

**CASENOTE**

**PROSECUTOR**

**v**

**DRAGOLJUB KUNARAC, RADOMIR KOVAC AND ZORAN VUKOVIC\***

**Appeals Chamber**

**International Criminal Tribunal for the Former Yugoslavia**

**I. INTRODUCTION**

The Security Council created the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in 1991 acting under Chapter VII of the Charter of the United Nations and pursuant to the ICTY Statute. The aim of this tribunal is to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1 January 1991.<sup>1</sup> Its competence includes prosecuting persons for violating the laws or customs of war,<sup>2</sup> crimes against humanity,<sup>3</sup> and other crimes<sup>4</sup> occurring within its jurisdiction.

A number of indictments have since been brought before this tribunal, which has both an original and appellate jurisdiction. On 12 June 2002, the ICTY Appeals Chamber rendered its judgment in *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, more commonly known as *Kunarac et al.*<sup>5</sup> This case has carved a niche for itself because it clarified the definition of several crimes under the ICTY's jurisdiction, particularly the status of rape as a crime under customary international law.<sup>6</sup>

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\* Appeals Chamber, 12 June 2002, [2002] Case Nos IT-96-23 and 23/1-A.

<sup>1</sup> Security Council resolution 827 was adopted on 25 May 1993; see ICTY Statute Articles 1 and 8.

<sup>2</sup> ICTY Statute Article 3.

<sup>3</sup> Ibid Article 5.

<sup>4</sup> For example, the ICTY Statute provides for grave breaches of the Geneva Conventions under Article 2 and genocide under Article 4.

<sup>5</sup> See *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23-T and IT-96-23/1-T.

<sup>6</sup> ICTY Press Release No 679, The Hague, 12 June 2002 (CVO/PIS/679-E) at <[www.un.org/icty/pressreal/p679-e.htm](http://www.un.org/icty/pressreal/p679-e.htm)> (visited July 2002).

## II. BACKGROUND

Between April 1992 and February 1993, Bosnian Serbs (Christians) and Bosnian Muslims in the municipality of Foca<sup>7</sup> in the Former Yugoslavia were engaged in armed conflict. The conflict involved a systematic attack by the Bosnian Serb Army and paramilitary groups on the non-Serb civilian population.<sup>8</sup> Non-Serb civilians were killed, raped or otherwise abused as a direct result of the armed conflict.<sup>9</sup> The campaign was allegedly successful in its aim of “cleansing” or ridding the area of non-Serbs.<sup>10</sup> Muslim women were specifically targeted and detained in public places such as school halls where they were mistreated in many ways.<sup>11</sup> For example, women and girls as young as twelve were sexually abused, repeatedly raped, gang raped, enslaved, transferred between soldiers and/or sold.<sup>12</sup> Within this context, it was alleged that Dragoljub Kunarac was the leader of a reconnaissance unit that formed part of the local Foca Tactical Group.<sup>13</sup> Radomir Kovac and Zoran Vukovic were members of the former military unit known as the “Dragan Nikolic unit.”<sup>14</sup> Together, in their capacity as Bosnian Serb soldiers, they actively carried out military tasks during the armed conflict<sup>15</sup> and Bosnian’s occupation of Foca.

## III. THE INDICTMENTS

Kunarac, Kovac and Vukovic were originally named by the ICTY prosecutor in an indictment with five other co-accused persons, which was confirmed on 26 June 1996. They were charged with crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws or customs of war committed in the region of Foca when occupied by Serbian forces.<sup>16</sup> On 4 March 1998, Kunarac

<sup>7</sup> Today, Foca is known as Srbinje, situated in Republika Srpska.

<sup>8</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic Case no IT-96-23 and 23/1-A, paras 2-3.

<sup>9</sup> Ibid para 3.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> See for example ibid paras 3, 6, 12 and 21.

<sup>13</sup> Ibid para 5.

<sup>14</sup> Ibid paras 11 and 19.

<sup>15</sup> Ibid para 2.

<sup>16</sup> Schircks, “The Foca Case before the International Criminal Tribunal for the Former Yugoslavia (ICTY): The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic” (2000) at <[www.coeicl.de/dokumente/foca\\_29062000.rtf](http://www.coeicl.de/dokumente/foca_29062000.rtf)> (visited Septem

surrendered himself voluntarily to the ICTY and was transferred into its custody on 5 March 1998.<sup>17</sup> As a result, he was severed from the original list of persons indicted in the First Amended Indictment confirmed on 19 August 1998.<sup>18</sup> On the other hand, Kovac was detained by the Stabilisation Force (SFOR)<sup>19</sup> on 2 August 1999 and transferred into the ICTY's custody where he was joined in the Second Amended Indictment confirmed on 3 September 1999. Vukovic was also detained by the SFOR on 23 December 1998 and subsequently transferred into the same custody on 24 December 1999.

A third revised indictment was filed on 21 February 2000,<sup>20</sup> all concerning breaches of the ICTY Statute and the individual criminal responsibility of those charged. Kunarac was charged under Article 7(1) and was also charged with superior responsibility under Article 7(3). The alleged crimes were crimes against humanity pursuant to Article 5 involving torture, rape and enslavement. In addition, he was charged with violations of the laws or customs of war under Article 3 for torture, rape and outrages upon personal dignity. Kovac was charged with violations of the laws or customs of war under Article 3 for rape and outrages upon personal dignity, and with crimes against humanity under Article 5 for rape and enslavement. Vukovic was charged with violations of the laws or customs of war under Articles 3 and 5 for torture and rape.

#### IV. THE TRIAL

Kunarac, Kovac and Vukovic were tried before Mumba (P), Hunt and Pocar JJ in Trial Chamber II of the ICTY in *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* IT-96-23-T and IT-96-23/1-T ("*Kunarac et al-T*"). The tribunal rendered its judgment on 22 February 2001, which held all three defendants individually criminally

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ber 2002); "The ICTY at a glance – Case Information Sheets" at <[www.un.org/icty/glance/index.htm](http://www.un.org/icty/glance/index.htm)> (visited September 2002).

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> The SFOR comprised mostly of NATO troops who were deployed to enforce some parts of the 1996 Dayton Accords that ended the Bosnian war: *Stammtisch Beau Fleuve* (SBF), "Glossary" at <[www.plexoft.com/SBF/S05.html](http://www.plexoft.com/SBF/S05.html)> (visited November 2002).

<sup>20</sup> "The ICTY at a glance – Case Information Sheets" at <[www.un.org/icty/glance/index.htm](http://www.un.org/icty/glance/index.htm)> (visited September 2002).

responsible for the alleged crimes.<sup>21</sup> Kunarac was found guilty on eleven counts,<sup>22</sup> and both Kovacur<sup>23</sup> and Vukovic on four counts each,<sup>24</sup> for crimes under Articles 3 and 5. They were respectively sentenced to 28 years, 20 years and 12 years imprisonment.<sup>25</sup>

## V. THE APPEAL

The ICTY Appeals Chamber has the power to affirm, reverse or revise decisions of the Trial Chambers.<sup>26</sup> The Appeals Chamber hears appeals only where there has been an error of substantive or procedural law invalidating a decision<sup>27</sup> or an error of fact that has occasioned a miscarriage of justice,<sup>28</sup> with the exception of legal issues of general significance to the ICTY's jurisprudence.<sup>29</sup> The Appeals Chamber exercises an inherent discretion in determining which submissions merit a "reasoned opinion" in writing<sup>30</sup> for the purposes of an appeal. Kunarac, Kovac and Vukovic filed their respective notices of appeal on

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<sup>21</sup> ICTY Statute Article 7(1) provides: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime."

<sup>22</sup> Indictment IT-96-23: Count 1 (crime against humanity (torture)), Count 2 (crime against humanity (rape)), Count 3 (violation of the laws or customs of war (torture)), Count 4 (violation of the laws or customs of war (rape)), Count 9 (crime against humanity (rape)), Count 10 (violation of the laws or customs of war (rape)), Count 11 (violation of the laws or customs of war (torture)), Count 12 (violation of the laws or customs of war (rape)), Count 18 (crime against humanity (enslavement)), Count 19 (crime against humanity (rape)) and Count 20 (violation of the laws or customs of war (rape)).

<sup>23</sup> Count 22 (crime against humanity (enslavement)), Count 23 (crime against humanity (rape)), Count 24 (violation of the laws or customs of war (rape)) and Count 25 (violation of the laws or customs of war (outrages upon personal dignity)).

<sup>24</sup> Count 33 (crime against humanity (torture)), Count 34 (crime against humanity (rape)), Count 35 (violation of the laws or customs of war (torture)) and Count 36 (violation of the laws or customs of war (rape)).

<sup>25</sup> *Prosecutor v Dragoljub Kunarac Radomir Kovac and Zoran Vukovic*, Case No IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001 at paras 885, 887 and 890.

<sup>26</sup> ICTY Statute Article 25(2).

<sup>27</sup> *Ibid* Article 25 (1)(a).

<sup>28</sup> *Ibid* Article 25(1)(b).

<sup>29</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case no IT-96-23 & 23/1-A at para 36; *Prosecutor v Zoran Kupreskic et al*, Case No IT-95-16-A, Judgment, 23 October 2001 at para 22.

<sup>30</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case no IT-96-23 & 23/1-A at para 47.

6 March 2001, and the appeal commenced on 20 March 2001. They appealed on five common grounds alleging errors with respect to the following findings of the Trial Chamber:<sup>31</sup>

1. Article 3 applied to their conduct;
2. Article 5 applied to their conduct;
3. the Trial Chamber's definitions of the offences charged;
4. the Trial Chamber's approach to cumulative charging; and
5. their cumulative convictions.

They also appealed on individual grounds. Kunarac appealed against his convictions and sentences on five grounds. Kovac appealed against his conviction on eight grounds and his sentence on five grounds. Vukovic appealed against his convictions on four grounds and his sentence on five grounds. The Appeal hearing took place in the ICTY Appeals Chamber from 4-6 December 2001 before Jorda (P), Shahabuddeen, Schomburg, Guney and Meron JJ.

## **VI. GROUNDS OF APPEAL**

### ***(a) Common Ground of Appeal concerning Article 3***

The appellants argued the following:

1. the Trial Chamber erred by preventing them from disproving armed conflict existed in two municipalities bordering the municipality of Foca (Gacko and Kalinovik);
2. there was no sufficient connection between their acts and the armed conflict; and
3. Article 3 concerned the rights of warring parties, not private individuals.

#### **(i) The Existence of Armed Conflict and its Nexus**

The Appeals Chamber confirmed that armed conflict was not limited to areas of actual military combat but existed across the entire territory under the control of the warring parties<sup>32</sup> and as such it was not necessary to prove armed conflict existed in each and every inch of the

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<sup>31</sup> Ibid para 24.

<sup>32</sup> Ibid para 64.

general area.<sup>33</sup> It also affirmed that there was ample evidence demonstrating an armed conflict existed in the municipalities of Gacko and Kalinovik at the relevant time.<sup>34</sup>

The Appeals Chamber affirmed that Article 3's applicability rests on two general conditions: (1) there must be an armed conflict; and (2) the acts of the accused must be closely related to the armed conflict.<sup>35</sup> Although temporal and geographical remoteness from the armed conflict did not negate the nexus between the armed conflict and those acts,<sup>36</sup> the existence of an armed conflict must have played a major part in the accused's ability, decision, manner or purpose for committing the crime.<sup>37</sup> The Chamber also found that the appellants, acting to further or under the guise of the armed conflict, had sufficiently shown that their acts were closely related to the armed conflict.<sup>38</sup>

As a result, the Appeals Chamber rejected the appellants' submission that the laws of war only prohibited those acts specific to an actual wartime situation.<sup>39</sup> It held that the laws of war were not limited to acts committed in actual combat<sup>40</sup> and did not displace normal peacetime laws. Instead, they added extra elements for the protection of victims in a wartime situation.<sup>41</sup>

**(ii) ICTY Statute Article 3 and Geneva Conventions Common Article 3**

Under this heading, the Appeals Chamber dealt with the material scope of these two provisions.

The Appeals Chamber rejected the appellants' submission that Article 3 of the ICTY Statute was restricted to the protection of property, the

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid para 55; *Prosecutor v Dusko Tadic*, Case no IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 at paras 67 and 70.

<sup>36</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* Case no IT-96-23 & 23/1-A, para 57.

<sup>37</sup> Ibid para 58.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid para 60.

<sup>40</sup> Ibid para 65.

<sup>41</sup> Ibid para 60.

proper use of permitted weapons and the rights of warring parties as opposed to private individuals.<sup>42</sup> Instead, it was a general residual clause covering all serious violations of international humanitarian law not falling under Articles 2, 4 or 5 of the ICTY Statute.<sup>43</sup>

The Appeals Chamber confirmed that prosecution under Article 3 of the ICTY Statute had four conditions:<sup>44</sup>

1. the violation must constitute an infringement of a rule of international humanitarian law;
2. the rule must be customary in nature or if belonging to a treaty the required conditions must be met;
3. the violation must be serious, constituting a breach of a rule protecting important values resulting in grave consequences for the victim; and
4. the violation must entail under customary or conventional law the individual responsibility of the person breaching the rule.

The Appeals Chamber also held that serious violations of Common Article 3 of the 1949 Geneva Conventions on customary international law<sup>45</sup> satisfied the conditions to prosecute under Article 3 of the ICTY Statute.<sup>46</sup> It rejected all three aspects of the appellants' submissions relating to Article 3 of the ICTY Statute and instead upheld the Trial Chamber's findings.

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<sup>42</sup> Ibid para 69.

<sup>43</sup> Ibid para 68.

<sup>44</sup> Ibid para 66 as authorised by the Prosecutor v Dusko Tadic, Case no IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 at para 94 and Prosecutor v Zlatko Aleksovski, Case no IT-95-14/1-A, Judgment, 24 March 2000 at para 20.

<sup>45</sup> Ibid para 68 as authorised by Prosecutor v Dusko Tadic, Case no IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 at para 98; and Prosecutor v Dragoljub Kunarac Radomir Kovac and Zoran Vukovic, Case no IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001 at para 408.

<sup>46</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at para 68.

**(b) Common Ground of Appeal – Article 5 of the ICTY Statute**

The appellants argued the following:

1. Their acts were not sufficiently connected to the armed conflict pursuant to Article 5 on a substantive nexus between the acts of the accused and the armed conflict, and for these to coincide temporally.
2. The Trial Chamber erred in establishing that there was an attack on the non-Serb population of Foca, as opposed to a purely military confrontation between two groups.
3. The attacks were “collateral damage” resulting from a legitimate military operation and the victims did not constitute a “population” pursuant to Article 5.
4. There was insufficient evidence to conclude that the attacks were widespread or systematic. In any case, the attack must be widespread *and* systematic, and this had not occurred in relation to their alleged acts.
5. The Trial Chamber erred in concluding that their acts were linked to the attack as they were purely of a military sort. The appellants also argued that to show a “nexus”, it required a plan or policy to commit such crimes, knowledge of the plan or policy, and the demonstrated willingness of the accused to participate in the plan.

**(i) Nexus with the Armed Conflict under Article 5**

The Appeals Chamber upheld, as a jurisdictional prerequisite, that a crime under Article 5 must be “committed in armed conflict” to be a crime against humanity.<sup>47</sup> This could be satisfied by proving that an armed conflict existed and the accused’s acts were linked to the armed conflict, not only in an objective sense but also geographically and temporally.<sup>48</sup> The Trial Chamber was therefore right to find that an armed conflict existed at the time and place relevant to the indictments, which led to this part of the common appeal being dismissed.

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<sup>47</sup> Ibid para 83.

<sup>48</sup> Ibid paras 82-83.



(ii) Legal Requirement of an 'Attack'

To be a crime against humanity, the accused must have acted as part of a widespread or systematic attack against a civilian population.<sup>49</sup> On this point, the Appeals Chamber affirmed the Trial Chamber's interpretation<sup>50</sup> that this required five elements to exist:

1. there must be an attack;<sup>51</sup>
2. the acts of the accused must be part of the attack;<sup>52</sup>
3. the attack must be directed against a civilian population;<sup>53</sup>
4. the attack must be widespread or systematic;<sup>54</sup> and
5. the accused must know that his or her acts constituted part of, and fitted into, a pattern of widespread or systematic crimes directed against a civilian population.<sup>55</sup>

In addition, the Appeals Chamber outlined that it only had jurisdiction over acts that were committed "in armed conflict" under Article 5 of the ICTY Statute.<sup>56</sup> As a consequence, this distinguished the ICTY's jurisdiction under this provision from customary international law.<sup>57</sup>

In establishing whether there was an armed attack on the civilian population, evidence of atrocities committed by the other side against its own civilian population was irrelevant,<sup>58</sup> unless it served to prove or

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<sup>49</sup> Ibid para 85.

<sup>50</sup> Prosecutor v Dragoljub Kunarac Radomir Kovac and Zoran Vukovic, Case no IT - 96-23-T & IT-96-23/1-T, Judgment, 22 February 2001 at para 410.

<sup>51</sup> Prosecutor v Dusko Tadic, Case no IT-94-1-A, Judgment, 15 July 1999 at paras 248 and 251.

<sup>52</sup> Ibid para 248.

<sup>53</sup> Prosecutor v Dusko Tadic, Case no IT -94-1-T, Judgment, 7 May 1997 at paras 635-644 and ICTY Statute Article 5.

<sup>54</sup> Prosecutor v Dusko Tadic, Case no IT-94-1-A, Judgment, 15 July 1999 at para 248; Prosecutor v Mile Mrksic et al, Case no IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996 at para 30.

<sup>55</sup> Prosecutor v Dusko Tadic, Case no IT-94-1-A, Judgment, 15 July 1999 at para 248; Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at para 85.

<sup>56</sup> Ibid para 86.

<sup>57</sup> Under customary international law the attack could precede, outlast or continue during the armed conflict, but it need not be a part of it: *ibid* para 86; Prosecutor v Dusko Tadic, Case no IT-94-1-A, Judgment, 15 July 1999 at para 251.

<sup>58</sup> *Ibid* para 87.

disprove the allegations made in the indictment.<sup>59</sup> The Appeals Chamber therefore held that all the Trial Chamber's legal and factual findings in relation to the armed attack were unimpeachable.<sup>60</sup>

**(iii) The Attack must be against a Civilian Population**

The Appeals Chamber confirmed that the term "civilian population" did not encompass the entire population of the place where the attack had taken place. Instead, it was enough to show that a sufficient number of individuals had been targeted in order to satisfy the Tribunal that the attack was directed against a civilian population as opposed to a limited, random number of individuals.<sup>61</sup> This required the civilian population to be the primary rather than the incidental targets of the attack.<sup>62</sup> The Appeals Chamber therefore upheld the Trial Chamber's finding that the armed attack had been directed against Foca's non-Serb civilian population.<sup>63</sup>

**(iv) The Attack must be Widespread or Systematic**

The Appeals Chamber reiterated that Article 5 of the ICTY Statute would be satisfied if it were shown that the attack was either "widespread" or "systematic".<sup>64</sup> It confirmed a two-step subjective test to establish this element, namely, (1) the population, the object of the attack, must be identified; and (2) it must be ascertained whether the attack was either widespread or systematic in light of the means, methods, resources and result of the attack on the population.<sup>65</sup> Only the attack, not the individual acts of the accused, need be widespread or systematic.<sup>66</sup> As a result, the Appeals Chamber was satisfied that the Trial Chamber did not err in concluding that the armed attack against Foca's non-Serb population was systematic.<sup>67</sup>

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<sup>59</sup> Ibid para 88; See also *Prosecutor v Zoran Kupreskic et al*, Case no IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, 17 February 1999.

<sup>60</sup> Ibid para 89.

<sup>61</sup> Ibid para 90.

<sup>62</sup> Ibid para 92.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid para 93.

<sup>65</sup> Ibid para 95.

<sup>66</sup> Ibid para 96.

<sup>67</sup> Ibid para 97.

(v) **Requirement of a Policy or Plan and Nexus with the Attack**

The Appeals Chamber confirmed that neither the ICTY Statute nor customary international law required the attacks or the acts of the accused to be supported by any form of “policy” or “plan”.<sup>68</sup> Although the existence of a policy or plan was held to be evidentially relevant, it was not a legal element that had to be satisfied.<sup>69</sup>

The Appeals Chamber specified that the required nexus between the acts of the accused and the attack consisted of twin elements: (1) the commission of an act whose nature or consequence was objectively part of the attack, and (2) the accused’s knowledge that an attack on the civilian population existed and his/her act was part of this.<sup>70</sup> In other words, the accused’s acts must not be isolated acts.<sup>71</sup> So long as there was a sufficient connection, the acts could be committed before, after or away from the main attack to form part of the attack against the civilian population.<sup>72</sup> As a result, the Appeals Chamber found that the Trial Chamber had correctly identified and applied the proper test to show the required nexus<sup>73</sup> between the acts of the accused and the systematic attack on Foca’s non-Serb population.

(vi) ***Mens Rea* for Crimes against Humanity**

The Appeals Chamber affirmed the Trial Chamber had correctly held that the accused must: (1) intend to commit the underlying offence(s), (2) know that there was an attack on the civilian population (although knowledge of the details of the attack was unnecessary), and (3) know that his or her acts comprised or risked comprising part of the attack.<sup>74</sup> The individual motives of the accused were irrelevant, and could be purely personal and not share the purpose of the attack.<sup>75</sup> The Appeals Chamber held that it was the attack, not the acts of the accused, which

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<sup>68</sup> Ibid para 98.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid para 99.

<sup>71</sup> An isolated attack is so far removed from the attack where, considering the context and circumstances in which it was committed, it could not reasonably be said to have been part of the attack: Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No IT-96-23 & 23/1-A at para 100.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid para 101.

<sup>74</sup> Ibid para 102.

<sup>75</sup> Ibid para 103.

must be directed against the target population, and the accused need only know that his or her acts were part of this.<sup>76</sup> Consequently, the Appeals Chamber rejected the appellants' common grounds of appeal relating to Article 5 of the ICTY Statute.

***(c) Grounds of Appeal and the Definition of 'Offences'***

***(i) Definition of Enslavement***

On appeal, Kunarac and Kovac submitted that the Trial Chamber's definition of the crime of enslavement was too broad and did not clearly identify the elements of the crime. They submitted alternative elements<sup>77</sup> and argued that by defining enslavement as "the exercise of any or all of the powers of ownership", the Trial Chamber committed an error of law thereby rendering its convictions invalid.<sup>78</sup> The Appeals Chamber rejected this, finding that the Trial Chamber's definition of the crime of enslavement was not too broad and reflected customary international law at the time the crimes were committed.<sup>79</sup>

Notably, the Appeals Chamber affirmed that whether a particular act was a form of enslavement depended upon the presence of the factors or indicia of enslavement.<sup>80</sup> It rejected the appellants' contentions that lack of resistance or the absence of a clear and constant lack of consent during the entire time of detention, could be interpreted as a sign of

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<sup>76</sup> Ibid.

<sup>77</sup> The alternative elements they submitted for the crime of enslavement were: (i) the accused must have treated the victim as his/her "own ownership"; (ii) a constant and clear lack of consent of the victims during the entire time of the detention or transfer; (iii) enslavement of the victim for an indefinite or at least prolonged period of time; and (iv) the required mens rea is the intent to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts: Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at paras 107-110.

<sup>78</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at para 111.

<sup>79</sup> Ibid para 124.

<sup>80</sup> These include but are not limited to: control of someone's movement; control of physical environment; psychological control; measures taken to prevent or deter escape; force; threat of force/coercion; duration; assertion of exclusivity; subjection to cruel treatment and abuse; control of sexuality; and forced labour: Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at para 119.

consent.<sup>81</sup> It also affirmed that duration and consent did not constitute elements of the crime of enslavement.<sup>82</sup> Finally, it concurred with the Trial Chamber's finding that the required *mens rea* consisted of the intentional exercise of a power attaching to the right of ownership.<sup>83</sup>

## (ii) Definition of Rape

The appellants challenged the Trial Chamber's definition of rape and argued that this crime required two elements in addition to penetration. They were: (1) force or the threat of force and (2) the victim's "continuous" or "genuine" resistance.<sup>84</sup> On these points, the Appeals Chamber concurred with the Trial Chamber and affirmed that force or threat of force was not an element of the crime of rape, although it could constitute evidence of non-consent.<sup>85</sup> Further, it agreed with the trial finding that on the facts of the case, the detentions amounted to circumstances that were so coercive as to negate any possibility of consent.<sup>86</sup> These grounds of appeal were therefore dismissed.

## (iii) Definition of Torture

Although the appellants, Kunarac and Vukovic, did not challenge the Trial Chamber's definition of torture, they asserted that the prosecution had not proven beyond reasonable doubt that the three constitutive elements of this crime existed.<sup>87</sup> Responding, the Appeals Chamber affirmed that some acts established *per se* the suffering of those who were tortured, and held that rape was such an act.<sup>88</sup> It found that rape necessarily implied "severe pain and suffering". The element of force or the threat of force in rape would be deemed proven once the rape

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<sup>81</sup> Ibid para 120.

<sup>82</sup> Ibid paras 120-121.

<sup>83</sup> Ibid para 122.

<sup>84</sup> Ibid para 125.

<sup>85</sup> Ibid para 129.

<sup>86</sup> Ibid paras 132-133.

<sup>87</sup> Namely, (i) the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) an intentional act or omission; and (iii) the acts or omission must aim at obtaining information/a confession/punishment/intimidation/coercion of the victim or a third person, or discrimination on any ground against the victim or a third person: Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic Case, no IT-96-23 & 23/1-A at para 142.

<sup>88</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at para 150.

itself was proven.<sup>89</sup> To satisfy the element concerning the victim's "continuous" or "genuine" resistance in rape, the test was whether the accused intended to act in a way which, in the normal course of events, would cause the victim severe physical or mental pain or suffering.<sup>90</sup> The Appeals Chamber therefore affirmed the legal conclusions and findings of the Trial Chamber and rejected this ground of appeal.

**(iv) Definition of Outrages upon Personal Dignity (Kovac)**

On appeal, Kovac argued that the Trial Chamber should have defined the crime of "outrages upon personal dignity" as requiring a specific intention to humiliate or degrade the victim.<sup>91</sup> He asserted that the objective of his act was of an exclusive sexual nature, and that the Trial Chamber had erred by not requiring that he had acted with the intent to humiliate his victims beyond reasonable doubt.<sup>92</sup>

The Appeals Chamber rejected this, stating that the Trial Chamber need not define the particular acts constituting the crime. The Trial Chamber had correctly defined the objective threshold.<sup>93</sup> The *mens rea* required only knowledge of the "possible" consequences of the act alleged.<sup>94</sup> An accused was therefore merely required to know this, or that his/her act or omission *could* (not *would*) cause serious humiliation and degradation, and amount to an outrage upon personal dignity.<sup>95</sup> The Appeals Chamber found that it was highly *improbable* that Kovac was not, at the very least, aware that his acts could have such effect.<sup>96</sup>

**(d) Cumulative Charging**

The Appellants argued that their cumulative charge was inappropriate.

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<sup>89</sup> Ibid para 151.

<sup>90</sup> Ibid para 153.

<sup>91</sup> Ibid para 157-158.

<sup>92</sup> Ibid para 158.

<sup>93</sup> Namely, 'any act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity': Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic Case no IT-96-23 & 23/1-A at para 163.

<sup>94</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic Case no IT-96-23 & 23/1-A, para 165.

<sup>95</sup> Ibid para 164-165.

<sup>96</sup> Ibid para 166.

The Appeals Chamber disagreed and held that it did not have to review this because cumulative charging was “settled jurisprudence.”<sup>97</sup>

**(e) Cumulative Convictions**

The Appellants argued that the Trial Chamber erred in convicting them for the same conduct under different statutory provisions. The Appeals Chamber explained that the ICTY Statute did not have a scale of penalties for its crimes or indications on their relative gravity.<sup>98</sup> As such, the Appeals Chamber affirmed that the Trial Chamber should apply the *Celebici*<sup>99</sup>/*Blockburger*<sup>100</sup> test as guided by the Statute.<sup>101</sup>

**(i) The Celebici/Blockburger Test**

Under this test, multiple convictions were permitted only where two elements existed: (1) the same act clearly violated two distinct provisions of the ICTY Statute; and (2) each provision required proof of an additional fact that the others did not.<sup>102</sup> Whether the same conduct violated two distinct statutory provisions was a question of law taking into account all the circumstances of the case.<sup>103</sup>

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<sup>97</sup> Ibid para 167.

<sup>98</sup> Ibid para 171.

<sup>99</sup> “Multiple convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct if it requires proof of a fact not required by the other. Where this test is not met, the Chamber must decide on the basis of the principle that the conviction under the more specific provision should be upheld”- the “Celebici test”: Prosecutor v Zejnir Delalic et al, Case no IT-96-21-A, Judgment, 20 February 2001 at paras 412-413.

<sup>100</sup> The Celebici approach stemmed from the Blockburger decision of the Supreme Court of the United States, in which it was stated, “The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one is whether each provision requires proof of an additional fact which the other does not”: Blockburger v United States (1931) 284 United States 299, 304.

<sup>101</sup> Ibid para 172.

<sup>102</sup> Ibid para 173.

<sup>103</sup> Ibid para 173-174.

**(ii) Violations of the laws or customs of war and crimes against humanity**

As stated above, Article 3 of the ICTY Statute dealt with violations of the laws or customs of war and Article 5 with crimes against humanity. The Appeals Chamber affirmed that convictions for the same conduct under Articles 3 and 5 were permissible based on the *Celebici* test, which was settled jurisprudence, and the intention of the law makers.<sup>104</sup>

**(iii) Rape and Torture**

Article 5(g) of the ICTY Statute dealt with rape and Article 5(f) dealt with torture. The Appeals Chamber affirmed that both crimes each contained one materially distinct element not contained in the other,<sup>105</sup> making convictions under both crimes permissible.<sup>106</sup> For rape to be categorised as torture, the elements of both rape and torture must be present.<sup>107</sup> The Appeals Chamber found that the physical pain, fear, anguish, uncertainty and humiliation suffered repeatedly by the Appellants' victims had elevated their acts to crimes of torture.<sup>108</sup>

**(iv) Rape and Enslavement (Kunarac and Kovac)**

As stated above, Article 5(g) of the ICTY Statute dealt with rape and Article 5(c) with enslavement. Kunarac and Kovac had argued that the Trial Chamber had erred by permitting these two crimes to be charged cumulatively. The Appeals Chamber rejected this and stated that enslavement, even if based on exploitation, was distinct from rape.<sup>109</sup>

**(v) Torture and Outrages upon Personal Dignity**

Article 3(1)(a) of the ICTY Statute dealt with torture while Article 3(1)(c) dealt with outrages upon personal dignity, in particular humiliating and degrading treatment. The Appellant argued that their conduct could not constitute both rape and torture simultaneously,

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<sup>104</sup> Ibid para 177-178.

<sup>105</sup> Namely, "penetration" (rape) and "prohibited purpose" (torture): Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at para 180.

<sup>106</sup> Ibid para 179.

<sup>107</sup> Ibid para 182.

<sup>108</sup> Ibid para 185.

<sup>109</sup> Ibid para 186.



stating that the one act excluded the other.<sup>110</sup> The Appeals Chamber held that rape constituted a recognised war crime under customary international law and punishable under Article 3.<sup>111</sup> As stated above, a conviction for rape could be cumulated with a conviction for torture based on the same conduct, since the two materially distinct elements of “penetration” (rape) and “prohibited purpose” (torture) existed.

**(vi) Rape and Outrages upon Personal Dignity (Kovac)**

The ICTY Statute in Article 3 dealt with rape and outrages against personal dignity. Kovac argued that the Trial Chamber could not convict on both counts based on the same conduct. The Appeals Chamber rejected this and affirmed that the Trial Chamber did not base the conviction on the same conduct.<sup>112</sup>

**(f) Individual Grounds of Appeal**

**(i) Errors of Fact (Kunarac)**

Kunarac alleged that the Trial Chamber had committed errors of fact occasioning a miscarriage of justice and he appealed his conviction on five grounds:<sup>113</sup>

1. rejection of his alibi defence;
2. evaluation and findings;
3. findings regarding counts 9 and 10 of his indictments;
4. evaluation of the evidence and reliance on the testimony of certain witnesses regarding counts 11 and 12 of his indictments;  
and
5. findings regarding counts 18 to 20 of his indictments.

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<sup>110</sup> Ibid para 188.

<sup>111</sup> This was based on the universal criminalisation of rape in domestic jurisdictions, explicit prohibitions contained in Geneva Convention IV, Additional Protocols I-II and the recognition of the seriousness of the offence in the jurisprudence of international bodies, including the European Commission on Human Rights and the Inter-American Commission on Human Rights: Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at para 195.

<sup>112</sup> Ibid para 197.

<sup>113</sup> Ibid para 26.

The Appeals Chamber dismissed all of the above and held that there was no specific reason to disturb the Trial Chamber's conclusions.<sup>114</sup>

**(ii) Errors of Fact (Kovac)**

Kovac appealed his convictions on eight grounds alleging errors of fact by the Trial Chamber in relation to the following:<sup>115</sup>

1. reliance on certain identification evidence;
2. its findings relating to the conditions in Kovac's apartment;
3. its findings relating to offences committed against witnesses FWS-75 and AS;
4. its findings relating to outrages upon personal dignity;
5. its finding that Kovac sold witnesses FWS-87 and AS;
6. its findings relating to the use of force when committing rape; and
7. Kovac's cumulative convictions for both rape and outrages upon personal dignity under Article 3 of the ICTY Statute.

The Appeals Chamber rejected those grounds of appeal because errors of fact leading to miscarriage of justice could not be found.<sup>116</sup>

**(iii) Errors of Fact (Vukovic)**

Vukovic appealed his convictions on four grounds alleging errors of fact by the Trial Chamber in relation to the following:<sup>117</sup>

1. alleged omissions in Indictment IT-96-23/1;
2. the acceptance of witness FWS-50's unreliable evidence that was the basis for his conviction concerning her rape and torture;
3. the acceptance of certain identification evidence; and
4. the rejection of his exculpatory evidence concerning the rape of witness FWS-50.

The Appeals Chamber rejected all of Vukovic's submissions and held that there was no reason to disturb the Trial Chamber's findings. Accordingly those grounds of appeal also failed.

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<sup>114</sup> Ibid paras 199-256.

<sup>115</sup> Ibid para 28.

<sup>116</sup> Ibid paras 257-290.

<sup>117</sup> Ibid para 30.

**(g) Grounds of Appeal relating to Sentencing**

Kunarac appealed his sentence on five grounds, alleging that the Trial Chamber:<sup>118</sup>

1. should have, in accordance with the ICTY Rules of Procedure and Evidence, pronounced an individual sentence for each offence for which he was convicted;
2. erred by imposing a sentence that exceeded the maximum prescribed by sentencing practices in the Former Yugoslavia;
3. failed to properly assess various aggravating factors;
4. erred in overlooking two mitigating factors; and
5. was ambiguous in its application of Rule 101<sup>119</sup> on credit for time served.

Similarly, Kovac appealed his sentence on five grounds alleging that the Trial Chamber had:<sup>120</sup>

1. prejudiced his rights through its retrospective application of amended Rule 101 in relation to the handing down of a single sentence and its severity;
2. erred in disregarding the sentencing practice in the Former Yugoslavia in accordance with Article 24(1)<sup>121</sup> of the ICTY Statute;
3. failed to properly assess various aggravating factors;
4. erred in finding that there were no mitigating factors; and
5. been unclear with respect to credit for time served.

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<sup>118</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at para 336.

<sup>119</sup> The ICTY Rules of Procedure and Evidence Rule 101(C) states that "[C]redit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal".

<sup>120</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at para 367.

<sup>121</sup> "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the Former Yugoslavia": ICTY Statute Article 24(1).

Vukovic also appealed his sentence on five grounds alleging that the Trial Chamber had:<sup>122</sup>

1. erred in imposing a single sentence for all his convictions;
2. been obligated by Article 24 (1) of the ICTY Statute to have recourse to the sentencing practices of the Former Yugoslavia relating to rape convictions;
3. misapplied aggravating factors in relation to witness FWS-50;
4. erred by ignoring Vukovic's help given to Muslim families and his family situation as mitigating factors; and
5. miscalculated his credit for time served.

**(i) Single Sentence (Kunarac, Kovac, Vukovic)**

Each appellant opposed the single sentence for multiple convictions imposed on them at trial. The Appeals Chamber held that under *Celebici*,<sup>123</sup> the main consideration was that the sentence should reflect the totality of the accused's criminal conduct.<sup>124</sup> It held that neither Rule 87(C)<sup>125</sup> nor Rule 101(C) of the ICTY Rules of Procedure and Evidence (18<sup>th</sup> edition) prohibited the Trial Chamber from imposing a single sentence. It further held that single sentences were not unknown in the practice of the ICTY and the International Criminal Tribunal for Rwanda ("ICTR").<sup>126</sup> As a result, this part of the appeal was dismissed.

**(ii) Sentencing Practice in the Courts of the Former Yugoslavia**

All three appellants submitted that the Trial Chamber was obliged to comply with Article 24(1)<sup>127</sup> of the ICTY Statute and Rule 101(B)(iii)

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<sup>122</sup> Ibid para 395.

<sup>123</sup> Prosecutor v Zejnil Delalic et al, Case no IT-96-21-A, Judgment, 20 February 2001 at para 771.

<sup>124</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic Case no IT-96-23 & 23/1-A at para 343.

<sup>125</sup> ICTY Rules of Procedure and Evidence Rule 87(C) states that if "the Trial Chamber finds the accused guilty on one or more charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."

<sup>126</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at para 344.

<sup>127</sup> "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In

of the ICTY Rules of Procedure and Evidence.<sup>128</sup> As a result, their sentences could not exceed the general maximum under the sentencing practices of the Former Yugoslavia, namely, 20 years imprisonment for war crimes.<sup>129</sup> The Appeals Chamber held that the Trial Chamber must “have taken [this] into account”,<sup>130</sup> although it was not bound by those sentencing practices.<sup>131</sup> Further, the Trial Chamber had followed all the necessary steps because it considered domestic sentencing practices, did not abuse its power, or make errors.<sup>132</sup> Accordingly, this ground of appeal was also dismissed.

### (iii) Aggravating Factors

#### *Vulnerability of the Victims*

Article 24(2) of the ICTY Statute<sup>133</sup> requires the Trial Chamber to consider the gravity of an offence in imposing sentences. Although gravity was not an element of rape, the Appeals Chamber affirmed that it could be taken into consideration during sentencing as a matter of statutory law.<sup>134</sup> The Appeals Chamber found that since the Trial Chamber did not commit an error, it rejected this ground argued by all three appellants.

#### *Contradictory Findings in the Trial Judgment (Kunarac)*

Kunarac argued that the Trial Chamber had reached contradictory findings in regard to his role in the armed conflict. However, the

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determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the Former Yugoslavia”: ICTY Statute Article 24(1).

<sup>128</sup> Rule 101(B) of the ICTY Rules of Procedure and Evidence states: “In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as: (iii) the general practice regarding prison sentences in the courts of the Former Yugoslavia”.

<sup>129</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at paras 345, 375 and 400.

<sup>130</sup> Rules 101(B)(iii) of the ICTY Rules of Procedure and Evidence; Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at para 348.

<sup>131</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A at para 347-349.

<sup>132</sup> Ibid paras 349, 377 and 402.

<sup>133</sup> “In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person”: ICTY Statute Article 24(2).

<sup>134</sup> Ibid para 352.

Appeals Chamber considered that the respective paragraphs in the judgment of the Trial Chamber were not inconsistent but instead had stated clearly that Kunarac was not regarded as a commander when the crimes were committed. The Appeals Chamber therefore dismissed this ground of appeal as without merit.<sup>135</sup>

*The Age of the Victims*

The Appeals Chamber found that the Trial Chamber was right to consider the expert evidence presented on the sentencing practices of the Former Yugoslavia for rape. This showed that the young age of victims of sexual crimes was relevant as aggravating circumstances.<sup>136</sup> Therefore, the Appeals Chamber also dismissed this part of the appeal.

*Enslavement (Kunarac and Kovac)*

The Trial Chamber had found Kunarac guilty of enslavement over a prolonged period (two months) and Kovac guilty of enslavement, rape and outrages upon personal dignity over a prolonged period (one to four months). The Appeals Chamber affirmed the Trial Chamber proper exercise of discretion in finding that the periods of enslavement were long enough to constitute aggravating circumstances when sentencing,<sup>137</sup> namely, the longer the enslavement, the more serious the offence.<sup>138</sup> Since duration should be a legitimate aggravating factor the Appeals Chamber dismissed this ground of appeal.

*Discriminatory Intent (Kunarac)*

The Appeals Chamber recalled *Tadic's* case<sup>139</sup> when affirming "discriminatory intent" as a legal element for an offence under Article 5(h) of the ICTY Statute, but this did not apply to other offences under Article 5.<sup>140</sup> Since it held that discriminatory intent could constitute an aggravating circumstance for sentencing purposes, it dismissed this ground of appeal by Kunarac.

*Retribution (Kovac)*

The Appeals Chamber held that the case law of the ICTY and the ICTR

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<sup>135</sup> Ibid para 353.

<sup>136</sup> Ibid paras 354-355.

<sup>137</sup> Ibid paras 356, 382.

<sup>138</sup> Ibid para 356.

<sup>139</sup> Prosecutor v Dusko Tadic, Case no IT-94-I-A, Judgment, 15 July 1999 para 305.

<sup>140</sup> Ibid para 357.

was consistent in considering “retribution” as an aggravating factor on the basis of punishment for specific criminal conduct.<sup>141</sup> Consequently, this ground of appeal by Kovac was dismissed.

**(iv) Mitigating Factors**

The appellant, Kunarac, claimed on appeal that since no witnesses suffered any severe consequences at his hands and since he was a father to three young children, they should have been considered as mitigating factors during his sentencing at the trial. The Appeals Chamber held that the inherent gravity of the particularly serious offences of which Kunarac was convicted demanded severe punishment and could not be mitigated by claims that they produced “no serious consequences” for his victims.<sup>142</sup> This ground of appeal was therefore dismissed.

However, the Appeals Chamber held that on the bases of Article 24(2) of the ICTY Statute, existing case law, and the practice of the courts of the Former Yugoslavia, the Appellant’s family concerns should have been considered as a mitigating factor.<sup>143</sup> Thus, this ground of appeal was partly successful. Nevertheless, having regard to the number and severity of the offences, the Appeals Chamber upheld the sentence imposed by the Trial Chamber.<sup>144</sup>

The appellant, Kovac, claimed that the Trial Chamber should have considered the following mitigating factors during his sentencing: (1) he had no prior intention to harm Muslims nor knowledge that his actions formed part of a widespread systematic attack; (2) his presence when “any harm could be done to any Muslims”; and (3) his relationship with witness FWS-87 and the protection he extended to this witness and witness AS.

On the first claim, the Appeals Chamber found that the elements forming Kovac’s intention and knowledge had been accepted as proven beyond reasonable doubt resulting in his conviction. Therefore, they

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<sup>141</sup> Ibid para 385.

<sup>142</sup> Ibid para 361.

<sup>143</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A para 362.

<sup>144</sup> Ibid.

could not be re-litigated in his sentencing appeal.<sup>145</sup> The second claim was rejected because it was vaguely pleaded and without reasoning. On the third claim, the Appeal Chamber concurred with the trial finding that his relationship with witness FWS-87 was one of "cruel opportunism", constant abuse and domination over a girl who was only 15 years old.<sup>146</sup> As a result, all three grounds were dismissed.

The appellant, Vukovic, made the following claims in his appeal against his sentence, claims he argued should have been mitigating factors: (i) he helped numerous Muslim families and he had shown his lack of knowledge of an attack on the Muslim population; (ii) the lack of serious consequences arising from his acts; (iii) he used no force or compulsion on his victims; and (iv) he was married with two children.

The Appeals Chamber found that since Vukovic's family concerns were relevant as a mitigating factor,<sup>147</sup> this ground of appeal was successful. However, like Kunarac, the Appeals Chamber concurred with the length of imprisonment the Trial Chamber had imposed on him.<sup>148</sup> The Appeals Chamber rejected the other grounds of appeal. Notably, the Chamber found that force or compulsion had been used prior to the rape of FWS-50, leading to her serious mental and physical pain.<sup>149</sup> Further, the Appellant's actions in helping other Muslims in the conflict did not change the fact that he had committed serious crimes against witness FWS-50.<sup>150</sup>

**(v) Credit for Time Served**

The Appeals Chamber found that the Trial Chamber had made an oral statement on 22 February 2001 that time spent in custody would be credited to the sentences of Kunarac, Kovac and Vukovic.<sup>151</sup> It found that the last paragraph of the Trial Judgment should be read together with the oral statement of the Trial Chamber<sup>152</sup> and therefore dismissed this ground of appeal based on the claim that the Trial Chamber did not

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<sup>145</sup> Ibid para 388.

<sup>146</sup> Ibid para 390.

<sup>147</sup> Ibid para 408.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid para 409.

<sup>150</sup> Ibid para 408.

<sup>151</sup> Ibid para 365.

<sup>152</sup> Ibid.



consider credit for time served. In effect, the Appeals Chamber reiterated that each Appellant should receive credit for their time served in detention, calculated from the time they entered into the custody of the tribunal.<sup>153</sup>

## VII. THE APPEALS CHAMBER - CONCLUSIONS

The Appeals Chamber dismissed the Appellants' appeals against their convictions and affirmed the convictions entered by the Trial Chamber. More specifically, for Kunarac, this concerned counts 1-4, 9-12 and 18-20 of Indictment IT-96-23. For Kovac, this concerned counts 22-25 of Indictment IT-96-23. For Vukovic, this concerned counts 33-36 of Indictment IT-96-23/1. The appeals against their sentences were also dismissed, and the Appeals Chamber corrected the formal disposition of the Trial judgment to reflect the Trial Chamber's oral statement regarding credit for time served. Although the Trial Chamber should have considered the Appellants' family circumstances, the Appeals Chamber upheld the sentences imposed at the trial because of the number and severity of the offences.<sup>154</sup>

## VIII. SOME REFLECTIONS

The significance of *Kunarac et al* needs to be considered in the context of the historical development and recognition of wartime sexual violence and enslavement of women under international law.

In fact, the impunity of wartime sexual violence and enslavement of women has left a stain on history and there have been at least six documented cases of mass sexual abuse and/or enslavement of women during various wars in the 20<sup>th</sup> century.<sup>155</sup> These were the Rape of Nanjing in 1937, the sexual slavery camps of the Japanese Imperial Army's "comfort women" throughout Asia during World War II, the rape of German women at the end of World War II, rapes during the Bangladesh-Pakistan war in the early 1970s and, finally, the mass

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<sup>153</sup> Ibid.

<sup>154</sup> Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case no IT-96-23 & 23/1-A, Disposition.

<sup>155</sup> Kesic, "The status of rape as a war crime in international law: Changes introduced after the wars in the Former Yugoslavia and Rwanda", (2001) at <[www.seeline-project.net/status\\_rape.htm](http://www.seeline-project.net/status_rape.htm)> (visited September 2002).

raping of women during the ethnic conflicts in Bosnia and Rwanda in the 1990s.<sup>156</sup> Yet, wartime rape was not clearly listed as a crime, nor prosecuted or punished until recently with the establishment of the ICTY and the ICTR.<sup>157</sup> The mass rapes that took place in the former Yugoslavia and Rwanda were the first in history to be brought before an international court and, as a result, signalled positive changes in international humanitarian law and international criminal law.<sup>158</sup>

The ICTY Statute was the first international legal instrument that identified rape as a crime against humanity.<sup>159</sup> In September 1998, the ICTR was the first international tribunal to recognise rape as a crime against humanity.<sup>160</sup> Now, *Kunarac et al* has marked the first ICTY convictions of rape and enslavement as crimes against humanity,<sup>161</sup> representing the first international trial to focus exclusively on wartime crimes of sexual violence.<sup>162</sup> By affirming the three convictions in this case, the ICTY Appeals Chamber in this case has provided a definitive ruling on wartime sexual violence and enslavement, thereby beginning another jurisprudential trail leading to the further development of international humanitarian law and international criminal law.

*Kunarac et al* has demonstrated that rape and enslavement during wartime amounted to crimes against humanity and torture.<sup>163</sup> In this case, although Kunarac, Kovac and Vukovic were relatively low-level soldiers, the Tribunal's comment that "lawless opportunists should expect no mercy, no matter how low their position in the chain of command may be"<sup>164</sup> has emphasised the high level of importance attached to such crimes and the willingness of the ICTY to prosecute those who commit them.

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<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> ICTY Statute Article 5(g).

<sup>160</sup> Prosecutor v Jean-Paul Akayesu, Case no ICTR-96-4-A, Judgment, 1 June 2001.

<sup>161</sup> Press Release No 566 of the Trial Chamber, The Hague, 22 February 2001 (JL/I/566-e) at <[www.un.org/icty/pressreal/p566-e.htm](http://www.un.org/icty/pressreal/p566-e.htm)> (visited July 2002).

<sup>162</sup> Mertus, "Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case", 2001 at <[www.asil.org/insights/insigh65.htm](http://www.asil.org/insights/insigh65.htm)> (visited September 2002).

<sup>163</sup> Ibid.

<sup>164</sup> Prosecutor v Dragoljub Kunarac Radomir Kovac and Zoran Vukovic, Case no IT - 96-23-T & IT-96-23/1-T, Judgment, 22 February 2001 per Mumba J.

This case has also set a precedent for sentencing procedures in relation to aggravating factors such as a victims' age and the weight given to mitigating factors such as family responsibilities. As has been observed, this case would provide not only an invaluable precedent but also the impetus for future international criminal investigations and prosecutions for sexual violence and slavery.<sup>165</sup> The outcomes of this case would also serve to encourage others to report similar atrocities committed against them so that the perpetrators could be made to account for their criminal acts.<sup>166</sup>

On the other hand, it must be remembered that this area of law is still in its relative infancy. There are claims that the ICTY and the ICTR have had a spotty record with regard to sexual violence allegations.<sup>167</sup> In this context, the international community still has a long way to go and there are many major players that continue to exist "out there" who could and should be brought to account for their misdeeds.<sup>168</sup>

In contrast to the *ad hoc* tribunals discussed above, the Rome Statute of the International Criminal Court (ICC) includes important provisions relating to this area of law. For instance, gender specific crimes are found under the heading, Crimes against Humanity and War Crimes. The list of these crimes is enlarged and covers a broader spectrum than that under the ICTY and ICTR Statutes. Under the Rome Statute, Article 7 treats rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence of comparable gravity as Crimes against Humanity. Article 8 lists such acts as War Crimes, while other forms of sexual violence constitute grave breaches of the Geneva Conventions.<sup>169</sup>

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<sup>165</sup> Mertus, "Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case" (2001) at <[www.asil.org/insights/insigh65.htm](http://www.asil.org/insights/insigh65.htm)> (visited September 2002).

<sup>166</sup> "Historic war crime verdict vindicates women" 2001 at <[www.cnn.com/2001/fyi/news/02/23/war.crime.verdict/](http://www.cnn.com/2001/fyi/news/02/23/war.crime.verdict/)> (visited September 2002).

<sup>167</sup> Mertus, "Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case", 2001 at <[www.asil.org/insights/insigh65.htm](http://www.asil.org/insights/insigh65.htm)> (visited September 2002).

<sup>168</sup> Per Terry Taylor of the International Institute for Strategic Studies, cited in "Historic war crime verdict vindicates women" 2001 at <[www.cnn.com/2001/fyi/news/02/23/war.crime.verdict/](http://www.cnn.com/2001/fyi/news/02/23/war.crime.verdict/)> (visited September 2002).

<sup>169</sup> Kesic V, "The Status of Rape as a War Crime in International Law: Changes Introduced after the Wars in the Former Yugoslavia and Rwanda" (2001) at <[http://www.seeline-project.net/status\\_rape.htm](http://www.seeline-project.net/status_rape.htm)> (visited 27/09/02).

In conclusion, it may be said that *Kunarac et al* has important implications for both international criminal law and international humanitarian law. It also represents a cornerstone in the attempt to bring justice to victims of wartime sexual crime and enslavement, and retribution for the perpetrators. In this sense, it is hoped that at the very least it would have a deterrence effect on the commission of these degrading crimes, highlighting them as unacceptable human behaviour that would not be tolerated by the international community.

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