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-96-23& IT-96-23/1-A
		Date:	12 June 2002
		Original:	French

IN THE APPEALS CHAMBER

Before: Judge Claude Jorda, Presiding
Judge Mohamed Shahabuddeen
Judge Wolfgang Schomburg
Judge Mehmet Güney
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Judgement of: 12 June 2002

PROSECUTOR
V
DRAGOLJUB KUNARAC
RADOMIR KOVAC
AND
ZORAN VUKOVIC

JUDGEMENT

Counsel for the Prosecutor:

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Mr. Slavi{a Prodanovic and Mr. Dejan Savatic for the accused Dragoljub Kunarac
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error caused a miscarriage of justice,[12] which has been defined as "?a? grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[13] The responsibility for the findings of facts and the evaluation of evidence resides primarily with the Trial Chamber. As the Appeals Chamber in the *Kupre{ki}* Appeal Judgement held:[14]

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.

40. In the *Kupre{ki}* Appeal Judgement it was further held that:[15]

> The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points.

41. Pursuant to Article 23(2) of the Statute, the Trial Chamber has an obligation to set out a reasoned opinion. In the *Furund`ija* Appeal Judgement, the Appeals Chamber held that Article 23 of the Statute gives the right of an accused to a reasoned opinion as one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute. This element, *inter alia*, enables a useful exercise of the right of appeal available to the person convicted.[16] Additionally, only a reasoned opinion allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of evidence.

42. The *rationale* of a judgement of the Appeals Chamber must be clearly explained. There is a significant difference from the standard of reasoning before a Trial Chamber. Article 25 of the Statute does not require the Appeals Chamber to provide a reasoned opinion such as that required of the Trial Chamber. Only Rule 117(B) of the Rules calls for a "reasoned opinion in writing." The purpose of a reasoned opinion under Rule 117(B) of the Rules is not to provide access to all the

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[12] *Ibid.*

[13] *Furund`ija* Appeal Judgement, para 37, quoting Black's Law Dictionary (7th ed., St. Paul, Minn. 1999). See additionally the 6th edition of 1990.

[14] *Kupre{ki}* Appeal Judgement, para 30.

[15] *Ibid.*, para 32.

[16] See *Hadjianastassiou* v *Greece*, European Court of Human Rights, no. 69/1991/321/393, [1992] ECHR 12945/87, Judgement of 16 December 1992, para 33.

2. Discussion

127. After an extensive review of the Tribunal's jurisprudence and domestic laws from multiple jurisdictions, the Trial Chamber concluded: [156]

> the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[157]

128. The Appeals Chamber concurs with the Trial Chamber's definition of rape. Nonetheless, the Appeals Chamber believes that it is worth emphasising two points. First, it rejects the Appellants' "resistance" requirement, an addition for which they have offered no basis in customary international law. The Appellants' bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.

129. Secondly, with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal's prior definitions of rape.[158] However, in explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape.[159] In particular, the Trial Chamber wished to explain that there are "factors ?other than force? which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim".[160] A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.

130. The Appeals Chamber notes, for example, that in some domestic jurisdictions, neither the use of a weapon nor the physical overpowering of a victim is necessary to demonstrate force. A threat to retaliate "in the future against the victim or any other person" is a sufficient *indicium* of

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[156] Trial Judgement, paras 447-456.
[157] *Ibid.*, para 460.
[158] See, e.g., *Furund`ija* Trial Judgement, para 185. Prior attention has focused on force as the defining characteristic of rape. Under this line of reasoning, force or threat of force either nullifies the possibility of resistance through physical violence or renders the context so coercive that consent is impossible.
[159] Trial Judgement, para 458.
[160] *Ibid.*, para 438.

163. In explaining that outrages upon personal dignity are constituted by "any act or omission which would be *generally* considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity",[219] the Trial Chamber correctly defined the objective threshold for an act to constitute an outrage upon personal dignity. It was not obliged to list the acts which constitute outrages upon personal dignity. For this reason, this ground of appeal is dismissed.

(b) *Mens rea* for the Crime of Outrages upon Personal Dignity

164. According to the Trial Chamber, the crime of outrages upon personal dignity requires that the accused knew that his act or omission *could* cause serious humiliation, degradation or otherwise be a serious attack on human dignity.[220] The Appellant, however, asserts that this crime requires that the accused knew that his act or omission *would have* such an effect.[221]

165. The Trial Chamber carried out a detailed review of the case-law relating to the *mens rea* of the crime of outrages upon personal dignity.[222] The Trial Chamber was never directly confronted with the specific question of whether the crime of outrages upon personal dignity requires a specific intent to humiliate or degrade or otherwise seriously attack human dignity. However, after reviewing the case-law, the Trial Chamber properly demonstrated that the crime of outrages upon personal dignity requires only a knowledge of the "possible" consequences of the charged act or omission. The relevant paragraph of the Trial Judgement reads as follows: [223]

> As the relevant act or omission for an outrage upon personal dignity is an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, an accused must know that his act or omission is of that character – i.e., that it could cause serious humiliation, degradation or affront to human dignity. This is not the same as requiring that the accused knew of the *actual* consequences of the act.

166. Since the nature of the acts committed by the Appellant against FWS-75, FWS-87, A.S. and A.B. undeniably reaches the objective threshold for the crime of outrages upon personal dignity set out in the Trial Judgement, the Trial Chamber correctly concluded that any reasonable person would have perceived his acts "to cause serious humiliation, degradation or otherwise be a serious attack on human dignity".[224] Therefore, it appears highly improbable that the Appellant was not, at the very least, aware that his acts could have such an effect. Consequently this ground of appeal is rejected.

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[219] Trial Judgement, para 507 (emphasis added).
[220] *Ibid.*, para 514.
[221] *Kovac* Appeal Brief, para 145.
[222] Trial Judgement, paras 508-514.