

PROSECUTOR v. VLASTIMIR ĐORĐEVIĆ
Case No. IT-05- 87/1-A
International Criminal Tribunal for the former Yugoslavia
Appeals Chamber Judgment
January 27, 2014

Judges:

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

Prosecution:

Daniela Kravetz
Kyle Wood
Đorđević Priya Gopalan
Saeeda Verrall

Defense:

Dragoljub Đorđević
Veljko Đurđić
Russell Hopkins
Marie O’Leary

Gender Keyword(s): Act of a Sexual Nature; Consent; Rape; Sexual Assault; Sexual Violence/Persecution

Procedural History: The events giving rise to this case took place in Kosovo between January 1 and June 20, 1999 (¶ 3). During this period of time, Kosovo Albanians were murdered and displaced within Kosovo or across the borders (¶ 4). The accused, Serbian citizen Vlastimir Đorđević, held the position of Chief of the Public Security Department of the Ministry of the Interior of the Republic of Serbia during this time period (¶ 2).

The Prosecution charged Đorđević with several crimes against humanity under Article 5 of the Statute of the Tribunal, including deportation, other inhumane acts (forcible transfer), murder, and persecutions on political, racial, and religious grounds (¶ 3). The Prosecution also charged Đorđević with murder as a violation of the laws or customs of war under Article 3 of the Statute (¶ 3). According to the Prosecution, Đorđević is responsible for these crimes under individual criminal responsibility as well as superior responsibility (*id.*).

On February 23, 2011, Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia (ICTY) entered a judgment in the case. The Trial Chamber found that Đorđević participated in a joint criminal enterprise (JCE) “with the purpose of modifying the ethnic balance in Kosovo to ensure Serbian control over the province” and that, pursuant to this JCE, Serbian forces murdered 724 Kosovo Albanians residents, displaced hundreds of thousands within Kosovo or across borders, and carried out certain acts of persecution and other inhumane acts (¶ 4). Additionally, the Trial Chamber found that Đorđević aided and abetted in the commission of these murders, deportations, persecutions, and other inhumane acts (*id.*).

With respect to its findings on the crime of persecution as a crime against humanity, the Trial Chamber specifically found that Đorđević was responsible for the crime based on acts of “deportation, forcible transfer, murder, and destruction or damage to property of cultural and religious significance” (*id.*). In addition to these acts, the Chamber also heard evidence of several alleged rapes and sexual assaults in support of the persecution charge (¶¶ 844-45). The Trial Chamber found that two young women, Witness K14 (in Priština/Prishtinë) and Witness K20 (in Beleg village, Dečani/Deçan municipality), were raped, but did not find that other alleged sexual assaults had been proven (¶ 844). The Trial Chamber further held that, although the Prosecution established the two incidents of rape, these rapes did not constitute the crime of persecution because it was not proven that they were not carried out with the requisite discriminatory intent (*id.*). Consequently, the Trial Chamber did not enter convictions against Đorđević for any sexual assaults (*id.*). Ultimately, the Chamber therefore entered a conviction against Đorđević for committing and aiding and abetting the above-mentioned crimes, sentencing him to 27 years of imprisonment (¶ 4).

Đorđević appealed the Trial Judgment on 19 grounds, challenging several legal and factual findings with regard to the existence of and his participation in the JCE, as well as the characterization of civilians and several other legal issues unrelated to sexual and gender-based violence (¶ 5). The Prosecution raised two grounds of appeal against the Trial Judgment (¶ 8). The first one dealt with the Trial Chamber’s finding described above with regard to Đorđević’s responsibility for persecution through sexual assault (*id.*). In its second challenge, the Prosecution contended that Trial Chamber erred in imposing a manifestly inadequate sentence in light of the gravity of the crimes and Đorđević’s role in them and requested that the Appeals Chamber increase Đorđević’s sentence to life imprisonment (*id.*). On the first issue, the Prosecution argued that the Trial Chamber erred in failing to find Đorđević guilty of three of the sexual assaults charged by the Prosecution, including the alleged assault of a Kosovo Albanian girl in a convoy in Priština/Prishtinë municipality and two young Kosovo Albanian women in Beleg, Dečani/Deçan municipality (¶ 845). The Prosecution also submitted that the Trial Chamber erred in failing to find that these sexual assaults, as well as the rapes of Witness K14 and Witness K20, amounted to the crime of persecution and that Đorđević was liable under the third category of JCE (*id.*). In response, Đorđević argued that the Prosecution had failed to show any errors in the Trial Judgment and that the Appeals Chamber did not have the power to enter new convictions or increase a sentence when there is no right of a further appeal (*id.*). The Appeals Chamber heard oral submissions from the parties regarding these appeals on May 13, 2013. This is a digest of the Appeals Chamber’s findings, with a focus on those grounds of appeal related to the allegations of sexual assault and rape as persecution.

Disposition: The Appeals Chamber grants the Prosecution’s first ground of appeal in full and finds Đorđević guilty of the crime of persecution through sexual assaults as a crime against humanity (¶ 981). It finds that the Trial Chamber erred in finding that the sexual assaults of the Kosovo Albanian girl in a convoy and two young Kosovo Albanian women in Beleg were not established (¶ 929). Moreover, the Appeals Chamber holds that the Trial Chamber erred in finding that the sexual assaults of Witnesses K20 and K14 were not carried out with discriminatory intent (*id.*). Indeed, the Appeals Chamber finds that the sexual assaults of Witness K20 and K14, as well as the assaults on the girl in a convoy and the two other women in Beleg, were in fact carried out with such intent and amount to persecution as a crime against humanity (*id.*). The Appeals Chamber further found that these acts were foreseeable to Đorđević, who willingly took the risk that he would bear responsibility for them when he participated in the JCE and is thus liable under the third form of JCE (*id.*). The Appeals

Chamber rejects the Prosecution's second ground of appeal that the sentence imposed failed to reflect the seriousness of the crimes and Đorđević's role and degree of participation (¶ 975). The Appeals Chamber grants in part some of Đorđević's grounds of appeal, reversing his conviction on several counts including deportation, other inhumane acts (forcible transfer), murder, and several counts of persecution through acts of murder, deportation, and forcible transfer (¶ 981). Therefore, the Appeals Chamber finds that a reduction in Đorđević's sentence is appropriate, as the overturned convictions outweigh the new convictions entered by the Appeals Chamber in terms of the number of victims involved, as well as Đorđević's level of responsibility (¶ 980). The Appeals Chamber reduces his sentence by nine years, thereby imposing a sentence of 18 years' imprisonment (*id.*).

Key Gender-Based Holdings:

ACT OF A SEXUAL NATURE:

- In considering the allegations that Đorđević is responsible for the sexual assault of five women, the Appeals Chamber describes the elements of sexual assault and determines that "it is evident that sexual assault requires that an act of a sexual nature take place" (¶ 852). The other elements of sexual assault and the Appeals Chamber's application of these elements to the case are described under "Sexual Assault" below.

CONSENT:

- As discussed under "Sexual Assault" below, the Appeals Chamber assesses allegations that Đorđević is responsible under JCE liability for persecution as a crime against humanity, supported by allegations that five women were sexually assaulted with discriminatory intent (¶¶ 844-929). In defining sexual assault, the Appeals Chamber finds 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" (¶ 852). Additionally, the Appeals Chamber finds that if the victim is being held in detention, especially during armed conflict, this "will normally vitiate consent" (*id.*). The Appeals Chamber finds that five women were raped or sexually assaulted, and in reference to four of these women, the Appeals Chamber notes the fact that witnesses heard them screaming and crying, which confirms that the women did not consent and that the perpetrators knew they did not consent (¶¶ 857, 868).

RAPE:

- The Trial Chamber found that two young women, Witness K14 (in Priština/Prishtinë town) and Witness K20 (in Beleg village, Dečani/Deçan municipality) were raped (¶ 844). The Trial Chamber did not find that the evidence established that the other three alleged victims of sexual assault (the Kosovo Albanian girl in a convoy in the Priština/Prishtinë municipality and the two young women in Beleg with Witness K20) had been sexually assaulted (¶ 846). The Appeals Chamber observes that the characterization of sexual assault is broader than rape and, as discussed in detail below, it considers whether the Trial Chamber erred in its finding with regard to the three additional alleged victims, but does not characterize the acts as rape (¶ 850). Rather, the Trial Chamber and the Appeals Chamber generally use the broader term of "sexual assault" to describe these allegations and their legal findings.

SEXUAL ASSAULT:

- The Trial Chamber found that the Prosecution failed to prove the alleged sexual assaults of a Kosovo Albanian girl in a convoy in Priština/Prishtinë municipality and two young Kosovo Albanian women in Beleg, Dečani/Dečan “due to lack of direct evidence” (¶ 846). On appeal, the Prosecution argued that the Trial Chamber erred in failing to find sexual assault in relation to these three women, and that the occurrence of sexual assault was the only reasonable conclusion to be drawn from the evidence (¶ 847). When setting out the elements of sexual assault, the Appeals Chamber notes that other Trial Chambers have held that 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” (¶ 850). The Appeals Chamber adopts the following elements of sexual assault, initially set out by the *Milutinovic, et al.* Trial Chamber:¹

- (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 (*id.*).

The Appeals Chamber also notes that, while acts amounting to sexual assault often involve parts of the body usually associated with sexuality, physical contact is not required as long as the act “humiliate[s] and /or degrades the victim in a sexual manner” (¶ 852). For example, the Appeals Chamber notes that forcing someone to witness certain acts could constitute sexual assault if it humiliates or degrades the victim in this manner (*id.*). The Appeals Chamber finds further that emphasis should be put on the sexual humiliation and degradation of the victim, rather than the sexual gratification of the perpetrator (¶ 852). Having established the elements of sexual assault, the Appeals Chamber individually assesses the allegations of sexual assault at issue:

- *The Kosovo Albanian girl in a convoy in Priština/Prishtinë municipality:* As noted above, the Prosecution appealed the Trial Chamber’s finding that the evidence had not established the sexual assault of a Kosovo Albanian girl in a convoy in Priština/Prishtinë municipality (¶ 845). The Appeals Chamber considers the evidence heard at trial in support of this allegation, which consisted of Witness K14’s testimony that in April 1999, a Kosovo Albanian girl who was in a convoy with other displaced persons was taken off of a tractor by two men who told her she was beautiful (¶ 853). The men, a policeman and a man dressed in camouflage trousers who was carrying knives, took turns going into the woods with the girl while the other stood guard (*id.*). Witness K14 testified that she heard the girl screaming and crying while she was in the woods, and saw her come back barefoot, naked, and wrapped in a blanket, whereas she had been fully clothed when the men had taken her into the woods (*id.*). The Trial Chamber held that it could not reach a finding of sexual assault

¹ *Prosecutor v. Milutinović et al.*, Trial Chamber Judgment, February 6, 2009, Vol. 1, ¶ 201.

due to lack of direct evidence about what had happened in the woods (*id.*). On appeal, the Prosecution pointed out the “specific circumstances” of the incident described above and argued that the intent of the men was clear when they told the girl she was beautiful and took her into the woods (¶ 854). In response, Dorđević argued that Witness K14 merely assumed “what may have happened to the girl” because no one saw what had happened and the alleged victim did not tell anyone what had happened (¶ 855). The Appeals Chamber reiterates that it will not lightly disturb a Trial Chamber’s factual findings and can only do so here if it finds that “no reasonable trial chamber could have found that the evidence was insufficient to satisfy a finding of sexual assault in relation to the girl in a convoy” (¶ 856). The Appeals Chamber recalls that direct evidence from the victim is not always required: a Trial Chamber may infer certain facts from circumstantial evidence if such an inference is the only reasonable inference to be drawn from that evidence (¶ 857). Applying that standard to the case at hand, the Appeals Chamber considers that the elements in Witness K14’s testimony are “clear indications” that the girl was subject to mistreatment in the woods (*id.*). In reaching this conclusion, the Appeals Chamber relies on the “suggestive comments” made by one of the men, the fact that the men took turns standing guard and going into the woods to be alone with the girl, the fact that the witness heard the girl screaming and crying while in the woods, the girl’s lack of clothing and apparent trauma when she returned to the convoy despite the lack of visible sign of violence, and Witness K14’s testimony that the man dressed in green camouflage trousers was “known to do these kinds of things” (*id.*). The Appeals Chamber finds that “the only reasonable conclusion in a situation where a young girl is taken by men to a location out of sight, is heard screaming and crying, and is returned in a seemingly naked state, is that she was subjected to mistreatment that was sexual in nature” (*id.*). Therefore, the Appeals Chamber finds that “no reasonable trier of fact could have failed to conclude that the only reasonable inference was that the girl was subjected to an act sexual in nature that infringed upon her right to physical integrity and/or amounted to an outrage on her personal dignity” (*id.*). As for the girl’s lack of consent, the Appeals Chamber holds that the circumstances, such as the fact that the men dragged her to the woods and that she was heard crying and screaming while in the woods, confirm that she did not consent and that the men knew she did not consent (*id.*).

- *The two young Kosovo Albanian women in Beleg*: On appeal, the Prosecution also argued that the Trial Chamber erred in failing to find that two women detained on the night of March 29 to 30, 1999, with a group of women and children, were also sexually assaulted (¶¶ 845, 860). The Appeals Chamber recalls that at trial, Witness K58 testified that the two women had been selected and taken away by soldiers for lengthy periods of time, that they were crying and had disheveled hair when they came back, and that one of them was heard telling her mother that she had been raped (*id.*). Citing only to Witness K58’s evidence, the Trial Chamber held that “in the absence of further evidence, it was unable to make a finding that these two women were subject to sexual assault” (*id.*). On appeal, the Prosecution argued that the Trial Chamber failed to consider the relevant evidence of Witness K20, a woman who the Trial Chamber had established was raped during the same incident (¶ 861). According to the Prosecution, the two young women were taken to a burnt-out

house together with Witness K20, who saw one of the women being taken to a room by Serbian forces and heard both women screaming (*id.*). The Prosecution also argued that the fact that other young Kosovo Albanian women were sexually assaulted the same night, including Witness K20, supported the conclusion that these two women were also sexually assaulted (*id.*). Đorđević argued that Witness K58's evidence is hearsay because she overheard a girl telling her mother that she had been raped, and that that girl could have been Witness K20 (¶ 862). Moreover, Đorđević contended that the two women told Witness K20 that they had not been raped (*id.*). The Appeals Chamber assesses the Trial Chamber's failure to take into account Witness K20's evidence in its determination of whether or not the other two women were sexually assaulted, evidence the Trial Chamber found credible enough to establish that K20 herself had been raped (¶ 863). The Appeals Chamber finds that the Trial Chamber's failure to consider Witness K20's evidence constitutes an error of law (¶ 864). The Appeals Chamber next considers Witness K20's evidence in order to determine whether the only reasonable inference from this evidence is that the two women had also been sexually assaulted (¶ 865). The Appeals Chamber cites the fact that Witness K20 knew the two young women, that they were all detained together in one room, and that the Serbian forces entered the room where they had detained Kosovo Albanian women and children, and "checked the faces of the people in the room using a flashlight," selecting Witness K20 as well as the two other young women and taking them each to different rooms of a nearby house (¶ 866). There, several soldiers raped Witness K20 in a bathroom while at the same time, she could hear the screams of the two other women, one of whom was held in a room next to the bathroom, and she testified that they were screaming in the same manner as she herself was screaming, so she assumed they were being raped, too (*id.*). After returning from the nearby house, one of the young women told Witness K20 that she had been cleaning and both told her that the soldiers had not done anything to them (*id.*). However, the Appeals Chamber considers the fact that it is not uncommon for women to refrain from disclosing a sexual assault (*id.*). The Appeals Chamber further notes that Witness K20's evidence is corroborated by Witness K58's evidence, which was taken into account by the Trial Chamber (¶ 867). Citing Witness K20's evidence that the two other young women were screaming, the Appeals Chamber finds that these women did not consent and that the perpetrators knew they did not consent (¶ 868). Considering the evidence as a whole, the Appeals Chamber is convinced beyond reasonable doubt that the only reasonable inference is that the two young Kosovo Albanian women in Beleg were sexually assaulted by members of the Serbian forces (¶¶ 868-69).

SEXUAL VIOLENCE/PERSECUTION:

- The Appeals Chamber occasionally uses the term "sexual violence," but more often uses the term "sexual assault" in reference to the allegations that five women—Witnesses K20 and K14, the Kosovo Albanian woman taken out of the convoy in the Priština/Priştinë municipality, and the two women detained in Beleg—had been raped or otherwise sexually assaulted by Serb soldiers (¶¶ 844-929). Having established that all of these sexual assaults did occur, the Appeals Chamber next determines whether or not this sexual violence constituted persecution as a crime against humanity (¶¶ 870-901). The Trial Chamber found that only the rapes of Witnesses K20 and K14 had been established beyond a reasonable doubt and held that

the Prosecution had failed to prove that these sexual assaults were committed with the requisite discriminatory intent to establish they amounted to acts of persecution (¶ 870). The Trial Chamber based this holding on the “limited number of incidents,” finding that it could not find discriminatory intent based upon the ethnicity of just two women (¶¶ 870, 872). The Prosecution appealed this finding, arguing that the Trial Chamber erred in law in evaluating the two sexual assaults in isolation, instead of taking into account the broader campaign of persecutory violence against Kosovo Albanians in which the sexual assaults occurred (¶¶ 844-45, 873). Furthermore, the Prosecution submitted that the Trial Chamber had considered broader contextual elements in assessing whether other acts amounted to persecution, but had not used the same approach in evaluating the sexual assaults (¶ 874). Đorđević contended that the Prosecution had not demonstrated that the Trial Chamber failed to consider the broader context in which the sexual assaults occurred and that the Prosecution had also failed to show that the women were raped because of their ethnicity (¶ 875). The Appeals Chamber indicates that the crime of persecution “requires evidence of a specific intent to discriminate on political, racial, or religious grounds” and that the Prosecution must prove that the relevant acts were committed with the requisite discriminatory intent (¶ 876). The Appeals Chamber finds that the Trial Chamber committed an error of law by failing to consider that the sexual assaults of Witnesses K14 and K20 occurred in the course of the forcible displacement of the Kosovo Albanian population as part of the JCE, the purpose of which was to pursue a “systematic campaign of terror and violence aimed at forcing the Kosovo Albanians to leave Kosovo to ensure control over the province” (¶ 877). It therefore undertakes its own assessment of whether the rapes of Witnesses K14 and K20, as well as the other three incidents of sexual assault established by the Appeals Chamber, were committed with discriminatory intent, taking into account the surrounding circumstances (¶ 880).

- *Witnesses K20 and two other young women in Beleg*: The Prosecution submitted that the sexual assaults of Witnesses K20 and the other two women in Beleg were part of the campaign of persecutory violence and amounted to persecutions, and therefore should not be treated separately (*id.*). Đorđević contended that the sexual assault of Witness K20 was not linked to any persecutory plan (¶ 885). The Appeals Chamber observes that Serbian forces targeted Witness K20 and her family and the two other young women, forced them from their homes, and put them into a basement with other families (¶ 890). Witness K20 testified that members of the Serbian forces told them that they had “asked for NATO,” thus they should not cry because they “asked for this (themselves)” and that they were at war with the state (*id.*). After taking Witness K20 and the two other women to a courtyard, the soldiers “cursed NATO planes that flew overhead” (*id.*). After Witness K20’s rape, the policeman who was standing guard told her that the Kosovo Liberation Army did worse than what they were doing, and that she could handle them (*id.*). The Appeals Chamber also notes that there is evidence that about 20 Kosovo Albanian women in Beleg were taken by soldiers to a room on the same night and were crying and disheveled upon their return (*id.*). The Appeals Chamber also considers the broader context of the sexual assaults, noting that Witness K20’s rape “took place in the context of the systematic campaign of terror and violence involving the commission of numerous persecutory acts against Kosovo Albanians with the aim to force the Kosovo Albanians out of Kosovo” (¶ 891). The Appeals Chamber concludes that Witness K20’s direct evidence of her rape “clearly supports” a finding of discriminatory intent because of her

ethnicity (¶ 892). This finding is not undermined by the fact that the perpetrators were also motivated by sexual desire because their decision to sexually assault Witness K20 was based on their goal to discriminate against her based on her ethnicity (*id.*). The Appeals Chamber notes that the sexual assaults on the two young women from Beleg occurred in the same circumstances as Witness K20's rape (¶ 893). Citing several factors, including the remarks made by the perpetrators to the victims, the fact that the victims were all Kosovo Albanian and the perpetrators were all Serb forces, and that the rapes occurred during the process of these Serb forces forcibly transferring Kosovo Albanians out of the area, the Appeals Chamber holds that "the only reasonable inference that can be drawn is that the perpetrators acted with discriminatory intent" (¶ 893).

- *Witness K14*: The Trial Chamber found that Witness K14 had been raped but that the Prosecution had not demonstrated that the rape was committed with discriminatory intent (¶ 870). On appeal, the Prosecution argued that the Trial Chamber had erred in finding that Witness K14 was not raped with discriminatory intent based on her ethnicity (*id.*). The Prosecution argued that, due to her ethnicity as a Kosovo Albanian, Witness K14 was subject to persecutory acts before her rape including being forced, along with other Kosovo Albanians, from her home in Priština/Prishtinë to one village after another by Serbian soldiers (¶ 882). According to the Prosecution, all these other discriminatory acts leading up to the rape should not be considered separately (*id.*). Đorđević contended that the sexual assault of Witness K14 was not linked to any persecutory plan, but was instead committed by "criminals operating in the theatre of war under the cover of night" (¶ 885). The Appeals Chamber notes the broader context leading up to the rape of Witness K14, including the displacement of Witness K14 and her family and other Kosovo Albanians in convoys, and remarks the Serbian forces made, such as telling the Kosovo Albanians to "go to their brothers in Albania and ask NATO for help" (¶ 894). The Appeals Chamber recalls that, after Witness K14 and her family returned to Priština/Prishtinë, policemen came to their house, told them to fill out papers they would need to have stamped to receive a green card, and then returned the following day and took Witness K14 to the Bozhur Hotel, where many Kosovo Albanian had been brought and mistreated (*id.*). A policeman raped Witness K14 in a separate room, and after experiencing continued harassment and intimidation by the same individuals, Witness K14 and her sister fled the area out of fear of further sexual assault (*id.*). The Appeals Chamber thus considers that Witness K14's rape took place in the same context of terror and persecutory acts as the sexual assaults of Witness K20 and the two young women in Beleg previously discussed (¶ 895). The Appeals Chamber also notes that the perpetrators were members of the Serbian forces who were in a position of authority over Kosovo Albanians and were engaged in discriminatory attacks against them (*id.*). Therefore, the Appeals Chamber finds that the only reasonable inference is that the perpetrators of the sexual assault of Witness K14 acted with discriminatory intent (*id.*).
- *The Kosovo Albanian girl in a convoy in Priština/Prishtinë municipality*: As noted above, the Trial Chamber held that the rape of the Kosovo Albanian girl

taken out of a convoy in Priština/Prishtinë municipality had not been established, but the Appeals Chamber holds that this was an error and that the sexual assault of this girl had been established (¶¶ 857, 870). The Prosecution contended that this sexual assault took place as part of a campaign of persecutory violence by Serbian forces (¶ 883). The Prosecution pointed out that the Serbian forces had created the atmosphere of terror that caused Kosovo Albanians, including the girl, to flee in convoys (*id.*). The Appeals Chamber (Judge Tuzmukhamedov dissenting) agrees that the Kosovo Albanian girl's sexual assault took place in the context of a systematic campaign of violence that included numerous persecutory acts against Kosovo Albanians and that, given these circumstances, the only reasonable inference was that the sexual assault was committed with discriminatory intent (¶ 897). The Appeals Chamber notes further that it was irrelevant whether the perpetrators were also acting out of sexual desire (*id.*).

- In addition to finding that the five incidents of sexual assault amounted to persecutory acts, the Appeals Chamber finds that the contextual elements for crimes against humanity were met, recalling that the Trial Chamber found that, at the time the sexual assaults took place, an armed conflict existed and there was a systematic attack against the Kosovo Albanian civilian population (¶ 899). The Appeals Chamber concludes that all five sexual assaults were part of this systematic attack against the Kosovo Albanian civilian population, which it also describes as widespread, and that the perpetrators knew that their acts were part of this attack (*id.*). The Appeals Chamber explains that unlike rape, sexual assault is not listed as a crime against humanity under Article 5(g) of the Statute (¶ 900). However, sexual assault may be punishable as persecution under international law if it “reaches the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute” (*id.*). The Appeals Chamber reiterates that the Trial Chamber found that Witnesses K14 and K20 had been raped, whereas the Appeals Chamber finds that the two other women in Beleg and the woman in the convoy were sexually assaulted (*id.*). The Appeals Chamber considers that, by definition, sexual assault “constitutes an infringement of a person’s physical or moral integrity” and that the sexual assaults under consideration occurred against young women in a context of fear, intimidation and harassment, thus meeting the gravity requirement (*id.*). Given the above determination that the sexual assaults were also committed with discriminatory intent based on ethnicity, the Appeals Chamber holds that the crime of persecution as a crime against humanity has been established through the sexual assaults of Witnesses K20 and the two young women in Beleg, Witness K14, and the Kosovo Albanian girl in a convoy (¶ 901).
- Judge Tuzmukhamedov argued in his dissent that it was not proved beyond reasonable doubt that the physical perpetrators of all five sexual assaults acted with discriminatory intent because discriminatory intent for these specific crimes cannot be inferred from “the general discriminatory nature of the attacks against the Kosovo Albanian population at the time” (Tuzmukhamedov Dissent ¶ 60). With regard to the majority’s findings regarding Witness K20 and the two other women in Beleg in particular, Judge Tuzmukhamedov noted that while some of the forces detaining the women made discriminatory remarks, there was no proof that the men who actually committed the sexual assaults made similar remarks (Tuzmukhamedov Dissent ¶ 62). Judge Tuzmukhamedov also disagreed with the majority’s finding that the sexual assault of Witness K14 was discriminatory based on the fact that she was Kosovo

Albanian and raped by persons “in a position of authority’ who were members of the Serbian forces that carried out the general attack against the Kosovo Albanian population at the time” (Tuzmukhamedov Dissent ¶ 61). Additionally, Judge Tuzmukhamedov disagreed with the majority’s finding that the girl in the convoy was sexually assaulted with discriminatory intent based only on the fact that the assault occurred while the girl and other Kosovo Albanians traveled in a convoy along a road lined with Serbian forces, seeking safety (*id.*).

Other issues:

MODE OF LIABILITY:

- Having established that the sexual assaults of five women constituted persecution as a crime against humanity, the Appeals Chamber turns to the issue of Đorđević’s liability for these crimes under JCE (¶ 902). The Trial Chamber found that Đorđević, together with other members of the political, military, and police leadership of the Federal Republic of Yugoslavia and Serbia, engaged in a JCE aimed at changing the ethnic balance in Kosovo and that Đorđević shared the intent to implement this plan and significantly contributed to it (¶ 902). The Appeals Chamber affirms this finding and considers the Prosecution’s argument that Đorđević should be convicted pursuant to the third category of JCE (JCE III) for persecution through sexual assaults as a crime against humanity discussed above (¶ 903). Đorđević challenged this argument on two grounds. First, the Defense argued that the Prosecution suggested an incorrect standard with respect to Đorđević’s *mens rea* in arguing that a JCE member’s knowledge of a mere possibility that a crime might be committed pursuant to the common plan was sufficient to trigger liability under JCE III for that crime (¶ 904). In response, the Appeals Chamber holds that an accused may be held responsible under a JCE III theory of liability for a crime outside the common purpose where the evidence establishes that: (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by a member of the JCE to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk that such crime may be committed by continuing to participate in the JCE and contributing thereto (¶ 906).² Contrary to the Defense’s argument, the Appeals Chamber specifies the *mens rea* standard does not require awareness of a “probability” that a crime would be committed (¶ 907). It is enough that the accused is aware that the perpetration of a crime is a *possible* consequence, as long as this possibility is sufficiently substantial as to be foreseeable to an accused (*id.*). The second legal issue raised by the Defense in response to the Prosecution’s JCE III argument was that the link between the JCE and the direct perpetrators of the foreseeable crimes was insufficient for Đorđević to be held liable (¶ 909). According to the Defense, the Prosecution must prove that one of the members of the JCE used the perpetrators “to commit the foreseeable crimes in furtherance of the common plan” (*id.*). The Appeals Chamber rejects this argument, finding that if a non-member of the JCE used by a member of the JCE to commit crimes *within* the common purpose also commits crimes *outside* the common purpose, these crimes may be imputed to members of the

² *Prosecutor v. Brdanin*, Appeals Chamber Judgment, April 3, 2007, ¶¶ 365, 411; *Prosecutor v. Kvočka et al.*, Appeals Chamber Judgment, February 28, 2005, ¶ 83; *Prosecutor v. Blaskić*, Appeals Chamber Judgment, July 29, 2004, ¶ 33; *Prosecutor v. Vasiljević*, Appeals Chamber Judgment, February 25, 2004, ¶ 101; *Prosecutor v. Tadić*, Appeals Chamber Judgment, July 15, 1999, ¶ 228.

JCE if they were a “natural and foreseeable consequence of the JCE” (¶ 912). In other words, the Prosecution need only prove that the foreseeable crimes were committed by a person who was used by a JCE member to carry out one or more of the crimes that *were* part of the common purpose (¶ 913). In view of this standard, the Prosecution argued that Đorđević should be convicted for persecution through sexual assaults because the assaults were a natural and foreseeable consequence of the JCE, Đorđević was aware of this, and he willingly accepted this risk when he participated in the JCE and furthered its common purpose (¶ 914). The Prosecution pointed to the massive displacement of civilians and killings and other violent crimes committed against Kosovo Albanians of which Đorđević was aware of in 1998 and 1999 (¶ 916). Đorđević contended that notice of the general crimes that had been committed during that time did not amount to awareness of the possible perpetration of sexual assaults and that he was never informed that sexual assaults were occurring (¶ 917). The Prosecution responded that it need not show that Đorđević knew of other sexual assaults occurring to establish his liability under JCE III; rather, it need only establish that the sexual assaults were committed by Serbian forces who were being used by members of the JCE to further their common purpose and that these sexual assaults were foreseeable (¶ 918). The Appeals Chamber looks at the overall context in which the sexual assaults occurred to determine if their occurrence was foreseeable to Đorđević (¶ 920). It begins by recalling the general atmosphere of violence and fear among the Kosovo Albanian population, which left it “highly vulnerable, lacking protection, and exposed to abuse and mistreatment by members of the Serbian forces” (¶ 921). The Appeals Chamber also notes that the women were especially vulnerable to sexual assaults, as they were separated from males (¶ 922). The Appeals Chamber therefore concludes that it has “no doubt” that sexual assaults were a natural and foreseeable consequence of the JCE’s common purpose (*id.*). The Appeals Chamber agrees with the Prosecution that Đorđević was a crucial member of the JCE and shared the intent to implement the common plan, citing his position as a senior official, which provided him with detailed knowledge of events such as killings and other violent crimes from direct contacts with other high-ranking officials and other sources such as the media, coupled with Đorđević’s presence in Kosovo in 1998 and 1999 (¶¶ 923-25). Taking into account all these circumstances, the Appeals Chamber finds that it was foreseeable to Đorđević that crimes of a sexual nature might be committed (¶ 926). Therefore, the Appeals Chamber, Judge Tuzmukhamedov dissenting, finds that the possibility that sexual assaults might be committed was “sufficiently substantial as to be foreseeable to Đorđević, that he willingly took the risk when he participated in the JCE,” and that the discriminatory intent was also foreseeable (*id.*). For all of these reasons, the Appeals Chamber grants the Prosecution’s appeal and finds Đorđević guilty under the third category of JCE for persecution as a crime against humanity through the sexual assaults of the five women described above (¶ 929). Judge Tuzmukhamedov’s dissent argues that the link between the individuals involved in the sexual assaults and the JCE of which Đorđević was found to belong was too weak given the uncertainty of some perpetrators’ identities (Judge Tuzmukhamedov Dissent ¶ 63). Furthermore, Judge Tuzmukhamedov submitted that the majority based its finding that it was foreseeable to Đorđević that members of the JCE would commit sexual assaults based on his general knowledge of Serbian forces committing serious crimes in the area without proof that he was informed about sexual assaults in particular (¶¶ 64-66).