

---

# Crimes of Sexual Violence in the War Crimes Chamber of the State Court of Bosnia and Herzegovina: Successes and Challenges

by Angela J. Edman\*

---

## INTRODUCTION

ESTABLISHED IN MARCH 2005 TO CONTINUE THE WORK OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY),<sup>1</sup> the War Crimes Chamber of the State Court of Bosnia and Herzegovina (WCC) faces substantial obstacles regarding prosecution of crimes of sexual violence. Estimates range from 20,000 to 50,000 wartime rapes in Bosnia alone.<sup>2</sup> Historically, rape and other crimes of sexual violence have gone unaddressed by courts, especially in wartime, and many jurisprudential barriers have prevented effective prosecutions. Prosecuting crimes of sexual violence successfully at the national level is crucial to bringing a sense of justice to victims and their families and ending a culture of impunity.

Thus far, the WCC has completed at least six trials involving crimes of sexual violence,<sup>3</sup> and additional cases are currently at trial or in appellate proceedings. This article examines how the WCC has treated these prosecutions and analyzes numerous challenges, particularly the WCC's definition of rape, and its reliance, or lack thereof, on previous international jurisprudence.

The WCC has made significant progress in prosecuting several rape cases, defining sexual violence, jurisprudentially defining sexual slavery and enslavement, and holding that rape can constitute persecution and torture. If it is to continue successfully prosecuting crimes of sexual violence, however, the WCC must: 1) amend its definition of rape to remove the requirement of force or the threat of force, and replace it with a definition requiring and emphasizing coercive circumstances; 2) include gender as a basis of persecution when prosecuting crimes of sexual violence as persecution, instead of only considering ethnicity, religion or political views; and 3) improve the quality of the Judgments by utilizing international jurisprudence from other tribunals.

## RAPE AS DEFINED BY CODE AND JURISPRUDENCE

### COMPARING BOSNIA-HERZEGOVINA'S DEFINITION OF RAPE WITH INTERNATIONAL STANDARDS

The Criminal Code of Bosnia and Herzegovina (the Code) mostly replicates provisions in the Rome Statute of the International Criminal Court (ICC), which regards sexual violence as a crime against humanity. According to both the Code and the Rome Statute, specific acts of sexual violence that constitute crimes against humanity include "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity."<sup>4</sup>

---

\* Angela J. Edman is a J.D. candidate at the Washington College of Law, and former Co-Editor-in-Chief of the Human Rights Brief.



Courtesy of Stuart Livingstone  
International Criminal Tribunal for the Former Yugoslavia.

The Code, however, further defines rape as, "coercing another by force or by threat or 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." This language is a misguided addition because jurisprudence from the ICTY and the International Criminal Tribunal for Rwanda (ICTR) consistently holds that force or the threat of force is not an element of rape.<sup>5</sup>

Under those established precedents, all crimes of sexual violence must be committed under coercive circumstances. Courts have vacillated on whether absence of consent should be an element of rape.<sup>6</sup> However, when rape is committed as an international crime, it involves widespread attacks or armed conflict, and thus the circumstances are "inherently coercive and make the question of consent redundant."<sup>7</sup> The *Akayesu* Trial Chamber provided the clearest explanation of "coercive circumstances," when it stated:

Coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee women.<sup>8</sup>

This interpretation indicates that while physical force and threats are likely sufficient to show that coercive circumstances existed, they are not necessary to prove coercion. By noting that coercion can be inherent in situations of armed conflict, the

*Akayesu* Trial Chamber negated the possibility of non-consent as an element of the international crime of rape. Notably, by using the disjunctive “or” between the phrases “armed conflict” and “the military presence of Interhamwe among refugee women,” the ICTR seems to say that coercive circumstances can be inherent even in situations in which there is no immediate armed conflict, but in which female refugees of one ethnic group are in the presence of members of the military of a different ethnic group. This becomes a significant ruling when applied to the situation in Bosnia (assuming the rule is applicable to internally displaced persons as well as refugees). The ruling indicates

---

The WCC has made significant progress in prosecuting several rape cases, defining sexual violence, jurisprudentially defining sexual slavery and enslavement, and holding that rape can constitute persecution and torture.

---

that for crimes of sexual violence charged as war crimes, but in which it is difficult for the prosecutor to prove armed conflict existed at the time and place of the crime, the prosecutor may decide to charge the crime instead as a crime against humanity — provided it meets the other *chapeaux* elements — so that the element of coercion is already proven if the refugees or internally displaced persons were in the presence of the armed forces of another ethnic group.

It is uncertain why the Code includes a requirement of force or the threat of force. The Code should be amended to re-define rape, using a definition, perhaps modeled after that found in *Akayesu* and confirmed in the *Čelebići* case.<sup>9</sup> That approach is more consistent with international jurisprudence regarding force, consent, and coercion.

#### ADVANCEMENTS AND RETRENCHMENTS IN THE WAR CRIMES CHAMBER RAPE JURISPRUDENCE

Despite the Code’s worrisome definition of rape, the WCC has made several important decisions regarding the conviction of rape and its elements that have advanced conformity with international standards. First, the WCC decided in *Prosecutor v. Janković* that corroboration of a witness’s testimony is not required for crimes of sexual violence. Notably, the WCC held

that because corroboration is not required for witness testimony in general, it cannot be required for witness testimony regarding crimes of sexual violence either. It is important that the WCC noted this early on in its jurisprudence, in hopes that future defendants will not attempt to discredit victim-witnesses who are testifying about sexual violence committed against them by accusing them of having no corroboration. It is also positive that the WCC holds crimes of sexual violence to the same evidentiary standards as other crimes.

Another positive development is the WCC’s recognition that the age of rape victims, many of whom were children and teenagers, is an aggravating circumstance. The *Samardžić* Trial Judgment held that raping girls under 16 increases the gravity of the crime. The Appeals Chamber further explained that the trauma is particularly serious for girls, who are more vulnerable and are left with “lasting and far-reaching effects on their mental and physical health.” Recognizing a victim’s young age as an aggravating factor is consistent with the ICTY’s decision in *Prosecutor v. Đerođić*, which noted that, “(t)he Appeals Chamber... has often affirmed the use of aggravating factors related to victim characteristics such as age.”<sup>10</sup>

There have also been setbacks in the WCC’s rape jurisprudence. First, the WCC has relied on the definition of rape in the ICTY’s *Kunarac* decision, which flies in the face of *Akayesu* by making non-consent an element, thus focusing on the victim’s behavior and excluding prosecution of otherwise clear cases of coercive sexual violence. The WCC’s *Šimšić* Trial Chamber relied on the *Kunarac* definition, but did not discuss consent; rather it stated, without elaboration, that coercive circumstances existed. Although consent was not raised here, it still seems advisable to rely on a definition that does not include non-consent as an element. Adding non-consent to the analysis and relying on *Kunarac* confuses it and invites retrenchment to an old view of the elements of rape that was debunked by *Akayesu*. The WCC should refrain from adding non-consent, in order to avoid focusing attention on victims’ behavior. Additionally, eliminating consent and focusing on coercion will enhance predictability and doctrinal clarity, and increase deterrence by providing clearer definitional boundaries.

Also worrisome is the WCC’s invocation of morality when adjudicating crimes of sexual violence.<sup>11</sup> The *Stanković* Appeals Chamber used a rape victim’s morality as a reason to exclude the public from her testimony. The *Šimšić* Trial Chamber went even further, stating:

(t)he Court was guided by reason of protection of morality in a democratic society, having in mind the traditional position of a woman in the Bosnia-Herzegovina milieu, even where some female witnesses expressed readiness to confront openly with the accused during their public confession.<sup>12</sup>

Scholars criticize invoking morality when discussing crimes of sexual violence, often referring to the Geneva Conventions’ protection of a woman’s “honor,” as diverting the focus from the crime as an act of violence, and focusing on the woman as a possession whose virginity is most valuable.<sup>13</sup> The *Stanković* Judgment did not need to invoke the victim’s morality; it elaborated other reasons sufficient to justify closing her testimony to the public, such as preventing the accused from revealing her



Bosnian government troops reach out towards a Muslim woman by a roadside in Travnik, central Bosnia.

identity, protecting her from the trauma of public discussion, and protecting her privacy. However, *Šimšić* seems to create the dangerous possibility that, due to a woman's "traditional position" in society (which the WCC failed to define), she may be prevented from testifying in public to preserve a sense of societal morality, even when she wants to testify in public and face her attacker.

#### CREATING PRECEDENT ON THE CRIMES OF SEXUAL SLAVERY AND ENSLAVEMENT

The BiH Criminal Code includes both enslavement and sexual slavery as crimes against humanity. The recognition of sexual slavery and enslavement in the context of crimes of sexual violence is a recent development in the field of international criminal law and is significant because it highlights the element of ownership of a human being in many crimes of sexual violence. Like the Rome Statute, the Code defines enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person, and includes the exercise of such power in the course of trafficking in persons, in particular women and children."<sup>14</sup> Although the Code and the Rome Statute include it as a sexual violence-based crime against humanity, both fail to define sexual slavery.<sup>15</sup> Unlike the Rome Statute, however, the Code does not provide an Elements of Crimes section,<sup>16</sup> thus leaving the Chambers to define sexual slavery through their jurisprudence.

Four of the five sexual violence cases completed by the WCC thus far involved charges of either enslavement or sexual slavery related to crimes committed by Bosnian Serb military, paramilitary, or police forces against Bosniak women and girls in the Karaman House, a building that served as a rape camp and was frequently referred to as the "Karaman Brothel."<sup>17</sup> In the first two cases completed, *Samardžić* and *Stanković*, the

perpetrators were both charged with rape; each seemingly possessed equivalent rank in the military and committed the same crimes.<sup>18</sup> Yet the Prosecutor charged *Samardžić* with sexual slavery and *Stanković* with enslavement, thus indicating that the lack of a clear definition leads to inconsistent charges for the same conduct.

#### DEVELOPMENT OF THE CRIME OF ENSLAVEMENT THROUGH THE *STANKOVIĆ* CASE

While both *Stanković* and *Samardžić* were charged with bringing girls to Karaman and keeping them as slaves, the WCC focused on *Stanković*'s role in establishing Karaman as a rape camp. The Trial Chamber detailed the consistent testimonies of five witnesses that established *Stanković*'s pattern of capturing females and bringing them to Karaman, particularly his authoritative role as the person in charge of assigning females to soldiers for rape. In establishing enslavement, the Trial Chamber noted that *Stanković* held a position of authority in the house, claimed one detainee as his own and treated her as his property, approved soldiers for entry to Karaman and "assigned" the girls to them, and sometimes brought soldiers to the house himself. The Trial Chamber discussed at length his role in subjecting female detainees to forced labor. The remainder of the charges involved acts of rape and forced labor by the accused.

It is not clear why the indictment separated the charges of enslavement and rape when the *actus reus* of both are so closely related: the rapes occurred in the context of enslavement, and a characteristic of the enslavement was rape. The Prosecutor may have done this out of caution, as *Stanković* was not only the first case transferred from the ICTY pursuant to ICTY Rule 11 *bis*, but the indictment was also one of the WCC's first to include charges of sexual violence.<sup>19</sup> Thus, the Prosecutor may have thought it wise to separate the elements to their most basic



form to encourage clear jurisprudential definitions of the crimes, as well as to ensure a conviction on at least one of the crimes. Or perhaps the Prosecutor viewed enslavement as an umbrella crime, with rape being one of the constituent crimes.

Regardless, the WCC's interpretation of enslavement fits the Code's definition by focusing on proof that Stanković exercised ownership rights over the detained females. Although the decision does not specifically refer to the ICTY's more detailed elements of enslavement, the WCC's interpretation of enslavement is consistent with the ICTY's, which lists as indicia of ownership:

(...) control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labor.<sup>20</sup>

Finally, it also is not clear why the Prosecutor chose to charge enslavement instead of sexual slavery. Because the Code does not define sexual slavery, the Prosecutor may have strategically chosen enslavement to increase the chances of a conviction for a crime with a clear definition. Also, the Prosecutor may have wished to draw attention to the non-sexual nature of the forced labor for which Stanković was also eventually prosecuted, such as forcing the detainees to wake the soldiers, cook, and clean for them, as forced labor can demonstrate enslavement.

#### DEVELOPMENT OF THE CRIME OF SEXUAL SLAVERY THROUGH THE SAMARDŽIĆ CASE

The Appeals Chamber sentenced Nedo Samardžić to 24 years in prison for nine counts of crimes against humanity, seven of which involved either rape or sexual slavery. By requiring that Samardžić had exercised powers attaching to the rights of ownership, and caused the victims to engage in sexual acts, the WCC's definition of sexual slavery matches the Rome Statute's definition. The WCC found that the elements of sexual slavery were established in part through witness testimony regarding the nature of the Karaman House. The witnesses consistently described Karaman as a brothel in which they were traded, bought and sold; were forced to cook, clean and do other chores; and were subjected to rape almost on a daily basis. The WCC also found that Samardžić himself committed multiple rapes.

The ICTY Statute does not define sexual slavery, but crimes of sexual violence committed during enslavement have been prosecuted as separate crimes against humanity.<sup>21</sup> The WCC echoed the ICTY *Kunarac* Appeals decision when it stated that a lack of resistance or obvious and constant disagreement to the conditions of enslavement cannot be interpreted as consent.<sup>22</sup> *Kunarac* went on to state that lack of consent is not an element of the crime of enslavement, since "enslavement flows from claimed rights of ownership." However, the decision never explicitly stated that it relied on *Kunarac*.

The *Samardžić* Appeals decision also seemed to apply *Kunarac* by listing the circumstances of the victim's detention at Karaman House as being so inherently coercive as to make consent a non-issue. Specifically, the surrounding presence of armed forces and police, the victim's separation from

male family members, and her lack of money or a possibility of escape rendered superfluous any inquiry into the presence or absence of consent. *Samardžić* thus created jurisprudence consistent with the definition of sexual slavery in the Criminal Code of BiH (and in the Rome Statute), as well as with ICTY jurisprudence on crimes of sexual violence committed in the context of enslavement.

Jurisprudence on sexual slavery and enslavement in the context of crimes of sexual violence is a relatively recent development. It constitutes a significant development because it highlights patriarchal power structures underlying and permitting many of these crimes. It demonstrates that such crimes do not occur as single events, but as part of a contiguous existence of ownership that constitutes a crime in itself. However, to best combat impunity for crimes of sexual violence involving ownership of a person, the WCC should explicitly refer to previous international jurisprudence to make its reasoning clear. It also must create and maintain jurisprudentially precise and distinct definitions of sexual slavery and enslavement to avoid inconsistent charging and reflect most realistically the nature of the crimes.

#### CRIMES OF SEXUAL VIOLENCE AS PERSECUTION

*Prosecutor v. Šimšić* is the WCC's first case convicting an accused for sexual violence as persecution. Prosecutions of gender-based crimes of persecution are possible because the Code enumerates gender as a prohibited basis of persecution.<sup>23</sup> The inclusion of gender as a prohibited basis is a new development in international criminal law, as neither the ICTY nor the ICTR Statutes include it,<sup>24</sup> whereas the Rome Statute does. However, the indictment did not specify that the persecution was gender-based; but rather that rape was committed on the basis of "political, national, ethnic, cultural and religious grounds." In this sense, the WCC's interpretation of persecution as related to gender mirrors that of the ICTY.

The ICTY Trial Chamber found in *Krstić* that rape can be committed with persecutorial intent; however, the ICTY limited the basis of persecution to the enumerated purposes and did not include gender, thus requiring a nexus between the rape and another act of persecution based not on gender.<sup>25</sup> While the WCC's recognition that rape can be a form of persecution is significant, the Prosecution should have tried to prove the rapes were committed as persecution not only against Muslims because of their religious beliefs and ethnicity, but also that the rapes were committed to persecute Muslim *women*, due to their unique characteristics and position in society. The crimes committed against them illuminated, took advantage of, and perverted roles that women may traditionally play as homemakers, as evidenced through forced labor in the form of cooking and cleaning, and through their roles as providers of sexual pleasure to the soldiers.

The Prosecutor demonstrated the elements of persecution, replicating those laid out in *Tadić*: that there is a discriminatory act or omission, that the act or omission is based on one of the prohibited purposes, and there is an intent to infringe on an individual's enjoyment of a basic or fundamental right.<sup>26</sup> The Prosecutor could have simultaneously demonstrated that, in addition to group membership of the Islamic religion, the detainees were discriminated against on the basis of their gender.

## CRIMES OF SEXUAL VIOLENCE AS TORTURE

*Prosecutor v. Janković* is the WCC's first prosecution of rape as the crime against humanity of torture. Janković was a leader in a paramilitary group and in the Bosnian Serb Army, and ordered and perpetrated acts of torture against male and female Bosnian Muslims in Foča. The WCC analyzed interrogations of female detainees to establish the framework for torture. A witness testified that Janković demanded she tell him the names of her village's residents and which of them had arms, and that he threatened her with gang rape. Though she tried to comply, Janković transported her to a barracks on the Drina River where he orchestrated a gang rape by at least ten soldiers. The rapes took place in a room in which she could hear her uncle outside screaming, being beaten, and then being shot. Other witnesses who were detained there also testified about interrogations and rapes.

The Code's definition of torture as a crime against humanity is identical to the Rome Statute's, requiring the "intentional infliction of severe pain and suffering, whether physical or mental, upon a person in the custody or under control of the accused," not including suffering resulting from lawful sanctions.<sup>27</sup> Both also require that crimes against humanity be committed in the course of an attack directed against a civilian population that is pursuant to or in furtherance of a State or organizational policy. The WCC listed the legal requirements of torture as causing severe pain and suffering, being intentional, and having a prohibited purpose. Those requirements are consistent with the standard established by the ICTY in *Kunarac*,<sup>28</sup> which adopted the Torture Convention's definition, but excluded the Convention's state action requirement. The ICTY reasoned that while human rights law as embodied by the Convention is directed at states, international humanitarian law affords more protection to individuals and does not require state action.<sup>29</sup>

Rape had previously been prosecuted as torture under international law. The ICTY in *Čelebići* extensively analyzed the requirements of prosecuting rape as torture by examining jurisprudence from other international bodies.<sup>30</sup> In analyzing the case of *Mejía v. Peru* at the Inter-American Commission on Human Rights,<sup>31</sup> the *Čelebići* Trial Chamber deduced that when determining whether a rape caused severe pain and suffering, one should consider not only the physical effects, but also the psychological and social effects of the crime.

In analyzing the European Court of Human Rights (ECHR) case *Aydın v. Turkey*<sup>32</sup>, the *Čelebići* Trial Chamber deduced that, because the ECHR stated that it would have reached the same conclusion that a rape violated Article 3 of the European Convention (prohibiting torture and cruel and inhuman or degrading treatment) even if the victim's rape had been considered separately from other acts of torture that were committed against the victim, the ECHR affirmed that rape inflicts a level of suffering at such a severe level as to constitute torture. *Čelebići* then referred to *Akayesu*, which ruled that rape constitutes torture because it constitutes a violation of personal dignity, and is used for the same purposes as torture, including: "intimidation, degradation, humiliation, discrimination, punishment, (and) control or destruction of a person." Lastly, *Čelebići* referred to several United Nations commission reports that affirmed rape constitutes a form of torture.<sup>33</sup>

*Janković* did not reference *Čelebići* or other international jurisprudence. While decisions of other international tribunals

are not binding on the WCC, looking to the jurisprudence of other tribunals can be very helpful, especially when deciding on new issues of law, like the *Čelebići* judgment did when it analyzed whether rape can be the basis for a torture prosecution. This failure to consider previous jurisprudence makes the WCC's judgments more susceptible to criticism; if other parties cannot tell on what basis the WCC makes decisions, its dicta and holdings are easier to discredit.

---

Despite the Code's worrisome definition of rape, the WCC has made several important decisions regarding the conviction of rape and its elements that have advanced conformity with international standards.

---

More importantly, although the tribunals' decisions are not binding on one another, the international criminal law concepts created by past jurisprudence have essential normative components that are universal, and failing to analyze past case law fractures international criminal legal doctrine. In fact, the Appeals Chamber often revokes Trial Chamber judgments due to a violation of the Criminal Procedure Code, which permits vacatur where a Chamber fails to explain the grounds and cite reasons for the decision.<sup>34</sup>

The tendency to ignore existing jurisprudence could result from the newness of Bosnia's criminal codes and the judiciary's transformation from a civil law system that does not utilize *stare decisis* to more of a common law system. If this is the problem, the international judges at the WCC should consider utilizing their positions to introduce more analysis of previous decisions by international tribunals.

Regardless of whether *Janković* should have referenced past jurisprudence, its conclusions seem consistent with the state of the existing international criminal case law. Aside from meeting the *Kunarac* definition, the WCC also met *Akayesu*'s prohibited purposes requirement for torture, which lists as prohibited purposes:

- (a) to obtain information or a confession from the victim or a third person;
- (b) to punish the victim or

a third person for an act committed or suspected of having been committed by either of them; (c) for the purpose of intimidating or coercing the victim or the third person; (or) (d) for any reason based on discrimination of any kind.<sup>35</sup>

The decision implied first that the *Kunarac* criteria were met, when it explained that the legal requirements for torture have been met because the gang-rape caused the witness severe pain and suffering, was intentional, and had prohibited purposes. It then met the *Akayesu* prohibited purposes element when it explained that the gang-rape was discriminatory as it was based on the victim's ethnicity, that Janković interrogated her to extract information, that he intimidated and threatened her with rape, and that he punished her for giving dissatisfactory answers during her interrogation by orchestrating the gang-rape.

Interestingly, the *Akayesu* prohibited purposes element also appears separately in Article 190, not under the rubric of crimes against humanity, but as a stand-alone crime of torture.<sup>36</sup> It is unclear why the Prosecutor did not bring an Article 190 charge as well, as all of the elements of the crime as listed under Article 190 were met. As of this date, the Prosecution has not brought any charges for the stand-alone crime of torture, perhaps because bringing various charges together under crimes against humanity or war crimes makes it easier to establish the context of the crimes. It may also be because, while torture as a crime against humanity requires the attack to be part of a state or organizational policy, torture as a stand-alone crime requires that the perpetrator either be a public official, or someone with the consent of a public official (the "state action" requirement). It is generally more difficult to prove the state action requirement, which derives from human rights law. Nevertheless, it is an important development that the WCC prosecuted rape as torture, although it should attempt to deliver clearer decisions invoking previous international jurisprudence.

## CONCLUSION

The WCC has made important strides in prosecuting crimes of sexual violence committed during the war in Bosnia. By ruling that rape can constitute both torture and persecution, and that those crimes against youth are particularly grave, the WCC has begun to recognize through its jurisprudence that crimes of sexual violence are especially serious. Defining sexual slavery was another crucial step, as was ruling that corroboration is not required for witness testimony on rape.

Additional progress is needed, however, particularly in taking the focus off the victim's behavior. The WCC should amend its definition of rape, which currently enables the defense to focus on a victim's behavior by raising force and consent-related issues, and replace it with one modeled after *Akayesu*. This would require coercive circumstances and not force or consent, reflecting the actual reality of sexual violence and bringing the focus back to the perpetrator's behavior. The WCC should similarly stop invoking morality. The WCC has created strong jurisprudence on sexual slavery and enslavement, but needs to create clearer distinctions between them to allow the Prosecutor to most effectively and consistently define and charge crimes, and contribute to a greater understanding of the true nature of such crimes. As gender is enumerated as a prohibited basis of persecution, the WCC should consider gender as a basis of persecution, when appropriate, instead of only using nationality, ethnicity and religion. Lastly, an abundance of international jurisprudence exists from the *ad hoc* tribunals on crimes of sexual violence. The WCC should consult these decisions when facing issues of law that it has never faced before.

The WCC has many challenges before it, and has begun to effectively address them. The WCC, however, must address the problems discussed to ensure the development of the strongest regime for combating impunity for crimes of sexual violence, and bringing justice to survivors of atrocities in Bosnia. **HRB**

## ENDNOTES: Crimes of Sexual Violence in the War Crimes Chamber of the State Court of Bosnia and Herzegovina

<sup>1</sup> Joint Preliminary Conclusions of OHR and ICTY Experts Conference on Scope of BiH War Crimes Prosecutions,” January 15, 2003 available at <http://www.un.org/icty/pressreal/2003/p723-e.htm> (last visited October 19, 2008). See also, Public Information and Outreach Section, website of the State Court of Bosnia and Herzegovina, available at <http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=7&id=15&jezik=e> (last visited April 29, 2008).

<sup>2</sup> Alexandra Stiglmeier, *Sexual Violence: Systematic Rape, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 327, 327 (Roy Gutman and David Rieff eds., 1999).

<sup>3</sup> The term “completed” here refers to trials that have issued a verdict at the appellate level. See, *Prosecutor v. Samardžić*, No. KT-RZ: 89/05, Appeals Chamber Judgment (Sarajevo, 13 December 2006); *Prosecutor v. Stanković*, No. X-KR-05/70, Appeals Chamber Judgment (Sarajevo, 28 March 2007); *Prosecutor v. Damjanović*, No. X-KRZ-05/51, Appeals Chamber Judgment (Sarajevo, 13 June 2007); *Prosecutor v. Šimšić*, No. X-KR-05/04, Appeals Chamber Judgment (Sarajevo, 7 August 2007); and *Prosecutor v. Janković*, No. KT-RZ-163/05, Trial Judgment (Sarajevo, 23 October 2007); *Prosecutor v. Vuković*, No. X-KRŽ-06/217, Appeals Chamber Judgment (Sarajevo, 13 August 2008).

<sup>4</sup> Criminal Code of Bosnia and Herzegovina, art. 172(1)(g), (“Official Gazette of Bosnia and Herzegovina” No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/08) available at [http://www.sudbih.gov.ba/files/docs/zakoni/en/krivicni\\_zakon\\_3\\_03\\_-\\_eng.doc](http://www.sudbih.gov.ba/files/docs/zakoni/en/krivicni_zakon_3_03_-_eng.doc) [hereinafter Criminal Code of BiH]; and Rome Statute of the International Criminal Court, art. 7(1)(g), 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002) available at <http://untreaty.un.org/cod/icc/statute/rome.htm> [hereinafter Rome Statute].

<sup>5</sup> See, e.g., *Prosecutor v. Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶¶ 128-129 (Appeals Chamber, 22 Mar. 2006) (holding that force is not an element of rape, and resistance is not required); *Prosecutor v. Akayesu*, No. ICTR-96-4-T (Trial Judgment, 2 Sept. 1998) (requiring only “circumstances which are coercive,” not forceful); and *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 185 (Trial Chamber, 10 Dec. 1998) (requiring the sexual penetration occur by force [or threat of force], or coercion).

<sup>6</sup> See, *Kunarac* Trial Judgment, ¶ 442 (requiring that “the sexual activity occurs without the consent of the victim”), and *Gacumbitsi v. Prosecutor*, No. ICTR-2001-64-A, ¶ (July 7, 2006) (contrasted with *Akayesu* and *Furundžija*, discussed at *supra* note 5, which do not require the element of non-consent).

<sup>7</sup> Wolfgang Schomburg and Ines Peterson, *Genuine Consent to Sexual Violence under International Criminal Law*, 101 Am. J. Int’l L. 121, 127 (January, 2007).

<sup>8</sup> *Akayesu* Trial Judgment, ¶ 688.

<sup>9</sup> See *Akayesu* Trial Judgment, ¶ 688 (defining rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”) and *Prosecutor v. Delalić (Čelebići)*, No. IT-96-21-T, Judgment ¶ 478-479 (16 November 1998) (confirming the *Akayesu* definition, and stating that it “sees no reason

to depart from the conclusion of the ICTR in the *Akayesu Judgment* on this issue”).

<sup>10</sup> *Prosecutor v. Deronjić*, Case No. IT-02-61, Judgment ¶ 124, (Appeals Chamber, 20 July 2005).

<sup>11</sup> See, e.g. *Šimšić* Trial Judgment, p. 9, and *Stanković* Appeals Judgment, p. 7.

<sup>12</sup> *Stanković* Appeals Judgment, p. 7.

<sup>13</sup> See, e.g., Helen Durham, *International Humanitarian Law and the Protection of Women*, in LISTENING TO THE SILENCES: WOMEN AND WAR 98 (Helen Durham and Tracey Gurd eds., 2005); and Judith G. Gardham and Michelle J. Jarvis, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 107-112 (Kluwer Law International, 2001).

<sup>14</sup> Criminal Code of BiH, art. 172(2)(c), and Rome Statute, art. 7(2)(c).

<sup>15</sup> Criminal Code of BiH, art. 172(1)(g), and Rome Statute, art. 7(1)(g).

<sup>16</sup> The ICC Elements of Crimes defines sexual slavery as “(1) The perpetrator exercised any or all of the power attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. (2) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.” *ICC Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000), 7(1)(g), referring to discussion on art. 8(2)(b)(xxii).

<sup>17</sup> *Prosecutor v. Samardžić*, Indictment, p. 4 (Sarajevo, February 9, 2006). Cases include: *Prosecutor v. Samardžić*, *Prosecutor v. Stanković*, *Prosecutor v. Šimšić*, and *Prosecutor v. Janković*.

<sup>18</sup> Both Samardžić and Stanković were members of the Army of the Republika Srpsk and were charged with bringing women and girls to Karaman house, keeping them in conditions of enslavement, and raping them, as well as forcibly transferring these and other women and girls to other buildings used for the same purpose and sharing them with other soldiers. See *Samardžić* Indictment, counts 3, 8, 10, 11, 15, 16 and 17; and *Stanković* Indictment, counts 1-6. Indeed, the indictments of both men list the other as a co-perpetrator for some crimes. See *Samardžić* Indictment, count 8; and *Stanković* Indictment, count 1.

<sup>19</sup> The *Stanković* Indictment is dated November 28, 2005. Prior to that, only the *Šimšić* indictment included charges of crimes of sexual violence. See website of the Court of Bosnia and Herzegovina, <http://www.sudbih.gov.ba/?jezik=e> (follow “Indictments” under “Section I”).

<sup>20</sup> *Prosecutor v. Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 119 (Appeals Chamber, 22 Mar. 2006).

<sup>21</sup> Kelly D. Askin, *The Jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors*, in LISTENING TO THE SILENCES: WOMEN AND WAR 133 (Helen Durham and Tracey Gurd eds., 2005).

<sup>22</sup> *Samardžić* Appeals Judgment, p. 18. The ICTY similarly stated that the “lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention” cannot be interpreted as consent. *Kunarac* Appeals Judgment, ¶ 120.

<sup>23</sup> Criminal Code of BiH, art. 172(1)(h).



<sup>24</sup> The ICTY and ICTR only prohibit persecution based on political, racial or religious grounds. See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 3217<sup>th</sup> mtg., art. 5(h), U.N. DOC. S/RES/827 (1993) [hereinafter ICTY Statute], and ICTR Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49<sup>th</sup> Sess., 3453<sup>rd</sup> mtg., Annex, art. 3(h), U.N. DOC S/RES/955 [hereinafter ICTR Statute].

<sup>25</sup> *Prosecutor v. Krstić*, No. IT-98-33, Judgment ¶¶ 617-618 (Trial Chamber, 2 August 2001).

<sup>26</sup> *Šimšić* Appeals Judgment, p. 47, and *Prosecutor v. Tadić*, Case No. IT-94-I-T, Judgment ¶ 7, (Trial Chamber, May 1997).

<sup>27</sup> Criminal Code of BiH, art. 172(2)(e), and Rome Statute, art. 7(2)(e).

<sup>28</sup> *Kunarac* Trial Judgment, ¶ 497.

<sup>29</sup> See Askin, *supra* note 43, at pp. 137-138.

<sup>30</sup> *Čelebići* Trial Judgment, ¶¶ 475-497.

<sup>31</sup> *Mejía v. Peru*, Annual Report of the Inter-American Commission on Human Rights, Report No. 5/96, Case No. 10.970, 1 March 1996.

<sup>32</sup> *Aydın v. Turkey*, Judgment of 25 Sept. 1997, ECHR.

<sup>33</sup> *Čelebići* Trial Judgment, ¶¶ 491-493, referring to the UN Special Rapporteur on Torture's 1992 Report *at*, Report of the Special Rapporteur, Sir Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32, E/CN.4/1995/34, ¶ 16 (stating that because rapes and other sexual abuse committed against women in detention constituted a "particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being," they constituted torture); the Report of the Commission of Experts, *at* Commission of Experts Report, Annexes IX to XII S/1994/674/Add.2 (Vol. V), ¶ 25, (holding that the significant harm that results from rape is the loss of control of the victims' body and agency, which infringes on human dignity); and the report of the Special Rapporteur on Contemporary

Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, *at* "Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict"; Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, E/CN.4/Sub.2/1998/13, 22 June 1998, para. 55 (stating that the prohibited purpose of discrimination in the Torture Convention provides an additional basis for prosecuting rape as torture).

<sup>34</sup> See, e.g., *Prosecutor v. Šimšić*, No. KRZ-05/04, Second Instance Decision on Revocation of First Instance Decision, pp. 2-3 (Sarajevo, 5 January 2007), and *Prosecutor v. Samardžić*, No. KRZ 05/49, p. 3 (Sarajevo, 29 September 2006) (both alleging violations of the Criminal Procedure Code of Bosnia and Herzegovina), art. 297(1)(k), ("Official Gazette" of Bosnia and Herzegovina, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07), available at <http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=6&jezik=e>, [hereinafter "Criminal Procedure Code of BiH"] which states the Criminal Procedure Code has been violated, "if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts."

<sup>35</sup> *Akayesu* Trial Judgment, ¶ 594.

<sup>36</sup> Criminal Code of BiH, art. 190: Torture and Other Cruel, Inhuman and Degrading Treatment, which states, "An official or another person, who, acting upon the instigation or with the explicit or implicit consent of a public official person, inflicts on a person physical or mental pain or severe physical or mental suffering for such purposes as to obtain from him or a third person information or a confession, or to punish him for a criminal offence he or a third person has perpetrated or is suspected of having perpetrated or who intimidates or coerces him for any other reason based on discrimination of any kind."