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SCSL - 2004 - 16 - PT

(286 - 345)

**SPECIAL COURT FOR SIERRA LEONE**

OFFICE OF THE PROSECUTOR

FREETOWN - SIERRA LEONE

Before: Judge Bankole Thompson

Judge Itoe

Judge Boutet

Registrar: Mr. Robin Vincent

Date filed: 20 February 2004

**THE PROSECUTOR**

**Against**

**SANTIGIE BORBOR KANU ET AL**

**Case No. SCSL - 2004 - 16 - PT**

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**REPLY TO DEFENCE RESPONSE TO PROSECUTION REQUEST FOR LEAVE TO  
AMEND THE INDICTMENT**

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Office of the Prosecutor:

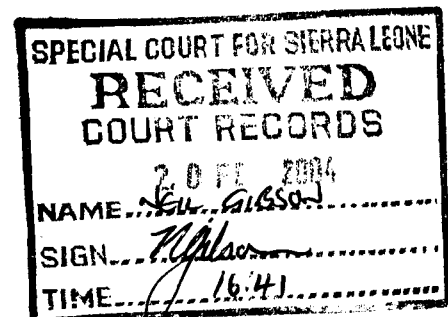
Mr. Luc Côté

Mr. Robert Petit

Ms. Adwoa Wiafe

Defence Counsel:

Mr. Geert-Jan Alexander Knoops



**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
FREETOWN-SIERRA LEONE

**THE PROSECUTOR**

**Against**

**SANTIGIE BORBOR KANU ET AL**  
**Case No. SCSL-2004-16-PT**

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AMEND THE INDICTMENT**

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The Prosecution files this reply to the Defence Response to Prosecution's Request for Leave to Amend the Indictment.

**I. BACKGROUND**

1. On 9 February 2004, the Prosecution filed a Request for Leave to Amend the Indictment adding a new count of "other inhumane acts" a crime against humanity, punishable under Article 2(g) of the Special Court Statute for the act of "forced marriage" committed by the accused persons and/or his subordinates. The Defence filed a response ("Response") on 17 February 2004 asking the Court to reject the Prosecution motion to amend. The Prosecution files its reply to the Defence Response.

**II. DEFENCE SUBMISSIONS**

2. The Defence objects to the Prosecution Motion to Amend the Indictment for the following reasons:

- a. The act of “forced marriage” does not amount to a crime against humanity because it is not expressly mentioned in Articles 2(g) and (i) of the Special Court Statute (“the Statute”) or the ICC Statute;
  - b. The act of “forced marriage” does not comply with the principle of specificity;
  - c. The act of “forced marriage” does not comply with the principle of specialty; and
  - d. Modifications to time frames in the indictment seriously prejudice the rights of the accused.
3. For the reasons stated below, the Prosecution submits that the Defence Response should be dismissed and the Prosecution Request granted.

### **III. ARGUMENTS**

#### **A. “Forced marriage” as a crime against humanity**

4. The Prosecution submits that, the determination of whether “forced marriage” falls under the category of “other inhumane acts” must be made in light of the specific elements of the offence of “other inhumane acts”, which is the substantive charge, and not the absence of express mention of the act of “forced marriage” in Article 2 of the Statute or any other law.
5. The suggestion by the Defence that for the act of “forced marriage” to be considered as “other inhumane acts”, it has to be expressly provided for in the Statute runs counter to the rationale for the inclusion of “other inhumane acts” as a distinct element of crimes against humanity expressed in commentaries on the subject and in the jurisprudence from the ICTY and ICTR. The jurisprudence has clearly established that the category of “other inhumane acts” is a residual category which encompasses a series of criminal acts not specifically enumerated<sup>1</sup> and that it is impossible to provide an exhaustive list of such

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<sup>1</sup> *Prosecutor v. Kordic & Cerkez*, Trial Judgement, IT-95-14/2-T, 26 February 2001, para. 269.

acts.<sup>2</sup> It has been held that although not falling within the enumerated categories of crimes against humanity, acts that ultimately qualify as “other inhumane acts” are, nevertheless, equally egregious.<sup>3</sup> Therefore, none of the Statutes of the ad hoc tribunals, the ICC nor case law has exhaustively designated all the crimes falling within the class of “other inhumane acts”. Rather, the charges based on this broad category have been looked at on a case by case basis.

6. Statutory support for the ambit of “other inhumane acts” can be found in the ILC Draft Code and the ICC Statute. The ILC, commenting on Article 18 of its Draft Code of crimes, states: “The Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which may constitute crimes against humanity. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in preceding paragraphs. Second, the act must in fact cause injury to a human being in terms of physical and mental integrity, health and human dignity.”<sup>4</sup> The ICC Statute, [Article 7(k)], provides details as to the elements of “other inhumane acts” as follows: 1) that the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health by means of an inhumane act, and 2) such act was of a character similar to any other act referred to in Article 7(1) of the Statute.
7. Jurisprudence from the ICTY and ICTR has also provided guidance as to the elements of “other inhumane acts”. For example, the *Akayesu Trial Chamber* decision recognised sexual violence, including the forced undressing of women in public, as “other inhumane acts” although specific mention had not been made of the crime of sexual violence in the ICTR statute.<sup>5</sup> The Trial Chamber defined sexual violence, which includes rape, as any act of a *sexual nature* which is committed on a person under circumstances which are *coercive*. [Emphasis added]. The Trial Chamber then held that sexual violence falls within the scope of “other inhumane acts”, “outrages upon personal dignity” and “serious bodily and mental harm”.<sup>6</sup> Further, “other inhumane acts” are said to be crimes that are not otherwise specified but which are of comparable seriousness to the crimes expressly

<sup>2</sup> *Id.*, para. 150. See also, *Kupreskic et al*, Trial Judgement, IT-95-16-T, 14 January 2000 at para. 563. The Trial Chamber noted that “An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.”

<sup>3</sup> *Prosecutor v. Kayishema & Ruzindana*, Trial Judgement, ICTR-95-I-T, 21 May 1999, para. 149 and 150.

<sup>4</sup> *Noted in Kayishema & Ruzindana*, *supra* note 3, para. 150.

<sup>5</sup> *Prosecutor v. Akayesu*, Trial Judgement, ICTR-96-4-T, 2 September 1998, at para. 688 and 697.

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

recognised as crimes against humanity.<sup>7</sup> An act amounts to “other inhumane acts” when it results in serious bodily or mental harm.<sup>8</sup> The ICTY thus held in the *Krstic Judgement* that rape and sexual abuse are acts which may cause serious bodily or mental injury.<sup>9</sup> The Prosecution submits that “forced marriage” satisfies these requirements and, in consequence, is a crime against humanity.

8. In paragraphs 51 to 57 of the proposed Amended Indictment, the Prosecution alleges that an unknown number of women were abducted from various listed locations and used as sex slaves and/or forced into marriages, and/or subjected to other forms of sexual violence. The “wives” were forced to perform a number of conjugal duties under coercion by their “husbands”. Of note, these crimes are charged cumulatively. Finally, the Prosecution alleges that the act of “forced marriage” was carried out as part of a widespread or systematic attack on the civilian population.
9. “Forced marriage”, as charged in the Indictment, meets the requirements of “other inhumane acts” since, it is of comparable seriousness to the crimes considered as crimes against humanity under Article 2 of the Special Court Statute. From the allegations in the Indictment, the act of “forced marriage” encompasses elements of coercion, sexual violence and enslavement. In addition, “forced marriage” is as serious as the crimes of enslavement or sexual slavery. Moreover, in line with the *Akayesu* and *Krstic* Judgements, “forced marriage” results in serious mental and physical suffering or injury. The *Kunarac Judgement* defined enslavement in terms of control and ownership of an individual, restriction or control of an individual’s autonomy and freedom of choice or movement, often accruing some gain to the perpetrator. According to the Tribunal, other indications of enslavement include exploitation, citing the example of forced labour, prostitution and sex.<sup>10</sup> Indeed, the act of “forced marriage” may encompass some of these indicators, but the Prosecution believes that it goes beyond that, making it a distinct form of inhumane act.
10. The Defence argues in paragraph 3(i) of the Response that the concept of “inhumane acts” is alien to the Geneva Conventions and their Additional Protocols. On the contrary, the

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<sup>7</sup> *Prosecutor v. Kayishema & Ruzindana*, supra note 3, para. 150. See also, *Prosecutor v. Kupreskic et al*, supra note 2, para. 566.

<sup>8</sup> *Prosecutor v. Krstic*, Trial Judgement, IT-98-33-T, 22 August 2001, para. 512 – 513.

<sup>9</sup> *Id.*, para. 513.

<sup>10</sup> *Prosecutor v. Kunarac et al*, Trial Judgement, IT-96-23/1-T, 22 February 2001, para. 542.

Prosecution notes that the principle underlying the Geneva Conventions and the related Protocols is one of humane treatment. Hence, these conventions contain concepts similar to the concept of “other inhumane acts” under which the act of “forced marriage” can be charged as a war crime. Specifically, the Geneva Conventions proscribe the crimes of cruel treatment and outrages upon personal dignity, in particular humiliating and degrading treatment which are akin to, and serve the same purpose as the category of “other inhumane acts”. The *Akayesu Judgement* supports the view that sexual violence crimes constitute both “other inhumane acts” and “outrages upon personal dignity”. To the extent that Article 3 of the Statute reflects the provisions of the Geneva Conventions and Additional Protocol II, it covers the act of “forced marriage”.

11. It is worth mentioning that acts such as “forced marriage” have long been prohibited by international treaties and conventions, some of which are relied on by the Defence. The main human rights instruments such as the Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights as well as the major regional conventions centre on the basic principle of human dignity and liberty and, consequently, prohibit cruel, inhuman and degrading treatment.<sup>11</sup> Needless to say, “forced marriage” is a serious violation of the right to liberty and security of person and, therefore, constitutes cruel treatment.<sup>12</sup>
12. Finally, the decision as to whether or not “forced marriage” constitutes “other inhumane acts”, at this stage of the proceedings, must be based on the allegations in the Indictment. As to whether, in fact, the criteria are met is a question for trial. Without the amendment it will be impossible for the Court to even consider this issue.

**B. “Forced marriage” does not violate the principle of specificity**

13. Contrary to what the Defence seems to assert, the Prosecution notes at the outset that the new count charged is “other inhumane acts” as a crime against humanity and not “forced marriage” as crime against humanity.
14. Furthermore, in determining the specific nature of “forced marriage”, reference must be made to the elements of “other inhumane acts” which are clear and unambiguous and can

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<sup>11</sup> See, e.g., Article 3 of the UDHR which states that “everyone has a right to life, liberty and security of person” and articles 16(2) and (3). Also, Article 9 & 23(3) of the ICCPR and Article 5 & 6 of the ACHR.

<sup>12</sup> Kupreskic, supra note 2, para. 711.

be objectively evaluated based on the facts adduced. As already mentioned, factors such as the gravity of the offence and the infliction of severe physical and mental injury to the victim are the decisive criteria in making this determination. Relying on the allegations in the Indictment and the foregoing arguments, the elements of “other inhumane acts” are met in this case.

15. In answer to Defence argument that “forced marriage” does not comply with the principle of specificity in that no reference is made of “forced marriage” in the *Kupreskic* case or the other major human rights instruments, the Prosecution relies on its earlier arguments that in neither the *Kupreskic* case nor the extensive body of conventions cited in paragraph 6 of the Defence Response is there an attempt to provide an exhaustive list of acts constituting “other inhumane acts”. The Prosecution takes the position that “forced marriage” is of equal gravity to all the crimes cited as examples in *Kupreskic* in that it constitutes cruel, humiliating and degrading treatment.

**C. The charge of “forced marriage” does not violate the speciality principle**

16. The Defence argues that the new count of “other inhumane acts” violates the right of the accused to be informed promptly of the charges against him at the time of his arrest. Secondly, the speciality principle prohibits the prosecution of the accused on charges other than those for which he was previously arrested.
17. The Prosecution reiterates its arguments in the Prosecution Motion that the count of “other inhumane acts” is based on existing allegations in the current Indictment as well as evidence already disclosed to the Defence. The proposed amendment does not seek to add any new factual allegations, but merely provides the legal characterization of a conduct based on existing factual allegations. In any event, the Prosecution’s obligation is to disclose charges existing at the time of arrest.<sup>13</sup>
18. Furthermore, the modification of the counts in the indictment, at this stage, is in the interest of justice as it not only reflects the evidence, but also shows the total culpability of the accused.

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<sup>13</sup> *Prosecutor v. Kovacevic*, IT-97-2-AR73, Decision Stating Reasons for Appeals Chamber Order of 29 May 1998, para. 36.

19. The argument that the accused can only be tried based on the charges for which he was previously arrested should be rejected. The Prosecution notes that the Defence cites the speciality principle as the basis for this proposition without expounding on the applicability of this principle to international criminal law, relying instead on authority which deals with the specificity principle.<sup>14</sup> The Prosecution refers to the *Kovacevic*<sup>15</sup> decision where the Appeals Chamber of the ICTY rejected the applicability of this principle to the operations of the International Tribunal, stating that it applied only to extradition situations.

#### **D. Modifications do not prejudice the Accused**

20. With regards to the addition of the word “about” as referred to in paragraph 5 (E) of the Request the Prosecution reiterates the arguments found in the Request to justify such request. The Prosecution further submits that this change does not cause any prejudice to the Defence due to the timeliness of the Request and the fact that it conforms to the evidence already disclosed.
21. The Prosecution further submits that the modification sought in paragraph 5 (G) of its Request is warranted for the reasons canvassed in its Request which are reasserted herein. Furthermore this modification simply seeks to extend the time period of a Count already alleged and is based on evidence already disclosed. Therefore the Prosecution submits that the timeliness of the modification and the familiarity of the general factual basis of the charge give sufficient notice to the accused to prepare to respond.

#### **IV. CONCLUSION**

22. For the foregoing reasons the Prosecution submits that the Trial Chamber dismiss the Defence Response in its entirety.

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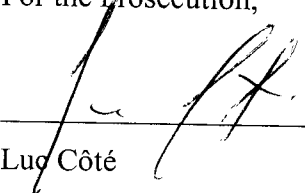
<sup>14</sup> See paras. 9 and 10 of Defence Motion, relying on Cassese, pages 145 – 147, as authority.


<sup>15</sup> *Prosecutor v. Kovacevic*, supra note 13, para. 37.



Freetown, 20 February 2004.

For the Prosecution,

  
\_\_\_\_\_  
Luc Côté

  
\_\_\_\_\_  
Robert Petit

**Prosecution Book of Authorities**

1. Prosecutor v. Kordic & Cerkez, Trial Judgement, IT-95-14/2-T, 26 February 2001.
2. Prosecutor v. Kupreskic et al, Trial Judgement, IT-95-16-T, 14 January 2000.
3. Prosecutor v. Kayishema & Ruzindana, ICTR-95-I-T, 21 May 1999
4. Prosecutor v. Akayesu, ICTR-96-4-T, 2 September 1998
5. Prosecutor v. Krstic, Trial Judgement, IT-98-33-T, 2 August 2001.
6. Prosecutor v. Kunarac et al, Trial Judgement, IT-96-23-T & IT-96-23/1-T, 22 February 2001.

*Prosecutor v. Kanu et al, SCSL-2003-16-PT*

Prosecutor v. Kordic & Cerkez, Trial Judgement, IT-95-14/2-T, 26 February 2001.

**IN THE TRIAL CHAMBER**

**Before:**

**Judge Richard May, Presiding**

**Judge Mohamed Bennouna**

**Judge Patrick Robinson**

**Registrar:**

**Mr. Hans Holthuis**

**Date: 26 February 2001**

**PROSECUTOR**

**v.**

**DARIO KORDIC**

**&**

**MARIO CERKEZ**

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**JUDGEMENT**

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**The Office of the Prosecutor:**

**Mr. Geoffrey Nice, Q.C.**

**Mr. Patrick Lopez-Terres**

**Mr. Kenneth R. Scott**

**Ms. Susan Somers**

**Mr. Fabricio Guariglia**

**Counsel for the Accused:**

**Mr. Mitko Naumovski, Mr. Turner T. Smith, Jr., Mr. Stephen M. Sayers, Mr. Robert Stein and**

**Mr. Christopher G. Browning, Jr., for Dario Kordic**

**Mr. Bozidar Kovacic and Mr. Goran Mikulicic, for Mario Cerkez**

**PART ONE: INTRODUCTION**

1. This is the Judgement of the Trial Chamber in the case of *Prosecutor v. Dario Kordic and Mario Cerkez*. Both accused are Bosnian Croats who played prominent parts in the conflict in the Central Bosnian region of Bosnia and Herzegovina in the early 1990s. Dario Kordic was a politician at the time, described as the most important Bosnian Croat political figure in the area. On the other hand, Mario Cerkez was a military man and Commander of a Brigade of the Croatian Defence Council. The conflict between the Bosnian Muslims and the Bosnian Croats, with which this case

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is concerned, took place mainly in 1992 and 1993. The accused are charged with offences arising from that conflict.

(b) Discussion

269. It is not controversial that the category "other inhumane acts" provided for in Article 5 is a residual category, which encompasses acts not specifically enumerated.<sup>366</sup> Trial Chambers have considered the threshold to be reached by these other acts in order to be incorporated in this category, reaching similar conclusions as to the serious nature of these acts. The *Tadić* Trial Chamber found that "inhumane acts" are acts "similar in gravity to those listed in the preceding subparagraphs".<sup>367</sup> In the words of the *Kupreški* Trial Chamber, in order to be characterised as inhumane, acts "must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5."<sup>368</sup> The *Tadić* Trial Chamber, in relation to the requisite nature of "other inhumane acts", held that they "must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity."<sup>369</sup>

270. Acts such as "mutilation and other types of severe bodily harm", "beatings and other acts of violence",<sup>370</sup> and "serious physical and mental injury"<sup>371</sup> have been considered as constituting inhumane acts. The Trial Chamber in *Kupreški* took a broader approach of which acts may fall into the category of other inhumane acts in concluding that acts such as the forcible transfer of groups of civilians, enforced prostitution, and the enforced disappearance of persons, may be regarded as "other inhumane acts".<sup>372</sup>

271. Within the context of the discussion of "other inhumane acts", the *Blaški* Trial Chamber defined the elements of serious bodily or mental harm thus:

- the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances;
- the suffering must be the result of an act of the accused or his subordinate;
- when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.<sup>373</sup>

<sup>366</sup> *Kupreški* Trial Judgement, para. 563; *Blaški* Trial Judgement, para. 237.

<sup>367</sup> *Tadić* Trial Judgement, para. 729.

<sup>368</sup> *Kupreški* Trial Judgement, para. 566.

<sup>369</sup> *Tadić* Trial Judgement, para. 729.

<sup>370</sup> *Tadić* Trial Judgement, para. 730.

<sup>371</sup> *Blaški* Trial Judgement, para. 239.

<sup>372</sup> *Kupreški* Trial Judgement, para. 566. Contrary to the *Tadić* Appeals Chamber's finding, the Trial Chamber appears to have included a requirement that some of the acts that may be characterised as "inhumane acts" be performed with a discriminatory intent.

<sup>373</sup> *Blaški* Trial Judgement, para. 243.

In addition, as discussed in relation to the requirements for the application of Article 5 of the Statute, the acts must have been committed as part of a widespread or systematic attack against a civilian population.

272. The Trial Chamber finds that where the act alleged in the Indictment to have caused injuries meets the requirements set out in the preceding paragraph, they may be characterised as "inhumane acts" for the purposes of Article 5 of the Statute.

**D. Unlawful Confinement of Civilians and Imprisonment**

273. Dario Kordi} and Mario ^erkez are alleged to have participated in the illegal detention of Bosnian Muslims. These acts are charged under Article 2 (as "unlawful confinement" in Counts 22 and 30 respectively), and Article 5 of the Statute (as "imprisonment" in Counts 21 and 29 respectively).<sup>374</sup> This section will determine the legal ingredients of these offences.

1. Unlawful Confinement (Article 2)

(a) Arguments of the Parties

274. According to the Prosecution, in order to constitute the crime of unlawful confinement of a civilian under Article 2 of the Statute, it must be proved that: (a) the victim was a civilian; and either (b) the initial confinement was not legal; or (c) the continuing confinement was not legal because the requisite procedural safeguards were violated.<sup>375</sup>

275. In relation to (b), the Prosecution argues that while the confinement of civilians is permitted in certain limited situations – and only as a measure of last resort - where the person is definitely suspected of or engaged in activities hostile to the security of a State, these situations remain the exception and, consequently, do not apply to an individual's political attitude towards the State.<sup>376</sup> Moreover, although the determination of the security of the State, a threat to which justifies internment or assigned residence, is left to the authorities of the State itself, it must nevertheless be made on a case-by-case basis<sup>377</sup> and the exceptional measure of confinement can never be taken on a collective basis.<sup>378</sup>

276. In respect of (c), the Prosecution states that even if the initial confinement of civilians is justifiable under the exceptions discussed above, the detainee must still be granted some basic

<sup>374</sup> Indictment, paras. 44-46 and 50-51.  
<sup>375</sup> Prosecution Final Brief, Annex 5, para. 51.  
<sup>376</sup> Prosecution Final Brief, Annex 5, paras. 56-58.  
<sup>377</sup> Prosecution Final Brief, Annex 5, para. 59.  
<sup>378</sup> Prosecution Final Brief, Annex 5, para. 59.

*Prosecutor v. Kanu et al, SCSL-2003-16-PT*

Prosecutor v. Kupreskic et al, Trial Judgement, IT-95-16-T, 14 January 2000.



**IN THE TRIAL CHAMBER**

**Before:**

**Judge Antonio Cassese, Presiding**  
**Judge Richard May**  
**Judge Florence Ndepele Mwachande Mumba**

**Registrar:**

**Mrs. Dorothee de Sampayo Garrido-Nijgh**

**Judgement of: 14 January 2000**

**PROSECUTOR**

**v.**

**Zoran KUPRESKIC,**  
**Mirjan KUPRESKIC,**  
**Vlatko KUPRESKIC,**  
**Drago JOSIPOVIC,**  
**Dragan PAPIC,**  
**Vladimir SANTIC, also known as "VLADO"**

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**JUDGEMENT**

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**The Office of the Prosecutor:**

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**Mr. Michael Blaxill**

**Counsel for the Accused:**

**Mr. Ranko Radovic, Mr. Tomislav Pasaric, for Zoran Kupreskic**  
**Ms. Jadranka Slokovic-Glumac, Ms. Desanka Vranjican, for Mirjan Kupreskic**  
**Mr. Borislav Krajina, Mr. Zelimar Par, for Vlatko Kupreskic**  
**Mr. Luko Susak, Ms. Goranka Herljevic, for Drago Josipovic**  
**Mr. Petar Puliselic, Ms. Nika Pinter, for Dragan Papic**  
**Mr. Petar Pavkovic, Mr. Mirko Vrdoljak, for Vladimir Santic**

The trial of Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, hereafter the "accused", before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, hereafter "International Tribunal", commenced on 17 August 1998 and came to a close on 10 November 1998.

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Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor , hereafter "Prosecution", and the Defence for the accused, the Trial Chamber

**HEREBY RENDERS ITS JUDGEMENT.**

## (b) Article 5(i): Other Inhumane Acts

562. The expression "other inhumane acts" was drawn from Article 6(c) of the London Agreement and Article II(1)(c) of Control Council Law No. 10.

563. There is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal and hence, that it is contrary to the principle of the "specificity" of criminal law. It is thus imperative to establish what is included within this category. The phrase "other inhumane acts" was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition. The importance of maintaining such a category was elucidated by the ICRC when commenting on what would constitute a violation of the obligation to provide "humane treatment" contained in common Article 3 of the Geneva Conventions:<sup>825</sup>

[I]t is always dangerous to try to go into too much detail – especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise.

564. In interpreting the expression at issue, resort to the *ejusdem generis* rule of interpretation does not prove to be of great assistance. Under this rule, that expression would cover *actions similar* to those specifically provided for. Admittedly such a rule of interpretation has been relied upon by various courts with regard to Article 6(c) of the London Agreement. Thus, for instance, in the *Tarneq* case, the District Court of Tel-Aviv held in a decision of 14 December 1951 that the definition of "other inhumane acts" laid down in the Israeli Law on Nazi and Nazi Collaborators (Punishment) of 1950, which reproduced the definition of Article 6(c), was to apply only to such other inhumane acts as resembled in their nature and their gravity those specified in the definition.<sup>826</sup> This interpretative rule lacks precision, and is too general to provide a safe yardstick for the work of the Tribunal.

565. The Statute of the International Criminal Court (ICC) (Article 7(k)) provides greater detail than the ICTY Statute as to the meaning of other inhumane acts: "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health".<sup>827</sup> However, this provision also fails to provide an indication, even indirectly, of the legal standards which would allow us to identify the prohibited inhumane acts.<sup>828</sup>

566. Less broad parameters for the interpretation of "other inhumane acts" can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity. Thus, for example, serious forms of cruel or degrading treatment of persons belonging to a particular ethnic, religious, political or racial group, or serious widespread or systematic manifestations of cruel or humiliating or degrading treatment with a discriminatory or persecutory intent no doubt amount to crimes against humanity: inhuman or degrading treatment is prohibited by the United Nations Covenant on Civil and Political Rights (Article 7), the European Convention on Human Rights, of 1950 (Article 3), the Inter-American Convention on Human Rights of 9 June 1994 (Article 5) and the 1984 Convention against Torture (Article 1).<sup>829</sup> Similarly, the expression at issue undoubtedly

embraces the forcible transfer of groups of civilians (which is to some extent covered by Article 49 of the IVth Convention of 1949 and Article 17(1) of the Additional Protocol II of 1977), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights), as well as the enforced disappearance of persons (prohibited by General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American Convention of 9 June 1994). Plainly, all these, and other similar acts, must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5 . Once the legal parameters for determining the content of the category of “inhumane acts” are identified, resort to the *ejusdem generis* rule for the purpose of comparing and assessing the gravity of the prohibited act may be warranted.

c. Relationship Between “Inhumane Acts” under Article 5(i) (Crimes Against Humanity) and “Cruel Treatment” under Article 3 (War Crimes)

711. These two crimes are clearly presented as alternatives in the Indictment and should be considered as such. Except for the element of widespread or systematic practice required for crimes against humanity, each of them does not require proof of elements not required by the other. In other words, it is clear that every time an inhumane act under Article 5(i) is committed, *ipso facto* cruel treatment under Article 3 is inflicted. The reverse is however not true: cruel treatment under Article 3 may not be covered by Article 5(i) if the element of widespread or systematic practice is missing. Thus if the evidence proves the commission of the facts in question, a conviction should only be recorded for one of these two offences: inhumane acts, if the background conditions for crimes against humanity are satisfied, and if they are not, cruel treatment as a war crime. Given this, it is not strictly necessary to consider the “different values test”, since the *Blockburger* test is ultimately dispositive of the issue.

*Prosecutor v. Kanu et al, SCSL-2003-16-PT*

Prosecutor v. Kayishema & Ruzindana, ICTR-95-I-T, 21 May 1999



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

**Before:**

Judge William H. Sekule, Presiding  
Judge Yakov A. Ostrovsky  
Judge Tafazzal Hossain Khan

**Registrar:**

Mr. Agwu U. Okali

**Decision of:** 21 May 1999

**THE PROSECUTOR**  
versus  
**CLÉMENT KAYISHEMA**  
and  
**OBED RUZINDANA**

*Case No. ICTR-95-1-T*

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**JUDGEMENT**

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**The Office of the Prosecutor:**

Mr. Jonah Rahetlah  
Ms. Brenda Sue Thornton  
Ms. Holo Makwaia

**Counsel for Clément Kayishema:**

Mr. André Ferran  
Mr. Philippe Moriceau

**Counsel for Obed Ruzindana:**

Mr. Pascal Besnier  
Mr. Willem Van der Griend

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***Other Inhumane Acts***

148. The Prosecution charges Kayishema with crimes against humanity for other inhumane acts in Counts 4, 10, 16 and 22 of the Indictment, and Ruzindana with crimes against humanity for other inhumane acts in Count 22 of the Indictment.

149. Since the Nuremberg Charter, the category 'other inhumane acts' has been maintained as a useful category for acts not specifically stated but which are of comparable gravity. The importance in maintaining such a category was elucidated by the ICRC when commenting on inhumane treatment contained in Article 3 of the Geneva Conventions,

It is always dangerous to try to go into too much detail – especially in this domain. However much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.

The form of wording adopted is flexible and, at the same time, precise.<sup>[50]</sup>

150. Other inhumane acts include those crimes against humanity that are not otherwise specified in Article 3 of the Statute, but are of comparable seriousness. The ICC Statute (Article 7(k)), provides greater detail than the ICTR Statute to the meaning of other inhumane acts: "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." The ILC commenting on Article 18 of its Draft Code of Crimes states

The Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which may constitute crimes against humanity. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity.

151. The Chamber notes the International Law Commission's commentary. In relation to the Statute, other inhumane acts include acts that are of similar gravity and seriousness to the enumerated acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, or persecution on political, racial and religious grounds. These will be acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity. The Prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to mental or physical health of the victim. The Chamber agrees with the Prosecution submission that the acts that rise to the level of inhumane acts should be determined on a case-by-case basis.<sup>[51]</sup>

152. The Defence asserts that for an accused to be found guilty of mental harm, there must be a

direct relation between the assailant and the victim.<sup>[52]</sup> The Prosecution on the other hand suggests that victims have suffered mental harm amounting to other inhumane acts due to them having witnessed atrocities for which the accused is responsible. For example, in relation to Count 4 the Prosecution submits,

[w]ith respect to serious mental harm, six survivors testified (and the survivors of all the other massacres testified) that they witnessed family members and friends being killed. As established by the evidence, Tutsi civilians were placed in an environment of fear and desperation and were forced to witness the killing and the severe injuring of friends, family and other Tutsi civilians. The killings were brutal in manner. The people saw carnage and heard the people singing exterminate them, exterminate them....The Prosecutor submits that such an environment inherently causes serious mental harm.<sup>[53]</sup>

153. The Chamber is in no doubt that a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends. However, to find an accused responsible for such harm under crimes against humanity, it is incumbent on the Prosecution to prove the *mens rea* on the part of the accused. Indeed, as stated above, inhumane acts are, *inter alia*, those which *deliberately* cause serious mental suffering. The Chamber considers that an accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental suffering on the third party, or where the accused knew that his act was likely to cause serious mental suffering and was reckless as to whether such suffering would result. Accordingly, if at the time of the act, the accused was unaware of the third party bearing witness to his act, then he cannot be held responsible for the mental suffering of the third party.

154. In summary, for an accused to be found guilty of crimes against humanity for other inhumane acts, he must commit an act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the other inhumane act, and with knowledge that the act is perpetrated within the overall context of the attack.

*Prosecutor v. Kanu et al, SCSL-2003-16-PT*

Prosecutor v. Akayesu, ICTR-96-4-T, 2 September 1998



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

**CHAMBER I - CHAMBRE I**

**OR : ENG**

**Before:**

Judge Laity Kama, Presiding  
Judge Lennart Aspegren  
Judge Navanethem Pillay

**Registry:**

Mr. Agwu U. Okali

**Decision of: 2 September 1998**

**THE PROSECUTOR  
VERSUS  
JEAN-PAUL AKAYESU**

*Case No. ICTR-96-4-T*

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**JUDGEMENT**

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**The Office of the Prosecutor:**

Mr. Pierre-Richard Prosper

**Counsel for the Accused:**

Mr. Nicolas Tiangaye  
Mr. Patrice Monthé

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## 8. VERDICT

## 7.7. Count 13 (rape) and Count 14 (other inhumane acts) - Crimes against Humanity

685. In the light of its factual findings with regard to the allegations of sexual violence set forth in paragraphs 12A and 12B of the Indictment, the Tribunal considers the criminal responsibility of the Accused on Count 13, crimes against humanity (rape), punishable by Article 3(g) of the Statute of the Tribunal and Count 14, crimes against humanity (other inhumane acts), punishable by Article 3(i) of the Statute.

686. In considering the extent to which acts of sexual violence constitute crimes against humanity under Article 3(g) of its Statute, the Tribunal must define rape, as there is no commonly accepted definition of the term in international law. The Tribunal notes that many of the witnesses have used the term "rape" in their testimony. At times, the Prosecution and the Defence have also tried to elicit an explicit description of what happened in physical terms, to document what the witnesses mean by the term "rape". The Tribunal notes that while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. An act such as that described by Witness KK in her testimony - the Interahamwes thrusting a piece of wood into the sexual organs of a woman as she lay dying - constitutes rape in the Tribunal's view.

687. The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Tribunal also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured. The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

688. The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of "other inhumane acts", set forth Article 3(i) of the Tribunal's Statute, "outrages upon personal dignity," set forth in Article 4(e) of the Statute, and "serious bodily or mental harm," set forth in Article 2(2)(b) of the Statute.

689. The Tribunal notes that as set forth by the Prosecution, Counts 13-15 are drawn on the basis of acts as described in paragraphs 12(A) and 12(B) of the Indictment. The allegations in these paragraphs of the Indictment are limited to events which took place "on or near the bureau communal premises." Many of the beatings, rapes and murders established by the evidence presented took place away from the bureau

communal premises, and therefore the Tribunal does not make any legal findings with respect to these incidents pursuant to Counts 13, 14 and 15.

690. The Tribunal also notes that on the basis of acts described in paragraphs 12(A) and 12(B), the Accused is charged only pursuant to Article 3(g) (rape) and 3(i) (other inhumane acts) of its Statute, but not Article 3(a)(murder) or Article 3(f)(torture). Similarly, on the basis of acts described in paragraphs 12(A) and 12(B), the Accused is charged only pursuant to Article 4(e)(outrages upon personal dignity) of its Statute, and not Article 4(a)(violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment). As these paragraphs are not referenced elsewhere in the Indictment in connection with these other relevant Articles of the Statute of the Tribunal, the Tribunal concludes that the Accused has not been charged with the beatings and killings which have been established as Crimes Against Humanity or Violations of Article 3 Common to the Geneva Conventions. The Tribunal notes, however, that paragraphs 12(A) and 12(B) are referenced in Counts 1-3, Genocide and it considers the beatings and killings, as well as sexual violence, in connection with those counts.

691. The Tribunal has found that the Accused had reason to know and in fact knew that acts of sexual violence were occurring on or near the premises of the bureau communal and that he took no measures to prevent these acts or punish the perpetrators of them. The Tribunal notes that it is only in consideration of Counts 13, 14 and 15 that the Accused is charged with individual criminal responsibility under Section 6(3) of its Statute. As set forth in the Indictment, under Article 6(3) "an individual is criminally responsible as a superior for the acts of a subordinate if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof." Although the evidence supports a finding that a superior/subordinate relationship existed between the Accused and the Interahamwe who were at the bureau communal, the Tribunal notes that there is no allegation in the Indictment that the Interahamwe, who are referred to as "armed local militia," were subordinates of the Accused. This relationship is a fundamental element of the criminal offence set forth in Article 6(3). The amendment of the Indictment with additional charges pursuant to Article 6(3) could arguably be interpreted as implying an allegation of the command responsibility required by Article 6(3). In fairness to the Accused, the Tribunal will not make this inference. Therefore, the Tribunal finds that it cannot consider the criminal responsibility of the Accused under Article 6(3).

692. The Tribunal finds, under Article 6(1) of its Statute, that the Accused, by his own words, specifically ordered, instigated, aided and abetted the following acts of sexual violence:

- (i) the multiple acts of rape of ten girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;
- (ii) the rape of Witness OO by an Interahamwe named Antoine in a field near the bureau communal;
- (iii) the forced undressing and public marching of Chantal naked at the bureau communal.

693. The Tribunal finds, under Article 6(1) of its Statute, that the Accused aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises in respect of (i) and in his presence in respect of (ii) and (iii), and by facilitating the commission of these acts through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place:

- (i) the multiple acts of rape of fifteen girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;



- (ii) the rape of a woman by Interahamwe in between two buildings of the bureau communal, witnessed by Witness NN;
- (iii) the forced undressing of the wife of Tharcisse after making her sit in the mud outside the bureau communal, as witnessed by Witness KK;

694. The Tribunal finds, under Article 6(1) of its Statute, that the Accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place:

- (i) the rape of Witness JJ by an Interahamwe who took her from outside the bureau communal and raped her in a nearby forest;
- (ii) the rape of the younger sister of Witness NN by an Interahamwe at the bureau communal;
- (iii) the multiple rapes of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe by Interahamwe near the bureau communal;
- (iv) the forced undressing of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe, and the forcing of the women to perform exercises naked in public near the bureau communal.

695. The Tribunal has established that a widespread and systematic attack against the civilian ethnic population of Tutsis took place in Taba, and more generally in Rwanda, between April 7 and the end of June, 1994. The Tribunal finds that the rape and other inhumane acts which took place on or near the bureau communal premises of Taba were committed as part of this attack.

### COUNT 13

696. The Accused is judged criminally responsible under Article 3(g) of the Statute for the following incidents of rape:

- (i) the rape of Witness JJ by an Interahamwe who took her from outside the bureau communal and raped her in a nearby forest;
- (ii) the multiple acts of rape of fifteen girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;
- (iii) the multiple acts of rape of ten girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;
- (iv) the rape of Witness OO by an Interahamwe named Antoine in a field near the bureau communal;
- (v) the rape of a woman by Interahamwe in between two buildings of the bureau communal, witnessed by Witness NN;
- (vi) the rape of the younger sister of Witness NN by an Interahamwe at the bureau communal;
- (vii) the multiple rapes of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe by Interahamwe near the bureau communal.

### COUNT 14

697. The Accused is judged criminally responsible under Article 3(i) of the Statute for the following

other inhumane acts:

- (i) the forced undressing of the wife of Tharcisse outside the bureau communal, after making her sit in the mud, as witnessed by Witness KK;
- (ii) the forced undressing and public marching of Chantal naked at the bureau communal;
- (iii) the forced undressing of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe, and the forcing of the women to perform exercises naked in public near the bureau communal.

*Prosecutor v. Kanu et al, SCSL-2003-16-PT*

Prosecutor v. Krstic, Trial Judgement, IT-98-33-T, 2 August 2001.

**IN THE TRIAL CHAMBER**

**Before:**

**Judge Almiro Rodrigues, Presiding**

**Judge Fouad Riad**

**Judge Patricia Wald**

**Registrar:**

**Mr. Hans Holthuis**

**PROSECUTOR**

**v.**

**RADISLAV KRSTIC**

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**JUDGEMENT**

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**The Office of the Prosecutor:**

**Mr. Mark Harmon**

**Mr. Peter McCloskey**

**Mr. Andrew Cayley**

**Ms. Magda Karagiannakis**

**Counsel for the Accused:**

**Mr. Nenad Petrusic**

**Mr. Tomislav Visnjic**

### 505. D. Mistreatments

506. While the indictment cites mainly the killing of large numbers of Bosnian Muslim men, it also alleges two kinds of mistreatments: serious bodily or mental harm, as a genocidal crime;<sup>1150</sup> and cruel and inhumane treatment, including severe beatings, as an element of the persecutions inflicted on the Bosnian Muslims.<sup>1151</sup>

#### 1. Serious bodily or mental harm

507. The serious bodily or mental harm, cited by the Prosecution in support of the genocide charge, relates to the suffering endured by those who survived the executions .
508. The Prosecution relies upon the definition of serious bodily or mental harm found in the *Akayesu* Judgement, which includes “acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution”.<sup>1152</sup> The Prosecution also quotes the *Eichmann* Judgement rendered by the Jerusalem District Court on 12 December 1961, according to which “the enslavement, starvation , deportation and persecution ?and theg detention ?of individualsg in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation , deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture”<sup>1153</sup> may constitute serious bodily or mental harm. The Defence made no specific submissions on this issue.
509. The Chamber observes that, in the decision on the review of the indictment against *Karadzic and Mladic* pursuant to Rule 61, the ICTY stated that cruel treatment, torture, rape and deportation could constitute serious bodily or mental harm done to members of a group under a count of genocide.<sup>1154</sup> The Preparatory Commission for the International Criminal Court indicated that serious bodily and mental harm “may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment”.<sup>1155</sup>
510. The *Kayishema and Ruzindana* Judgement defined serious bodily harm as “harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses”.<sup>1156</sup> The same Judgement held that serious mental harm must “be interpreted on a case- by-case basis in light of the relevant jurisprudence”.<sup>1157</sup> Reference to serious mental harm, in the context of the Genocide Convention, appears to have been restricted originally to the injection of pharmacological substances occasioning the serious impairment of mental faculties.<sup>1158</sup> The United States supported this restrictive interpretation, indicating in a statement of interpretation annexed to their instrument of accession that, in their view, “mental harm” meant permanent impairment of the mental faculties brought on through drugs, torture or techniques similar thereto.<sup>1159</sup> In addition, the Preparatory Committee of the International Criminal Court points out that “‘mental harm’ is understood to mean more than the minor or temporary impairment of mental faculties”.<sup>1160</sup> A distinction must thus be drawn between serious mental harm and emotional or psychological damage or attacks on the dignity of the human person not causing lasting impairment. The *Akayesu* Judgement stressed, however, that “causing serious bodily or mental harm [...] does not necessarily mean that the harm is permanent and irremediable”.<sup>1161</sup>
511. The serious bodily or mental harm, included within Article 4 of the Statute , can be informed by the Tribunal’s interpretation of the offence of wilfully causing great suffering or serious injury to

body or health under Article 2 of the Statute . The latter offence was defined in the *Celebici* Judgement as “an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury”.<sup>1162</sup>

512. The *Blaskic* Judgement defined the serious bodily or mental harm required to prove a charge of persecution under Article 5 as follows:

the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case by case basis with due regard for the individual circumstances ;

the suffering must be the result of an act of the accused or his subordinate;

when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim, through his own will or deliberate recklessness.<sup>1163</sup>

513. The Trial Chamber finds that serious bodily or mental harm for purposes of Article 4 *actus reus* is an intentional act or omission causing serious bodily or mental suffering. The gravity of the suffering must be assessed on a case by case basis and with due regard for the particular circumstances. In line with the *Akayesu* Judgement,<sup>1164</sup> the Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.

514. The Chamber is fully satisfied that the wounds and trauma suffered by those few individuals who managed to survive the mass executions do constitute serious bodily and mental harm within the meaning of Article 4 of the Statute.<sup>1165</sup>

## 2. Cruel and Inhumane Treatment

515. The Prosecution relies on paragraphs 4, 6, 7, 11 and 22 to 26 of the indictment to allege that persecutions were committed against the Bosnian Muslims by, among other crimes, “the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings.”<sup>1166</sup> The paragraphs mentioned above, however, do not contain any specifics with respect to cruel and inhumane treatment.

516. Cruel and inhumane treatment has been defined in the jurisprudence of the Tribunal as “an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity” and includes such offences as torture.<sup>1167</sup> The Chamber has just explained how the term “serious” should be interpreted.

517. The Trial Chamber has described in detail the ordeal suffered both by the Bosnian Muslims who fled to Potocari and the Bosnian Muslims captured from the column. More specifically, the Trial Chamber heard reliable evidence concerning the severe beatings and other cruel treatments suffered by the Bosnian Muslim men after they had been separated from their relatives in

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Potocari. Numerous witnesses further testified about the terrible conditions prevailing both in and outside the UN Potocari compound: lack of food and water which the VRS provided in very limited quantity, thousands of people crammed into a small space. More significantly, rapes and killings were reported by credible witnesses and some committed suicide out of terror. The entire situation in Potocari has been depicted as a campaign of terror. As an ultimate suffering, some women about to board the buses had their young sons dragged away from them, never to be seen again.<sup>1168</sup>

518. The Trial Chamber thus concludes that the VRS and other Serb forces imposed cruel and inhumane treatment on a large number of Bosnian Muslims who were subjected to intolerable conditions in Potocari, cruelly separated from their family members, and, in the case of the men, subjected to the unspeakable horror of watching their fellow captives die on the execution fields, escaping that fate only by chance. The main fact for which the Prosecution alleges inhumane treatment, though, is the forcible transfer of the Bosnian Muslim women, children and elderly outside the enclave of Srebrenica.

Prosecutor v. Kunarac et al, Trial Judgement, IT-96-23-T & IT-96-23/1-T, 22 February 2001.



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**Before:**

**Judge Claude Jorda, Presiding**

**Judge Mohamed Shahabuddeen**

**Judge Wolfgang Schomburg**

**Judge Mehmet Güney**

**Judge Theodor Meron**

**Registrar:**

**Mr. Hans Holthuis**

**Judgement of:**

**12 June 2002**

**PROSECUTOR**

**V**

**DRAGOLJUB KUNARAC**

**RADOMIR KOVAC**

**AND**

**ZORAN VUKOVIC**

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**JUDGEMENT**

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**Mr. Slavisa Prodanovic and Mr. Dejan Savatic for the accused Dragoljub Kunarac**

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

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

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 is seised of appeals against the Trial Judgement rendered by Trial Chamber II on 22 February 2001 in the case of *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*.

Having considered the written and oral submissions of the parties, the Appeals Chamber

**HEREBY RENDERS ITS JUDGEMENT.**

- (i) that the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and
- (ii) that he knew that the act or omission could have that effect.

## G. Enslavement

### 1. Background

515. The Indictment charges both Dragoljub Kunarac and Radomir Kova- with enslavement as a crime against humanity under Article 5(c) of the Statute.<sup>1239</sup> The common elements of crimes against humanity under this Article are set out above. What falls to be determined here is what constitutes "enslavement" as a crime against humanity; in particular, the customary international law content of this offence at the time relevant to the Indictment.

516. What follows is not intended to be an exhaustive pronouncement on the law of enslavement. The enslavement charges in the present case relate solely to the treatment of women and children and certain allegations of forced or compulsory labour or service.

517. The Prosecutor made submissions on enslavement in her briefs<sup>1240</sup> and during closing arguments.<sup>1241</sup> The Defence made submissions on enslavement in their final trial brief<sup>1242</sup> and during closing arguments.<sup>1243</sup>

### 2. The law

518. The Statute does not define "enslavement". It is therefore necessary to look to various sources that deal with the same or similar subject matter, including international humanitarian law and human rights law.

<sup>1239</sup> Indictment IT-96-23 (Counts 18 and 22 respectively).

<sup>1240</sup> Prosecutor's Pre-Trial Brief I, pars 198-221; Prosecutor's Final Trial Brief, pars 796-872.

<sup>1241</sup> T 6286-6288.

<sup>1242</sup> Defence Final Trial Brief, pars N.3.1-N.3.8.

<sup>1243</sup> T 6428-6441 (in relation to Dragoljub Kunarac); T 6520-6525 (in relation to Radomir Kova-).

519. Although the international legal struggle against slavery – dating back more than a century and a half - was one of the most important forerunners to the international protection of human rights, it is only in 1926 that the Slavery Convention provided the first basic definition. That definition - "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised"<sup>1244</sup> – proved to be abiding. The Slavery Convention also prohibits the slave trade:

The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of slaves.<sup>1245</sup>

With respect to forced or compulsory labour, the state parties to that Convention furthermore recognised

that recourse to compulsory or forced labour may have grave consequences and undertake [...] to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.<sup>1246</sup>

520. The customary international law status of these substantive provisions is evinced by the almost universal acceptance of that Convention and the central role that the definition of slavery in particular has come to play in subsequent international law developments in this field. The 1956 Supplementary Slavery Convention<sup>1247</sup> augments the Slavery Convention and defines slavery and the slave trade<sup>1248</sup> in essentially the same terms as used in the Slavery Convention. In particular, "slavery" and "slave" are defined as follows:

[...] 'slavery' means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and 'slave' means a person in such condition or status.<sup>1249</sup>

521. Just before the Second World War, the 1930 Forced and Compulsory Labour Convention<sup>1250</sup> was drafted under the auspices of the International Labour Organisation

<sup>1244</sup> Art 1(1) of the Slavery Convention. Yugoslavia ratified the Slavery Convention on 28 Sept 1929.

<sup>1245</sup> Art 1(2) of the Slavery Convention.

<sup>1246</sup> Art 5 of the Slavery Convention.

<sup>1247</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Yugoslavia ratified the Supplementary Slavery Convention on 20 May 1958. Bosnia and Herzegovina succeeded to the same Convention on 1 Sept 1993.

<sup>1248</sup> Art 7(c) of the Supplementary Slavery Convention ("[...] 'slave trade' means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves by whatever means of conveyance.").

("ILO"). That Convention defines forced or compulsory labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".<sup>1251</sup> Excluded from the definition is, *inter alia*, any work or service exacted in the event of war that endangers the existence or the well-being of the whole or part of the population,<sup>1252</sup> and minor communal services that can be considered as normal civic obligations.<sup>1253</sup> The 1957 Convention Concerning the Abolition of Forced Labour ("Forced Labour Convention")<sup>1254</sup> was also drafted under the auspices of the ILO and was intended to complement the Slavery Convention, the Supplementary Slavery Convention and the Forced and Compulsory Labour Convention. It provides that

Each member of the International Labour Organization which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour  
 (a) As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; [...] (e) As a means of racial, social, national or religious discrimination.<sup>1255</sup>

522. The end of the Second World War saw the first codification of crimes against humanity in the Charter of the International Military Tribunal of 1945 ("Nuremberg Charter"),<sup>1256</sup> which provides that the Nuremberg Tribunal

[...] shall have the power to try and punish persons who [...] committed any of the following crimes: The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes against Peace [...]; (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, [...] *deportation to slave labor* [...]; (c) *Crimes against Humanity*: namely, murder, extermination, *enslavement*, deportation and other inhumane acts committed against any civilian population [...].<sup>1257</sup>

The Nuremberg Charter did not, however, provide a definition of enslavement.

<sup>1249</sup> Art 7(a) of the Supplementary Slavery Convention.

<sup>1250</sup> The Convention Concerning Forced or Compulsory Labour. Yugoslavia ratified the Forced and Compulsory Labour Convention on 4 Mar 1933. Bosnia and Herzegovina ratified the same Convention on 2 June 1993. The Forced and Compulsory Labour Convention has received more than 150 ratifications.

<sup>1251</sup> Art 2(1) of the Forced and Compulsory Labour Convention.

<sup>1252</sup> Art 2(2)(d) of the Forced and Compulsory Labour Convention.

<sup>1253</sup> Art 2(2)(e) of the Forced and Compulsory Labour Convention.

<sup>1254</sup> This Convention has been ratified by more than 140 states.

<sup>1255</sup> Art 1 of the Forced Labour Convention.

<sup>1256</sup> Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 Aug 1945 (signed by Britain, France, the USA and the USSR, and acceded to by 19 other states (Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece,

523. The Nuremberg indictment<sup>1258</sup> included deportation to slave labour and enslavement charges.<sup>1259</sup> The Nuremberg judgement,<sup>1260</sup> however, made no attempt to define these concepts or to draw a systematic distinction between deportation to slave labour and enslavement.<sup>1261</sup> In the section of that judgement dealing with the legal findings in relation to each individual defendant, reference was made to the involvement in one way or another in the slave labour program of thirteen defendants.<sup>1262</sup> The Nuremberg Tribunal, however, did not indicate whether that conduct went to the convictions entered for war crimes or for crimes against humanity, except in the case of the defendant Von Schirach, who was only convicted of a crime against humanity in relation to his involvement in forced labour.<sup>1263</sup> From Von Schirach's conviction, at least, it is clear that that Tribunal interpreted slave or

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Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia)).

<sup>1257</sup> Art 6 of the Nuremberg Charter. Emphasis added.

<sup>1258</sup> Reprinted in *Trial of Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Vol 1 (1947), pp 27-92.

<sup>1259</sup> *Ibid*, Count One (The Common Plan or Conspiracy), pp 29 *et seq*; Count Three (War Crimes), (B) Deportation for slave labor and for other purposes of the civilian populations of and in occupied territories, pp 51-52 ("During the whole period of the occupation by Germany of both the Western and Eastern Countries it was the policy of the German Government and of the German High Command to deport able-bodied citizens from such occupied countries to Germany and to other occupied countries for the purpose of slave labor upon defense works, in factories, and in other tasks connected with the German war effort. [...]": at p 51); (H) Conscription of civilian labour, p 62 ("Throughout the occupied territories the defendants conscripted and forced the inhabitants to labour and requisitioned their services for purposes other than meeting the needs of the armies of occupation and to an extent far out of proportion to the resources of the countries involved. All the civilians so conscripted were forced to work for the German war effort. [...]": at p 62); Count Four (Crimes against Humanity), (A) Murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations before and during the war, p 66 ("[...] [The defendants] subjected them to [...] enslavement [...]. At these and other camps the civilians were put to slave labor [...]": at p 66).

<sup>1260</sup> Reprinted in *Trial of Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Vol 22 (1947), pp 411-589 (rendered on 30 Sept and 1 Oct 1946).

<sup>1261</sup> *Ibid*, p 470 (slave labour); pp 477-478 and pp 480-481 (slave labour); pp 486-491 (The Nuremberg Tribunal found Germany's deportation and slave labour policies to be in flagrant violation of not only Article 6(b) of the Nuremberg Charter, but also of Article 52 of the Hague Convention. (*Ibid*, p 486). Art 52 of the Regulations Respecting the Laws and Customs of War on Land, Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land ("Hague Convention") provides that "Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.").

<sup>1262</sup> Deportation to slave labour, slave and forced labour and enslavement, are referred to in relation to the convictions of the following defendants: Goering (*ibid*, pp 526-527); Keitel (*ibid*, p 536); Kaltenbrunner (*ibid*, pp 537-538); Rosenberg (*ibid*, pp 540-541); Frank (*ibid*, pp 542-544); Frick (*ibid*, p 546); Funk (*ibid*, p 552); Von Schirach (*ibid*, pp 565-566); Sauckel (*ibid*, 566-568); Jodl (*ibid*, pp 570-571); Seyss-Inquart (*ibid*, pp 575-576); Speer (*ibid*, pp 577-579); Bormann (*ibid*, pp. 586-587).

<sup>1263</sup> *Ibid*, pp 565-566.

forced labour to constitute not only a war crime, but also enslavement as a crime against humanity. Other specific aspects of the Nuremberg judgement deserve mention here. With respect to the so-called voluntary recruiting of forced labourers, the Tribunal, in relation to the defendant Sauckel, appointed by Hitler as Plenipotentiary General for the Utilisation of Labour, said that he "[...] described so-called "voluntary" recruiting by "a whole batch of male and female agents just as was done in the olden times for shanghaiing. [...]"<sup>1264</sup> The defendant Speer was convicted for his participation in the slave labour program, even though he "insisted that the slave labourers be given adequate food and working conditions so that they could work efficiently".<sup>1265</sup> Last, the Nuremberg Tribunal referred to "female domestic workers" in the context of the slave labour program, specifically, the transfer of 500 000 female domestic workers from the eastern occupied territories to Germany over whom the defendants Sauckel, Himmler and Bormann had control.<sup>1266</sup> According to the transcripts of the proceedings before the Nuremberg Tribunal, these domestic workers were procured to relieve German housewives and the wives of German farmers.<sup>1267</sup> They had no claim to free time, although, as a reward for good work, they could be given leave to stay outside the assigned home for three hours once a week.<sup>1268</sup>

524. The Allied Control Council Law No 10 of 1945 ("CCL 10")<sup>1269</sup> also codified crimes against humanity, including enslavement, in terms similar to the Nuremberg Charter.<sup>1270</sup> Some CCL 10 judgements, notwithstanding the general failure to distinguish between war crimes and crimes against humanity and enslavement and related concepts, indicate which factors were considered in determining whether enslavement was committed.

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<sup>1264</sup> *Ibid*, p 567.

<sup>1265</sup> *Ibid*, p 579.

<sup>1266</sup> *Ibid*, p 586.

<sup>1267</sup> Reprinted in *Trial of Major War Criminals Before the International Military Tribunal, Nuremberg*, 14 November 1945 – 1 October 1946, Vol 3 (1947), Proceedings, 1 December 1945 – 14 Dec 1945, p 451.

<sup>1268</sup> *Ibid*, p 452.

<sup>1269</sup> Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity, 20 Dec 1945. CCL 10 was enacted by the Allied Control Council of Germany, composed of Great Britain, France, the USA and the USSR. The aim was to establish a uniform legal basis in Germany for the prosecution, by the Allies in their respective zones of occupation, of war criminals and other similar offenders other than those dealt with by the Nuremberg Tribunal.

<sup>1270</sup> CCL 10 defines crimes against humanity as "Atrocities and offences, including but not limited to murder, extermination, *enslavement*, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population [...]" (Art II(c) of CCL 10 (emphasis added)).

525. The accused in the *Milch* case before the US Military Tribunal was charged with slave labour and deportation to slave labour of German nationals and nationals of other countries as a crime against humanity.<sup>1271</sup> The Tribunal held that:

Does anyone believe that the vast hordes of Slavic Jews who laboured in Germany's war industries were accorded the rights of contracting parties? They were slaves, nothing less - kidnapped, regimented, herded under armed guards, and worked until they died from disease, hunger, exhaustion. [...]. As to non-Jewish foreign labour, with few exceptions they were deprived of the basic civil rights of free men; they were deprived of the right to move freely or to choose their place of residence; to live in a household with their families; to rear and educate their children; to marry; to visit public places of their own choosing; to negotiate, either individually or through representatives of their own choice, the conditions of their own employment; to organize in trade unions; to exercise free speech or other free expression of opinion; to gather in peaceful assembly; and they were frequently deprived of their right to worship according to their own conscience. All these are the sign-marks of slavery, not free employment under contract.<sup>1272</sup>

The US Military Tribunal in the *Pohl* case, in considering war crimes and crimes against humanity charges, succinctly held as follows:

Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery - compulsory uncompensated labour - would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.<sup>1273</sup>

<sup>1271</sup> *US v Milch*, Judgement of 31 July 1948, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol II (1997), p 773.

<sup>1272</sup> *Ibid*, p 789. Milch was found guilty of war crimes charged in Countone of the indictment in that he was responsible for the "slave labor and deportation to slave labor of the civilian populations of countries and territories occupied by the German armed forces, and in the enslavement, deportation, ill-treatment and terrorization of such persons. [...]" (*ibid*, p 790). Milch was also found guilty of crimes against humanity (count three) for the same war crimes insofar as they related to foreign nations (*ibid*, pp 790-791). With reference to the definition of the crimes in CCL 10, Judge Fitzroy D Phillips in his concurring opinion stated that CCL 10 treats as separate crimes and different types of crime deportation to slave labour (as a war crime) and enslavement (as a crime against humanity) (*ibid*, Concurring Opinion, p 860 at p 866). In the *Krupp* case (*US v Krupp and Others*, Judgement of 31 July 1948, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No 10*, Vol IX, Part 2 (1997), p 1327), the US Military Tribunal adopted the statement of the law applicable to the deportation to slave labour and enslavement of the *Milch* case made by Judge Phillips (*ibid*, pp 1432-1433). In that case, the Tribunal also held that the employment of concentration camp inmates under the circumstances disclosed was a crime (*ibid*, pp 1433-1435).

<sup>1273</sup> *US v Oswald Pohl and Others*, Judgement of 3 November 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No 10*, Vol V, (1997), p 958 at p 970. Other CCL 10 cases in which enslavement and related aspects were considered, include *IG Farben* (*US v Carl Krauch and Others*), summarised in *Law Reports of Trials of War Criminals*, The UN War Crimes Commission, Vol X (1997), pp 1-68 at 53; and *Flick* (*US v Friedrich Flick and Others*), reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No 10*, Vol VI (1997).



526. The Charter of the International Military Tribunal for the Far East of 1946 ("Tokyo Charter"),<sup>1274</sup> in terms similar to the Nuremberg Charter, provided that Tribunal with jurisdiction over

[...] (a) Crimes against Peace [...]; (b) Conventional War Crimes: Namely, violations of the laws or customs of war; (c) *Crimes against Humanity*: Namely, murder, extermination, *enslavement*, deportation and other inhumane acts [...].<sup>1275</sup>

527. The Tokyo indictment,<sup>1276</sup> in the part of the indictment dealing with conventional war crimes and crimes against humanity,<sup>1277</sup> included references to war labour, forced labour and enslavement, without distinguishing between war crimes and crimes against humanity.<sup>1278</sup> The Tokyo judgement<sup>1279</sup> also did not systematically distinguish between deportation to slave labour, slave labour and enslavement, nor did it attempt to define them in any detail.<sup>1280</sup> With respect to the use of labour by civilians from occupied territories, the following was stated:

Having decided upon a policy of employing prisoners of war and civilian internees on work directly contributing to the prosecution of the war, and having established a system to carry that policy into execution, the Japanese went further and supplemented this

<sup>1274</sup> "Special Proclamation: Establishment of an International Military Tribunal for the Far East", Order of the Supreme Commander for the Allied Powers, Tokyo, Jan 19, 1946, as amended, Apr 26, 1946.

<sup>1275</sup> Art 5 of the Tokyo Charter.

<sup>1276</sup> Reprinted in Pritchard, *The Tokyo Major War Crimes Trial, The Records of the International Military Tribunal for the Far East With an Authoritative Commentary and Comprehensive Guide*, Vol 2 (1998).

<sup>1277</sup> "Group Three: Conventional War Crimes and Crimes against Humanity" (Counts 53-55), *ibid*, pp 12-14 of the indictment.

<sup>1278</sup> Count 53 obliquely contained a conspiracy charge, also referring to "persons in charge of each of the camps and labour units for prisoners of war and civilian internees [...]" (*ibid*, p 13 of the indictment). Appendix D to the indictment was incorporated under Group Three of the charges in the indictment. Section Two of Appendix D referred to "Illegal employment of prisoner of war labour [...]" (at p iii). Section Twelve of Appendix D referred to "Failure to respect family honour and rights, individual life, [...], and deportation and enslavement of the inhabitants [...], contrary to [Article 46 of Annex III ("Military Authority over the Territory of the Hostile State") of the 1907 Hague Convention] and to the Laws and Customs of War: Large numbers of the inhabitants of [occupied] territories were murdered, tortured, raped and otherwise ill-treated, arrested and interned without justification, sent to forced labour, and their property destroyed or confiscated." (at p vi).

<sup>1279</sup> Reprinted in Röling and Rüter, *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE) 29 April 1946-12 November 1948*, Vol I (1977), pp 1-466 (rendered on 4-12 Nov 1948).

<sup>1280</sup> References to forced labour and slave labour in the Tokyo judgement include, in Chapter VIII ("Conventional War Crimes (Atrocities)"): *ibid*, p 388 ("Many of the captured Chinese were [...] placed in labour units to work for the Japanese Army [...]. Some of these captives [...] were transported to Japan to relieve the labor shortage in the munitions industries."); *ibid*, pp 403-406 (use of forced labour to construct Burma-Siam railway, including use of conscripted "native labourers"); *ibid*, pp 413-414 (labour of prisoners of war and civilian internees); *ibid*, p 416 (use of prisoners of war and internees to work on war-related projects); *ibid*, pp 416-417 (use of forced "native" labour). References to forced labour and slave labour in relation to individual defendants include: Kimura (*ibid*, p 452, use of prisoners of war in forced labour, including work on the Burma-Siam railway); and Tojo (*ibid*, pp 462-463, ill-treatment of prisoners of war and internees, including use of prisoners of war in construction of Burma-Siam railway).

source of manpower by recruiting labourers from the native population of the occupied territories. This recruiting of labourers was accomplished by false promises, and by force. After being recruited, the labourers were transported to and confined in camps. Little or no distinction appears to have been made between these conscripted labourers on the one hand and prisoners of war and civilian internees on the other hand. They were all regarded as slave labourers to be used to the limit of their endurance. For this reason, we have included these conscripted labourers in the term "civilian internees" whenever that term is used in this chapter.<sup>1281</sup>

528. Some of the provisions of the 1977 Additional Protocol II<sup>1282</sup> and the 1949 Geneva Convention IV<sup>1283</sup> are of assistance for current purposes. They give some indication as to who may be required to perform what kinds of work under what conditions in armed conflicts. Some indication is also given as to minimum protections to be extended to civilians, in particular women and children, to whom special protection is consistently granted.

529. Of particular importance in this regard is Article 4 ("Fundamental guarantees") of Additional Protocol II, which Protocol "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949".<sup>1284</sup> Article 4 provides that in non-international conflicts:

(1) All persons who do not take a direct part [...] in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. [...] (2) Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; [...] (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; [...] (h) threats to commit any of the foregoing acts. [...].<sup>1285</sup>

The reference to slavery and the slave trade is based on Article 1 of the Slavery Convention of 1926. In a commentary to the Additional Protocol, it is said that:

<sup>1281</sup> *Ibid*, pp 416-417 (the Chapter referred to is Chapter VIII ("Conventional War Crimes (Atrocities)") of the judgement.

<sup>1282</sup> Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II"). Yugoslavia ratified both Additional Protocols on 11 June 1979. Bosnia and Herzegovina succeeded to both Additional Protocols on 31 Dec 1992.

<sup>1283</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949 of 12 Aug 1949. Yugoslavia ratified the Geneva Conventions on 21 April 1950. Bosnia and Herzegovina succeeded to the Geneva Conventions on 31 Dec 1992.

<sup>1284</sup> Art 1(1) of Additional Protocol II.

<sup>1285</sup> Art 4 falls under Part II ("Humane Treatment") of Additional Protocol II.

This sub-paragraph reiterates the tenor of Article 8, paragraph 1, of the [ICCPR]. It is one of the "hard-core" fundamental guarantees, now reaffirmed in the Protocol. The prohibition of slavery is now universally accepted; therefore the adoption of the sub-paragraph did not give rise to any discussion. However, the question may arise what is meant by the phrase "slavery and the slave trade in all their forms". It was taken from the Slavery Convention, the first universal instrument on this subject, adopted in 1926 (Article 1). A Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, was adopted in 1956, and supplements and reinforces the prohibition; certain institutions and practices comparable to slavery, such as servitude for the payment of debts, serfdom, the purchase of wives and the exploitation of child labour are prohibited. [...] <sup>1286</sup>

Other provisions of Additional Protocol II that are of general relevance for present purposes are those relating to children, <sup>1287</sup> persons whose liberty has been restricted and who are made to work, <sup>1288</sup> and the prohibition of the forced movement of civilians. The last mentioned prohibition is aimed against the displacement of the civilian population, something which "shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand." <sup>1289</sup>

530. Geneva Convention IV similarly underlines the basic protections to be extended to civilians. Article 3, common to all four Geneva Conventions, which relates to non-international conflicts and finds application through Article 3 of the ICTY Statute, provides that persons taking no active part in the hostilities shall in all circumstances be treated humanely. Other noteworthy provisions of Geneva Convention IV, despite applying only to

<sup>1286</sup> Sandoz, Swinarski and Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), p 1376.

<sup>1287</sup> Art 4 of Additional Protocol II.

<sup>1288</sup> Art 5 of Additional Protocol II, which falls under Part II ("Humane Treatment") of Additional Protocol II. Art 5(1) specifically provides as follows, with respect to work: "(1) In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained; [...] (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population."

<sup>1289</sup> Art 17 of Additional Protocol II provides in full: "(1) The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. (2) Civilians shall not be compelled to leave their own territory for reasons connected with the conflict." Art 17 falls under Part IV ("Civilian Population") of Additional Protocol II. Various provisions of Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I"), although relating to international armed conflicts, also underline the basic protection to be extended in particular to women and children. This includes a provision relating to fundamental guarantees, which is similar in part to that of Additional Protocol II, without the express reference to slavery (Art 75). Another provision on the protection of women states that women "shall be the subject of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault". (Art 76(1)). A provision on the protection of children states that children "shall be the object of special respect and shall be protected against any form of indecent assault." (Art 77).

international armed conflicts, include Article 24 (special consideration for children),<sup>1290</sup> Article 27 (humane treatment of protected persons),<sup>1291</sup> Article 31 (protection from coercion),<sup>1292</sup> Article 32 (prohibition of any measure causing physical suffering or extermination),<sup>1293</sup> Article 42 (assigned residence and internment),<sup>1294</sup> Article 51 (prohibition of work and requisitioning of labour) and various Articles relating to the treatment of internees.<sup>1295</sup> Article 95, one of the Articles relating to the treatment of internees, sets out the conditions under which a detaining power may require internees to work. It is worth quoting in some detail:

<sup>1290</sup> Art 24 falls under Part II ("General Protection of Populations Against Certain Consequences of War") of Geneva Convention IV.

<sup>1291</sup> Art 27 provides: "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion. However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war." This Article falls under Part III ("Status and Treatment of Protected Persons"), Section I ("Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories") of Geneva Convention IV.

<sup>1292</sup> Art 31 falls under Part III ("Status and Treatment of Protected Persons"), Section I ("Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories") of Geneva Convention IV.

<sup>1293</sup> Art 32 falls under Part III ("Status and Treatment of Protected Persons"), Section I ("Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories") of Geneva Convention IV.

<sup>1294</sup> Art 42 provides: "The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary. If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be." Art 42 falls under Part III ("Status and Treatment of Protected Persons"), Section II ("Aliens in the Territory of a Party to the Conflict") of Geneva Convention IV.

<sup>1295</sup> These provisions fall under Part III ("Status and Treatment of Protected Persons"), Section IV ("Regulations for the Treatment of Internees") of Geneva Convention IV and include: Art 80 ("Internees shall retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status."); Art 82 ("The Detaining Power shall, as far as possible, accommodate the internees according to their nationality, language and customs. [...] Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes of enforcement of the provisions of Chapter IX of the present Section. Internees may request that their children who are left at liberty without parental care shall be interned with them. Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life."); Art 95; and Art 96 ("All labour detachments shall remain part of and dependent upon a place of internment. The competent authorities of the Detaining Power and the commandant of a place of internment shall be responsible for the observance in a labour detachment of the provisions of the present Convention. The commandant shall keep an up-to-date list of the labour detachments subordinate to him and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross and of other humanitarian organisations who may visit the places of internment.").

The Detaining Power shall not employ internees as workers, unless they so desire. Employment which, if undertaken under compulsion by a protected person not in internment, would involve a breach of Articles 40 or 51 of the present Convention, and employment on work which is of a degrading or humiliating character are in any case prohibited. [...] These provisions constitute no obstacle to the right of the Detaining Power to employ [...] internees for administrative and maintenance work in places of internment and to detail such persons for work in the kitchens or for other domestic tasks [...].<sup>1296</sup> No internee may, however, be required to perform tasks for which he is, in the opinion of a medical officer, physically unsuited. The Detaining Power shall take entire responsibility for all working conditions, for medical attention, for the payment of wages, and for ensuring that all employed internees receive compensation for occupational accidents and diseases. [...].

Article 40 concerns the treatment of aliens in the territory of a party to the conflict.<sup>1297</sup> It provides as follows:

Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are. If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations. In the cases mentioned in the two preceding paragraphs, protected persons compelled to work shall have the benefit of the same working conditions and of the same safeguards as national workers in particular as regards wages, hours of labour, clothing and equipment [...].

Article 51 concerns the treatment of protected persons in occupied territories.<sup>1298</sup> In the relevant part it provides that an occupying power

may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. [...] Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. [...]

531. Article 27 of Geneva Convention IV, for example, provides for special consideration for women, in that women shall be "especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. [...]"<sup>1299</sup>

The quoted provision

[...] denounces certain practices which occurred, for example, during the last World War, when innumerable women of all ages, and even children, were subjected to outrages of the worst kind: rape committed in occupied territories, brutal treatment of

<sup>1296</sup> Internees permanently detailed for such work shall be paid fair wages by the detaining power (Art 95 of Geneva Convention IV).

<sup>1297</sup> Art 40 falls under Part III ("Status and Treatment of Protected Persons"), Section II ("Aliens in the Territory of a Party to the Conflict") of Geneva Convention IV.

<sup>1298</sup> Art 51 falls under Part III ("Status and Treatment of Protected Persons"), Section III ("Occupied Territories") of Geneva Convention IV.

<sup>1299</sup> The Trial Chamber interprets "honour" in the sense of "dignity", without thereby detracting from its view that these are violent crimes.

every sort, mutilations etc. In areas where troops were stationed, or through which they passed, thousands of women were made to enter brothels against their will or were contaminated with venereal diseases, the incidence of which often increased on an alarming scale.<sup>1300</sup>

532. The Trial Chamber notes that in the present case no assertion has been made that the victims relevant to the enslavement counts were interned or residentially assigned; such assertions, if made, could not have been valid.<sup>1301</sup>

533. Various international human rights treaties refer to slavery or related concepts without explicitly providing any definition. These include the Universal Declaration of Human Rights of 1948 ("UDHR"),<sup>1302</sup> the International Covenant on Civil and Political Rights of 1966 ("ICCPR"),<sup>1303</sup> the European Convention on Human Rights and Fundamental Freedoms of 1950 ("European Convention"),<sup>1304</sup> the American Convention on

<sup>1300</sup> Pictet (gnl ed), *Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), p 205, with reference to *Commission of Government Experts for the Study of the Convention for the Protection of War Victims* (Geneva, Apr 14-26, 1947). *Preliminary Documents*, Vol III, p 47.

<sup>1301</sup> See Art 42 of Geneva Convention IV, quoted above. Also see Arts 41, 43 and Part III, Section IV ("Regulations for the treatment of internees", Arts 79-141) of Geneva Convention IV and Art 17 of Additional Protocol II, quoted above. With respect to Art 42 of Geneva Convention IV, Pictet (gnl ed), *Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), p 258, states as follows: "[...] the mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security. [...] Henceforward only absolute necessity, based on the requirements of state security, can justify recourse to these two measures, and only then if security cannot be safeguarded by other, less severe means."

<sup>1302</sup> The UDHR provides that "No one shall be held in slavery or servitude: slavery and the slave trade shall be prohibited in all their forms." (Art 4 of the UDHR).

<sup>1303</sup> The ICCPR provides that "(1) No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. (2) No one shall be held in servitude. (3) (a) No one shall be required to perform forced or compulsory labour; [...] (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include: [...] (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community [...]" (Art 8 of the ICCPR; no derogation from Arts 8(1) and (2) may be made: Art 4(2) of the ICCPR). The *travaux préparatoires* shows that the term "slavery" implied the destruction of the juridical personality, a relatively limited and technical notion, whereas servitude was a more general idea covering all possible forms of man's domination of man (Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), pp 164-165, 167-168; Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), p 148). Furthermore, *involuntariness* is the fundamental definition feature of "forced or compulsory labour", whereas slavery and servitude are prohibited even in event of voluntariness (Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), p 167).

<sup>1304</sup> Art 4 of the European Convention provides: "(1) No one shall be held in slavery or servitude. (2) No one shall be required to perform forced or compulsory labour. (3) For the purposes of this Article the term 'forced or compulsory labour' shall not include: (a) any work required to be done in the ordinary course of detention [...] or during conditional release from such detention; (b) any service of a military character [...]; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations." Under Art 15(2) of

Human Rights of 1969 ("American Convention")<sup>1305</sup> and the African Charter on Human and Peoples' Rights of 1981 ("African Charter").<sup>1306</sup>

534. The European Commission and Court of Human Rights ("European Commission" and "ECHR" respectively) have not yet had to decide a case even remotely similar to the present. Some of their remarks and findings on the interpretation of the relevant provisions of the European Convention are, however, of some assistance for current purposes. In the *Van Droogenbroeck v Belgium* case,<sup>1307</sup> the European Commission observed *obiter dictum*, that the distinction between servitude and forced labour is not explicitly stated in the European Convention and that

It may be considered, however, that in addition to the obligation to perform certain services for others, the notion of servitude embraces the obligation for the "serf" to live on another person's property and the impossibility of altering his condition.<sup>1308</sup>

The European Commission was chiefly guided in this interpretation by Article 1 of the Supplementary Slavery Convention.<sup>1309</sup>

535. The ECHR, in the case of *Van der Musselle v Belgium*<sup>1310</sup> had to consider a complaint by a lawyer who had been required to defend a person without receiving remuneration or being reimbursed for his expenses. The applicant claimed, *inter alia*, that these circumstances amounted to forced or compulsory labour contrary to Article 4(2) of the European Convention. The Court noted that "forced or compulsory labour" is not defined in the European Convention and that no guidance on this point is to be found in various Council of Europe documents relating to the preparatory work of the European

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the European Convention, no derogation from the first par of Art 4 is permitted under any circumstances.

<sup>1305</sup> The American Convention provides that "No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women." (Art 6(1)). It further provides that no one shall be required to perform forced or compulsory labour (Art 6(2)), except for certain limited exceptions (Art 6(3)). Art 6 may in no circumstance be suspended (Art 27).

<sup>1306</sup> The African Charter provides that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." (Art 5 of the African Charter).

<sup>1307</sup> Application No-7906/77, Decision of 5 July 1979 on the admissibility of the application, European Commission of Human Rights, D/R 17, 59.

<sup>1308</sup> *Ibid*, p 72.

<sup>1309</sup> *Ibid*.

<sup>1310</sup> Application No 8919/80, Judgment (merits) of 23 November 1983, European Court of Human Rights, A 70.

Convention.<sup>1311</sup> The drafters of that Convention, like the drafters of Article 8 of the ICCPR, based their work to a large extent on the 1930 Forced and Compulsory Labour Convention.<sup>1312</sup> The Court expressly took account of the 1930 Forced and Compulsory Labour Convention and the 1957 Forced Labour Convention in interpreting "forced or compulsory labour" as used in the European Convention.<sup>1313</sup> It found that the word "labour" is not limited to manual labour.<sup>1314</sup> Concerning the adjective "forced", the Court stated that "it brings to mind the idea of physical or mental constraint [...]."<sup>1315</sup> As to "compulsory", there has to be work "exacted [...] under the menace of any penalty" and also performed against the will of the person concerned, that is work for which he "has not offered himself voluntarily".<sup>1316</sup> The Court also referred to the jurisprudence of the European Commission, which has consistently considered the elements of forced or compulsory labour to be that the work or service is performed against the will of the person concerned and that the requirement that the work or service is performed is unjust or oppressive or the work or service itself involves unavoidable hardship.<sup>1317</sup> The Court expressly distanced itself from the second element identified by the Commission,<sup>1318</sup> and adopted a different approach,<sup>1319</sup> eventually holding that there was no compulsory labour for the purposes of Article 4(2) of the European Convention.<sup>1320</sup>

536. The Trial Chamber also notes the 1979 Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), which includes the obligation that states parties suppress "all forms of traffic in women and exploitation of prostitution of women."<sup>1321</sup> The 1989 Convention on the Rights of the Child also specifically forbids trafficking in children.<sup>1322</sup> Unlike the 1949 Convention for the Suppression of the Traffic in

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<sup>1311</sup> *Ibid*, par 32.

<sup>1312</sup> *Ibid*.

<sup>1313</sup> *Ibid*.

<sup>1314</sup> *Ibid*, par 33.

<sup>1315</sup> *Ibid*, par 34.

<sup>1316</sup> *Ibid*.

<sup>1317</sup> *Ibid*, par 37.

<sup>1318</sup> Observing that it derives not from Article 2(1) of the 1930 Forced and Compulsory Labour Convention but from other unrelated Articles of that Convention concerned with transitional arrangements (*ibid*, par 40).

<sup>1319</sup> *Ibid*.

<sup>1320</sup> *Ibid*, par 40.

<sup>1321</sup> Art 6 of the CEDAW. Yugoslavia ratified the CEDAW on 26 Feb 1982. Bosnia and Herzegovina succeeded to the CEDAW on 1 Sept 1993. More than 160 states are party to the CEDAW.

<sup>1322</sup> Art 11(1) of the Convention on the Rights of the Child ("States Parties shall take measures to combat the illicit transfer and non-return of children abroad.") Yugoslavia ratified the Convention on the Rights of



Persons and of the Exploitation of the Prostitution of Others, the afore-mentioned treaties do not require a link between trafficking and prostitution.<sup>1323</sup>

537. The UN International Law Commission ("ILC") has consistently included enslavement as a crime against humanity in its draft codes of crimes against the peace and security of mankind.<sup>1324</sup> The 1991 Draft Code of Crimes Against the Peace and Security of Mankind included "establishing or maintaining over persons a status of slavery, servitude or forced labour" as a violation of systematic or mass violations of human rights, a category which corresponds to crimes against humanity.<sup>1325</sup> The commentary to that draft provision states that this part of the draft is based on some of the conventions that define those crimes, namely, the Slavery Convention, the Supplementary Slavery Convention, the ICCPR and the two ILO Conventions.<sup>1326</sup> The 1996 Draft Code of Crimes Against the Peace and Security of Mankind, includes enslavement as a crime against humanity.<sup>1327</sup> "Enslavement" was defined to mean

establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely-recognized standards of international law, such as: the 1926 Slavery Convention (slavery); the 1956 [Supplementary Slavery Convention] (slavery and servitude); the [ICCPR] (slavery and servitude); and the 1957 [Forced Labour Convention] (forced labour).<sup>1328</sup>

The Draft Code also included "rape, enforced prostitution and other forms of sexual abuse" as a crime against humanity.<sup>1329</sup> As a body consisting of experts in international law, including government legal advisers, elected by the UN General Assembly, the work of the

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the Child on 3 Jan 1991. Bosnia and Herzegovina succeeded to that Convention on 1 Sept 1993. More than 190 states are party to this Convention.

<sup>1323</sup> The Working Group on Contemporary Forms of Slavery also recently adopted a recommendation stating that "transborder trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights." (Report of the Working Group on Contemporary Forms of Slavery on its twenty-third session (E/CN.4/Sub.2/1998/14), recommendation 4).

<sup>1324</sup> See Art 2, par 11 of the 1954 Draft Code of Crimes Against the Peace and Security of Mankind, Yearbook of the International Law Commission (1954), Vol II, Documents of the sixth session including the report of the Commission to the General Assembly, p 150.

<sup>1325</sup> Report of the International Law Commission on the work of its forty-third session, 29 April-19 July 1991, GA, Supplement No 10 (A/46/10), p 265 (Art 21).

<sup>1326</sup> *Ibid*, pp 267-268.

<sup>1327</sup> Report of the International Law Commission on the work of its forty-eight session, 6 May-26 July 1996, GA, Supplement No 10 (A/51/10), p 93 (Art 18 (Crimes against Humanity) of the Draft Code).

<sup>1328</sup> *Ibid*, par 10, p 98.

<sup>1329</sup> *Ibid*, p 93.

ILC, at least in relation to this issue, may be considered as evidence of customary international law.<sup>1330</sup>

538. With respect to the geographical area relevant to the current case, the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY Criminal Code") criminalised war crimes against the civilian population, which included the ordering or commissioning of forcible prostitution, rape and forcible labour.<sup>1331</sup> It furthermore criminalised establishing "slavery relations" and transporting people in "slavery relation", as follows:

(1) Whoever brings another person in slavery relation, or engages in the trade with persons who are in slavery relation, or who incites another person to sell his freedom or freedom of persons he supports, shall be punished by imprisonment for a term exceeding one year but not exceeding 10 years. (2) Whoever transports persons in slavery relation from one country to another, shall be punished by imprisonment for a term exceeding six months but not exceeding five years.<sup>1332</sup>

### 3. Conclusion

539. In summary, the Trial Chamber finds that, at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person.

540. Thus, the Trial Chamber finds that the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers.

<sup>1330</sup> *Prosecutor v Furundžija*, Judgement, Case IT-95-17/1-T, 10 Dec 1998, par 227.

<sup>1331</sup> Art 142 of the SFRY Criminal Code ("Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to [...] inhuman treatment [...], immense suffering or violation of bodily integrity or health [...]; forcible prostitution or rape; [...] other illegal arrests and detention [...]; forcible labour [...] or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.") Art 154 of the Criminal Code of the Federation of Bosnia and Herzegovina of 28 Nov 1998 is similar to Art 142 of the SFRY Criminal Code.

<sup>1332</sup> Art 155 of the SFRY Criminal Code. Art 167 of the Criminal Code of the Federation of Bosnia and Herzegovina of 1998 provides: "(1) Whoever, in violation of the rules of international law, enslaves another person or puts him/her in similar position, or keeps him/her in such position, buys, sells or hands him/her over to another person, or whoever mediates in the buying, selling or handing over of such a person, or whoever incites another person to sell his/her freedom or freedom of persons he/she supports or takes care of, shall be punished with a sentence of imprisonment for a term between one year and ten years. (2) Whoever transports persons in slavery or similar relation from one country to another, shall be punished with a sentence of imprisonment for a term between six months and five years. (3) Whoever commits the act described in paragraphs 1 and 2 of this Article against a juvenile, shall be punished with a sentence of imprisonment for not less than five years."

541. This definition definition may be broader than the traditional and sometimes apparently distinct definitions of either slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law. This is evidenced in particular by the various cases from the Second World War referred to above, which have included forced or compulsory labour under enslavement as a crime against humanity. The work of the ILC, discussed above, further supports this conclusion.<sup>1333</sup>

542. Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion, the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability, detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, international law, including some of the provisions of Geneva

<sup>1333</sup> Also see the Rome Statute of the International Criminal Court of 1998 ("ICC Statute"), adopted at Rome on 17 July 1998, PCNICC/1999/INF/3 (17 Aug 1999) (as of early February 2001, 27 states have ratified the ICC Statute, and 139 states signed it, including Bosnia and Herzegovina, which signed it on 17 July 2000. The ICC Statute requires 60 ratifications before it enters into force). Art 30 ("Mental element") of the ICC Statute provides: "(1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. (2) For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. (3) For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly." The ICC Statute makes numerous references to enslavement. As a crime against humanity (Art 7), "[e]nslavement" as well as "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity" (Art 7(1)(g)) are prohibited. "Enslavement" "[...] means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." (Art 7(2)(c)). "Forced pregnancy" is defined as "the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. [...]" (Art 7(2)(f)). The setting out of the violations in separate sub-paragraphs of the ICC Statute is not to be interpreted as meaning, for example, that sexual slavery is not a form of enslavement. This separation is to be explained by the fact that the sexual violence violations were considered best to be grouped together. These provisions obviously do not *necessarily* indicate what the state of the relevant law was at the time relevant to this case. However they do provide some evidence of state *opinio juris* as to the relevant customary international law at the time at which the recommendations were adopted. See, eg,

Convention IV and the Additional Protocols, make clear that not all labour or service by protected persons, including civilians, in armed conflicts, is prohibited – strict conditions are, however, set for such labour or service. The “acquisition” or “disposal” of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement.

543. The Trial Chamber is therefore in general agreement with the factors put forward by the Prosecutor, to be taken into consideration in determining whether enslavement was committed. These are the control of someone’s movement,<sup>1334</sup> control of physical environment,<sup>1335</sup> psychological control,<sup>1336</sup> measures taken to prevent or deter escape,<sup>1337</sup> force, threat of force or coercion,<sup>1338</sup> duration,<sup>1339</sup> assertion of exclusivity,<sup>1340</sup> subjection to cruel treatment and abuse,<sup>1341</sup> control of sexuality and<sup>1342</sup> forced labour.<sup>1343</sup> The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor.<sup>1344</sup> The Trial Chamber considers that the *mere ability* to do so is insufficient, such actions actually occurring could be a relevant factor.

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*Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 227; *Prosecutor v Tadic*, Case No IT-94-A, Judgement, 15 July 1999, par 223.

<sup>1334</sup> Prosecutor’s Pre-Trial Brief I, par 205.

<sup>1335</sup> *Ibid*, par 207.

<sup>1336</sup> *Ibid*, par 208.

<sup>1337</sup> *Ibid*, par 209.

<sup>1338</sup> *Ibid*, par 210.

<sup>1339</sup> *Ibid*, par 211.

<sup>1340</sup> *Ibid*, par 212.

<sup>1341</sup> *Ibid*, par 213.

<sup>1342</sup> *Ibid*, par 214.

<sup>1343</sup> *Ibid*, par 216.

<sup>1344</sup> *Ibid*, par 220.