

**UNITED  
NATIONS**

International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of the  
Former Yugoslavia since 1991

Case No.: IT-05-87/1-A  
Date: 27 January 2014  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Carmel Agius, Presiding  
Judge Patrick Robinson  
Judge Mehmet Güney  
Judge Khalida Rachid Khan  
Judge Bakhtiyar Tuzmukhamedov

**Registrar:** Mr. John Hocking

**Judgement of:** 27 January 2014

**PROSECUTOR**

v.

**VLASTIMIR ĐORĐEVIĆ**

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**JUDGEMENT**

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**The Office of the Prosecutor:**

Ms. Daniela Kravetz  
Mr. Kyle Wood  
Ms. Priya Gopalan  
Ms. Saeeda Verrall

**Counsel for the Accused:**

Mr. Dragoljub Đorđević  
Mr. Veljko Đurđić  
Mr. Russell Hopkins  
Ms. Marie O'Leary

increase Đorđević's sentence.<sup>2463</sup> Đorđević argues that the Prosecution has failed to show any errors in the impugned parts of the Trial Judgement and that, in any event, the Appeals Chamber does not possess the power to enter new convictions or increase a sentence when there is no right of a further appeal.<sup>2464</sup> The Appeals Chamber will address these submissions in turn.

## **B. Alleged errors in findings on sexual assault**

### **1. Introduction**

846. The Trial Chamber found that the alleged sexual assaults of the Kosovo Albanian girl in a convoy in Priština/Prishtinë and two young Kosovo Albanian women in Beleg were not established due to a lack of direct evidence.<sup>2465</sup>

847. The Prosecution submits that by requiring direct evidence, the Trial Chamber erroneously considered the evidence before it to be insufficient to prove these sexual assaults.<sup>2466</sup> The Prosecution contends that the only reasonable conclusion to be drawn from the evidence is that the Kosovo Albanian girl in a convoy and the two young women in Beleg village were sexually assaulted and that the Trial Chamber therefore erred when it found otherwise.<sup>2467</sup>

848. Đorđević responds that the Prosecution "simply restates the evidence" without showing how the Trial Chamber failed to take it into consideration.<sup>2468</sup> He contends that the Trial Chamber acted within its discretion when it declined to rely solely on circumstantial or indirect evidence.<sup>2469</sup>

849. In this sub-section, the Appeals Chamber will first set out the elements of sexual assault. It will subsequently address the submissions with regard to the alleged sexual assaults of the girl in a convoy in Priština/Prishtinë municipality and the two young women in Beleg.

### **2. Definition and elements of sexual assault**

850. The Appeals Chamber notes that the definition and elements of sexual assault have been discussed, in various degrees of detail, by several trial chambers.<sup>2470</sup> Trial chambers have held that

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<sup>2463</sup> Prosecution Appeal Brief, para. 56; Appeal Hearing, 13 May 2013, AT. 178, 206.

<sup>2464</sup> Đorđević Response Brief, paras 3-6, 54.

<sup>2465</sup> Trial Judgement, paras 1792, 1794. The Trial Chamber also found that the alleged sexual assaults in the municipalities of Srbica/Skenderaj and Prizren had not been proven (Trial Judgement, para. 1795). The Prosecution has not appealed this finding.

<sup>2466</sup> Prosecution Appeal Brief, paras 5, 18.

<sup>2467</sup> Prosecution Appeal Brief, paras 5, 18, 22, 24, 34, 39.

<sup>2468</sup> Đorđević Response Brief, paras 33, 35.

<sup>2469</sup> See Đorđević Response Brief, paras 33-34.

sexual assault is broader than rape and encompasses “all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading for the victim’s dignity”.<sup>2471</sup> The Appeals Chamber notes that the *Milutinović et al.* Trial Chamber, after a thorough analysis, identified the elements of sexual assault as follows:

- (a) The physical perpetrator commits an act of a sexual nature on another; this includes requiring that other person to perform such an act.
- (b) That act infringes the victim’s physical integrity or amounts to an outrage to the victim’s personal dignity.
- (c) The victim does not consent to the act.
- (d) The physical perpetrator intentionally commits the act.
- (e) The physical perpetrator is aware that the act occurred without the consent of the victim.<sup>2472</sup>

851. This definition was adopted by the Trial Chamber in the present case.<sup>2473</sup> While the Appeals Chamber is satisfied that this definition correctly reflects the elements of sexual assault (other than rape), it finds that some further elaboration is useful.

852. It is evident that sexual assault requires that an act of a sexual nature take place. The Appeals Chamber notes that the act must also constitute an infringement of the victim’s physical or moral integrity.<sup>2474</sup> Often the parts of the body commonly associated with sexuality are targeted or involved. Physical contact is, however, not required for an act to be qualified as sexual in nature.<sup>2475</sup> Forcing a person to perform or witness certain acts may be sufficient, so long as the acts humiliate and/or degrade the victim in a sexual manner.<sup>2476</sup> Furthermore, the Appeals Chamber agrees with the *Milutinović et al.* Trial Chamber that “it would be inappropriate to place emphasis on the sexual gratification of the perpetrator [...]. In the context of an armed conflict, the sexual humiliation and

<sup>2470</sup> See *Milutinović et al.* Trial Judgement, vol. 1, paras 195-201; *Brdanin* Trial Judgement, para. 1012; *Stakić* Trial Judgement, para. 757; *Furundžija* Trial Judgement, para. 186.

<sup>2471</sup> *Brdanin* Trial Judgement, para. 1012; *Stakić* Trial Judgement, para. 757; *Furundžija* Trial Judgement, para. 186 (in these cases, the definition of sexual assault was not challenged on appeal). See *Kvočka et al.* Trial Judgement, para. 180, referring to *Akayesu* Trial Judgement, para. 688 (the definition of sexual assault was again not challenged on appeal). See *Akayesu* Trial Judgement, in which the Trial Chamber held that “sexual violence, which includes rape, [is] any act of a sexual nature which is committed on a person under circumstances which are coercive. [It] is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact” (*Akayesu* Trial Judgement, para. 688. This definition was also not challenged on appeal).

<sup>2472</sup> *Milutinović et al.* Trial Judgement, vol. 1, para. 201.

<sup>2473</sup> Trial Judgement, para. 1768.

<sup>2474</sup> See *Stakić* Trial Judgement, para. 757; *Furundžija* Trial Judgement, para. 186.

<sup>2475</sup> See *Milutinović et al.* Trial Judgement, vol. 1, para. 199; *Akayesu* Trial Judgement, para. 688.

degradation of the victim is a more pertinent factor than the gratification of the perpetrator” as it is precisely the sexual humiliation and degradation which “provides specificity to the offence”.<sup>2477</sup> 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.<sup>2478</sup> In addition, a status of detention, particularly during armed conflict, will normally vitiate consent.<sup>2479</sup>

### 3. Kosovo Albanian girl in a convoy in Priština/Prishtinë municipality

853. The Trial Chamber considered Witness K14’s evidence that, sometime in April 1999, a Kosovo Albanian girl, who was travelling with other displaced persons in a convoy from Graštica/Grashticë in the Priština/Prishtinë municipality to the town of Priština/Prishtinë, was taken off a tractor in Lukare/Llukar by two men, one being a policeman and the other carrying knives and dressed in camouflage trousers.<sup>2480</sup> The man dressed in camouflage trousers took the girl into the woods, while the policeman stood guard.<sup>2481</sup> When the man came out of the woods, the policeman then went into the woods with the girl.<sup>2482</sup> The Trial Chamber considered Witness K14’s evidence that the girl was heard from the convoy to be screaming and crying while in the woods, and that when she was returned to the convoy about half an hour later, she was flushed from crying.<sup>2483</sup> It also noted that, while she had been clothed when taken into the woods, “[s]he was barefoot, wrapped in a blanket and appeared to be naked” upon return to the convoy.<sup>2484</sup> The Trial Chamber concluded that the evidence on the alleged sexual assault of the girl in the convoy was insufficient to satisfy a finding of sexual assault, noting in particular the lack of direct evidence regarding the events in the woods.<sup>2485</sup>

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<sup>2476</sup> See *Milutinović et al.* Trial Judgement, vol. 1, para. 199; *Brđanin* Trial Judgement, para. 1012; *Stakić* Trial Judgement, para. 757; *Furundžija* Trial Judgement, para. 186.

<sup>2477</sup> *Milutinović et al.* Trial Judgement, vol. 1, para. 199.

<sup>2478</sup> See *Milutinović et al.* Trial Judgement, vol. 1, para. 200.

<sup>2479</sup> See *Kvočka et al.* Appeal Judgement, para. 396; *Kunarac et al.* Appeal Judgement, paras 132-133; *Milutinović et al.* Trial Judgement, vol. 1, para. 200.

<sup>2480</sup> Trial Judgement, paras 832, 1792.

<sup>2481</sup> Trial Judgement, paras 832, 1792.

<sup>2482</sup> Trial Judgement, para. 832.

<sup>2483</sup> Trial Judgement, paras 832, 1792.

<sup>2484</sup> Trial Judgement, paras 832, 1792, with further references.

<sup>2485</sup> Trial Judgement, paras 832, 1792.