

**PROSECUTOR v. NIKOLA ŠAINOVIĆ, NEBOJŠA PAVKOVIĆ, VLADIMIR
LAZAREVIĆ and SRETEN LUKIĆ**

Case No. IT-05-87-A

International Criminal Tribunal for the Former Yugoslavia

Appeals Chamber Judgment

January 23, 2014

Judges:

Judge Liu Daqun, Presiding

Judge Mehmet Güney

Judge Fausto Pocar

Judge Arlette Ramaroson

Judge Bakhtiyar Tuzmukhamedov

Prosecutor:

Peter Kremer

Elena Martin Salgado

Virginie Monchy

Aditya Menon

Todd Schneider

Mathias Marcussen

Daniela Kravetz

Kyle Wood

Michelle Jarvis

Nema Milaninia

Defense Counsel:

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Branko Lukić

Dragan Ivetić

Gender Keyword(s): Credibility or Character of the Victim; Opportunistic Crime; Penis; Sexual Assault/Attack/Abuse; Rape

Procedural History: The events giving rise to this case took place between March and June 1999 and concern the forcible displacement of the Albanian population in Kosovo (¶ 6). On July 8, 2005, Trial Chamber III of the Tribunal granted the Prosecution's request to join the three accused in the case of *Prosecutor v. Milan Milutinović, Dragoljub Ojdanić, and Nikola Šainović* with the four accused in the case of *Prosecutor v. Nebojša Pavković, Vladimir Lazarević, Vlastimir Dordević, and Sreten Lukić* (¶ 32).

The Trial Chamber ordered the Prosecution to submit a consolidated indictment against the seven accused (¶ 32). In its decision of March 22, 2006, the Trial Chamber found that the proposed amended indictment and the Prosecution's Pre-Trial Brief did not provide a sufficient description of the crimes allegedly committed in 1998 (¶ 70). It ordered the Prosecution to "identify the dates and locations of the crimes, the connection to each Accused and supporting material for its allegations" (*id.*). The Trial Chamber accepted the second amended indictment on May 11, 2006, two months before the beginning of the trial. On June 26, 2006, the Trial Chamber confirmed the operative indictment (*id.*). The indictment charged the accused with murder as a war crime as well as several crimes against humanity including deportation; other inhumane acts (forcible transfer); murder; and persecution through sexual assault, murder, and the destruction of or damage to religious property (¶ 6). The trial began on July 10, 2006 (¶ 43).

The Trial Chamber found that, "during the time of the crimes alleged in the Indictment," a joint criminal enterprise (JCE) existed, the common purpose of which was to ensure continued control by the Federal Republic of Yugoslavia (FRY) and Serbian authorities over Kosovo, which was to be achieved by criminal means (¶ 7). It determined that "through a widespread *and* systematic campaign of terror and violence, the Kosovo Albanian population was to be forcibly displaced both within and without Kosovo (*id.*). The Trial Chamber further concluded that while the crimes of deportation and forcible transfer were within the scope of the common purpose, the crimes of murder, sexual assault, and destruction of cultural property fell outside the common purpose (*id.*).

The Trial Chamber found that Šainović, Lukić and Pavković possessed the intent to forcibly displace the Kosovo Albanian population and contributed significantly to the JCE. As the members of the JCE used Army of Yugoslavia (VJ) and Ministry of Interior of the Republic of Serbia (MUP) forces in furtherance of their common purpose, the crimes committed by these forces in the course of implementing the common purpose were found to be imputable to Šainović, Lukić and Pavković (¶¶ 8, 9, 11). As regards the crimes falling outside the common purpose, the Trial Chamber held that the murders of Kosovo Albanians and the destruction of or damage to religious property were reasonably foreseeable to Šainović and Lukić while the occurrence of sexual assaults was not (¶¶ 8, 11). The Trial Chamber convicted Šainović, Lukić and Pavković of committing, through participation in the JCE, deportation, other inhumane acts (forcible transfer), murder, and persecution as crimes against humanity and murder as a violation of the laws or customs of war (¶¶ 8, 9, 11). The Trial Chamber further found that all of the crimes falling outside the common purpose were reasonably foreseeable to Pavković (¶ 9). This included the commission of persecution, through sexual assault, as a crime against humanity, the commission of which the Trial Chamber held was foreseeable to Pavković, thus it convicted him of this crime under extended JCE liability, or JCE III (¶¶ 283, 602).

The Trial Chamber found that it had not been established that Lazarević shared the intent of the members of the JCE and could accordingly not be held responsible under this mode of liability (¶ 10). Instead, the Trial Chamber found Lazarević to have aided and abetted the crimes of deportation and forcible transfer in which the VJ was involved (*id.*). For this reason, the Trial Chamber convicted Lazarević of aiding and abetting deportation and other inhumane acts (forcible transfer) as crimes against humanity (*id.*).

The Defendants appealed, challenging their convictions and sentences on several grounds, and requesting that the Appeals Chamber reverse their convictions and enter acquittals (on all charges) or, if any conviction was upheld, to determine that the sentences imposed by the Trial Chamber were excessive and reduce the sentence (¶¶ 12-15).

The Prosecution also presented six grounds of appeal against the Trial Judgment, including, requesting that the Appeals Chamber convict Šainović and Lukić for persecution as a crime against humanity for the sexual assaults in Beleg and Ćirez/Qirez, (for which Pavković had been convicted under JCE); and convict Šainović, Pavković, and Lukić for persecution as a crime against humanity for the sexual assaults in Priština/Prishtina, increasing the Defendants' sentences should these new convictions be entered (¶ 16). The Prosecution also submitted that, in any event, the sentences imposed by the Trial Chamber were too low and should be increased (*id.*). With regard to the Trial Chamber's finding that the rapes that occurred in Priština /Prishtina did not constitute persecution as a crime against humanity, the Prosecution argued that the Chamber had erred in law and fact by not finding that these rapes occurred with the required discriminatory intent (¶¶ 574). The Prosecution thus requested that the Appeals Chamber find that the rapes of witnesses K31, K14, and K62 were committed with discriminatory intent, and as a result, convict Šainović, Pavković, and Lukić for these rapes as persecution and increase their sentences accordingly (¶¶ 574-576). The Prosecution argued further that Pavković had the required *mens rea* and should therefore be convicted of persecution as a crime against humanity for the sexual assaults that were committed in Pristina (¶ 1593). On January 23, 2014, the Appeals Chamber issued its judgment in this matter. This is a digest of the Appeals Chamber's findings with a focus on those grounds of appeal related to allegations of sexual assault described above.

Disposition:

The Appeals Chamber allows in part the Prosecution's third and fourth grounds of appeal, and finds, Judge Liu and Judge Tuzmukhamedov dissenting, that the Trial Chamber incorrectly found Šainović and Lukić not guilty for committing, through their participation in a JCE, persecution as a crime against humanity through sexual assaults in Beleg, Ćirez/Qirez, and Priština/Prishtina (pp. 739, 742). The Appeals Chamber declines, Judge Ramarosan dissenting, to enter new convictions against them in this regard (pp. 740, 742). The Appeals Chamber also accepts in part the prosecution's fourth ground of appeal and finds that the Trial Chamber incorrectly found Pavković not guilty for committing, through his participation in a JCE, persecution as a crime against humanity through sexual assaults, committed in Priština/Prishtina, but declines, Judge Ramarosan dissenting, to enter new convictions against him in this regard (p. 740). Additionally, the Appeals Chamber reverses Šainović, Lukić and Pavković's convictions for three counts of JCE liability for murder and persecution through murder as a crime against humanity; reverses all four Defendants' convictions for certain counts of deportation and inhumane acts (forcible transfer) as crimes against humanity; and allows in part the prosecution's fifth ground of appeal and finds that the Trial Chamber incorrectly found Lazarević not guilty for aiding and abetting deportation and inhumane acts (forcible transfer) as crimes against humanity in separate counts (pp. 739-742). The Appeals Chamber grants Šainović's appeal with regard to sentencing and reduces his sentence from 22 years to 18 years of imprisonment;

grants Lukić's appeal regarding sentencing and reduces his sentence from 22 years to 20 years; and affirms Pavković's sentence of 22 years; (pp.740-742).

Key Gender-Based Holdings:

CREDIBILITY OR CHARACTER OF THE VICTIM:

- As discussed under "Rape" below, Lukić argued on appeal that Witness K14, who testified that several policemen came to her apartment wearing blue ribbons, took her to a hotel, and raped her, was an unreliable witness (¶ 589). Lukić based this assertion on the fact that K14 testified that the policemen were wearing blue ribbons while he contended that on the day in question, the policemen were wearing red ribbons (¶¶ 589-590). The Appeals Chamber observes that the Trial Chamber specifically noted evidence that police forces in Kosovo had been instructed to wear red ribbons on the day in question and acknowledged some contradictions in K14's testimony, but concluded that given K14's "age, the traumatic nature of the event, and the passage of time" such contradictions were understandable (¶ 592). The Trial Chamber concluded that such contradictions did not undermine the reliability of K14's account or her identification of the perpetrators as police, who she correctly identified as wearing blue uniforms (*id.*). The Appeals Chamber finds that the Trial Chamber carefully evaluated the reliability of K14's evidence and was able to observe her demeanor in court, thus the Trial Chamber reasonably relied on the testimony of K14 as a reliable account of the incident (*id.*).

OPPORTUNISTIC CRIME:

- As discussed under "Modes of Liability" below, in response to the Prosecution's assertion that he should have been found guilty of persecution as a crime against humanity through sexual assaults under JCE III liability, Lukić argued that the sexual assaults were not foreseeable to him because they "were individual instances of crime" and were not related to any "planning" or "order" given either by him or other commanders (¶ 1571). He characterized the rapes as "separate isolated opportunistic acts" (*id.*). The Defendants raised similar arguments in response to the Prosecution's submission that the rapes were committed with the discriminatory intent required to constitute persecution as a crime against humanity (¶¶ 577, 589, 595). The Defendants characterized the rapes as isolated, domestic, ordinary crimes, unconnected to the broader displacement of Kosovo Albanians while the Prosecution emphasized that the rape of K62 in particular "was not a simple crime of opportunity committed in isolation: rather, it was an act of violence and intimidation that formed part of the discriminatory operation targeting K62's neighbourhood as well as the broader campaign to expel ethnic Albanians from Kosovo" (¶¶ 577, 589, 595). The Appeals Chamber finds that the rapes were committed with discriminatory intent and were committed within the context of a broader campaign to forcibly displace Kosovo Albanians through a campaign of terror and violence (¶¶ 586, 593, 599, 1582, 1592).

PENIS:

- As discussed in “Rape” below, the Appeals Chamber assesses the Trial Chamber’s findings that K62 was raped by either a VJ soldier or MUP personnel (¶ 594). During the rape, one of the men put his penis in K62’s mouth (*id.*).

RAPE:

- The Trial Chamber found that Witnesses K31, K14, and K62 were raped by VJ and MUP forces in Pristina in April and May 1999 (¶ 573). However, the Trial Chamber concluded that the Prosecution failed to present any evidence to demonstrate the discriminatory intent of the perpetrators who committed these rapes and thus held that the rapes did not constitute persecution as a crime against humanity (*id.*). The Appeals Chamber considers the Prosecution’s contention that the Trial Chamber erred in this finding by failing to consider the context in which the rapes occurred (¶ 580). The Appeals Chamber assesses the evidence presented at trial and notes that the Trial Chamber found that the Prosecution had failed to present “any evidence” from which the discriminatory intent of the perpetrators of the rapes could be inferred, despite the fact that K31, K14, and K62 – all Kosovo Albanian women – were raped by VJ and MUP forces “in the course of the operation to remove large numbers of Kosovo Albanians from Priština/Prishtina town”(*id.*). The Appeals Chamber thus finds that the Trial Chamber erred by failing to properly consider the context in which the rapes occurred and holding that there was no evidence from which to infer the perpetrators’ discriminatory intent (*id.*). Having found this error, the Appeals Chamber determines whether the only reasonable inference to be drawn from the evidence presented at trial was that K31, K14, and K62 were raped because they were Kosovo Albanian (*id.*)..
 - Witness K31: The Appeals Chamber notes that the Trial Chamber found that K31 was sexually assaulted by a soldier as she was transported to a Pristina hospital with her brother (¶ 581). The Trial Chamber found that K31 was taken to the basement once she reached the hospital, locked inside a room with 10-15 other Kosovo Albanian women, was beaten, drugged, and raped by 3 VJ soldiers, and was bitten by one of the soldiers while he sexually assaulted her (*id.*). The Appeals Chamber considers the Prosecution’s submission that the only reasonable inference to be drawn from the evidence is that K31 was raped with discriminatory intent given the fact that K31 had been expelled from her village and detained with other Kosovo Albanian women and after one soldier raped her, K31 heard him swear at Albanians (¶ 582). The Prosecution argued that K31’s rape and detention were not isolated events but rather an integral part of a larger scheme of discriminatory events in which K31 was targeted because she was Kosovo Albanian (*id.*). The Appeals Chamber takes into consideration Sainović’s arguments that the discriminatory attack against the Kosovo Albanian population cannot be extended to include the act of rape based on coincidences of time and location, and Sainović and Lukić’s contentions that the broader attack and the rape were unconnected (¶¶ 583, 585). The

Appeals Chamber looks at the context of K31's rape, including the fact that she and other Kosovo Albanians had been expelled from their village, which was attacked by VJ and MUP soldiers as part of a campaign to remove Albanians, and she had witnessed the killing of her relatives by FRY and Serbian forces due solely to their ethnicity (¶ 584). K31's brother had been shot during the attack and she and her brother were transported to the hospital for that reason and it was there that K31 was handcuffed, threatened, beaten, interrogated and raped (*id.*). Looking at the totality of the evidence, the Appeals Chamber is satisfied that the only reasonable inference to draw from the evidence is that K31's rape was conducted with discriminatory intent (*id.*). The Appeals Chambers therefore finds that K31's rape was not merely coincidental to a broader attack on Kosovo Albanian, rather it constitutes persecution as a crime against humanity committed within the context of a systematic attack against the civilian population of Pristina and part of a broader widespread and systematic attack against Kosovo Albanians in Kosovo (¶ 586).

- *Witness K14*: The Appeals Chambers looks to the evidence presented at trial to determine whether K14's rape was conducted with discriminatory intent (¶ 587). From the evidence presented at trial, the Trial Chamber found that in late May 1999, a group of policemen wearing ribbons on their arms came to K14's home in Pristina (*id.*). Two of the policemen, with a local person dressed as a policeman, returned the next day and took K14 and her sister to their car (*id.*). The policemen allowed her sister to return to the home but forced K14 into the car where one of the policemen slapped her in the face, bit her neck, hit her with a rifle butt, and drugged her (*id.*). The policemen took K14 to Bozhur Hotel, where one of the policemen raped her (*id.*). After the rape, the Trial Chamber found that the policeman told K14 that he would not let the other policeman into the room if K14 promised to come back on Monday and bring her sister for his friend (*id.*). For the next two days, both policemen drove past K14's home, honking the horn several times (*id.*). On the Monday that she was meant to return to the hotel, K14 and her family fled Pristina (*id.*). The Prosecution submitted that the only reasonable inference to draw from the evidence and the context was that K14 was raped with discriminatory intent and that it was an act of persecution committed during the discriminatory campaign to drive out Albanians from Pristina (¶ 588). The Appeals Chamber considers the evidence that prior to K14's rape, her house was targeted due to the Kosovo Albanian residents in the home and that K14 and her family faced various acts of intimidation by policemen prior to her rape (*id.*). Further, the Appeals Chamber considers the fact that the Bozhur Hotel was well-known for the beatings of those detained there and that the hotel was filled with Kosovo Albanians on the day in question (*id.*). Sainović argued that K14's rape fulfilled the elements of rape as a domestic crime and not of that of persecution as a crime against humanity, while Lukić argued that K14's testimony was unreliable because she incorrectly identified the color of the ribbons that the police forces were wearing on the day in question (¶ 589). The Appeals Chamber considers the totality of the evidence and is satisfied

that the only reasonable inference to be drawn is that K14 was raped with discriminatory intent by a member of the MUP (¶ 591). In evaluating the evidence, the Appeals Chamber determines that K14 was intentionally chosen by the police from a Kosovo Albanian household, as the police came to K14's home the day before the rape, required her family to fill out forms, warned them not to keep refugees, and stated that they would come back the next day to take the family to Bozhur Hotel to have the forms stamped (*id.*). When the policemen returned, K14 was taken to a hotel feared by Kosovo Albanians as a place of violence and raped (*id.*). With regard to Lukić's assertion that K14 was an unreliable witness, the Appeals Chamber concludes that the Trial Chamber reasonably relied on K14's testimony although some of K14's evidence was contradictory (*id.*). This finding is discussed further under "Credibility or Character of the Victim" The Appeals Chamber finds that K14 was raped by a policeman with discriminatory intent and that the act constitutes persecution as a crime against humanity (¶ 593). The Appeals Chamber also finds that the crime was committed in the context of a systematic attack against the civilian population of Pristina, which was a part of the systematic and widespread attack against Kosovo Albanian citizens in Kosovo (*id.*).

- *Witness K62*: The Appeals Chamber looks at the evidence presented at trial to determine whether K62's rape was committed with the requisite discriminatory intent (¶ 594). The Trial Chamber found that on April 1, 1999, K62 was alone in her home when 3 VJ soldiers or MUP personnel entered her apartment (*id.*). While two of the men started to search the apartment, the other man pushed K62 to the floor and raped her (¶ 594). The second man came over and raped K62 as well, and the third man put his penis in K62's mouth (*id.*). The Appeals Chamber considers the Prosecution's submission that K62's rape was committed with discriminatory intent as the VJ or MUP personnel arrived at K62's apartment and asked her if there were any KLA members in her apartment (¶ 595). The Appeals Chamber considers the Prosecution's contention that K63, K62's husband, provided evidence that he saw armed police in his neighborhood ejecting Kosovo Albanians from Pristina on the day in question (*id.*). The Prosecution argued that this evidence demonstrates that this was not a simple crime of opportunity that occurred in isolation, but rather an act of violence and intimidation that formed part of a broader campaign to expel ethnic Albanians from Kosovo (*id.*). Sainović argued that these general circumstances did not demonstrate discriminatory intent for the specific act of rape (¶ 596). Lukić argued that K63 was not a reliable witness and he did not see the rape and that K62's testimony regarding whether the perpetrators were MUP or VJ personnel was inconsistent (¶¶ 596, 598). The Appeals Chamber looks at the totality of the evidence and the context and determines that the only reasonable inference to be drawn is that K62 was raped with discriminatory intent by three VJ or MUP personnel (¶ 597). The discriminatory intent is evidenced by the fact that Kosovo Albanian residents were being ejected from their homes in Pristina the same day as the rape occurred and when the VJ or MUP personnel came

to K62's apartment, they asked questions relating to the potential presence of KLA members, (*id.*). The Appeals Chamber also determines that the inconsistency in K62's evidence as to whether the perpetrators were VJ or MUP is irrelevant to Lukić's criminal responsibility because the Trial Chamber previously found that both VJ and MUP crimes were imputable to Lukić (¶ 598). The Appeals Chamber finds that K62 was raped by 3 VJ soldiers or MUP personnel with discriminatory intent, and that the rape constitutes persecution as a crime against humanity (¶ 599). Further, the Appeals Chamber finds that the rape was committed in the context of a systematic attack against the civilian population of Pristina, which was part of the systematic and widespread attack against Kosovo Albanian civilians in Kosovo (*id.*).

SEXUAL ASSAULT/ATTACK/ABUSE:

- The Appeals Chamber uses the term “sexual assault” interchangeably with the term “rape” in discussing the allegations and analyzing the legal issues discussed further under “Rape” above and “Modes of Liability” below.

Other Issues:

MODE OF LIABILITY:

- The Appeals Chamber addresses two issues regarding the Defendants' liability under JCE III for persecution as a crime against humanity committed through sexual assaults: 1) the foreseeability standard by which the JCE III liability of Sainović and Lukić should have been assessed for sexual assaults that occurred in Beleg and Ćirez/Qirez and Priština/Prishtina; and 2) whether Pavković possessed the required *mens rea* for JCE III liability for sexual assaults committed in Priština/Prishtina.
- The Trial Chamber found that persecution as a crime against humanity was committed through sexual assaults in Beleg and Ćirez/Qirez in March and April 1999, respectively (¶ 1550). The Trial Chamber convicted Pavković for these crimes under JCE III liability, but it acquitted Sainović and Lukić of these crimes under JCE III, finding that the Prosecution had failed to prove that the crimes were reasonably foreseeable to Sainović and Lukić and that such level of foreseeability was required in order to give rise to JCE III liability (*id.*). The Trial Chamber adopted this standard of foreseeability from the Appeals Chamber's decision in the *Brđanin* case, which held that for an accused to incur criminal responsibility pursuant to JCE III “it has to be reasonably foreseeable on the basis of the information available to the accused that the crime or underlying offence *would be committed*”¹ (*id.*, *emphasis added*). On appeal, the Prosecution argued that the Trial

¹ *Prosecutor v. Brđanin*, Appeals Chamber Judgment, April 3, 2007, ¶¶ 365, 411. It should be noted that the Trial Chamber cited this case for its proposition that the foreseeability requirement was that it must be foreseeable to the accused that the crime in question *would be* committed. In fact, the paragraphs of the *Brđanin* Appeals Chamber judgment cited by the Trial Chamber provide that for JCE III liability, it must be foreseeable that such a crime *might be* perpetrated.

Chamber erred by applying this “probability” standard regarding the likelihood that the offense at issue *would be* committed, and as a result, acquitted Sainović and Lukić for JCE III liability for these sexual assaults (¶ 1551). The Prosecution submitted that the Trial Chamber should have instead applied the standard for JCE III liability articulated by the Appeals Chamber after the *Brđanin* Decision in the *Karadžić* JCE III Decision², which held that JCE III liability requires only an awareness that the crime is a “possible” rather than a “probable” consequence of the implementation of the JCE. (¶ 1553). The Appeals Chamber agrees with the Prosecution, finding that “the Trial Chamber erred in law in concluding that for JCE III liability to arise, it must be foreseeable to the accused that the crime ‘*would be committed*’” (¶ 1557, *emphasis added*). In other words, the Appeals Chamber finds that for JCE III liability, the correct legal standard is that “it was foreseeable to the accused that such a crime *might be* committed by a member of the JCE or one or more of the persons used by the accused (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose and the accused willingly took the risk that such a crime *might* occur by joining or continuing to participate in the enterprise” (*id.*, *emphasis added*). The Appeals Chamber then applies this legal standard to the evidence in the present case to determine whether this evidence establishes, beyond reasonable doubt, that persecution, through sexual assaults, committed in Beleg, Ćirez/Qirez, and Priština/Prishtina was foreseeable to Sainović and Lukić and that they willingly took the risk that the crimes could be committed (¶ 1559). The Prosecution points to evidence adduced at trial regarding the leadership roles that both Sainović and Lukić played leading MUP and VJ personnel, which the Prosecution asserts gave them access to information that sexual assaults were a possible consequence of the broader common purpose of the JCE, which was to forcibly displace the Kosovo Albanian population (¶¶ 1560-1561, 1575, 1583). Factors cited by the Prosecution include information about widespread violence committed against Kosovo Albanians shared at meetings both men attended, letters they received from concerned groups and individuals, reports by human rights organizations, and articles in the media (¶¶ 1560-1563). The Appeals Chamber assesses the individual knowledge of both Sainović and Lukić and whether the information each man had was sufficient to put them on notice that sexual assaults were a possible consequence of the actions of all those involved in the JCE (¶ 1575). The Prosecution asserts that Sainović and Lukić’s awareness of other violent crimes committed by VJ and MUP forces was sufficient to put them on notice that sexual assaults could occur as “there is no legal requirement that a crime be committed in large numbers for it to be foreseeable pursuant to JCE III” rather, the question

² *Prosecutor v. Radovan Karadžić*, Decision on Prosecution’s Motion Appealing Trial Chamber’s Decision on JCE III Foreseeability, June 25, 2009, ¶¶ 15, 17-18.

should be whether sexual assaults fit into the broader pattern of violence occurring, as sexual assaults are not qualitatively different from other violent acts (¶ 1562). The Prosecution argued further that sexual assaults were foreseeable given the use of violence and terror in the execution of the common plan of the JCE to forcibly remove Kosovo Albanians and the Defendants' opportunity to witness the nature of that process of displacement; the incorporation of violent paramilitaries into the ranks of the VJ and MUP; the history of sexual assault throughout the conflict in the former Yugoslavia; the strong animosity based on ethnic differences at work in the region at that time; and the refugee crisis the displacement had created, putting women at risk of sexual assault, especially since they were separated from their male counterparts (¶¶ 1561-1562). Sainović argued that he did not have the access to information that the Prosecution alleged he had and claimed he was unaware of the incidence of any other crimes, "particularly of rape, given that rape is an 'entirely different serious' crime" and characterized the rapes evidenced in this case as "isolated and sporadic" and thus not foreseeable (¶¶ 1564-1568). Lukić similarly denied having sufficient knowledge to foresee the possibility of sexual assaults occurring and characterized such acts as "opportunistic" (¶ 1571). The Appeals Chamber assesses all of the evidence that each man possessed the requisite knowledge to foresee the possibility of sexual assaults occurring and whether, possessing such knowledge, the defendants willingly took the risk that such assaults could occur (¶ 1575). The Appeals Chamber finds that for JCE III liability to apply, it must establish "the possibility of sexual violence being committed was sufficiently substantial as to be foreseeable to each accused" (*id.*). The Appeals Chamber recalls that the JCE, of which both men were members, shared a common purpose to forcibly displace the Kosovo Albanian population through "a widespread and systematic campaign of terror and violence" (¶¶ 1576, 1584). To determine whether or not each man could foresee that sexual assaults could occur within the context of this common purpose, the Appeals Chamber reviewed the Prosecution's evidence of the meetings, reports, and other sources of information detailing the commission of violent crimes provided to the defendants at the relevant time, as well as both men's presence in the area at key moments, which afforded them both the chance to see the violent crimes that were being committed firsthand (¶¶ 1560-1561, 1575, 1577-1582, 1585-1591). Given the circumstances, "the Appeals Chamber, Judge Liu dissenting, finds that Sainović must have been aware that sexual assaults could be committed on discriminatory grounds in an environment of ethnic animosity in which hundreds of thousands of Kosovo Albanian civilians were being forcibly displaced" (¶ 1581). Citing evidence that he was aware of specific reports of rapes that had occurred in the context of the displacement of Kosovo Albanians in the area and other information he was privy to, the Appeals Chamber makes the same finding in regard to Lukić (¶ 1591). As a result, the Appeals Chamber finds that both men participated in a JCE to forcibly displace Kosovo

Albanians, knowingly taking the risk that sexual assaults could occur as a result, and thus committed, under JCE III liability, persecution through sexual assaults (¶¶ 1582, 1592).

- Turning to the second issue regarding the applicability of JCE III liability to sexual assaults in this case, the Appeals Chamber assesses whether Pavković possessed the requisite *mens rea* to be held liable for sexual assaults that occurred in Pristina (¶ 1593). As noted above, the Trial Chamber held that Pavković was responsible under JCE III for the sexual assaults that occurred in Beleg and Ćirez/Qirez, but did not find him similarly responsible for the sexual assaults that occurred in Pristina (¶ 1593). The Prosecution argued that having found Pavković responsible for these other sexual assaults committed by VJ and MUP personnel in Beleg and Ćirez/Qirez, the Trial Chamber should have also found him responsible for the sexual assaults VJ and MUP personnel committed in Pristina (*id.*). In assessing this argument, the Appeals Chamber recalls its findings regarding the connection between Pavković and VJ and MUP forces, and seeks to determine whether this link also makes the sexual assaults VJ and MUP forces committed in Pristina imputable to Pavković (¶ 1595). The Appeals Chamber finds that because the sexual assaults in Pristina were also “committed by VJ and/or MUP forces, [it] finds that these crimes are also attributable to Pavković, as a JCE member (*id.*). The Appeals Chamber next examines whether or not the sexual assaults committed in Pristina were sufficiently foreseeable to Pavković (¶ 1596). The Appeals Chamber reviews the Trial Chamber’s findings with regard to Pavković’s JCE III liability for the sexual assaults that occurred in Beleg and Ćirez/Qirez, which was based on the common purpose of the JCE to forcibly displace Kosovo Albanians through “a widespread and systematic campaign of terror and violence”; Pavković’s intent to displace that population and his awareness of the context in which the forcible displacement took place, including the strong animosity between the Serbs and the Kosovo Albanian population; and his detailed knowledge of events occurring in Kosovo at that time, which put him on notice that serious crimes, including murders and sexual crimes, would be committed by VJ and MUP personnel (*id.*). Additionally, the Trial Chamber found that Pavković was regularly in Pristina throughout the conflict and during the displacement of Kosovo Albanians and that there was evidence that he had learned of violent crimes occurring, including murder (¶ 1599). The Appeals Chamber recounts evidence that the Trial Chamber heard, including reports Pavković received and meetings he attended, as well as his own reports and orders that he issued, that discussed the occurrence of serious crimes, including rape, establishing his knowledge of violent acts committed by VJ and MUP personnel (¶¶ 1599-1600). Recalling Pavković’s intent to forcibly displace the Kosovo Albanian population through a campaign of terror and violence and his conviction under JCE III liability for persecution through sexual assaults that occurred in Beleg and Ćirez/Qirez, and the evidence that Pavković was aware of various criminal acts of violence committed by VJ and MUP forces against the Kosovo Albanian population, the Appeals Chamber finds beyond a reasonable doubt that Pavković could foresee the sexual assaults committed in Pristina and that he participated in the JCE, through his role as a commander of the 3rd Army, acting in furtherance of the JCE despite his awareness of the possibility that sexual assaults

might be committed, willingly taking the risk of this occurring (¶ 1602). The Appeals Chamber thus holds that Pavković is responsible through his participation in a JCE for persecution as a crime against humanity through sexual assaults that occurred in Pristina (¶ 1603).

- Having found that Sainović and Lukić are liable under JCE III for the sexual assaults that occurred in Beleg and Ćirez/Qirez and having found Pavković responsible under JCE III for the sexual assaults that occurred in Pristina, the Appeals Chamber grants the Prosecution's appeal in part on these grounds (¶ 1604). However, the Appeals Chamber, Judge Ramaroson dissenting, declines to enter new convictions on appeal in relation to the sexual assaults in question (*id.*).