

## The Foča “Rape Camps”:

### A Dark Page Read through the ICTY’s Jurisprudence

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#### INTRODUCTION

On 31 October 2007, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (the “Tribunal” or “ICTY”) rendered its Judgement on the Appeal filed by Dragan Zelenović in the case *Prosecutor v. Dragan Zelenović*,<sup>1</sup> affirming the Trial Chamber sentence of 15 years’ imprisonment.<sup>2</sup> This case focused on the crimes committed in the municipality of Foča, in Bosnia and Herzegovina (BiH) after the Bosnian-Serb forces attacked the municipality in April 1992. It was the last case before the Tribunal concerned with the atrocities perpetrated in Foča to reach a verdict. Some of these cases have been tried before the Tribunal whereas some others have been referred to the authorities of BiH and then to the Court of Bosnia and Herzegovina (the “Court of BiH”).

The atrocities committed in Foča marked one of the darkest pages of the 1992-1995 war in Bosnia and Herzegovina between the Serb and Muslim forces. During and after the take-over of the municipality by Bosnian-Serb forces in April 1992, “Muslim and other non-Serb inhabitants were subjected to a widespread and systematic pattern of abuses, designed to remove the majority of them from the municipality”.<sup>3</sup> Muslim women were particularly targeted during this campaign and became victims of repeated rapes and atrocious sexual abuses. Rape camps were established; Muslim women were detained and endured the most heinous violations of their basic human rights. The victims went through an indescribable ordeal, living in constant fear for an extended period of time which, if possible, exacerbated the trauma. This article gives a general overview of the so-called “rape camp” cases tried before the ICTY and the Court of BiH.<sup>4</sup>

<sup>1</sup> *Zelenović*, Appeal Judgement, (IT-96-23/2-S), 31 October 2007.

<sup>2</sup> *Zelenović*, Trial Judgement, (IT-96-23/2-S), 4 April 2007.

<sup>3</sup> *Zelenović*, Trial Judgement, para. 19.

<sup>4</sup> The cases which are object of analysis in the present work are: *Prosecutor v. Kunarac et al.* (IT-96-23&23/1), *Prosecutor v. Dragan Zelenović* (IT-96-23/2-S), *Prosecutor v. Janković & Stanković* (IT-96-23/2). The latter was referred to BiH pursuant to Rule 11 *bis* of the Tribunal’s Rules and was broken into two different cases, namely case X-KR-05/70 against Radovan Stanković and case X-KR-05/161 against Gojko Janković. See <http://www.sudbih.gov.ba/>. The analysis of the cases *Prosecutor v. Krnojelac* (IT-97-25) and *Prosecutor v. Todović and Rasević* (IT-97-25/1,

Specifically, after a brief historical and factual background, this article provides an analysis of the complex procedural history of the cases which originated from one single indictment. In this analysis, several procedural issues which characterised the cases at stake, such as the referral procedure and the guilty plea agreement, are also discussed. Finally the article focuses on the approach of the Tribunal to the crime of rape in relation to these events.

## 1. HISTORICAL AND FACTUAL BACKGROUND

The municipality of Foča is located in the southern-east part of Bosnia and Herzegovina.<sup>5</sup> According to the last official census in 1991, the population amounted to 40,513 persons of whom 45% were Serbs, 52% were Muslims and the remaining 3% was composed of other ethnicities. On 8 April 1992, the Bosnian-Serb forces launched their attack on the municipality of Foča, using heavy artillery to shell the town and paramilitary groups to fight against the pockets of resistance.<sup>6</sup> The aim of the campaign was, *inter alia*, to remove the non Serb population from the Foča area: “The *method employed* was mostly expulsion through terror”.<sup>7</sup>

The take-over of the town of Foča was swift whereas in the neighbouring villages the fighting went on until mid-July 1992. The Serb forces were composed of the Yugoslav People’s Army (the “JNA”), the Territorial Defence (TO) which later became the Army of the Bosnian-Serb Republic (VRS), the Serb police and various irregular Serb military formations.<sup>8</sup>

Almost the entire Muslim population which lived in Foča before the 1992 attack was removed. In 1994 the town was renamed Srbinje (literally “the town of the Serbs”), and it is now part of the new entity called *Republika Srpska* created through the Dayton Agreement.<sup>9</sup> Every mosque in Foča was destroyed, and every trace of Muslim presence in the area was effectively deleted.<sup>10</sup>

After being captured, men and women were separated and transported to buildings such as schools, the local prison and other municipality buildings which had been converted into detention facilities, where they endured deprecating and humiliating treatment. Men were beaten and in many cases killed. The ones who survived were detained in very “precarious” conditions for a long period of time after which the survivors were transferred to Montenegro or to other locations

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subsequently referred to the Court of BiH) despite the fact that they refer to the events which occurred in the Foča municipality are beyond the scope of this work. The reason for this being that in these cases the accused were not charged with rape.

<sup>5</sup> See, Map of Bosnia and Herzegovina (Shaded Relief) CIA 2002: [http://www.lib.utexas.edu/maps/europe/bosnia\\_rel\\_2002.pdf](http://www.lib.utexas.edu/maps/europe/bosnia_rel_2002.pdf)

<sup>6</sup> *Kunarac et al.*, Trial Judgement, (IT-96-23&23/1), 22 February 2001, para. 21.

<sup>7</sup> Summary of the *Kunarac et al.* Trial Judgment, Press release n. 566, available at: <http://www.un.org/icty/latest-e/index.htm>.

<sup>8</sup> *Zelenović*, Trial Judgement, para. 18.

<sup>9</sup> See, Political Map of Bosnia and Herzegovina (Shaded Relief) CIA 1997: [http://www.lib.utexas.edu/maps/bosnia/bosnia\\_herz\\_pol97.pdf](http://www.lib.utexas.edu/maps/bosnia/bosnia_herz_pol97.pdf).

<sup>10</sup> *Kunarac et al.*, Trial Judgement, paras. 46-47.

under the control of the BiH government.<sup>11</sup> Girls and women, some of them as young as 12, were at first held at Buk Bijela<sup>12</sup> and then they were transferred to other detention centres such as the Foča High School,<sup>13</sup> the Partizan Sports Hall<sup>14</sup> (located just a few metres from the local police station) and the Kalinovik High School, where civilians from Gacko, Kalinovik (neighbouring municipalities) and neighbouring villages were kept.<sup>15</sup> In these places “the terror took on another, very *personal* dimension”.<sup>16</sup> Conditions were described by many witnesses as “dreadful” and “appalling”.<sup>17</sup> Food was scarce and of poor quality, hygiene facilities were almost non-existent, sanitary conditions were appallingly low and only a few gym mattresses were available for the “detainees”.

It was within this context that a system of constant and methodical physical and psychological torture – including sexual assaults and rape – was set up by the Serb forces. Soldiers were granted free access to the detention centres, which became known as “rape camps”, and were allowed to select and take away girls and women who they then raped, tortured and humiliated in the cruellest possible way.<sup>18</sup> “The women had no choice but to obey those men and those who tried to resist were beaten in front of the other women”.<sup>19</sup> Several houses within the municipality of Foča were additionally used to rape Muslim women who were locked inside with no possibilities of escape and in many cases enslaved by the Serb soldiers so as to become their personal property. They were obliged to clean, cook, wash the dishes and were repeatedly raped by their torturers, being constantly at their mercy. Some of the women were then sold and many of them were not seen again.<sup>20</sup> Muslim women were subjected to daily rape and torture for months; some of them were detained until the beginning of 1993.

<sup>11</sup> *Zelenović*, Trial Judgement, para. 19.

<sup>12</sup> Buk Bijela was a settlement on a hydro-electric dam construction site which was turned into a local military headquarters and barracks for Bosnian Serb forces and paramilitary soldiers after the April 1992 take-over of Foča and the surrounding villages. *Prosecutor v. Dragan Zelenović* (IT-96-23/2-S), Joint submission of annex to the Plea Agreement, Amended Indictment, 17 January 2007, para. 5.1.

<sup>13</sup> After the Serb forces took over the Foča area, 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. *Prosecutor v. Dragan Zelenović* (IT-96-23/2-S), Joint submission of annex to the Plea Agreement, Amended Indictment, 17 January 2007, para. 6.1

<sup>14</sup> Partizan was on slightly higher ground than the other buildings in the neighbourhood and could therefore be seen clearly from the surrounding areas, including the police building. Partizan was also close to the main municipal building, where the Serb authorities had their principal offices. Partizan consisted of two large halls. All detainees were held in only one of the halls. This hall measured roughly 12 metres by 7 metres. *Prosecutor v. Dragan Zelenović* (IT-96-23/2-S), Joint submission of annex to the Plea Agreement, Amended Indictment, 17 January 2007, paras 7.1-7.2.

<sup>15</sup> *Kunarac et al.*, Trial Judgement, para. 31.

<sup>16</sup> Summary of the *Kunarac et al.* Trial Judgment, Press release n. 566, available at: <http://www.un.org/icty/latest-e/index.htm>.

<sup>17</sup> *Kunarac et al.*, Trial Judgement, paras. 30-31.

<sup>18</sup> See *Kunarac et al.*, Trial Judgement, paras. 29-39 and *Zelenović*, Trial Judgement, paras. 25-26.

<sup>19</sup> *Kunarac et al.*, Trial Judgement, para. 35.

<sup>20</sup> *Kunarac et al.*, Trial Judgement, para. 42.

Within these “rape camps”, the frequency of the crimes and the number of soldiers who perpetrated them were both very high. Some of the witness stated that they had been sexually violated so many times that were unable to assess with accuracy the number of times they had been raped.<sup>21</sup> In this context, the authorities which were supposed to protect the victims not only failed in their duty to do so, but became torturers *themselves* and assisted the Serb forces in perpetrating the crimes.

The consequences of these deplorable crimes committed in Foča on the victims are barely imaginable.<sup>22</sup> Borrowing the words of Presiding Judge Mumba, “Rapes were used by members of the Bosnian Serb armed forces as an instrument of terror. An instrument they were given free rein to apply whenever and against whomsoever they wished.” The Judge continued, stating that the perpetrators of these crimes had “shown the most glaring disrespect for the women’s dignity and their fundamental human rights on a scale that far surpasses even what one might call the average seriousness of rapes during wartime.”<sup>23</sup>

## 2. PROCEDURAL BACKGROUND OF THE CASES

The cases concerned with the events occurring in Foča in 1992<sup>24</sup> find their common origin in the initial indictment which was confirmed on 26 June 1996 and had the case number IT-96-23. This initial indictment included Dragan Zelenović and seven other accused, namely Dragan Gagović, Gojko Janković, Janko Janjić, Radomir Kovač, Zoran Vuković, Dragoljub Kunarac, and Radovan Stanković. Dragoljub Kunarac was severed from the initial indictment on 19 August 1998 (amended indictment) and he was later joined by Radomir Kovač on 3 September 1999 (second amended indictment). The charges against the two accused were finally embodied in the third amended indictment, which was filed and confirmed on 1 December 1999.

Meanwhile, on 30 July 1999 Dragan Gagović died and the indictment against him was consequently withdrawn. The remaining five accused were in a “separate indictment” which was confirmed on 7 October 1999.

Thus the initial indictment had been split into two separate indictments, namely the “third amended indictment” against Dragoljub Kunarac and Radomir Kovač, and the “separate indictment” against Dragan Zelenović, Gojko Janković, Janko Janjić, Zoran Vuković and Radovan Stanković. At this time both cases held the same initial case number.

<sup>21</sup> *Kunarac et al.*, Trial Judgement, para. 37.

<sup>22</sup> “The physical and psychological health of many of the female detainees seriously deteriorated as a result of the sexual assaults. The detainees lived in constant fear and some of the sexually abused women became suicidal. Others became indifferent as to what happened to them and suffered from depression.” *Zelenović*, Trial Judgement, para. 25.

<sup>23</sup> Summary of the *Kunarac et al.* Trial Judgment, Press release n. 566, available at: <http://www.un.org/icty/latest-e/index.htm>.

<sup>24</sup> See *supra* note 4.

Through a decision of the Trial Chamber, dated 15 February 2000, the case against Zoran Vuković was joined to that of Dragoljub Kunarac and Radomir Kovač. Consequently, on 16 February 2000, the Trial Chamber severed Zoran Vuković from the “separate indictment”. A new indictment against him alone was filed and confirmed and the three accused stood trial jointly under the case number IT-96-23 & 23/1.

The case against the remaining four accused was given the number IT-96-23/2. Following the death of Janko Janjić, on 20 April 2001 another indictment was filed against Dragan Zelenović, Radovan Stanković and Gojko Janković, who at the time were all still at large.

On 9 July 2002, Radovan Stanković was arrested and transferred to the ICTY the very next day. The Prosecutor then filed a separate indictment against him. The final amended indictment against Radovan Stanković was confirmed on 24 February 2004 and in September 2004 the Prosecutor asked the case to be referred to the BiH authorities pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence of the Tribunal (the “Rules”).<sup>25</sup> The Referral Bench on 17 May 2005 ordered that the case be transferred to the BiH authorities. The Appeals Chamber on 1 September 2005 confirmed the decision and the accused was subsequently transferred to BiH.<sup>26</sup>

On 14 March 2005, Gojko Janković was transferred to the ICTY. On 29 November 2004 the Prosecutor had filed a motion to have the case against him and Zelenović transferred to BiH. The two accused were still at large at the time. The Referral Bench ordered the referral of the Janković case to BiH on 22 July 2005. This decision was confirmed by the Appeals Chamber on 15 November 2005 and the accused was transferred to BiH on 8 December 2005.

Finally, on 10 June 2006, the last remaining accused from the initial indictment, Dragan Zelenović, was transferred to The Hague. On 14 July 2006, the accused pleaded not guilty to all counts. While the motion for referral filed by the Prosecutor on 24 November 2004 was still standing, on 17 January 2007 Dragan Zelenović pleaded guilty to seven counts of rape and torture as crimes against humanity.<sup>27</sup>

### 3. PROSECUTOR V. KUNARAC *ET AL.*

The case against Dragoljub Kunarac, Radomir Kovač and Zoran Vuković was the first case at the ICTY in which the accused were convicted of rape not only as violation of the laws or customs of war according to Article 3 of the Statute of

<sup>25</sup> See, ‘Rules of Procedure and Evidence of the Tribunal’: <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev40e.pdf>.

<sup>26</sup> Following his referral to the Court of BiH, on 23 May 2007, Radovan Stanković escaped from the Foča prison where he was serving a 20-year sentence. As of January 2008, there was still an Interpol warrant out for his arrest. See ‘Stanković, Radovan’, at <http://www.haguejusticeportal.net/eCache/DEF/6/073.html>.

<sup>27</sup> For a more detailed and exhaustive procedural background of the cases discussed in this article see: <http://www.un.org/icty/cases-e/cis/zelenovic/cis-zelenovic.pdf>.

the Tribunal (the “Statute”),<sup>28</sup> but also as a crime against humanity under Article 5 (g) of the Statute. Previous convictions at the ICTY had only ever been handed down for the crime of rape as a violation of the *laws or customs of war*.<sup>29</sup> This judgement elevated the crime of rape to a *crime against humanity* whose gravity is second only to the crime of genocide. Furthermore, this case marked the first time that an international tribunal had convicted defendants *exclusively* for sexual violence or prosecuted sexual slavery at all.

The *Kunarac et al.* trial commenced on 20 March 2000 and lasted for 8 months.<sup>30</sup> Dragoljub Kunarac was the leader of a reconnaissance unit which formed part of the local Foča Tactical Group.<sup>31</sup> He was a soldier who had access to the highest military command in the Foča area and was in charge of collecting information about the enemy. Mr. Kunarac volunteered and was directly involved in many military operations which took place in the area during and after April 1992.<sup>32</sup> Radomir Kovač and Zoran Vuković were both members of a military unit which at the time was called the “Dragan Nikolić Unit”.<sup>33</sup>

The evidence showed that the method employed to carry out the removal of the non-Serb population was expulsion through terror and that rapes were used by members of the Bosnian Serb armed forces as an instrument of terror.<sup>34</sup> The Trial Chamber found that the defendants had sexually abused, raped, tortured and enslaved several Muslim girls and women detained in the area of Foča, showing deepest disrespect for the human dignity of Muslim women.

Dragoljub Kunarac was found guilty – on the basis of individual criminal responsibility – of torture, rape and enslavement as crimes against humanity, and torture and rape as violations of the laws or customs of war. Kunarac was sentenced to 28 years’ imprisonment.

On the basis of individual criminal responsibility, Radomir Kovač was found guilty of rape and outrages upon personal dignity as violations of the laws or customs of war, and of enslavement and rape as crimes against humanity and sentenced to 20 years’ imprisonment.

Zoran Vuković was found guilty – again on the basis of individual criminal responsibility – of torture and rape as violations of the laws or customs of war and as crimes against humanity. He was sentenced to 12 years’ imprisonment. On 12 June 2002 the Appeals Chamber affirmed the Trial Judgement.

<sup>28</sup> See, ‘Statute of the International Criminal Tribunal for the former Yugoslavia’: <http://www.un.org/icty/legaldoc-e/index.htm>.

<sup>29</sup> See *Prosecutor v. Furundžija* (IT-95-17/1), where the accused was charged with rape as a violation of the laws or customs of war.

<sup>30</sup> Closing arguments were heard on 20-22 November 2000 and the Judgment was rendered on 21 February 2001. Sixty-two witnesses were heard, including many young women who had been detained and raped by the accused and others.

<sup>31</sup> *Kunarac et al.*, Appeal Judgement, para. 5.

<sup>32</sup> *Kunarac et al.*, Trial Judgement, para. 582.

<sup>33</sup> The three accused actively participated in the campaign aimed at the removal of the non Serb population from the Foča area during which Muslim women and young girls were taken to “rape camps”.

<sup>34</sup> Summary of the *Kunarac et al.* Trial Judgement, Press release n. 566, available at: <http://www.un.org/icty/latest-e/index.htm>.

#### 4. PROSECUTOR V. JANKOVIĆ & STANKOVIĆ

The case against Radovan Stanković was the first case referred by the ICTY to the Court of BiH pursuant to Rule 11 *bis*.<sup>35</sup> According to the indictment, the accused was a member of the Miljevina battalion, a Bosnian Serb paramilitary unit based in Foča. He along with other soldiers of the same battalion used the abandoned house of a Muslim man as his own residence. In this house, nine Muslim girls and women were enslaved by the accused and two of them were raped – on an ongoing basis – by him and his comrades from 3 August 1992 until 10 October 1992.

Stanković was charged on the basis of individual criminal responsibility with enslavement and rape as crimes against humanity and rape and outrages upon personal dignity as violations of the laws or customs of war.

According to the indictment, Gojko Janković was a sub-commander of the military police and a paramilitary leader in Foča. He took part in the military attack on Foča and he was directly involved in the interrogation, torture and rape of Muslim women. Janković was likewise charged with torture and rape as crimes against humanity and as violations of the laws or customs of war, on the basis of individual criminal responsibility, and – due to his command position within the military police – also on the basis of superior criminal responsibility (Article 7 (3) of the Statute).

As mentioned above, the accused were tried before the Court of BiH following the referral of the case pursuant to Rule 11 *bis* of the Rules of the ICTY. (A brief explanation of the functioning of the referral procedure is set out below.) On 14 November 2006, the Court of BiH sentenced Radovan Stanković to 16 years’ imprisonment. On 28 March 2007, the Appellate Panel in Sarajevo modified the conviction, increasing it to 20 years. Radovan Stanković escaped the facilities of the Foča prison on 25 May 2007 while being taken for dental treatment at a local hospital. On 16 February 2007, the Court of BiH sentenced Gojko Janković to 34 years’ imprisonment. The sentence was appealed by the accused. On 23 October 2007 the hearing before the Appellate Panel took place and on 16 November 2007 the sentence was confirmed. In both cases the accused were convicted, *inter alia*, for rape as a crime against humanity.

##### 4.1. THE TRANSFER OF CASES TO NATIONAL JURISDICTIONS - RULE 11 BIS

Rule 11 *bis* of the Tribunal’s Rules – entitled ‘Referral of the Indictment to Another Court’ – was adopted on 12 November 1997 and revised on 30 September 2002.<sup>36</sup> The transfer of cases to national jurisdictions is an essential component of the ICTY completion strategy.<sup>37</sup> The UN Security Council (SC) had previously

<sup>35</sup> ‘Rules of Procedure and Evidence of the Tribunal’: <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev40e.pdf>.

<sup>36</sup> Since the 30 September 2002 revision of Rule 11 *bis*, there have been three amendments – one of 10 June 2004, one of 28 July 2004, and one of 11 February 2005.

<sup>37</sup> The other factors upon which the completion strategy depends are: (i) the length of court proceedings; (ii) the number and character of existing and new indictments, which produce the

reaffirmed the necessity for the Tribunal to concentrate “on the prosecution and trial of the *most senior leaders* suspected of being most responsible for crimes within the ICTY’s jurisdiction, transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions...”<sup>38</sup> and called on the international community to “assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY.”<sup>39</sup> In other words, the transfer of cases would “free up ICTY resources and complement trials in The Hague by nationalizing, where appropriate, the process of accountability”<sup>40</sup>

Rule 11 *bis* states that after an indictment is confirmed, and prior to the commencement of the trial, the President of the Tribunal may appoint a Referral Bench composed by three permanent Judges belonging to the Trial Chambers in order to decide *proprio motu* or upon a Prosecution’s motion whether the case should be referred to the authorities of a State. That State may be the one in which the accused was arrested, in whose territory the crimes were committed, or a State which has jurisdiction and is willing and prepared to accept the case. Those State authorities will then proceed to refer the case to the appropriate Court for trial. Therefore, the Referral Bench does not choose the Court which will try the case but only the State whose authorities will then assign the case to the competent Court.

However, as far as BiH is concerned, it can be safely assumed that the designated Court is the Court of BiH in Sarajevo and specifically its War Crimes Chamber, whose establishment was encouraged by the Security Council.<sup>41</sup>

In making its decision, the Referral Bench must first and foremost consider the gravity of the crimes charged and the level of responsibility borne by the accused.<sup>42</sup> Furthermore, the Judges have to be satisfied that the accused will receive a fair trial and that the death penalty will be not imposed.<sup>43</sup>

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workload of the Tribunal; (iii) cooperation from states of the former Yugoslavia, including efforts to facilitate the arrest of fugitive indictees, most notably Radovan Karadžić and Ratko Mladić; See Dominic Raab, “*Evaluating the ICTY and its completion strategy*”, Journal of International Criminal Justice 3 (2005), 82-102, pp. 89-95. The ICTY completion strategy was summarised in the Security Council (“SC”) Resolution 1503/2003 and reaffirmed in SC Resolution 1534/2004. For the original text of these and other Security Council Resolutions see [www.un.org](http://www.un.org).

<sup>38</sup> SC Resolution 1503/2003, preamble. Emphasis added.

<sup>39</sup> SC Resolution 1503/2003, operative part para. 1.

<sup>40</sup> Dominic Raab, “*Evaluating the ICTY and its completion strategy*”, Journal of International Criminal Justice 3 (2005), 82-102, p. 92.

<sup>41</sup> SC Resolution 1503/2003, operative part para 5. Specifically the Security Council *called* “on the donor community to support the work of the High Representative to Bosnia and Herzegovina in creating a special chamber, within the State Court of Bosnia and Herzegovina, to adjudicate allegations of serious violations of international humanitarian law.”

<sup>42</sup> Rule 11 *bis* (C). See also SC Resolution 1534/2004, paras. 5-6.

<sup>43</sup> The decision of the Referral Bench can be appealed within 15 days from the date in which the accused is notified of the decision. Such a decision can also be taken in cases where the accused is at large. The Prosecutor can monitor the way in which the trial is conducted by the State court to guarantee that the fair trial standard is respected. Finally, before the accused has been sentenced by



In the case against Radovan Stanković and Gojko Janković, the Referral Bench – which issued two decisions for the transfer of the cases to BiH – found that in relation to both accused the factual basis for the alleged crimes was “limited in scope, both geographically and temporally, and also in terms of the number of victims affected”.<sup>44</sup>

Further, in relation to Gojko Janković, the Judges stated that “The fact that the Accused may have been in command of others on a local level is, in the opinion of the Referral Bench, not a sufficient basis to characterise him as a “leader” for the purposes of Rule 11 *bis*.”<sup>45</sup> Consequently the Referral Bench was “satisfied that the gravity of the crimes charged and the level of responsibility of the Accused [were] not *ipso facto* incompatible with referral of the case to the authorities of a State meeting the requirements of Rule 11 *bis* (A).”<sup>46</sup>

In the decision pertaining to Gojko Janković, the Referral Bench affirmed that as the crimes were alleged to have been committed in BiH, against people living in BiH, and as the accused was and remained a citizen of BiH, the link to that country was much stronger than to that of Serbia and Montenegro.<sup>47</sup>

The Judges also addressed other issues related to the right of the accused to a fair trial and concluded, in both decisions, that “the laws applicable to proceedings against the Accused in Bosnia and Herzegovina provide an adequate basis to ensure compliance with the requirements for a fair trial.” The cases were accordingly referred to the authorities of BiH.<sup>48</sup>

## 5. PROSECUTOR V. DRAGAN ZELENović

On 10 June 2006, Dragan Zelenović was transferred to the ICTY in The Hague, having been arrested by Russian authorities in August 2005.<sup>49</sup> According to the indictment, Zelenović was a soldier and a *de facto* military policeman in Foča and a member of the “Dragan Nikolić Unit”. Zelenović was directly and actively

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a national court, the Referral Bench can revoke the order and ask the State to defer the case back to the Tribunal.

<sup>44</sup> See *Prosecutor v. Janković & Stanković* (IT-96-23/2) Decision on Referral of Case under Rule 11 *bis*, 17 May 2005 para. 19 and Decision on Referral of Case under Rule 11 *bis*, 22 July 2005, para. 19.

<sup>45</sup> *Prosecutor v. Janković & Stanković*, (IT-96-23/2), Decision on Referral of Case under Rule 11 *bis*, 22 July 2005, para. 19

<sup>46</sup> *Prosecutor v. Janković & Stanković*, (IT-96-23/2) Decision on Referral of Case under Rule 11 *bis*, 17 May 2005 para. 20 and Decision on Referral of Case under Rule 11 *bis* 22 July 2005, para. 20.

<sup>47</sup> *Prosecutor v. Janković & Stanković*, (IT-96-23/2), Decision on Referral of Case under Rule 11 *bis*, 22 July 2005, para. 24.

<sup>48</sup> *Prosecutor v. Janković & Stanković*, (IT-96-23/2) Decision on Referral of Case under Rule 11 *bis*, 17 May 2005 paras. 68 and 96 and Decision on Referral of Case under Rule 11 *bis* 22 July 2005, paras. 94 and 105.

<sup>49</sup> The operative indictment against him had been confirmed on 7 October 1999 and re-filed on 20 April 2001. See ‘Dragan Zelenović – ICTY Case Information Sheet’: <http://www.un.org/icty/cases-e/cis/zelenovic/cis-zelenovic.pdf>.

involved in the campaign launched by the Serb forces in the municipality of Foča in April 1992 and with the commission of heinous crimes against several Muslim women and girls.<sup>50</sup>

The Prosecution filed a motion for referral of the Zelenović case to the authorities of BiH on 29 November 2004 (the “11 *bis* Motion”), while the accused was still at large. After his transfer to the Tribunal, Zelenović initially pleaded not guilty to all counts of the indictment. On 13 October 2006, a hearing concerning the 11 *bis* Motion took place and after having heard the parties and the authorities of BiH through video conference from Sarajevo the Referral Bench considered its decision.

On 14 December 2006, the Prosecution and the Defence jointly filed a Motion for Consideration of Plea Agreement between Dragan Zelenović and the Office of the Prosecutor pursuant to Rule 62 *ter*. Zelenović agreed to plead guilty to seven counts of crimes against humanity, three of which charge torture, as provided for by Article 5(f) of the Statute, and four of which charge rape, as provided for by Article 5(g) of the Statute.<sup>51</sup>

During a hearing on 16 January 2007, the Trial Chamber requested that the parties clarify certain points of the Plea Agreement and that they file, as an annex to the Plea Agreement, a copy of the Indictment redacted of all parts to which Zelenović did not intend to plead guilty. The parties filed the annex on the same day. Consequently, the Motion filed by the Prosecution seeking leave to withdraw several counts dealing with violations of the laws or customs of war was granted. Zelenović pleaded guilty to several counts of torture and rape as crimes against humanity. In their sentencing briefs, the Prosecution and the Defence recommended that the Trial Chamber impose a term of imprisonment within the range of 10 to 15 years and of 7 to 10 years, respectively.<sup>52</sup> The Sentencing hearings took place on 23 February 2007 and, on 4 April 2007, the Trial Chamber rendered its judgement. Zelenović was held personally accountable for committing nine rapes, eight of which were qualified as both torture and rape and sentenced to 15 years’ imprisonment. The judgement was affirmed by the Appeals Chamber on 31 October 2007.

### 5.1. THE PLEA AGREEMENT PROCEDURE AT THE ICTY – RULE 62 *TER*

Rule 62 *ter* of the Tribunal’s Rules provides for a plea agreement procedure.<sup>53</sup> This provision was added to the Rules in December 2001 as a consequence of the

<sup>50</sup> During this period the accused personally, along with other soldiers, selected several Muslim girls and women who were detained in centres such as Buk Bijela, Foča High School or the Partizan Sports Hall and subjected them to torture and rape. Zelenović also took two Muslim women to an apartment in Foča where he raped one of them while the other woman was raped by the other co-perpetrators. *Prosecutor v. Dragan Zelenović* (IT-96-23/2-S), Joint submission of annex to the Plea Agreement, Amended Indictment, 17 January 2007, p. 3.

<sup>51</sup> *Zelenović*, Trial Judgement, para 10.

<sup>52</sup> *Zelenović*, Trial Judgement, para. 14. Prosecution’s Sentencing Brief, 31 January 2007 and Defence Sentencing Brief, 14 February 2007.

<sup>53</sup> Rule 62 *ter*, Rules of Procedure and Evidence, p. 54. Available at: <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev40e.pdf>.

increasing application of plea agreements. According to this rule, the Prosecution and the Defence may agree that, upon the accused pleading guilty to the indictment or to one or more counts of the indictment, the Prosecution may: apply to the Chamber seeking leave to withdraw the remaining charges; recommend a certain sentencing range; or it may agree not to oppose the sentencing range proposed by the Defence. The Trial Chamber is by no means bound by such a plea agreement.

Following the plea agreement in the present case, Zelenović pleaded guilty to seven counts of rape and torture as crimes against humanity; he further agreed to cooperate with the Office of the Prosecutor, including testifying at any trial before the Tribunal. In return the Prosecutor withdrew the remaining charges of rape and torture as violations of the laws or customs of war.

One of the criticisms levelled at the plea agreement procedure is that it often results in the dismissal of certain charges from the original indictment – jeopardising the Tribunal’s fundamental objective to prosecute serious violations of international humanitarian law.<sup>54</sup> In this Zelenović case, what the Prosecution agreed to do was withdraw the charges of rape and torture qualified as violations of the laws or customs of war.<sup>55</sup>

The same crimes of torture and rape remained charged as crimes against humanity therefore assuring that the plea reflected not merely an agreement between the parties, but, instead, the actual conduct of the accused and the crime committed.<sup>56</sup>

The plea agreement was among the factors which were specifically taken into account as a mitigating circumstance by the Trial Chamber in assessing the sentence. The Judges affirmed that:

[A] guilty plea may have a mitigating effect on the sentence since the admission of guilt may show honesty and readiness to take responsibility, it may help establishing the truth and contribute to reconciliation, and... because of the guilty plea victims are relieved from giving evidence in court and thereby potentially re-living their trauma. The avoidance of a lengthy trial, and thereby the time and effort saved by the Tribunal, is also a factor to take into account in sentencing, although it should not be given undue weight.<sup>57</sup>

The Trial Chamber went on to state that the timing of a guilty plea is also important and must be taken into account when assessing the weight attributed to such a guilty plea. The accused was at large for a long time and did not voluntarily surrender to the Tribunal. Moreover, he did not immediately plead

<sup>54</sup> See the Preamble note and Article 1 of the ‘Updated Statute of the International Criminal Tribunal for the former Yugoslavia’. Available at: <http://www.un.org/icty/legaldoc-e/index.htm>.

<sup>55</sup> See ‘Plea Agreement’, para. 3(a). Available at: <http://www.un.org/icty/stankovic/trialc/other/zel-jmot070116e.pdf>.

<sup>56</sup> See Alan Tieger and Milbert Shin, “*Plea Agreement in the ICTY*”, *Journal of International Criminal Justice* 3 (2005), 666-679, p. 676.

<sup>57</sup> *Zelenović*, Trial Judgement, para. 45.

guilty. However, by means of his plea agreement with the Prosecution, he did so before his trial commenced and therefore, the Trial Chamber stated that considerable weight in mitigation could be given to Zelenović's guilty plea.<sup>58</sup>

The Trial Chamber also recalled the Prosecution statement that this was "the first time in the history of the Tribunal that a perpetrator admits to and confirms what happened to the female non-Serb population in Foča in 1992" and welcomed it as a contribution to the establishment of the truth and as a means to develop the reconciliation in the area.<sup>59</sup>

The Trial Chamber stated that:

[T]he crime base in the present case is not only similar, but to a large extent identical to the one in the *Kunarac et al.* case. The participation of Mr. Zelenović in the crimes committed is comparable with that of at least some of the perpetrators in the aforementioned case.<sup>60</sup>

However, the Trial Chamber stressed that – despite the similarities between the two cases – there was also an important difference between them, namely that Dragan Zelenović had pleaded guilty and it had given considerable weight to it.<sup>61</sup>

It can be asserted that, in the present case, the plea agreement which the accused concluded with the Prosecution had a considerable effect on the length of the sentence, which – considering the gravity of the crimes and the sentences rendered in the *Kunarac et al.* case – might have been considerably harsher.

Whether the agreement originated from sincere remorse on the part of the accused, or whether it was a way to elude the transfer of the case to the BiH authorities once there was nothing else to lose, remains uncertain. What *is* certain is that through this admission of guilt – the first related to the events in Foča – what happened in that area from April 1992 has been clarified and acknowledged as never before. Additionally, the findings of the other related cases discussed above have been corroborated and strengthened by Dragan Zelenović's guilty plea.

## 6. THE TRIBUNAL'S APPROACH TO THE CRIME OF RAPE IN THE FOČA CASES

The cases related to the crimes committed in the Foča municipality and in particular the *Kunarac et al.* case which was the first to deliver its verdict, contain many interesting aspects concerning the substantive law related to the crime of rape in international law and in the jurisprudence of the Tribunal.

<sup>58</sup> *Zelenović*, Trial Judgement, para. 46.

<sup>59</sup> See *Zelenović*, Trial Judgement, para. 48.

<sup>60</sup> *Zelenović*, Trial Judgement, para. 67.

<sup>61</sup> *Zelenović*, Trial Judgement, para. 68.

### 6.1. RAPE AS A CRIME AGAINST HUMANITY

Article 5 (g) of the Statute refers to rape as a crime against humanity within the Tribunal’s jurisdiction. The offences enlisted in Article 5, if committed in the context of an armed conflict ‘as part of a widespread or systematic attack directed against the civilian population’, amount to crimes against humanity if the perpetrator knew of the wider context in which his acts occurred and knew that his acts were part of the attack.

The Trial Chamber in *Kunarac et al.* was satisfied that an armed conflict existed from 8 April 1992 until at least February 1993 in the Foča municipality. It also found that the crimes charged in the indictment were closely related to the armed conflict.<sup>62</sup>

The Trial Chamber further emphasised that the requirement that the acts be ‘closely related to the armed conflict’ was also satisfied if the criminal conduct occurred in the *aftermath* of the fighting, up to a point at which the combat activity ended, and if the acts were committed in furtherance or took advantage of the situation created by the fighting.<sup>63</sup>

The Judges determined that there was a systematic attack against the Muslim civilian population which, after the municipality had been taken over, was subjected to a specific strategy which followed the same pattern:

Muslim houses and apartments were systematically ransacked or burnt down, Muslim villagers were rounded up or captured, and sometimes beaten or killed in the process. Men and women were separated, with many of the men detained in the former KP Dom prison.<sup>64</sup>

Muslim women endured the ordeals described in the previous paragraphs. The accused knew of the attack against the civilian population and “they knew that their criminal acts fitted in with or were part of this attack”.<sup>65</sup> Consequently all the elements required to consider the conduct of the accused as a crime against humanity were found beyond reasonable doubt by the Trial Chamber.

### 6.2. THE ELEMENTS OF THE CRIME OF RAPE

The Trial Chamber in *Kunarac et al.* then turned to the analysis of the elements of the crime of rape. The specific elements of the crime of rape, namely the *actus reus* and the *mens rea*, are not set out in the Statute nor in international humanitarian law or human rights instruments.<sup>66</sup> The Trial Chamber therefore adopted as a starting point of its analysis the definition of rape given by the Trial Chamber in the *Furundžija* case (the “Furundžija definition”).<sup>67</sup>

<sup>62</sup> *Kunarac et al.*, Trial Judgement, paras. 567-568. “Not only were the many underlying crimes made possible by the armed conflict, but they were very much a part of it. Muslim civilians were killed, raped or otherwise abused as a direct result of the armed conflict and because the armed conflict apparently offered blanket impunity to the perpetrators.”

<sup>63</sup> *Ibid.*

<sup>64</sup> *Kunarac et al.*, Trial Judgement, para. 573.

<sup>65</sup> *Kunarac et al.*, Trial Judgement, para. 581.

<sup>66</sup> *Kunarac et al.*, Trial Judgement, para. 437.

<sup>67</sup> *Prosecutor v. Furundžija*, (IT-95-17/1), 10 December 1998. See para. 185, p. 73. Available at:

The *Furundžija* Trial Chamber – while acknowledging the definition of rape given by the ICTR in the *Akayesu* case – noticed that it was not possible to discern the elements of the crime of rape from international treaty or customary law, nor from the “general principles of international criminal law or general principles of international law”.<sup>68</sup> Consequently, the *Furundžija* Trial Chamber pronounced that in order to arrive at an accurate definition of rape based on the criminal law principle of specificity it was “necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.”<sup>69</sup>

The Trial Chamber in *Furundžija* found that the *actus reus* of the crime of rape is:

- (i) 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;
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>70</sup>

The Trial Chamber in *Kunarac et al.* agreed that “these elements, if proved, constitute the *actus reus* of the crime of rape in international law”,<sup>71</sup> but found that the element in paragraph (ii), although appropriate to the circumstances of *that case*, was too narrowly construed for the requirements of international law. Specifically, the Trial Chamber found that the *Furundžija* definition, when it states that the above-described acts would constitute rape *only when accompanied* by “coercion or force or threat of force against the victim or a third person”, did not refer to other factors “which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim”. A ‘broadened’ approach in this respect was – in the opinion of the Judges – the appropriate scope of the definition in international law.<sup>72</sup>

Interestingly, in a footnote the Trial Chamber acknowledged that the Prosecution in its final trial brief also seemed to share the narrow approach to the elements of rape requiring proof of coercion or force or threat of force against the victim or a third person, and expressed its disagreement on this submission.<sup>73</sup>

The Trial Chamber found that the analysis of the legal systems carried out in *Furundžija* showed that although force, threat of force and coercion are certainly central elements to many legal systems, “the true common denominator which unifies all the systems [is the] wider or more basic principle of penalising

<http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf>.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Furundžija* Trial Judgment, para. 177.

<sup>70</sup> *Furundžija* Trial Judgment, para. 185.

<sup>71</sup> *Kunarac et al.*, Trial Judgement, para. 438.

<sup>72</sup> *Ibid.*

<sup>73</sup> See *Kunarac et al.*, Trial Judgement, footnote 1119.

violations of sexual autonomy”.<sup>74</sup> The Judges seemed to be willing to stress the relevance of the “absence of consent” among the elements characterising the *actus reus* of the crime of rape.

Furthermore, the Trial Chamber stated that, according to the survey of the law in force in many different legal systems, it can be concluded that sexual conduct can be considered as ‘rape’ when it falls among one of three broad categories.

- (i) First of all, when the sexual activity is accompanied by force or threat of force to the victim or a third party.<sup>75</sup> Several jurisdictions provide a definition of rape which requires that the sexual conduct is carried out by force or accompanied by force or threat of force.<sup>76</sup>
- (ii) The second category is that where the sexual activity is “accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal”.<sup>77</sup> As for this category, the Trial Chamber took into account several legal systems in which the law considers relevant certain circumstances which pertain to the vulnerability or deception of the victim *besides* from the use of force or threat of force.<sup>78</sup> The Trial Chamber gave a few examples stating that “these circumstances include that the victim was put in a state of being unable to resist, was particularly vulnerable or incapable of resisting because of physical or mental incapacity, or was induced into the act by surprise or misrepresentation.”<sup>79</sup>
- (iii) Finally, the third category enumerated by the Trial Chamber comprises the sexual activity which “occurs without the consent of the victim”.<sup>80</sup> It emphasised that in many common law systems<sup>81</sup> “it is the absence of the victim’s free and genuine consent to sexual penetration which is the defining characteristic of rape.”<sup>82</sup> This is a crucial point in the Trial Chamber’s discussion. It points out that – in these jurisdictions – force or threat of force need not be proven; but that when “consent” is obtained through such factors it is not considered real consent.<sup>83</sup>

<sup>74</sup> *Kunarac et al.*, Trial Judgement, para. 440.

<sup>75</sup> *Kunarac et al.*, Trial Judgement, para. 442.

<sup>76</sup> *Kunarac et al.*, Trial Judgement, paras. 443-445. On this point the Trial Chamber analysed the following legal systems: BiH, Germany, Korea, China, Norway, Spain, Brazil, Austria, and some States of the US among which New York, Massachusetts, and Maryland were included.

<sup>77</sup> *Kunarac et al.*, Trial Judgement, para. 442.

<sup>78</sup> *Kunarac et al.*, Trial Judgement, paras. 446-452. On this point the Trial Chamber analysed the following legal systems: Sweden, Portugal, France, Italy, Denmark, Finland, Estonia, Japan, Argentina, Costa Rica, Uruguay, Philippines, and some States of the US, including California.

<sup>79</sup> *Kunarac et al.*, Trial Judgement, para. 446.

<sup>80</sup> *Kunarac et al.*, Trial Judgement, para. 442.

<sup>81</sup> *Kunarac et al.*, Trial Judgement, paras. 453-456. On this point the Trial Chamber analysed the following legal systems: England, New Zealand, Canada, Australia, India, Bangladesh, South Africa, Zambia and Belgium.

<sup>82</sup> *Kunarac et al.*, Trial Judgement, para. 453.

<sup>83</sup> *Ibid.*

Furthermore, the Trial Chamber stresses how the consent must be genuine and voluntarily given.

These considerations seem to reflect the Judges understanding of the elements of rape. Specifically the Trial Chamber concluded that the core element which turns a sexual activity into rape is the violation of the sexual autonomy of a person which means the lack of consent on her part. Consent must be given voluntarily as a result of the victim's free will, assessed in the context of the surrounding circumstances.

The use of force, the threat of force, or any other circumstance which make the victim particularly vulnerable or negated her ability to make an informed refusal (namely, the first two categories discussed above), "are matters which result in the will of the victim being overcome or in the victim's submission to the act being non-voluntary".<sup>84</sup> In other words, the essential element of the crime of rape is the *absence of the free consent* of a person to engage in sexual conduct, whereas force, threat of force or taking advantage of a person who is unable to resist are evidence that the sexual autonomy of such a person has been violated, as there was no such free agreement, but they are not *necessarily* elements which need to be proven for the crime of rape. Therefore the terms coercion, force, or threat of force employed by the Furundžija definition were not to be interpreted narrowly. Specifically, the term "coercion" should be interpreted as referring to most conduct which negates free and voluntary consent.<sup>85</sup> Consequently, the Trial Chamber found that the *actus reus* of the crime of rape in international law is constituted by:

- (i) 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;
- (ii) where such sexual penetration occurs without the consent of the victim.<sup>86</sup>

The *mens rea* of the crime of rape "is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim".<sup>87</sup>

This definition of rape given by the Trial Chamber was challenged on appeal. Specifically, the Appellants argued that – in addition to penetration – two further elements must be proven, namely the force or threat of force and the victim's "continuous" or "genuine" resistance.<sup>88</sup> In other words, according to this interpretation, the victim must show resistance throughout all the sexual intercourse so as to give notice to the perpetrator that his conduct is not welcome.

The Appeals Chamber rejected this argument defining it "wrong on the law and absurd on the facts".<sup>89</sup> Secondly, and most importantly, the Appeals Chamber

<sup>84</sup> *Kunarac et al.*, Trial Judgement, para. 457.

<sup>85</sup> *Kunarac et al.*, Trial Judgement, para. 459.

<sup>86</sup> *Kunarac et al.*, Trial Judgement, para. 460.

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

<sup>88</sup> See *Kunarac et al.*, Appeal Judgement, para. 125.

<sup>89</sup> *Kunarac et al.*, Appeal Judgement, para. 128.



emphasised that it concurred with the definition of rape given by the Trial Chamber, and with regard to the role of force in such a definition noticed that the departure of the Trial Chamber from the previous jurisprudence of the Tribunal on this point was only apparent. Specifically, in the opinion of the Appeals Chamber, the Trial Chamber addressed the relationship between force and consent finding that “force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape”.<sup>90</sup> The Trial Chamber felt the need to explain that there are factors other than force which “would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim”.<sup>91</sup>

The Appeals Chamber found that this conclusion was reached out of concern that a “narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.”<sup>92</sup>

### 6.3. CUMULATIVE CONVICTIONS

Finally, the Trial Chamber addressed the issue of cumulative convictions, namely the question of whether an accused can be convicted for the same conduct under different statutory provisions. In *Kunarac et al.* the accused were charged, *inter alia*, with rape as a violation of the laws or customs of war *and* as a crime against humanity. The Trial Chamber followed the approach stated by the Appeals Chamber (in its majority) in the *Delalić et al.* case<sup>93</sup> with the regard to cumulative convictions.

According to this approach multiple convictions are allowed when each of the statutory provisions involved (in this case Article 3 and Article 5 of the Statute) has a distinct element not common to the other: “An element is materially distinct from another if it requires proof of a fact not required by the other.”<sup>94</sup>

As for the impact of multiple convictions on the assessment of the sentence to be imposed, the latter must reflect the totality of the criminal conduct and the overall culpability of the accused. However, the prejudice that an accused may suffer because of cumulative convictions must be taken into account when imposing a sentence.

This approach was then applied to the *Kunarac et al.* case. The Trial Chamber noticed that it is possible to enter convictions for the same conduct under Article 3 and 5 of the Statute because violation of the laws or customs of war and crimes against humanity contain distinct elements. Specifically the distinctive element of Article 3 against Article 5 of the Statute is the nexus requirement, which holds that there must be a close link between the acts of an accused and the armed conflict.

<sup>90</sup> *Kunarac et al.*, Appeal Judgement, para. 129.

<sup>91</sup> *Kunarac et al.*, Trial Judgement, para. 438.

<sup>92</sup> *Kunarac et al.*, Appeal Judgement, para. 129.

<sup>93</sup> *Prosecutor v. Delalić et al.*, (IT-96-21), Appeals Judgement, 20 February 2001.

<sup>94</sup> *Ibid.*, para. 412.

The distinct element of Article 5 of the statute against Article 3 is the requirement of a widespread or systematic attack directed against a civilian population.<sup>95</sup> Consequently convictions for rape under both articles were possible.

The Trial Chamber additionally found it possible to convict the accused for the same conduct which amount to both the crimes of rape and torture under Article 5 of the Statute. The latter finding was the object of an appreciable analysis carried out by the Appeals Chamber. It agreed with the Trial Chamber that “the crimes of rape and torture each contain one materially distinct element not contained in the other, making convictions under both crimes permissible”, namely “an element of the crime of rape is penetration, whereas an element for the crime of torture is a prohibited purpose, neither element being found in the other crime”.<sup>96</sup>

The Appeals Chamber stressed that for rape to be categorised as torture all the elements of rape and torture must be present in the conduct of the accused.<sup>97</sup> It concluded that in the case under analysis:

[T]he physical pain, fear, anguish, uncertainty and humiliation to which the Appellants repeatedly subjected their victims elevate their acts to those of torture. These were not isolated instances. Rather, the deliberate and co-ordinated commission of rapes was carried out with breathtaking impunity over a long period of time... Whether roused from their unquiet rest to endure the grim nightly ritual of selection or passed around in a vicious parody of processing at headquarters, the victims endured repeated rapes, implicating not only the offence of rape but also that of torture under Article 5 of the Statute. In the egregious circumstances of this case... all the elements of rape and torture is met.<sup>98</sup>

## CONCLUSION

The atrocities committed in the Foča municipality against the Muslim civilian population and particularly against the Muslim women are amongst the most heinous crimes in international law. The crime of rape in the past had too often been considered as a natural component of every war, something which no longer evoked indignation on account of it being an ‘inevitable’ consequence of an armed conflict. The ICTY to its enduring credit addressed this dark page of a terrible war, denying such an attitude and giving a full and accurate account of what happened in the area showing no mercy for the perpetrators of such a crime. The Tribunal captured the gravity of the crimes perpetrated in Foča and showed a deep understanding of the sufferance endured by the victims who were left with profound scars which will probably never heal.

“Muslim women and girls, mothers and daughters together were robbed of the last vestiges of human dignity, women and girls treated like chattels, pieces of property at the arbitrary disposal of the Serb occupation forces, and more

<sup>95</sup> See *Kunarac et al.*, Trial Judgement, para. 556.

<sup>96</sup> *Kunarac et al.*, Appeal Judgement, para. 179.

<sup>97</sup> *Ibid*, 182.

<sup>98</sup> *Ibid*, 185.

specifically, at the beck and call of the three accused.”<sup>99</sup> Rape was used as an instrument of terror, perpetrated through a constant and systematic pattern and the Tribunal convicted the perpetrators under Article 5 of the Statute, thus elevating the crime of rape, in the jurisprudence of the Tribunal, to a crime against humanity second only to genocide in its gravity.

The detailed analysis of the *actus reus* of the crime of rape offered by the ICTY in the so-called “rape camp” cases showed that there is no room in international law for a narrow definition of the elements of rape and that the main component is the absence of genuine consent of the victim and *not* the use of force. In other words, rape can also occur when there is no use of force, as long as the consent of the victim is missing. The relatively low rank of the accused will not allow them from escaping criminal prosecution. As the Trial Chamber in the *Kunarac et al.* case put it: “Political leaders and war generals are powerless if the ordinary people refuse to carry out criminal activities in the course of war. Lawless opportunists should expect no mercy, no matter how low their position in the chain of command may be.”<sup>100</sup>

The approach of the Tribunal to these cases is to be welcomed as it contributed to the establishment of the truth, giving a detailed account of the terrible events which occurred in Foča from April 1992. Many of the victims could see their torturer convicted, but most of all the Tribunal made clear that rape under international criminal law is among the gravest offences and that there will be no leniency shown for the perpetrators of such crimes.

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<sup>99</sup> Summary of the *Kunarac et al.* Trial Judgment, Press release n. 566, available at <http://www.un.org/icty/>.

<sup>100</sup> *Ibid.*