case No. IT-95-9-PT*, para. 35.

²¹⁰ ICTY (Sec. Amended Indictment) 19 November 1998, *Case No. IT-95-9-PT*, para. 44.

²¹¹ ICTY (Sec. Amended Indictment) 19 November 1998, *Case No. IT-95-9-PT*, para. 45.

²¹² ICTY (Sec. Amended Indictment) 19 November 1998, *Case No. IT-95-9-PT*, para. 46.

²¹³ ICTY (T. Ch.) 31 July 2001, *Case No. IT-95-9/1-S*, para. 4.

²¹⁴ ICTY (T. Ch.) 31 July 2001, *Case No. IT-95-9/1-S*, para. 38.

²¹⁵ ICTY (T. Ch.) 31 July 2001, *Case No. IT-95-9/1-S*, para. 39.

²¹⁶ ICTY (T. Ch.) 31 July 2001, *Case No. IT-95-9/1-S*, para. 40.

The Trial Chamber ‘accepted the guilty plea and entered a finding of guilt accordingly’, whereby all other counts of the indictment were withdrawn.²¹⁷ The manner in which several of the crimes were committed, including witnesses C and E who were forced to perform fellatio on other prisoners, were considered as aggravating circumstances by the Trial Chamber.²¹⁸ Furthermore, the Trial Chamber found the sexual assaults perpetrated by the accused to be serious and grave offences.²¹⁹

Regarding the acts of sexual assault as enumerated above under count 1 (persecution), and looking back to the sexual assaults mentioned in count 16, 19 and 22 (rape) of the indictment, it can be concluded that these sexual acts are the same. Although the indictment is not clear on this point, because the prosecutor only mentioned in count 1 that Todorović participated in acts of ‘sexual assaults’, the judgement of the Trial Chamber makes it clear that these ‘sexual assaults’ mentioned in count 1 imply the same sexual acts as mentioned in count 16, 19 and 22. This also means that the prosecutor specifically charged the act of fellatio under both persecution as well as rape as a crime against humanity. Count 16, 19 and 22 were withdrawn, which in this case meant that the judges only had to evaluate if the act of fellatio was punishable under persecution as a crime against humanity. This leads to the conclusion that fellatio, which is considered to amount rape, is also found to constitute a method of persecution.²²⁰ Lastly, it can be concluded that persecution can entail sexual violence between males.

Todorović case		
Charged crimes against humanity	Judgement	Facts/Evidence
Count 1 persecution	Guilty plea	Todorović conducted: - kicking in the genital area; - ordering a man to bite into a penis; - ordering men to perform oral sex on each other; - ordering men to perform fellatio.
Count 16, 19 and 22	-	Withdrawal of all other counts (plea agreement).

3.5. Kvočka et al. case

This paragraph will discuss the Kvočka et al. case. In this case five perpetrators were convicted: Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlađo Radić, Zoran Žigić. All five perpetrators will be discussed in this paragraph.

Miroslav Kvočka (born in 1957) ‘was a police officer in Prijedor municipality prior to the conflict and was the first commander of the Omarska camp. During June 1992, he was

²¹⁷ ICTY (T. Ch.) 31 July 2001, *Case No. IT-95-9/1-S*, paras. 8 and 17.

²¹⁸ ICTY (T. Ch.) 31 July 2001, *Case No. IT-95-9/1-S*, para. 64.

²¹⁹ ICTY (T. Ch.) 31 July 2001, *Case No. IT-95-9/1-S*, para. 66.

²²⁰ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005. p. 158.

replaced (...) and thereafter held responsibility as a deputy commander of the camp'.²²¹ Kvočka was arrested by the SFOR on 8 April 1998 and transferred to the ICTY the next day. His initial appearance before the ICTY was on 14 April 1998.²²²

Dragoljub Prcać (born in 1937) 'served as a policeman in Croatia and then was a Criminal Technician for the Public Security Service in Prijedor municipality for several years prior to the conflict. He was the second Deputy Commander of the Omarska camp.'²²³ Prcać was arrested in Bosnia and Herzegovina on 5 March 2000 and transferred to the ICTY on the same day. His initial appearance before the ICTY was on 10 March 2000.²²⁴

Milojica Kos (born in 1963) 'was a reserve policeman who had been called to full-time duty at the time of his involvement in the Omarska camp. He was appointed as one of three shift commanders of guards at the Omarska camp.'²²⁵ Kos was arrested by the SFOR on 28 May 1998 and transferred to the ICTY on 29 May 1998. His initial appearance before the ICTY was on 2 June 1998.²²⁶

Mlađo Radić (born in 1952) 'was a police officer in Prijedor municipality prior to the conflict and served as one of three shift commanders of guards at the Omarska camp'.²²⁷ Radić was arrested by the SFOR on 8 April and transferred to the ICTY the next day. His initial appearance before the ICTY was on 14 April 1998.²²⁸

Zoran Žigić (born in 1958) 'was a taxi driver in the Prijedor area. During the period of 26 May to 30 August 1992, he entered all three camps for the purpose of abusing, beating, torturing and/or killing prisoners'.²²⁹ Žigić was arrested in Republika Srpska on 16 April 1998 and transferred to the ICTY on the same day. His initial appearance before the ICTY was on 20 April 1998.²³⁰

The indictment for all five of the accused was amended on 26 October 2000. The prosecutor charged Kvočka, Prcać, Kos, Radić and Žigić with *persecution* as a crime against humanity

²²¹ ICTY (Amended Indictment) 26 October 2000, *Case No.* IT-98-30/I-PT, para. 19.

²²² ICTY, 'The Omarska and Keraterm Cases: Further Initial Appearance on 10 December 1998 of defendants Radic, Kvočka, Zigic and Kos', *press release* (CC/PIU/366-E) 30 November 1998, p. 1; ICTY (Case information sheet) *Case No.* IT-98-30/1, p. 4.

²²³ ICTY (Amended Indictment) 26 October 2000, *Case No.* IT-98-30/I-PT, para. 20.

²²⁴ ICTY, 'Dragoljub Prcac detained by SFOR in Bosnia and Herzegovina and transferred to the Hague', *press release* (JL/PIS/475e) 6 March 2000, p. 1; ICTY (Case information sheet) *Case No.* IT-98-30/I-PT, p. 4.

²²⁵ ICTY (Amended Indictment) 26 October 2000, *Case No.* IT-98-30/I-PT, para. 21.

²²⁶ ICTY, 'The Omarska and Keraterm Cases: Further Initial Appearance on 10 December 1998 of defendants Radic, Kvočka, Zigic and Kos', *press release* (CC/PIU/366-E) 30 November 1998, p. 1; ICTY (Case information sheet) *Case No.* IT-98-30/I-PT, p. 4.

²²⁷ ICTY (Amended Indictment) 26 October 2000, *Case No.* IT-98-30/I-PT, para. 22.

²²⁸ ICTY, 'The Omarska and Keraterm Cases: Further Initial Appearance on 10 December 1998 of defendants Radic, Kvočka, Zigic and Kos', *press release* (CC/PIU/366-E) 30 November 1998, p. 1; ICTY (Case information sheet) *Case No.* IT-98-30/I-PT, p. 4.

²²⁹ ICTY (Amended Indictment) 26 October 2000, *Case No.* IT-98-30/I-PT, para. 23.

²³⁰ ICTY, 'Zoran Žigić in the Custody of Authorities of the Republika Srpska', *press release* (cc/PIU/309) 16 April 1998, p. 1; ICTY (Case information sheet) *Case No.* IT-98-30/I-PT, p. 4.

(Count 1 of the indictment) and charged Kvočka, Prcać, Kos, Radić and Žigić with *other inhumane acts* as a crime against humanity (count 2). Count 1 and 2 were cumulatively charged and reads as follows. Between 24 May 1992 and 30 August 1992, Kvočka, Prcać, Kos, Radić and Žigić ‘participated in persecutions of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor area, on political, racial or religious grounds’. The persecution included ‘the sexual assault and rape of Bosnian Muslims, Bosnian Croats and other non-Serbs in Prijedor municipality, including prisoners detained in the Omarska, Keraterm and Trnopolje camps’.²³¹ Kvočka, Prcać, Kos, Radić and Žigić ‘instigated, committed or otherwise aided and abetted the persecutions of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor area’, through their direct participation in crimes and through their ‘approval, encouragement, acquiescence, and assistance in the development and continuation of the conditions in the camp and the on-going commission of the crimes’ against the prisoners in the Omarska camp. Kvočka, Prcać, Kos and Radić had the ‘authority to control the conduct of the guards in the camp and to prevent or control the conduct of any visitors to the camp’. They had an ‘independent duty to uphold the laws in force on the territory of Bosnia and Herzegovina and to safeguard the lives of civilians’.²³² In addition, between 24 May 1992 and 30 August 1992, Kvočka, Prcać, Kos and Radić ‘knew or had reason to know that persons subordinate to them in the Omarska camp were about to participate in the persecution of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor area (...) or had done so, and failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators’.²³³ Furthermore, count 14 (*torture*) and count 15 (*rape*) of the indictment elaborate on the sexual assault and rape mentioned in count 1 and 2 by mentioning that between ‘24 May 1992 and 30 August 1992, at the Omarska camp, (...) Radić raped and sexually assaulted female prisoners, including the rape of witness A on five occasions during June and July 1992, the rape of witness K on one occasion around the middle of July, the sexual assault of witness E between 22 June 1992 and 26 June 1992, the sexual assault of witness F between 1 June 1992 and 3 August 1992, the sexual assault of witness J on several occasions between 9 June 1992 and 3 August 1992, and the sexual assault of witness L between 22 June 1992 and 3 August 1992’.²³⁴ Lastly, it should be noted that in the Omarska camp, approximately thirty-six of the detainees were women, who were ‘guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity’. The Omarska camp ‘was a commonplace for women to be subjected to sexual intimidation or violence’.²³⁵

Trial Chamber

As can be read above, the charges in count 1 (*persecution*) are based on the same facts as count 2 (*other inhumane acts*). Therefore the Trial Chamber evaluated whether cumulative

²³¹ ICTY (Amended Indictment) 26 October 2000, *Case No.* IT-98-30/I-PT, paras. 24-25.

²³² ICTY (Amended Indictment) 26 October 2000, *Case No.* IT-98-30/I-PT, paras. 26-32.

²³³ ICTY (Amended Indictment) 26 October 2000, *Case No.* IT-98-30/I-PT, para. 33.

²³⁴ ICTY (Amended Indictment) 26 October 2000, *Case No.* IT-98-30/I-PT, para. 42.

²³⁵ ICTY (T. Ch I) 2 November 2001, *Case No.* IT-98-30/I-T, paras. 98-108 and 327.

convictions were permissible under the applicable ‘Čelebići test’.²³⁶ Regarding the relationship between other inhumane acts and persecution, ‘inhumane acts have a subsidiary nature, and thus if any inhumane acts fall within a persecution conviction, the inhumane acts charged under Article 5(i) must be dismissed’.²³⁷ The sexual assault and rape mentioned in the indictment under count 1, is elaborated by the prosecutor in count 14 and 15. Which means that they also contain the same facts. Regarding the relationship between persecution, *torture* (count 14) and *rape* (count 15), the Trial Chamber noticed that if ‘the criminal acts satisfy the criteria for more than one crime but the offenses do not each contain materially distinct elements, and thus cumulative convictions are impermissible, then the Trial Chamber must decide for which offence it will enter a conviction’. ‘The offence of rape requires sexual penetration, while the offence of torture requires the infliction of severe pain or suffering for a prohibited purpose. Thus (...) convictions for both are allowed if the requirements of each are met. Nonetheless, the Trial Chamber (...) indicated that the crime of persecution requires a materially distinct element, namely the discriminatory intent, vis-à-vis the crime of torture; this same intent also distinguishes persecution from elements of rape. Therefore, in instances where the same act qualifies as rape, torture, and persecution under Article 5 of the Statute, the Trial Chamber may convict the accused for persecution only’.²³⁸ This being said, the judgement of the Trial Chamber concerning persecution (count 1) will be discussed hereafter. Kvočka, Prcać, Kos, Radić and Žigić will be dealt with in turn.

Kvočka is, amongst other things, charged with individual responsibility in count 1 of the indictment as a participant in persecution.²³⁹ ‘While it is not clear that Kvočka had direct knowledge of each and every form of abuse committed in the camp, nevertheless he undoubtedly knew that a wide variety of crimes were being committed and that physical and mental violence was systematically used to threaten and terrorize the detainees in the camp.’ Furthermore, ‘evidence demonstrated that Kvočka had extensive knowledge of the abusive practices and conditions and knew that serious crimes were regularly committed in Omarska camp’.²⁴⁰ ‘The Trial Chamber believed that Kvočka did intervene on a few occasions and he took some steps to improve the situation of certain family members or friends.’ However, the Trial Chamber found ‘he could have done far more to mitigate the terrible conditions in the camp’. Namely, Kvočka was ‘in a position of sufficient authority and influence to prevent or halt some of the abuses, either by intervening personally or by seeking assistance from others, and to report abuses committed against detainees in the camp. (...) The Trial Chamber did not have sufficient evidence to conclude that Kvočka himself physically perpetrated crimes against detainees in the camp. It is nonetheless indisputable that he was present while crimes were committed and he was undoubtedly aware that crimes of extreme physical and mental violence were routinely inflicted upon the non-Serbs imprisoned in Omarska. Despite knowledge about the abusive treatment and conditions, Kvočka continued to work for at least

²³⁶ See Chapter 2 Cumulative convictions of this thesis for the explanation of the ‘Čelebići test’.

²³⁷ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 228.

²³⁸ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 233.

²³⁹ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 329.

²⁴⁰ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, paras. 384-385.

17 days in the camp, where he performed the tasks required of him skillfully, efficiently, and without complaint.’²⁴¹ ‘The evidence is sufficient to conclude that Kvočka’s participation in the camp was not only knowing, it was willing.’²⁴² ‘He actively contributed to the everyday functioning and maintenance of the camp and he remained culpably indifferent to the crimes committed therein. His participation enabled the camp to continue unabated its insidious policies and practices. (...) The Trial Chamber found beyond reasonable doubt that Kvočka was aware of the context of persecution and ethnic violence prevalent in the camp and he knew that his work in the camp facilitated the commission of crimes.’ He had the intent to discriminate against the non-Serbs detained in the camp. Therefore Kvočka is responsible for the crimes committed in Omarska camp.²⁴³ The Trial Chamber found Kvočka a co-perpetrator of the joint criminal enterprise (JCE) of the Omarska camp.²⁴⁴ In short, JCE means that ‘those involved in a common purpose can be prosecuted’. The common purpose in this judgement involved the persecution ‘which includes crimes which were an intended or a natural and foreseeable consequence of the common purpose, e.g., the rapes and sexual assault on the women held captive in the Omarska camp’.²⁴⁵ Kvočka has been found guilty of ‘persecution as a crime against humanity based on the murder, torture, rape, and other inhumane acts charged in the indictment and committed as part of the joint criminal enterprise’. Again, ‘this conviction for persecution subsumes the other crimes against humanity charged’ (rape, torture and other inhumane acts). Thus they ‘cannot be the subject of separate convictions and must be dismissed’.²⁴⁶

Prcać is, amongst other things, charged with individual responsibility in count 1 of the indictment for being a participant in persecution.²⁴⁷ Although it is not clear if Prcać ‘had knowledge of each and every form of abuse committed in the camp, he undoubtedly knew that a wide variety of crimes were being committed against detainees and that physical and mental violence was used to threaten and terrorize them’.²⁴⁸ The Trial Chamber found that Prcać ‘was aware of the large scale nature of the abuses committed against detainees in the Omarska camp and that crimes alleged against Prcać in the (...) indictment were committed during the time he worked in the camp. Prcać had personal knowledge of a criminal system of abusive treatment and conditions in the Omarska camp in which he worked’.²⁴⁹ The Trial Chamber found ‘that there is no sufficient evidence establishing beyond a reasonable doubt

²⁴¹ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, paras. 395-397.

²⁴² ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 404.

²⁴³ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, paras. 407-408.

²⁴⁴ Joint criminal Enterprise requires: (1) A plurality of persons, (2) the existence of a common plan, which amounts to or involves the commission of a crime provided in the Statute and (3) participation of the accused in the execution of the common plan (Krstić case ICTY (T. Ch) 2 August 2001, *Case No. IT-98-33-T*). When the crimes committed by one or more members of the group that aren’t within the range of the common plan a person might still be held liable if it was foreseeable that such a crime might be perpetrated by one or more members of the group and that the accused willingly took the risk (Tadić case).

²⁴⁵ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 488.

²⁴⁶ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, paras. 414-415.

²⁴⁷ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 422.

²⁴⁸ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 448.

²⁴⁹ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 449.

that Prcać was directly involved in committing specific crimes against detainees. (...) Prcać was aware of the crimes of extreme physical and mental violence routinely inflicted upon the non-Serbs detained in Omarska and of the discriminatory context in which these crimes occurred. He was also aware of the abusive conditions of detention. Despite this knowledge, Prcać continued to work for at least twenty-two days in the camp, where he performed the tasks required of him efficiently, effectively, and indifferently.²⁵⁰ In addition, 'Prcać may have been in a position to oppose the mistreatment he witnessed of detainees who were moved around the camp according to the lists he managed. However, he remained impassive when crimes were committed in his presence, and his silence can be regarded as giving moral support or approval to the perpetrators'. The Trial Chamber found that 'Prcać's knowing participation in the camp was significant, as his acts and omissions substantially contributed to assisting and facilitating the joint criminal enterprise to persecute the non-Serb population of Prijedor who were detained in Omarska camp. (...) Prcać was aware of the context of persecution and ethnic conflict prevalent in the camp, and he knew that his work in the camp facilitated the crimes committed therein.' Therefore, Prcać is 'responsible for participating in the persecution committed in Omarska camp, which was a joint criminal enterprise'.²⁵¹ 'Prcać was in the camp for over three weeks during which time his position and administrative functions contributed significantly to furthering the efforts of the Omarska camp, rendering him liable as a co-perpetrator of the joint criminal enterprise.' In sum, the Trial Chamber found Prcać guilty of co-perpetrating persecution (count 1) as part of the joint criminal enterprise.²⁵²

Kos is, amongst other things, charged with individual responsibility in count 1 of the indictment for being a participant in persecution.²⁵³ The Trial Chamber found that 'Kos was aware of the abusive treatment and conditions prevailing in Omarska camp, and that he was undoubtedly aware that crimes of extreme physical and mental violence were routinely inflicted upon the non-Serbs imprisoned in Omarska, and he was aware as well of the context of discrimination in which the crimes were committed. Despite this knowledge, he continued to work in the camp for over two months, where he performed the tasks required of him without complaint or hesitation'.²⁵⁴ 'Kos' intent to further the joint criminal enterprise can be inferred from his continued and extensive presence as a guard shift leader in the camp, as well as his personal and direct implication in crimes of violence, harassment, and intimidation committed against detainees. (...) Kos' contribution to the maintenance and functioning of Omarska camp as a guard shift leader was substantial.' The Trial Chamber further found that 'he knowingly and intentionally contributed to the furtherance of the joint criminal enterprise'.²⁵⁵ 'Due to the fact that Kos played a key role in the functioning of the camp as a guard shift leader, he remained in the camp for almost its entire existence, and he personally exploited the vulnerable position of the detainees in the camp', the Trial Chamber found 'Kos

²⁵⁰ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, paras. 456-457.

²⁵¹ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, paras. 462-464.

²⁵² ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, paras. 469-470.

²⁵³ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 472.

²⁵⁴ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 489.

²⁵⁵ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, paras. 499-500.

was a co-perpetrator of the crimes committed in Omarska camp.’ In sum, the Trial Chamber found Kos guilty as a co-perpetrator of persecution (count 1) committed as part of the joint criminal enterprise.

Radić is, amongst other things, charged with individual responsibility in count 1 of the indictment for being a participant in persecution.²⁵⁶ The Trial Chamber heard evidence that guards on Radić’s shift were particularly brutal. ‘It was during his shift that the worst mistreatment was inflicted and more people were called out of the rooms, never to return.’²⁵⁷ Radić’s ‘failure to intervene gave the guards a strong message of approving of their behavior. Given his position of authority over the guards, his non-intervention condoned, encouraged, and contributed to the crime’s commission and continuance’.²⁵⁸ The Trial Chamber found that ‘Radić, in his role as a guard shift leader, was exposed on a daily basis to killings, tortures, and other abuses committed in Omarska camp against non-Serb detainees. He knew that crimes of extreme physical and mental violence were routinely committed in the camp for discriminatory purposes.’²⁵⁹ Evidence concerning the sexual violence suggests that Radić ‘regularly attempted to bribe or coerce victims to “agree” to sexual intercourse in exchange for favors’. ‘Radić grossly abused his position and took advantage of the vulnerability of the detainees. On one occasion he called Witness J into his office and told her that he could help her if she had sexual intercourse with him. Later he attempted to rape her.’ Witness K testified that ‘Radić had previously attempted to coerce her into having sex with him by saying that her children would not be killed if she would agree to having sexual intercourse with him’. Radić assaulted and raped her. The Trial Chamber recalled ‘previous holdings by the Tribunal, as well as Rule 96, dealing with evidence in cases of sexual assault, which states that a status of detention will normally vitiate consent in such circumstances’.²⁶⁰ ‘Witness F testified that Radić took her to one of the rooms.’ Once there, he told her that ‘he could help her if she agreed to sleep with him and that she should get out of the room where she was held one night when he was on duty. He then touched the “female parts” of her body. Sifeta Susić testified that on one occasion (...) Radić grabbed her, put her down on his knees and said: “It’s better for me to rape you than somebody else do it”. Terrified, she ran off. Zlata Cikota testified that the morning after her arrival in the camp, she was told she should go see Radić and take her identity card. Once in the office with Radić, he wrote down her personal details then grabbed her breasts. She was shocked and told him she was an old woman, but Radić said “Well, you’re good, it doesn’t really matter”. Zlata Cikota managed to leave the room when another person came in.’²⁶¹ ‘Witness A was the third witness who testified before the Court that Radić raped her. The Trial Chamber had no difficulty believing that this witness suffered a terrible and traumatizing ordeal. However, her testimony was so confused as to details of the rape that it cannot be relied upon to establish guilt.’²⁶² The Trial Chamber found that Radić ‘raped

²⁵⁶ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, paras. 506-507.

²⁵⁷ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 527.

²⁵⁸ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 538.

²⁵⁹ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 545.

²⁶⁰ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, paras. 548-555.

²⁶¹ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 547.

²⁶² ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 557.

Witness K and that he attempted to rape Witness J'. It found that 'the sexual intimidations, harassment, and assaults committed by Radić against Witness J, Witness F, Sifeta Susić, and Zlata Cikota clearly fall within' the definition of sexual violence as 'any act of a sexual nature, which is committed on a person under circumstances which are coercive'. Thereby the Trial Chamber found that Radić committed sexual violence against these survivors.²⁶³ The Trial Chamber further found that 'the rape and other forms of sexual violence were committed only against the non-Serb detainees in the camp and that they were committed solely against women, making the crimes discriminatory on multiple levels. (...) The rape of Witness K and the attempted rape of Witness J manifest his intent to inflict severe pain and suffering.' Thus, the Trial Chamber also found that 'Radić is guilty of the torture of Witness K and Witness J. (...) In considering whether severe pain and suffering was also inflicted upon the other victims of sexual violence, the Trial Chamber takes into consideration the extraordinary vulnerability of the victims and the fact that they were held imprisoned in a facility in which violence against detainees was the rule, not the exception. The detainees knew that Radić held a position of authority in the camp, that he could roam the camp at will, and order their presence before him at any time. The women also knew or suspected that other women were being raped or otherwise subjected to sexual violence in the camp. The fear was pervasive and the threat was always real that they could be subjected to sexual violence at the whim of Radić.' Under these circumstances, the Trial Chamber found that 'threat of rape or other forms of sexual violence undoubtedly caused severe pain and suffering to Witness F, Zlata Cikota, and Sifeta Susić and thus, the elements of torture are also satisfied in relation to these survivors'.²⁶⁴ Furthermore the Trial Chamber found that 'Radić's contribution to the maintenance and functioning of the Omarska camp was knowing and substantial'. He 'willingly and intentionally contributed to the furtherance of the joint criminal enterprise to persecute and otherwise abuse the non-Serbs detained in the camp, that he was responsible for gross mistreatment of detainees in the camp, and that he physically perpetrated a number of serious crimes, in which particularly sexual violence'.²⁶⁵ Furthermore, the Trial Chamber has found that Radić played a 'substantial role in the functioning of Omarska camp as a guard shift leader. He remained at the camp for its entire duration never missing a single shift.' Guard's on his shift 'were notoriously brutal and he played a role in orchestrating the abuses, and he personally committed crimes of sexual violence against female detainees. Radić is thus a co-perpetrator of the joint criminal enterprise'.²⁶⁶ In sum, the Trial Chamber found Radić guilty for being a co-perpetrator of persecution (count 1) committed as part of the joint criminal enterprise.

Lastly, the Trial Chamber judgement of the accused Žigić will be discussed. Žigić is, amongst other things, charged with individual responsibility in count 1 of the indictment as a

²⁶³ Definition of sexual violence is from the Akayesu case ICTR (T. Ch. I) 2 September 1998, *Case No.* ICTR-96-4-T; ICTY (T. Ch I) 2 November 2001, *Case No.* IT-98-30/I-T, para. 559.

²⁶⁴ ICTY (T. Ch I) 2 November 2001, *Case No.* IT-98-30/I-T, paras. 560-561.

²⁶⁵ ICTY (T. Ch I) 2 November 2001, *Case No.* IT-98-30/I-T, para. 566.

²⁶⁶ ICTY (T. Ch I) 2 November 2001, *Case No.* IT-98-30/I-T, para. 575.

participant in persecution.²⁶⁷ The Trial Chamber found that all crimes against humanity charged by the indictment were covered by persecution (count 1). The evidence demonstrated conclusively that Žigić ‘regularly entered Omarska camp for the specific purpose of abusing detainees. (...) He physically and directly perpetrated crimes of serious physical and mental violence against the non-Serbs detained in Omarska camp, knowing they were non-Serbs detained in the camp by reason of their religion, politics, race, or ethnicity.’ The Trial Chamber found that ‘Žigić’s participation in Omarska camp was significant. Žigić was aware of the persecutory nature of the crimes and he aggressively and eagerly participated in the persecution of non-Serbs in Omarska and was a co-perpetrator of the joint criminal enterprise of the Omarska camp.’²⁶⁸ Therefore, the Trial Chamber found Žigić guilty of persecution (count 1).²⁶⁹

Regarding this Trial Chamber judgement it is noteworthy that, although there was not much evidence that Žigić, Kvočka, Kos and Prcać knew that the ‘women in the Omarska camp were raped or otherwise sexually assaulted, the Trial Chamber concluded that they nevertheless incurred individual criminal responsibility on the basis of the joint criminal enterprise theory’.²⁷⁰

Appeals Chamber

Kvočka, Prcać, Radić and Žigić appealed against their conviction by the Trial Chamber. On appeal, the sentences imposed on these appellants were all affirmed. However, regarding Kvočka, the Appeals Chamber noted that no conclusive evidence was provided on the dates on which Witnesses F, J and K were raped and sexually assaulted. Therefore the Trial Chamber could not properly conclude that these crimes were committed during the time that Kvočka was employed in the camp. Hence the Appeals Chamber found that the Trial Chamber erred in stating that rape and sexual assault, with which Kvočka was charged in the indictment, were committed in Omarska during the time that he was employed there and, consequently, erred in convicting Kvočka of persecution for sexual assault and rape.²⁷¹ ‘The incidents in which Žigić participated, despite their quality of grave crimes, formed only mosaic stones in the general picture of violence and oppression.’ The Appeals Chamber found that, ‘in the absence of further evidence of concrete crimes committed by Žigić, no reasonable trier of fact could conclude from the evidence before the Trial Chamber that Žigić participated in a significant way in the functioning of Omarska camp. He cannot be held responsible as a participant in this joint criminal enterprise; his conviction for the crimes committed in this

²⁶⁷ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 581.

²⁶⁸ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 610.

²⁶⁹ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 761.

²⁷⁰ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 488.

²⁷¹ ICTY (A. Ch) 28 February 2005, *Case No. IT-98-30/1-A*; ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, paras. 333-334.

camp “in general” have been overturned.²⁷² Furthermore, his conviction pursuant to Article 7(1) of the Statute under count 1 (persecution) in so far as this conviction related to the crimes committed in the Omarska camp were reversed.²⁷³ The judgement of the Trial Chamber shows that the acts of sexual violence were committed “in general”.²⁷⁴ Therefore it follows that Žigić conviction for this part of persecution is reversed.

Conclusion

The first conclusion that can be drawn is that rape and torture and other inhumane acts can be committed with a persecutorial intent and can thus entail the crime of persecution. Secondly, there was little evidence submitted at trial that demonstrated that the accused knew that women were being raped or otherwise sexually assaulted. However, ‘because the camp operated as criminal enterprise designed to prosecute, terrorize and otherwise mistreat detainees, it was wholly foreseeable that women held in the camp would be raped’. The accused Prać and Kos were therefore, even though they did not committed the crimes themselves, also ‘liable for all crimes committed as an intended or even foreseeable consequence of the joint criminal endeavor’.²⁷⁵ Thus, it can be concluded that even if there is little evidence of whether participants of a joint criminal endeavor knew that the crimes were being committed, they can still be held responsible for all foreseeable consequences of the endeavour, including sexual violence.

Kvočka et al. case		
<u>Kvočka</u> Charged crimes against humanity	Judgement	Facts/Evidence
Count 1 persecution	Guilty with the exception of sexual assault and rape	The Appeals Chamber concluded that there is no evidence regarding the sexual assault and rape. Incorporating count 2, 14 and 15.
Count 2 other inhumane acts	Dismissed	Subsumed under persecution (count 1).
Count 14 torture	Dismissed	Subsumed under persecution (count 1).
Count 15 rape	Dismissed	Subsumed under persecution (count 1).
<u>Pračić</u> Charged crimes against humanity	Judgement	Facts/Evidence
Count 1 persecution	Guilty	Co-perpetrating persecution as part of the joint criminal enterprise.

²⁷² ICTY (A. Ch) 28 February 2005, *Case No. IT-98-30/1-A*; ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, para. 599.

²⁷³ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 489.

²⁷⁴ ICTY (T. Ch I) 2 November 2001, *Case No. IT-98-30/I-T*, paras. 581- 694.

²⁷⁵ See for meaning of the joint criminal endeavor the meaning of JCE in footnote 244 of this thesis; K. D. Askins, ‘A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003’, *The human rights brief* (vol. 11) 2004, p. 19.

		Incorporating count 2, 14 and 15.
Count 2 other inhumane acts	Dismissed	Subsumed under persecution (count 1).
Count 14 torture	Dismissed	Subsumed under persecution (count 1).
Count 15 rape	Dismissed	Subsumed under persecution (count 1).
<u>Kos</u> Charged crimes against humanity	Judgement	Facts/Evidence
Count 1 persecution	Guilty	Co-perpetrating persecution as part of the joint criminal enterprise. Incorporating count 2, 14 and 15.
Count 2 other inhumane acts	Dismissed	Subsumed under persecution (count 1).
Count 14 torture	Dismissed	Subsumed under persecution (count 1).
Count 15 rape	Dismissed	Subsumed under persecution (count 1).
<u>Radić</u> Charged crimes against humanity	Judgement	Facts/Evidence
Count 1 persecution	Guilty	Radić personally committed: - bribing and coercing victims to have sexual intercourse with him; - assault; - rape; - attempted rape; - threat of rape; - touching of the ‘female parts’; - sexual pronouncements; - grabbing of breasts. Radić is thus a co-perpetrator of persecution as part of the joint criminal enterprise. Incorporating count 2, 14 and 15.
Count 2 other inhumane acts	Dismissed	Subsumed under persecution (count 1).
Count 14 torture	Dismissed	Subsumed under persecution (count 1).
Count 15 rape	Dismissed	Subsumed under persecution (count 1).
<u>Žigić</u> Charged crimes against humanity	Judgement	Facts/Evidence
Count 1 persecution	Guilty with the exception of sexual assault and rape	The Appeals Chamber concluded that there is no evidence regarding the sexual assault and rape. Incorporating count 2, 14 and 15.
Count 2 other inhumane acts	Dismissed	Subsumed under persecution (count 1).
Count 14 torture	Dismissed	Subsumed under persecution (count 1).
Count 15 rape	Dismissed	Subsumed under persecution (count 1).

3.6. Sikirica case

The case that will be discussed in this paragraph concerns a man called Dusko Sikirica. Sikirica was delivered to the ICTY for serious violations of International Humanitarian Law committed in the territory of the former Yugoslavia.²⁷⁶ Sikirica was born in 1964 and during the violations he was commander of Security at the Keraterm camp. ‘As the commander he was in a position of superior authority to everyone else present in the camp.’²⁷⁷ Warrants for the arrest of Sikirica had been issued on 21 July 1995 and almost five years later he was arrested in Bosnia and Herzegovina and transferred to the International Tribunal on 25 June 2000, making his initial appearance on 7 July 2000.²⁷⁸

The indictment against Sikirica was confirmed on 21 July 1995 and the second amended indictment was filed on 3 January 2001.²⁷⁹ Only two of the nine counts that were charged in the indictment against Sikirica entailed sexual violence as a crime against humanity. Namely, count 3 *persecution* (Article 5(h) ICTY Statute) and count 4 *other inhumane acts* (Article 5(i) ICTY Statute). These counts were cumulatively charged for the following facts. Between 24 May 1992 and 30 August 1992 Sikirica ‘participated in the persecution of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor area, and specifically in the Keraterm camp, on political, racial or religious grounds’.²⁸⁰ The persecution included ‘sexual assault and rape of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor municipality, including those detained in the Keraterm camp’.²⁸¹ Sikirica instigated, committed or otherwise aided and abetted the persecutions in the Prijedor area, ‘through his direct participation in crimes and through his instigation, approval, encouragement, acquiescence and assistance in the development and continuation of the conditions in the Keraterm camp’.²⁸² As the camp commander Sikirica ‘had the authority to control the conduct of the guards in the camp and to prevent or control the conduct of visitors in the camp. He had the authority to set the daily regime of the prisoners’ and in addition, as a policeman on active duty, Sikirica ‘had an independent duty to uphold the laws in force on the territory (...) and to safeguard the lives and property of civilians’.²⁸³ Lastly, Sikirica ‘knew or had reason to know that persons subordinate to them in the Keraterm camp were about to participate in the persecution (...), or had done so, and failed to take necessary and reasonable measures to prevent such acts’.²⁸⁴

On 19 September 2001 a guilty plea to count 3, *persecution*, of the indictment was entered by

²⁷⁶ ICTY (T. Ch) 13 November 2001, *Case No. IT-95-8-S*, para. 1.

²⁷⁷ ICTY (Sec. Amended Indictment) 3 January 2001, *Case No. IT-95-8-PT*, para. 19.

²⁷⁸ ICTY, ‘Dusko Sikirica detained by SFOR in Bosnia and Herzegovina’, *press release (JL/P.I.S./513-e)* 26 June 2000, p. 1; ICTY (T. Ch) 13 November 2001, *Case No. IT-95-8-S*, para. 4.

²⁷⁹ ICTY (T. Ch) 13 November 2001, *Case No. IT-95-8-S*, para. 1-5.

²⁸⁰ ICTY (Sec. Amended Indictment) 3 January 2001, *Case No. IT-95-8-PT*, para. 35.

²⁸¹ ICTY (Sec. Amended Indictment) 3 January 2001, *Case No. IT-95-8-PT*, para. 36.

²⁸² ICTY (Sec. Amended Indictment) 3 January 2001, *Case No. IT-95-8-PT*, para. 37.

²⁸³ ICTY (Sec. Amended Indictment) 3 January 2001, *Case No. IT-95-8-PT*, para. 38.

²⁸⁴ ICTY (Sec. Amended Indictment) 3 January 2001, *Case No. IT-95-8-PT*, para. 42.

Sikirica, which the Trial Chamber accepted on the same date.²⁸⁵ When Sikirica entered a plea of guilty to count 3 of the indictment, the prosecution confirmed at that same date that it formally withdrew the remaining counts against Sikirica.²⁸⁶ This means that count 4 was also withdrawn. In the Plea Agreement the prosecution and Sikirica agreed on certain facts of count 3 as being true, which ‘encompasses the evidence led by the prosecution in respect of the Keraterm camp as to the specific allegation in the indictment of (...) the sexual assault and rape of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor municipality, including those detained in the Keraterm camp’.²⁸⁷ Rapes were ‘carried out, often by persons who were not part of the camp staff, and certain detainees were forced to engage in sexual activities against their will’.²⁸⁸ ‘One woman told witness K that she had been raped in an office at Keraterm by Nedeljko Timarac, and then by other men in turn, all night long. She was then taken outside and told to sit on a rock.’²⁸⁹ ‘Sikirica admits to having been the commander of security at the Keraterm camp’ and that ‘a small number of woman were raped at Keraterm’. Moreover, he admits that ‘there is evidence that certain detainees were forced to engage in sexual activities against their will’.²⁹⁰ It is acknowledged by the prosecution and the Trial Chamber that there is no evidence that Sikirica ‘knew of the incidents of rape or was in a position to know of them after the event’.²⁹¹

Noteworthy in this case is that the Trial Chamber discusses evidence of hearsay (witness K). Obviously this testimony does not stand alone now Sikirica pledged guilty to count 3, but it is interesting to be aware that hearsay evidence is mentioned in this case. This is because it might be interesting for future sexual violence cases where only hearsay evidence is available. The relevant question would then be if and how hearsay evidence can contribute to a conviction. Secondly, it is noteworthy that, as can be read above, it is acknowledged by the prosecution and the Trial Chamber that there is no evidence that Sikirica knew of the incidents of rape or was in a position to know of them after the event, but he is still held responsible for these acts. Therefore one could conclude that although there is no evidence that the accused knows or is in the position to know about these incidents after the event, he can still be held responsible if he pleads guilty to these acts. Of course, the guilty plea must be in accordance with Rule 62 *bis* of the Rules of Procedure and Evidence. This means that ‘the guilty plea has been made voluntarily’, ‘the guilty plea is informed’, ‘the guilty plea is not equivocal’ and ‘there is a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case’.

Sikirica case		
Charged crimes against	Judgement	Facts/Evidence

²⁸⁵ ICTY (T. Ch) 13 November 2001, *Case No. IT-95-8-S*, para. 15.

²⁸⁶ ICTY (T. Ch) 13 November 2001, *Case No. IT-95-8-S*, para. 15.

²⁸⁷ ICTY (T. Ch) 13 November 2001, *Case No. IT-95-8-S*, para. 18.

²⁸⁸ ICTY (T. Ch) 13 November 2001, *Case No. IT-95-8-S*, para. 22.

²⁸⁹ ICTY (T. Ch) 13 November 2001, *Case No. IT-95-8-S*, para. 99.

²⁹⁰ ICTY (T. Ch) 13 November 2001, *Case No. IT-95-8-S*, paras. 19 and 125.

²⁹¹ ICTY (T. Ch) 13 November 2001, *Case No. IT-95-8-S*, paras. 22 and 125.

humanity		
Count 3 persecution	Guilty plea	Sikirica pleaded guilty to instigating or otherwise aiding and abetting the: - rape; - sexual assault (no specific details).
Count 4 other inhumane acts	-	Withdrawal of all other counts (plea agreement).

3.7. Simić case

Milan Simić, born in 1960, was ‘a member of the Fourth Detachment, a JNA-organised territorial defence unit. On 30 May 1992 (...) Simić was appointed President of the Executive Board of the Bosanski Samac Assembly and became a member of the Serb Crisis Staff. As President of the Executive Board, (...) Simić was responsible for the governmental affairs of the municipality’. He was ‘released from this position on or about 24 June 1993 after being shot and seriously wounded in an assassination attempt’.²⁹² The initial indictment was issued on 21 July 1995 and on 14 February 1998 Simić voluntarily surrendered to the tribunal. His first appearance before the ICTY was on 17 February 1998, where he pleaded ‘not guilty’ to the charges against him contained in the initial indictment.²⁹³

The Initial indictment against Simić has been amended three times and the most recent version, the fourth amended indictment, was issued on 9 January 2002.²⁹⁴ In this indictment Simić was charged with seven counts, of which four counts were sexual violence crimes charged as a crime against humanity. Namely, count 4 torture, count 5 inhumane acts, count 7 torture and lastly count 8 inhumane acts. On 15 May 2002 Simić agreed to a plea agreement whereby he pleaded guilty to count 4 and 7 of the indictment. On 16 May 2002 the prosecution agreed to withdraw the remaining charges against him.²⁹⁵ Count 4, *torture* as a crime against humanity, was described in the indictment as follows: between 10 June and 3 July 1992, in the hallway of the Bosanski Samac primary school, Simić, ‘accompanied by other Serb men, beat Hasan Bicic, Muhamed Bicic, Perica Mistic, and Ibrahim Salkic with a variety of weapons. (...) Simić kicked Hasan Bicic, Muhamed Bicic, Perica Mistic, and Ibrahim Salkic in their genitals and fired a gun shot over the heads of Hasan Bicic, Muhamed Bicic, Perica Mistic, and Ibrahim Salkic’.²⁹⁶ Count 7, *torture* as a crime against humanity, described in the indictment that on or about June 1992 in the building of the Bosanski Samac primary school, Simić, ‘who was accompanied by other Serb men, kicked Safet Hadzialijagic and beat him repeatedly with a variety of weapons. (...). During the beating, the other Serb men repeatedly pulled down the victim’s pants and threatened to cut off his penis’, while Simić also ‘fired gun shots over the head of Safet Hadzialijagic’.²⁹⁷

²⁹² ICTY (Fourth amended indictment) 9 January 2002, *Case No.* IT-95-9, para. 2.

²⁹³ ICTY (T. Ch. II) 17 October 2002, *Case No.* IT-95-9/2-S, paras. 2 and 1-2.

²⁹⁴ ICTY (T. Ch. II) 17 October 2002, *Case No.* IT-95-9/2-S, para. 3.

²⁹⁵ ICTY (T. Ch. II) 17 October 2002, *Case No.* IT-95-9/2-S, paras. 2 and 9-16.

²⁹⁶ ICTY (Fourth amended indictment) 9 January 2002, *Case No.* IT-95-9, para. 24.

²⁹⁷ ICTY (Fourth amended indictment) 9 January 2002, *Case No.* IT-95-9, para. 26.

Concerning count 4, *torture*, Simić acknowledged in the plea agreement that between 10 June and 3 July 1992, Hasan Bicic, Muhamed Bicic, Perica Misic, and Ibrahim Salkic were attacked, brutally beaten and kicked on various parts of their bodies, and especially in the genitals, by him and the men accompanying him. During ‘the beating, gunshots were fired above their heads’.²⁹⁸ The victims were ‘ordered to stand with their legs apart in order to receive forceful kicks to their genitals’.²⁹⁹ Simić also acknowledged in the plea agreement, concerning count 7, *torture*, that in June 1992, Safet Hadzialijagic was severely beaten by him and the men accompanying him. While it was ‘common knowledge in Bosanski Samac that Safet Hadzialijagic had a heart condition’, he ‘was forced to pull down his pants and one of the men accompanying (...) Simić brandished a knife and threatened to cut off (...) Hadzialijagic’s penis’. The other assailants ‘were challenging and exhorting the man wielding the knife to cut off (...) Hadzialijagic’s penis’. At one point the barrel of the handgun was pushed into Hadzialijagic’s mouth and Simić ‘fired gunshots over his head, before the victim was released’.³⁰⁰ Consequently the Trial Chamber entered a finding of guilt.

While this is a very grave case, it is important to notice in this judgement that this is the first time that the threat of committing sexual violence (the threat to cut off the penis) is recognized as a crime deserving punishment.³⁰¹ This judgement therefore lowered the threshold, that had been kept up until now, in determining when an act of sexual violence can be qualified as torture as a crime against humanity. Furthermore, it can be concluded that brutally beating and kicking in the genitals of a victim can be qualified as prohibited acts of sexual violence. Lastly, it can be concluded that torture can entail male sexual violence.

Simić case		
Charged crimes against humanity	Judgement	Facts/Evidence
Count 4 torture	Guilty plea	Simić pleaded guilty to: - brutally beating and kicking Hasan Bicic, Muhamed Bicic, Perica Misic, and Ibrahim Salkic in their genitals.
Count 7 torture	Guilty plea	Simić pleaded guilty to: - Serb men forcing the victim to pull down his pants and <u>threatening</u> to cut off his penis, while Simić severely beated and fired gun shots over the head of the victim.

3.8. Plavšić case

Biljana Plavšić (born in 1930) was a leading member of the SDS from the moment of its establishment on. From November 1990 until April 1992 ‘Plavšić was a member of the collective Presidency of Bosnia Herzegovina’ and from February 1992 until May 1992 ‘she was an acting President of the Serbian Republic of Bosnia Herzegovina’. Then ‘she became a

²⁹⁸ ICTY (T. Ch. II) 17 October 2002, *Case No. IT-95-9/2-S*, paras. 11 and 53.

²⁹⁹ ICTY (T. Ch. II) 17 October 2002, *Case No. IT-95-9/2-S*, para. 63.

³⁰⁰ ICTY (T. Ch. II) 17 October 2002, *Case No. IT-95-9/2-S*, paras. 11 and 54.

³⁰¹ A.L.M. de Brouwer, *Supranational criminal prosecution of sexual violence. The ICC and the practice of the ICTY and the ICTR* (diss. UvT), Antwerp: Intersentia 2005, p. 490.

member of the three member Presidency of the Bosnian Serb Republic' and from June 1992 until December 1992 she 'served as a member of the expanded Presidency of the Bosnian Serb Republic'.³⁰² Plavšić, known as the 'Serbian Iron Lady' as a result of 'her hard-line nationalism and rabidly anti-Muslim views', surrendered voluntarily to the ICTY on 10 January 2001. The initial indictment against Plavšić was originally confirmed on 7 April 2000, but remained sealed until the surrender of Plavšić. She initially appeared before the Trial Chamber on 11 January 2001.³⁰³

A consolidated indictment against Plavšić was confirmed on 23 February 2001 and an amended consolidated indictment against Plavšić was confirmed on 4 March 2002.³⁰⁴ On 2 October 2002 Plavšić agreed to a plea agreement whereby she pleaded guilty to count 3 *persecution* as a crime against humanity as mentioned in the latter indictment. Therefore the prosecutor agreed to dismiss the remaining counts of the indictment.³⁰⁵ Because all the other counts were dismissed, only count 3 will be discussed. This count entails the following. Between 1 July 1991 and 30 December 1992, Plavšić, acting individually or in concert with other participants, 'planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution' of persecution of the Bosnian Muslim, Bosnian Croat or other non-Serb populations of 37 municipalities in Bosnia and Herzegovina.³⁰⁶ Bosnian Serb Forces and Bosnian Serb Political and Governmental Organs and their agents committed, amongst other charges, cruel or inhumane treatment during and after the attacks on towns and villages and in detention facilities. The cruel or inhumane treatment included 'torture, physical and psychological abuse, sexual violence and forced existence under inhumane living conditions'.³⁰⁷ 'Bosnian Serb Forces and Bosnian Serb Political and Governmental organs that committed persecutions in Municipalities undertook these acts with JNA/VJ forces', 'Bosnian Serb paramilitary units and volunteer units'.³⁰⁸

The Trial Chamber judged that, although Plavšić did not participate in the conception or planning of the cruel and inhuman treatment and had a small role in its executions, she did participated in the cover up of the crimes mentioned in the indictment 'by making public statements of denial for which she had no support. When she subsequently had reason to know that these denials were in fact untrue, she did not recant or correct them. The Bosnian Serb leadership, including (...) Plavšić, ignored the allegations of crimes committed by their forces: (...) Plavšić disregarded reports of widespread ethnic cleansing and publicly rationalized and justified it. She was aware that the key leaders of the Serbian Republic of

³⁰² ICTY (Amended Consolidated Indictment) 7 March 2002, *Case No. IT-00-39&40-PT*, para. 2.

³⁰³ N.A. Combs, 'International Criminal Tribunal for the Former Yugoslavia-genocide and crimes against humanity-international criminal law and procedure- plea bargaining-justice, reconciliation, and sentencing', *The American journal of international law* (vol. 97) 2003, p. 930; ICTY (T. Ch) 27 February 2003, *Case No. IT-00-39&40/1-S*, paras. 1 and 3.

³⁰⁴ ICTY (T. Ch) 27 February 2003, *Case No. IT-00-39&40/1-S*, para. 2.

³⁰⁵ ICTY (T. Ch) 27 February 2003, *Case No. IT-00-39&40/1-S*, paras. 1 and 5.

³⁰⁶ ICTY (Amended Consolidated Indictment) 7 March 2002, *Case No. IT-00-39&40-PT*, para. 18.

³⁰⁷ ICTY (Amended Consolidated Indictment) 7 March 2002, *Case No. IT-00-39&40-PT*, paras. 19-21.

³⁰⁸ JNA is Yugoslav National Army; ICTY (Amended Consolidated Indictment) 7 March 2002, *Case No. IT-00-39&40-PT*, para. 23.

Bosnia Herzegovina ignored these crimes despite the power to prevent and punish them.’ She ‘continued to support the regime through her presence within the leadership structure, through her public praise and defence of Bosnian Serb forces and through the denial of Bosnian Serb crimes’.³⁰⁹ Plavšić stated to the Trial Chamber that she was repeatedly informed of allegations of cruel and inhuman conduct against non-Serbs but she refused to accept them or even to investigate them.³¹⁰ Specific prohibited acts of sexual violence are not mentioned in the indictment or in the judgement of the Trial Chamber. But an example of the cruel and inhuman treatment was the forcible expulsions in the municipalities which ‘were characterized and accompanied by brutality and violence as “only by brute force was it possible to separate people”. (...) This brutality included numerous sexual assaults and rapes.’³¹¹

It can be concluded that this is the first case before the ICTY where a woman is being convicted of prohibited acts of sexual violence amounting to persecution as a crime against humanity. Moreover, Plavšić is the first Bosnian Serb leader to plead guilty.³¹² Noteworthy in this case is that although Plavšić did not participate in the conception or planning of the cruel and inhuman treatment and had a small role in its executions, she has still been found guilty due to her participation in the cover up of the crimes, the fact that she ignored the allegations of these crimes and due to her support of the regime.

Plavšić case		
Charged crimes against humanity	Judgement	Facts/Evidence
Count 3 persecution	Guilty plea	Plavšić pleaded guilty to: - participating in the cover up of sexual violence crimes, ignoring the allegations of these crimes and supporting the regime.

3.9. Stakić case

Milomir Stakić, who was born in 1962, was a medical doctor by profession and in 1991 he became Vice-President of the Prijedor Municipal Assembly of the SDS in Prijedor. In April 1992, Stakić ‘became President of the SDS Crisis Staff of Prijedor Municipality, which was also known as the War Presidency’.³¹³ The initial indictment against Stakić was confirmed on 13 March 1997 and on 23 March 2001, pursuant to a warrant of arrest of the International Tribunal dated 22 January 2001, Stakić was arrested in Belgrade. On that same day he was transferred to the United Nations Detention Unit in The Hague.³¹⁴

³⁰⁹ ICTY (T. Ch) 27 February 2003, *Case No. IT-00-39&40/1-S*, paras. 17-18.

³¹⁰ ICTY (T. Ch) 27 February 2003, *Case No. IT-00-39&40/1-S*, para. 51.

³¹¹ ICTY (T. Ch) 27 February 2003, *Case No. IT-00-39&40/1-S*, para. 34.

³¹² N.A. Combs, ‘International Criminal Tribunal for the Former Yugoslavia-genocide and crimes against humanity-international criminal law and procedure- plea bargaining- justice, reconciliation, and sentencing’, *The American journal of international law* (vol. 97) 2003, p. 930.

³¹³ ICTY (Fourth Amended Indictment) 10 April 2002, *Case No. IT-97-24-PT*, paras. 21-22.

³¹⁴ ICTY (T. Ch) 31 July 2003, *Case No. IT-97-24-T*, paras. 10 and 941.

On 11 April 2002, the prosecution filed a fourth amended indictment containing eight charges against Stakić. Only one count contained prohibited acts of sexual violence as a crime against humanity. Namely, count 6 *persecution*, which reads as follows. Between about 30 April 1992 and 30 September 1992, Stakić ‘acting individually or in concert with others in the Bosnian Serb leadership, planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of persecutions on political, racial or religious grounds of the Bosnian Muslim and Bosnian Croat population in Prijedor Municipality’.³¹⁵ The planning, preparation or execution of persecutions included torture, physical violence, rapes and sexual assaults, constant humiliation and degradation of Bosnian Muslims and Bosnian Croats.³¹⁶

The trial of Stakić on the allegations set out in the fourth amended indictment began on 16 April 2002, and on 31 July 2003 the Trial Chamber completed the judgement in this case.³¹⁷ Concerning count 6, *persecution* as a crime against humanity, the Trial Chamber heard evidence that ‘witness H was raped at Omarska every night usually by three or four men. Witness H later learned that one of the men who raped her was called Pavlić or Pavić. Due to the frequent rapes, Witness H experienced severe blood loss and fell into a coma. Dr. Kosuran was summoned and he told the guard that she was weak and in danger as a result of low blood pressure. Witness H had constant painful bleeding from the rapes.’³¹⁸ Another incident of ‘sexual abuse occurred in the “White House” on 26 June 1992. The guards tried to force Mehmedalija Sarajlic to rape a girl. Sarajlic begged: “Don't make me do it. She could be my daughter. I am a man in advanced age.” The soldiers replied: “Well, try to use the finger.” There was a scream and beatings, and then everything was silent. A minute or two later, a guard came into the room and asked for two strong men who went to fetch the body of (...) Sarajlic. His dead body was later seen near the “White House”.’³¹⁹ Furthermore, in the Keraterm camp a woman, Witness H, was taken to a first floor room by a guard. ‘Then this guard raped her in a “sort of ceremony”. He left her lying on a desk and other men came into the room.’ She ‘could not tell the number or the names of the rapists, and she lost consciousness several times. When she awoke the next morning, she was covered in blood and thought she was dying.’³²⁰ The Trial Chamber also heard ‘convincing evidence of one incident in late July, when Witness B saw the men from Brdo (...) outside. Half the group was naked from the waist-down and standing, and half the group was kneeling. According to Witness B: “They were positioned in such a way as if engaged in intercourse.”’³²¹ In addition, both ‘Witness F and Witness I testified that they heard that women were raped in the Trnopolje camp. Several other witnesses testified that women who were detained at the Trnopolje camp were taken out of the camp at night by Serb soldiers and raped or sexually assaulted. Dr. Idriz Merdžanić testified that there were several women who sought help at the

³¹⁵ ICTY (Fourth Amended Indictment) 10 April 2002, *Case No.* IT-97-24-PT, para. 53.

³¹⁶ ICTY (Fourth Amended Indictment) 10 April 2002, *Case No.* IT-97-24-PT, para. 54.

³¹⁷ ICTY (T. Ch) 31 July 2003, *Case No.* IT-97-24-T, para. 11.

³¹⁸ ICTY (T. Ch) 31 July 2003, *Case No.* IT-97-24-T, paras. 234-235.

³¹⁹ ICTY (T. Ch) 31 July 2003, *Case No.* IT-97-24-T, para. 236.

³²⁰ ICTY (T. Ch) 31 July 2003, *Case No.* IT-97-24-T, para. 240.

³²¹ ICTY (T. Ch) 31 July 2003, *Case No.* IT-97-24-T, para. 241.

clinic. Dr. Merdžanić was able to arrange for several of them to visit the gynecological ward in Prijedor in order to enable them to establish that the rapes had occurred. Dr. Duško Ivić, a Serb physician, reported that all the women who went had been raped.’ Moreover, an individual, who was herself a victim of rape in the camp, testified that ‘several women and young girls, including a 13 year old one, were raped in the camp or taken out at night for this purpose. Thus, the Trial Chamber is satisfied that rapes did occur in the Trnopolje camp.’³²² Lastly, Witness Q was arrested around July 1992 and taken to the Trnopolje camp where she stayed at the command house where Kurozović was living, until September 1992. The first night in the house Kurozović sat down and said to Witness Q: ‘Come on, get up and give me a kiss’. ‘Witness Q looked down and did not want to comply. He grabbed her face and ordered her to take her clothes off. (...) He stripped naked and told her to do the same.’ Then he started ripping her shirt. She ‘asked him not to do this to her. He kissed her and started biting and hitting her. (...) He took out his penis and put it in her mouth and then raped her.’ Apart from two nights, Kuruzović came to her and raped her on all of the nights they were in that house.³²³ The testimony of Witness Q is credible and therefore the Trial Chamber considered it proven beyond reasonable doubt that she was repeatedly raped in the Trnopolje camp.³²⁴

The Trial Chamber was, due to the statements discussed above, convinced that rape based on discriminatory intent was committed in the Keraterm, Omarska and Trnopolje camp.³²⁵ The aforementioned findings led the Trial Chamber to the conclusion that various crimes such as the rapes and sexual assaults were committed by the direct perpetrators with a discriminatory intent. ‘What is crucial is that these crimes formed part of a persecutorial campaign headed inter alia by (...) Stakić as (co-)perpetrator behind the direct perpetrators. He is criminally responsible for all these crimes and had a discriminatory intent in relation to all of them, whether committed by the direct perpetrator/actor with a discriminatory intent or not.’³²⁶ Stakić appealed against the judgement of the Trial Chamber, but the Appeals Chamber did not change the above discussed part of the judgement of the Trial Chamber. Therefore the judgement of the Appeals Chamber is being disregarded in this paragraph.

In concluding, and as it has been seen before in the cases discussed above, the accused is convicted for sexual violence crimes he himself did not commit. Namely, in this case the fact that Stakić headed the persecutorial campaign, made him guilty of being the (co-)perpetrator of persecution behind the direct perpetrators. Lastly, also in this case acts of male sexual violence, namely men who were positioned in such a way as if engaged in intercourse, have been sentenced under persecution as a crime against humanity.

Stakić case		
Charged crimes against humanity	Judgement	Facts/Evidence

³²² ICTY (T. Ch) 31 July 2003, *Case No.* IT-97-24-T, para. 244.

³²³ ICTY (Fourth Amended Indictment) 10 April 2002, *Case No.* IT-97-24-PT, paras. 791-795.

³²⁴ ICTY (Fourth Amended Indictment) 10 April 2002, *Case No.* IT-97-24-PT, para. 805.

³²⁵ ICTY (Fourth Amended Indictment) 10 April 2002, *Case No.* IT-97-24-PT, para. 806.

³²⁶ ICTY (Fourth Amended Indictment) 10 April 2002, *Case No.* IT-97-24-PT, para. 818.

Count 3 persecution	Guilty	The rapes, multiple rapes of the same victim and sexual assaults (guards forcing another person to rape a young girl, men who were positioned in such a way as if engaged in intercourse, ripping of a shirt, kissing and taking out a penis to put into a victim's mouth) that were committed by the direct perpetrators formed a part of a persecutorial campaign headed inter alia by Stakić as (co-)perpetrator.
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3.10. Nikolić case

Dragan Nikolić, born in 1957, was from at least early June 1992 until about 30 September 1992, a commander of the Susica detention camp in Vlasenica.³²⁷ The initial indictment against Nikolić was confirmed on 4 November 1994. ‘The Trial Chamber issued an international arrest warrant for (...) Nikolić to be transmitted to all States’ on 31 October 1995. As a result Nikolić was ‘apprehended by the Multinational Stabilisation Force (...) on or about 20 April 2000.’ Immediately after his arrest in Bosnia and Herzegovina he was transferred to the Tribunal on 21 April 2000 and on 28 April 2000 Nikolić initially appeared before the Trial Chamber.³²⁸

The initial indictment has been amended three times, the latest version being the third amended indictment of 31 October 2003. Which described count 1, *persecution* as a crime against humanity, as follows. Nikolić persecuted ‘Muslim and non-Serb detainees at the Susica camp by subjecting them to murders, rapes and torture’. He ‘subjected detainees to an atmosphere of terror created by the murders, beatings, sexual violence and other physical and mental abuse of detainees and to inhumane living conditions’. Regarding the sexual violence, ‘Nikolić persecuted Muslim and non-Serb detainees by participating in sexual violence directed at women at the Susica camp’ as set forth in count 3 of the indictment, which will be discussed here below. ‘As a result, detainees suffered severe psychological and physical trauma. (...) Nikolić participated in creating and maintaining this atmosphere of terror and the inhumane conditions.’ Therefore he is individually criminally responsible for persecution on political, racial and religious grounds.³²⁹ Count 3, which entails *rape* as a crime against humanity, reads as follows. ‘From early June until about 15 September 1992 many female detainees at the Susica camp were subjected to sexual assaults, including rapes and degrading physical and verbal abuse. (...) Nikolić personally removed and otherwise facilitated the removal of female detainees from the hangar, which he knew was for purposes of rapes, and other sexually abusive conduct. The sexual assaults were committed by camp guards, special forces, local soldiers and other men. (...) Female detainees were sexually assaulted at various locations. (...) Nikolić allowed female detainees, including girls and elderly women, to be verbally subjected to humiliating sexual threats in the presence of other detainees in the hangar.’ He ‘facilitated the removal of female detainees by allowing guards, soldiers and other males to have access to these women on a repetitive basis and by otherwise encouraging

³²⁷ ICTY (Third Amended Indictment) 31 October 2003, *Case No. IT-94-2-PT*, para. 1.

³²⁸ ICTY (T. Ch.) 18 December 2003, *Case No. IT-94-2-S*, paras. 8-11 and 22.

³²⁹ ICTY (Third Amended Indictment) 31 October 2003, *Case No. IT-94-2-PT*, paras. 3-7.

the sexually abusive conduct'. By his aiding and abetting in this conduct, in relation to female detainees in the Susica camp, Nikolić is individually criminally responsible for count 3.³³⁰

As has been seen above, Trial Chambers have allowed the prosecutor, for the most part, to amend indictments under Rule 50 of the Rules of Procedure and Evidence of the ICTY. The Trial Chamber in this case 'invited such amendment, although the propriety of a Trial Chamber's doing so (at least one that will sit in judgement on the case) is unclear'. Namely, 'in the Rule 61 hearing against Nikolić, the prosecution presented evidence that women (including young girls) were subjected to rape and other forms of sexual assault during their time at Susica camp, and that the accused was implicated in some of these assaults. The prosecutor, however, had not charged Nikolić with sexual assault, as either a crime against humanity, a grave breach, or a violation of the laws or customs of war. Consequently, the Trial Chamber invited the prosecutor to amend the indictment to include' charges of rape and other forms of sexual assault.³³¹ As can be read above, the prosecutor had adopted the advice of the Trial Chamber in the indictment.

Nikolić pleaded guilty to count 1 and 3, *persecution* and *rape*, of the indictment on 2 September 2003, which was accepted by the Trial Chamber on 4 September 2003. Consequently, the 'Trial Chamber entered a finding of his guilt.'³³² As the charges in count 1 are based on the same underlying facts as count 3, the Trial Chamber must evaluate whether cumulative convictions are permissible under the applicable 'Čelebići test'.³³³ The acts of murder, torture and aiding and abetting rape were committed with the discriminatory intent required for them to be included in the count of persecution. Therefore, based on the Plea Agreement, the Trial Chamber entered a single conviction for (count 1) persecutions committed by acts of: '(...) sexual violence (count 1), (...) subjection to inhumane conditions (count 1), creating and maintaining an atmosphere of terror (count 1), and aiding and abetting rape (count 3).'³³⁴ Concerning count 1, the Trial Chamber found that Nikolić 'abused his personal position of power especially vis à vis the female detainees of Sušica camp. He personally removed and returned women of all ages from the hangar, handing them over to men whom he knew would sexually abuse or rape them. Witness SU-032 believes had they resisted, they would have been liquidated' and therefore had to 'agonize throughout the day, knowing what was to be her fate in the coming night'.³³⁵ Nikolić appealed against the judgement of the Trial Chamber but the Appeals Chamber did not change the above discussed part of the judgement of the Trial Chamber. Therefore the judgement of the Appeals Chamber is being disregarded in this paragraph.

³³⁰ ICTY (Third Amended Indictment) 31 October 2003, *Case No.* IT-94-2-PT, paras. 20-22.

³³¹ S.D. Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *The American journal of international law* (vol. 93) 1999, p. 73 and 88; ICTY (Review of indictment pursuant to rule 61 of the Rules of Procedure and Evidence) 20 October 1995, *Case No.* IT-94-2-R61, para. 33.

³³² ICTY (T. Ch.) 18 December 2003, *Case No.* IT-94-2-S, paras. 35-36.

³³³ See Chapter 2 Cumulative convictions of this thesis for the explanation of the 'Čelebići test'.

³³⁴ ICTY (T. Ch.) 18 December 2003, *Case No.* IT-94-2-S, paras. 115-119.

³³⁵ ICTY (T. Ch.) 18 December 2003, *Case No.* IT-94-2-S, para. 194.

An important conclusion in this case, is that the Trial Chamber is able to influence the content of the indictment. Hereby the Trial Chamber makes legal determinations outside of the judgement. The question that also must be asked here is, whether the impartiality can be ensured this way. Indeed, the Trial Chamber must not be tempted to take over the role of the prosecutor. Lastly, also Nikolić has been found guilty of sexual violence crimes he himself did not commit. This leads to the conclusion that facilitating and encouraging sexual violence is also a severe and prohibited conduct.

Nikolić case		
Charged crimes against humanity	Judgement	Facts/Evidence
Count 1 persecution	Guilty plea	Nikolić pleaded guilty to: - facilitating and encouraging sexual violence; - aiding and abetting rape.

3.11. Češić case

Ranko Češić, who was born in 1964, lived in Brcko before the war. ‘During May and June 1992, Češić acted under the apparent authority of the Brcko police.’³³⁶ The initial indictment against Češić was submitted on 30 June 1995 and confirmed on 21 July 1995. ‘Češić was arrested in Belgrade by the authorities of the Federal Republic of Yugoslavia on 25 May 2002’ and was transferred to the United Nations Detention Unit at The Hague on 17 June 2002. He initially appeared before the Trial Chamber on 20 June 2002.³³⁷

The third amended indictment was filed on 26 November and comprised 12 counts, including count 8 which entailed *rape* as a crime against humanity.³³⁸ This count described in the indictment that ‘on about 11 May 1992, at Luka camp, (...) Češić forced, at gunpoint, Muslim detainees A and B, who were brothers detained there, to beat each other and perform sexual acts on each other and perform sexual acts on each other in the presence of others, causing them great humiliation and degradation’.³³⁹

Češić pleaded guilty to all counts with which he was charged, including count 8 (*rape*). ‘The Trial Chamber, being satisfied that the plea was voluntary, informed, unequivocal and that there was a sufficient factual basis for the crime and for (...) Češić’s participation in it, entered a finding of guilt on the same day.’³⁴⁰ Češić admitted in his guilty plea that, on approximately 11 May 1992, he ‘intentionally forced, at gunpoint, two Muslim brothers detained at Luka Camp to perform fellatio on each other in the presence of others. (...) Češić acknowledged that he was fully aware that this was taking place without the consent of the victims.’³⁴¹ One of the

³³⁶ ICTY (Third Amended Indictment) 26 November 2002, *Case No.* IT-95-10/1-PT, para. 6.

³³⁷ ICTY (Third Amended Indictment) 26 November 2002, *Case No.* IT-95-10/1-PT, paras. 1-4.

³³⁸ ICTY (Third Amended Indictment) 26 November 2002, *Case No.* IT-95-10/1-PT, paras. 1 and 3.

³³⁹ ICTY (Third Amended Indictment) 26 November 2002, *Case No.* IT-95-10/1-PT, para. 15.

³⁴⁰ ICTY (T. Ch.) 11 March 2004, *Case No.* IT-95-10/1-S, para. 4.

³⁴¹ ICTY (T. Ch.) 11 March 2004, *Case No.* IT-95-10/1-S, para. 13.

victims stated that after being beaten by Češić and after Češić fired approximately in the direction of his brother, Češić ‘forced both brothers to perform fellatio on each other and left the office after he told a guard to make sure that they would not stop until he returned. He left the door open when he went out’, which made it possible for several guards to watch and laugh. The victim stated that ‘the situation lasted for about 45 minutes, until Češić returned with another guard’. The victim specified in two statements that ‘Češić was his neighbour before the war and knew both brothers since before the war’.³⁴² Regarding the sexual assault, the Trial Chamber found that ‘the assault was preceded by threats and several guards were watching and laughing while the act was performed. The family relationship and the fact that they were watched by others makes the offence of humiliating and degrading treatment particularly serious. The violation of the moral and physical integrity of the victims justifies that the rape be considered particularly serious as well.’³⁴³ ‘Češić actively participated in the violence inflicted upon the victims before the sexual assault and initiated the assault by ordering it.’ Češić hence is a perpetrator of this crime.³⁴⁴

It can be concluded that this is the fifth case of the ICTY in which male sexual violence is being judged by the Trial Chamber. Therefore it can be said that male sexual violence was not uncommon during the Yugoslavia conflict.³⁴⁵ This case differs though from the other discussed cases, because this case concerns two brothers. This fact and the fact that they were watched by others makes the offence particularly serious.

Češić case		
Charged crimes against humanity	Judgement	Facts/Evidence
Count 8 rape	Guilty plea	Češić pleaded guilty to: - intentionally forcing two Muslim brothers to perform fellatio on each other in the presence of others.

3.12. Brđanin case

Radoslav Brđanin, who was born in 1948, was ‘elected in 1990 as SDS deputy from Celinac to the Council of Municipalities of the Assembly of Bosnia and Herzegovina. On 25 April 1991, he was elected as the First Vice-President of the Association of the Bosanska Krajina Municipalities Assembly. In October 1991, he became a member of the Assembly of the Serbian People of Bosnia and Herzegovina and then on 5 May 1992, he was appointed President of the ARK Crisis Staff. On 15 September 1992, he was appointed the Minister for Construction, Traffic and Utilities and acting Vice-President in the Government of Republika

³⁴² ICTY (T. Ch.) 11 March 2004, *Case No.* IT-95-10/1-S, para. 14.

³⁴³ ICTY (T. Ch.) 11 March 2004, *Case No.* IT-95-10/1-S, para. 35.

³⁴⁴ ICTY (T. Ch.) 11 March 2004, *Case No.* IT-95-10/1-S, para. 36.

³⁴⁵ Amongst other, the following writings support this statement: M. Alison, ‘The hidden prevalence of male sexual assault during war: observations on blunt trauma to the male genitals’, *British Journal of Criminology* (vol. 46) 2006, p. 16-25 and S. Sivakumaran, ‘Sexual Violence Against Men in Armed Conflict’, *The European Journal of International Law* (Vol. 18) 2007, p. 253-276.

Srpska.³⁴⁶ Brđanin was initially indicted on 14 March 1999. He was ‘arrested by SFOR in Banja Luka on 6 July 1999 and transferred to the United Nations Detention Unit in The Hague on the same day’. Brđanin initially appeared before the judge on 12 July 1999.³⁴⁷

The sixth and final amended indictment was issued on 9 December 2003³⁴⁸ and entailed count 3, *persecution* as a crime against humanity, because between about 1 April 1992 and 31 December 1992, Brđanin ‘acting individually or in concert with others in the Bosnian Serb leadership, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of persecutions on political, racial or religious grounds of the Bosnian Muslim and Bosnian Croat population’. This planning, preparation or execution of persecutions included ‘rapes and sexual assaults, constant humiliation and degradation of Bosnian Muslims and Bosnian Croats’. Brđanin, ‘knew or had reason to know that Bosnian Serb forces under his control were about to commit such acts or had done so, and he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof’. Because of his involvement in these acts or omissions Brđanin committed persecutions which is a crime against humanity.³⁴⁹ Furthermore, the indictment mentions count 6, which entails *torture* as a crime against humanity, because between about 1 April 1992 and 31 December 1992, Brđanin ‘acting individually or in concert with others in the Bosnian Serb leadership, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution of a campaign of terror designed to drive the Bosnian Muslim and Bosnian Croat population from their municipalities’. The execution of the campaign of terror included ‘the intentional infliction of severe pain or suffering on Bosnian Muslim or Bosnian Croat non-combatants by inhumane treatment including sexual assaults, rape, and other forms of severe maltreatment in camps, police stations, military barracks and private homes or other locations, as well as during transfers of persons and deportations. Camp guards and others, including members of the Bosnian Serb forces, used all manner of weapons during these assaults. Many Bosnian Muslims and Bosnian Croats were forced to witness executions and brutal assaults on other detainees.’ In the Prijedor and Teslic municipality a number of non-combatant Bosnian Muslims were raped and sexually assaulted by unidentified soldiers. ‘Brđanin knew or had reason to know that Bosnian Serb forces under his control were about to commit such acts or had done so, and he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.’ Because of his involvement in these acts or omissions Brđanin committed torture which is a crime against humanity.³⁵⁰

Concerning count 3 of the indictment, *persecution* as a crime against humanity, the Trial Chamber established that ‘a number of Bosnian Muslim women were raped in Prijedor and in Teslić municipalities’ (which will also be discussed here below under count 6). The Trial

³⁴⁶ ARK meaning Autonomous Region of Krajina; ICTY (Sixth Amended indictment) 9 December 2003, *Case No. IT-99-36-T*, para. 14.

³⁴⁷ ICTY (T. Ch) 1 September 2004, *Case No. IT-99-36-T*, paras. 1156 and 1162.

³⁴⁸ ICTY (T. Ch) 1 September 2004, *Case No. IT-99-36-T*, para. 1169.

³⁴⁹ ICTY (Sixth Amended indictment) 9 December 2003, *Case No. IT-99-36-T*, paras. 45-48.

³⁵⁰ ICTY (Sixth Amended indictment) 9 December 2003, *Case No. IT-99-36-T*, paras. 53-56.

Chamber found that, apart from these municipalities, rapes of Bosnian Muslim and Bosnian Croat women also occurred in the municipalities Banja Luka, Bosanska Krupa, Donji Vakuf and Kotor Varoć. One of the direct perpetrators ‘made no secret that he wanted a Bosnian Muslim woman to “give birth to a little Serb”’.³⁵¹ In each incident mentioned, armed Bosnian Serb soldiers or policemen were the perpetrators. The Trial Chamber found that ‘many incidents of sexual assault occurred, including the case of a Bosnian Croat woman who was forced to undress herself in front of cheering Bosnian Serb policemen and soldiers. (...) Frequently, it was demanded that detainees perform sex with each other.’ The Trial Chamber was furthermore ‘satisfied that, evaluated in their context, these acts are serious enough to rise to the level of crimes against humanity’.³⁵² Regarding the constant humiliating and degrading treatment,³⁵³ as part of the ill-treatment by camp guards, Bosnian Muslims and Bosnian Croats were also forced to perform sexual acts on each other. ‘It was announced that their mothers and sisters would be raped in front of them. Bosnian Muslims and Bosnian Croats were forced to watch other members of their group being (...) raped.’³⁵⁴ To conclude, the Trial Chamber is satisfied beyond reasonable doubt that all the acts mentioned under count 3 ‘were carried out with the intent to discriminate against the Bosnian Muslim and Bosnian Croat women on racial, religious or political grounds’. It has been established beyond reasonable doubt by the Trial Chamber that Brđanin had knowledge of the existence of these camps and the situation in the camps and detention facilities. He was aware that the inmates were subjected to these crimes mentioned above. Although Brđanin did not actively assist in the commission of any of these crimes committed in these camps and detention facilities, in light of his position, the Trial Chamber was ‘satisfied that his inactivity with respect to the camps and detention facilities, together with his public attitude to them, constituted encouragement and moral support to the running of these camps and detention facilities by the army and the police’. Therefore the Trial Chamber was satisfied that Brđanin aided and abetted persecution with respect to torture, rapes, sexual assaults and the constant humiliation and degradation by the physical perpetrators.³⁵⁵ Regarding count 6 of the indictment (*torture* as a crime against humanity), in June or July 1992, at Keraterm camp, a number of guards ‘raped a female inmate on a table in a dark room until she lost consciousness. The next morning, she found herself lying in a pool of blood. Other women in the camp were also raped.’³⁵⁶ ‘In August 1992, Slobodan Kuruzović, the commander of Trnopolje camp, personally arranged for a Bosnian Muslim woman to be detained in the same house in which he had his office. During the first night, Kuruzović entered her room with a pistol and a knife. He took his clothes off

³⁵¹ Where the direct perpetrators made no secret that he wanted a Bosnian Muslim woman to “give birth to a little Serb”, it should be noticed that this particularly act, is also a crime of forced pregnancy. Although the Rome Statute of the ICC has an explicit basis for the prosecution of forced pregnancy, the ICTY has not. See also paragraph 3.3. Kunarac et al. case; ICTY (T. Ch) 1 September 2004, *Case No. IT-99-36-T*, paras. 1010-1011.

³⁵² ICTY (T. Ch) 1 September 2004, *Case No. IT-99-36-T*, para. 1013.

³⁵³ Humiliating and degrading treatment is prohibited under common Article 3 of the Geneva Conventions, although such acts are not explicitly listed under Article 5 or elsewhere in the Statute. In order to rise to the level of crimes against humanity, they must meet the test of gravity which satisfies the criteria for persecution.

³⁵⁴ ICTY (T. Ch) 1 September 2004, *Case No. IT-99-36-T*, para. 1018.

³⁵⁵ ICTY (T. Ch) 1 September 2004, *Case No. IT-99-36-T*, paras. 1054-1061.

³⁵⁶ ICTY (T. Ch) 1 September 2004, *Case No. IT-99-36-T*, para. 512.

and (...) started raping her.’ When she started screaming, Kuruzović warned her: “You better keep quiet. Did you see all these soldiers standing outside? They will all take their turns on you.” ‘Kuruzović raped that woman nearly every night for about a month. On two occasions, he stabbed her shoulder and her leg with his knife because she resisted against being raped.’³⁵⁷ ‘There were many more incidents of rape at the Trnopolje camp between May and October 1992. Not all of the perpetrators were camp personnel. Some were allowed to visit the camp from the outside. Soldiers took out girls aged 16 or 17 from the camp and raped them on the way to Kozarac on a truck. In one case, even a 13 year old Bosnian Muslim girl was raped.’³⁵⁸ The Trial Chamber found that in the Omarska camp, there were also frequent incidents of sexual assault and rape. ‘On 26 June 1992, Omarska camp guards tried to force Mehmedalija Sarajlic, an elderly Bosnian Muslim, to rape a girl.’ Sarajlic begged: “Don’t make me do it. She could be my daughter. I am a man in advanced age.” The soldiers replied: “Well, try to use the finger.” There was a scream and beatings, and then everything was silent. ‘The guards had killed the man.’³⁵⁹ The Trial Chamber, by majority, found ‘that the threat of rape constituted a sexual assault *vis-à-vis* the female detainee’.³⁶⁰ ‘On an unknown date after May 1992, an armed man entered the Omarska camp restaurant where detainees were eating. He uncovered the breast of a female detainee, took out a knife, and ran it along her breast for several minutes. The other detainees were holding their breath because they thought he might cut off the breast at any second. Bystanding camp guards laughed and obviously enjoyed watching this incident.’³⁶¹ Therefore the Trial Chamber concludes ‘that rapes and sexual assaults were commonplace throughout the camps in the Prijedor area. It is satisfied that in all these incidents, the male perpetrators aimed at discriminating against the women because they were Muslim.’³⁶² ‘Over the period of July to October 1992, a number of Bosnian Muslim women were raped by members of the Bosnian Serb police and the Army of the Serbian Republic of Bosnia and Herzegovina in the Teslić municipality.’ The Trial Chamber found that ‘all this was intrinsically discriminatory against these women’.³⁶³ In concluding, the Trial Chamber was ‘satisfied that the treatment described above constituted severe pain and suffering amounting to torture, inflicted intentionally on the victims, who were all noncombatants’.³⁶⁴

‘There is no evidence to establish that the accused ordered or instigated the commission of any of the underlying acts of’ the crime of torture.³⁶⁵ However, the Trial Chamber is satisfied that Brđanin was aware that during the armed attacks in Teslić the ‘Bosnian Serb forces would commit a number of crimes including the crime of torture’. Therefore the Trial

³⁵⁷ See for the crime of Kuruzović also paragraph 3.2.8. Stakić case; ICTY (T. Ch) 1 September 2004, *Case No.* IT-99-36-T, para. 513.

³⁵⁸ ICTY (T. Ch) 1 September 2004, *Case No.* IT-99-36-T, para. 514.

³⁵⁹ See also paragraph 3.9. in this chapter. This incident is also mentioned in the Stakić case.

³⁶⁰ See also paragraph 3.2.8. Stakić case for the same incident; ICTY (T. Ch) 1 September 2004, *Case No.* IT-99-36-T, para. 516.

³⁶¹ ICTY (T. Ch) 1 September 2004, *Case No.* IT-99-36-T, para. 517.

³⁶² ICTY (T. Ch) 1 September 2004, *Case No.* IT-99-36-T, para. 518.

³⁶³ ICTY (T. Ch) 1 September 2004, *Case No.* IT-99-36-T, para. 523.

³⁶⁴ ICTY (T. Ch) 1 September 2004, *Case No.* IT-99-36-T, para. 524.

³⁶⁵ ICTY (T. Ch) 1 September 2004, *Case No.* IT-99-36-T, para. 526.

Chamber is satisfied that Brđanin ‘aided and abetted members of the Bosnian Serb forces in the commission of (...) the torture of a Bosnian Muslim woman in Teslić in July 1992’. In addition, the Trial Chamber has no doubt that Brđanin was ‘aware of the nature of the above mentioned camps and detention facilities and that inmates were tortured therein’. Although Brđanin ‘did not actively assist in the commission of any of the crimes committed in these camps and detention facilities, in the light of his position as the President of the Autonomous Region of Krajina Crisis Staff, the Trial Chamber is satisfied beyond reasonable doubt that his inactivity as well as his public attitude with respect to the camps and detention facilities constituted encouragement and moral support to the members of the army and the police to continue running these camps and detention facilities in the way described to the Trial Chamber throughout the trial. (...) The Trial Chamber is satisfied that this fact had a substantial effect on the commission of torture in the camps and detention facilities.’ Therefore, Brđanin aided and abetted members of the Bosnian Serb forces in the commission of the crimes amounting to torture in camps and detention facilities.³⁶⁶ Lastly, the Trial Chamber decided that the convictions for the charges of torture (count 6) are impermissibly cumulative with convictions for charges of persecution (count 3). ‘While, the underlying act of torture (...) overlap with the corresponding underlying acts of persecution, persecution contains additional discriminatory elements (...) that are not required for torture’. The charge of torture is therefore subsumed by the charge of persecution, which means that a conviction may only be entered for persecution (count 3) and not for torture (count 6).³⁶⁷

Both parties appealed against the judgement of the Trial Chamber.³⁶⁸ But there is only one ground of appeal which is important for this topic. Therefore only this ground will be discussed in this paragraph. This ground regards the *torture* as charged in the indictment as a crime against humanity. The Appeals Chamber found that there was ‘insufficient evidence to prove beyond a reasonable doubt that Brđanin’s conduct constituted either encouragement or moral support for the camp personnel (...), which had a substantial effect on the commission of torture’. ‘In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused’s conduct amounts to official sanction of the crime and thus substantially contributes to it. It follows that encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of it.’ Accordingly, the Appeals Chamber found that, ‘in this case, encouragement and moral support could only have had a substantial effect if the camp personnel committing torture were aware that Brđanin made encouraging and supporting statements or encouraged and supported through his inaction. (...) The Trial Chamber’s examination of Brđanin’s responsibility for torture in camps and detention facilities refers to no evidence indicating that the personnel running the camps and detention facilities were

³⁶⁶ ICTY (T. Ch) 1 September 2004, *Case No. IT-99-36-T*, paras. 525-538.

³⁶⁷ ICTY (T. Ch) 1 September 2004, *Case No. IT-99-36-T*, para. 1085.

³⁶⁸ The prosecution filed its Notice of Appeal on 30 September 2004 and Brđanin filed his Notice of Appeal on 1 October 2004; ICTY (A. Ch) 3 April 2007, *Case No. IT-99-36-A*, Annex paras. 7 and 8.

encouraged to commit torture by Brđanin’s inactivity or public attitude.’ ‘There is simply no evidence which would support the conclusion that Brđanin encouraged or supported torture in the camps by his conduct. (...) The Appeals Chamber considered that there is scant evidence to support the inference that Brđanin’s failure to intervene, together with his public attitude, actually had the effect of encouraging camp and detention facilities personnel to commit acts of torture. The same can be said of the inference that camp and detention facility personnel were aware of Brđanin’s alleged support for their crime of torture.’ The Appeals Chamber concluded that, ‘even within the context of the Strategic Plan, no reasonable trier of fact could have come to the conclusion that these inferences were the only reasonable ones that could have been drawn from the evidence’. The Appeals Chamber therefore found that ‘the Trial Chamber erred in finding Brđanin responsible for aiding and abetting torture in the camps and detention facilities. (...) The Appeals Chamber therefore overturns Brđanin’s conviction for torture’ (count 6) ‘insofar as he has been found guilty for aiding and abetting torture in the camps and detention facilities’.³⁶⁹ As mentioned above, The Trial Chamber ‘incorporated’ count 6 into count 3, the latter being the crime of persecution. This means that this part of count 3 is also considered overturned.³⁷⁰ In particular, ‘the Appeals Chamber has overturned Brđanin’s conviction for aiding and abetting members of the Bosnian Serb forces in the commission of the following crimes: (...) the torture of a number of Bosnian Muslim women in the Keraterm camp in July 1992, the torture of a number of Bosnian Muslim women in the Trnopolje camp between May and October 1992 and the torture of a number of Bosnian Muslim women in the Omarska camp in June 1992 (...). However, the Appeals Chamber has upheld Brđanin’s conviction for torture as a crime against humanity (...), insofar as it relates to the armed attacks by Bosnian Serb forces on non-Serb towns, villages and neighbourhoods after 9 May 1992.’³⁷¹ Thus, the rape of a number of Bosnian Muslim women raped by members of the Bosnian Serb police and the Army of the Serbian Republic of Bosnia and Herzegovina in the Teslić municipality.

In conclusion, it can be said that encouragement or moral support for the direct perpetrator by the accused, is substantial for liability.³⁷² This case shows that encouragement and moral support could only have had a substantial effect if the direct perpetrators committing the torture were aware that the accused made encouraging and supporting statements or encouraged and supported through his inaction. Furthermore, it is clear that encouragement and moral support cannot be assumed too easily, there has to be clear evidence which unfortunately was not the case in the Brđanin case.

Brđanin case		
Charged crimes against humanity	Judgement	Facts/Evidence
Count 3 persecution	Guilty	Brđanin aided and abetted persecution with respect to:

³⁶⁹ ICTY (A. Ch) 3 April 2007, *Case No. IT-99-36-A*, paras. 259-289.

³⁷⁰ ICTY (A. Ch) 3 April 2007, *Case No. IT-99-36-A*, note 1406.

³⁷¹ ICTY (A. Ch) 3 April 2007, *Case No. IT-99-36-A*, para. 503.

³⁷² See for a further discussion of encouragement, moral support and aiding and abetting paragraph 4.4. of this thesis.

		<ul style="list-style-type: none"> - <u>rapes</u> of Bosnian Muslim and Bosnian Croat women in the municipalities Prijedor, Teslić, Banja Luka, Bosanska Krupa, Donji Vakuf and Kotor Varoć; - <u>sexual assault</u> including a woman who was forced to undress herself in front of cheering soldiers and policemen and soldiers or policemen demanding detainees to perform sex with each other; - <u>constant humiliating and degrading treatment</u> including Bosnian Muslims and Bosnian Croats who were forced to perform sexual acts on each other, announcements that mothers and sisters will be raped in front of their eyes and forcing Bosnian Muslims and Bosnian Croats to watch other members of their group being raped.
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3.13. Krajišnik case

Momčilo Krajišnik, who was born in 1945 was ‘a leading member of the Serbian Democratic Party of Bosnia and Herzegovina (SDS) and he served on a number of SDS bodies and committees’. On 12 July 1991, Krajišnik ‘was elected to the Main Board of the SDS. He was President of the Assembly of Serbian People in Bosnia and Herzegovina (Bosnian Serb Assembly) from 24 October 1991 until at least November 1995. He was a member of the National Security Council of the Bosnian Serb Republic and from the beginning of June 1992 until 17 December 1992, he was a member of the expanded Presidency of the Bosnian Serb Republic.’³⁷³ The initial indictment was confirmed on 25 February 2000. Krajišnik was arrested by SFOR in Sarajevo on 3 April 2000 and on that same day he was transferred to the ICTY where he initially appeared on 7 April 2000.³⁷⁴

The amended consolidated indictment was affirmed on 4 March 2002. This indictment charged Krajišnik in count 3 with persecution as a crime against humanity. The prosecutor stated in the indictment that between 1 July 1991 and 30 December 1992, Krajišnik, acting individually or in concert in a ‘joint criminal enterprise, planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of persecutions of the Bosnian Muslim, Bosnian Croat or other non-Serb populations’. The ‘Bosnian Serb Forces and Bosnian Serb Political and Governmental Organs and their agents committed persecutions in the Municipalities upon Bosnian Muslim, Bosnian Croat or other non-Serb populations’. The persecutions included cruel or inhumane treatment during and after the attacks on towns and villages in the Municipalities and in detention facilities including sexual violence. By these acts and/or his omissions therein, Krajišnik participated in persecutions on political, racial and religious grounds.³⁷⁵

³⁷³ ICTY (Amended Consolidated Indictment) 27 September 2006, *Case No.* IT-00-39 & 40-PT, para. 1.

³⁷⁴ ICTY (T. Ch. I) 27 September 2006, *Case No.* IT-00-39-T, para. 11; ICTY (Case information sheet), *Case No.* IT-00-39-T, p. 1.

³⁷⁵ ICTY (Amended Consolidated Indictment) 27 September 2006, *Case No.* IT-00-39 & 40-PT, paras. 18-19.

In February 2006 the Trial Chamber delivered its judgement. Concerning count 3, *persecution*, it found that ‘in a number of detention centres, Muslim and Croat detainees were raped or sexually abused’. For example, in the Batković camp in Bijeljina, ‘male detainees were forced to engage in degrading sexual acts with each other in the presence of other detainees. In several detention centres in Foča, women and young girls were raped on a regular basis’, namely in the Bukovica motel, the workers huts at Buk Bijela, Srednja Škola and in Karaman’s house in Miljevina. Sexual assault also occurred in other camps, headquarters, factories, schools, police stations and at a sports centre.³⁷⁶ In the Foča detention centre Dragoljub Kunarac,³⁷⁷ while raping a woman, ‘expressed with verbal and physical aggression his view that rapes against Muslim women were one of the many ways in which the Serbs could assert their superiority and victory over the Muslims’.³⁷⁸ Therefore the Trial Chamber concluded that ‘cruel or inhumane treatment was carried out on discriminatory grounds’ and found thus that ‘all above incidents of cruel and inhumane treatment constitute persecution as a crime against humanity’.³⁷⁹ Krajišnik himself was found guilty of the commission of persecution through his participation in a joint criminal enterprise (JCE).³⁸⁰

Both Krajišnik and the prosecution filed an appeal against the judgement of the Trial Chamber. The Appeals Chamber delivered its judgement in March 2009. Regarding the acts of sexual violence, which were sentenced under persecution, the Appeals Chamber pointed out that ‘the Trial Chamber generally found that they were added to the JCE after leading members of the JCE were informed of them, took no effective measures to prevent their recurrence, and persisted in the implementation of the common objective, thereby coming to intend these (...) crimes’.³⁸¹ The Appeals Chamber found, however, that ‘the Trial Chamber made only scarce findings, if at all, on these requirements’. Therefore, the Appeals Chamber was ‘not able to conclude with the necessary preciseness how and at which point in time the common objective of the JCE included the (...) crimes, and, consequently, on what basis the Trial Chamber imputed those (...) crimes to Krajišnik. (...) Neither the Appeals Chamber nor an accused can be required to engage in speculation on the meaning of the Trial Chamber’s findings – or lack thereof – in relation to such a central element of Krajišnik’s individual criminal responsibility as the scope of the common objective of the JCE.’³⁸² Thus, these findings led to the conclusion of the Appeals Chamber that the Trial Chamber failed to reach any finding on the link between the principal perpetrators of persecution and the JCE members. As a result, the Appeals Chamber quashed Krajišnik’s convictions of sexual

³⁷⁶ To be more precise: ‘Sexual abuse also occurred in Luka camp in Brčko; the civil defence headquarters, a factory outside the town of Hadžići, and the sports centre in Hadžići; Kalinovik elementary school; the police station and Pilana sawmill in Kotor Varoš; the police station in Vogošća; and the Dom Kulture Čelopek [C34.8] in Zvornik.’; ICTY (T. Ch. I) 27 September 2006, *Case No. IT-00-39-T*, para. 800.

³⁷⁷ See also paragraph 3.3. in this chapter.

³⁷⁸ ICTY (T. Ch. I) 27 September 2006, *Case No. IT-00-39-T*, para. 804.

³⁷⁹ ICTY (T. Ch. I) 27 September 2006, *Case No. IT-00-39-T*, paras. 795-806.

³⁸⁰ ICTY (T. Ch. I) 27 September 2006, *Case No. IT-00-39-T*, paras. 306-404.

³⁸¹ ICTY (Summary of Appeals Chamber Judgement) 17 March 2009, *Case No. IT-00-39*, p. 3.

³⁸² ICTY (Summary of Appeals Chamber Judgement) 17 March 2009, *Case No. IT-00-39*, p. 3.

violence (count 3).³⁸³

This case shows that the prosecution of a defendant as perpetrator of a crime as part of the JCE should not be that easily. Scarce findings on the requirements (1) being informed of the crime, (2) taking no effective measures to prevent their recurrence and (3) persisting in the implementation of the common objective, may not lead to a conviction of being the perpetrator of the crime as part of the JCE. Thereby, this is the second case in this chapter whereby lack of evidence quashed the verdict of the Trial Chamber.³⁸⁴

Krajišnik case		
Charged crimes against humanity	Judgment	Facts/Evidence
Count 3 persecution	Not guilty	Persecution as part of the joint criminal enterprise: - rape (on a regular basis); - sexual abuse; - forcing male detainees to engage in degrading sexual acts with each other in the presence of other detainees.

3.14. Zelenović case

The last case that will be discussed in this chapter concerns Dragan Zelenović who was born on 12 February 1961. Zelenović ‘was one of the sub-commanders of the military police and a paramilitary leader in Foča’.³⁸⁵ The initial indictment of 18 June 1996 against Zelenović was confirmed on 26 June 1996. ‘Since the initial indictment, a number of warrants for the arrest of (...) Zelenović have been issued, including (...) one to the authorities of all member states of the United Nations on 12 January 2004.’ He finally was arrested on 22 August 2005 in Russia by the Russian authorities and on 10 June 2006 he was ‘transferred to the Tribunal and detained at the United Nations Detention Unit’. Zelenović initially appeared before the ICTY on 13 June 2006.³⁸⁶

A redacted version of the amended indictment was filed on 20 April 2001, which charged Zelenović with seven counts of torture and rape as crimes against humanity.³⁸⁷ These charges will now be discussed in turn. Counts 5 and 6 of the indictment entailed *torture* and *rape* cumulatively charged as crimes against humanity because on 3 July 1992, soldiers commanded by Gojko Jankovic, and among them Zelenović, ‘arrested a group of at least 60 Muslim women, children and a few elderly men from Trosanj and Mjesaja, and took them to Buk Bijela’. ‘Buk Bijela was used as a temporary detention and interrogation facility for civilian women, children and the elderly who were captured in various villages in the municipality of Foča’. ‘While detained at Buk Bijela for several hours, all the Muslim

³⁸³ ICTY (A. Ch.) 17 March 2009, *Case No.* IT-00-39-A; ICTY (Summary of Appeals Chamber Judgement) 17 March 2009, *Case No.* IT-00-39, p. 3.

³⁸⁴ See also the judgement of the Appeals Chamber in the Kvočka et al. case in paragraph 3.5. of this thesis.

³⁸⁵ ICTY (Amended Indictment) 4 April 2007, *Case No.* IT-96-23/2-I, para. 2.4.

³⁸⁶ ICTY (T. Ch. I) 4 April 2007, *Case No.* IT-96-23/2-S, paras. 1-6.

³⁸⁷ ICTY (T. Ch. I) 4 April 2007, *Case No.* IT-96-23/2-S, para. 1.

civilians were lined up (...) and guarded by armed soldiers. They were threatened with being killed or raped and were otherwise humiliated.’ Zelenović was one of the soldiers who interrogated the women. Thereby he ‘threatened the women with murder and sexual assault if they lied. (...) Zelenović and other soldiers acting under the control of (...) Jankovic gang-raped several women during or immediately after the interrogation who they suspected of lying.’³⁸⁸ One of those sexual assaults which occurred on or about 3 July 1992 concerned FWS-75 who was interrogated by Janković and Zelenović. ‘Janković warned FWS-75 not to lie, otherwise she would be raped by soldiers and killed afterwards.’ When ‘FWS-75 did not answer a questions sufficiently, a soldier took her to another room’. In that room, ‘at least ten unidentified soldiers raped her, in turn. The nature of the rape included vaginal penetration and fellatio’ and ‘FWS-75 lost consciousness after the tenth soldier sexually assaulted her’. This incident lasted between one to two hours.³⁸⁹ Another witness, FWS-87, was also interrogated by Zelenović and three other soldiers. After she was accused of not telling the truth, the ‘interrogators removed her clothing and then, each one of them raped her’ (vaginal penetration). During the assault, ‘FWS-87 experienced severe pain, followed by heavy vaginal bleeding’.³⁹⁰ Counts 13 and 14 also cumulatively charged Zelenović with *torture* and *rape* as crimes against humanity, based on the following facts. The Foča High School functioned as a barracks for Serb soldiers, and as a short term detention facility for Muslim women, children and the elderly. ‘Many of the female detainees in the Foča High School were subjected to sexual abuse during their detention (...). From the second day of their detention, every evening, groups of Serb soldiers sexually assaulted, including gang-rape, some of the younger women and girls in class-rooms or apartments in neighbouring buildings. (...) The soldiers threatened to kill the women or the women's children if they refused to submit to sexual assaults. Women who dared to resist the sexual assaults were beaten.’³⁹¹ Zelenović was among the above mentioned soldiers. The indictment further notes that the ‘physical and psychological health of many female detainees seriously deteriorated as a result of these sexual assaults. Some of the women endured complete exhaustion, vaginal discharges, bladder problems and irregular menstrual bleedings.’ They lived in constant fear and some of the ‘sexually abused women became suicidal’ while others ‘became indifferent as to what would happen to them and suffered from depression’.³⁹² On or about 6 or 7 July 1992, Zelenović in concert with other soldiers selected FWS-50, FWS-75, FWS-87, FWS-95 out of the group of detainees and ‘led them to a classroom where unidentified soldiers stood waiting’. There he ‘decided which woman should go to which man’. After the women were ordered to remove their clothes, Zelenović raped FWS-75 (vaginal penetration).³⁹³ Furthermore, between or about ‘8 July and about 13 July 1992, on three occasions, FWS-75 and FWS-87 were taken from the Foča High School to an apartment building’ (Brena) owned by Zelenović. There Zelenović and two other unidentified soldiers raped FWS-75 (vaginal and anal penetration and fellatio). On that same occasion Zelenović also raped FWS-87

³⁸⁸ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, paras. 5.1-5.3.

³⁸⁹ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, para. 5.4.

³⁹⁰ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, para. 5.5.

³⁹¹ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, paras. 6.1-6.4.

³⁹² ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, para. 6.5.

³⁹³ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, para. 6.6.

(vaginal penetration).³⁹⁴ Also, between about '8 July and about 13 July 1992, on two occasions (...) Zelenović and several other unidentified soldiers took FWS-75 and FWS-87 to Brena and raped them'. On these occasions, he raped FWS-75 (vaginal and anal penetration and fellatio) and raped FWS-87 (vaginal penetration).³⁹⁵ Around this same date, but on another occasion, 'FWS-75, FWS-87 and Z.G. were taken by (...) Zelenović to an abandoned house of a Muslim policeman in Gornje Polje. There (...) Zelenović raped FWS-87 (vaginal penetration)' again.³⁹⁶ Counts 41 and 42 cumulatively charged Zelenović again with torture and rape as crimes against humanity, but of course based on different facts than the above mentioned. From at least on or about 13 July 1992 until at least 13 August 1992, the living conditions in Partizan detention centre were brutal. The detention was characterized, amongst other things, by inhumane treatment and physical and psychological torture, including sexual assaults.³⁹⁷ The indictment mentions that 'Immediately after the transfer of women to Partizan, a pattern of sexual assaults commenced. Armed soldiers, mostly in groups of three to five, entered Partizan, usually in the evenings, and removed women. When the women resisted or hid, the soldiers beat or threatened the women to force them to obey. The soldiers took the women from Partizan to houses, apartments or hotels for the purpose of sexual assault and rape.'³⁹⁸ Serb soldiers took FWS-48, FWS-95, FWS-50 (a 16 year old girl), FWS-75 and FWS-87 (a 15 year old girl) out of Partizan and sexually abused them almost every night during their detention (vaginal and anal penetration and fellatio).³⁹⁹ Due to the sexual assaults, many women suffered permanent gynecological harm. 'One woman can no longer have children. All the women who were sexually assaulted suffered psychological and emotional harm; some remain traumatised.'⁴⁰⁰ On one occasion in July 1992, witness FWS-87 was gang-raped by four men including Zelenović.⁴⁰¹ Lastly the indictment mentions count 49 which entails rape as a crime against humanity. The facts mentioned under this count reads as follows. 'On or about 30 October 1992, FWS-75, FWS-87 and two other women were taken' by Zelenović and two other soldiers. These women were 'detained at different houses and apartments, and continued to be subjected to sexual assaults'. At the apartment near the Fish Restaurant in Foča, all four women were raped by Zelenović and the two other soldiers.⁴⁰²

Concerning the charges described above, Zelenović agreed to plead guilty to aiding and abetting the rape against FWS-75 and committing the rape against FWS-87 as torture and rape as crimes against humanity (counts 5 and 6). The Trial Chamber mentioned in the judgement that 'Zelenović knew that his action in respect of the interrogation and his omission to act with regard to the threats of rape and death, and the eventual transfer of FWS-75 to the room where she was raped, substantially assisted in the commission of the crime'.

³⁹⁴ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, para. 6.8.

³⁹⁵ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, para. 6.9.

³⁹⁶ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, para. 6.10.

³⁹⁷ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, paras. 7.1 and 7.4.

³⁹⁸ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, para. 7.5.

³⁹⁹ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, para. 7.6.

⁴⁰⁰ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, para. 7.7.

⁴⁰¹ ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, para. 7.13.

⁴⁰² ICTY (Amended Indictment) 4 April 2007, *Case No.IT-96-23/2-I*, paras. 9.1 and 9.2.

Zelenović therefore pleaded guilty to aiding and abetting this rape against FWS-75.⁴⁰³ Furthermore, Zelenović agreed to plead guilty to the ‘co-perpetration of rape in relation to FWS-87 and two unidentified women and committing rape three times against FWS-75 and three times against FWS-87 as *torture* and *rape* as crimes against humanity (counts 13 and 14)’. Zelenović further pleaded guilty to ‘committing rape against FWS-87 as *torture* and *rape* as crimes against humanity (counts 41 and 42), and to co-perpetration of rape in relation to FWS-75 and two unidentified women and committing the rape against FWS-87 as *rape* as a crime against humanity (count 49)’. The prosecution withdrew the remaining charges.⁴⁰⁴

Noteworthy in this case is that the Trial Chamber requested the parties to clarify certain points of the Plea Agreement, in particular why certain incidents were qualified as both torture and rape while one incident was qualified only as rape. In response to the question by the Trial Chamber the prosecution argued that ‘all the incidents to which Mr. Zelenović has pleaded guilty are to be classified as torture because they were committed on discriminatory grounds. As for the incidents at Buk Bijela, the purpose of the rapes was to obtain information or a confession, which would be an additional reason to classify the incidents as torture. As for the other instances of rape that occurred in July and August 1992, the Prosecution argued that they were committed for the purpose of punishing and intimidating or coercing the victim or a third person, which again would be a reason to classify the incidents as torture. As for count 49, according to which Mr. Zelenović is charged with rape, but not torture, as a crime against humanity, the parties agreed that also this act was committed on discriminatory grounds. The Prosecution submits that, although it could have charged this act as torture, in its discretion it chose not to do so’.⁴⁰⁵

The Trial Chamber accepted the guilty pleas on 17 January 2007, and found Zelenović guilty in accordance with his pleas.⁴⁰⁶ Thereby ‘Zelenović has been found guilty of personally committing nine rapes, eight of which were qualified as both torture and rape’. Furthermore he has also been ‘found guilty of two instances of rape through co-perpetratorship, one of which was qualified as both torture and rape, and one instance of torture and rape through aiding and abetting’. The Trial Chamber mentioned that ‘four of the instances of sexual abuse were gang rapes, committed together with three or more other perpetrators. In one of those instances he participated as aider and abettor in the rape of FWS-75 by at least ten soldiers, which was so violent that the victim lost consciousness. He participated as co-perpetrator in an incident during which the victim was threatened with a gun to her head while being sexually abused. The Trial Chamber finds that the scale of the crimes committed was large and that (...) Zelenović’s participation in the crimes was substantial.’⁴⁰⁷ The Trial Chamber noticed that an ‘important factor when assessing the gravity of a crime is the vulnerability of the victims’. It goes further by explaining that the ‘victims in this case were arrested and

⁴⁰³ ICTY (T. Ch. I) 4 April 2007, *Case No.IT-96-23/2-S*, para. 21.

⁴⁰⁴ ICTY (T. Ch. I) 4 April 2007, *Case No.IT-96-23/2-S*, para. 13.

⁴⁰⁵ ICTY (T. Ch. I) 4 April 2007, *Case No.IT-96-23/2-S*, paras. 11 and 42.

⁴⁰⁶ ICTY (T. Ch. I) 4 April 2007, *Case No.IT-96-23/2-S*, para. 13.

⁴⁰⁷ ICTY (T. Ch. I) 4 April 2007, *Case No.IT-96-23/2-S*, para. 38.

detained under brutal conditions for long periods of time. They were unarmed and defenseless. The victims were therefore in a particularly vulnerable situation at the time of the commission of the crime. In addition, victim FWS-87, who was raped by (...) Zelenović on numerous occasions, was about 15 years old at the time of the commission of the crimes. This further increases the gravity of the crimes committed against her. Mr. Zelenović was aware, and took advantage of, this vulnerability of the victims.⁴⁰⁸ Lastly the Trial Chamber mentioned that as ‘a result of the violent sexual assaults, the physical and psychological health of many of the victims was seriously damaged. The women and girls in the detention centers lived in constant fear of rapes that may be repeated and sexual assaults. Some became suicidal while others became indifferent to what happened to them. The scars left from the crimes committed against them were deep and might never heal. This, perhaps more than anything, speaks about the gravity of the crimes in this case.’⁴⁰⁹

In concluding, it can be said that this is a very severe case and the first case in this chapter in which the Trial Chamber asked the parties to clarify why certain incidents are qualified as both torture and rape while one incident was qualified only as rape. Strangely enough, the prosecutor gets away with a rather vague explanation. Namely, because ‘it chose not to do so.’ This is unfortunate, because this gives us no insight into the “charging tactics” of the prosecutor. Instead it looks like these decisions are based on arbitrariness.

Zelenović case		
Charged crimes against humanity	Judgement	Facts/Evidence
Count 5 torture & Count 6 rape	Guilty plea	Zelenović pleaded guilty to: - aiding and abetting the (gang) rape(s) against FWS-75 (the eventual transfer of FWS-75 to the room where she was raped and his omission to act with regard to the threats of rape); - committing the (gang) rape(s) against FWS-87.
Count 13 torture & Count 14 rape	Guilty plea	Zelenović pleaded guilty to: - the co-perpetration of rape in relation to FWS-87; - the co-perpetration of rape in relation to two unidentified women; - committing rape three times against FWS-75; - committing rape three times against FWS-87.
Count 41 torture & Count 42 rape	Guilty plea	Zelenović pleaded guilty to: - committing (gang) rape(s) against FWS-87.
Count 49 rape	Guilty plea	Zelenović pleaded guilty to: - the co-perpetration of rape in relation to FWS-75; - the co-perpetration of rape in relation to two unidentified women; - committing the rape against FWS-87.

⁴⁰⁸ ICTY (T. Ch. I) 4 April 2007, *Case No.IT-96-23/2-S*, para. 39.

⁴⁰⁹ ICTY (T. Ch. I) 4 April 2007, *Case No.IT-96-23/2-S*, para. 40.

4.1. Introduction

This chapter will discuss the answer to the research question of this thesis. As a reminder, this question reads as follows:

When is an act of sexual violence sentenced under rape as a crime against humanity (Article 5(g) of the ICTY Statute) and when is an act of sexual violence sentenced under enslavement, torture, persecution or other inhumane acts as a crime against humanity (Article 5(c),(f),(h) and (i) of the ICTY Statute)?

By giving a short summary of chapters 1, 2 and 3 and thereby my view, the answer to the research question will become visible. Therefore this chapter will firstly discuss sexual violence in paragraph 4.2. Secondly, cumulative convictions will be discussed in paragraph 4.3. The answer to the research question will be discussed in paragraph 4.4. and lastly my final observations will be given in paragraph 4.5.

4.2. Sexual violence

The first step in finding an answer to the research question was to discuss what the term ‘sexual violence’ as a crime against humanity precisely entailed (Chapter 1). In order to do this, it was important to study at the Statute of the ICTY and other legal documents that existed prior to the first judgements of the ICTY. These latter documents showed that sexual violence as a crime against humanity implies rape, enforced prostitution, sexual mutilation and other forms of sexual assault committed against women, men or children. Furthermore, for a person to be responsible for acts of sexual violence it does not matter whether this person is directly or indirectly involved. Indeed, this conclusion does not complete the determination of what sexual violence precisely entails. It seems that, prior to the first judgement of the ICTY, the tribunal had not been given it much thought as to which crimes could entail sexual violence. But on the other hand, a solid determination of what sexual violence entails is not desirable as acts of sexual violence can always differ and change through time. A specific and exhaustive list could therefore, in a worst case scenario, lead to impunity (because of the *principle of legality*). Furthermore, the Statute of the ICTY remained silent as to whether and when an act of sexual violence could be sentenced under enslavement, torture, persecutions or other inhumane acts. Chapter 1 was therefore just a little step in finding an answer to the research question.

4.3. Cumulative charges and convictions

It was also important to discuss the issue of cumulative charges and convictions (Chapter 2). To understand the underlying logic of when an act of sexual violence is sentenced under rape

as a crime against humanity and when an act of sexual violence is sentenced under enslavement, torture, persecution or other inhumane acts as a crime against humanity, it is important to know whether an accused may be charged and convicted of more than one offence for the same conduct (also known as cumulative charges and convictions) or not. Jurisprudence of the ICTY shows that the ICTY allows cumulative charging because, prior to the presentation of all of the evidence, it is not possible for the prosecutor to determine to a certainty which of the charges brought against an accused will be proven. Cumulative convictions are also allowed because such convictions fully reflect each violation that occurred.⁴¹⁰

4.4. The answer to the research question

Chapter 3, the core of this thesis, discusses the case law of the ICTY. To understand when an act of sexual violence is sentenced under rape as a crime against humanity and when an act of sexual violence is sentenced under enslavement, torture, persecution or other inhumane acts as a crime against humanity, it is important to look at the relevant jurisprudence of the ICTY and to distinguish the facts in these cases. The hypothesis was that when it is possible to distinguish facts in the cases, it becomes possible to see which acts of sexual violence fall under rape and which acts of sexual violence, that might look similar to the former, fall under, torture, enslavement, persecution or other inhumane acts. Therefore Chapter 3 is also kind of a continuation of Chapter 1, because through case law a further determination of what sexual violence precisely entails according to the ICTY can be found. Chapter 3 discusses thirteen sexual violence cases of the ICTY. These were all cases of the ICTY in which acts of sexual violence were charged as a crime against humanity by the prosecutor and then judged by the Trial Chamber and in some cases also by the Appeals Chamber. After writing Chapter 3, I realized that it would not be possible to give an answer to the research question in just one or two sentences. Therefore the answer is spread out in this paragraph. As can be read in this paragraph it becomes clear when an acts of sexual violence is sentenced under rape and when it is sentenced under enslavement, torture, persecution or other inhumane acts. To create a clear overview, the acts are also divided in lists of enslavement, torture, rape, persecution and other inhumane acts. Lastly, the topic evidence will be discusses as evidence has a very important role in determining if an act of sexual violence can be sentenced at all.

This paragraph will discuss the following sub questions. First of all the question *when is an act of sexual violence sentenced under enslavement?* Secondly, *when is an act of sexual violence sentenced under torture?* Then *when is an act of sexual violence sentenced under rape?* Followed by *when is an act of sexual violence sentenced under persecution?* And *when is an act of sexual violence sentenced under other inhumane acts?* Lastly the role of evidence herein will be discussed.

When is an act of sexual violence sentenced under enslavement?

⁴¹⁰ See for the benefits and disadvantages of cumulative conviction Chapter 2 of this thesis.

The Kunarac et al. case was the first case before the ICTY in which acts of sexual violence were sentenced under enslavement as a crime against humanity. The Trial Chamber decided that acts whereby women are treated as personal property and used for sexual services while they are being kept in a house for a certain period of time, consists enslavement. The sexual services entailed women being raped during their stay in the house, two attempts of rape of which one attempt was in front of other soldiers, orders for the women to undress, multiple rapes, handing over the women to other soldiers for the purpose of rape and abuse, one woman who was sold for the purpose of rape and one victim who was lent out to other soldiers for the purpose of rape in exchange for money. Furthermore, the Kunarac case showed that a conviction for aiding and abetting enslavement is possible if one assists the perpetrators in the raping by allowing the perpetrators to visit the apartment where the women are held and (1) allowing the perpetrators to rape the women, (2) encouraging the perpetrators to rape them or by (3) handing over the women to other men in the knowledge that they would rape them. The Kunarac et al. case also showed that by assisting in setting up ‘sexual enslavement conditions’ at the aforementioned house, one can also be prosecuted for aiding and abetting enslavement. Providing assistance, encouragement or moral support to the perpetrator in his conduct of sexual violence is thereby not required per se for aiding and abetting enslavement. Although this is the only case whereby acts of sexual violence were sentenced under enslavement, it still provides an answer to when acts of sexual violence can be sentenced under enslavement. The acts of sexual violence that can thus be sentenced under enslavement are listed below.

Acts of sexual violence that can be sentenced under enslavement as a crime against humanity (Article 5(c) of the ICTY Statute)

While keeping the women in a house for a certain period of time and treating them as personal property, conducting the following acts of sexual violence amount to enslavement:

- rape (Kunarac et al. case);
- attempts of rape (Kunarac et al. case);
- attempt of rape in front of other soldiers (Kunarac et al. case);
- ordering to undress (Kunarac et al. case);
- multiple rapes (Kunarac et al. case);
- handing over women to other soldiers for the purpose of rape and abuse (Kunarac et al. case);
- selling women for the purpose of rape (Kunarac et al. case);
- lending women to other soldiers for the purpose of rape in exchange for money (Kunarac et al. case).

While keeping the women in a house for a certain period of time and treating them as personal property, conducting the following acts amount to aiding and abetting enslavement:

- assisting the perpetrator in the rape by allowing soldiers to visit the apartment where the women are held and (1) allowing to rape the women, (2) encouraging the soldiers to rape them or by (3) handing over the women to other men in the knowledge that they would rape them (Kunarac et al. case);
- assisting in setting up ‘sexual enslavement conditions’ at a house. Providing assistance, encouragement or moral support to the perpetrator in his conduct of sexual violence is thereby not required per se for aiding and abetting enslavement. (Kunarac et al. case).

When is an act of sexual violence sentenced under torture?

The Kunarac et al. case was also the first case before the ICTY whereby acts of sexual violence were sentenced under torture as a crime against humanity. These acts of sexual violence entailed aiding and abetting and conducting rape, gang-rape and fellatio. The combination of aiding and abetting and perpetrating these acts of sexual violence gave rise to severe pain and suffering, physical and/or mental, which made that these acts did not just amount to rape but to torture as well. But a combination of these acts of sexual violence is not a requirement to amount to torture. The Kunarac et al. case also determined that one single act of rape, where the perpetrator forced the victim with the full knowledge that she did not consent, can also amount to torture as long as it meets the requirements of torture, namely, ‘*severe pain or suffering, whether physical or mental.*’ This is interesting because it can be said that rape is always an act whereby the perpetrator forces the victim with the knowledge that the victim does not consent and it can be said that the requirements of ‘*severe pain or suffering, whether physical or mental*’ are always met. It goes without saying that victims of rape are in pain and suffer immense, both physically and mentally. Therefore you would think that the prosecutor will always charge rape cumulatively with torture. But, as also can be seen in the Kunarac case, this is (for reasons unknown) not the case.⁴¹¹ Furthermore, the Simić case also contributes in determining when acts of sexual violence are sentenced under torture as a crime against humanity. Brutally beating and kicking victims in their genitals, forcing a victim to pull down his pants and threatening to cut off the victim’s penis while beating him and while firing gunshots above his head were acts of sexual violence sentenced under torture. Important to notice is that this judgement recognizes that the mere threat of committing sexual violence (the threat to cut off the penis) is a crime amounting to torture. This judgement therefore lowers the threshold in determining when an act of sexual violence can be qualified as torture. It hence seems that it is not always necessary to actually commit the act of sexual violence to be sentenced for torture. The last case concerning a conviction under torture is the Zelenović case. The accused was convicted for aiding and abetting rapes and gang-rapes because he transferred the victim to the room where she was raped and because of his omission to act with regard to threats of rape. Furthermore the accused himself committed rapes and gang-rapes and he participated as a co-perpetrator in the rapes. These incidents were sentenced under torture because they were committed on discriminatory grounds and because the purpose of the rapes was to obtain information or a confession, punishing and intimidating or coercing the victim or a third person. As seen above, the Kunarac et al. case and the Zelenović case made clear why certain incidents of rape fall within the scope of torture and therefore can be cumulatively charged with rape, it unfortunately does not clarify why certain incidents of rape sometimes do *not* fall within the scope of torture but only under the scope of rape (no cumulative charging). It therefore remains unclear why certain incidents are qualified as both torture and rape and why other incidents are qualified only as rape. The indictments of

⁴¹¹ The Češić case and the Zelenović case also prosecuted and convicted solely rape without torture. The difference between these two cases and the Kunarac case is that the conviction of the former two cases is based on a guilty plea which the latter case is not.

the cases discussed in this thesis and the judgements in these cases do not clarify this decision of the prosecutor. Only in one case, the Zelenović case, the Trial Chamber asked the prosecutor to clarify why certain incidents are qualified as both torture and rape while one incident was qualified only as rape. Strangely enough, the prosecutor gets away with a rather vague explanation: “it chose not to do so.” This is unfortunate, because this gives us no insight into the “charging tactics” of the prosecutor. To be clear, these cases do explain why certain rape incidents fall within the scope of torture, but the obscurity is that it does not explain why certain rape incidents do not fall within the scope of torture. Therefore, in deciding whether an act of rape should be sentenced under torture, it seems that it depends on the will of the prosecutor and until now it looks like that will is based on arbitrariness instead of well reasoned arguments.

Acts of sexual violence that can be sentenced under torture as a crime against humanity (Article 5(f) of the ICTY Statute)

Conducting:

- rape (Kunarac et al. case and Zelenović case);
- gang-rape (Zelenović case);
- brutally beating and kicking victims in their genitals (Simić case);
- forcing a victim to pull down his pants (Simić case);
- threatening to cut off a penis while beating and while firing gunshots above the victims head (Simić case).

The combination of aiding and abetting and conducting:

- rape (Kunarac et al. case and Zelenović case);
- gang-rape (Kunarac et al. case and Zelenović case);
- fellatio (Kunarac et al. case).

Co-perpetrating:

- rape (Zelenović case).

When is an act of sexual violence sentenced under rape?

In the Kunarac et al. case, the first case before the ICTY where rape was sentenced as a crime against humanity, Kunarac, Kovać and Vuković were all convicted of rape. Kunarac and Kovać also aided and abetted rapes and gang-rape and conducted gang-rapes. For all these conducts they were charged and sentenced for rape as a crime against humanity. Furthermore Kunarac was also convicted of aiding and abetting the ‘vaginally and orally’ gang-rape of two women. The indictment of the prosecutor makes it clear that the oral rapes mean, in this case, fellatio. What is interesting to see is that in the very first sexual violence case before the ICTY, the Tadić case, the prosecutor did not charge fellatio as an acts of rape, instead it charged fellatio under other inhumane acts.⁴¹² The reason why the prosecutor chose to prosecute fellatio as other inhumane acts is not clear. The prosecutor in the Kunarac et al. case on the other hand did not follow this path and charged fellatio as an act of rape. The Trial

⁴¹² See paragraph 4.4. of this thesis or see Chapter 3 of this thesis.

Chamber followed herein the prosecutor by convicting Kunarac of aiding and abetting the orally gang-rape as an act of rape. Considering the fact that fellatio matches more with the elements of rape than it does with the elements of other inhumane acts and considering the fact that other inhumane acts are more of a subsidiary nature, it can be said that this was a better choice of the prosecutor in the Kunarac et al. case.⁴¹³ Another case where sexual violence was sentenced under rape as a crime against humanity is the Češić case. Češić was convicted of rape as a crime against humanity because he intentionally forced, at gun point, two Muslim brothers to perform fellatio on each other in the presence of others. This made Češić a perpetrator performing rape as a crime against humanity. The decision of this case thereby confirms that the act of fellatio can indeed be sentenced under rape as a crime against humanity. The last case concerning a conviction under rape as a crime against humanity is the Zelenović case. The accused was convicted for aiding and abetting rapes and gang-rapes because he transferred a woman to a room where she was raped and because of his omission to act with regard to the threats of rape. Furthermore he himself committed rapes and gang-rapes and he participated as co-perpetrator in rapes.

Acts of sexual violence that can be sentenced under rape as a crime against humanity (Article 5(g) of the ICTY Statute)

Conducting:

- rape (Kunarac et al. case and Zelenović case);
- gang-rape (Kunarac et al. case and Zelenović case);
- intentionally forcing, at gun point, two Muslim brothers to perform fellatio on each other in the presence of others (Češić case).

Co-perpetrating:

- rape (Zelenović case).

Aiding and abetting:

- rape (Kunarac et al. case and Zelenović case);
- gang-rape (Kunarac et al. case and Zelenović case);
- fellatio (Kunarac et al. case).

When is an act of sexual violence sentenced under persecution?

The Todorović case was the first case before the ICTY whereby acts of sexual violence were sentenced under persecution. Therefore this case makes a start in determining when an act of sexual violence can be sentenced under persecution. The Todorović case shows that kicking in the genital area, ordering a man to bite into a penis, ordering men to perform oral sex on each other and ordering men to perform fellatio are acts of sexual violence which can be sentenced under persecution. The Kvočka et al. case continues in determining when an act of sexual violence can be sentenced under persecution. It sentenced that persecution can also

⁴¹³ See for the elements of rape and other inhumane acts Chapter 1 of this thesis or the Tadić case in Chapter 3 of this thesis.

constitute bribing and coercing victims into having sexual intercourse, assault, rape, an attempt to rape, threat of rape, touching of the 'female parts', sexual pronouncements and grabbing of breasts. Furthermore, this case is of importance because two of the five accused were liable for acts of sexual violence even though they had not committed the crimes themselves and even though there was little evidence submitted at trial that the accused knew that women were being raped or otherwise sexually assaulted. Nonetheless, as these acts of sexual violence were committed in a camp and since this camp operated as a joint criminal enterprise designed to persecute, terrorize and otherwise mistreat detainees, it was foreseeable that the women who were held in this camp would be raped. Because they continued their work in the camp and remained impassive, as silence could be regarded as giving moral support or approval to the perpetrators, the accused were liable as co-perpetrators for all crimes committed as an intended or even foreseeable consequence of the joint criminal enterprise. The Trial Chamber in the Sikirica case adds that instigating or aiding and abetting rape and sexual assault (no specific details to the latter mentioned) also amounts to persecution. This case concerned a guilty plea of the aforementioned acts of sexual violence. What is noticeable in this case is that this is the only case where the prosecutor and the Trial Chamber acknowledged that there was no evidence supporting the facts that the accused knew of the incidents of rape or was in a position to know of them after the event. Even though there was no evidence he was still held responsible for these acts. Therefore it is possible to conclude that although there is no evidence that an accused knew of these incidents or is in a position to know of them after the event, he can still be held responsible if he pleaded guilty to these acts. The Plavšić case, the sole woman charged before the ICTY, shows that, although an accused did not participate in the conception or planning of crimes against humanity or had a small role in its executions, by (1) participating in the cover up of sexual violence crimes, (2) ignoring the allegations of these crimes and (3) supporting the regime, the accused can be convicted of participating in persecution. Another case in which the accused is convicted of sexual violence crimes he himself did not commit, is the Stakić case. In the Stakić case the accused was found guilty of (co-)perpetrating persecution because the rapes, multiple rapes of the same victim and sexual assaults (including guards forcing another person to rape a woman, positioning men in such a way as if engaged in intercourse, kissing of a victim against her will and putting a penis into the mouth of a victim) that were committed by the direct perpetrators formed a part of a persecutorial campaign headed *inter alia* by accused himself. The Nikolić case also sentenced the accused with persecution for acts of sexual violence he himself did not commit. The Trial Chamber came to its conviction given that the accused facilitated and encouraged sexual violence by removing and returning female detainees from the hangar, handing them over to men for the purpose of sexual abuse and rape. The accused is therefore convicted of aiding and abetting sexual abuse and rape. The last case whereby an accused was convicted of persecution by the ICTY is the Brđanin case. In this case the accused aided and abetted persecution with respect to (1) rapes of women in multiple municipalities, (2) sexual assault including a woman who was forced to undress herself in front of cheering soldiers and policemen and soldiers or policemen demanding detainees to perform sex with each other and (3) constant humiliating and degrading treatment including Bosnian Muslims and Bosnian Croats who were forced to perform sexual acts on

each other, announcements that mothers and sisters will be raped in front of their eyes and forcing Bosnian Muslims and Bosnian Croats to watch other members of their group being raped. His knowledge of the existence of these camps and the situation in these camps and facilities and thereby his inactivity with respect to the camps and detention facilities, together with his public attitude to them, constituted encouragement and moral support to the running of these camps and detention facilities. Therefore the Trial Chamber was satisfied that the accused aided and abetted persecution.

Thus, seven cases whereby acts of sexual violence were prosecuted as persecution as a crime against humanity are hereby discussed. In two of these cases the accused was in fact also the perpetrator of the alleged acts of sexual violence.⁴¹⁴ In six of the seven cases the accused were convicted for crimes he or she himself did not commit.⁴¹⁵ It seems that if the accused has a certain authority and if the accused has knowledge, even if it is little, of the incidents and the general situation and combines it with inactivity or showing no effort in trying to stop the incidents or the situation, it is enough for convicting them of persecution as a crime against humanity. Furthermore, these cases show that acts of sexual violence charged as persecution together with other crimes against humanity have eventually been sentenced solely under persecution. Namely, in two cases⁴¹⁶ it concerned a guilty plea only to the acts of sexual violence that were placed under the count of persecution. The other counts including crimes against humanity were therefore withdrawn. In three other cases⁴¹⁷ the prosecutor charged the acts of sexual violence under persecution cumulatively with torture, rape and/or other inhumane acts as crimes against humanity, but these cumulatively charges did not meet the 'Čelebići test'.⁴¹⁸ Therefore the other charged counts of crimes against humanity were subsumed under persecution and only a single conviction of persecution was entered. It therefore seems that when persecution as a crime against humanity is cumulatively charged with torture or rape, a cumulative conviction is impossible as the 'Čelebići test' cannot be met. The judges will always decide to convict under persecution as it is the more specific provision that should be upheld (the fact that the crime of persecution requires a discriminatory intent as additional materially distinct element makes the provision more specific). When persecution is charged cumulatively with other inhumane acts as a crime against humanity, it seems that cumulative conviction of these crimes is also impossible as other inhumane acts have a subsidiary nature. Thus if any inhumane acts fall within a persecution conviction, the charged inhumane acts must be dismissed. Either way, it looks like torture, rape or other inhumane acts as crimes against humanity, cumulatively charged with persecution as a crime against humanity, can never 'win'.

Acts of sexual violence that can be sentenced under persecution as a crime against humanity (Article 5(h))

⁴¹⁴ The Todorović case and Kvočka et al. case.

⁴¹⁵ The Todorović case being the exception and the Kvočka case being the one that overlaps. Namely, the Kvočka charges multiple suspects whereby there is one accused convicted of perpetrating the sexual violence crimes on his own. The other convicted in this were convicted of crimes they themselves did not commit.

⁴¹⁶ Todorović case and Sikirica case.

⁴¹⁷ Kvočka et al. case, Nikolić case and Brđanin case

⁴¹⁸ See for an explanation of the 'Čelebići test' Chapter 2 of this thesis.

of the ICTY Statute)

Conducting:

- kicking in the genital area (Todorović case);
- ordering a man to bite into a penis (Todorović case);
- ordering men to perform oral sex on each other (Todorović case);
- ordering men to perform fellatio (Todorović case);
- bribing and coercing victims to have sexual intercourse with him (Kvočka et al. case);
- assault (Kvočka et al. case);
- rape (Kvočka et al. case);
- attempt rape (Kvočka et al. case);
- threat of rape (Kvočka et al. case);
- touching of the 'female parts' (Kvočka et al. case);
- sexual pronouncements (Kvočka et al. case);
- grabbing of breasts (Kvočka et al. case).

(Co-)perpetrating:

- rape (Stakić case);
- multiple rapes of the same victim (Stakić case);
- sexual assaults (Stakić case);
- guards forcing another person to rape a woman (Stakić case);
- positioning men in such a way as if engaged in intercourse (Stakić case);
- kissing of a victim against her will (Stakić case);
- putting a penis into the mouth of a victim (Stakić case).

Instigating or otherwise aiding and abetting:

- rape(s) (Sikirica case);
- sexual assault (Sikirica case).

Aiding and abetting:

- rape(s) (Nicolić case and Brđanin case);
- sexual abuse (Nicolić case);
- sexual assault (Brđanin case);
- in forcing a woman to undress herself in front of cheering soldiers and policemen (Brđanin case);
- in demanding detainees to perform sex with each other (Brđanin case);
- in constant humiliating and degrading treatment (Brđanin case);
- in forcing persons to perform sexual acts on each other (Brđanin case);
- in giving announcements to victims that mothers and sisters will be raped in front of their eyes (Brđanin case);
- in forcing persons to watch other members of their group being raped (Brđanin case).

Joint criminal enterprise:

- even though the accused did not committed the crimes themselves and even though there was little evidence submitted at trial that the accused knew that women were being raped or otherwise sexually assaulted in the camp, the accused can still be held liable as a co-perpetrators, as they continued their work in the camp and remained impassive, for all the sexual violence crimes committed in the camp as an intended or even foreseeable consequence of the joint criminal enterprise (Kvočka et al. case).

Participating, ignoring and supporting:

- participating in the cover up of sexual violence crimes (Plavšić case);
- ignoring the allegations of these crimes (Plavšić case);

- supporting the regime (Plavšić case).

When is an act of sexual violence sentenced under other inhumane acts?

The Tadić case, which was the first sexual violence trial held by the ICTY, affirmed the in Chapter 1 mentioned statement of the Commission of Experts of the United Nations, whereby the commission considered that sexual violence could also be committed against men.⁴¹⁹ The Trial Chamber affirmed this by finding the accused guilty of other inhumane acts as a crime against humanity because of his aiding and abetting in male sexual violence. This sexual violence entailed aiding and encouraging a group of Serbs who ordered one male detainee to lick the naked bottom of another male detainee, who ordered one male detainee to perform fellatio on the other male detainee and who ordered to bite the testicles and to hit and bite the genitals of the other male detainee. This actually ended in one detainee biting off one of the testicles of the other detainee. Thereby this is the first case showing that male sexual violence is a severe crime deserving punishment. This view was later on also supported by the Todorović case, the Simić case, the Stakić and the case Češić case, where acts of male sexual violence were also convicted. As already mentioned above, in this case the prosecutor chose (for reasons that are unclear) to prosecute fellatio under other inhumane acts as a crime against humanity. Later case law shows that this view is not followed by other prosecutors as they charge fellatio under rape. As also mentioned above, it looks like this is a positive development considering the fact that fellatio matches better with the elements of rape than it does with the elements of other inhumane acts and considering the fact that other inhumane acts are more of a subsidiary nature. Although acts of sexual violence were charged more than once as other inhumane acts, this is the only case where acts of sexual violence were actually sentenced as other inhumane acts as a crime against humanity. The fact that in later case law fellatio was charged as rape and the fact that the provision of other inhumane acts was seen as being of subsidiary nature,⁴²⁰ might clarify why acts of sexual violence were only in this case sentenced as other inhumane acts. Nevertheless, the Tadić case still provides an answer as to when acts of sexual violence can be sentenced under other inhumane acts. These acts of sexual violence are listed here below.

Acts of sexual violence that can be sentenced under other inhumane acts as a crime against humanity (Article 5(i) of the ICTY Statute)

Aiding and encouraging men in:

- licking of a naked bottom (Tadić case);
- performing fellatio (Tadić case);
- biting testicles and genitals (Tadić case);
- hitting of genitals (Tadić case);

⁴¹⁹ See paragraph 1.2. of this thesis for the discussion of the final Report of the Commission of Experts of the United Nations.

⁴²⁰ See paragraph 4.4. under When is an act of sexual violence sentenced under persecution? and paragraph 3.5. of this thesis for a more detailed explanation of the subsidiary nature.

Evidence

To determine when an act of sexual violence is sentenced under rape as a crime against humanity (Article 5(g) of the ICTY Statute) and when an act of sexual violence is sentenced under enslavement, torture, persecution or other inhumane acts as a crime against humanity (Article 5(c),(f),(h) and (i) of the ICTY Statute), it is important that there is enough evidence to support the charged crimes against humanity. When there is no sufficient evidence to support the charges of crimes against humanity, an accused cannot be convicted and sentenced. Seven of the thirteen cases discussed in this thesis were cases in which the accused pleaded guilty.⁴²¹ As already mentioned above, the Sikirica case shows that when an accused pleads guilty the 'evidence threshold' is very low or maybe it can be said that evidence is not even necessary at all when an accused pleads guilty. Namely, the Sikirica case shows that although there is no evidence that the accused knows of these incidents or is in a position to know of them after the event, he can still be found guilty if he pleaded guilty to these acts. Of course, the guilty plea must be in accordance with Rule 62 *bis* of the Rules of Procedure and Evidence. This means that 'the guilty plea has been made voluntarily', 'the guilty plea is informed', 'the guilty plea is not equivocal' and 'there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case'. In the other six cases where there were no guilty pleas, the Tadić case showed that the prosecutor withdrew the two counts concerning acts of sexual violence of the indictment before the case was judged by the Trial Chamber due to lack of witnesses. Furthermore, the judges in the Tadić case decided that the testimony of one witness is sufficient evidence for conviction. Rule 96(i) of the Rules of Procedure and Evidence of the ICTY says that 'in cases of sexual assault no corroboration of the victim's testimony shall be required'. In line with Rule 96(i), this case shows that not only no corroboration of a victim's testimony shall be required, no corroboration of a witness's testimony who is not a victim shall be required either. The Kunarac et al. case shows that the accused was not guilty of certain counts because the only testimony given concerning a particularly count was not sufficiently credible to establish what was alleged. Therefore the acts of sexual violence were not proven beyond reasonable doubt. The Appeals Chamber in the Kvočka case states that concerning a joint criminal enterprise conclusive evidence must be provided on the dates on which the sexual violence took place. Only then a proper judgement can be given as to whether the crimes were committed during the time the accused was employed in the camp and thus knew about the crimes committed as part of a joint criminal enterprise. The other accused in the Kvočka case however were convicted as being part of the joint criminal enterprise given that their charges could be proved, although, with little evidence. Later on, in the Krajišnik case an addition to this judgement was formulated. Namely, in that case the Appeals Chamber judged that scarce findings on the requirements (1) being informed of the crime, (2) taking no effective measures

⁴²¹ Todorović case, Sikirica case, Simić case, Plavšić case, Nikolić case, Češić case and the Zelenović case.

to prevent their recurrence and (3) persisting in the implementation of the common objective, may not lead to a conviction of being the perpetrator of the crime as part of the joint criminal enterprise. Concerning the aiding and abetting of crimes against humanity, the judges in the Brđanin case judged that in ‘cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence on (or very near to) the crime scene, (...) which all together allow the conclusion that the accused’s conduct amounts to official sanction of the crime and thus substantially contributes to it.’⁴²² The Appeals Chamber found that, even within the context of a strategic plan, encouragement and moral support can only be of effect if the camp personnel committing the acts of sexual violence were aware of the encouraging and supporting statements or encouraging and support through the inaction or public attitude of the accused. Coming back to determining when an act of sexual violence is sentenced under rape as a crime against humanity and when an act of sexual violence is sentenced under enslavement, torture, persecution or other inhumane acts as a crime against, it can be said that a guilty plea to the acts of sexual violence or (a) witness(es) are of importance. Regarding the aiding and abetting of crimes against humanity it can be said that the authority of the accused combined with his presence on the crime scene is of importance. In addition encouragement and moral support can only be of effect if the direct perpetrators committing the crimes against humanity are aware that the accused made encouraging and supporting statements or encouraged and supported through inaction or public attitude. Concerning a joint criminal enterprise it can be said that sufficient evidence concerning the requirements (1) being informed of the crime, (2) taking no effective measures to prevent their recurrence and (3) persisting in the implementation of the common objective, is needed for a conviction.⁴²³

4.5. Final observations

This chapter makes it partly clear when and which acts of sexual violence can be prosecuted as rape as crimes against humanity and when and which acts of sexual violence can be prosecuted as enslavement, torture, persecution or other inhumane acts as a crime against humanity (if there is sufficient evidence). Thereby a part of the research question is answered. Unfortunately, there is no clear structure or rule to detect in when an act of sexual violence is prosecuted under rape and when an act of sexual violence is prosecuted under enslavement, torture, persecution or other inhumane. Besides the definitions given in Chapter 1 (paragraph 1.4.) regarding enslavement, torture, rape, persecution and other inhumane acts, there is no legal document which makes it clear why the prosecutor chooses to prosecute certain acts of sexual violence under rape and others under enslavement, torture, persecution and other inhumane acts or why the prosecutor chooses for cumulative charging for some incidents and chooses not to charge cumulatively for other incidents. My hypothesis was that by analyzing the case law of the ICTY, the reasoning might become clear, which also would have made it possible to distill a general rule. After studying the relevant case law it must be concluded that

⁴²² ICTY (A. Ch) 3 April 2007, *Case No. IT-99-36-A*, para. 277.

⁴²³ See also part five, Section 4 Production of Evidence and part six, Section 3 Rules of Evidence of the Rules of Procedure and Evidence of the ICTY.

the reasoning remains unclear. A general rule can therefore not be formulated. The judges of the ICTY do not demand clarification of the prosecutor in his “charging tactics” concerning acts of sexual violence. For example, only in one of the thirteen studied cases the judges asked the prosecutor for clarification. Namely, in the Zelenović case the Trial Chamber asked why certain incidents were qualified as both torture and rape while one incident was qualified only as rape. Strangely enough, the prosecutor got away with a rather vague explanation: ‘it chose not to do so’. By not providing an explanation it looks like these decisions are based on arbitrariness instead of well thought “charging tactics”. In determining when an act of sexual violence is sentenced under rape as a crime against humanity and when an act of sexual violence is sentenced under enslavement, torture, persecution or other inhumane acts as a crime against humanity, it seems that in most cases the judges follow and depend on the “charging tactics” of the prosecutor as long as there is enough evidence to support the charged crimes. Only in one case the Trial Chamber interfered by inviting the prosecutor to amend the indictment and to include charges of rape and other forms of sexual violence.⁴²⁴ Although this only happened in one case, judges must not be tempted in taking over the role of the prosecutor. On the other hand, it was just an advisement. Therefore, although it is not clear, prosecutors are probably not obliged to follow this advisement. Furthermore, if there is enough evidence to support the charged counts of the prosecutor, it seems that the judges always concur with the charged counts of the prosecutor. Of course the judges assess whether the elements of crimes against humanity and the definitions of enslavement, torture, rape, persecution or other inhumane acts are met. But they do not check if the “charging tactics” including the “cumulative charging tactics” are case by case equally. For example, as seen above, it still is not clear why certain rape incidents are cumulatively charged as torture and others are not. This *inter alia* also means that it is not always clear for example why certain incidents are not sentenced as torture aside from the cumulative charging. Because there is a chance that the “charging tactics” are not equal there is a risk that people are not convicted equally. A consequence of unequal sentencing could be that civilians and states will not take tribunals seriously anymore. Which at worst can make the legal system fail and bring back the danger of impunity. Therefore I advise that guidelines should be developed for the prosecutors as to when to prosecute acts of sexual violence under enslavement, torture, rape, persecution and other inhumane acts. Guidelines for the prosecutor also ensure that the Trial Chamber will not be tempted to take over the role of the prosecutor. With guidelines available they do not have to advise the prosecutor since the advisements are already in the guidelines. On the other hand, these guidelines should not be obligatory, because prosecutors should be able to take another direction as acts of sexual violence can always differ and change through time and changes are not foreseeable. If prosecutors want to deviate from the guideline, good arguments for this deviation must be given. Given the fact that the ICTY tribunal is not a permanent tribunal, my observations and advise should also be taken into account by the permanent ICC and my observations and advise should also be kept in mind when other (*ad hoc*) tribunals are being set up.

⁴²⁴ See paragraph 3.4. Nikolić case of this thesis.

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