

**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-A
Date: 17 November 2009

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC REDACTED VERSION

PROSECUTION'S CONSOLIDATED REPLY BRIEF

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Accused:

Mr. Toma Fila and Mr. Vladimir Petrović for Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Sreten Lukić

I. INTRODUCTION	1
II. GROUND ONE: THE INDICTMENT PLED PERSECUTIONS BY FORCIBLE TRANSFER AND DEPORTATION	2
A. OVERVIEW	2
B. THE INDICTMENT PLED PERSECUTIONS BY FORCIBLE TRANSFER AND DEPORTATION.....	2
C. THE PROSECUTION DID NOT WAIVE ITS RIGHT TO RAISE THIS ISSUE.....	4
D. THE RESPONDENTS HAVE NOT SHOWN PREJUDICE	5
III. GROUND TWO: THE CHAMBER ERRED IN ACQUITTING OJDANIĆ AND LAZAREVIĆ OF MURDER AND PERSECUTIONS BY MURDER	7
A. OVERVIEW	7
B. OJDANIĆ SHOULD BE CONVICTED OF AIDING AND ABETTING MURDER AND PERSECUTIONS BY MURDER.....	8
1. The Chamber applied an erroneous <i>mens rea</i> standard for aiding and abetting	9
2. The Chamber’s findings show that Ojdanić was aware of the likelihood that murders (killings with direct or indirect intent to cause death) would be committed if he ordered the VJ into Kosovo	12
3. Conclusion	14
C. LAZAREVIĆ SHOULD BE CONVICTED OF AIDING AND ABETTING MURDER AND PERSECUTIONS	15
D. CONCLUSION.....	16
IV. GROUND THREE: ŠAINOVIĆ AND LUKIĆ POSSESSED THE REQUIRED JCE III MENS REA WITH RESPECT TO THE SEXUAL ASSAULTS AS PERSECUTIONS... 	18
A. OVERVIEW	18
B. THE CHAMBER ADOPTED THE WRONG JCE III MENS REA STANDARD	18
C. ŠAINOVIĆ AND LUKIĆ WERE AWARE THAT SEXUAL ASSAULTS WERE A POSSIBLE RESULT OF IMPLEMENTING THE JCE	19
1. Šainović.....	19
2. Lukić	20
D. CONCLUSION.....	22
V. GROUND FOUR: THE PRIŠTINA/PRIŠTINA RAPES WERE PERSECUTIONS.....	23
A. OVERVIEW	23
B. THE CIRCUMSTANCES SURROUNDING THE PRIŠTINA/PRIŠTINA RAPES DEMONSTRATE DISCRIMINATORY INTENT	23
C. NO REQUIREMENT TO PROVE ELEMENTS OF ARTICLE 7(3) TO HOLD RESPONDENTS LIABLE	24
VI. GROUND FIVE: LAZAREVIĆ AND OJDANIĆ ARE RESPONSIBLE FOR ALL LOCATIONS WHERE VJ PARTICIPATED IN FORCIBLE TRANSFER AND DEPORTATION	26
A. OVERVIEW	26
B. THE CHAMBER’S FINDINGS THAT THE VJ COMMITTED CRIMES WERE NOT UNREASONABLE	26
C. IF CONVICTED FOR CRIMES COMMITTED IN ADDITIONAL VILLAGES, OJDANIĆ’S AND LAZAREVIĆ’S SENTENCES SHOULD BE INCREASED	27
VII. GROUND SIX: THE SENTENCES ARE MANIFESTLY INADEQUATE	29
A. OVERVIEW	29
B. THERE IS NO ESTOPPEL	29
C. THE CHAMBER FAILED TO INDIVIDUALISE SENTENCES.....	30
D. COMPARISON OF CRIMES AND SENTENCES IS RELEVANT TO ASSESSING GRAVITY	31
E. CONCLUSION	31
VIII. CONCLUSION.....	32
GLOSSARY.....	33

I. INTRODUCTION

1. This Consolidated Prosecution Reply Brief addresses the Responses of Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić. The Prosecution's seeks reversal of legal errors and review of relevant factual findings in light of the correct legal standard. The Prosecution's appeal also challenges certain unreasonable factual conclusions in the Judgement based on the Chamber's predicate factual findings. Rather than addressing the issues as framed by the Judgement, the Respondents challenge and reargue the predicate factual findings—mostly repeating arguments raised and rejected at trial—as if the Prosecution appeal justifies a full review of the trial record *de novo*.

II. GROUND ONE: THE INDICTMENT PLED PERSECUTIONS BY FORCIBLE TRANSFER AND DEPORTATION

A. Overview

2. Contrary to the Respondents' claims,¹ the Prosecution properly pled persecutions by forcible transfer and deportation in the Indictment. As such, the main issue before the Appeals Chamber is not waiver as the Respondents suggest,² but the Chamber's incorrect legal interpretation of the persecutions count in the Indictment. Even if waiver applies, the Respondents will suffer no prejudice if convicted for persecutions by forcible transfer and deportation because they always had clear notice of the charges against them.³

B. The Indictment pled persecutions by forcible transfer and deportation

3. The Indictment pled forcible transfer and deportation as underlying acts of persecutions and these underlying discriminatory acts were consistently understood as such by the parties throughout the proceedings.⁴ Contrary to the Respondents' claims, the Prosecution did not "deliberate[ly]" choose to exclude persecutions by forcible transfer and deportation,⁵ nor did it make a "mistake".⁶ The real issue is the Chamber's error in misreading the Indictment and requiring a direct cross-reference in the Indictment to a paragraph describing the forcible displacements. The Prosecution Pre-Trial Brief reflects the correct reading of the Indictment.⁷ The Chamber should have construed subparagraph 77(a) of the persecutions count as providing sufficient notice.⁸

4. The Respondents were fully aware that the core Prosecution case that they had to answer was the discriminatory forcible transfer and deportation of the Kosovo

¹ Šainović Response, paras.6, 39, 44; Ojdanić Response, paras.33-45; Lazarević Response, paras.6-8; Lukić Response, para.8.

² Šainović Response, paras.19, 28-36, 38, 44; Ojdanić Response, paras.41-53; Pavković Response, paras.1-8; Lukić Response, para.7.

³ *But see* Šainović Response, paras.18, 25, 27, 34, 35, 44; Ojdanić Response, paras.54-59; Lazarević Response, paras.14-15.

⁴ Prosecution Brief, paras.13-21.

⁵ Ojdanić Response, paras.41-42, 46.

⁶ Šainović Response, para.20; Lukić Response, para.8.

⁷ Prosecution Pre-Trial Brief, paras.37-41 (generally), paras.223, 237-238, 283-284 (Ojdanić), paras.323-324 (Lazarević).

⁸ Prosecution Brief, para.7.

Albanian civilian population⁹ and that the charges included persecutions by forcible transfer and deportation. Šainović admits that the absence of a direct cross-reference to paragraph 72 was an “evident omission.”¹⁰ Lukić states that

[T]he evidence and facts the prosecution is now presenting are merely the same for which they sought and received a conviction for deportation, there is no benefit or tangible difference to be gained/served by convicting twice on the same underlying acts.¹¹

5. The Indictment was clear that the persecutions count included forcible transfer and deportation. Paragraph 77(a) expressly refers to persecutions consisting of forcible transfer and deportation of Kosovo Albanian civilians and includes all relevant paragraph references. Material facts about forcible transfer and deportation of the Kosovo Albanian civilians were linked to the persecutions count in the Indictment by incorporating paragraphs 25–32 and 71–77 by cross-referencing.

6. Although the Indictment was amended, its drafting history with respect to the persecutions count is not “convoluted”.¹² The persecutions count has always explicitly and clearly pleaded forcible transfer and deportation as underlying acts of persecutions. The persecutions count in the Initial Indictment and the First Amended Indictment contained a general reference to forcible transfer and deportation¹³ and then in the Second and Third Amended Indictments, the persecutions count contained a single cross-reference to the forcible transfer and deportation counts.¹⁴ Starting with the Amended Joinder Indictment and including the operative Indictment the persecutions count contained a double cross-reference to the forcible transfer and deportation counts.¹⁵ The amendment to the indictment in the *Đorđević* case¹⁶ is irrelevant and does not imply that the Indictment in the present case was defective. The *Đorđević* amendment averted the possibility of an overly technical reading of the Indictment, but did not change the substance of the persecutions count because forcible transfer and deportations were always part of it.

⁹ Prosecution Brief, paras.20-21.

¹⁰ Šainović Response, para.20.

¹¹ Lukić Response, para.6.

¹² Ojdanić Response, para.44.

¹³ See Initial Indictment, paras.90-100; First Amended Indictment, paras.16-26.

¹⁴ See Second Amended Indictment, para.68; Third Amended Indictment, para.68.

¹⁵ See Amended Joinder Indictment, paras.33, 77-78; Second Amended Joinder Indictment, paras.32, 76-77; Indictment, paras.32, 76-77. See also Prosecution Brief, paras.7-11.

¹⁶ *Đorđević* Prosecution’s Motion for Leave to Amend Indictment.

7. Finally, contrary to Ojdanić's argument,¹⁷ the *mens rea* for aiding and abetting persecutions by forcible transfer and deportation was properly pled in the Indictment. Paragraph 17 sets out the proper standard for the aiding and abetting mode of liability. Paragraph 77 provides specific notice that all the Accused are charged with the persecutions count by, among other modes of liability, aiding and abetting. The paragraphs with respect to the *mens rea* of the Accused also set out sufficient facts to put them on notice that they were charged with aiding and abetting persecutions by forcible transfer and deportation.¹⁸ The Prosecution Pre-Trial Brief reaffirmed this fact to Ojdanić and Lazarević.¹⁹

C. The Prosecution did not waive its right to raise this issue

8. The Prosecution's failure to amend the Indictment following the Chamber's comment about the persecutions count²⁰ does not amount to waiver.²¹ The Prosecution answered the Chamber's comment by presenting its core case as there was no need to correct a technicality that does not alter the substance of a pleading.²² The Prosecution argued throughout the proceedings that persecutions included acts of forcible transfer and deportations. Even in closing argument, the Prosecution stated its case included persecutions by forcible transfer and deportations:

Now, we have charged in this case a count of persecutions which includes the deportations and murders that I have already spoken about.²³

9. No response to the Chamber's inquiries was required because the Indictment provided clear notice that persecutions included forcible transfers and deportations. The Chamber erred in law when it excluded forcible transfer and deportations from the persecutions count based on an erroneous and overly technical reading of the Indictment.²⁴ This error resulted in a manifest injustice.

¹⁷ Ojdanić Response, paras.55, 59.

¹⁸ Indictment, para.44(a),(e),(f) (Ojdanić); para.59(a),(e) (Lazarević).

¹⁹ Prosecution Pre-Trial Brief, paras.37-41 (generally), paras.223, 237-238, 283-284 (Ojdanić), paras.323-324 (Lazarević).

²⁰ T.5409-5410, 12569-12570, 12778-12779, 12783.

²¹ *Contra* Pavković Response, paras.5-8, Šainović Response, paras.28-36, 44, Ojdanić Response, paras.47-50, Lukić Response, para.7.

²² Prosecution Brief, para.13.

²³ T.26788.

²⁴ Prosecution Brief, para.4.

10. However, if the Appeal Chamber determines that the Prosecution did not react properly to the challenged Rule 98bis Decision, then the issue should be addressed anyway because of its importance and the resulting injustice. This injustice amounts to special circumstances constituting an exception to waiver.²⁵ In these special circumstances, the only relevant question is whether the accused will suffer prejudice if the error is corrected. The answer in this case is no.

D. The Respondents have not shown prejudice

11. A party must do more to show prejudice than allege it; the party must show how prejudice actually arises in the context of the case.²⁶ The Respondents' new-found misunderstanding of the scope of the persecutions count never impaired their defence strategy or caused prejudice during the trial. Contrary to Šainović's argument,²⁷ the defence strategy did not change before or after the Rule 98bis Decision. Despite their allegations,²⁸ the Respondents show no prejudice now.²⁹

12. The Respondents had clear notice of the charges against them, including the *mens rea* for aiding and abetting persecutions by forcible transfer and deportation. Throughout the case, the Respondents challenged all the elements of the Prosecution's core case of persecutions by forcible transfer and deportation. They challenged the Prosecution case that a campaign of massive forcible transfer and deportation of Kosovo Albanians was carried out on discriminatory grounds in furtherance of the common criminal purpose.³⁰

13. The facts supporting the *actus reus* of persecutions by forcible transfer and deportation equate with those for the *actus reus* of the crimes of forcible transfer and deportation. The *mens rea* of the JCE, consisting of the intent to forcibly displace Kosovo Albanians in order to maintain control over the province,³¹ equally establishes the *mens rea* for persecutions by forcible transfer and deportation of the Kosovo Albanians. The defence cannot invoke prejudice regarding the requisite *actus reus* and

²⁵ See e.g. *Simić* AJ, para.212, *Furundžija* AJ, para.173, *Galić* AJ, para.34, *Kambanda* AJ, para.28.

²⁶ *Čelebići* AJ, paras.630-632.

²⁷ Šainović Response, paras.34-35.

²⁸ *But see* Šainović Response, paras.18, 25, 27, 34-35, 44; Lazarević Response, paras.14-15; Ojdanić Response, paras.54-59.

²⁹ See above paras.4-6.

³⁰ Prosecution Brief, paras.23-24.

³¹ Judgement, Vol.III, paras.470, 785, 1134.

mens rea for persecutions by forcible transfer and deportations of the Kosovo Albanian population.

III. GROUND TWO: THE CHAMBER ERRED IN ACQUITTING OJDANIĆ AND LAZAREVIĆ OF MURDER AND PERSECUTIONS BY MURDER

A. Overview

14. The Chamber made all the necessary findings to convict Ojdanić and Lazarević for aiding and abetting the murders at Korenica and Meja³² and Dubrava/Lisnaja. The Chamber failed to convict them because it erred in law or in fact. Nothing in the Ojdanić or Lazarević Responses contradicts the Prosecution’s arguments in Ground Two of its appeal. The Appeals Chamber should convict Ojdanić and Lazarević for aiding and abetting murder as a crime against humanity (Count 3), as a violation of the laws or customs of war (Count 4) and as an underlying act of persecutions (Count 5).

15. The Chamber found that, even before the start of the conflict, Ojdanić was aware that “excessive uses of force and forcible displacements were likely to occur if he ordered the VJ into Kosovo in 1999.”³³ It noted in particular that Ojdanić had received indications of VJ and MUP involvement in the massacre of civilians in Gornje Obrinje/Abria e Epërme in late September 1998.³⁴ The Chamber also found that Ojdanić knew of the campaign of terror and violence being carried out in 1999 against Kosovo Albanians.³⁵ It even found that Ojdanić was aware of VJ members killing Kosovo Albanians.³⁶ The correct *mens rea* standard for aiding and abetting is the awareness of the likelihood³⁷ that a type of crime, with the essential elements of the *actus reus* and the *mens rea*, will be committed and that his or her conduct assists the commission of the crime.³⁸ Had the Chamber applied the correct standard, the

³² The Chamber found that at least 287 people were murdered by joint VJ and MUP forces in and around Korenica and Meja: Judgement, Vol.II, para.1197. Ojdanić’s attempt to reduce this number to 275 (Ojdanić Response, para.70) should be rejected. Ojdanić refers in this connection to Judgement, Vol.II, para.238, but even there the Chamber found that “275 individuals named in Schedule H of the Indictment were killed by the VJ and MUP forces on 27 April 1999 in and around the villages of Meja and Korenica (*in addition to the 13 victims named above* [at para.233])” (emphasis added).

³³ Judgement, Vol.III, para.623.

³⁴ Judgement, Vol.III, paras.543, 623.

³⁵ Judgement, Vol.III, para.625.

³⁶ Judgement, Vol.III, para.629.

³⁷ In the jurisprudence “likely” is synonymous with “probably”, *Martić* TJ, para.79. fn.150.

³⁸ Prosecution Brief, para.38.

only reasonable conclusion open on its findings was that, from the beginning of the conflict, Ojdanić had the *mens rea* for aiding and abetting murder as a crime against humanity, a violation of the laws or customs of war, and an act of persecutions.³⁹

16. The same result would have applied to Lazarević. Lazarević knew that murders were likely during joint VJ-MUP operations and that his acts and omissions would assist in their commission. He was aware that VJ members were killing Kosovo Albanians in some instances,⁴⁰ that crimes against civilians were committed during VJ and MUP operations in 1998 and early 1999⁴¹ and that from late March 1999, VJ and MUP carried out serious criminal acts and a campaign of terror, violence and forcible displacement against Kosovo Albanians. He knew, for example, that between 24 March and 2 April 1999, over 300,000 Kosovo Albanians had left for Albania.⁴²

17. Contrary to Ojdanić's assertions,⁴³ the Prosecution does not dispute that the aider and abettor needs to be aware of the essential elements of the crime, including the *mens rea* of the physical or intermediary perpetrators for the crimes. This is inherent in the requirement of the awareness of the likelihood that the crime will be committed. Having awareness of the likelihood of a crime means having awareness of the likelihood that the *actus reus* of the crime will be committed with the required *mens rea*.

18. In the present case, Ojdanić and Lazarević were aware not only of the likelihood of killings (*actus reus* of murder) but also of killings with the required *mens rea* for murder and persecution.

B. Ojdanić should be convicted of aiding and abetting murder and persecutions by murder

19. The Chamber erred in law in applying an erroneous *mens rea* requirement for aiding and abetting.⁴⁴ Applying the correct standard, the Chamber should have

³⁹ See also Prosecution Brief, paras.41-46.

⁴⁰ Judgement, Vol.III, para.928.

⁴¹ Judgement, Vol.III, para.923.

⁴² Judgement, Vol.III, paras.923-924. See also Prosecution Brief, paras.50-57.

⁴³ Ojdanić Response, paras.85, 92-93, 102.

⁴⁴ See below III. B. 1.

convicted Ojdanić.⁴⁵ Alternatively, if the Chamber applied the correct standard but found that Ojdanić's awareness of the *mens rea* of the principal perpetrators had not been established,⁴⁶ then the Chamber erred in fact in failing to conclude that Ojdanić possessed the *mens rea* of aiding and abetting murder and persecutions by murder.⁴⁷

1. The Chamber applied an erroneous *mens rea* standard for aiding and abetting

20. As argued in the Prosecution Brief, the Chamber applied an erroneous *mens rea* standard for aiding and abetting. The correct standard was awareness of the likelihood that murders would be committed and that his conduct would assist the commission of these crimes.⁴⁸ Ojdanić need not have been “aware that VJ and MUP forces were going into the specific crime sites [...] in order to commit killings.”⁴⁹ This requirement is too high.

21. Contrary to Ojdanić's argument,⁵⁰ the Chamber did require Ojdanić to foresee the precise murders. Ojdanić recognises this in his Appeal Brief where he argues that the Chamber should have applied the same standard to forcible transfer and deportation as it applied to the “specific” murders.⁵¹

(a) The aider and abettor need not be aware of the precise details of the crimes

22. Ojdanić argues in his Response that an aider and abettor must know that his conduct assists the “specific crime” (in the sense of knowing the location of the crime) committed by the principal offender.⁵² While he uses the phrase “specific crime”, in the context, he means “precise crime”. This argument must fail.⁵³ While the

⁴⁵ See below III. B. 2.

⁴⁶ *Contra* Ojdanić Response, paras.74, 78, 85, 90.

⁴⁷ See below III. B. 2. and III. B. 3.

⁴⁸ Prosecution Brief, para.38.

⁴⁹ Prosecution Brief, paras.36-39, citing Judgement, Vol.III, para.629.

⁵⁰ Ojdanić Response, para.78. See also para.83.

⁵¹ Ojdanić Brief, para.238 (arguing that by requiring proof that “Ojdanić was aware that VJ and MUP forces were going into the specific crime sites [...] in order to commit killings,” “the Trial Chamber applied the correct *mens rea* standard in relation to aiding and abetting the crime of murder, but failed to apply the same standard to the crimes of forcible displacement”)(emphasis in original).

⁵² Ojdanić Response, paras.80-82, referring to Ojdanić Brief, Ground 3(A).

⁵³ See also Prosecution Response to Ojdanić Brief, response to Ground 3(A).

aider and abettor must know the “specific crime”⁵⁴, the Appeals Chamber, by defining “specific crime” as “murder, extermination, rape, torture, wanton destruction of property, etc.” makes clear that what is required is knowledge of the type of crime.⁵⁵ Thus, the aider and abettor must be aware of the essential elements of the crime he is assisting,⁵⁶ not the precise details of the crime to be committed.⁵⁷ As explained by the *Orić* Trial Chamber, it is not required that the “aider and abettor already foresees the place, time and number of the precise crimes.”⁵⁸ In particular, the aider and abettor of murder need not be aware of the scale of murders.⁵⁹

23. In his Response, Ojdanić confuses the two concepts of *specific* crime and *precise* crime.⁶⁰ There is no requirement that an aider and abettor be aware of precise crimes including their location. According to ICTY case-law, the aider and abettor need not be certain of the type of crime that is ultimately committed, as long as he “is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed”.⁶¹ The Chamber thus erred in law in acquitting Ojdanić because it found no proof that Ojdanić was “aware that VJ and MUP forces were going into the specific crime sites [...] in order to commit killings.”⁶²

(b) The correct *mens rea* standard is awareness of the likelihood of murders

24. As explained in the Prosecution Appeal Brief, the correct *mens rea* standard for aiding and abetting is awareness of the likelihood that a type of crime will be committed (in addition to being aware of the likelihood that the conduct assists in the

⁵⁴ *Tadić* AJ, para.229(iv); *Vasiljević* AJ, para.102(ii).

⁵⁵ *Tadić* AJ, para.229(iii); *Vasiljević* AJ, para.102(i) (“The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of property, etc.)”).

⁵⁶ *Mrkšić* AJ, paras.49, 159; *Orić* AJ, para.43; *Nahimana* AJ, para.482; *Brdanin* AJ, para.484; *Simić* AJ, para.86; *Aleksovski* AJ, para.162.

⁵⁷ *Simić* AJ, para.86; *Mrkšić* AJ, paras.49, 159; *Nahimana* AJ, para.482; *Blaškić* AJ, para.50; *Furundžija* TJ, para.246; *Strugar* TJ, para.350; *Brdanin* TJ, para.272; *Naletilić* TJ, para.63; *Blaškić* TJ, para.287.

⁵⁸ *Orić* TJ, para.288.

⁵⁹ *Contra* Ojdanić Response, para.75. This is different for the crime of extermination. Killing on a large scale is an essential element of extermination. *Stakić* AJ, para.259; *Ntakirutimana* AJ, para.522. The aider and abettor of extermination needs to be aware of large-scale killings. *Brdanin* AJ, para.487; *see also* *Stakić* AJ, para.260.

⁶⁰ Ojdanić Response, paras.80-82. *See also* Ground 3(A) of Ojdanić Brief.

⁶¹ *Simić* AJ, para.86. *See also* *Mrkšić* AJ, paras.49, 63; *Blaškić* AJ, paras.45, 50; *Ndindabahizi* AJ, para.122; *Furundžija* TJ, para.246; *Blaškić* TJ, para.287 (both referred to in *Blaškić* AJ, fn.94), *Brdanin* TJ, para.272; *Strugar* TJ, para.350.

⁶² Judgement, Vol.III, para.629.

commission of the crime).⁶³ In other words, the aider and abettor must be aware of the likelihood that the *actus reus* of the crime will be committed with the required *mens rea*. Contrary to Ojdanić's assertions,⁶⁴ this standard includes the requirement that the aider and abettor be aware of the *mens rea* of the physical or intermediary perpetrators. Ojdanić misunderstands the Tribunal's jurisprudence on the *mens rea* of aiding and abetting.⁶⁵

25. The Prosecution does not dispute that the aider and abettor must have the requisite awareness that physical or intermediary perpetrators had the *mens rea* for the crime. The Chamber's findings satisfy this test. Ojdanić was aware of the likelihood that murders—that is acts of killing with the required *mens rea*—would be committed if he ordered the VJ into Kosovo in 1999. If Ojdanić was aware of the likelihood of “murder”, then he was aware of the likelihood of killings with the required *mens rea*.

26. The standard of awareness of the likelihood for the *mens rea* of aiding and abetting does not blur JCE III liability and aiding and abetting liability.⁶⁶ The two forms of liability have distinct requirements. In particular:

- The aider and abettor needs to 1) make a substantial contribution to a specific crime; 2) know, in the sense of being aware of the probability, that a specific crime will be committed, *i.e.* be aware of the likelihood that all essential elements of a crime will be fulfilled and that his conduct assist the commission of the crime. He does not need to have the *mens rea* for any crime;
- A JCE member needs to 1) make a significant contribution to the JCE I or JCE II crimes; 2) have shared intent for JCE I or knowledge of the system of ill-treatment as well as the intent to further the system of ill-treatment for JCE II, which includes *mens rea* for the JCE I or JCE II crimes; 3) have the awareness of the possibility and willingly taking the risk that the JCE III

⁶³ Prosecution Brief, para.38.

⁶⁴ Ojdanić Response, paras.85 and following.

⁶⁵ *Contra* Ojdanić Response, paras.92-102.

⁶⁶ *Contra* Ojdanić Response, paras.75, 105-109.

crimes will be committed (that is, with that awareness, the accused decided to participate in that enterprise).⁶⁷

(c) The mens rea for murder is direct or indirect intent to cause death

27. A perpetrator of murder need not act “in order to commit” a killing. Indirect intent (awareness of the likelihood that death will occur) suffices for murder.⁶⁸ Ojdanić himself recognises that awareness of a likelihood is sufficient with regard to causing death.⁶⁹ Since the murderer need not act with direct intent, an aider and abettor of murder need not be aware of the likelihood that the murderer aimed at killing. Indirect intent is sufficient. Ojdanić argues that the Chamber simply found that it had not been shown he knew the perpetrators were going in the crime sites with the intent to kill.⁷⁰ To the extent that this is what the Chamber meant by “it has not been proved that Ojdanić was aware that VJ and MUP forces were going into the specific crime sites [...] in order to commit killings,”⁷¹ then the Chamber further erred in law.

2. The Chamber’s findings show that Ojdanić was aware of the likelihood that murders (killings with direct or indirect intent to cause death) would be committed if he ordered the VJ into Kosovo

28. Contrary to Ojdanić’s argument,⁷² it is irrelevant that the killings did not follow a clear pattern as the murders were not found to be part of the common criminal plan. The Chamber used pattern evidence to find that displacement crimes formed part of the joint criminal enterprise.⁷³ That murders were not found to be part

⁶⁷ See e.g. *Karadžić* JCE III Foreseeability AD, para.18; *Martić* AJ, paras.83, 168; *Brdanin* AJ, paras.365, 411; *Stakić* AJ, paras.65, 87; *Blaškić* AJ, para.33; *Vasiljević* AJ, para.101; *Krnojelac* AJ, para.32; *Tadić* AJ, para.228.

⁶⁸ *D.Nikolić* SAJ, para.39; *Mrkšić* TJ, para.486; *Martić* TJ, para.60; *Delić* TJ, para.48; *Strugar* TJ, paras.235-236, referring to *Blaškić* AJ, paras.41-42; *Stakić* TJ, para.587; *Perišić* Decision on Preliminary Motion, para.21; *Hadžihasanović* Rule 98bis Decision, para.37. This is consistent with the ICRC Commentary which defines the term “wilful” - used in the description of the crime of “wilful killing” - as including recklessness. ICRC Commentary, margin nos.493, 3474; relied upon in *Strugar* AJ, para.270, when discussing the *mens rea* of attack on civilians.

⁶⁹ Ojdanić Response, para.86.

⁷⁰ Ojdanić Response, para.78.

⁷¹ Judgement, Vol.III, para.629 (emphasis added).

⁷² Ojdanić Response, paras.104, 117.

⁷³ Judgement, Vol.III, para.94.

of the pattern does not imply that Ojdanić was not aware that murders would likely occur.⁷⁴

29. The Appeals Chamber should reject Ojdanić's arguments that the events in 1998 could not have indicated to him that murders were likely to occur in 1999.⁷⁵ As noted above, the Chamber found that Ojdanić's knowledge of events in 1998—in particular the indications he received concerning VJ and MUP involvement in the massacre of civilians in Gornje Obrinje/Abria e Epërme in late September 1998—made him aware that excessive uses of force and murders were likely to occur if he ordered the VJ into Kosovo in 1999.⁷⁶ To decide the Prosecution's appeal, the Chamber's findings are operative even though Ojdanić challenges them in his appeal.⁷⁷ Based on these findings, the only reasonable conclusion is that, from the beginning of the conflict, Ojdanić was aware of the likelihood that the VJ would commit killings with the requisite *mens rea* for murder if ordered into Kosovo in 1999.

30. Information received by Ojdanić throughout the conflict confirms his *mens rea* for aiding and abetting murder and persecutions:

- The 2 April 1999 press release and other information received by Ojdanić in April 1999 confirm his awareness of the likelihood of the commission of murders by the VJ even before the massacre at Korenica and Meja.⁷⁸ Ojdanić's argument that he would have understood this as propaganda is untenable in light of his awareness, even before the conflict started, of the likelihood of murders if he ordered the VJ into Kosovo in 1999;⁷⁹
- Contrary to Ojdanić's assertions,⁸⁰ Gajić's testimony confirms that the murder of eight civilians by VJ volunteers was discussed at the Supreme Command Staff briefing of 3 April 1999;⁸¹
- The Arbour letter (received by Ojdanić at the latest on 2 May 1999⁸²) confirms Ojdanić's awareness of the likelihood of murders by the VJ.⁸³ It

⁷⁴ *Contra* Ojdanić Response, para.111.

⁷⁵ *Contra* Ojdanić Response, para.111.

⁷⁶ Judgement, Vol.III, paras.543, 623.

⁷⁷ Ojdanić Brief, Ground 3(C). The Prosecution will answer these arguments in its response to the Ojdanić Brief.

⁷⁸ *See* Prosecution Brief, para.43.

⁷⁹ *Contra* Ojdanić Response, paras.112, 115.

⁸⁰ Ojdanić Response, paras.113-114.

⁸¹ T.15332-15333 (open). The questions asked to Mr. Gajić were in relation to what was discussed at the briefing.

⁸² Judgement, Vol.III, para.556.

⁸³ Prosecution Brief, para.44. *Contra* Ojdanić Response, para.116.

referred to serious violations of international humanitarian law, including attacks on the civilian population by Ojdanić's subordinates;⁸⁴

- Ojdanić was informed on 4 May 1999 that the foreign press were reporting mass killings. It is irrelevant that no further details of the mass killings by the VJ were provided.⁸⁵

31. Ojdanić's acts after 16 May 1999 do not relieve him of responsibility for the murders in Dubrava/Lisnaja on 25 May 1999.⁸⁶ As explained in the Prosecution Brief, the same set of actions by Ojdanić contributed to both the crimes of murder and forcible displacement by the VJ.⁸⁷ In particular, his standing order for the VJ to operate in Kosovo in 1999 contributed to all crimes committed by the VJ in co-ordinated action with the MUP. The fact that Ojdanić may have taken some general measures after 16 May 1999 in relation to crimes does not diminish his contributions to the murders committed on 25 May 1999.⁸⁸ Neither is it enough to show that Ojdanić was no longer aware of the likelihood of murders after 16 May 1999. In fact, the Chamber found that the measures taken by Ojdanić were clearly insufficient to prevent the recurrence of serious offences and that Ojdanić knew he had done too little.⁸⁹

32. Given what Ojdanić knew and when he knew it, the only reasonable conclusion is that Ojdanić was aware of the likelihood that killings would be committed by the VJ with the requisite *mens rea* for murder (direct or indirect intent to cause death).⁹⁰ The evidence does not allow for the suggestion that Ojdanić was aware only of the possibility that murders would occur.⁹¹

3. Conclusion

33. The only reasonable conclusion open on the basis of the Chamber's findings was that, from the beginning of the conflict, Ojdanić had the *mens rea* for aiding and

⁸⁴ Exh.P401 (public) and Exh.3D1090 (public).

⁸⁵ *Contra* Ojdanić Response, para.116.

⁸⁶ *Contra* Ojdanić Response, para.117.

⁸⁷ Prosecution Brief, para.40.

⁸⁸ *See also* the response to be filed by the Prosecution to Ojdanić Brief, Grounds 1 and 2.

⁸⁹ Judgement, Vol.III, paras.610-611 (finding in particular that Ojdanić knew that "reliance on the military justice system would not constitute an effective measure to punish the crimes committed by his subordinates").

⁹⁰ *Contra* Ojdanić Response, para.118.

⁹¹ *Contra* Ojdanić Response, para.118.

abetting murder as a crime against humanity, a violation of the laws or customs of war, and an act of persecutions.

34. The Chamber either erred in law in applying an erroneous *mens rea* requirement or erred in fact in failing to conclude that Ojdanić possessed the *mens rea* of aiding and abetting murders and persecutions by murder. In either case, a conviction should be entered.

C. Lazarević should be convicted of aiding and abetting murder and persecutions

35. Lazarević's Response to Ground Two of the Prosecution's Appeal Brief fails to make focussed and direct arguments as to why he should not be convicted on appeal for aiding and abetting murder and persecutions. Lazarević does not refute the Prosecution's argument that the Chamber's factual findings support a conviction for aiding and abetting murder. He merely repeats arguments from his Appeal Brief challenging the VJ's involvement in the events at Korenica and Meja, Đakovica Municipality, and Dubrava, Kačanik Municipality.⁹² Many of these arguments were raised and rejected at trial.⁹³ These unfounded arguments will be addressed in the Prosecution's response to Lazarević's appeal.⁹⁴ For its appeal, the Prosecution relies on the Chamber's factual findings, which are operative unless changed on appeal.

36. In addition, as discussed below, Lazarević takes the Chamber's findings out of context, portrays the Prosecution's arguments as allegations notwithstanding that they are based on the Chamber's findings and, in several instances, misapprehends the Prosecution's argument.⁹⁵

37. In paragraph 41 of his Response, Lazarević discusses two orders that the Chamber addressed in the section on Lazarević's knowledge of crimes. The Chamber

⁹² Compare Lazarević Response, paras.20-39 with Lazarević Brief, paras.45, 46, 52, 62, 63, 65, 66, 204-207; See also paras.77-92. Lazarević does the same at paragraphs 57-59 repeating paras.524-526 of his Appeal Brief. The Chamber's finding is in Judgement, Vol.III, para.848.

⁹³ See Lazarević Response, para.26, Lazarević Final Brief, para.465; Lazarević Response, para.28, Lazarević Final Brief, para.408; Lazarević Response, para.30, Lazarević Final Brief, para.411; Lazarević Response, para.31, Lazarević Final Brief, para.378; Lazarević Response, para.34, Lazarević Final Brief, para.328; Lazarević Response, para.35, Lazarević Final Brief, para.329; Lazarević Response, para.36, Lazarević Final Brief, para.328.

⁹⁴ The Prosecution will answer these arguments in its response to the Lazarević Brief, Ground 1(c), paras.77-86 (Korenica), 87-92 (Meja), Ground 1(i), paras.202-208 (Dubrava).

⁹⁵ Lazarević Response, paras.40-59.

found that these orders for the protection of civilians had a bearing on Lazarević's awareness of crimes committed in 1998.⁹⁶ At paragraph 42, he refers to another order, which the Chamber also discussed⁹⁷ but gave little weight.⁹⁸

38. In paragraphs 43 to 47, Lazarević misrepresents the Prosecution's arguments as baseless allegations or conclusions, ignoring that they are based on the Chamber's findings.⁹⁹

39. Paragraphs 48 and 56 of Lazarević's Response show a misunderstanding of the basis of his individual criminal responsibility as an aider and abettor. His argument implies that measures by military and police authorities to punish VJ reservists for crimes vitiate his knowledge of the likelihood of their occurrence. They do not.¹⁰⁰

40. In paragraphs 49–55 of his Response Brief, Lazarević misapprehends that his individual criminal responsibility does not depend on whether or not the VJ was responsible for the killings, but rather his knowledge of the MUP's involvement in killings and that he knew of joint VJ–MUP actions (with the knowledge that murders would likely occur).¹⁰¹

D. Conclusion

41. Ojdanić and Lazarević were acquitted of aiding and abetting murder because the Chamber required *mens rea* of the precise crimes committed by the principal perpetrators—the wrong legal test. If the Chamber had applied the correct legal test to its factual findings, it would have found Ojdanić and Lazarević guilty of aiding and

⁹⁶ Judgement, Vol.III, paras.811, 817.

⁹⁷ Judgement, Vol.III, para.904.

⁹⁸ Judgement, Vol.III, para.912.

⁹⁹ In response to Lazarević Response, para.43 for evidence of Lazarević's knowledge of crimes in 1998, *see* Judgement, Vol.III, paras.807-808. As to paragraph 44, for his knowledge of crimes while present at the Forward Command Post, *see* Judgement, Vol.III, para.811. As to paragraph 45 for Lazarević's knowledge of the contents of the UNSC resolution, *see* Judgement, Vol.III, paras.809. As to paragraph 46 for Lazarević's knowledge about the *alleged* involvement of the VJ in this incident, *see* Judgement, Vol.III, paras.815. In paras.823 *et seq.* the Chamber addressed the Grom 3 and 4 plans. As to paragraph 47, for the incident in Žegra, *see* Judgement, Vol.II, para.944 and Judgement, Vol.III, para.854.

¹⁰⁰ Judgement, Vol.III, paras.854, 873 *et seq.*

¹⁰¹ Judgement, Vol.III, para.848. The related Chamber's findings are found in Judgement, Vol.II, paras.686, 687 and Judgement, Vol.III, paras.879, 880, 885.

abetting murder. Alternatively, the Chamber erred in fact. Their Response Briefs do not advance cogent arguments supporting the Chamber's erroneous conclusion.

IV. GROUND THREE: ŠAINOVIĆ AND LUKIĆ POSSESSED THE REQUIRED JCE III *MENS REA* WITH RESPECT TO THE SEXUAL ASSAULTS AS PERSECUTIONS

A. Overview

42. In 1998 and 1999, sexual assaults were foreseeable crimes to Šainović and Lukić given the information available to them. Despite this awareness, they willingly participated in the JCE. Šainović and Lukić should be convicted of the sexual assaults perpetrated in executing the JCE's common criminal purpose.

B. The Chamber adopted the wrong JCE III *mens rea* standard

43. Contrary to Šainović's argument,¹⁰² the Appeals Chamber settled the applicable law in relation to individual criminal responsibility under the JCE III mode of liability in the *Karadžić* JCE III Foreseeability Appeal Decision.¹⁰³ In this decision, the Appeals Chamber considered the relevant jurisprudence, including the *Brdanin* Appeal Decision,¹⁰⁴ and held that the correct standard is the "possibility" standard.¹⁰⁵ The Appeals Chamber had earlier adopted this standard in the *Martić* Appeal Judgement.¹⁰⁶

44. The Prosecution accepts that JCE III *mens rea* is determined using "information available to the accused."¹⁰⁷ This element is part of the correct standard.¹⁰⁸ Contrary to Šainović's¹⁰⁹ and Lukić's¹¹⁰ assertions, the information available to them demonstrated that sexual assaults were foreseeable.¹¹¹ The possibility that these crimes might take place was sufficiently substantial, rather than remote or implausible.¹¹²

¹⁰² Šainović Response, para.50.

¹⁰³ *Karadžić* JCE III Foreseeability AD, paras.15-18.

¹⁰⁴ *Karadžić* JCE III Foreseeability AD, para.17.

¹⁰⁵ *Karadžić* JCE III Foreseeability AD, paras.15, 18.

¹⁰⁶ *Martić* AJ, paras.83, 168; Prosecution Brief, para.64, fn.139.

¹⁰⁷ Šainović Response, para.53.

¹⁰⁸ Prosecution Brief, para.65 ("the accused with the awareness that such a crime was a "possible" consequence of the implementation of the JCE, decided to participate in that enterprise").

¹⁰⁹ Šainović Response, paras.54-56.

¹¹⁰ Lukić Response, para.18.

¹¹¹ Prosecution Brief, paras.67-76.

¹¹² *Karadžić* JCE III Foreseeability AD, para.18.

45. Lukić misstates the applicable law.¹¹³ The JCE III “possibility” standard is justified because “the actor already possesses the intent to participate and further the common criminal purpose of a group.”¹¹⁴

46. This ground of appeal concerns individual criminal responsibility for the sexual assault crimes under JCE III, not superior responsibility pursuant to Article 7(3) of the Statute.¹¹⁵ Lukić appears to argue that elements of Article 7(3) need to be proven in order to hold him responsible for the sexual assaults. However, criminal responsibility under JCE III requires a showing that it was foreseeable to the JCE member that crimes might be perpetrated.¹¹⁶ Article 7(3) requirements are irrelevant. The reasons for Milutinović’s acquittal¹¹⁷ are also irrelevant.

C. Šainović and Lukić were aware that sexual assaults were a possible result of implementing the JCE

1. Šainović

47. JCE III requires foreseeability of the possibility that crimes will occur.¹¹⁸ Šainović¹¹⁹ has contested the connection between the violent crimes of which he was aware and the foreseeability of sexual assaults,¹²⁰ his knowledge of rape in 1998,¹²¹ and the use of individuals with past criminal behaviour.¹²²

48. Notwithstanding possible ambiguity¹²³ with respect to the terms “rape” and “murder” on page 37 of Exh.P1468,¹²⁴ Šainović’s awareness of crimes taking place in

¹¹³ Lukić Response, para.19.

¹¹⁴ *Blaškić* AJ, para.33.

¹¹⁵ Lukić Response, paras.23-30.

¹¹⁶ *Martić* AJ, paras.83, 168.

¹¹⁷ Lukić Response, para.28.

¹¹⁸ *See e.g. Krstić* AJ, para.150 (To establish JCE III liability, the Chamber need not conclude that the accused “was actually aware that those other criminal acts were being committed; it was sufficient that their occurrence was foreseeable to him and that those other crimes did in fact occur.”). *Contra* Šainović Response, para.66.

¹¹⁹ Contrary to Šainović’s allegation, the Prosecution has not confused his role and awareness with those of Lukić. *See* Šainović Response, paras.63, 106. *Compare* e.g. with Prosecution Brief, fns.143, 154, 155, 156, 157, 158, 163, 168, 169, 184, 185.

¹²⁰ Šainović Response, paras.66.

¹²¹ Šainović Response, paras.74-80.

¹²² Šainović Response, paras.92-94.

¹²³ Šainović Response, paras.74-80, 85. *See also* Lukić Response, paras.36-37.

¹²⁴ *See* Judgement, Vol.I, paras.1061-1064.

1998 and 1999 was sufficient to conclude that sexual assaults were foreseeable to him.¹²⁵

49. Contrary to Šainović's submission,¹²⁶ he was informed about burning of houses and killings in the context of joint VJ–MUP operations in Kosovo in 1998.¹²⁷ He received this information during Joint Command meetings, which contrary to his allegation,¹²⁸ were led by him.¹²⁹

50. Šainović knew that the joint VJ–MUP operations had caused¹³⁰ a “humanitarian catastrophe”.¹³¹ In such circumstances, the vulnerability of women is inevitable, making it foreseeable to him that violent crimes might be perpetrated against them.¹³²

51. Šainović's awareness of the possibility that sexual assaults might take place was enhanced¹³³ by his knowledge that individuals with past violent and criminal conduct were incorporated in the VJ–MUP forces and participating in the joint operations.¹³⁴

2. Lukić

52. Contrary to Lukić's submissions,¹³⁵ the Prosecution's submissions regarding his awareness of the possibility that sexual assaults might take place are based on findings in the Judgement, which are fully footnoted in the Prosecution's Brief.¹³⁶ Lukić also misstates the law as requiring notice of the sexual assaults to establish their foreseeability in order to incur JCE III criminal liability.¹³⁷ Further, Lukić's makes general negative assertions about the meaning of the Chamber's findings. Lukić's submissions are unfounded and can be summarily dismissed.¹³⁸

¹²⁵ Judgement, Vol.III, paras.441-453, 456, 463, 470-473.

¹²⁶ Šainović Response, paras.72-73, 84.

¹²⁷ Judgement, Vol.III, para.441.

¹²⁸ Šainović Response, para.67.

¹²⁹ Judgement Vol.III, para.309.

¹³⁰ *Contra* Šainović Response, paras.68-70.

¹³¹ Judgement, Vol.III, para.442.

¹³² *See Krstić* AJ, para.149; *Krstić* TJ, para.616; *Kvočka* TJ, para.327.

¹³³ *Contra* Šainović Response, paras.92-94.

¹³⁴ Prosecution Brief, para.71.

¹³⁵ Lukić Response, paras.20, 46, 48.

¹³⁶ Prosecution Brief, pp.26-31.

¹³⁷ *Krstić* AJ, para.150.

¹³⁸ *See e.g.* Lukić Response, para.40(A-G).

53. Contrary to Lukić's submissions,¹³⁹ Lukić was well-informed through various reporting mechanisms about crimes against Kosovo Albanian civilians that occurred in 1998 as a result of the VJ–MUP joint military operations.¹⁴⁰ Joint Command participants regularly discussed the violent crimes committed by joint VJ–MUP forces, including massive displacements,¹⁴¹ burning of houses,¹⁴² and murder.¹⁴³ Lukić knew that joint VJ–MUP operations he had planned had caused a “refugee crisis”.¹⁴⁴ In this context, women's vulnerability and insecurity were a matter of course, making it foreseeable to him that violent crimes might be perpetrated against them.¹⁴⁵

54. Lukić's awareness of the possibility that sexual assaults might take place was reinforced¹⁴⁶ by his knowledge that individuals with past violent and criminal conduct were incorporated in the joint VJ–MUP forces in Kosovo.¹⁴⁷

55. All but two¹⁴⁸ documents in Appendix 1 of the Prosecution Brief¹⁴⁹ demonstrate that sexual assault was one of the crimes of violence committed against Kosovo Albanian civilians throughout 1998 and 1999 during joint VJ–MUP operations and the campaign to forcibly displace them. Given Lukić's role at the relevant time, he must have been aware that this crime was being committed by VJ–MUP troops.¹⁵⁰

¹³⁹ Lukić Response, paras.38-40.

¹⁴⁰ Judgement, Vol.III, paras.976-982, 995, 1036, 1052, 1058-1059.

¹⁴¹ Judgement, Vol.III, paras.1079, 1081.

¹⁴² Judgement, Vol.III, para.1080.

¹⁴³ Judgement, Vol.III, paras.1081.

¹⁴⁴ Judgement, Vol.III, para.1079.

¹⁴⁵ See *Krstić* AJ, para.149; *Krstić* TJ, para.616; *Kvočka* TJ, para.327.

¹⁴⁶ Lukić Response, paras.46-82.

¹⁴⁷ Paramilitary groups were incorporated into MUP entities and deployed in Kosovo in early-1999. Judgement, Vol.I, para.731; Vol.III, para.575 (the “Scorpions” were incorporated into the SAJ in early 1999 and sent to Kosovo); Vol.I, paras.645, 687 (members of the “Scorpions”, “Grey Wolves”, and “Arkan's Tigers” were attached to the JSO). See also Vol.I, para.742; Prosecution Brief, para.71.

¹⁴⁸ Exh.6D01333.E, p.5(public) (4 May 1998—indicating sexual assault incident outside of Kosovo). The Prosecution has already commented on the ambiguity surrounding Exh.P1468, page 37. See above para.48.

¹⁴⁹ Lukić Response, paras.43-45.

¹⁵⁰ Prosecution Brief, para.75.

D. Conclusion

56. Šainović's and Lukić's arguments fail to undermine the legal and factual grounds of appeal brought by the Prosecution. Šainović and Lukić should be convicted for the sexual assaults as underlying acts of persecutions.

V. GROUND FOUR: THE PRIŠTINA/PRISHTINA RAPES WERE PERSECUTIONS

A. Overview

57. The “wholly erroneous” standard of review advanced by Pavković¹⁵¹ is not applicable. The Prosecution has argued both legal and factual errors, for which the applicable standards are ones of correctness¹⁵² and reasonableness.¹⁵³ The fact that the rapes in Count 4 occurred within the general context of a military and police operation to expel Kosovo Albanians from Priština/Prishtina town, together with specific surrounding circumstances of each rape, show that they were committed with discriminatory intent.¹⁵⁴ Where the accused is a JCE member, there is no need to prove additional elements—such as those of superior responsibility—advanced by Lukić.¹⁵⁵ Criminal responsibility for JCE III crimes is based on the finding that the Respondent is a member of a JCE with full intent for the JCE crimes.

B. The circumstances surrounding the Priština/Prishtina rapes demonstrate discriminatory intent

58. The rapes in Priština/Prishtina described in Ground Four of the Prosecution Brief were directly connected with the operation to remove Kosovo Albanians from Priština/Prishtina town.¹⁵⁶ The specific surrounding circumstances of each of the Priština/Prishtina rapes show that they were committed with discriminatory intent.¹⁵⁷ K31, K14 and K62 were targeted for detention, expulsion and rape because they were Kosovo Albanians. These rapes cannot be separated from the conditions under which they occurred and cannot be compared to rapes committed in another place by a civilian perpetrator, as Lukić argues.¹⁵⁸

59. The Priština/Prishtina rapes cannot be isolated from their surrounding circumstances by claiming that they are simply a result of “location or time

¹⁵¹ Pavković Response, paras.9-10.

¹⁵² *D. Milošević* Appeal Judgement, para.14.

¹⁵³ *D. Milošević* Appeal Judgement, para.15.

¹⁵⁴ Prosecution Brief, paras.83-104.

¹⁵⁵ *Contra* Lukić Response, paras.88-96.

¹⁵⁶ Judgement, Vol.II, para.889.

¹⁵⁷ Prosecution Brief, paras.87-100.

¹⁵⁸ Lukić Response, para.86.

coincidence”;¹⁵⁹ stating that [REDACTED] is only an “act of rape from the domain of general criminality, with no additional qualifying elements”;¹⁶⁰ or ignoring¹⁶¹ the evidence that K14 was raped at Hotel Bozhur¹⁶² [REDACTED].¹⁶³ Everything that happened to the three women was connected to their ethnicity. This included the VJ or MUP personnel forcing themselves into the home of K62;¹⁶⁴ the policemen forcibly taking K14 and her sister from their home;¹⁶⁵ the attack on K31’s village;¹⁶⁶ the detention of K31 and K14 in locations filled with Kosovo Albanians;¹⁶⁷ the brutal rapes;¹⁶⁸ [REDACTED];¹⁶⁹ and the fact that K62 and K14 subsequently fled from Priština/Prishtina with their families.¹⁷⁰

C. No requirement to prove elements of Article 7(3) to hold Respondents liable

60. Lukić argues that certain elements of Article 7(3), specific discriminatory intent and additional elements need to be proven in order to hold him responsible for rapes as persecution.¹⁷¹ However, a JCE member will be held to be responsible for a JCE III crime if it was foreseeable to him that the crime might be perpetrated in carrying out the common criminal purpose.¹⁷² Neither specific intent nor Article 7(3) requirements are relevant to this inquiry.

61. Lukić argues that K14 and K62 were not raped by the members of the MUP. This ignores that the Chamber in fact found that K14 was raped by a policeman and K62 was raped by “three VJ or MUP personnel.”¹⁷³ As a member of the JCE, Lukić is

¹⁵⁹ Šainović Response, para.123.

¹⁶⁰ Šainović Response, paras.125-126.

¹⁶¹ See Šainović Response, paras.127-131.

¹⁶² Judgement, Vol.II, para.878; [REDACTED].

¹⁶³ [REDACTED].

¹⁶⁴ Judgement, Vol.II, paras.875, 889.

¹⁶⁵ Judgement, Vol.II, para.877, [REDACTED].

¹⁶⁶ Judgement, Vol.II, paras.1259-1262.

¹⁶⁷ For K31, see Judgement, Vol.II, para.880; [REDACTED]. For K14, see Exh.P2644 (K14 Milošević testimony), p.1429 (noting that “there were lots of Albanians waiting” at the Hotel Bozhur on 21 May 1999); [REDACTED].

¹⁶⁸ Judgement, Vol.II, paras.880,889 (rapes of K31), 878 (rape of K14), 875(rapes of K62)

¹⁶⁹ [REDACTED].

¹⁷⁰ See Judgement, Vol.II, para.875 (K62 and her husband were forcibly expelled from her home two nights after her rape), para.878 (K14 fled Priština/Prishtina with her family on foot the Monday after her rape).

¹⁷¹ Lukić Response, paras.88-96. While these paragraphs appear to be directed more at Ground 3 of the Prosecution Brief than at Ground 4, the Prosecution nevertheless responds to them here.

¹⁷² Karadžić JCE III Foreseeability AD, paras.15-18.

¹⁷³ Judgement, Vol.II, para.889.

thus responsible for the crimes of both the MUP and the VJ,¹⁷⁴ and not solely for the crimes of the MUP.¹⁷⁵

¹⁷⁴ Judgement, Vol.III, para.1132.

¹⁷⁵ See Lukić Response, paras.94-95.

VI. GROUND FIVE: LAZAREVIĆ AND OJDANIĆ ARE RESPONSIBLE FOR ALL LOCATIONS WHERE VJ PARTICIPATED IN FORCIBLE TRANSFER AND DEPORTATION

A. Overview

62. The Chamber erroneously failed to convict Lazarević and Ojdanić for forcible transfer and deportation in particular locations¹⁷⁶ despite having found that the VJ was involved in these crimes. For instance, it convicted one of them while acquitting the other for the same village.¹⁷⁷ Lazarević and Ojdanić try to avoid the only correct conclusion: that where the Chamber found the VJ was involved in the commission of crimes, such factual findings must support convictions of both Lazarević and Ojdanić. In addition, if the Respondents are convicted for forcible transfer and deportation in additional villages, their sentences should be increased.

B. The Chamber's findings that the VJ committed crimes were not unreasonable

63. Lazarević and Ojdanić should be convicted for the crimes of forcible transfer and deportation because the Chamber found these crimes were committed by the VJ in particular locations. The Chamber was explicit that it only intended to acquit them for those proven crime base incidents where the MUP were the sole perpetrators.¹⁷⁸ Ojdanić and Lazarević ignore these findings and argue that the operative findings were the Chamber's acquittals.¹⁷⁹

64. For the relevant villages, Lazarević and Ojdanić selectively quote witness testimony to focus on police presence, while ignoring or minimizing the army's participation¹⁸⁰ and incorrectly state that the evidence as analyzed by the Chamber

¹⁷⁶ Beleg, Žabare/Zhabar and Dušanovo/Dushanova (for Ojdanić) and Sojevo/Sojeva, Mirosavlje/Mirosala, Staro Selo, Žabare/Zhabar and Dušanovo (for Lazarević).

¹⁷⁷ Ojdanić was acquitted for crimes in Beleg for which Lazarević was properly convicted. *See* Prosecution Brief, paras.106-108. Lazarević was acquitted for crimes in Sojevo/Sojeva, Mirosavlje/Mirosala and Staro Selo, for which Ojdanić was properly convicted. *See* Prosecution Brief, paras.109-113. Both were improperly acquitted for crimes committed in Žabare/Zhabar and Dušanovo/Dushanova. *See* Prosecution Brief, paras.114-118.

¹⁷⁸ Judgement, Vol.III, paras.632, 932.

¹⁷⁹ Ojdanić Response, para.122; Lazarević Response, para.72.

¹⁸⁰ Ojdanić Response, paras.129-132, 135, 137-141, 148, 150; Lazarević Response, paras.79, 103, 120-122.

demonstrates that the VJ did not perpetrate the crimes of forcible transfer and deportation.¹⁸¹ However, the Chamber found that the VJ committed these crimes in these villages and the Respondents have failed to show that these findings were unreasonable.¹⁸²

65. In addition, Lazarević misreads Exh.P1615 by stating that it does not support the Prosecution's position that the 252nd Tactical Group was active in Miroslavlje.¹⁸³ Exh.P1615, an original BCS document with its official English translation, confirms that this unit was active in Miroslavlje¹⁸⁴ and that troops subordinate to Lazarević operated in this village.¹⁸⁵

C. If convicted for crimes committed in additional villages, Ojdanić's and Lazarević's sentences should be increased

66. ICTY and ICTR case-law shows that the Appeals Chamber has increased sentences based on an increase in the gravity of the defendants' conduct.¹⁸⁶ If the Appeals Chamber applies the Chamber's factual findings and convicts, Ojdanić will be responsible for forcible transfer and deportation in three more villages, and Lazarević in five more villages. Together, they account for thousands more victims.¹⁸⁷ The increased number of victims affects the gravity of the criminal responsibility of Lazarević and Ojdanić. A higher sentence should result.¹⁸⁸

67. Ojdanić cites two cases in support of his argument that a conviction for crimes committed in additional villages should not lead to a higher sentence. Both are

¹⁸¹ Ojdanić Response, para.122; Lazarević Response, paras.72, 77, 82, 88, 109, 125.

¹⁸² For Beleg, *see* Judgement, Vol.II, paras.54-60, 65-69, 1158, 1184-1186. For Sojevo/Sojeva, *see* Judgement, Vol.II, paras.960-976, 998-999, 1169, 1250-1252. For Staro Selo, *see* Judgement, Vol.II, paras.985-996, 1002, 1169, 1250-1252. For Miroslavlje/Mirosala, *see* Judgement, Vol.II, paras.981-984, 1001, 1169, 1250-1252. For Žabare/Zhabar, *see* Judgement, Vol.II, paras.711-729, 1165, 1229-1231. For Dušanovo/Dushanova, *see* Judgement, Vol.II, paras.269-286, 1162.

¹⁸³ Lazarević Response, para.95.

¹⁸⁴ Exh.P1615, p.87 (BCS) and p.70 (English) (*see* 18:45 entry).

¹⁸⁵ Prosecution Brief, para.113.

¹⁸⁶ *See* Mrkšić AJ, para.419, *Krnojelac* AJ, p.115 (Disposition), *Semanza* AJ, p.126 (Disposition), *Gacumbitsi* AJ, p.73 (Disposition).

¹⁸⁷ While the Chamber was not specific about the number of victims in Beleg and Žabare/Zhabar, it did find that hundreds of people were expelled from Sojevo/Sojeva (applies only to Lazarević)(Judgement, Vol.II, para.998); 1,000 people from Miroslavlje/Mirosala (applies only to Lazarević)(Judgement, Vol.II, para.1000-1001); 500-600 people from Staro Selo (applies only to Lazarević)(Judgement, Vol.II, para.993) and 4,000-5,000 people from Dušanovo/Dushanova (applies to both)(Judgement, Vol.II, para.286).

distinguishable.¹⁸⁹ In *Strugar* the Prosecution specifically requested no increase in sentence for one of its grounds of appeal, while in *Martić* it was unclear if the Prosecution was requesting an increase.¹⁹⁰ Here, there is no doubt as to the fact that the Prosecution is requesting an increase in sentence.¹⁹¹ Unlike *Strugar* and *Martić*, the change proposed here would significantly increase the gravity of the Accused's conduct.

¹⁸⁸ Ojdanić engages in speculation that the Chamber was aware of Ojdanić's responsibility for Beleg when sentencing him. *See* Ojdanić Response, para.153. There is no basis for this assertion.

¹⁸⁹ Ojdanić Response, para.157-158.

¹⁹⁰ *Strugar* AJ, para.388; *Martić* AJ, paras.351-352.

¹⁹¹ Prosecution Brief, para.119.

VII. GROUND SIX: THE SENTENCES ARE MANIFESTLY INADEQUATE

A. Overview

68. The Chamber erred in law by failing to give due weight to relevant factors, including the gravity of the crimes, and by failing to assess each factor for each crime and Accused. The standard of review is reasonableness.¹⁹² The Prosecution also points to discernable legal errors.

69. Estoppel does not apply to bar a Prosecution sentence appeal.¹⁹³ The Prosecution's suggested sentence range of 20 years to life¹⁹⁴ at the end of trial does not clash with the Prosecution's sentence appeal. The Prosecution is not arguing that the Chamber failed to consider aggravating or mitigating circumstances related to each Accused.¹⁹⁵ Rather, it argues that the Chamber failed to consider properly the role and degree of participation of each Accused in its assessment of the gravity of the crimes. The examples of crimes committed in Kosovo provided in the Prosecution Brief bring into focus on the seriousness of the underlying crimes.¹⁹⁶ Also, the two Appeals Chamber judgements provide useful examples of sentencing in cases with comparable scale and gravity.¹⁹⁷

B. There is no estoppel

70. Estoppel does not apply in this case.¹⁹⁸ The Respondents have not shown any detrimental reliance or injury. Contrary to Šainović's argument,¹⁹⁹ the Prosecution in its Final Trial Brief simply indicated a sentencing range of 20 years to life for the

¹⁹² *Contra* Ojdanić, paras.162-165. Ojdanić's reference to *Gacumbitsi* at para.153 is misplaced, as the Prosecution argument is exactly that the sentences imposed by the Chamber cannot be reconciled with the principles governing sentencing at the Tribunal. *See* Prosecution Brief, para.198.

¹⁹³ *Contra* Lukić Response, paras.98-110; Šainović Response, paras.145-151, 153-162.

¹⁹⁴ Prosecution Final Brief, para.1100.

¹⁹⁵ *Contra* Ojdanić Response, para.169; Lukić Response, paras.117-118.

¹⁹⁶ *Contra* Ojdanić Response, paras.166-168; Lukić Response, para.121; Šainović Response, para.173.

¹⁹⁷ *Contra* Ojdanić Response, paras.186-202; Lukić Response, paras.111-116; Šainović Response, paras.151-152, 182-183, 185.

¹⁹⁸ *See Continental Shelf* Judgement, para.30 (finding estoppel to be inapplicable because there was no evidence that a party by its conduct caused the opposing party detrimentally to change its position or suffer any prejudice). *See also Gulf of Maine* Judgement, paras.129-130, 145.

¹⁹⁹ Šainović Response, para.146.

Chamber's consideration, having regard to the specific modes of liabilities and crimes for which the Respondents could be found criminally responsible. It was impossible for the Prosecution to make a specific sentence submission after the individual criminal responsibility of each Accused had been decided because the Tribunal no longer follows the practice of having a separate sentencing hearing following a finding of guilt.

71. Given the Chamber's findings of responsibility with respect to each Respondent, the Chamber should have imposed a sentence in the upper end of the Prosecution's suggested range.

C. The Chamber failed to individualise sentences

72. The Prosecution argues that in assessing the gravity of the crime,²⁰⁰ the Chamber failed to consider the role and degree of participation of each Accused in the commission of the crimes. It does not argue that the Chamber failed to consider aggravating or mitigating circumstances.²⁰¹

73. Although the Chamber made findings showing the gravity of the crimes, contrary to Respondents' arguments,²⁰² when assessing sentence, the Chamber failed to take these gravity findings into account. Šainović underlines this point when referring to the "Gravity of the offences" section in the sentencing part of the Judgement.²⁰³ In the context of a four-volume Judgement, this section is only six paragraphs long²⁰⁴ and only three of its paragraphs discuss the seriousness of the underlying crimes. The only reference made to the Accused in this section concerns their form of responsibility.²⁰⁵

74. There is no contradiction between Ground One of the Prosecution Brief and the argument that the Chamber failed to take into account the discriminatory nature of the crimes in assessing the sentence, as Ojdanić suggests.²⁰⁶ The Chamber was aware of the discriminatory nature of the crimes but failed to take this into account in

²⁰⁰ Judgement, Vol.III, paras.1171-1176.

²⁰¹ *Contra* Ojdanić Response, para.169; Lukić Response, paras.117-118.

²⁰² Lukić Response, para.122; Šainović Response, paras.163-172.

²⁰³ Šainović Response, para.165.

²⁰⁴ Judgement, Vol.III, para.1171-1176.

²⁰⁵ Judgement, Vol.III, para.1175.

²⁰⁶ Ojdanić Response, paras.170-171.

imposing sentence. Likewise, the Chamber's cursory references to the widespread and systematic campaign and vulnerability of some victims were insufficient²⁰⁷ because the Chamber failed to consider the physical and psychological impact on the victims.

D. Comparison of crimes and sentences is relevant to assessing gravity

75. The Chamber erred in its consideration of the seriousness of the underlying crimes.²⁰⁸ The Prosecution Brief includes a non-exhaustive list of examples of each type of crime to show their seriousness. The Prosecution made no suggestion that the Chamber should have considered the seriousness of the underlying crimes for which the Respondents were not convicted.²⁰⁹ To the contrary, Appendix 2 of the Prosecution Brief lists the crimes for which each Accused was convicted. The Chamber had merely noted that the Respondents were responsible for crimes that included "hundreds of murders, several sexual assaults, and the forcible transfer and deportation of hundreds of thousands of people."²¹⁰ This inadequate consideration of the seriousness of the crimes when combined with a failure to individualize their sentences led to manifestly inadequate sentences.²¹¹

76. The Prosecution is aware that the comparison between sentences in different cases has limited value.²¹² However, because the modes of liability are identical and the crimes are comparable in scale and gravity, the sentences imposed by the *Martić* and *Brdanin* Appeals Chamber offer guidance.²¹³

E. Conclusion

77. The Respondents' sentences do not correspond to the seriousness of the underlying crimes and their degree of participation in them. Their sentences are manifestly inadequate and must be corrected on appeal.

²⁰⁷ *Contra* Ojdanić Response, para.172.

²⁰⁸ Prosecution Brief, paras.120-130.

²⁰⁹ Prosecution Brief, paras.124-160. Ojdanić Response, paras.166-168; Lukić Response, para.121; Šainović Response, para.173. At paras.173-185, Ojdanić repeats arguments from his Appeal Brief concerning his degree of participation in the crimes charged. The Prosecution will address these arguments in its response to the Ojdanić Brief.

²¹⁰ Judgement, Vol.III, para.1172.

²¹¹ Prosecution Brief, para.125.

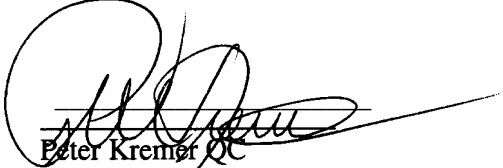
²¹² *See* Lukić Response, para.114, Ojdanić Response, paras.186-202.

²¹³ Prosecution Brief, para.197.

VIII. CONCLUSION

78. The Prosecution respectfully requests that the Appeals Chamber grant the Prosecution's appeal.

Word Count: 9151



Peter Kremer QC
Senior Appeals Counsel

Dated this 17th day of November 2009
At The Hague, The Netherlands

GLOSSARY

Pleadings, Orders, Decisions etc from Prosecutor v. Šainović et al. (Prosecutor v. Milutinović et al.) Case No. IT-05-87

Abbreviation used in Reply	Full citation
Ojdanić Brief	<i>Prosecutor v. Nikola Šainović et al.</i> Case No. IT-05-87-A, General Ojdanić's Appeal Brief, 23 September 2009
Lazarević Brief	<i>Prosecutor v. Nikola Šainović et al.</i> Case No. IT-05-87-A, General Vladimir Lazarević's Refiled Appeal Brief, 20 October 2009 [PUBLIC REDACTED] [25 MAY 2010]
Šainović Response	<i>Prosecutor v. Nikola Šainović et al.</i> Case No. IT-05-87-A Defence Respondent's Brief, 2 November 2009
Ojdanić Response	<i>Prosecutor v. Nikola Šainović et al.</i> Case No. IT-05-87-A, General Ojdanić's Response Brief, 2 November 2009
Pavković Response	<i>Prosecutor v. Nikola Šainović et al.</i> Case No. IT-05-87-A, General Pavković Reply to Prosecution Appeal Brief, 2 November 2009
Lazarević Response	<i>Prosecutor v. Nikola Šainović et al.</i> Case No. IT-05-87-A, Lazarević Defence Respondent's Brief, 2 November 2009
Lukić Response	<i>Prosecutor v. Nikola Šainović et al.</i> Case No. IT-05-87-A, Sreten Lukić's Response to the Prosecution Appeal, 2 November 2009 [PUBLIC REDACTED] [31 AUGUST 2010]
Lazarević Final Brief	<i>Prosecutor v. Milan Milutinović et al.</i> Case No. IT-05-87-T, Vladimir Lazarević's Final Trial Brief, 29 July 2008 [PUBLIC REDACTED] [25 MAY 2010]
Chamber	Trial Chamber in <i>Prosecutor v. Šainović et al.</i> , Case No. IT-05-87-A
Indictment	Third Amended Joinder Indictment, <i>Prosecutor v. Milutinović et al.</i> , Case No. IT-05-87-PT, 21 June 2006
Second Amended Joinder Indictment	<i>Prosecutor v. Milan Milutinović et al.</i> , Case No. IT-05-87-PT, T.Ch., Second Amended Joinder Indictment, 5 April 2006
Amended Joinder Indictment	<i>Prosecutor v. Milan Milutinović et al.</i> , Case No. IT-05-87-PT, T.Ch., Amended Joinder Indictment, 16 August 2005

Third Amended Indictment	<i>Prosecutor v. Slobodan Milošević et al</i> , Case No. IT-99-37-PT, T.Ch., Third Amended Indictment, 19 July 2002
Second Amended Indictment	<i>Prosecutor v. Slobodan Milošević et al</i> , Case No. IT-99-37-PT, T.Ch., Second Amended Indictment, 29 October 2001
First Amended Indictment	<i>Prosecutor v. Slobodan Milošević et al</i> , Case No. IT-99-37-PT, T.Ch., First Amended Indictment, 29 June 2001
Initial Indictment	<i>Prosecutor v. Slobodan Milošević et al</i> , Case No. IT-99-37-PT, T.Ch., Indictment, 22 May 1999
Judgement	Judgement, <i>Prosecutor v. Milutinović et al</i> , Case No. IT-05-87-T, T.Ch., 26 February 2009
Prosecution Pre-Trial Brief	Prosecutor's Pre-Trial Brief Pursuant to Rule 65ter, <i>Prosecutor v. Milan Milutinović et al</i> , Case No. IT-05-87-T, 10 May 2006
Prosecution Brief	<i>Prosecutor v. Nikola Šainović et al</i> . Case No. IT-05-87-A, Prosecution Appeal Brief, 10 August 2009 [PUBLIC REDACTED] [21 AUGUST 2009]

Other ICTY authorities

Abbreviation used in Reply	Full citation
<i>Čelebići</i> AJ	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić & Esad Landžo, a.k.a. "Zenga"</i> , Case No. IT-96-21-A, App.Ch., Judgement, 20 February 2001
<i>Aleksovski</i> AJ	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-A, App.Ch., Judgement, 24 March 2000
<i>Blaškić</i> AJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-A, App.Ch., Judgement, 29 July 2004
<i>Blaškić</i> TJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-T, T. Ch., Judgement, 3 March 2000
<i>Brdanin</i> AJ	<i>Prosecutor v Radoslav Brdanin</i> , Case No. IT-99-36-A, App.Ch., Judgement, 3 April 2007
<i>Brdanin</i> TJ	<i>Prosecutor v Radoslav Brdanin</i> , Case No. IT-99-36-T, T. Ch., Judgement, 1 September 2004
<i>Delić</i> TJ	<i>Prosecutor v. Rasim Delić</i> , Case No. IT-04-83-T, Judgement, T.Ch.15 September 2008

<i>D.Milošević</i> AJ	<i>Prosecutor v. Dragomir Milošević</i> , Case No.IT-98-29/1-A, App. Ch., Judgement, 12 November 2009
<i>D.Nikolić</i> SAJ	<i>Prosecutor v. Dragan Nikolić</i> , Case No. IT-94-02-A, App.Ch. Judgement on Sentencing Appeal, 4 February 2005
<i>Furundžija</i> AJ	<i>Prosecutor v. Anto Furundžija</i> , Case No. IT-95-17/1-A, App.Ch., Judgement, 21 July 2000
<i>Furundžija</i> TJ	<i>Prosecutor v. Anto Furundžija</i> , Case No. IT-95-17/1-T, T.Ch., Judgement, 10 December 1998
<i>Galić</i> AJ	<i>Prosecutor v. Stanislav Galić</i> , Case No. IT-98-29-A, App.Ch., Judgement, 30 November 2006
<i>Hadžihasanović</i> Rule 98bis Decision	<i>Prosecutor v. Enver Hadžihasanović & Amir Kubura</i> , Case No.IT-01-47-T, T.Ch., Decision on Motions for Acquittal pursuant to Rule 98bis of the Rules of Procedure and Evidence, 27 September 2004
<i>Karadžić</i> JCE III Foreseeability AD	<i>Prosecutor v. Karadžić</i> , Case No. IT-95-5/18-AR72.4, App. Ch., Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009.
<i>Krnojelac</i> AJ	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-A, App.Ch., Judgement, 17 September 2003
<i>Krstić</i> AJ	<i>Prosecutor v. Radislav Krstić</i> , Case No. IT-98-33-A, App.Ch., Judgement, 19 April 2004
<i>Krstić</i> TJ	<i>Prosecutor v. Radislav Krstić</i> , Case No. IT-98-33-T, T.Ch., Judgement, 2 August 2001
<i>Kvočka</i> TJ	<i>Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić & Dragoljub Prcać</i> , Case No. IT-98-30/1-T, T.Ch., Judgement, 2 November 2001
<i>Martić</i> TJ	<i>Prosecutor v. Milan Martić</i> , Case No.IT-95-11-T, T.Ch., Judgement, 12 June 2007
<i>Martić</i> AJ	<i>Prosecutor v. Milan Martić</i> , Case No.IT-95-11-A, App.Ch., Judgement, 8 October 2008
<i>Mrkšić</i> AJ	<i>Prosecutor v.Mile Mrksić & Veselin Šljivančanin</i> , Case No. IT-95-13/1-A, App.Ch., Judgement, 5 May 2009
<i>Mrkšić</i> TJ	<i>Prosecutor v. Mile Mrksić, Miroslav Radić & Veselin Šljivančanin</i> , Case No. IT-95-13/1-T, T.Ch., Judgement, 27 September 2007
<i>Naletilić</i> TJ	<i>Prosecutor v. Mladen Naletilić & Vinko Martinović</i> , Case No.

	IT-98-34-T, T.Ch., Judgement, 31 March 2003
<i>Orić</i> AJ	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-A, App.Ch., Judgement, 3 July 2008
<i>Orić</i> TJ	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-T, T.Ch., Judgement, 30 June 2006
<i>Perišić</i> Decision on Preliminary Motion	<i>Prosecutor v. Momčilo Perišić</i> , Case No. IT-04-81-PT, Decision on Preliminary Motion, 29 August 2005
<i>Simić</i> AJ	<i>Prosecutor v. Blagoje Simić</i> , Case No. IT-95-9-A, App.Ch., Judgement, 28 November 2006
<i>Stakić</i> AJ	<i>Prosecutor v. Milomir Stakić</i> , Case No. IT-97-24-A, App.Ch. Judgement, 22 March 2006
<i>Stakić</i> TJ	<i>Prosecutor v. Milomir Stakić</i> , Case No. IT-97-24-T, T.Ch., Judgement, 31 July 2003
<i>Strugar</i> TJ	<i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-T, T.Ch., Judgement, 31 January 2005
<i>Tadić</i> AJ	<i>Prosecutor v. Duško Tadić a/k/a "Dule"</i> , Case No. IT-94-1-A, App.Ch., Judgement, 15 July 1999
<i>Vasiljević</i> AJ	<i>Prosecutor v. Mitar Vasiljević</i> , Case No. IT-98-32-A, App.Ch., Judgement, 25 February 2004

ICTR authorities

Abbreviation used in Reply	Full citation
<i>Gacumbitsi</i> AJ	<i>Prosecutor v. Sylvestre Gacumbitsi</i> , Case No. ICTR-2001-64-A, App.Ch., Judgement, 7 July 2006
<i>Kambanda</i> AJ	<i>Jean Kambanda v Prosecutor</i> , Case No. ICTR 97-23-A, App.Ch., Judgement, 19 October 2000
<i>Nahimana</i> AJ	<i>Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze</i> , Case No. ICTR-99-52-A, App.Ch., Judgement, 28 November 2007
<i>Ndindabahizi</i> AJ	<i>Prosecutor v. Emmanuel Ndindabahizi</i> , Case No. ICTR-01-71-A, App.Ch., Judgement, 16 January 2007
<i>Ntakirutimana</i> AJ	<i>Prosecutor v. Ntakirutimana & Ntakirutimana</i> , Case No. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004
<i>Semanza</i> AJ	<i>Prosecutor v. Laurent Semanza</i> , Case No. ICTR-97-20-A, App.Ch., Judgement, 20 May 2003

Pleadings from other cases

Abbreviation used in Reply	Full citation
<i>Đorđević</i> Prosecution's Motion for Leave to Amend Indictment	<i>Prosecutor v. Vlastimir Đorđević</i> , Case No. IT-05-87/1_PT, Prosecution's Motion for Leave to Amend the Third Amended Joinder Indictment with Annexes A, B, and C, 2 June 2008

ICJ Judgements

Abbreviation used in Reply	Full citation
<i>Continental Shelf</i> Judgement	<i>North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p.3.</i>
<i>Gulf of Maine</i> Judgement	<i>Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 246</i>

General Sources

Abbreviation used in Reply	Full citation
ICRC Commentary	ICRC, Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949, ICRC, Martinus Nijhoff (1987)

Other Abbreviations

Abbreviation used in Reply	Full citation
Exh.	Exhibit
fn.	Footnote
fns.	Footnotes
para.	paragraph
paras	paragraphs
p.	page
pp.	pages
T.	Trial Transcript
UNSC	United Nations Security Council