

# THE PROSECUTION OF CONFLICT-RELATED SEXUAL AND GENDER-BASED VIOLENCE IN BOSNIA AND HERZEGOVINA



## A TOPICAL DIGEST OF CASE LAW

*A Publication of the Gender and International Criminal Law Project  
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related to

THE PROSECUTION OF CONFLICT-RELATED SEXUAL AND  
GENDER-BASED VIOLENCE IN BOSNIA AND HERZEGOVINA

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## **I. INTRODUCTION**

The past 22 years have witnessed tremendous progress toward increased accountability for conflict-related sexual and gender-based violence (SGV). The International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the International Criminal Court (ICC) have each contributed landmark precedents and demonstrated promising practices for achieving justice on behalf of victims of the many forms of SGV that occur during armed conflict and periods of repression. International tribunals have held that rape and sexual violence can constitute war crimes, crimes against humanity and even genocide. Human rights bodies such as the European Court of Human Rights (ECHR) have also considered related issues, such as how international tribunals assessing rape during armed conflict can inform domestic criminal justice systems' understanding of coercion and consent as elements of this offense.

Despite these achievements, documents related to these ground-breaking cases have been difficult to locate. Prosecutors, judges, victim advocates, and others pursuing accountability for SGV crimes struggled to compare approaches of different chambers within a single tribunal, much less across tribunals. Many advocates and practitioners, particularly those in remote regions without access to a law library or research institute, did not have access to critical analysis of actions by prosecutors, arguments raised by defense counsel, or decisions made by tribunals. In response to this, with support from the Open Society Foundation, the Gender and International Criminal Law Project – a joint effort between American University's War Crimes Research Office and Women and the Law Program – created a unique Gender Jurisprudence Collections database (available at [www.genderjurisprudence.org](http://www.genderjurisprudence.org)) that allows practitioners to research more than 31,000 documents from 13 criminal tribunals and the ECHR using 30 search criteria and more than 130 search terms relevant to the prosecution of SGV. With support from the Secretary's Office of Global Women's Issues at the U.S. Department of State, the Gender and International Criminal Law Project has expanded and tailored the database and other research tools to support justice system actors trying conflict-related SGV as international crimes within the domestic criminal system of Bosnia and Herzegovina. As part of this effort, Project staff created this topical digest, focused on the issues most prominently reflected in conflict-related SGV jurisprudence coming out of Bosnian courts, in order to provide local justice system actors with a resource in which they could easily access the key holdings on those issues in one document. The digest includes selected case law from the ICTY, ICTR, SCSL, ICC, and ECHR as well as from the State Court of Bosnia and Herzegovina and cantonal and district courts. Topics include: how rape is defined, including the element of coercion in the definition of rape and the element of consent in the definition of rape; the elements of rape tried as international crimes, including rape as an act of genocide, rape or sexual violence as the crime against humanity of persecution, and rape as torture; and procedural issues such as whether corroboration of SGV victims' testimony is required and how courts have addressed issues related to SGV victims' credibility. The Table of Contents provides a thorough guide to the cases

covered in the digest and the pages where excerpts of those cases can be found. The Table of Authorities provides a full citation for each of the documents cited throughout the topical digest. We hope users find this resource helpful in their efforts to combat impunity for conflict-related sexual and gender-based crimes.

## II. RAPE: DEFINITION

*International criminal tribunals and domestic courts trying international crimes have elaborated on the elements of the crime of rape in cases involving genocide, crimes against humanity, and war crimes. Jurisprudence addressing these elements is discussed below, with the exception of consent and coercion, which are discussed separately in section III below. Jurisprudence addressing rape as an act of genocide, as persecution, and a form of torture is also discussed separately under “Genocidal Rape (Section IV),” “Rape as Torture (Section V)” and “Sexual Violence as Persecution (Section VI).”*

### A. Early jurisprudence of ad hoc tribunals adopts a conceptual definition of rape

*Akayesu* (ICTR Trial Chamber), September 2, 1998, paras. 687-88: The Trial Chamber declines to delineate precisely which acts would constitute rape, stating that “rape is a form of aggression and . . . the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.” The Trial Chamber “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.”

*Delalić, et al.* [also referred to as “*Mucić, et al.*” or “*Celebici Camp*”] (ICTY Trial Chamber), November 16, 1998, paras. 478-79: The Trial Chamber refers to the *Akayesu* Trial Chamber finding that “rape cannot be captured in a mechanical description of objects and body parts,” noting that it “sees no reason to depart from the conclusion of the ICTR in the *Akayesu* Judgement on this issue.”

*Musema* (ICTR Trial Chamber), January 27, 2000, paras. 226, 228-29: “The Chamber concurs with the conceptual approach set forth in the *Akayesu* Judgement for the definition of rape, which recognizes that the essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.” “The Chamber further notes, as the *Furundžija* Judgement from the ICTY acknowledges [see *Furundžija* below], that there is a trend in national legislation to broaden the definition of rape. In light of the dynamic ongoing evolution of the understanding of rape and the incorporation of this understanding into principles of international law, the Chamber considers that a conceptual definition is preferable to a mechanical definition of rape. The conceptual definition will better accommodate evolving norms of criminal justice. For these reasons, the Chamber adopts the definition of rape and sexual violence set forth in the *Akayesu* Judgement.”

- 1) The *actus reus* of rape includes intercourse but can entail any physical invasion of a sexual nature committed on a person under circumstances which are coercive

*Akayesu* (ICTR Trial Chamber), September 2, 1998, paras. 596-98: “The Trial Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence[,] which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.” “While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.”

- 2) Physical invasion of a sexual nature differentiates rape from other forms of sexual violence

*Musema* (ICTR Trial Chamber), January 27, 2000, para. 227: “The Chamber considers that the distinction between rape and other forms of sexual violence drawn by the *Akayesu* Judgement, that is ‘a physical invasion of a sexual nature’ as contrasted with ‘any act of a sexual nature’ which is committed on a person under circumstances which are coercive is clear and establishes a framework for judicial consideration of individual incidents of sexual violence and a determination, on a case by case basis, of whether such incidents constitute rape.”

*B. Later jurisprudence of the ad hoc tribunals adopts a narrower definition of rape, defining rape as the non-consensual sexual penetration, however slight, of specific body parts*

*Furundžija* (ICTY Trial Chamber), December 10, 1998, para. 185: The Trial Chamber defines the *actus reus* of rape as: “(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.”

*Kunarac, et al.* (ICTY Appeals Chamber), June 12, 2002, paras. 127-28: The Appeals Chamber affirms the Trial Chamber’s definition of “the *actus reus* of the crime of rape in international law... [as]: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.”

*Semanza* (ICTR Trial Chamber), May 15, 2003, paras. 344-45: “The *Akayesu* Judgement enunciated a broad definition of rape.... The Appeals Chamber of the ICTY...affirmed a narrower interpretation defining the material element of rape...as the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or



by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator..... While this mechanical style of defining rape was originally rejected by this Tribunal, the Chamber finds the comparative analysis in *Kunarac* to be persuasive and thus will adopt the definition of rape approved by the ICTY Appeals Chamber.”

### C. *The International Criminal Court’s definition of rape*

*Bemba* (ICC Trial Chamber), March 21, 2016, para. 99: “Rape requires an invasion of a person’s body by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.” [See Section III.F. below for circumstances which give this invasion a criminal character.]

- 1) The concept of “invasion” is intended to be broad enough to be gender neutral and includes same-sex penetration

*Bemba* (ICC Trial Chamber), March 21, 2016, para. 100: “The Chamber emphasises that, according to the [ICC’s] Elements of Crimes, ‘the concept of ‘invasion’ is intended to be broad enough to be gender neutral. Accordingly, ‘invasion’, in the Court’s legal framework, includes same-sex penetration.”

- 2) The concept of “invasion” encompasses both male and/or female perpetrators and victims

*Bemba* (ICC Trial Chamber), March 21, 2016, para. 100: “The Chamber emphasises that, according to the [ICC’s] Elements of Crimes, ‘the concept of ‘invasion’ is intended to be broad enough to be gender neutral. Accordingly, ‘invasion’, in the Court’s legal framework... encompasses both male and/or female perpetrators and victims.”

### D. *Vaginal penetration constitutes rape*

*Akayesu* (ICTR Trial Chamber), September 2, 1998, paras. 421, 424, 430: The Trial Chamber recounts the testimony of three witnesses alleging they were raped by *Interahamwe* and describing in each incident that the perpetrator penetrated the victim’s vagina with his penis.

*Delalić, et al.* [also referred to as “*Mucić, et al.*” or “*Celebici Camp*”] (ICTY Trial Chamber), November 16, 1998, para. 962: “The Trial Chamber finds that acts of vaginal penetration by the penis under circumstances that were coercive, quite clearly constitute rape.”

*Radić, et al.* (War Crimes Section, State Court of BiH, Second Instance Panel), March 9, 2011, para. 611: The Panel finds that “penetration was effected by the sexual organs of all of the said persons into the victim’s vagina and mouth, which amounts to the criminal offense of rape in violation of Article 172(g) of the [2003 Criminal Code of Bosnia and Herzegovina].”

#### *E. Partial penetration constitutes rape*

*Furundžija* (ICTY Trial Chamber), December 10, 1998, para. 185 (emphasis added): The Trial Chamber defines the *actus reus* of rape as: “(i) the sexual penetration, *however slight*: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.”

*Radić, et al.* (State Court of Bosnia and Herzegovina Appellate Panel), March 9, 2011, paras. 526, 571, 579: The Panel holds that the accused Brekalo’s partial penetration of the victim’s vagina with his penis constitutes rape, relying on the ICTY’s *Furundžija* definition, which provides that penetration – “however slight” – constitutes rape if the other elements are met.

#### *F. Penetration by foreign objects can constitute rape*

*Akayesu* (ICTR Trial Chamber), September 2, 1998, para. 686: “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.”

*Musema* (ICTR Trial Chamber), January 27, 2000, paras. 220-29: The Chamber adopts the definition of rape and sexual violence set forth in *Akayesu*, but also specifies that “variations on the acts of rape may include acts which involve the insertions of objects and/or the use of bodily orifices not considered to be intrinsically sexual.”

#### *G. Oral penetration can constitute rape*

*Delalić* (ICTY Trial Chamber), November 16, 1998, para. 1066 (emphasis added): “The Trial Chamber finds that the act of forcing Vaso Đordić and Veseljko Đordić to perform *fellatio* on one another constituted, at least, a fundamental attack on their human dignity. Accordingly, the Trial Chamber finds that this act constitutes the offence of inhuman treatment... [and] *could constitute rape for which liability could have been found if pleaded in the appropriate manner.*”

*Furundžija* (ICTY Trial Chamber), December 10, 1998, para. 184: “[F]orced oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration. Thus the notion that a greater stigma attaches to a conviction for forcible vaginal or anal penetration than to a conviction for forcible oral penetration is a product of questionable attitudes. Moreover any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle which favours broadening the definition of rape.”

*Češić* (ICTY Trial Chamber), March 11, 2004, paras. 14, 35, 52: The Chamber explains in a sentencing judgment that the accused pled guilty of rape as a crime against humanity for forcing two brothers to perform *fellatio* on each other.

*Radić, et al.*, (State Court of Bosnia and Herzegovina Appellate Panel), March 9, 2011, paras. 601, 611, 622-23: The Appellate Panel finds that the accused committed rape as a crime against humanity under Article 172(1)(g) of the 2003 Criminal Code of Bosnia and Herzegovina, finding that forced penetration of the victims' mouth with the sexual organs of the accused meets the elements of rape.

*Bemba*, (ICC Trial Chamber), March 21, 2016, para. 101: "The Chamber notes that the definition of rape encompasses acts of 'invasion' of any part of a victim's body, including the victim's mouth, by a sexual organ. Indeed, as supported by the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), oral penetration, by a sexual organ, can amount to rape and is a degrading fundamental attack on human dignity which can be as humiliating and traumatic as vaginal or anal penetration."

*H. Acts of sexual violence falling outside the definition of rape can constitute other international crimes*

*Semanza* (ICTR Trial Chamber), May 15, 2003, paras. 344-45: "The *Akayesu* Judgement enunciated a broad definition of rape.... The Appeals Chamber of the ICTY...affirmed a narrower interpretation defining the material element of rape...as the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator." The Trial Chamber recognizes that "other acts of sexual violence that do not satisfy this narrow definition may be prosecuted as other crimes against humanity . . . such as torture, persecution, enslavement, or other inhumane acts."

*I. The mens rea of rape*

- 1) The *mens rea* of rape is the intention to effect sexual penetration and the knowledge that it occurs without the consent of the victim

*Kunarac, et al.* (ICTY Trial Chamber), February 22, 2001, para. 460: The Trial Chamber defines the *mens rea* of the crime of rape under international law as "the intention to effect sexual penetration and the knowledge that it occurs without the consent of the victim."

*Semanza* (ICTR Trial Chamber), May 15, 2003, para. 346: "The mental element for rape as a crime against humanity is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim."

- 2) Factual circumstances, such as captivity, can evidence the required knowledge that the penetration is non-consensual

*Kunarac, et al.* (ICTY Appeals Chamber), June 12, 2002, paras. 127-28, 211, 218: The Appellant argued that he lacked the *mens rea* to meet the definition of rape because he was not aware that

victim D.B. had not consented to intercourse, noting she had initiated the sexual contact. The Appeals Chamber rejects the argument, citing the Trial Chamber's finding that, "given the circumstances of D.B.'s captivity in Partizan, ... the Appellant could not have assumed that D.B. was consenting to sexual intercourse."

*Radić, et al.*, (War Crimes Section, State Court of BiH, Appellate Panel), March 9, 2011, para. 528: The Appellate Panel recalls the circumstances cited by the Appeals Chamber in the *Kunarac et al.* judgment described above, noting that "factual circumstances can be a good proof in the decision-making as to whether the accused had the required *mens rea* to commit the rape. These implicit modes of crime make it clear that the perpetrator knew that the sexual intercourse did not and cannot occur with the consent of the victim, especially in the situation when women were held in captivity."

*See also* "Section III: CONSENT AND COERCION IN THE DEFINITION OF RAPE AND OTHER FORMS OF SEXUAL VIOLENCE."

### III. CONSENT AND COERCION IN THE DEFINITION OF RAPE AND OTHER FORMS OF SEXUAL VIOLENCE

*International criminal tribunals and domestic courts trying international crimes have addressed the concept of consent, whether its absence is an element of the crime of rape and/or other forms of sexual violence, and its relationship with force and coercion. As a general matter, courts have interpreted the concept of non-consent broadly, holding that physical force is not required and that non-consent may be evidenced by “coercive circumstances,” which are often present in situations such as armed conflict or detention.*

- A. *Early jurisprudence of ad hoc tribunals defines rape as a physical invasion of a sexual nature – and sexual violence as an act of a sexual nature – committed on a person under “circumstances which are coercive,” which need not be evidenced by a show of physical force*

*Akayesu* (ICTR Trial Chamber), September 2, 1998, para. 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.”

*Akayesu* (ICTR Trial Chamber), September 2, 1998, para. 688: “The Tribunal notes that in this context, coercive circumstances need not be evidenced by a show of physical force.” Rather, “[t]hreats, 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 ... military presence” The Trial Chamber finds that the presence of *Interahamwe* militia among refugee Tutsi women at the bureau communal constituted coercive circumstances.

- B. *Later jurisprudence of ad hoc and hybrid tribunals defines rape as the non-consensual sexual penetration of specific body parts*

*Furundžija* (ICTY Trial Chamber), December 10, 1998, para. 185: The Trial Chamber defines the *actus reus* of rape as: “(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.”

*Kunarac, et al.* (ICTY Appeals Chamber), June 12, 2002, paras. 127-28: The Appeals Chamber affirms the Trial Chamber’s definition of “the *actus reus* of the crime of rape in international law... [as]: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.”

- 1) Force or threat of force provides clear evidence of non-consent, but force is not an element of rape *per se*

*Kunarac, et al.* (ICTY Appeals Chamber), June 12, 2002, para. 129 [Emphasis in original]: The Appeals Chamber affirms the Trial Chamber's definition of rape and finds that, "in explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape." The Appeals Chamber agrees with the Trial Chamber that there are "factors other than force which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim," adding that a "narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force."

*Stakić* (ICTY Trial Chamber), July 31, 2003, paras. 755-56. The Trial Chamber agrees with the finding in the *Kunarac, et al.* Appeals Judgment that "[f]orce or threat of force provide clear evidence of non-consent, but force is not an element *per se* of rape. [...] A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force."

*Ndindiliyimana, et al.* (ICTR Trial Chamber), May 17, 2011, para. 2121: "Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape."

*Taylor* (SCSL Trial Chamber), May 18, 2012, para. 416: "Force or the threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape and there are factors other than force which may render an act of sexual penetration non-consensual or non-voluntary on the part of the victim."

- 2) Victim's resistance is not required to put accused on notice of lack of consent

*Kunarac, et al.* (ICTY Appeals Chamber), June 12, 2002, paras. 125, 128: Kunarac and his co-defendants appealed the Trial Chamber's Judgment, arguing that the Trial Chamber's definition of rape should include the requirements of "force or threat of force and the victim's 'continuous' or 'genuine' resistance." The Appeals Chamber disagrees, concluding that the "bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts."



- 3) Consent must be given voluntarily, as a result of the victim's free will, assessed within the context of the surrounding circumstances

*Kunarac, et al.* (ICTY Trial Chamber), February 22, 2001, paras. 452, 457, 460: The Trial Chamber assesses national laws codifying rape, finding that while many require force or threat of force or otherwise rendering the victim helpless, acts constitute rape if “the victim’s will was overcome or ... her ability freely to refuse the sexual acts was temporarily or more permanently negated.” “Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.” “[Thus, t]he Trial Chamber understands that the *actus reus* of the crime of rape in international law is constituted by... sexual penetration, however slight... where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.”

*Kvočka, et al.* (Trial Chamber), November 2, 2001, paras. 175-77: “The Trial Chamber agrees with the factors set out by the Trial Chamber in *Kunarac*, defining rape as a violation of sexual autonomy. In order for sexual activity to be classified as rape: (i) the sexual activity must be accompanied by force or threat of force to the victim or a third party; (ii) the sexual activity must be accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or (iii) the sexual activity must occur without the consent of the victim.” “The *Kunarac* Judgement emphasizes that the consent must be ‘given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances’ and the principal focus should be whether there were serious violations of sexual autonomy.”

*Ndindiliyimana, et al.* (ICTR Trial Chamber), May 17, 2011, para. 2121: “Consent for these purposes must be given voluntarily and freely and is assessed within the context of the surrounding circumstances.”

*Janković [Gojko]* (War Crimes Section, State Court of BiH, First Instance Panel), February 16, 2007, pages 65-67: In assessing a case in which a 16-year-old girl was captured, taken to a house, kept there and repeatedly raped, the Panel concludes that despite positive remarks the victim made about the accused, it “is satisfied beyond reasonable doubt that under the aforementioned circumstances, the relationship between the Accused, who was a married man and the father of three children, and the minor FWS-186, could never amount to or transform into a normal and consensual sexual relationship.” Despite the fact that the victim had a key to the house and was left alone at times, she could not go anywhere because she was in Serb-controlled territory. “Given the extreme conditions in which FWS-186 found herself, she was never in a position to give a true consent. She was *de facto* deprived of her sexual autonomy.”

*Barićanin* (War Crimes Section, State Court of BiH, First Instance Panel), November 9, 2011, para. 215: “[T]he Panel was also mindful of the ICTY jurisprudence in *Furundžija*, where the

Trial Chamber has held that ‘sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim,’” and notes “the relevance not only of force, threat of force and coercion but also of absence of consent or voluntary participation.” The Panel notes further that in *Kunarac*, this definition was further elaborated in a way that force is given a broad interpretation and includes “rendering the victims helpless.”

- 4) A person cannot give genuine consent if affected by natural, induced or age-related incapacity

*Sesay, et al.* (SCSL Trial Chamber), March 2, 2009, paras.147-48: “The use or threat of force provides clear evidence of non-consent, but it is not required.” “[E]ven in the absence of force or coercion, a person cannot be said to genuinely have consented to the act. A person may not, for instance, be capable of genuinely consenting if he or she is too young, under the influence of some substance, or suffering from an illness or disability.”

*Taylor* (SCSL Trial Chamber), May 18, 2012, para. 416: “A person may be incapable of giving genuine consent if affected by natural, induced or age related incapacity.”

- 5) While force or threat of force may evidence lack of consent, the absence of consent may be evidenced in other ways, such as if the victim has been subjected to detention, captivity, duress or psychological oppression

*Furundžija* (ICTY Trial Chamber), December 10, 1998, para. 271: “[I]t is the position of the Trial Chamber that any form of captivity vitiates consent.”

*Kunarac, et al.* (ICTY Trial Chamber), February 22, 2001, paras. 462, 464: The Trial Chamber acknowledges that while the absence of genuine consent may be evidenced by force or threats, lack of consent can be evidenced in other ways as well and recalls that “Rule 96 provides in relevant part that: (ii) consent shall not be allowed as a defence if the victim (a) has been subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression...” “The factors referred to in Rule 96 are also obviously not the only factors which may negate consent. However, the reference to them in the Rule serves to reinforce the requirement that consent will be considered to be absent in those circumstances unless freely given.”

*Kunarac, et al.* (ICTY Appeals Chamber), June 12, 2002, paras. 130-33: The Appeals Chamber notes that “in the circumstances giving rise to the instant appeal” – namely, the rape of women being held in detention – “true consent will not be possible.”

*Kvočka, et al.* (ICTY Appeals Chamber), February 28, 2005, para. 396: The Chamber affirms the *Kvočka, et al.* Trial Chamber Judgment’s finding that “in cases of sexual assault ... a status of detention will normally vitiate consent in such circumstances.”

*Šainović, et al.* (ICTY Trial Chamber), February 26, 2009, para. 200: “Any form of coercion, including acts or threats of violence, detention, and generally oppressive surrounding circumstances, is simply evidence that goes to proof of lack of consent. In addition, the Trial Chamber is of the view that when a person is detained, particularly during an armed conflict, coercion and lack of consent can be inferred from these circumstances.”

*Dorđević* (ICTY Appeals Chamber), January 27, 2014, para. 852: “With regard to the issue of consent, the Appeals Chamber considers that any form of coercion, including acts or threats of (physical or psychological) violence, abuse of power, any other forms of duress and generally oppressive surrounding circumstances, may constitute proof of lack of consent and usually is an indication thereof. In addition, a status of detention, particularly during armed conflict, will normally vitiate consent.”

*Nikačević* (War Crimes Section, State Court of BiH, First Instance Panel), February 19, 2009, pages 28, 32: “‘Coercion’ as the second element of the crime of sexual violence is understood as the absence of voluntary consent.” “[I]n assessing whether the victim could freely and voluntarily consent to sexual intercourse, the Panel considered all circumstances, including the Accused's acts prior to the incident, his behavior during the incident itself, and the general context of events in Foča at the time. While recognizing that certain facts, when viewed in isolation, are subject to multiple interpretations, the Panel concludes that it was proven beyond reasonable doubt that the victim could not and did not freely and voluntarily consent to sexual intercourse. In particular, the Panel concludes that the Accused, through his actions, created an atmosphere of extreme violence, fear, and psychological oppression, and further that he took advantage of a violent and coercive environment, to break the victim’s will.”

*Hasanović and Pavić* (Brčko District, BiH Appellate Panel), May 11, 2009, pages 1,7: The Panel convicts the Defendants of rape as a war crime, citing the circumstances that made the intercourse coercive in this case, including the fact that “the aggrieved party had been forcibly transferred from her home; her freedom of movement was limited; armed men in uniforms unknown to her came to the house late at night during the curfew and ordered her to leave the room where she stayed with her husband, which made her believe that they were going to shoot her.” The Panel held that “such coercive circumstances exclude any possibility for voluntariness of the concrete sexual intercourse.”

*Baričanin* (War Crimes Section, State Court of BiH, First Instance Panel), November 9, 2011, paras. 111, 205, 219-225: The Defense argued that the sexual intercourse was not coerced as the accused “did not physically abuse” the victim and the victim did not physically resist. The First Instance Panel dismisses this argument, finding that the “specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal” included the manner in which Baričanin and his co-perpetrator entered the apartment where the victim’s family was located; the fact that the family was taken to an undisclosed location; the manner in which Baričanin took the victim to the apartment where the intercourse took place; the fact that

Baričanin kept a rifle by the bedside; and the fact that Baričanin presented himself as a person who could save her and safely reunite her with her family. The Panel concludes that, under the circumstances, the evidence satisfies the elements of rape as a crime against humanity under the Bosnian Criminal Code, which expressly requires “[c]oercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape).” See also *Baričanin* (War Crimes Section, State Court of BiH, Appellate Panel), March 28, 2012, paras. 43-51: The Appellate Panel affirms this finding.

*M.C. v. Bulgaria* (ECHR), December 4, 2003, paras. 74, 88-100, 161,171: The European Court of Human Rights finds that while many domestic laws include elements such as “force” in their definitions of rape, the relevant issue is “the meaning given to words such as ‘force’ or ‘threats’ or other terms used in legal definitions.” After reviewing how different countries’ laws define consent, the Court concludes that, while physical force or other forms of coercion (such as using elements of surprise or a ruse or taking advantage of a victim’s helplessness or lack of capacity) could prove lack of consent, “the courts in a number of countries have developed their interpretation so as to encompass any non-consensual sexual act.”

- 6) Non-consent can also be inferred from coercive background circumstances, such as an ongoing genocide campaign, an attack against a civilian population or armed conflict

*Muhimana* (ICTR Trial Chamber), April 28, 2005, para. 546: “Circumstances prevailing in most cases charged under international criminal law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent.”

*Gacumbitsi* (ICTY Appeals Chamber), July 7, 2006, paras. 148-49, 155: The Appeals Chamber finds that “[t]he Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. As with every element of any offence, the Trial Chamber will consider all of the relevant and admissible evidence in determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But it is not necessary, as a legal matter, for the Prosecution to introduce evidence...of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign...”

*Karemera and Ngirumpatse* (ICTR Trial Chamber), February 2, 2012, paras. 1676, 1681: “Non-consent can be inferred from the existence of coercive background circumstances under which meaningful consent is not possible.”

*Taylor* (SCSL Trial Chamber), May 18, 2012, para. 416: “The consent of the victim must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. This is necessarily a contextual assessment. However, in situations of armed conflict or detention, coercion is almost universal.”

7) Force or threat of force against a third person constitutes coercion

*Furundžija* (ICTY Trial Chamber), December 10, 1998, paras. 180, 185: After assessing a range of domestic jurisdictions to discern common elements in the definition of rape, the Trial Chamber finds that “all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim” but that “force is given a broad interpretation and includes rendering the victim helpless.” The Chamber notes that some jurisdictions accept “force or intimidation” directed at a third party as constituting coercion. The Trial Chamber incorporates this interpretation into its definition of the objective elements of rape, noting that rape is sexual penetration “by coercion or force or threat of force against the victim or a third person.”

*C. International Criminal Court adopts broad interpretation of circumstances which give invasion of a person’s body its criminal character*

- 1) Rape requires: (i) force; (ii) threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person; (iii) taking advantage of a coercive environment; or (iv) a person incapable of giving genuine consent

*Bemba* (ICC Trial Chamber), March 21, 2016, para. 102: “[F]or the invasion of the body of a person to constitute rape, it has to be committed under one or more of four possible circumstances: (i) by force; (ii) by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person; (iii) by taking advantage of a coercive environment; or (iv) against a person incapable of giving genuine consent.”

- 2) Victim’s lack of consent is not a legal element of the crime of rape under the Rome Statute

*Bemba* (ICC Trial Chamber), March 21, 2016, paras. 105-06: “The Chamber notes that the victim’s lack of consent is not a legal element of the crime of rape under the Statute. The preparatory works of the Statute demonstrate that the drafters chose not to require that the Prosecution prove the non-consent of the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice.” “Therefore, where ‘force’, ‘threat of force’, or ‘taking advantage of a coercive environment’ is proven, the Chamber considers that the Prosecution does not need to prove the victim’s lack of consent.”

- 3) Factors that may evidence a “coercive environment” include threats, intimidation, extortion and other forms of duress which prey on fear or desperation, and the presence of hostile forces among the civilian population

*Bemba* (ICC Trial Chamber), March 21, 2016, paras. 103-04: “As noted, one of the possible circumstances for rape, as set out in the [ICC] Elements of Crimes, is that a perpetrator ‘tak[es] advantage of a coercive environment’. In interpreting the concept of a ‘coercive environment’, the Chamber... is guided by the *Akayesu* Trial Judgment’s discussion of ‘coercive circumstances’: ‘[C]oercive 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.’ The Chamber does not exclude the possibility that, in addition to the military presence of hostile forces among the civilian population, there are other coercive environments of which a perpetrator may take advantage to commit rape.”

- 4) Factors that may contribute to create a coercive environment include the number of people involved in committing the crime, whether the rape is committed during or immediately following a combat situation, and the commission of other crimes in conjunction with the rape

*Bemba* (ICC Trial Chamber), March 21, 2016, paras. 103-04: “Further, the Chamber considers that several factors may contribute to create a coercive environment. It may include, for instance, the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes.”

*D. States have a positive obligation to penalize and effectively prosecute “any non-consensual sexual act, including in the absence of physical resistance by the victim”*

*M.C. v. Bulgaria* (European Court of Human Rights), December 4, 2003, paras. 133, 163, 166, 171, 181, 185, 187: The European Court finds that narrowly defining rape “jeopardis[es] the effective protection of the individual’s sexual autonomy” and holds that member States have a positive obligation to penalize and effectively prosecute “any non-consensual sexual act, including in the absence of physical resistance by the victim.” The European Court acknowledges that, “while in practice it may sometimes be difficult to prove lack of consent in the absence of ‘direct’ proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances” and holds that such an “investigation and its conclusions must be centered on the issue of non-consent.” By failing to meet this standard, Bulgaria fell short of meeting States’ positive obligations “to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.”

*See also* “Section II: RAPE: DEFINITION.”



#### IV. GENOCIDAL RAPE

*The crime of genocide is defined as committing one or more enumerated acts “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” The enumerated acts are: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group. International criminal tribunals have held that sexual violence, including rape, can constitute an act of genocide in the form of “causing serious bodily or mental harm to members of the group” or “imposing measures intended to prevent births within the group.”*

A. *Rape and sexual violence can constitute the actus reus of “causing serious bodily or mental harm”*

1) Rape and sexual violence can constitute serious bodily and mental harm

*Akayesu* (ICTR Trial Chamber), September 2, 1998, paras. 706-07, 731-33: “With regard, particularly, to the acts . . . [of] rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence . . . were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the *Bureau Communal* premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole. As stated above, Akayesu himself, speaking to the *Interahamwe* who were committing the rapes, said to them: ‘don't ever ask again what a Tutsi woman tastes like’. This sexualized representation of ethnic identity graphically illustrates that [T]utsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the [T]utsi group – destruction of the spirit, of the will to live, and of life itself.” “[I]t appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.”

*Karemera, et al.* (ICTR Trial Chamber), February 2, 2012, para. 1666: “Considering the nature of the crimes and the brutal and often public manner in which they were carried out, often repeatedly and by more than one assailant, the Chamber concludes that the sexual assaults, mutilations and rapes that Tutsi women were forced to endure from April to June 1994 certainly constituted acts of serious bodily and mental harm.”

*Gacumbitsi* (ICTR Trial Chamber), June 17, 2004, paras. 291-93: “Serious bodily harm means any form of physical harm or act that causes serious bodily injury to the victim, such as torture and sexual violence. Serious bodily harm does not necessarily mean that the harm is irremediable. Similarly, serious mental harm can be construed as some type of impairment of mental faculties, or harm that causes serious injury to the mental state of the victim. . . [T]he Chamber has already found that the Accused publicly instigated the rape of Tutsi women and girls, and that the rape of Witness TAQ and seven other Tutsi women and girls by attackers who heeded the instigation was a direct consequence thereof. The Chamber finds that these rapes caused serious physical harm to members of the Tutsi ethnic group. Thus, the Chamber finds that, as to the specific crime of serious bodily harm, Sylvestre Gacumbitsi incurs responsibility for the crime of genocide by instigating the rape of Tutsi women and girls.”

## 2) Serious harm need not cause permanent and irremediable harm

*Krstić* (ICTY Trial Chamber), August 2, 2001, para. 513: “[T]he 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. . . [T]he Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.”

## 3) Serious harm must be assessed by the circumstances of each case

*Karadžić* (ICTY Trial Chamber), March 24, 2016, paras. 545, 2581-82, 2626: While the Trial Chamber found that Karadžić lacked the *mens rea* to commit genocide in the Municipalities identified in Count 1 of the indictment against him, the Chamber did find that acts of rape and other forms of sexual violence met the *actus reus* of “causing serious bodily or mental harm to members of [a national, ethnical, racial or religious group].” “Determination of what constitutes serious harm depends on the circumstances of each case. Examples of serious bodily or mental harm as an act of genocide include torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to the external or internal organs of members of the group.” “The Chamber also found that in the Count 1 Municipalities, namely Foča, Prijedor, Vlasenica, and Zvornik, Bosnian Muslim women, men, girls, and boys were subjected to rape and other acts of sexual violence, involving serious abuses of a sexual nature. These acts were found to cause serious mental or physical suffering or injury. The Chamber considers that these

acts were of such a serious nature as to contribute or tend to contribute to the destruction of the Bosnian Muslims and Bosnian Croats in the Count 1 Municipalities.”

*B. Rape and sexual violence can constitute the actus reus of “imposing measures intended to prevent births within the group”*

*Akayesu* (ICTR Trial Chamber), September 2, 1998, paras. 507-08: “The Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.”

*C. Evidence of rape and sexual violence demonstrating the mens rea of genocide: the intent to destroy a protected group*

*Karadžić* (ICTY Trial Chamber), March 24, 2016, paras. 2616-17, 2619-20, 2626: The Trial Chamber finds in its judgment that the evidence of criminal acts committed against Bosnian Muslims and Bosnian Croats, including acts of rape and sexual violence committed in detention centers in several Municipalities, was not sufficient to prove beyond a reasonable doubt that Karadžić possessed genocidal intent.

*Al Bashir* (ICC Pre-Trial Chamber), July 12, 2010, paras. 29-31: In re-assessing the Prosecution’s request for an arrest warrant for Al Bashir for acts of genocide, the Pre-Trial Chamber finds “there are reasonable grounds to believe that acts of rape, torture and forcible displacement were committed against members of the targeted ethnic groups” including the Fur, Masalit and Zaghawa. “Accordingly, the Chamber finds that there are reasonable grounds to believe that the material element of the crime of genocide by causing serious bodily or mental harm...is fulfilled” and that, based on these factual circumstances, “there are reasonable grounds to believe that the subjective elements of the crime of genocide by causing serious bodily and mental harm...are fulfilled.”

## V. SEXUAL VIOLENCE AS PERSECUTION

*Several international and domestic tribunals have prosecuted rape or other types of sexual violence as acts of the crime against humanity of persecution. Prosecuting sexual violence as persecution raises specific challenges, including whether the acts themselves violate a fundamental right and are of sufficient gravity to rise to the level of persecution and how discrimination on the specified grounds can be evidenced in cases of rape and other acts of sexual violence.*

*A. Persecution is defined as an act or omission which discriminates in fact, infringes upon a fundamental right, and is committed with the intent to discriminate*

*Kordić and Čerkez* (ICTY Appeals Chamber), December 17, 2004, para. 101: Persecution as a crime against humanity has been defined by the ICTY Appeals Chamber as:

“an act or omission which :1) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and 2) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).”

See also *Krnjelac* (ICTY Appeals Chamber), September 17, 2003, para. 185; *Vasiljević* (ICTY Appeals Chamber), February 25, 2004, para. 113; *Blaškić* (ICTY Appeals Chamber), July 29, 2004, para. 131; *Stanišić, et al.* (ICTY Trial Chamber), May 30, 2013, para. 1238.

*B. A single act may qualify as persecution as long as it discriminates in fact and is carried out deliberately with the intention to discriminate on one of the listed grounds*

*Dorđević* (ICTY Appeals Chamber), January 27, 2014, para. 887: “[T]he Appeals Chamber recalls that, although the crime of persecutions often refers to a series of acts, a single act may qualify as persecutions as long as it discriminates in fact and is carried out deliberately with the intention to discriminate on one of the listed grounds.”

*Kupreskić, et al.* (ICTY Trial Chamber), January 14, 2000, para. 624: “[T]he Trial Chamber notes that persecution was often used to describe a series of acts. However, the Trial Chamber does not exclude the possibility that a single act may constitute persecution. In such a case, there must be clear evidence of the discriminatory intent. For example, in the former Yugoslavia an individual may have participated in the single murder of a Muslim person. If his intent clearly was to kill him because he was a Muslim, and this occurred as part of a wide[spread] or systematic persecutory attack against a civilian population, this single murder may constitute persecution. But the discriminatory intent of the perpetrator must be proved for this crime to qualify as persecution.”

See also *Blaškić* (ICTY Appeals Chamber), July 29, 2004, para. 135; *Vasiljević* (ICTY Appeals Chamber), February 25, 2004, para. 113; *Kordić and Čerkez* (ICTY Appeals Chamber), December 17, 2004, para. 102.

- 1) An act or omission must be of same level of gravity as other enumerated acts within crimes against humanity provision

*Dordević* (ICTY Appeals Chamber), January 27, 2014, para. 900: “The Appeals Chamber further recalls that in order for underlying acts to amount to persecutions as a crime against humanity, they must be of equal gravity or severity as other acts enumerated under Article 5 [criminalizing crimes against humanity] of the [ICTY] Statute. In this regard, the Appeals Chamber notes that the Trial Chamber found that Witness K20 and Witness K14 were raped, which is listed as a crime against humanity under Article 5(g) of the [ICTY] Statute. The Appeals Chamber found that the Kosovo Albanian girl in a convoy and the two young women in Beleg were sexually assaulted, which is not listed in the Statute as a crime against humanity. The Appeals Chamber, however, recalls that sexual assault may be punishable as persecutions under international criminal law, ‘provided that it reaches the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute’. The Appeals Chamber also recalls that sexual assault by definition constitutes an infringement of a person’s physical or moral integrity. Furthermore, it notes that the sexual assaults in question were committed against young women, by multiple perpetrators, and in a general context of fear, intimidation, and harassment. Therefore, the Appeals Chamber is satisfied that these sexual assaults reach the same level of gravity as other crimes listed in Article 5.”

*Brđanin* (ICTY Appeals Chamber), April 3, 2007, para. 296: “The Appeals Chamber recalls that acts underlying persecutions under Article 5(h) of the [ICTY] Statute need not necessarily be considered a crime in international law. For the acts not enumerated as a crime in the Statute to amount to the crime of persecution pursuant to Article 5(h) of the [ICTY] Statute, they must be of equal gravity to the crimes listed in Article 5 of the Statute, whether considered in isolation or in conjunction with other acts.”

- 2) To apply the standard of gravity, the acts must not be considered in isolation, but in context, by looking at their cumulative effect

*Kvočka, et al.* (ICTY Appeals Chamber), February 28, 2005, para. 321: “The Appeals Chamber also notes that with respect to the *actus reus* of the crime of persecutions, the Trial Chamber rightly noted that the acts included in the crime of persecution, be they considered in combination or separately, are of the same gravity as the enumerated crimes in Article 5 of the Statute....The Appeals Chamber points out that to apply the standard of gravity, the acts must not be considered in isolation, but in context, by looking at their cumulative effect.”

*Radić, et al.* (War Crimes Section, State Court of BiH, Appellate Panel), March 9, 2011, paras. 691, 693, 808: The Appellate Panel cites to the Court of BiH and ICTY case law to determine that “When it comes to the criminal offence of persecution, the criminal acts have to be

examined together and as a whole, and they have to amount to serious and obvious deprivation of the fundamental rights with a discriminatory intent”. The Panel convicts the defendants of persecution as a crime against humanity in violation of Article 172(1)(h) of the Criminal Code of BiH, in conjunction with other crimes against humanity including acts of rape and sexual violence, which were all committed with discriminatory intent. Specifically, the Panel finds that the numerous rapes of women and girls, sometimes committed more than once in a single day, were an integral element “of the criminal system of persecution since they were committed with a discriminatory intent against the Bosniak women.”

### 3) Acts of sexual violence other than rape can constitute persecution

*Simić et al.* (ICTY Trial Chamber), October 17, 2003, para. 771: “The Trial Chamber is also satisfied that the beatings were committed on discriminatory grounds. The evidence shows that practically all detainees who were beaten were non-Serbs. On one occasion, a victim was beaten in the crotch, and his assailants told him that Muslims should not propagate. Prisoners were regularly insulted on the basis of their ethnicity. For these reasons, the Trial Chamber finds that the beatings that were committed on discriminatory grounds constitute cruel and inhumane treatment as an underlying act of persecution.”

*Brđanin* (ICTY Trial Chamber), September 1, 2004, para. 1013: “The Trial Chamber finds that many incidents of sexual assault occurred, including the case of a Bosnian Croat woman who was forced to undress herself in front of cheering Bosnian Serb policemen and soldiers. In another incident, a knife was run along the breast of a Bosnian Muslim woman. Frequently, it was demanded that detainees perform sex with each other. In each incident, armed Bosnian Serb soldiers or policemen were the perpetrators. The Trial Chamber is satisfied that, evaluated in their context, these acts are serious enough to rise to the level of crimes against humanity. Moreover, the Trial Chamber is satisfied that the circumstances surrounding the commission of sexual assaults leave no doubt at all that there was discrimination in fact and discriminatory intent on the part of the direct perpetrators, based on racial, religious or political grounds.”

See also *Stanišić and Župljanin* (ICTY Trial Chamber), March 27, 2013, Vol. I, paras. 1663, 1669, 1690: The Trial Chamber finds that acts including cutting off non-Serb detainees’ penises and forcing the detainees to perform sexual acts on each other amounts to persecution.

*Lelek* (War Crimes Section, State Court of BiH, First Instance Panel), May 23, 2008, p. 2: The Panel finds that forcing a woman and her 80-year-old mother to undress and forcing another woman to touch a man’s penis while calling the woman ethnic slurs constitute acts of persecution.

### 4) Infringing upon a fundamental right includes infringing the right to physical integrity



*Dorđević* (ICTY Appeals Chamber), January 27, 2014, para. 900: “The Appeals Chamber... recalls that sexual assault may be punishable as persecutions under international criminal law, ‘provided that it reaches the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute’. The Appeals Chamber also recalls that sexual assault by definition constitutes an infringement of a person’s physical or moral integrity....[T]he sexual assaults in question were committed against young women, by multiple perpetrators, and in a general context of fear, intimidation, and harassment. Therefore, the Appeals Chamber is satisfied that these sexual assaults reach the same level of gravity as other crimes listed in Article 5.”

*C. The mens rea of persecution is the intent to discriminate on prohibited grounds*

- 1) Discriminatory intent can be evidenced by circumstances surrounding the commission of rape and acts of sexual violence

*Brđanin* (ICTY Trial Chamber), September 1, 2004, paras. 1010-1011: “Earlier in this judgement, the Trial Chamber established that a number of Bosnian Muslim women were raped in Prijedor and in Teslic municipalities. The Trial Chamber finds that, apart from these municipalities, rapes of Bosnian Muslim and Bosnian Croat women occurred in the municipalities of Banja Luka, Bosanska Krupa, Donji Vakuf, and in Kotor Varos. In each incident, armed Bosnian Serb soldiers or policemen were the perpetrators. There can be no doubt that these rapes were discriminatory in fact. With regard to the requisite *mens rea*, the Trial Chamber notes that the direct perpetrators made abundant use of pejorative language. One of them made no secret that he wanted a Bosnian Muslim woman to ‘give birth to a little Serb’. The Trial Chamber is satisfied beyond reasonable doubt that, in the circumstances surrounding the commission of these rapes, these acts were carried out with the intent to discriminate against the Bosnian Muslim and Bosnian Croat women on racial, religious or political grounds.”

*Sainović, et al.* (ICTY Appeals Chamber), January 23, 2014, paras. 579-99: “While the requisite discriminatory intent may not be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity, the ‘discriminatory intent may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent.’” The Appeals Chamber concludes that “the only reasonable inference to be drawn from the evidence” was that Kosovo Albanian women were raped with discriminatory intent by policemen and soldiers based on the surrounding circumstances. The Appeals Chamber cites the fact that the victims were Kosovo Albanian, and that the rapes occurred in the context of a campaign to displace Kosovo Albanians that included expelling Kosovo Albanians from their homes, setting fire to the homes, and looting belongings. Further, one victim was raped while being held with a group of Kosovo Albanian women during which one of the perpetrators swore at Albanians during the incident. Additionally, the rape occurred in conjunction with the victim being beaten, handcuffed, and interrogated. The Appeals Chamber also finds a Kosovo Albanian woman was raped with discriminatory intent by a policeman where there was evidence that her household was targeted because it was known to be inhabited by Kosovo

Albanians. The Chamber found that another Kosovo Albanian woman was raped with discriminatory intent because the perpetrators – who were soldiers – searched her apartment and questioned whether she was harboring KLA [Kosovo Liberation Army] personnel as part of a campaign to expel Kosovo Albanians from the neighborhood.

*Dorđević* (ICTY Appeals Chamber), January 27, 2014, paras. 876-77, 886, 888: The Appeals Chamber finds that “the requisite discriminatory intent cannot be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity, however, it ‘may be inferred from such a context of the attack so long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent.’” The Appeals Chamber finds that “if out of a group of persons selected on the basis of racial, religious, or political grounds, only certain persons are singled out and subjected to mistreatment, a reasonable trier of fact may infer that this mistreatment was carried out on discriminatory grounds.” The Appeals Chamber finds that the Trial Chamber in *Dorđević* erred in finding that “specific evidence” of discriminatory intent was required while failing to take into account the surrounding circumstances in which the victims were raped. This “broader context” in which the rapes took place includes the fact that they “occurred in the course of the forcible displacement of the Kosovo Albanian population carried out by the Serbian forces” and that it was part of a plan “implemented through a systematic campaign of terror and violence, aimed at forcing the Kosovo Albanians to leave Kosovo to ensure Serbian control over the province.” The Appeals Chamber references prior ICTY case law finding that “the fact that crimes occurred while the victims were – on discriminatory grounds – deported or detained prior to deportation, has been considered in order to infer discriminatory intent from the circumstances.” The Appeals Chamber finds that the sexual assaults were committed with discriminatory intent as evidenced by the fact that they occurred in the same vicinity and at the same time as the broader campaign to kill and terrorize Kosovo Albanians, with rapes occurring just prior to victims being expelled to Albania and perpetrated by the same Serbian soldiers who were committing other acts as part of the campaign to displace Kosovo Albanians.

See also *Stakić* (ICTY Trial Chamber), July 31, 2003, paras. 791, 793: The Trial Chamber notes the “important role” played by the direct perpetrator’s discriminatory intent as evidenced by his derogatory language toward the Muslim woman he raped. *Stanišić and Župljanin* (ICTY Trial Chamber), vol. 1, paras. 475, 1087: In its findings regarding the charge of persecution, the Trial Chamber notes the use of ethnic slurs against male detainees forced to perform *fellatio* on each other as well as against a woman who was raped.

- 2) The group targeted for discrimination can be defined on the basis of positive or negative criteria

*Kvočka, et al.* (ICTY Trial Chamber), November 2, 2001, para. 195: “The Tadić Trial Chamber Judgement indicated that the discriminatory act could result from the application of positive or negative criteria. It found that an attack ‘conducted against only the non-Serb portion of the population because they were non-Serbs’ was indicative of the necessary discriminatory intent. In

this case, the detainees in Omarska camp were selected on the basis of political, ethnic, or religious criteria; their specific attributes differing from those, and being defined in distinction to those, of their Bosnian Serb captors and abusers. When all the detainees are non-Serbs or those suspected of sympathizing with non-Serbs, and all abusers are Serbs or Serb sympathizers, it is disingenuous to contend that religion, politics, and ethnicity did not define the group targeted for attack.”

- 3) The group targeted for discrimination includes those suspected of belonging to targeted group or those who sympathize with targeted group

*Kvočka, et al.* (ICTY Trial Chamber), November 2, 2001, para. 195: “[T]he Trial Chamber notes that persons suspected of being members of these groups are also covered as possible victims of discrimination. For example, if a Bosnian Serb was targeted on suspicion of sympathizing with Bosnian Muslims, that attack could be classified as persecutory. Additionally, if a person was targeted for abuse because she was suspected of belonging to the Muslim group, the discrimination element is met even if the suspicion proves inaccurate.”

*Naletilić and Martinović* (ICTY Trial Chamber), March 31, 2003, para. 636 (emphasis in original): “A discriminatory basis exists where a person is targeted on the basis of religious, political or racial considerations, i.e. for his or her membership in a certain victim group that is targeted by the perpetrator group. The Chamber concurs with the view expressed in the *Kvočka* Trial Judgement that the targeted group does not only comprise persons who *personally* carry the (religious, racial or political) criteria of the group. The targeted group must be interpreted broadly, and may, in particular, include such persons who are *defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group*. The Chamber finds this interpretation consistent with the underlying *ratio* of the provision prohibiting persecution, as it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status. The Chamber finds that in such cases, a factual discrimination is given as the victims are *discriminated [against] in fact* for who or what they are on the basis of the perception of the perpetrator.”

- 4) Discriminatory intent is not excluded by sexual motive

*Kvočka, et al.*, (ICTY Appeals Chamber), February 28, 2005, para. 463: “Motive and intent must be distinguished. Personal motives, such as settling old scores, or seeking personal gain, do not exclude discriminatory intent.”

*Dorđević* (ICTY Appeals Chamber), January 27, 2014, paras. 887, 892, 895: “The Appeals Chamber further recalls that personal motive does not preclude a perpetrator from also having the requisite specific intent. The Appeals Chamber emphasises that the same applies to sexual crimes, which in this regard must not be treated differently from other violent acts simply because of their sexual component. Thus, a perpetrator may be motivated by sexual desire but at the same time also possess the intent to discriminate against his or her victim on political, racial, or religious grounds.” “[T]he Appeals Chamber, Judge Tuzmukhamedov dissenting, considers that, even if it were to be assumed

that the perpetrators also were motivated by sexual desire when they raped Witness K20, their decision to do so arose out of a will to discriminate against her on the basis of ethnic grounds.” “[E]ven if it were to be assumed that the policemen were also motivated by sexual desire, the decision to rape Witness K14 arose out of a will to discriminate against her on ethnic grounds.”

- 5) Where permitted by statute, acts of discrimination based upon sex or gender can constitute persecution

*Samardžić*, (War Crimes Section, State Court of BiH, Appellate Panel), December 13, 2006, pages 3-4: “[A]s part of a widespread and systematic attack against the Bosniak civilian population of the Foča Municipality, being aware of such an attack, as a member of the army of the so-called Serb Republic of BiH, [Samardžić] carried out persecution of the Bosniak civilian population on national, ethnic, religious and sexual grounds in the form of forcible transfer of population, severe deprivation of physical liberty in violation of fundamental rules of international law, coercing to sexual slavery, rapes and other inhumane acts intentionally causing great suffering, or serious injury to body or health. Whereby, by the acts described under Counts 1 through 9 of the convicting part of the Verdict, he committed the criminal offense of Crimes against Humanity in violation of Article 172(l)(h)...” Article 172(1)(h) of the 2003 Criminal Code of Bosnia and Herzegovina includes in its definition of persecution discriminatory acts committed on the basis of sex or gender. This provision provides: “Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual [,] gender or other grounds that are universally recognised as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina”.

*Kujundžić* (War Crimes Section, State Court of BiH, First Instance Panel), October 30, 2009, para. 591: “Each act committed by the Accused Predrag Kujundzic was perpetrated with a discriminatory intent, exactly for the reason of a different ethnic, religious, national and cultural identity of the victim. The Panel concludes that all of those acts had, as the intention, exactly the discrimination of the victims on the grounds of that identity, as well as on the sexual ground (in the event of rape of the witnesses 2 and 4 and keeping Witness 2 in sexual slavery), which beyond doubt is contrary to the rules of international law. Such conclusion is based on the words and acts by the Accused during the perpetration of the referenced crimes, which is explained in detail further in the Verdict.”

## VI. RAPE AS TORTURE

*International criminal tribunals, as well as the War Crimes Section of the State Court of Bosnia and Herzegovina, have held that rape and other forms of sexual violence may constitute torture as a war crime or as a crime against humanity. In addition to the chapeau elements required for the broader categories of war crimes and crimes against humanity, jurisprudence from international criminal tribunals have provided that acts of sexual violence must meet additional criteria to amount to an act of torture, including the infliction of severe physical and mental suffering, committed for a prohibited purpose, and in early tribunal case law, by or with the consent or acquiescence of a public official. More recently, the Rome Statute creating the International Criminal Court rejected the “prohibited purpose” and “public official” elements, defining torture as a crime against humanity as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanction” (Rome Statute, Art. 7(2)(e)). The ICC’s Elements of Crimes requires the “prohibited purpose” element for torture as a war crime, however (Art. 8(2)(a)(ii)(1) and Art. 8(2)(c)(i)(4)). Article 172(2)(e) of the Criminal Code of Bosnia and Herzegovina defines torture as a crime against humanity without requiring that an accused have a “prohibited purpose” for an act to amount to torture. The jurisprudence below addresses case law from international criminal tribunals, the War Crimes Section of the State Court of Bosnia and Herzegovina, and the European Court of Human Rights. The cases first define how rape can constitute torture more broadly and then addresses individual elements of torture as they have been applied to allegations of rape or other forms of sexual violence.*

### *A. Rape and sexual violence can meet the criteria defining torture*

*Delalić, et al.* [also referred to as *Mucić, et al.* or “Celebici Camp”] (ICTY Trial Chamber), November 16, 1998, paras. 494-96, 941-43, 963-64 : “The Trial Chamber finds that the elements of torture... may be enumerated as follows:

- (i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,
- (ii) which is inflicted intentionally,
- (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
- (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.

Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria.”

*Lelek* (War Crimes Section, State Court of BiH, First Instance Panel), May 23, 2008, pages 28, 36-37: “Pursuant to the language of Article 172(2)(e) of the CC [Criminal Code] of BiH at the time this verdict was decided, the elements of torture as a crime against humanity were:

- 1) Intentional infliction;
- 2) Of severe pain or suffering, whether physical or mental;
- 3) Upon a person in the custody of the Accused.”

In addition to recognizing these elements, the *Lelek* Panel notes that “[t]he International Criminal Tribunal for Rwanda (ICTR) and the ICTY have concluded that, according to customary international law, in order for rape to be an act of torture it is necessary that the infliction of the severe pain or suffering is for the purpose of ‘obtaining information or a confession, punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.’” The Panel “acknowledges that while the ICTY and the ICTR have identified such a prohibited purpose as an additional element, this element is not required as part of the definition of torture under Article 172 of the CC of BiH.”

[*Note that subsequent to this verdict, the Criminal Code of BiH was amended in 2014 to state the following: “Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under control of the perpetrator ...”* [Emphasis added.]

- 1) “Causes severe pain or suffering”

- a) Rape and sexual violence *per se* cause severe pain or suffering

*Kunarac, et al.*, (ICTY Appeals Chamber), June 12, 2002, paras. 149-50: “Torture is constituted by an act or an omission giving rise to ‘severe pain or suffering, whether physical or mental’, but there are no more specific requirements which allow an exhaustive classification and enumeration of acts which may constitute torture. Existing case-law has not determined the absolute degree of pain required for an act to amount to torture. The Appeals Chamber holds that the assumption of the Appellants that suffering must be visible, even long after the commission of the crimes in question, is erroneous. Generally speaking, some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.”

*Lelek* (War Crimes Section, State Court of BiH, First Instance Panel), May 23, 2008, pages 28, 36-37: “Raping the witness also constitutes torture, because the rape necessarily gives rise to severe pain and suffering.” “Some actions *per se* imply suffering on the part of those subjected to them. Rape is such an act; sexual violence inevitably leads to severe pain or suffering and thus the qualification of this act as torture is justified. This incident surely caused severe suffering, mental pain and disgust with the injured party. The very fact that non-Serb women and girls were forcibly brought to the Vilina vlas spa, by armed men, under physical threat against them and their families, and that they were imprisoned precisely to be sexually and physically abused

surely causes terrible suffering and the feeling of helplessness with the victim who is placed there, completely helpless and without any possibility to protect herself or avoid sexual abuse. As the witness stated, she was brought to the Vilina vlas spa and was raped for the exclusive purpose of the perpetrator's sadistic abuse because of her ethnic affiliation and for purposes of illicit discrimination. The witness described multiple and merciless sexual abuse she was subjected to while she was in the spa and which resulted in internal and external physical injuries and bleeding."

- b) Being forced to witness sexual attacks causes severe physical and mental suffering

*Furundžija* (ICTY Trial Chamber), December 10, 1998, para. 267(ii): "While the accused continued to interrogate Witness A and Witness D, Accused B beat them both on the feet with a baton. Witness D was then forced to watch Accused B's sexual attacks on Witness A, which have already been described. The physical attacks upon Witness D, as well as the fact that he was forced to watch sexual attacks on a woman, in particular, a woman whom he knew as a friend, caused him severe physical and mental suffering."

*Kvočka, et al.* (ICTY Trial Chamber), November 2, 2001, paras. 145, 149: "The jurisprudence of the Tribunals, consistent with the jurisprudence of human rights bodies, has held that rape may constitute severe pain and suffering amounting to torture, provided that the other elements of torture, such as a prohibited purpose, are met." "Damage to physical or mental health will be taken into account in assessing the gravity of the harm inflicted. The Trial Chamber notes that abuse amounting to torture need not necessarily involve physical injury, as mental harm is a prevalent form of inflicting torture. For instance, the mental suffering caused to an individual who is forced to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture. Similarly, the *Furundžija* Trial Chamber found that being forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer. The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped."

- 2) Rape and sexual assault committed "for such purposes as...obtaining information...punishing...intimidating or coercing ...or ...discrimination" constitutes torture

*Delalić, et al.* [also referred to as *Mucić, et al.* or "Celebici Camp"] (ICTY Trial Chamber), November 16, 1998, paras. 471, 495, 941, 963: "[I]t is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict." "A fundamental distinction regarding the purpose for which torture is inflicted is that between a 'prohibited purpose' and one which is purely private.

The rationale behind this distinction is that the prohibition on torture is not concerned with private conduct, which is ordinarily sanctioned under national law. In particular, rape and other sexual assaults have often been labelled as ‘private’, thus precluding them from being punished under national or international law. However, such conduct could meet the purposive requirements of torture as, during armed conflicts, the purposive elements of intimidation, coercion, punishment or discrimination can often be integral components of behaviour, thus bringing the relevant conduct within the definition. Accordingly, [o]nly in exceptional cases should it therefore be possible to conclude that the infliction of severe pain or suffering by a public official would not constitute torture... on the ground that he acted for purely private reasons.” “The purposes of the rapes committed by Hazim Delić were, *inter alia*, to obtain information about the whereabouts of [victim] Ms. Čećez's husband who was considered an armed rebel; to punish her for her inability to provide information about her husband; to coerce and intimidate her into providing such information; and to punish her for the acts of her husband. The fact that these acts were committed in a prison-camp, by an armed official, and were known of by the commander of the prison-camp, the guards, other people who worked in the prison-camp and most importantly, the inmates, evidences Mr. Delić's purpose of seeking to intimidate not only the victim but also other inmates, by creating an atmosphere of fear and powerlessness.” “In addition, the violence suffered by Ms. Čećez in the form of rape, was inflicted upon her by Delić because she is a woman. As discussed above, this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.” Similarly, the Trial Chamber finds in regard to victim Ms. Antić, “The rapes were committed inside the Celebici prison-camp and on each occasion Hazim Delić was in uniform, armed and viciously threatening towards Ms. Antić. The purpose of these rapes was to intimidate, coerce and punish Ms. Antić. Further, at least with respect to the first rape, Delić’s purpose was to obtain information from Ms. Antić, as it was committed in the context of interrogation. In addition, the violence suffered by Ms. Antić in the form of rape, was inflicted upon her by Delić because she is a woman. As discussed above, this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.”

a) The prohibited purpose need not be the sole reason for the conduct

*Kunarac, et al.* (ICTY Trial Chamber), February 22, 2001, para. 485, 816: “The Trial Chamber is satisfied that the following purposes have become part of customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person.” “In the Final Trial Brief of the Defence, the accused Zoran Vukovic argued that, even if it were proved that he had raped a woman, the accused would have done so out of a sexual urge, not out of hatred. However, all that matters in this context is his awareness of an attack against the Muslim civilian population of which his victim was a member and, for the purpose of torture, that he intended to discriminate between the group of which he is a member and the group of his victim. There is no requirement under international customary law that the conduct must be *solely*



perpetrated for one of the prohibited purposes of torture, such as discrimination. The prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose. The Trial Chamber has no doubt that it was at least a predominant purpose, as the accused obviously intended to discriminate against the group of which his victim was a member, [i.e.] the Muslims, and against his victim in particular.”

- b) Raping a person on the basis of sex or gender constitutes a prohibited purpose

*Kvočka, et al.* (ICTY Trial Chamber), November 2, 2001, para. 560: “The Trial Chamber further finds that the rape and other forms of sexual violence were committed only against the non-Serb detainees in the camp and that they were committed solely against women, making the crimes discriminatory on multiple levels. Radić did not rape any of the male non-Serb detainees. As recognized in *Čelebići*, raping a person on the basis of sex or gender is a prohibited purpose for the offence of torture.”

*Delalić, et al.* [also referred to as *Mucić, et al.* or “*Celebici Camp*”] (ICTY Trial Chamber), November 16, 1998, paras. 941, 963: As noted, the Trial Chamber finds that “the violence suffered by Ms. Čećež in the form of rape, was inflicted upon her by Delić because she is a woman. As discussed above, this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.” Similarly, the Trial Chamber finds in regard to victim Ms. Antić, “The rapes were committed inside the Celebici prison-camp and on each occasion Hazim Delić was in uniform, armed and viciously threatening towards Ms. Antić. The purpose of these rapes was to intimidate, coerce and punish Ms. Antić. Further, at least with respect to the first rape, Delić’s purpose was to obtain information from Ms. Antić, as it was committed in the context of interrogation. In addition, the violence suffered by Ms. Antić in the form of rape, was inflicted upon her by Delić because she is a woman. As discussed above, this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.”

- c) While the Criminal Code of Bosnia and Herzegovina does not require acts to be committed for a “prohibited purpose,” courts acknowledge that acts committed based on discrimination due to a victim’s “ethnic affiliation” are torture

*Lelek* (War Crimes Section, State Court of BiH, First Instance Panel), May 23, 2008, pages 28, 36-37: [T]he Panel finds that the acts [of rape] were committed for the purpose of discrimination due to the victims’ “ethnic affiliation,” specifically, for being “Bosniaks and Muslims.” The Panel “acknowledges that while the ICTY and the ICTR have identified such a prohibited purpose as an additional element, this element is not required as part of the definition of torture under Article 172 of the [Criminal Code of Bosnia and Herzegovina] CC of BiH. Nevertheless, in regards to both allegations of torture, the Panel finds that the acts were

committed for the purpose of discrimination due to the victims' "ethnic affiliation," specifically, for being "Bosniaks and Muslims."

- 3) Rape or sexual violence committed by or with the consent or acquiescence of a public official or person acting in an official capacity constitutes torture

*Delalić, et al.* [also referred to as *Mucić, et al.* or "Čelebići Camp"] (ICTY Trial Chamber), November 16, 1998, para. 495: The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official.

- a) Rape of a detainee by a state official to elicit information amounts to torture

*Aydin v. Turkey* (ECHR), November 25, 1997, paras. 83, 85-86: "While being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally." The Court finds that the applicant was taken to gendarmerie headquarters and the suffering that was inflicted on her there was for the purpose of eliciting information. "Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the [European] Convention [on Human Rights]. Indeed the Court would have reached this conclusion on either of these grounds taken separately."

- b) Officials of non-state parties to a conflict may constitute a person acting in an official capacity

*Delalić, et al.* [also referred to as *Mucić, et al.* or "Celebici Camp"] (ICTY Trial Chamber), November 16, 1998, paras. 473-74: "Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities. The incorporation of this element into the definition of torture contained in the Torture Convention again follows the Declaration on Torture and develops it further by adding the phrases 'or with the consent or acquiescence of' and 'or other person acting in an

official capacity'. It is thus stated in very broad terms and extends to officials who take a passive attitude or turn a blind eye to torture, most obviously by failing to prevent or punish torture under national penal or military law, when it occurs.”

c) The presence of a state official or authority figure is not required

*Kunarac, et al.* (ICTY Trial Chamber), February 22, 2001, paras. 496-97: “The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.”

*Kvočka, et al.* (ICTY Appeals Chamber), February 28, 2005, para. 284: “The Appeals Chamber will next consider whether or not the Trial Chamber committed an error of law in not requiring that the crime of torture be committed by a public official or, in the case of a plurality of perpetrators, that at least one of the persons involved in the torture process be a public official. This question was resolved by the Appeals Chamber in the *Kunarac* Appeal Judgement. In that case, the Appeals Chamber concluded that the *Kunarac* Trial Chamber was correct to take the position that the public official requirement was not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention. The Appeals Chamber in the present case reaffirms that conclusion. As a result, the Appeals Chamber finds that Kvočka’s argument that he could not be found guilty of torture for acts perpetrated by Žigic and Knežević on the ground that they were not public officials is bound to fail, regardless of the precise status of these two individuals. This sub-ground of appeal is rejected.”

## VII. CORROBORATION

*Sexual and gender-based violence most frequently occurs in a private context with few, if any, witnesses aside from the perpetrator and the victim. As a result, tribunals have addressed the issue of whether corroborating testimony from additional witnesses are necessary to evidence rape or other forms of sexual violence, promulgating rules and developing case law negating corroborating witnesses as an evidentiary requirement. Jurisprudence from the ICTY and ICTR cites to Rule 96(i) of both tribunals' Rules of Procedure and Evidence, which provides in relevant part: "in cases of sexual assault, no corroboration of a victim's testimony shall be required."*

### A. Corroboration of testimony regarding sexual assault is not required

*Tadić* (ICTY Trial Chamber), May 7, 1997, paras. 536-39: "The general principle which the Rules require the Trial Chamber to apply is that any relevant evidence having probative value may be admitted into evidence unless its probative value is substantially outweighed by the need to ensure a fair trial. Rule 96(i) alone deals with the issue of corroboration, and then only in the case of sexual assault, where it says that no corroboration is to be required.... It is explained that this Sub-rule accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long denied to victims of sexual assault by the common law." "Quite apart from the effect of the Rules, it is not correct to say that in present day civil law systems corroboration remains a general requirement. The determinative powers of a civil law judge are best described by reference to the principle of free evaluation of the evidence: in short, the power inherent in the judge as a finder of fact to decide solely on the basis of his or her personal intimate conviction. This wide discretionary power is subject to a limited number of restrictions. However, the principle reflected in the Latin maxim *unus testis, nullus testis*, which requires testimonial corroboration of a single witness's evidence as to a fact in issue, is in almost all modern continental legal systems no longer a feature." "Similarly, this principle does not exist in Marxist legal systems, including those of the former Yugoslavia and China, which largely follow the civil law principle of the freedom of evaluation of evidence. It follows that there is no ground for concluding that this requirement of corroboration is any part of customary international law and should be required by this International Tribunal."

*Akayesu* (ICTR Trial Chamber), September 2, 1998, paras. 134-35: "Rule 96(i) of the Rules alone specifically deals with the issue of corroboration of testimony required by the Chamber. The provisions of this Rule, which apply only to cases of testimony by victims of sexual assault, stipulate that no corroboration shall be required." Citing the language from the *Tadić* judgment directly above, the Trial Chamber concludes that "the Chamber can rule on the basis of a single testimony provided such testimony is, in its opinion, relevant and credible."

*Katanga* (ICC Trial Chamber), March 7, 2014, para. 986: "The Chamber must, however, underscore that under rule 63(4) of the [ICC's] Rules of Procedure and Evidence there is no legal

requirement that corroboration is required to prove crimes of sexual violence.” Rule 63(4) of the ICC’s Rules of Procedure and Evidence provides in relevant part that “a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.”

*B. Courts are free to assess the reliability and credibility of a single witness’s testimony*

*Delalić, et al.* [also referred to as *Mucić, et al.* or “Celebici Camp”] (ICTY Appeals Chamber), February 20, 2001, para. 506: “[T]here is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence. What matters is the reliability and credibility accorded to the testimony.”

*Musema* (ICTR Trial Chamber, Judgment II), January 27, 2000, paras. 45-46: “The Chamber recalls that, as is stated in the *Akayesu* Judgement and the *Rutaganda* Judgement, sub-Rule 96(i) accords to the testimony of a victim of sexual assault the same basis of evaluation of reliability as the testimony of victims of other crimes. . . . [I]t is proper to infer that the ability of the Chamber to rule on the basis of testimonies and other evidence is not bound by any rule of corroboration, but rather on the Chamber’s own assessment of the probative value of the evidence before it. . . . The Chamber may freely assess the relevance and credibility of all evidence presented to it. The Chamber notes that this freedom to assess evidence extends even to those testimonies which *are* corroborated: the corroboration of testimonies, even by many witnesses, does not establish absolutely the credibility of those testimonies.” *See also Musema* (ICTR Appeals Chamber, Judgment II B), November 16, 2001, paras. 37-38 (affirming the finding of the Trial Chamber on appeal).

*Kunarac, et al.* (ICTY Trial Chamber), February 22, 2001, para. 566: “In some cases, only one witness has given evidence of an incident with which one or other of the accused has been charged. Rule 96 specifically overrules the requirement which exists or which used to exist in some domestic systems of law that the evidence of a complainant who alleges rape must be corroborated - a requirement which has indeed been removed in most of those domestic systems. Nevertheless, the fact remains that only one witness has given evidence of that incident, usually because she has been the only person present other than the particular accused when the incident charged is alleged to have taken place. In such a situation, the Trial Chamber has scrutinised the evidence of the Prosecution witness with great care before accepting it as sufficient to make a finding of guilt against any of the accused.”

*Nyiramasuhuko, et al.* (ICTR Trial Chamber), June 24, 2011, paras. 174-76 “There is no requirement that convictions be made only on evidence of two or more witnesses. The Chamber may rule on the basis of a single testimony if, in its opinion, that testimony is relevant and credible. Corroboration is simply one of many potential factors in the Chamber’s assessment of a witness’[s] credibility. If the Chamber finds a witness credible, that witness’[s] testimony may be accepted even if not corroborated. Similarly, even if the Chamber finds that a witness’[s]

testimony is inconsistent or otherwise problematic enough to warrant its rejection, it might choose to accept the evidence nonetheless because it is corroborated by other evidence. The ability of the Chamber to rule on the basis of testimonies and other evidence is not bound by any rule of corroboration, but rather on the Chamber's own assessment of the probative value of the evidence before it. The Chamber may freely assess the relevance and credibility of all evidence presented to it. The Chamber notes that this freedom to assess evidence extends even to those testimonies which are corroborated: the corroboration of testimonies, even by many witnesses, does not establish absolutely the credibility of those testimonies. When the evidence of only one witness is available in relation to a certain material fact, the Chamber may rely on such evidence even in the absence of corroboration, but should carefully scrutinise all uncorroborated evidence before making any findings on the basis of such evidence. The Chamber recalls that in cases of sexual assault, pursuant to Rule 96 (i) of the Rules, the Chamber shall not require corroboration of the victim's evidence."

*Radić, et al.*, (War Crimes Section, State Court of BiH, Appeals Panel), March 9, 2011, para. 545: "The Court of BiH has tried many war crime cases with a very large number of rape victims. The Court used its discretion when resolving these cases and accepted the position that in the evaluation of the evidence with regard to sexual violence, the judgment as to the credibility of a witness lies solely in the domain of the Court, with judges free to draw any conclusion they see fit, providing it passes the threshold of reasonableness and that corroboration is not required in general or in particular."

*Janković [Gojko]* (War Crimes Section, State Court of BiH, First Instance Panel), February 16, 2007, page 58: "The only evidence presented to the Court in relation to the first and second item of this count [alleging two incidents of rape] was the testimony of FWS-95 and thus, in convicting, the Court relies solely on her testimony. Nevertheless, the Court is free in its evaluation of the evidence submitted and corroboration is not required in general or in particular. This rule applies equally to the testimony of a victim of sexual assault."

*Tanasković* (War Crimes Section, State Court of BiH, First Instance Panel), August 24, 2007, page 30: The Panel addressed the fact that the Defense objected that "this Count of the Indictment [alleging rape] was based on the testimony of only one witness, that is, the protected witness, and that a conviction cannot be established on such testimony. The Panel notes that it is free to evaluate the evidence and, pursuant to Article 15 of the BiH CPC [Criminal Procedure Code], the Court has the right to evaluate the existence or non-existence of facts and that right is not related to special formal evidentiary rules. In the opinion of the Panel, if certain evidence is lawful and valid, and if it is authentic and credible, such evidence can be sufficient to establish that a criminal offense has been committed, even if that evidence comes from only one witness. The crime of rape is rarely committed before witnesses. The Panel noted that Witness A gave a highly emotional and for her a painful testimony in a clear and coherent manner, and that there were no inconsistencies in her testimony with regard to what happened to her subsequently and

the actions of the Accused himself.” (This finding was affirmed by the Appellate Panel, March 26, 2008, pages 14-17.)

*Nikačević* (War Crimes Section, State Court of BiH, First Instance Panel), February 19, 2009, page 36: “The Panel is also aware, as stated earlier, that only the witness-victim testified about the act of rape, because she was alone with the Accused in the room at the time of the event the Accused is charged with. For this reason, the Panel reviewed particularly carefully the testimony of the Prosecution witness before accepting it as the basis for reaching the conclusion on guilt. In doing so, the Panel also took into account the ICTY jurisprudence pursuant to [Rule] 96 of the [ICTY’s Rules of Procedure and Evidence] stipulating that no corroboration of the victim’s testimony shall be required when a rape victim gives evidence.” (This finding was affirmed by the Appellate Panel, July 12, 2010, paras. 52, 71.)

## VIII. CREDIBILITY OR CHARACTER OF THE VICTIM

*At both domestic and international tribunals, the credibility or character of a victim of sexual or gender-based violence often becomes a focus of the trial to a greater extent than witnesses testifying about other types of crimes they have experienced. Courts have addressed their approach to credibility issues specific to victims of sexual or gender-based victims, giving unique consideration to factors such as delayed or selective reporting of the crime, relationships with victim support organizations, “unexpected” behavior, and difficulty recalling certain details without inconsistencies in their testimony.*

### *A. Suffering from Post-Traumatic Stress Disorder does not undermine a witness’s credibility*

*Furundžija* (ICTY Trial Chamber), December 10, 1998, paras. 99, 103, 105, 108-09: “The Prosecution argued in its closing remarks that any arguments that Witness A’s credibility was diminished due to therapeutic interference with her memory or because of biological damage to her brain were based on pure speculation. [Post-traumatic stress disorder, or PTSD] does not render a person’s memory of traumatic events unworthy of belief. In fact, the expert evidence indicated that intense experiences such as the events in this case are often remembered accurately despite some inconsistencies.” “[T]he Trial Chamber finds that Witness A’s memory regarding material aspects of the events was not affected by any disorder which she may have had. The Trial Chamber accepts her evidence that she has sufficiently recollected these material aspects of the events. There is no evidence of any form of brain damage or that her memory is in any way contaminated by any treatment which she may have had.” The Chamber rejects the Defense argument that participating in group therapy could have led to contamination of Witness A’s memory, leading the group to “fill in the blanks and lead to false beliefs.” “Indeed the Trial Chamber accepts the evidence of Dr. Rath [an experienced clinical and forensic psychologist from California, called by the Prosecution] that such treatment that she may have had was of a purely preliminary nature. The Trial Chamber also considers that the aim in therapy is not fact-finding. The Trial Chamber bears in mind that even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness.”

### *B. Declining to make prior statements regarding rape does not undermine a victim’s credibility*

*Kvočka, et al.* (ICTY Trial Chamber), November 2, 2001, para. 552: “The Defense challenged the credibility of Witness K, since during cross-examination, the witness acknowledged she had not mentioned that Radić raped her to a female journalist that interviewed her in Zagreb in 1993, while in the statement given to the Office of the Prosecutor in 1995 she did describe this incident. Furthermore, the Defense pointed out that there were contradictions between the 1995 statement and the testimony of Witness K before the Trial Chamber concerning the time of the



day that the rape occurred. However, the Trial Chamber finds the fact that Witness K did not mention this rape incident in 1993 to a journalist is irrelevant, particularly in light of the sexual and intensely personal nature of the crime. This omission does not undermine the credibility of her testimony.” *See also Kvočka et al.* (ICTY Appeals Chamber), February 28, 2005, paras. 404-05: Appeals Chamber affirms Trial Chamber’s finding that Witness K was credible.

*C. Receiving support and/or reparation does not undermine a victim’s credibility*

*Bemba* (ICC Trial Chamber), March 21, 2016, para. 331: “The Chamber notes that the creation of and participation in victims’ organizations is a common feature of post-conflict societies. In addition to providing some level of psychological and material support to victims and their families, such organizations may assist victims in their search for justice and facilitate victims’ claims for reparations, furthering the victims’ right to a remedy, which has been recognised in international instruments. Accordingly, membership or participation in a victims’ organization, or their potential future claims for reparation, cannot, in itself, be considered as factors undermining a witness’s credibility.”

*D. Associating with a victims’ organization does not undermine a victim’s credibility*

*Nikačević* (War Crimes Section, State Court of BiH, First Instance Panel), February 19, 2009, pages 8, 37: “The Prosecutor... states that the fact that the rape was reported late, which was pointed to by the Defense during the evidentiary procedure, that is, that both witnesses did not talk about the rape up until... 2007, when they confided in and gave their statements to the Women-Victims of War Association, cannot affect the credibility of their statements, particularly considering the circumstances which existed in the territory of the municipality and town of Foča in the period concerned. That is, the witnesses as citizens of the town of Foča of Bosniak ethnicity were deprived of fundamental human rights, thus they were left to their own fate fearing for their lives on a daily basis and under these circumstances they could not ask for any protection because it would not be given to them. Keeping silent about rape, as stated by the Prosecutor, is not a rare case, which was also confirmed by the Defense witness Dr. Danilo Mihajlović stating that many women do not tell anybody that they have been raped, and they have reasons for remaining silent for many years following the rape.” “[I]t is important to examine a claim made by the Defense. [Redacted] was originally driven from Foča to Montenegro by the Accused. Another neighbor made arrangements with him to take [redacted] and her daughter away. The Defense raised this issue to undermine her credibility. Why after all would any reasonable woman go anywhere with her rapist? To ask this question points to the ignorance of this crime. Rape is a crime of power and there is no one way a reasonable woman responds to an unreasonable crime. This was a time of war and chaos. [Redacted] was fundamentally a survivor. As such, the Panel viewed this situation differently.” *See also Nikačević* (War Crimes Section State Court of BiH Appellate Panel), July 12, 2010, paras. 62-63: The Appellate Panel finds that “the fact that the victims first reported the rapes to the Women Victims of War association does not reduce the truthfulness or credibility of their statements.

Actually, it is logical that women who have undergone exceptionally traumatic events decide to first share their experience with the women who have undergone identical or similar situations.” The Appellate Panel also finds that “reporting the rape 15 years later does not necessarily challenge the credibility of the victims’ statements.”

*E. Delaying or selectively reporting a rape case does not undermine a victim’s credibility*

*Palija* (War Crimes Section, State Court of BiH, First Instance Panel), November 28, 2007, pages 43-46: The Panel finds the fact that there were minor details that Witness A did not recall about the alleged rape and the fact that she did not tell one of her friends about it “absolutely irrelevant bearing in mind the trauma that the witness suffered not only at that time, during the rape, but also during the repeated traumatization caused by the very recollection and retelling of the incident.” The Panel recounts Witness A’s testimony that the accused warned her not to tell anyone what had happened or else he would kill her friend or children and notes that “the severity of her trauma was a reason why she could not remember the exact date” when the rape occurred.

*Damjanović* (War Crimes Section, State Court of BiH, Appellate Panel), June 13, 2007, page 9: “[T]he fact that the injured party did not talk to anyone about the rape other than her husband is easily understandable if we bear in mind the circumstances at that time and that a very stressful and traumatic incident is at issue here, with a strong impact regardless of the time flow. Besides, in the patriarchal community, in which the injured party has lived, the rape is regarded as a disgrace for the victim herself; furthermore, bearing in mind that everything took place in the presence of her husband it is completely understandable as to why the injured party did not talk about it before.”

*Mejakić, et al.* (War Crimes Section, State Court of BiH, First Instance Panel), May 30, 2008, page 129: “During the evidentiary proceedings, the Defense, during the cross-examination, pointed out to the witness her earlier statement in which she did not mention rape. In terms of the differences between the statements, the witness gave an explanation noting that she was afraid at that time, that she was in a shock due to the traumas she went through, as a result of which she omitted the rape. The Court accepted these arguments, bearing in mind the fact that the referenced statement was given in May 1993, meaning less than a year after the critical events, at which point the witness was quite possibly still in a state of shock and in fear of everything she went through in the Omarska Camp.”

*Bogdanović* (War Crimes Section, State Court of BiH, Appellate Panel), June 21, 2012, paras. 47, 67-68, 70-71, 79: On appeal, the Defense argued that the fact that a rape victim “gave her first statement about this incident 17 years later... gives rise to a suspicion of the truthfulness and accuracy of the incident.” The Appellate Panel finds that “[i]t is important to take into account the fact that the witness knew from the very first encounter with the Accused who he was,

regardless of the fact that she did not share this information with her family, neighbors and friends, stating that she had never told anyone that the Accused had raped her but only that he mistreated her, for the following reasons: ‘I did not do it because we are a generation, how to put it, that kept these intimate things to ourselves, and we were not free to talk about it. I was afraid of my husband’s reaction if I told him all these details. We stayed in the apartment, did not go anywhere. I was also afraid of my then 18-years old son’s reaction, what he would do if he found out who it was, because I knew this person. It would have been different if it had been an unknown person and if I did not know who did it. What would my family say, the community, my neighbors...’” “It is also necessary to take into consideration the conservative community, lack of education, a general lack of empathy, which are only some of the reasons for which rape victims, including the injured party..., rarely report the perpetrators of this criminal offense.” “It is common knowledge that sex crime victims reluctantly decide to report these offenses, for many reasons, primarily due to the fear of retribution, embarrassment, sense of self-accusation, mistrust in the prosecution authorities, confusion and many other reasons.” “In the opinion of the Appellate Panel, the injured party was quite understandably hiding the identity of the perpetrator, because the Accused used force and many threats against the injured party during the perpetration of the criminal offense, and because she feared for her safety and the safety of her husband who had been taken to a camp.” In response to the Defense argument that the fact that the victim had not sought therapy for 17 years after the alleged rape undermined her credibility, the Appellate Panel notes that “[t]he contested Verdict correctly states the fact that rape victims often work and appear to function normally, referring to the expert witnesses’ testimony before the Court, who pointed out that these persons ‘suffer quietly’ and function with diminished capacity.”

*F. Minor inconsistencies do not undermine a victim’s credibility*

*Lelek* (War Crimes Section, State Court of BiH, First Instance Panel), May 23, 2008, pages 35-36: “Regardless of the Defence objections, the Panel finds that the testimony of witness MM contains no significant inconsistencies that would affect the credibility of her testimony. The Panel finds that such inconsistencies in testimonies, especially given by victims of such offences, can surely be attributed to the passage of time and, hence, to the poor quality of recollection, and her traumatic experience preventing her from observing the details. However, the testimony of the witness in the key parts pertaining to the identification of the Accused and the overall account of the events is sufficient and reliable.”

*Marković* (War Crimes Section, State Court of BiH, Appellate Panel), September 27, 2011, para. 80: “[T]he Appellate Panel stresses that the Trial Panel properly dismissed minor inconsistencies in the victim’s testimony and the statements she had given to the Prosecutor’s Office during investigation. As the Trial [P]anel noted in *Furundžija*, ‘survivors of such traumatic experiences cannot reasonably be expected to recall the precise minutiae of events, such as exact dates or times. Neither can they reasonably be expected to recall every single element of a complicated and traumatic sequence of events. In fact, inconsistencies may, in

certain circumstances, indicate truthfulness and the absence of interference with witnesses.’ The Appellate Panel affirms this position, and consequently does not attach any particular weight to the inconsistencies in the victim’s testimony regarding the date and time of the crime.”

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