IN TRIAL CHAMBER II

Before:
Judge Florence Ndepele Mwachande Mumba, Presiding
Judge David Hunt
Judge Fausto Pocar

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
3 July 2000

PROSECUTOR

v

Dragoljub KUNARAC, Radomir KOVAC and Zoran VUKOVIC

DECISION ON MOTION FOR ACQUITTAL

The Office of the Prosecutor:

Mr Dirk Ryneveld
Ms Peggy Kuo
Ms Hildegard Uertz-Retzlaff
Mr Daryl Mundis

Counsel for the Accused:

Mr Slavisa Prodanovic and Ms Mara Pilipovic for Dragoljub Kunarac
Mr Momir Kolesar and Mr Vladimir Rajic for Radomir Kovac
Mr Goran Jovanovic and Ms Jelena Lopicic for Zoran Vukovic

1 Introduction

1. The three accused – Dragoljub Kunarac (“Kunarac”), Radomir Kovac (“Kovac”) and Zoran Vukovic (“Vukovic”) – have moved for a judgment

of acquittal pursuant to Rule *98bis* of the Rules of Procedure and Evidence ("Rules").[1] The application is made in relation to a number of different counts:

(a) All three accused have moved in relation to the counts charging them with torture , as a crime against humanity,[2] and as a violation of the laws or customs of war.[3]

(b) Kunarac and Kovac have moved in relation to the counts charging them with outrages upon personal dignity, as a violation of the laws or customs of war.[4]

(c) Kunarac has also moved in relation to the count charging him with plunder of private property, as a violation of the laws or customs of war,[5] and those counts charging him with responsibility as a superior.[6]

(d) Vukovic has also moved in relation to the counts in which he is charged with the rape of Witness FWS-48, as a crime against humanity,[7] and as a violation of the laws or customs of war[8] and "all criminal acts which [he] is charged for in connection with the Witness FWS48".[9]

(e) All three accused have moved for acquittal upon the basis that they have been charged cumulatively with different offences arising out of the same alleged facts .[10]

2 Rule *98bis*

2. Rule *98bis*(B) provides:

The Trial Chamber shall order the entry of judgment of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges.

The Rule does not identify the basis upon which a Trial Chamber should consider a motion for the entry of such a judgment at the close of the prosecution case. The Rule was, however, adopted in 1998 in order to deal with a situation – which by that time had developed in every trial heard by the Tribunal – where the accused applied at the close of the prosecution case for a determination that there was no case to answer on one or more or all of the charges in the indictment. In the absence of a specific rule, these applications had been made pursuant to Rule 54 , which permits a Trial Chamber to make such orders as may be necessary for the conduct of the trial. The test

generally adopted in such applications was –

[...] whether as a matter of law there is evidence, were it to be accepted by the Trial Chamber, as to each count charged in the indictment which could lawfully support a conviction of the accused.[11]

3. Following its adoption in 1998, Rule *98bis* was interpreted initially in the same way, as meaning:

[...] that the Trial Chamber must grant the Motion if it is convinced that, at this stage of the proceedings, the prosecution has not provided sufficient evidence to justify immediately a judgment of conviction based on the various counts invoked by counsel for the accused.[12]

The same general test has been applied in all but one of the subsequent cases.[13] The exception was, however, decided without hearing submissions from either party .[14] The Trial Chamber does not propose to follow that decision. The test which the Trial Chamber has applied in the present case is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* convict – that is to say, evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question. If the evidence does not reach that standard, then the evidence is, to use the words of Rule *98bis*(B), “insufficient to sustain a conviction”.

4. It is important to emphasise that, for the purposes of that determination, the Trial Chamber does not generally reach any conclusion as to the credit of the witnesses called by the prosecution.[15] It is a fundamental rule in relation to determining issues of fact that no conclusion should ever be reached in relation to the credit of a witness until *all* the evidence has been given. A tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of *all* the evidence in the case which must be considered . The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case. Conversely , apparently credible evidence of another witness may lose that appearance in the light of evidence given by other witnesses.[16]

5. If the Trial Chamber *were* entitled to weigh questions of credit generally when determining whether a judgment of acquittal should be entered, and if it found that such a judgment was not warranted,

the perception would necessarily be created (whether or not it is accurate) that the Trial Chamber had accepted the evidence of the prosecution's witnesses as credible. Such a consequence would then lead to two further perceptions: (1) that the accused will bear at least an evidentiary onus to persuade the Trial Chamber to alter its acceptance of the credibility of the prosecution's witnesses, and (2) that the accused will be convicted if he does not give evidence himself. He would virtually be required to waive the right given to him by the Tribunal's Statute to remain silent.[17]

6. The Trial Chamber does not propose to reach any conclusions at this stage concerning the credibility of the prosecution witnesses. The exceptional circumstances in which a question of credit may have to be determined at this stage are discussed in *Prosecutor v Kordic* ("*Kordic* Decision"),[18] but they do not apply in this case. It is therefore unnecessary for the Trial Chamber to determine whether the *Kordic* Decision should be followed completely on this point.

7. It should, however, be added that, in limited circumstances, there is a distinction which has to be drawn between the credibility of a witness and the reliability of that witness's evidence. Credibility depends upon whether the witness should be believed. Reliability assumes that the witness is speaking the truth, but depends upon whether the evidence, if accepted, proves the fact to which it is directed. Where the particular fact to which the evidence is directed is an element of the offence charged (which has to be established beyond reasonable doubt), and where evidence of that witness is the *only* evidence given in relation to that fact , the Trial Chamber at this stage must be satisfied that a reasonable tribunal of fact *could* find beyond reasonable doubt that the particular fact has been established by the evidence of that witness.[19]

8. A situation where the reliability of the evidence given by such a witness becomes of substantial importance is well illustrated in relation to the issue of identification . There are many difficulties with the identification of an offender:

Identification is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognising on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably the tendency to substitute a photographic image once seen for

a hazy recollection of the person initially observed.[20]

There have been some notorious cases in domestic jurisdictions over the years in which completely honest evidence of identification has been shown to be wrong after innocent people have been convicted.[21] For these reasons, special caution has been found to be necessary before accepting identification evidence because of the possibility that even completely honest witnesses may have been mistaken in their identification. Because the witness who gives evidence of identification honestly believes that his or her evidence is correct, that evidence will usually be quite impressive, even persuasive. The ultimate issue here, however , is not whether the evidence is honest. The issue is whether the evidence is reliable . If the evidence of identification is not capable of establishing beyond reasonable doubt that the accused is the offender because it is unreliable in this sense, then (even if the evidence to which the prosecution has pointed is accepted) that evidence is “insufficient to sustain a conviction” and the accused is entitled to a judgment of acquittal in relation to that charge.

9. The prosecution has nevertheless submitted that the Trial Chambers have “interpreted the standard of review at the mid-trial stage to be lower than proof beyond a reasonable doubt”.[22] This submission is a misleading one. It appears to have been based on a misunderstanding of what was decided in the most recent of these cases, the *Kordic* Decision. In that case, it was argued that, in order to find that there was a case to answer, the Trial Chamber had to be satisfied *at that stage and for itself* that each element of the offences charged *had* been established beyond reasonable doubt. Such an approach would be the same as that taken at the end of *all* the evidence, when determining whether to convict the accused. The Trial Chamber held that the true test to be applied was not whether there was evidence which satisfied the Trial Chamber beyond reasonable doubt of the guilt of the accused (as the defence in that case had argued), but rather it was whether there was evidence on which a reasonable Trial Chamber *could* convict.[23]

10. The *different* standard of review is obvious. The prosecution needs only to show that there is evidence upon which a reasonable tribunal of fact *could* convict, not that the Trial Chamber itself *should* convict. The former would usually require less persuasion by the prosecution than would the latter, when questions of credit inevitably become important. But it is misleading to say , without reference to that

context, that the standard is a *lower* one.[24] The evidence to which the prosecution needs to point must still be sufficient (if accepted) to establish the guilt of the accused beyond reasonable doubt for, without such evidence, it would not be open to the reasonable tribunal of fact to convict .

3 Discussion and findings

(a) Torture

11. The defence has argued that the prosecution has failed to produce sufficient evidence to establish *any* of what are asserted to be the elements of this offence.[25] No distinction has been made, or need be made, between torture as a crime against humanity and as a violation of the laws or customs of war for the purposes of the argument put. Some of the propositions put forward by the defence as to what are the elements of this offence are perhaps questionable. The prosecution has responded that questions as to the applicable law cannot be argued in an application under Rule *98bis*.[26] The Trial Chamber does not accept that proposition. Rule *98bis* is concerned with the sufficiency of the evidence elicited during the prosecution case to sustain a conviction on the relevant charge. A Trial Chamber can only determine whether there *is* sufficient evidence to do so if the elements of that charge are known. If there is a dispute between the parties as to whether the relevant charge includes a particular element, and if there is no evidence to prove that particular element in dispute, the existence or otherwise of that particular element becomes vital to the determination to be made under Rule *98bis*.[27]

12. In the present case, however, the Trial Chamber is satisfied that, even if the prosecution must establish each of the ingredients for which the defence contends , there is sufficient evidence (if accepted) to sustain a conviction for that offence . In the circumstances that the trial is to resume immediately, it is unnecessary to take time in outlining that evidence.

(b) Outrages upon personal dignity

13. The defence has challenged the availability of this charge on a number of legal grounds, but has not taken issue with either the identity of the elements of the offence if it exists or the sufficiency of the evidence to sustain a conviction for it.[28] In relation to these matters , the Trial Chamber agrees with the prosecution that those legal issues cannot be argued in an application under Rule *98bis*, but

that they may be raised at the conclusion of all the evidence.[29] The Trial Chamber rejects the Motion so far as it concerns those legal issues at this stage.

(c)(i) Plunder

14. The indictment asserts that Kunarac and other soldiers "looted" the apartment occupied by Witness FWS-183, and that subsequently he "robbed her of all the gold and money she had hidden".[30] Evidence has been given which (if accepted) would establish those facts. The defence has , however, argued that those facts are insufficient to establish the offence of plunder as a violation of the laws or customs of war because it has not been shown that Kunarac took part in a "widespread" plunder, and that, even if they were sufficient , there is no evidence that the value of the goods taken was the "high" value required .[31] The prosecution has responded that it is sufficient to show that the value of the property taken was such that "its unlawful appropriation SinvolvedC grave consequences for the victims".[32] It also relied upon evidence that other Muslims in the same apartment building had had property taken from them during this time.[33] It did not address directly the defence submission that there must be a "widespread " plunder in order to qualify as a war crime.

15. The word "plunder" in its ordinary meaning suggests that more than the theft of property from one person or even from a few persons in the one building is required . Plunder is synonymous with "pillage",[34] which more clearly emphasises that there must be theft involving a more extensive group of persons or a pattern of thefts over some identifiable area such as, for example, the Muslim section of a village or town or even a detention centre. The *Celebici* Judgment held that plunder included unjustified appropriations both by individual soldiers for their private gain and by the organised seizures within the framework of a systematic exploitation of enemy property.[35] In *Prosecutor v Blaskic*,[36] the accused's conviction for plunder was based upon the large-scale activities of his subordinates over a widespread geographical area.[37] Neither judgment therefore found it necessary to consider whether plunder requires the thefts to be widespread.

16. Nevertheless, in the view of the Trial Chamber, the use of the word "plunder " in Article 3(e) of the Statute refers to its ordinary meaning of involving unjustified appropriations of property either from more than a small group of persons or from persons over an identifiable area such as already described. This interpretation is more consistent

with plunder being a violation of the laws or customs of war. It is inappropriate to include within that term a theft from only one person or from only a few persons in the one building. There is no evidence in the present case which satisfies the interpretation adopted. There will therefore be a judgment of acquittal in favour of Kunarac on Count 13.

(c)(ii) Responsibility as a superior

17. The defence has argued that the prosecution has failed to produce sufficient evidence to establish that Kunarac was a superior within the meaning of Article 7.3.[38] The argument is one of interpretation of certain evidence, but it does not deal with other evidence to which the prosecution has referred in its Response,[39] including Prosecution Exhibit 67 (an interview with Kunarac after his arrest), which evidence taken as a whole (if accepted) provides a sufficient basis upon which a reasonable tribunal of fact could be satisfied that Kunarac bore superior responsibility in accordance with Article 7.3. In the circumstances that the trial is to resume immediately , it is unnecessary to take time in outlining that evidence.

(d) Rape of Witness FWS-48

18. The defence has argued that, as Witness FWS-48 did not recognise Vukovic in court as the person who raped her,[40] he should be acquitted of all criminal acts alleged against him involving her evidence .[41] The prosecution responded that there was nevertheless sufficient evidence otherwise to establish that he was the man who had raped her.[42]

19. The Trial Chamber accepts the prosecution's argument that the failure by Witness FWS-48 to identify Vukovic in court does not necessarily destroy any case which may be established otherwise in the evidence that it was he who raped her. It has been obvious that each of the accused in one way or another, and whether deliberately or otherwise, has changed his appearance during the period of about eight years which has elapsed since these events are alleged to have taken place, and even during the course of the trial itself. The failure to identify an accused in court is certainly a matter which is relevant to the reliability of the evidence of an identifying witness. The real issue here, however, is whether there is any other evidence in the prosecution case which is sufficient to satisfy a reasonable tribunal of fact beyond reasonable doubt that it was the accused Vukovic who raped Witness FWS-48 ,[43] *notwithstanding* her failure to identify him

in court.

20. FWS-48 testified that she knew a man called Zoran Vukovic before the war, because he had lived near her brother in Foca, but that they had not been close.[44] He had lived in a house nearby her brother's home in Osmana Đikica Street.[45] She said that the same person she had known before the war was one of the soldiers who had captured her and other villagers at Trosanj on 3 July 1992.[46] In her evidence concerning the rapes themselves alleged in paragraphs 7.9 (the Hotel Zelengora), 7.10 (the Brena block), and 7.15 (Aladza) of the indictment, she identified the Zoran Vukovic she had known before the war as the man who had committed those particular rapes.[47] She identified the house in Aladza where that Zoran Vukovic had raped her as being in Osmana Đikica Street.[48]

21. However, it was not disputed by the prosecution that there were more than one man called Zoran Vukovic who have to be considered. Witness FWS-48 described the Zoran Vukovic to whom she was referring as having the nickname "Zoka",[49] and as having blue eyes and brown hair, being not very fat, and short in build, sort of medium build.[50] Later in her evidence, Witness FWS-48 described the Zoran Vukovic she had known before the war as a short person with blue eyes and brown hair, not very tall, quite thin.[51] Those descriptions are capable of fitting the accused Vukovic.[52] A second witness described another Zoran Vukovic as having the nickname "Kifla", as having lived in Brod, with brown hair, and as being quite fat and medium build .[53] That description does not fit the accused Vukovic. A third witness gave evidence of another Zoran Vukovic, whom she described as not too tall, dark haired, good looking and having green eyes (although she was not one hundred per cent sure) and a limp.[54] That description does not fit the accused Vukovic. A fourth witness testified that he knew of ten or eleven men called Zoran Vukovic in the area of Foca,[55] but no attempt was made to obtain their descriptions or their whereabouts so as to establish that the accused Vukovic must have been the same person as the Zoran Vukovic whom Witness FWS-48 had known before the war.[56] If there remains a reasonable possibility that the accused Vukovic is *not* the same person as the Zoran Vukovic whom Witness FWS-48 knew before the war, then the prosecution could not persuade a reasonable tribunal of fact beyond reasonable doubt that the two were the one and the same man.

22. There is available evidence which (if accepted) is capable of giving

at least some circumstantial support for the prosecution case upon this issue. Two witnesses detained with Witness FWS-48 have each said that the accused Zoran Vukovic was directly involved in raping her. Witness FWS-50 identified him as having raped her at Buk Bijela and again when he took her from the Partizan Hall.[57] Witness FWS75 identified him as having raped her in the Kovac's apartment.[58] None of the witnesses who were detained with Witness FWS-48 suggested that there was more than one Zoran Vukovic who was involved in raping women.[59] There is also some evidence which (if accepted) places both the accused Vukovic and the Zoran Vukovic whom Witness FWS-48 knew before the war in the same situation . Witness FWS-87, who was detained with Witness FWS-48, said that she saw the accused Vukovic at the Foca High School where they were detained,[60] and Witness FWS-48 said that she saw the Zoran Vukovic whom she knew before the war at the High School.[61] Witness FWS-87 also said that the accused Vukovic operated with one Dragan Zelenovic in raping women,[62] and Witness FWS-48 said that the Zoran Vukovic whom she knew before the war operated with Zelenovic in raping women.[63]

23. On the other hand, although Witness FWS-48 mentions a number of other witnesses who had been detained with her, none of those witnesses gave evidence that she had been "taken out" by the accused Vukovic. One such witness (FWS-105) mentioned Witness FWS-48 several times in her statement and evidence, but she did not say that she had ever seen Witness FWS-48 with the accused Vukovic. The evidence of Witness FWS-48 herself is that she was never "taken out" by Zoran Vukovic with any other of the women who have given evidence (or with anyone else whom she was able to identify), or raped in premises where there were any other such persons present. And, although Witness FWS-48 places the Zoran Vukovic whom she knew before the war on the scene as one of the soldiers who had captured her and other villagers at Trosanj on 3 July 1992, no other witness who had been captured at Trosanj identified the accused Vukovic as having being there.[64] Conversely, although other witnesses identified the accused Vukovic as being present at Buk Bijela later the same day,[65] Witness FWS-48 does not suggest that the Zoran Vukovic whom she knew before the war was there.

24. In totality, therefore (and accepting for the purposes of this Decision that the evidence of Witness FWS-48 is true), there is no direct evidence that the Zoran Vukovic whom she knew before the war

(and whom she says raped her) and the accused Vukovic are the one and the same person. Witness FWS-48 has been able to identify the man who raped her only by a name which is shared by others and by a very general description which would fit any number of men. The prosecution has not eliminated by way of description or location elsewhere at the time all of the other men with the same name as being the man whom the witness had known before the war. None of the other witnesses who were detained with Witness FWS-48 were in a position to support the fact that she had been raped by the accused Vukovic. There is no evidence that the accused Vukovic raped any other women in the house in Osmana Đikica Street, Aladza, where the Zoran Vukovic she knew before the war is alleged to have raped her. The only circumstantial evidence which supports the prosecution case (as outlined in par 22) is insufficient, even when taken in combination, to establish that it was the accused Vukovic who raped Witness FWS-48.

25. The Trial Chamber is not satisfied that the totality of this evidence provides a sufficient basis upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt that it was the accused Vukovic who raped Witness FWS-48. There is therefore no case for the accused Vukovic to answer in relation to those parts of the indictment based upon the evidence of Witness FWS-48.

26. The prosecution has submitted that, as Counts 33 to 36 rely upon rapes alleged to have been committed by Vukovic upon other women apart from Witness FWS-48, there can be no judgment of acquittal in relation to those counts pursuant to Rule *98bis*. That is correct, but that does not mean that, once the Trial Chamber has concluded that Vukovic has no case to answer in relation to the allegations by Witness FWS-48, those allegations remain open to be proved by further evidence obtained during the defence case. Vukovic is entitled to a ruling of no case to answer at this stage of the proceedings. This is the way the *Kordic* Decision dealt with a similar situation.[66]

(e) Cumulative charging

27. The defence has challenged the right of the prosecution to charge torture as both a crime against humanity pursuant to Article 5 of the Tribunal's Statute and a violation of the laws or customs of war pursuant to Article 3.[67] The Trial Chamber agrees with the prosecution that this is not a matter which can be argued in an application under Rule *98bis*.[68] The Trial Chamber rejects the Motion so far as it concerns this issue.

4 Disposition

28. For the foregoing reasons, the Trial Chamber:

(1) enters a judgment of acquittal in favour of the accused Dragoljub Kunarac on Count 13;

(2) holds that the accused Zoran Vukovic has no case to answer in relation to the allegations made by Witness FWS-48 in support of Counts 33 to 36; and

(3) otherwise dismisses the Motion for Judgment of Acquittal pursuant to Rule *98bis*.

Done in English and French, the English text being authoritative.

Dated this 3rd day of July 2000,
At The Hague,
The Netherlands.

_____
Judge Florence Ndepele Mwachande Mumba
Presiding Judge

[Seal of the Tribunal]

1- Defence Motion of the Accused Mr Dragoljub Kunarac, Mr Radomir Kovac and Mr Zoran Vukovic for Judgment of Acquittal Pursuant to Rule 98bis, 20 June 2000 (“Motion”).
2- Counts 1 and 5 [in the indictment against Kunarac and Kovac] and Counts 21 and 33 [in the indictment against Vukovic].
3- Counts 3 and 7 [in the indictment against Kunarac and Kovac] and 23 and 35 [in the indictment against Vukovic].
4- Counts 21 and 25.
5- Count 13.
6- Counts 1-4, 14-17. Counts 14-17 were withdrawn by the prosecution on 3 Apr 2000: Transcript, p 1479.
7- Count 34.
8- Count 36.
9- Motion, par V (p 8). This would include torture, as a crime against humanity (Count 33) and as a violation of the laws or customs of war (Count 35).

10- The Motion does not identify the particular counts upon which they seek a judgment of acquittal.
11- Prosecutor v Tadic, Decision on Defence Motion to Dismiss Charges, Case IT-94-1-T, 13 Sept 1996, p 2. The same test was adopted in Prosecutor v Delalic, Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case, Case IT-96-21-T, 18 Mar 1998, p 4: whether "[…] as a matter of law, there is evidence relating to each element of the offences in question which, were it to be accepted, is such that a reasonable Tribunal might convict."
12- Prosecutor v Blaskic, Decision of Trial Chamber I on the Defence Motion to Dismiss, Case IT-95-14-T, 3 Sept 1998, p 4.
13- Prosecutor v Kupreskic, Decision on Motion for Withdrawal of the Indictment Against the Accused Vlatko Kupreskic, Case IT-95-16-T, 18 Dec 1998, p 3: "[whether] there is evidence […] which were it to be accepted by this Trial Chamber, could lawfully support a conviction"; Prosecutor v Kordic, Decision on Defence Motions for Judgment of Acquittal, Case IT-95-14/2-T, 6 Apr 2000 ("Kordic Decision"), para 26: "whether there is evidence on which a reasonable Trial Chamber could convict".
14- Prosecutor v Jelisic, Judgment, Case IT-95-10-T, 19 Oct 1999, Transcript p 2333: "[…] one must not confuse the notion of acquittal [under Rule 98bis] with that of lack of evidence, that is, no prosecution case".
15- The circumstances when the credit of a prosecution witness may be examined at this stage were discussed in the Kordic Decision, par 28.
16- Prosecutor v Tadic, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, Case IT-94-1-A-R77, 31 Jan 2000, para 92.
17- Article 21.4(g).
18- Decision on Defence Motions for Judgment of Acquittal, Case IT-95-14/2-T, 6 Apr 2000, at par 28.
19- The Kordic Decision states (at par 19) that questions of both the reliability and the credibility of a witness are generally disregarded in the determination of whether there is a case to answer. However, a reading of the case cited as authority for that proposition – Regina v Galbraith [1981] 1 WLR 1039 – makes it clear (at 1042) that the Court of Appeal was using the word "reliability" in the sense of the credibility of the witness rather than in the sense of the reliability of that witness's evidence, as this Decision has used that word. The power to withdraw a case from the jury in common law countries is well established where the evidence of (say) identification is unreliable in this sense: Alexander v The Queen (1981) 145 CLR 395 at 402-403, 417, 430, 433, 435.
20- Alexander v The Queen, at 426 (Mason J). There is no reason to

suggest that the common experience of such inherent frailties of identification evidence exists only in common law countries or that it is not equally applicable in international criminal trials.
21- See, for example, the UK Report “Evidence of Identification in Criminal Cases” (HMSO, 1976), known as the Devlin Report; Alexander v The Queen (1981) 145 CLR 395 at 435-436 (Murphy J).
22- Prosecutor’s Response to Defence Motion for Judgment of Acquittal Pursuant To Rule 98bis, 27 June 2000 (“Response”), par 14.
23- Kordic Decision, para 26.
24- That is the context in which the Trial Chamber in the Kordic Decision (at par 11) spoke of a “lower” standard: “An analysis if the International Tribunal’s jurisprudence shows a consistent pattern in determining motions for acquittal at the close of the prosecution’s case, not on the basis of a Trial Chamber being satisfied beyond a reasonable doubt of the guilt of the accused on the basis of the Prosecution’s case, but on a different and lower standard.” After analysing that jurisprudence, the Trial Chamber went on to say (at par 26): “The Chamber concludes that the true test to be applied on a motion for acquittal under Rule 98bis is not whether there is evidence which satisfies the Trial Chamber beyond a reasonable doubt of the guilt of the accused, but rather, whether there is evidence on which a reasonable Trial Chamber could convict.”
25- Motion, par I (pp 4-6).
26- Response, pars 13, 20.
27- The prosecution has relied upon the Kordic Decision (at par 36) as authority for the proposition which it put. The Trial Chamber does not interpret what was said in that Decision as intending to deny what is said in the text of this Decision. If what was said in the Kordic Decision was intended otherwise, the Trial Chamber, with respect, disagrees, with it, and does not propose to follow it.
28- Motion, par III (p 7).
29- Response, pars 45-49.
30- Indictment, par 8.1.
31- Motion, par II (pp 6-7).
32- Response, par 35, quoting Prosecutor v Delalic, Case IT-99-21-T, Judgment, 16 Nov 1999 (“Celebici Judgment”), pars 1146-1154.
33- Response, par 42.
34- The International Committee of the Red Cross Dictionary defines the two terms together.
35- Paragraphs 590-591. This is consistent with the ICRC Commentaries on the Fourth Geneva Convention (1958), p 226, and on Additional Protocol II (1957), p 1376.
36- Case IT-95-14-T, Judgment, 3 Mar 2000.
37- Ibid, par 14.

38- Motion, par IV (pp 7-8).
39- Response, pars 51-52.
40- Transcript, p 2673: Asked whether she was able to recognise Zoran Vukovic “today”, she answered: “The face isn’t familiar to me that that is the man, no.” Subsequently, she said (at Transcript, p 2674): “Zoran Vukovic took me to Aladza, that same Zoran Vukovic, but in this courtroom, I can’t recognise him as being the man.” In another part of her evidence, and apparently in relation to the Zoran Vukovic who she said had raped her, she said (at Transcript, p 2707): “I don’t remember him, his face. I don’t recognise him. I can’t recognise that man. He did not – his face did not remain in my memory for me to be able to recognise him now.”
41- Motion, par V (p 8).
42- Response, pars 55-62.
43- See pars 7-10 of this Decision.
44- Transcript, p 2628.
45- Ibid, p 2816.
46- Ibid, p 2628.
47- Ibid, pp 2671-2672, 2681-2682, 2701, 2704-2706.
48- Ibid, pp 2700-2701.
49- Ibid, pp 2708-2709. The prosecution’s Response (at par 58) has spelt this as “Zorka”.
50- Transcript, p 2674.
51- Ibid, p 2707.
52- Another witness (FWS-75) described the accused Zoran Vukovic (whom she also identified in court) as short, a small man, with blond or fair hair: Transcript, p 1388.
53- Witness FWS-75, Transcript, p 1497.
54- This evidence was give in closed session at Transcript, p 3217.
55- Osman Subasic, Transcript, p 4084.
56- The submissions of the prosecution appear to proceed upon the assumption that the onus lay upon the accused to point to evidence that others of the men called Zoran Vukovic fell within his own description or were actually in Foca at the time: Response, pars 60-61. But the onus lay upon the prosecution to establish that the accused Vukovic was the same person as the Zoran Vukovic whom Witness FWS-48 had known before the war and who she alleges raped her.
57- Transcript, pp 1242-1243, 1262-1264.
58- Ibid, pp 1388, 1450-1452.
59- Witness FWS-48 also said that she did not remember another Zoran Vukovic who did so: Transcript, p 2709.
60- Transcript, p 1687.
61- Transcript, p 2674.

62- Transcript, pp 1674, 1679, 1682.
63- Transcript, pp 2677, 2679
64- For example, Witnesses FWS-75, FWS-87 and DB.
65- Witnesses FWS-62, at Transcript, p 964, and FWS-75, at Transcript, p 1388.
66- See pars 29-35.
67- Motion, par VI (p 8).
68- Response, par 64.