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-03-67-T
		Date:	31 March 2016
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IN TRIAL CHAMBER III

Before: **Judge Jean-Claude Antonetti, Presiding**
Judge Mandiaye Niang
Judge Flavia Lattanzi

Registrar: **Mr John Hocking**

Opinion issued on: **31 March 2016**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

CONCURRING OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI ATTACHED TO THE JUDGEMENT

The Office of the Prosecutor

Mr Serge Brammertz
Mr Mathias Marcussen

The Accused :

Mr Vojislav Šešelj

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I. INTRODUCTION

It is unusual for a court ruling to have annexed to it an opinion of several hundred pages, even through at the Supreme Court of the United States or the International Court of Justice, for example, certain opinions run on a similar number of pages. What compelled me to write an opinion **concurring** with the Judgement? I was compelled to write it due to this specific case which is very uncommon, both in terms of the length of provisional detention and the various difficulties that accompanied the proceedings from beginning to end, hampering, in my view, the normal course of justice.

I thought it necessary to explain **clearly** to the reader how international justice was administered in the trial of **Vojislav Šešelj**, without hiding any disturbing truths. From my point of view this opinion is necessary because, for one, the victims need to know **why** the judges took so long to render the judgment. The Accused, who had the right to an **expeditious trial**, also needs to know **why** that was not the case. Finally**, the Prosecution** also needs to be informed of the real reasons why the Judgement could not be delivered before 31 March 2016.

In order for the reader to be fully aware of what actually happened, a certain **courage** is needed to tackle the various subjects that will be dealt with here below and, in my view, it serves no purpose to hide the problems we encountered. In this respect, I was very impressed by the **Nuremberg** trial, on which a book written by one of the assistant prosecutors provided a wealth of detailed information subsequent to the judgment.[1]

It is almost certain that, in the future, researchers will study the workings of our international tribunal (and, perhaps, this very case) and will certainly reveal what I am about to describe here.

The case itself could be considered a simple one because it was more or less about trying an accused who **had no administrative, ministerial or military responsibility** at the time of the commission of the crimes. His was a case of an **opposition leader** who, as part of exercising his mandate as a member of parliament or in the course of his political campaigns, spoke out a number of times *via* the media and visited frontlines. What makes the case complicated is that the Prosecution, relying on a theory derived from the Tadić case-law, wanted to ascribe to the Accused **a major role** in a joint criminal enterprise ("JCE"). As a result of this aspect of the case, it is necessary to obtain an objective view of this notion of JCE and conduct a thorough examination of the forms of responsibility, since the appropriate form of responsibility for the accused must be

[1] Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Knopf 1992. Published in French as *Procureur à Nuremberg*, by Editions du Seuil, 1995, 709 p.

determined. Having developed a legal outline, I had to address various procedural issues that impacted on the substance of the case; these issues are many and are all included in the chapter on "procedural issues".

I feel it is also my duty to explain to the uninitiated reader why this case took more than **13 years**, what the real reasons are and who, if anyone, is responsible for the delay? That is the reason why I will later recall the circumstances surrounding the **disqualification of Judge Harhoff** which led to a delay **of more than two years** in delivering the Judgement, as it should have been rendered on 30 October 2013, but was delivered on this day of **31 March 2016**.

The second reason has to do with **ineffective management**. As the reader will be able to see, it seems incredible that a case of this kind could have lasted almost twelve years during which the administration of the Tribunal failed to provide judges with a stable team of lawyers headed by a **permanent** senior legal officer, even though throughout that period we witnessed numerous departures and the arrival of several Chambers legal officers. It would, however, have made sense for the Chamber to have one and the same legal officer from the beginning to the end of the trial…This, unfortunately, was not the case and, from my point of view, it is the **main reason** for the delay, which should normally give the Accused the **right to financial compensation for a failure in the public service system of international justice, a right that is reinforced by the present Judgement of acquittal.**

All in all, this opinion is **the account** of a judge who experienced a case from within; a judge who, while protecting the **secrecy of deliberations,** tried at his own level to find the means of expediting the proceedings and whose attempts to this end were stymied by **the weight of old habits** and **the ICTY's traditional modus operandi,** on account of which, in resolution 2256 (2015), the UN Security Council requested that the Office of Internal Oversight Services (OIOS) carry out an evaluation of its work methods.

Despite these various difficulties, I must enlighten the reader on all the issues that will be raised here in order to answer legitimate questions and avoid these kinds of errors being repeated in the future by other international courts, such as the ICC for example.

Because the task of bringing justice is such a difficult one, it is very important that those who administer it avoid the pitfalls and seek **at all times** the proper means to render an expeditious

Judgement, all the while safeguarding the rights of the Accused and of the Prosecution, and bearing always in mind the expectations of the victims.

II. GENERAL ISSUES

1. THE COMPOSITION OF THE TRIAL CHAMBER

On 20 October 2006, following a hunger strike by **Vojislav Šešelj**, the Appeals Chamber issued a Decision[2] reversing the Trial Chamber's [Decision] on the issue of assigned counsel (called "standby" counsel). Under these circumstances, I was asked by the President of the Tribunal to take over as Presiding Judge of the Trial Chamber with a different composition, even though I was already presiding over another important case.

In the interests of the **ICTY,** I accepted this **duty,** even though I was fully aware that it would be very difficult and would directly impact on my work capacity, since it meant that, for years ahead, I would have a considerable workload requiring my physical and mental presence at hearings both **in the mornings** and **in the afternoons**, as well as my attendance of numerous deliberations with other judges and countless decision-making sessions, all this in two particularly demanding cases.

I nevertheless set **one condition,** namely, that I would only accept the case if the Trial Chamber entrusted me with **all** of its functions during the pre-trial stage, in keeping with the Rules of Procedure and Evidence ("Rules"). Indeed, under Rule 65 *ter* (C), "*The pre-trial Judge shall be entrusted with all of the pre-trial functions set forth in Rule 66, Rule 67, Rule 73* bis *and Rule 73* ter*, and with all or part of the functions set forth in Rule 73.*"[3]

Having been assigned in the pre-trial stage, I took over the case which was then in a deplorable state because, on the one hand, the Trial Chamber that had just been invalidated by the Appeals Chamber had numerous pending motions before it and, on the other, the Accused had not received a single document from the Prosecution for years on the grounds that, since he was opposing the assignment of counsel, he did not wish to cooperate. Consequently, I noted the extent of the damage at the very first status conference and had to proceed with finesse and conviction to resolve the existing problems and enjoin the Prosecution to make a fresh start and disclose evidence to the Accused pursuant to Rules 66 and 68.

During this pre-trial stage, the composition of the Trial Chamber was made definitive with the appointments of Judges **Lattanzi** and **Harhoff**.[4]

[22] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, "Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel", 8 December 2006, para. 14.
[3] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Order Entrusting Functions to Pre-Trial Judge", public, 27 February 2007.
[4] *The Prosecutor v. Vojislav Šešelj*, case IT-03-67-PT, "Order Assigning Judges to a Case before a Trial Chamber", public, 26 October 2007.

In parallel with this case, Judge Harhoff was assigned to the *Stanišić and Župljanin*[5] case and Judge Lattanzi to the *Karadžić* case as a reserve judge.[6]

It is noteworthy that I was not consulted by the President of Tribunal regarding the assignment of these two Judges to other cases… Had I been, I would have said that, bearing in mind the situation of the Accused in pre-trial detention, this case needed to be given **top priority**; furthermore, Article 14.3 of the Statute makes it obligatory to consult the permanent judges and also makes available to the Trial Chamber an effective and stable **legal team**, which was not an impossible challenge, considering the attraction that our international court held for numerous candidates.

Following the disqualification of Judge **Harhoff**, **Judge Niang** was appointed on 31 October 2013. I had the opportunity then to put an end to all those years when the Accused filed a motion to terminate the proceedings. However, I decided to continue with the new judge, despite numerous drawbacks, in order to have justice served in this case.

[5] *The Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, "Order Re-Assigning Case to a Trial Chamber and Assigning *Ad Litem* Judges for the Purposes of Pre-Trial Work", public, 24 March 2009.
[6] *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, "Order Assigning *Ad Litem* Judges to a Case before a Trial Chamber", public, 4 September 2009.

2. JUDGE NIANG'S FAMILIARISATION WITH THE RECORD

Judge **Niang** was appointed by an order of the Vice-President to replace Judge Harhoff. As soon as he arrived, Judge Niang was confronted with Vojislav **Šešelj's** motion requesting the Chamber to find that his [time spent in] provisional detention was excessive, that the Chamber had been "contaminated" by Judge Harhoff and that, in those circumstances, his trial should be discontinued. The Prosecution responded to this motion by inviting the Trial Chamber to reject it.

The Trial Chamber, in its new composition, issued its decision on continuation of proceedings on **13 December 2013**.

Judge Niang joined to this Decision his separate opinion giving an estimate of the time he would require to familiarise himself with the record. Subsequently, Judge Niang informed his colleagues by an internal memo that, having been assigned to the *Popović et al.* case, he could only begin this work once the Appeal Judgement in that case had been delivered. After the Appeal Judgement in *Popović et al.* had been rendered on **30 January 2015**, Judge Niang began his process of familiarisation.

At the end of **June 2016**, Judge Niang informed his colleagues by internal memo that he had completed his process of familiarisation. That being so, a meeting was held early in July 2015 allowing the judges to recapitulate the issues and include them all in a single working document which was sent to the judges on **18 November 2015**.

The notion of "familiarisation" is particularly interesting. What exactly does it mean? Does the Judge have to have a **complete** and **exhaustive** view of all the elements of the proceedings or should he rely only on some of them? The French language dictionary *Le Petit Robert* gives the following definition of the term "to familiarise oneself: **"To familiarise oneself with something, to become familiar through habit, practice, or exercise"**. *Le Petit Robert* indicates as synonyms: "to get accustomed to", "to get used to". To draw a parallel with the Slobodan Milošević case, the new judge who took up his post on 1 June 2004 was involved in a decision of 142 pages, consisting of 300 paragraphs and 809 footnotes, only 15 days after being assigned to the case, since the decision was rendered on 16 June 2004. Even more remarkably, this new judge ruled on a number of partial acquittals listed in a table in an annex of several pages. It was thus evident that this new judge had not studied the case-file through and through, but settled instead for reading a document that had been prepared by the legal team.

In the case of Vojislav **Šešelj**, I would not have allowed the new judge to say simply “aye or nay” based on a document prepared by the legal team! That is not my understanding of justice because the Accused has certain rights, and first and foremost, the right to be given a fair hearing before qualified judges. That being so, it was natural that the process of familiarisation should take time and, in this respect, Judge Niang did wonders since, in less than six months, he reviewed 1,399 documents and 17,554 pages of transcript, and it was thanks to his arrival that we were able to give precise instructions to the team so that they could prepare a working document for us..

That the word "familiarisation" was included in Article 15 *bis* of the Rules demonstrates the desire to ensure that proceedings can continue with a substitute judge without prejudice to the Accused. Moreover, this Article provides an additional safeguard by subordinating familiarisation to the consent of the judges composing the truncated panel short of one judge, since the new judge has to prove that he has familiarised himself with the record, the onus of proof being on him.

It was particularly important for me to raise this issue in this opinion, because it was quite clear that different levels of familiarity with the record could lead to different outcomes, and I am very pleased that the new judge put a lot into this case, as this Judgement bears out.

3. THE METHODS OF WORK AT THE ICTY AND THE USE OF TIME

The **Vojislav Šešelj** case is a complex case that required the mobilisation of the Judges and the legal team in order to render **the Judgement** within an acceptable time limit. Despite the efforts of them both, and with all the procedural vicissitudes encountered in this case, this Judgement was delivered more than four years after the end of the trial.[7]

What are the **true reasons** for that? There are a number of them, and I shall enumerate the principal ones, without being completely exhaustive:

- **First**, the testimony-based evidence had to be analysed rigorously in order to establish its relevance and probative value beyond all reasonable doubt. Since nearly all Prosecution witnesses were either accused of being **false witnesses** or declared themselves to be **defence witnesses**, it was necessary to **sort through [the evidence]** and distinguish between what was the truth and what was speculation or outright lies.

  Aware of this difficulty, the Chamber deemed it appropriate to admit into evidence the witnesses' prior statements in order to compare the evidence these witnesses gave in court with their prior statements because, in some cases, there were significant discrepancies. Thus, the judges had to examine methodically each and every witness statement. This was a time-consuming exercise, which may explain the length of the deliberations.

  The specific nature of this case did not facilitate the task of **Judge Niang** when he was appointed to replace **Judge Harhoff.** Moreover, this replacement of a judge caused the delivery of the Judgement - initially scheduled on 30 October 2013 - to be further delayed for almost two and a half years.

- **The second factor,** which seems to me more decisive, concerns **the work methods** prevailing at the ICTY. Since the creation of this Tribunal, these methods have never varied, which I find regrettable. When a Chamber is designated, it is assisted by a legal team consisting of lawyers who are recruited based on several criteria and graded from P1 to P5.

  The legal team is headed by an officer with a P3 or P4 grade (in some cases even a P5) who exercises **direct authority** over the assistants who, under his direction, draft decisions or the Judgement. The judges come in at the stage of deliberations, either to approve the drafts or

[7] The hearings closed on 20 March 2012.

to make corrections. All this takes time because, first of all, a draft has to be written by an assistant and then revised by his superiors, and only then is it submitted to the judges.

The **constant** turnover of legal officers of the Chamber also caused delays, because on each occasion, a new arrival needed time to learn the ropes, which obviously had an impact on the work currently under way.

Knowing how **unwieldy** this system is, upon my appointment as **pre-trial judge**, I changed the work method by working only with one new P2 assistant, which enabled me to complete the pre-trial proceedings in **record time,** since I made and drafted the decisions **myself**, thus **advancing** the date of the start of the trial by **six months**.

Based on this experience, I believe that an **expeditious** trial before an international court is possible on the express condition that **the Presiding Judge** has direct authority over the assistants who would report not to an internal hierarchy, but to the **Presiding Judge alone**. From my point of view, the **Presiding Judge** should be the one to designate the **intern** or **the assistant,** as the case may be, who will sit in the courtroom in order to write the summary of the trial session. That kind of situation would never have happened with the method of work that I advocated. The way things are done at the ICTY is such that change is impossible without a "cultural revolution", which is unlikely to ever take place.

There are two possibilities: either we want an expeditious trial and a judgment delivered in record time, in which case the Presiding Judge needs to be given **complete authority, or** we let the legal team play its "traditional role" at the ICTY, but then no-one should be surprised if the proceedings go on for years.

To improve the system, I wish to add that the recruitment of assistants should be in the hands of the **Presiding Judge**, who would select personalities based on the competencies required by a particular case. Currently, assistants are recruited in accordance with the UN system which is **cumbersome and complex,** and takes into account a whole series of different parameters, not all of which I find rational.

It is a pity not to have realised that the work method needs to be changed when we have available to us a pool of talented assistants, eager to do good work. Despite this **wealth of**

human resources at the disposal of the Judges, we are not putting it to good use, all because of inadequate work methods.

The ideal system that I suggest has the advantage of doing away with this subordination and enabling better time management in the drafting of documents.

These issues that are essential for the expeditiousness of the procedure and for safeguarding the rights of the Accused **should be** raised as part of an audit of international criminal tribunals (ICTY ICTR, and the Mechanism).

I am convinced that such an audit would confirm my point of view and enable the Mechanism to operate more effectively, all the more because it will be hearing the appeals – if submitted – in the cases of Radovan **Karadžić** and Ratko **Mladić.**

In resolution 2256 (2015), the UN Security Council entrusted the OIOS with the mission of carrying out an evaluation, and, I have produced an own-initiative report on this issue that I submitted to the director of this office, including various recommendations.

4. THE ROLE OF THE REGISTRY AND ITS IMPACT ON THE PROCEEDINGS

The ICTY **Registry** manages personnel, notably by recruiting legal staff for the judges. In some cases this can pose problems if a judge and a legal assistant are not a good match, because the former neither hires nor fires the latter.

The **Registry** also manages different services, including the **Tribunal's** internal and external **communications**, by appointing a spokesperson. In my view, this also poses problems, because several different "spokespersons" are required and, in addition, the spokesperson of a Trial Chamber should act only on the **express instructions** of the judges, or even the Presiding Judge alone, and not independently, as he or she does not have all the relevant information on the situation.[8] The Registry also manages the detention unit in Scheveningen, as it has full control over the detention conditions and health issues in particular.

Apart from these tasks, the Registry is directly involved in the proceedings pursuant to Rule 33 (B) of the Rules which stipulates as follows: *"The Registrar, in the execution of his or her functions, may make oral and written representations to the President or Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary."*

Thus, the Registrar can follow this procedure to challenge a Chamber's decision affecting a fair trial by personally appealing a Trial Chamber's decision before the Appeals Chamber. In my view this constitutes an **interference** that is not provided for in the Statute and poses a certain number of problems.[9]

Similarly, pursuant to Rule 65 (B) of the Rules Governing the Detention of Persons Awaiting Trial or Appeal or Otherwise Detained on the Authority of the Tribunal ("Rules of Detention"),[10] the

[8] In this respect, *see* the press conference of 19 June 2013 held by the spokesperson who was questioned on extremely sensitive subjects (ICTY Weekly Press Briefing), including being asked about this trial in the last two questions.

[9] On the issue of financing the Defence of the Accused, following a decision by the Trial Chamber of 29 October 2010 (*See The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Redacted Version of Decision on Financing of Defence" filed on 29 October 2010, public, 2 November 2010), the Registry lodged an appeal on 19 November 2010 (original in English entitled "Registry Submission Pursuant to Rule 33 (B) Following the Trial Chamber's Decision on Financing of Defence Dated 29 October 2010", public, with public, confidential and *ex parte* annexes, 19 November 2010). By its decision of 8 April 2011 the Appeals Chamber upheld the Trial Chamber's Decision of 29 October 2010. *See* the English original entitled "Decision on the Registry Submissions Pursuant to Rule 33 (B) Regarding the Trial Chamber's Decision on Financing of Defence", confidential, 8 April 2011.

[10] According to Rule 65 (B) of the Rules Governing the Detention of Persons Awaiting Trial or Appeal or Otherwise Detained on the Authority of the Tribunal (21 July 2005): "*All such communication shall be privileged unless the Registrar has reasonable grounds to believe that the privilege is being abused in an attempt to: i. arrange an escape, ii. interfere with or intimidate witnesses or iii. interfere with the administration of justice or iv. otherwise endanger the security and safety of the Detention Unit. Prior to such communication being monitored, the detainee and his counsel shall be notified by the Registrar of the reasons for monitoring. The detainee may at any time request the President to reverse any decision made by the Registrar under this Rule."*

Registrar can himself order the **monitoring of** the Accused's **communications**. Where this accused is concerned, this occurred a number of times at a crucial phase stage when the Accused had to decide whether he was going to present a defence case after the closure of the Prosecution case. The Accused publicly stated that because of the monitoring and the fact that he was unable to mount a proper defence case, he could not defend himself in these conditions.[11] If the reason for monitoring the Accused had been **an escape attempt or any other legitimate reason**, it would be understandable, but to this day, I have not been able to find out **why** the Accused's communications were monitored; it appears to me that this poses a problem and that, in a well-functioning international tribunal, it would be highly desirable that all the players work in symbiosis. Unfortunately, this is not the case.

I also wish to cite another characteristic example of the important role played by the Registry and its effects on the procedure. This time it concerns the health of the Accused.

The fact is that the Accused suffers from several serious conditions and he never made a secret of it, discussing them publicly in the courtroom. Among these conditions, the Accused suffered from an elevated heart rate, and for this reason doctors from outside the detention unit were brought in to examine him.[12]

In this period, the Accused was hospitalised and then returned to the Detention Unit. Due to medical confidentiality required by the management of the Detention Unit and Dutch law, the Trial Chamber was never informed in any detail of the Accused's illness. Nevertheless, I was able to observe that, one day, the Accused suddenly felt unwell and had most certainly lost consciousness for a while before he was given first aid and hospitalised.[13] Worried by this situation, I began seriously wondering about the medical treatment that the Accused was actually receiving from the

[11] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, T(E) pp. 17053-17055, 23 August 2011. "*The fact that I'm self-defending doesn't mean that I have to be alone. I have to have a structure to work on my behalf and for my benefit in the field. You wouldn't give me, for instance, two years for me [to go to Belgrade to prepare my defence], to go and inspect the locations of crimes, collect statements from witnesses, such evidence, etcetera, myself*". He added: "*Now we have come to the stage of the Defence case, and what do we have? You are giving me six weeks for a list of [the evidence], the witnesses and the preliminary statements of witnesses. Who will take the 80 preliminary witness statements? How can that be done in six weeks? How am I expected to obtain all that evidence within six weeks? This is an absurd situation. I'm not complaining because of the level of absurdity. The more absurd it gets, the more procedural benefits for me, in fact". "And since a year has passed since the adjournment or, rather, the suspension of two of my legal associates, and prohibiting me from establishing and maintaining proper communications with them, based on a false claim by Tomislav Nikolić that I abused the privileged communication for political ends".* (*Ibid*, T(F) p. 14737, 10 September 2009).

[12] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Order to Obtain Reports from United Nations Detention Unit and to Proceed with a New Medical Examination", public, 12 January 2011.

[13] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, T(F) pp. 17343-17345, 14 March 2012.

medical service of the Detention Unit. Apart from some piecemeal reports, I never found out why the medical intervention had taken so long.

I wanted to mention all these events to say that it is the duty of an international tribunal to concern itself with the situation of the convicted persons in terms of their detention, and that this must be done under the **absolute control** of the Judge presiding over the case, and not by the **Registry** which has been vested with some extraordinary powers that remain unchecked, apart from the possibility of a challenge by the Accused before the President of the Tribunal.

I also learned from media reports that the Accused had **colorectal cancer** and was receiving chemotherapy.

During his time in detention, the Accused refused to share any medical information on his actual condition.

It was only thanks to the written submissions by his legal associates addressed to the President of the Tribunal, contesting a decision to isolate him, that the judges of the Trial Chamber learned certain medical details from a report by the Detention Unit's doctor.

If the Registry is performing a strictly administrative task, referral to the President of the Tribunal so that he may exercise his discretion over an issue would be natural. However, if the Registry's activity has implications for the trial, then **the trial judge** should have **sole** competence.

Moreover, at the stage of deliberations, I learned **by chance** that the privileged communications of the Accused with the members of his team had been suspended by a decision of the Registry without informing the Trial Chamber. The Accused's website provided some information at the time of their 384th conference held on 20 June 2013. It stated that each time, there had been a correlation between the suspension of privileged communications and the elections calendar…This seems to corroborate the Accused's complaints. Fortunately, the Registrar lifted this ban and the Accused was informed thereof in his own language on 19 August 2013.

It is almost certain that in the event of the Accused's death in detention, there would have been such a furore in the media that accusations would have been levelled against the judges. Being aware of this situation and "enlightened" by the circumstances of Slobodan Milošević's death, I did not wish to find myself in a situation where I would have to assume this kind of responsibility.

The role played by the **Registry** throughout this case will remain **a mystery** to me. Was this excessive role due to overzealousness and a lack of foresight, or was there another reason?

I informed the **President of the Tribunal** of the **Registry**'s role by an internal memo dated **19 January 2011** that remained unanswered…

I am all the more surprised by this because the Registry has competent officials among its staff, and I believe that the OIOS audit needs to look into the operation of the Registry and propose solutions that would ensure the latter's greater neutrality.

5. THE CONSPIRACY THEORY AND A FAIR TRIAL

Since his arrival at the Tribunal, **Vojislav Šešelj** never stopped claiming in his submissions and public statements in the courtroom that the Indictment against him was designed to remove him from Serbia's political scene.

In this scenario, an Indictment was drawn up based on elements lacking substance in order to incriminate him. Informed of the existence of this Indictment, he decided to come to the Netherlands **on his own** without waiting for the execution of the arrest warrant; he paid for his own airfare, and upon arrival at the Schiphol airport, was arrested and taken straight to the detention unit in Scheveningen, in execution of the arrest warrant against him.

Later, he declared in the courtroom that he had come to The Hague in order to clear the good name of the members of the Serbian Radical Party.

Not content with this explanation, he added that it was the international community, through NATO member-countries, that had engineered his incarceration during all those years. To support his claims, he quoted from a diplomatic telegram from the US Embassy in Paris reporting that the diplomatic adviser to the French President had stated in a meeting that everything should be done to prevent **Vojislav Šešelj** from being elected President of the Republic of Serbia.

According to him, that was obvious proof of the international community's **collusion** to prevent him from playing a political part in his own country. He backed this viewpoint by saying that, when he was a candidate in parliamentary elections in his country, the Registrar prevented him from communicating freely with his family members and associates and prohibited him from having any contact with the media.[14]

He also added that the Tribunal has been infiltrated by Western secret services, thereby claiming that they were all as bad as each other: the Prosecutor, the Registrar and the judges. As anyone can see, the Accused has cast serious doubts over the functioning of international justice based on a number of material elements that he believes to be incontestable.

Admittedly, for political reasons, some people would not welcome this Accused's return to political life. **It is also true** that one sometimes wonders about how the Registry has behaved towards this Accused whose telephone calls they monitor just as he is preparing his final brief and

[14] Decision by the Deputy Registrar pursuant to Rules 60 and 63 of the Rules of Detention, public, 12 December 2003.

his closing arguments.[15] **Certainly** one could also wonder about the more or less nebulous role of certain members of the Tribunal, but all this in my view does not amount to a conspiracy because there is a major obstacle to that – the Judges.

For a conspiracy to succeed, the judges would have to be a part of it. Either they turn a blind eye and do not wish to see what is going on, or they take their decisions in keeping with a "concerted plan".

But in this particular case, what would be the judges' motive or intention? Does this mean that the judges are lieges to their governments, executing the orders they are given? For my part, I can only answer in the **negative**.

I never received any orders from anyone or any bidding from any quarters. As far as I am concerned, I only do my job, which is to assess the evidence produced by the Prosecution and reach a decision on the guilt or innocence of the Accused based on the evidence. There can therefore be no conspiracy of the kind the Accused had in mind.

Vojislav Šešelj has also stressed countless times that he has not been given a fair trial as envisaged by Article 21 of the Statute, which proves, to his mind, the existence of a conspiracy. There again, as far as I am concerned, I need to set the record straight and recall some incontestable elements of this case. When I came to this case, in its pre-trial stage, I noted there was an abnormally high number of outstanding motions by the Accused, and my professional experience led me to conclude that a huge problem was about to develop solely as a result of the fact that standby counsel had been imposed on him.[16]

What is more, it was obvious that this Dutch lawyer[17] did not know B/C/S and had no contact with the Accused whatsoever. The decision had been taken by different Chambers and mentioned in court. Knowing this, and in connection with the Accused's motion, I issued an opinion on the right

[15] Original version in English entitled: "Further Registry Submission Pursuant to Rule 33 (B) Regarding the Accused's Request for Review of the Decision to Monitor his Privileged Communications", Decision of the President of the Tribunal, public, 5 December 2011.
[16] Original version in English entitled: "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence", public, 9 May 2003.
[17] Decision by the Registrar to withdraw Mr. Lazarević as standby counsel and to assign Mr. Van der Spoel as standby counsel for the accused, public, 16 February 2004.

to self-defence.[18] The Accused did not learn of this opinion because, having decided to refuse all communication with the Dutch lawyer or the Office of the Prosecutor, he could not be informed of the decisions rendered, and even less so of an opinion written by a Judge. Despite this fight he was waging, a Chamber designated by the President of the Tribunal had taken the decision to proceed with the trial, disregarding the issue of standby counsel.

Following **Vojislav Šešelj**'s hunger strike whereby he put his own life in danger, the Appeals Chamber reversed a decision, affirming, in a way, the Accused's right to represent himself without standby counsel.[19] It should be noted at this point that the Appeals Chamber's decision was motivated by a procedural problem and was not a substantive position on the major issue that is self-representation.

I am stressing this to highlight the fact that there could have been no conspiracy because, had there been one, I would have personally supported the presence of standby counsel and would have thus prevented the Accused from putting forth his claims. I always refused to do this, even when the Prosecution, disregarding the Appeals Chamber's decision, demanded from the outset of the trial over which I presided that standby counsel be imposed.

On the other hand, once the fact that he could represent himself was official, the issue of financing his defence arose and, specifically, of remuneration to be paid to his close associates. Once again, the Registry adopted a stance that was obstructive, to say the least, maintaining "come hell or high water" that it was up to the Accused to prove his indigence and not up to the Registry to determine whether he was in a position to pay his own associates. Fully aware of this problem, the Chamber rendered an equitable decision, making the Registry responsible for 50% of the financing of the Accused's associates and leaving to **Vojislav Šešelj** the remaining 50%.[20] Unfortunately, our decision was not implemented and this allowed the Accused to claim that his rights had been violated.[21]

[18] Public version of the "Consolidated Decision on Assignment of Counsel, Adjournment and Prosecution Motion for Additional Time with Separate Opinion of Presiding Judge Antonetti in Annex", Separate Opinion of Judge Jean-Claude Antonetti, public, 24 November 2009.
[19] English original entitled "Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel", public, 8 December 2006.
[20] "Redacted Version of Decision on Financing of Defence", public, 2 November 2010.
[21] Closing arguments of the Accused, 15 March 2012, T(F) pp. 17408 and 17409.

6. FAIR TRIAL AND JURISPRUDENCE

The issue of time was raised by the Accused **Vojislav Šešelj** in the proceedings against him, particularly with regard to the length of his detention and the right of every accused, acknowledged in Article 21 (4) (c) of the Statute, to be tried without undue delay.

At the hearing of **20 October 2009**, **Vojislav Šešelj** made an oral request to the Trial Chamber to terminate the proceedings against him due to a grave violation of his rights, basing it on the doctrine of abuse of process.[22] He presented a number of arguments. **Vojislav Šešelj** maintained that the **length of his detention on remand** and his trial were excessive. He stressed that he had waited five years before the commencement of his trial[23] and argued that his detention of six years and eight months whilst awaiting judgement (at the time of the request) exceeded the standard of reasonable limit.[24]

According to **Vojislav Šešelj**, the numerous delays that had hindered his proceedings were all the fault of the **Prosecution,** which had notably made changes to the type and amount of evidence it had presented, requested additional time for the presentation of its case, attempted to impose counsel on the Accused, and, on top of that, amended the Indictment several times.[25] **Vojislav Šešelj** considered that the Prosecution had failed to comply with its obligations to proceed expeditiously and with due vigilance, in accordance with the jurisprudence of the European Court of Human Rights in the *Jablonski v. Poland* case (appeal judgment of 21 December 2000).[26] He also considered that the excessive length of his trial constituted a violation of his rights that was sufficiently serious to justify the implementation of the abuse of process doctrine according to which the Chamber should terminate his proceedings.[27]

The Trial Chamber recalled that undue delay may not justify the application of the **abuse of process** doctrine unless it renders impossible the right of the accused to a fair trial.[28] In the *Šešelj* case, the Trial Chamber recalled the complexity of the trial and the gravity of the charges against the Accused. It recalled that 900 exhibits had been admitted and 76 witnesses heard.[29] It also reiterated its considerations expressed in its decision of 11 February 2009, specifying that "*its duty*

[22] Court transcript of 20 October 2009, pp. 14760 to 14767.
[23] *Ibid*, p. 14756.
[24] *Ibid*, pp. 14756 and 17460.
[25] *Ibid*, pp. 14770 and 14771.
[26] English translation of the B/C/S original entitled "*Submission 437: Reply of Professor Vojislav Šešelj to the 'Response to the Accused's Oral Motion for Termination of Proceedings Pursuant to the Abuse of Process Doctrine'*", 29 December 2009, para.15.
[27] Court transcript of 20 October 2009, p. 14760.
[28] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Decision on Oral Request of the Accused for Abuse of Process", 10 February 2010 (public), para. 23.
[29] *Ibid*, para. 29.

to preserve the integrity and fairness of the proceedings must prevail over time considerations in light of the exceptional circumstances of this case".[30] For these reasons, in light of the complexity of the case, the number of witnesses heard and exhibits tendered, the conduct of the parties and the serious nature of the charges against **Vojislav Šešelj**, the Trial Chamber found that the right of the Accused to be tried without undue delay had not been violated.[31] It should be noted that the Accused did not wish to appeal this decision.

In a decision of **29 September 2011**, the Chamber rejected a motion by **Vojislav Šešelj**[32] that **reiterated** the relevance of the abuse of process doctrine in his case and requested, once again, that the Trial Chamber discontinue his proceedings on these grounds, alleging serious violations of his rights.[33] Specifically, the Accused alleged that the excessive length of his detention without the Trial Chamber delivering a Judgement or rendering a decision on the issue of time spent in detention constituted a violation of his right to be tried within a reasonable time.[34] In rejecting this motion, the Trial Chamber stressed that it had constantly ensured the respect of the rights of the defence. Moreover, the Chamber deemed that the Accused had not lodged an appeal against the Decision of 10 February 2010 or asked the Chamber to reconsider it. Accordingly, the Chamber decided that it would only examine the arguments of the Accused for the period after **10 February 2010**.[35] Having done so, the Trial Chamber found that the Accused had not presented any evidence that would lead it to conclude that an **abuse of process** had occurred.

Further, in January 2012, the Accused submitted a new request to the Trial Chamber claiming damages in the amount of **two million euros** on account of alleged violations of his fundamental rights since the time of his arrest and provisional detention.[36] Among the grounds cited, **Vojislav Šešelj** claimed that the length of his detention was excessive[37] and that his right to be tried within a reasonable time had been violated. In particular, the Accused invoked repeated delays in his proceedings to allege that his right to be tried within a reasonable time had been violated and, on

[30] *Ibid*, para. 29, citing page 2 of the "Decision on Prosecution Motion for Adjournment with Dissenting Opinion of Judge Antonetti in Annex", 11 February 2009.
[31] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Decision on Oral Request of the Accused for Abuse of Process", 10 February 2010 (public), para. 30.
[32] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Decision on Motion by Accused to Discontinue Proceedings", 29 September 2011 (public), paras 32-33.
[33] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "*Motion to Discontinue the Proceedings due to Flagrant Violation of the Rights to a Trial Within a Reasonable Period in the Context of the Doctrine of Abuse of Process",* public, 13 July 2011.
[34] *Ibid*, paras 15, 16, 19, 20 and 73.
[35] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Decision on Motion by Accused to Discontinue Proceedings", 29 September 2011 (public), para. 28.
[36] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, **"**Claim for Damages on Account of Violation of Elementary Rights of Professor Vojislav Šešelj During Nine Years of Detention", 27 January 2012 (public), paras 3 to 4 and 64.
[37] *Ibid*, para. 3.

those grounds, demanded to be paid damages in the amount of 500,000 euros.[38] He maintained, moreover, that the Chamber had never justified the length of his detention and that the failure to try him within a reasonable time entitled him to provisional release for the duration of the proceedings.[39] The Chamber considered that the Accused had essentially repeated the same arguments that had been analysed and rejected by the Decisions of 10 February 2010 and 29 September 2011. It therefore did not find it timely to re-examine them on their merit.[40] The Trial Chamber thus reiterated its position regarding the Accused's allegations of the violation of his rights. It remained convinced that the Accused had not shown that his right to be tried within a reasonable time had been violated or that the length of his preventive detention was excessive.[41] As the grounds of the Accused's motion on the **violation of his fundamental rights were rejected, no damages were awarded.**

I also wish to note that the Accused has never filed a motion for **provisional release** before this Chamber, notably on medical grounds…even though he had serious health problems, as can be seen from the request the Accused's associates submitted to the President of the Tribunal challenging the measure taken by the Registry to isolate him from other detainees on account of the toxicity of the chemotherapy treatment he was undergoing.

Thus, the Trial Chamber ruled several times on the issue of undue delays. This case is not comparable to the *Gatete* case, particularly in terms of its complexity. As an illustration, while the ICTR Trial Chamber trying the *Gatete* case heard 49 witnesses and admitted into evidence 146 Prosecution exhibits in the course of 30 trial days,[42] the Chamber in the *Šešelj* case heard **81 witnesses** and examined **1,370 exhibits** during proceedings that lasted 175 days.[43] We see that there is no common denominator between the two cases. Another interesting case to analyse is ***Justin Mugenzi and Prosper Muginareza.***

[38] *Ibid*, paras 13-14 and 54-58. *See* also the Defence Closing Arguments, Transcript, 14 March 2012, pp. 17338-17339.
[39] *Ibid*, paras 55 and 57. The Accused refers notably to the following texts: Article 5 (3) of the ECHR; Article 9 (3) of the ICCPR; Article 7 (5) of the ECHR; Article 60 (4) of the ICC Statute. The Accused also cites the jurisprudence of the European Court of Human Rights regarding the right of the accused to be tried without undue delay and the reasonable length of detention.
[40] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Decision on Accused's Claim for Damages on Account of Alleged Violations of his Elementary Rights During Provisional Detention", 21 March 2012 (public), para. 91.
[41] *Ibid*, para. 92.
[42] *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Judgement and Sentence, 31 March 2011 (public), para. 60.
[43] ICTY Case Information Sheet on the Šešelj case.

6.1. The Gatete case

In this case, during the first-instance trial, **Jean-Baptiste Gatete** raised the issue of **the excessive length** of the proceedings. The Defence invoked the duration of the Accused's pre-trial detention to claim that his right to be tried without undue delay had been violated.[44] Thus, over seven years elapsed between the arrest of **Jean-Baptiste Gatete** and the commencement of his trial. The Defence thus sought relief. The Defence made a number of submissions:[45]

- The length of pre-trial detention cannot be justified either by the complexity or the size of the case against **Jean-Baptiste Gatete**;
- The Prosecution did not bring the case to trial within the appropriate amount of time;
- The Pre-Trial Chamber delayed rendering decisions between April 2003 and April 2007, **the accumulated delay being due to the involvement of the Judges and legal staff of the said Chamber in several other cases**;
- As a result of these pre-trial delays, the Accused suffered prejudice due to the unnecessarily long period spent in detention, which has adversely affected the preparation of his case because the memories of witnesses and their availability have diminished.

The Defence asserted that Mr **Gatete's** right to be tried without undue delay had been violated and that, in the case of a conviction, the appropriate remedy would be a **reduction in his sentence**.[46]

The Prosecution submitted that the length of the Accused **Gatete**'s pre-trial detention was not due to his conduct, but to the structure and resources of the Tribunal. In view of the Tribunal's limited resources, the Prosecutor had requested to transfer the case to Rwandan courts. Finally, the Accused had avoided arrest for a long time and thus contributed to the delay.[47]

The Chamber that delivered the Judgement recognised that the delay in the pre-trial stage was significant, but stated that a number of factors must be taken into consideration to determine

[44] *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Judgement and Sentence, 31 March 2011 (public), para. 54.
[45] *Ibid*., para. 55
[46] *Ibid.*, para. 55.
[47] *Ibid.*, para. 56.

whether it was undue.[48] It stressed that the *Gatete* case cannot be compared to multi-accused trials which had run for years, with over a thousand exhibits and in excess of a hundred witnesses. It recalled that, while the charges against **Gatete** were reduced to six counts, the crimes involve several allegations, such as alleged participation in a joint criminal enterprise, as well as conspiracy to commit genocide, and thus, involve complex issues of fact and law.[49]

In conclusion, it emphasised that the conduct of the relevant authorities and the Prosecutor created an unjustifiable delay in the pre-trial stage of the proceedings.[50] The Chamber notes "particular instances where it appears that the conduct of the relevant authorities and the Prosecution has led to pre-trial delay which cannot be explained."[51] While the Trial Chamber recalls the Prosecution's discretion with respect to investigations and prosecutions, it also has the duty to drive the proceedings. In the *Gatete* case, there are **instances of delay on the part of the Prosecution for which the Chamber finds no justification**.[52]

Nevertheless, while the Trial Chamber recognised that the pre-trial delay had been significant, it found that - in view of the complex nature of the case and the fact that the Prosecutor had filed a request for referral of the Gatete case to the Rwandan courts pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence of the Tribunal (this request had been rejected by the Chamber) –the delay was not undue, there had been minimal prejudice suffered by the Accused, and, once the trial had commenced, it was conducted extremely expeditiously.[53]

The Appeals Chamber affirmed **Gatete**'s convictions for genocide and extermination as a crime against humanity.[54] Having considered all the relevant factors, it found that a term of life imprisonment was the appropriate sentence for **Jean-Baptiste Gatete** in view of the convictions that had been upheld. However, it recalled that **it had found that the Accused's right to be tried without undue delay had been violated and that, in this case, the extent of the pre-trial delay constituted prejudice *per se***. The Appeals Chamber stressed that any violation of a person's rights entailed the right to seek effective remedy pursuant to Article 2 (3) (a) of the International Covenant on Civil and Political Rights. The Appeals Chamber held that a term consisting of a certain number

[48] *Ibid.*, para. 59.
[49] *Ibid*, para. 60.
[50] *Ibid*, para. 61.
[51] *Ibid*.
[52] *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Judgement and Sentence, 31 March 2011 (public), para. 62.
[53] *Ibid*, para. 64.
[54] *Jean-Baptiste Gatete v. the Prosecutor*, Case No. ICTR-00-61-A, Appeal Judgement, 9 October 2012 (public), para. 284.

of years, being by its nature a reduced sentence, was the appropriate remedy for the violation of the Accused's rights. In determining the appropriate remedy, the Appeals Chamber recalled its finding that **Gatete** had failed to demonstrate that he had been prejudiced in either the preparation or the presentation of his defence.[55]

Having considered the gravity of the crimes for which **Jean-Baptiste Gatete**'s conviction had been upheld and taking into account the violation of his right to be tried without undue delay, the Appeals Chamber set aside Gatete's sentence of life imprisonment and concluded that his sentence should be reduced to a term of 40 years' imprisonment.[56]

The Appeals Chamber was unequivocal in its Judgement when it recognised the violation of the Accused's rights. Still, it did not go so far as to invalidate **all of the proceedings,** limiting itself to a symbolic reduction of the sentence.

6.2. The Justin Mugenzi and Prosper Muginareza case

More recently, **on 4 February 2013**, in the ***Justin Mugenzi and Prosper Muginareza*** case, the ICTR Appeals Chamber was required to respond to the argument of the Accused that their right to a **fair trial** had been violated due to the **length of deliberations**. The appellants also relied on the dissenting opinion of **Judge Short** on this issue.

First, the issue of the violation of the right to **a fair trial** was ruled on in a Judgement rendered on 23 June 2010 where this argument was rejected **by a majority**. **Judge Short** issued a dissenting opinion, finding that the accused's rights had been violated and that the undue delay in the proceedings had resulted from the fact that **Judges Khan and Muthoga** had been assigned to other cases, which had an **impact** on the proceedings (noting that the close of the trial was on 5 December 2008 and the Judgement was rendered on 30 September 2011).[57]

In the Judgement rendered on 30 September 2011, **Judge Short** again attached a dissenting opinion recalling that the Accused had been incarcerated without judgement **for more than 12 years** and that his right to **a fair trial** had thus been violated. He added that, as a remedy, **it would be appropriate to provide a five-year reduction of sentence.**

[55] *Ibid,* para. 286.
[56] *Ibid,* para. 287.
[57] *The Prosecutor v. Casimi Bizimungu et al.,* Case No. ICTR-99-50-T, Judgement and Sentence, 30 September 2011.

On this issue, in its Judgement of 4 February 2013,[58] the Appeals Chamber stated that the **complexity of the case** justified the duration of the proceedings, and that this duration had to be considered in a comprehensive manner (*Cf*. para. 37). **Judge Robinson wrote** a dissenting opinion arguing that there had been no **fair trial** due to the excessive length of the judgement drafting phase. In his opinion, in similarly complex cases, notably ***Bagasora*** and ***Popović*** the delays were relatively **short**.

As we can see, this issue has emerged as one of great importance, with the principal argument being that the judges had been assigned to other cases.

6.3. Conclusion

In this kind of situation, I believe that the judges should not have been assigned to other cases and that it would have been preferable **to suspend** certain cases, even if it meant releasing the persons involved pending the start of their trials. This would have been a **viable** solution, without any insurmountable problems. I admit, however, that awaiting a judgment for a long time can be stressful, both for the Accused's family and for the Accused himself, and, in the event that the Accused is ultimately acquitted, considerable financial compensation should be granted.

In the present case, considering the length of his pre-trial detention and the fact that he was found "not guilty", **Vojislav Šešelj** should be granted relief pursuant to **Article 5 of the Rules of Procedure and Evidence** that stipulates: "**The relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with the fundamental principles of fairness."**

[58] *The Prosecutor v. Justin Mugenzi and Prosper Mugiraneza*, Case No. ICTR-99-50-A, Judgement, 4 February 2013.

7. CONTEMPT PROCEEDINGS BEFORE THE TRIBUNAL

The trial of **Vojislav Šešelj** was saturated with allegations against the Office of the Prosecutor, which led to the appointment of an ***amicus curiae*** tasked with investigating the said allegations. In addition, the Prosecution made a whole series of allegations against the Accused and his associates, giving rise to a number of contempt proceedings before the Tribunal.

In conformity with the Rules, the Tribunal may initiate proceedings for contempt of the tribunal against those who knowingly and wilfully interfere with its administration of justice.[59]

I opted to **recuse myself** almost systematically from contempt proceedings at the Tribunal because I consider that, while dealing with the **main case**, I cannot **be distracted** by its side aspects. In fact, the overriding obligation dictated by the Statute of the Tribunal is to ensure an **expeditious trial**. On countless occasions I stated in my various opinions that dealing with a contempt case could paralyse a trial for a long time. This is what happened in the *Simić* case where, following a banal motion for contempt of court, the Trial Chamber interrupted its work for two years while waiting for the outcome of the contempt proceedings.

Apart from this issue of expeditious justice, there is another legal problem: namely, whether, by virtue of UN Security Council resolution 827[60] we have jurisdiction for these type of proceedings. Insofar as the acts of contempt of the Tribunal were committed in States, would it not be the national courts that have jurisdiction upon denunciation by the Tribunal? This question was raised publicly by one of the members of the UN Security Council following the Appeals Chamber's decision in the *Hartmann* case. The Appeals Chamber had issued an arrest warrant against **Florence Hartmann**[61] after her refusal to pay the fine to which she had been sentenced by a specially appointed Trial Chamber.[62] The spokesperson of the French Foreign Ministry commented on this arrest warrant as follows:[63]

> *"By its decision of 16 November 2011, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia converted the fine of 7,000 euros to which*

[59] ICTY Rules of Procedure and Evidence, Rule 77.
[60] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), Doc. UN S/RES/827, 25 May 1993.
[61] *The Prosecutor v. Florence Hartmann*, Case No. IT-02-54-R77.5-A, "Second Order on Payment of the Fine Pursuant to Rule *77 bis* and Warrant of Arrest", 16 November 2011 (public), para. 12.
[62] *In the case against Florence Hartmann,* Case No. IT-02-54-R77.5, "Judgement on Allegations of Contempt", 14 September 2009 (public), para. 90.
[63] Ministry of Foreign and European Affairs of the Republic of France, foreign policy statements, press release of 26 November 2011.

it had sentenced Ms Florence Hartmann on 19 July 2011 to a 7 days' term of imprisonment, issuing an arrest warrant for her.

The Tribunal requested that France execute this decision by extraditing Ms Hartmann so that she could serve her sentence.

In matters concerning cooperation with criminal courts, and in particular when asked to extradite a person in order for him/her to serve their sentence, France can only act in accordance with the procedure envisaged by the legislation. The Ministry of Justice, seized of this request, noted in this case that the texts governing the cooperation between the International Criminal Tribunal for the former Yugoslavia and France apply only to the serious crimes that this tribunal has the mission of trying. ***The contempt of court for which Ms Hartmann was convicted not being one of such crimes, France has no legal grounds on which it could provide cooperation.***

In these circumstances, the French authorities find it impossible to grant the Tribunal's request. This impossibility in no way detracts from France's resolve to continue to cooperate actively with the International Criminal Tribunal for the former Yugoslavia to enable it to accomplish the mission entrusted to it."

Thus, the French authorities have seriously challenged the **legality** of such proceedings, invoking the legal instruments governing cooperation between States and the ICTY...

Perhaps having this in mind, the **Security Council** adopted **resolution 1966**[64] on the international mechanism for performing the residual functions of the criminal tribunals and resolved the problem, since the Rules drafted by the Secretary-General of the United Nations – **and not by the judges** – provide a mechanism for prosecuting contempt of court cases, envisaging the appointment of a single judge (Rule 12 (1)).[65]

"In the event of a trial of a case pursuant to paragraphs 2 and 3 of Article 1 of this Statute, or to consider the referral of such a case to a national jurisdiction, the President shall appoint three judges from the roster to compose a Trial Chamber and the Presiding Judge from amongst their number to oversee the work of that Trial

[64] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), Doc. UN S/RES/1966, 22 December 2010.

Chamber. In all other circumstances, including trials pursuant to paragraph 4 of Article 1 of this Statute, the President shall appoint a Single Judge from the roster to deal with the matter."

I wish to elaborate on the contempt cases, because the sentences pronounced against the Accused can be of consequence.

In several instances, the Prosecution filed motions for contempt before the Chamber against the Accused. The said motions were disposed of as follows:

7.1. Contempt cases against the Accused and his associates

On 21 October 2008, I stated in public session that I had asked the President of the Tribunal to designate another Chamber to deal with the various motions for contempt filed by the Prosecution, specifically involving allegations of identification of protected witnesses and of intimidation of Prosecution witnesses.[66] On 29 October 2008, the President of the Tribunal assigned Trial Chamber II to deal with one such case.[67]

Several months ago, I was informed by an internal memo written by the President of Trial Chamber I of the existence of **three arrest warrants** related to pressure exerted not on witnesses in the present case, but on witnesses in contempt cases.

In my view, this had an impact on the probative value to be given to their testimonies because it seems to me that, if the witnesses named by the Prosecution had not been pressured by the Accused, the direct consequence of that was that their testimonies should be accorded a higher probative value than if they had been intimidated.

I therefore re-examined all these testimonies on the basis of that personal observation.

7.2. Contempt case against the Accused (IT-03-67-R77.2)

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[66] T(F) pp. 10806-10808.
[67] *The Prosecutor v. Vojislav Šešelj*, IT-03-67-T, Order Assigning Motions to a Trial Chamber (29 October 2008) (ICTY, President) (public redacted version).

One of these motions resulted in case IT-03-67-R77.2.[68] This contempt case is now closed,[69] the Appeals Chamber having upheld the Trial Judgement, which found the Accused guilty of contempt of court. In this case, he was charged with disclosing confidential information in breach of witness protection measures.

In the main case,[70] Trial Chamber III had ordered protective measures for witnesses, notably the use of pseudonyms and a ban on disclosing names, addresses, places of residence and any other information likely to identify protected witnesses before the Tribunal. After these orders and decisions granting the protected measures had been issued, the Accused **Vojislav Šešelj** wrote and published a book disclosing confidential information, such as names and excerpts from the written statement of one protected witness, on the basis of which it was possible to identify three protected witnesses.

The Trial Chamber found that **Vojislav Šešelj** was aware of the protective measures in place when he published his book,[71] and also knew that he was disclosing information which identified three persons as protected witnesses before the Tribunal.[72] For these reasons, the Trial Chamber sentenced him to a single term of imprisonment of 15 months.[73]

Vojislav Šešelj appealed this decision; the Appeals Chamber affirmed **Vojislav Šešelj**'s sentence of 15 months' imprisonment.[74]

[68] *The Prosecutor v. Vojislav Šešelj*, IT-03-67-R77.2, "Decision on Allegations of Contempt" (21 January 2009), para. 1 (ICTY, Trial Chamber II).
[69] Case IT-03-67-R77.2.
[70] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67.
[71] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, "Public Redacted Version of 'Judgement on Allegations of Contempt' Issued on 24 July 2009", 24 July 2009 (public), para. 26.
[72] *Ibid.*, para. 30.
[73] *Ibid.*, para. 40.
[74] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Judgement, 19 May 2010 (public), para. 42.

7.3. Contempt case against the Accused (IT-03-67-R77.3)

In this second contempt case, the Trial Chamber found **Vojislav Šešelj** guilty of wilfully disclosing confidential information identifying ten protected witnesses in a book he had authored.

The Trial Chamber found that **Vojislav Šešelj** had acted in this way in full awareness of the protective measures granted to the ten witnesses in question.[75] The Chamber stressed that the electronic publication and dissemination of the book by the Accused on his website rendered the violation of the Trial Chamber's orders particularly serious;[76] that, moreover, the Accused had shown no remorse and had indicated his intention to continue disclosing information in violation of the Tribunal's orders.[77] Such conduct cannot but have an adverse impact upon the work of the Tribunal and the confidence of witnesses in the effectiveness of orders and decisions on protective measures. Therefore, in its Judgement of 31 October 2011, the Trial Chamber imposed on **Vojislav Šešelj** a sentence of 18 months' imprisonment to be served concurrently with the sentence of 15 months imposed by the Chamber in case no. IT-03-67-R77.2.[78]

The *Amicus* Prosecutor appealed the judgement on four grounds.

In the first two grounds, the *Amicus* Prosecutor contests the decision of the Trial Chamber according to which the sentence of 18 months' imprisonment is to be served concurrently with the sentence of 15 months imposed in the first contempt case (Case No. IT-03-67-R77.2). The *Amicus* Prosecutor contends that the sentence of 15 months of imprisonment had already expired before the [Contempt] Trial Judgement was rendered and that a sentence that has been served cannot be reactivated .[79]

The Appeals Chamber granted these grounds of appeal, rejecting **the concurrent running of sentences**, but considering that the sentence imposed on the Accused in the instant case should be deducted from the total duration of his sentence.[80] Considering that **Vojislav Šešelj** had been in custody for 10 years, the Appeals Chamber found that the sentence imposed in this contempt case had been served.

[75] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, "Public Redacted Version of "Judgement" Issued on 31 October 2011", 31 October 2011, para. 71.
[76] *Ibid.*, para. 78.
[77] *Ibid.*, para. 79.
[78] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, "Public Redacted Version of "Judgement" Issued on 31 October 2011", 31 October 2011, para. 81.
[79] The *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3-A, Appeal Judgement, 28 November 2012, para. 21.

Further, the Appeals Chamber, **Judge Pocar** partially dissenting,[81] rejected the third ground of appeal. Following the *Amicus* Prosecutor's submission that the Contempt Trial Chamber had failed to provide a reasoned opinion for imposing a concurrent sentence, the Appeals Chamber granted the first and second grounds of appeal, reversing the imposition of a concurrent sentence, and consequently, dismissed the third ground of appeal as moot.[82]

Finally, in his fourth ground of appeal, the *Amicus* Prosecutor contested the length of the imposed sentence. He submitted that the Trial Chamber failed to take into account both the previous convictions of the Accused for the same acts and the gravity of the offence.[83] The Appeals Chamber recalled that trial chambers had discretion in determining an appropriate sentence, and that the Appeals Chamber could not revise it unless there was a discernible error.[84]

In this case, as the *Amicus* Prosecutor had not demonstrated such an error, the Appeals Chamber upheld the sentence of **18 months' imprisonment**.

7.4. Contempt case against the Accused following the publication of names of protected witnesses on his website (IT-03-67-R77.4)

Vojislav Šešelj was tried for contempt of court following the publication on his website of names of protected witnesses.[85] Specifically, the Accused was charged with failing to comply with an order of the Chamber to remove from his website several documents containing confidential information on protected witnesses.[86]

On 28 June 2012, Trial Chamber II issued its Judgement in this case. The Chamber found the Accused guilty of contempt of the Tribunal, considering that, by refusing to remove confidential documents from his website even after the Chamber had ordered him to do so, **Vojislav Šešelj** had knowingly and wilfully interfered with the Tribunal's administration of justice.[87] The Chamber

[80] *Ibid.*, para. 23.
[81] Judge Pocar, just as argued by the *Amicus* Prosecutor, considers that Rule 87 (C) of the ICTY Rules of Procedure and Evidence allows for a concurrent sentence only in the context of multiple counts in a single case. In this case, Šešelj faced a single count of contempt. The Appeals Chamber should therefore have granted this part of the third ground. *The Prosecutor v. Vojislav Šešelj*, *op. cit*., "Partially Dissenting Opinion of Judge Pocar", paras 4 and 5.
[82] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3-A, Appeal Judgement, *op. cit.*, para. 27.
[83] *Ibid.*, para. 29.
[84] *Ibid.*, para. 31.
[85] Case No. IT-03-67-R77.4.
[86] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4, "Public Redacted version of the Judgement Issued on 28 June 2012", 28 June 2012, para. 2.
[87] *Ibid.*, para. 49.

emphasised the gravity of this case of contempt of court that had arisen as a result of the Accused's refusal to comply with the Chamber's orders and decisions, and recalled that, in addition to violating the Tribunal's orders, the non-compliance of the Accused risked undermining public confidence in the Tribunal and, thereby, the effectiveness of its judicial function.[88] The Chamber, by majority, **Judge Trechsel** dissenting, sentenced **Vojislav Šešelj** to a single term of **two years of imprisonment**.[89] Judge Trechsel attached a partially dissenting opinion wherein he expressed his agreement as far as the conviction of the Accused was concerned, but disagreed with the severity of the sentence imposed by the majority.[90]

As we can see, this Trial Chamber did not deal with the merit of all these cases, and, in the case of the Accused's motion against the Office of the Prosecutor, before deciding whether to indict, it decided to seek the opinion of an *amicus curiae*. As the opinion was negative, the Chamber drew the relevant conclusions and rejected the motion of the Accused.

I insisted on recusing myself because it seemed to me that, should I find the Accused guilty of contempt of court, I would run the risk of taking that into account in assessing the main case. I therefore preferred to leave it to others to deal with these cases. The real reason underlying these motions lies, in my view, in the fact that the ICTY procedure gives the parties too much leeway where witnesses are concerned, with no control from the judges.

In these circumstances, it is not surprising that either of the parties, the **Prosecution** or the **Defence**, might be tempted to sway the witnesses to support their case, and thus, contact by either of the parties with a witness could lead that witness to become "conditioned". This risk would not exist if the witness had contact with a neutral party, which unfortunately is not the case in *common law* procedure.

Moreover, there is another problem underlying this issue of witnesses, primarily protected ones, and that is **witness protection**. It must be noted that different trial chambers have followed a rather permissive practice, granting the Prosecution's requests for witness protection measures even when it was not clear that the witness in question actually needed protection. There again, our international tribunal could have avoided certain problems if the judges had played a greater role in the particularly sensitive phase of the protection of witnesses.

[88] *Ibid.*, para. 53.
[89] *Ibid.*, para. 58.

On 30 May 2013, the Appeals Chamber rejected **Vojislav Šešelj**'s appeal and affirmed the sentence of two years' imprisonment imposed on him by the Trial Chamber.

In his appeal **Vojislav Šešelj** requested the Appeals Chamber to reverse the [Contempt] Trial Judgement and enter an acquittal or, alternatively, order a re-trial to give him the opportunity to present his defence. **Vojislav Šešelj** alleged that his right to a fair trial had been violated. He contended that the Trial Chamber had made several errors in law: (i) refusing him the assistance of a case manager and failing to provide a clear and reasonable answer to his request for a case manager, thereby violating the principle of equality of arms, and thus, his right to a fair trial; (ii) infringing on his right to communicate with his legal advisor and his case manager; and (iii) issuing an unfair sentence.

The Appeals Chamber firstly analysed **Vojislav Šešelj'**s first ground of appeal, according to which the [Contempt] Trial Chamber had erroneously concluded that it was unnecessary to afford him the assistance of a case manager, given the simplicity of the case.

The Appeals Chamber recalled that the principle of equality of arms did not imply that an indigent self-represented accused should necessarily be provided with legal aid. **Vojislav Šešelj** had not been declared indigent by the Registry.

The Appeals Chamber found that the Contempt Trial Chamber had committed an error of law in "failing to provide a reasoned opinion" to **Vojislav Šešelj** justifying its refusal to grant him the assistance of a case manager. Nonetheless, the Appeals Chamber considered that the Accused had not suffered prejudice as a result of this error and that, therefore, that error did not invalidate the judgement. In fact, the Appeals Chamber recalled that **Vojislav Šešelj** had requested the assistance of a legal advisor and a case manager for the purpose of establishing a list of questions to be put to him during his examination-in-chief as a witness and to prepare in advance for the filing of an appeal. The Appeals Chamber also noted that **Vojislav Šešelj** had intended neither to call witnesses nor to tender exhibits at trial. The Appeals Chamber was of the view that the Accused had not demonstrated how a legal advisor had been insufficient to accomplish the above-mentioned tasks. Moreover, **Vojislav Šešelj** had failed to show how the assistance of a case manager, or lack thereof, would have impacted the presentation of his defence.

[90] *Ibid.*, paras 59-65.

The Appeals Chamber found that the error of law did not invalidate the [Contempt] Trial Chamber Judgement and dismissed **Vojislav Šešelj**'s first ground of appeal.

The Appeals Chamber then turned to the second ground of **Vojislav Šešelj**'s appeal according to which the [Contempt] Trial Chamber had infringed on his right to communicate with his legal advisor and his case manager. The Appeals Chamber could not see how the lack of privileged communication between **Vojislav Šešelj** and his case manager could preclude privileged communication between **Vojislav Šešelj** and his legal advisor. It thus rejected this argument as being without merit. The Appeals Chamber added that it was not within its jurisdiction to review the decisions taken with respect to access by Šešelj's legal support staff to confidential material, as this falls within the purview of the Registry.

Finally, the Appeals Chamber considered the Accused's third ground of appeal arguing that the sentence he had been issued was unduly severe. The Appeals Chamber was of the view that the Contempt Trial Chamber had acted within its discretion and that **Vojislav Šešelj** had failed to demonstrate how the Contempt Trial Chamber had committed an error in law or violated his right to a fair trial in exercising its discretion.

Two judges of the Appeals Chamber, Judge **Güney** and Judge **Tuzmukhamedov**, issued a separate and partially dissenting opinion attached to the Appeal Judgement.

In their view, the majority failed to properly articulate the issue at stake, namely: whether it was reasonable for the Contempt Trial Chamber to deny **Vojislav Šešelj**'s request for the assistance of a case manager.

These two judges believed that the majority did not adequately explain its conclusion that the dismissal of **Vojislav Šešelj**'s request for a case manager had not substantially disadvantaged the presentation of his case. And indeed, when the Appeals Chamber found that the Contempt Trial Chamber had erred by failing to provide a reasoned opinion explaining its refusal to afford him the assistance of a case manager, the majority deemed it sufficient to state that **Vojislav Šešelj** had failed to demonstrate that he had suffered any prejudice.

Moreover, the dissenting judges considered that the Contempt Trial Chamber had abused its discretion by failing to provide a reasoned opinion explaining the rejection of **Vojislav Šešelj**'s request for a case manager and by failing to comply with its obligation to keep the Accused

informed. The two judges argue that, when a self-represented accused is being tried by a Trial Chamber, that Chamber is required to be particularly attentive in determining the impact upon the exercise of the Accused's right to legal assistance.

The dissenting judges also deemed that the Contempt Trial Chamber's error constituted sufficient prejudice to warrant an effective remedy.

7.5. The Prosecution's motion for contempt against the Accused and stay of trial proceedings

The Prosecution seized the Trial Chamber of a motion for contempt against Vojislav Šešelj and his associates at the time, including Aleksandar Vučić, the current Prime Minister of the Republic of Serbia.

This submission also requested a stay of trial proceedings.

This last request was granted by the majority of the judges (myself dissenting and joining a separate opinion to the decision). Consequently, the trial proceedings were suspended for several months.

As Vojislav Šešelj was implicated and could be sentenced to a term of imprisonment if the Prosecution's allegations were proven, I decided to recuse myself from these proceedings so that I would not have to get involved in this case, especially since a conviction and sentence against Vojislav Šešelj for contempt would have a direct impact on the duration of the trial proceedings considering that, instead of dedicating itself to the main case, Trial Chamber would have to decide on the merit of the motion. Furthermore, I believed that the primary focus should be on the main case.

As the investigations in this case were no longer within the purview of the Trial Chamber conducting the main case, and bearing in mind the confidential and *ex parte* nature of the motion, I had no further news about these proceedings for years.

However, in my concern to ensure the respect of the rights of both the Accused and **the Prosecution**, I was in favour of the witnesses cited in this motion appearing as **witnesses of the**

Chamber, but accepted that the preliminary statements they had given to the Office of the Prosecutor, prior to the alleged pressure, should be taken into consideration.

A few weeks later, the presiding judge of the Chamber seized of these proceedings informed his colleagues by internal memo that an *amicus curiae* report had been filed, and I learned from this memo that no case had been initiated against Vojislav Šešelj.

The competent Chamber subsequently decided to make public the three arrest warrants against Vojislav Šešelj's associates.

8. THE PROBATIVE VALUE OF TESTIMONIES

In the course of the presentation of their evidence, the Prosecution produced witness testimonies they considered to be incriminating for the Accused.

Unfortunately, from the outset of the case, this position of the Prosecution was challenged by **the Accused** who declared that **the totality** of the Prosecution witnesses were **false witnesses** or, at best, had been **manipulated.**

During cross-examination, the Accused **systematically** attacked the credibility of these witnesses with the obvious aim of either destabilising them or leaving the judges with the impression that they were lying.

The case became complicated when a number of witnesses who had started out as witnesses for the Prosecution produced statements declaring themselves witnesses for the **Defence**; this complicated the **burden of proof** for the Prosecution.

The fact that both parties (Prosecution and Defence) had made mutual allegations of **contempt of court** concerning pressure on and intimidation of witnesses only complicated the proceedings, inevitably raising the **key issue** of the **probative value** that the judges should accord to the evidence of these witnesses.

Should high, average or no probative value be accorded to this evidence?

To answer this question, I must inevitably refer to **my personal criteria of evaluation** because, in the abundance of information supplied by these witnesses, the task was to distinguish between what was **trustworthy** and what was **not.** This task was further complicated by the fact that the witnesses had given their evidence several years after the events in question. **Who** could reasonably claim **that** they are able to relate with accuracy what they saw and heard fifteen years ago? Unless they had sustained a psychological shock or a serious injury, they would not be able to provide very precise details. How is it possible then that we have such detailed statements and that, fifteen years later, a witness is able to give us the first and last names of eighteen victims?

With that in mind, it is evident that the entire phase of investigation conducted by the Office of the Prosecutor is questionable. Anyone familiar with the process of investigation knows that, faced with a witness's failing memory or reluctance, the investigator has to prompt the witness's recollection

with appropriate questions and thus, little by little, by a process of association, he might begin remembering things.

In this case, we have a very clear example in the reference to "**Šešelj's men"**. We know from the evidence on the record that, before being interviewed by the Office of the Prosecutor, a certain number of witnesses had been questioned by the investigation services of Bosnia-Herzegovina. Later on, they gave a statement to the Office of the Prosecutor in The Hague and then, a few years later, they were re-interviewed and gave another statement before testifying.

It was striking to notice that, for example, there was no mention of "Šešelj's men" in the statements initially taken by the local investigation services in Bosnia-Herzegovina or in the witnesses' first statements, but they **miraculously** appear in the second statement. Did their memory come back in the meantime or were they helped in this? I cannot answer this question as I was not present at the interviews; but I do note that the Accused strenuously challenged the Prosecution's method with these witnesses and that certain witnesses stated, under oath, that the record of their statement was drafted after the interview and that they had signed the record in English…

A **reasonable** trier of fact must examine all this evidence **detail** by **detail,** integrating the totality of the assertions into one general picture so that, while hearing a given witness testify under oath, he would be able to identify the passages that have a greater probative value. Thus it seems that, upon hearing a witness testify in court, a judge might accord to some parts of his testimony a higher **probative value** and reject some other parts, considering that in these specific instances, the witness was exaggerating or even lying. In any case, these parts of his testimony will be compared to his first statement and with the other evidence on the record.

To complete my discussion of this issue, I am attaching in an annex **a table** presenting my point of view on the probative value to be accorded to the witnesses' evidence, be it *viva voce* or Rule 92 *bis* or 92 *quater*. I also evaluated the statements of witnesses who did not appear in court, but whose statements were admitted by decisions of the Chamber. For maximum precision, I classified their probative value into seven categories, from 'absolute' to 'zero'.

9. THE PROBATIVE VALUE OF DOCUMENTS

The Prosecution tendered **1,399** documents in support of its allegations.

The **principal documents** were mentioned in the **Prosecution Closing Brief** dated 6 February 2012; they are either mentioned in the paragraphs of the Closing Brief or in the footnotes.

I judged it necessary to examine in greater depth these **principal documents,** especially those supporting the Prosecution's theory on the JCE.

In this spirit, I selected for the table annexed to my opinion **193** documents listed by order of admission, the first document being **P0008** and the last **P01363.** Each of these important documents is described in the column 'description of exhibit'. Also indicated is the date of issue of the document when it is known with certainty.

Thus, for example, Exhibit **P01191** mentions a press conference published in a 1994 book. In this case, the year 1994 is indicated in the "date" column. Other exhibits, such as Exhibit P01226, present a television interview with Vojislav Šešelj, the content of which was published in a book in 1994. As I had no precise date for this television interview, I chose to put a question mark ("?") in the "date" column.

As regards the probative value to be accorded to these documents, using the same classification as for witness testimonies, I placed them in **seven categories,** running from **absolute probative value** to **zero probative value**. The result of this examination of the 127 documents was that a large majority had a probative value that ranged from absolute or very strong to strong, but, on the other hand, some documents had an average value; this is the case with documents P00999, P01001, P01169, P01170, P01174, P01180, P01188, P01191, P01194, P01198, P01199, P01200, P01210, P01213, P01215, P01216, P01217, P01218, P01220, P01221, P01222, P01223, P01225, P01227, P01228, P01230, P01236, P01237, P01241, P01251, P01263, P01264, P01272, P01274, P01275, P01277, P01280, P01281, P01282, P01285, P01289, P01309, P01310, P01312, P01313, P01318, P01319, P01323, P01324, P01339.

It appears, therefore, that **not a single document** admitted at the Prosecution's request had zero or very low probative value, with the exception of the documents admitted through the Bar Table I and Bar Table II procedure and the documents attached to the Oberschall Report.

My attention was particularly drawn to **four** documents: **P00999, P01311, P01312 and P01323.**

I found these documents particularly interesting because document **P00999** is an interview with **Branislav Gavrilović called "Brne"**, or "Chetnik Duke". In response to the questions put to him, he talked about his role and the role of the volunteers of the Serbian Radical Party in certain battles. This document is especially interesting as it indicates that it was **Vojislav Šešelj** who named him a "**Chetnik Duke**" as the commander of the Serbian Radical Party's volunteers in Slavonia, Baranja and Western Srem. This document also illustrates a certain level of intelligence, and gives the impression that the Serbian Radical Party did not just have one leader and those who carried out orders.

The second document, **P01311,** is an interview with **Vojislav Šešelj** published in the daily *Novosti* on 8 November 1993 where it is stated that the members of his movement were arrested by the Ministry of the Interior and charged with crimes.

This document is of particular interest for the JCE because it is hard to see how there could have been any agreement between **Vojislav Šešelj** and **Slobodan Milošević** when the former's followers were being arrested by the police. This document is also important because it mentions **Ljubiša Petković's** resignation and expulsion from the Party.

The third document, Exhibit **P01312,** is an account of the conferences held by **Vojislav Šešelj** accusing **Slobodan Milošević** and others of crimes, and **Slobodan Milošević** of being a Mafioso. This document recalls the arrest of volunteers and members of the Serbian Radical Party, saying that the volunteers were under the command of the JNA or Republika Srpska or the Serbian Krajina.

Asked whether in December 1993 he had supported **Slobodan Milošević**, he replied "not at all", but that he had only supported him for the sake of a policy of patriotism. Regarding General **Života Panić** – and I believe document **P01012** to be crucial on this point - Šešelj accuses him of stealing the 17 million German marks that disappeared from *Vukovarska Banka*. There is also a reference to the **ICTY** where he says he cannot see himself appearing before this Tribunal without **Slobodan Milošević** in tow.

The fourth document, Exhibit **P01323,** is a war diary of a volunteer from the Kragujevac Chetnik Detachment. It should be noted that this detachment was formed on 7 July 1991 in the village of

Grošnica, comprising other volunteers from Serbia. It states that the second platoon was headed by Srećko Radovanović.

It is interesting to observe that this group carried out its actions on orders that were not issued by either **Vojislav Šešelj** or by people close to him. The general impression one has from examining this document is that the defence of these villages was organised by the local community, and not propelled from Belgrade. Still, it is important to stress that on 31 August 1991 **Zoran Rankić** travelled from Belgrade to Markušica village where he spoke to the volunteers. Nevertheless, it appears that, in reality, the operations were carried out by the territorial defence, even if there were volunteers who had come from Serbia or were members of the Serbian Radical Party.

10. THE PROBATIVE VALUE OF THE WITNESSES THE PROSECUTION CLAIMED WERE INTIMIDATED

The Prosecution, in paragraphs 639 *et seq*. of its Closing Brief, asks the Trial Chamber to take into consideration the prior statements of certain witnesses even though they had subsequently retracted them.

These witnesses are **Ljubiša Petković** (now deceased), **Zoran Dražilović, VS026 and VS034.**

The Prosecution affirms that these persons were close to **Vojislav Šešelj** and that **Ljubiša Petković,** after refusing to testify, became a member of parliament and exerted pressure on Witnesses **VS033** and **VS034** (the latter did not appear).

I do not share the Prosecution's view especially as, in the common law system, witnesses are either for the Prosecution or for the Defence, and it is therefore up to the parties to ensure that their witnesses support their case. This did not happen since a large number of witnesses declared themselves as Defence witnesses and were willing to appear only for the Accused, and not for the Prosecution.

On the issue of the probative value of the evidence given by such witnesses, my approach was based on vigilance. I therefore took great care to sort through the various testimonies, compare them with other evidence and cross-check the information.

11. THE PROBATIVE VALUE OF DOCUMENTS ADMITTED THROUGH BAR TABLE PROCEDURES I AND II

In the course of the trial, the Prosecution had requested the Chamber to admit a number of documents without the intermediary of witnesses. This was a laudable initiative because, by avoiding the need to bring in witnesses for these documents to be admitted, it was possible for the trial to proceed more expeditiously; at the time, I wholly supported the unanimous decision of the Chamber to admit these documents.

This was at a time when I envisaged that the Accused would present his defence by calling his own witnesses and, in addition, he could testify himself in accordance with the Rules. At that stage of the proceedings, I would have been able to present these admitted documents to the Accused to question him on their content, especially since no-one else had been able to assess them.

Regrettably, this phase of the proceedings never materialised because the Accused exercised his right not to present a defence.

In that situation, I, as a judge, had to evaluate documents that had not been discussed by the parties at trial once the deliberations stage had been reached.

Wisdom would have dictated that the Trial Chamber should **dismiss** these admitted documents.

However, since they had already been admitted, the Trial Chamber had technically no other choice but to accord each of these documents a certain probative value, if they were of any relevance to the Indictment.

It is therefore in this spirit that I analysed the documents stemming from the Trial Chamber's Bar Table I and II decisions, carefully studying the content of **each document** and reappraising it by comparison with other documents and with the submissions from the Prosecution and the Defence.

III. PROCEDURAL ISSUES

1. SELF-REPRESENTATION

On 24 February 2003, **Vojislav Šešelj** surrendered himself to the Tribunal.[91] At his initial appearance he stated his intention to defend himself.[92] In its **decision of 9 May 2003, Trial Chamber II,** of which I was not part at the time, having taken up my duties at the ICTY in early October 2003, did not rule in his favour and ordered the Registrar of the Tribunal to appoint a defence counsel for the Accused, notably due to the Accused's "tendency to act in an obstructionist fashion while at the same time revealing a need for legal assistance."[93] On 5 September 2003, the Registrar assigned **attorney Aleksandar Lazarević** as standby counsel for the Accused and then withdrew this appointment on 16 February 2004 and assigned **Mr Tjarda van der Spoel** as standby counsel for **Vojislav Šešelj**.[94]

In November 2004, **Vojislav Šešelj** filed a motion requesting that the Chamber's decision assigning standby counsel be re-examined.[95] In its **Decision of 1 March 2005**, **Trial Chamber II** rejected the Accused's motion, considering that it seemed "more practical in the overall interests of justice in this case to ensure that there is counsel readily available to the Accused in The Hague should he wish to consult counsel in the preparation of his defence. To this end, given the availability of interpretation services, the assignment of **Mr Van der Spoel** is appropriate even though he is not conversant with B/C/S."[96]

At this stage, it should be noted that, if the proposed mechanism had been put into practice, it would have been necessary to have an interpreter present at every meeting between the Accused and his standby counsel.

Being aware of the major problems linked with this decision of 5 September 2003 and the decision of 16 February 2004, I joined a **dissenting opinion** to the **Trial Chamber's Decision of 1 March 2005,** in which I elaborated on the reasons why I did not share the view expressed by the majority of the Chamber regarding the assignment of standby counsel. In fact, I believed that the Accused put forth a new circumstance that justified a review of the **9 May 2003 Decision**, namely that the appointment of standby counsel who did not speak the language of the Accused inevitably restricted the rights of the Defence. Moreover, I recall that the right to self-representation is enshrined in the

[91] Initial appearance, T (F) 26 February 2003, p. 2.
[92] *Ibid*, pp. 1-6.
[93] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence", 9 May 2003 (public), para. 23.
[94] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision", 16 February 2004 (public), p 2.
[95] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Request by the Accused to the Trial Chamber to Re-examine Decision to Assign Standby-Counsel to the Accused", 9 November 2004, p. 10.
[96] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Accused's Motion to Re-examine the Decision to Assign Standby Counsel", 1 March 2005, p 5.

principal international legal instruments on human rights and that Article 21 of the ICTY Statute provides that every accused person is entitled, in full equality, to a basic set of minimum guarantees, notably the right "to defend himself in person or through legal assistance of his own choosing."[97] While the Appeals Chamber considered that the right of an accused to defend himself was of paramount importance, stating that the accused have a presumptive right to represent themselves before the Tribunal,[98] it nevertheless specified that this right is not absolute and is subject to some limitations. In the ***Milošević case***, by analogy with the restrictions of the right of an accused to be present at his own trial, the Appeals Chamber considered that the right of the Accused to defend himself may be curtailed on the ground of substantial trial disruption.[99]

Consequently, certain situations may arise when it is necessary to give precedence to the guarantee of a fair trial over the fundamental right to self-representation. Nevertheless, the Appeals Chamber in the *Milošević* case recalled that "any restriction of the Accused's right to represent himself must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial."[100] What needs to be assessed is whether an intervention against the wishes of the Accused is necessary and proportionate to the legitimate aim pursued. In the case of the Accused **Vojislav Šešelj**, my opinion is that the appointment of standby counsel constitutes **a restriction** that does not meet the standard of proportionality. The Chamber, by a majority, takes issue with the Accused **Vojislav Šešelj**'s propensity for obstructionist behaviour. This, however, does not suffice to qualify it as substantial disruption and therefore, it could not be claimed that [the Accused displayed] "such manifestly excessive behaviour so as to hinder the proper administration of justice," and the choice to curtail his right to defend himself was not justified. My opinion was also an opportunity to express my profound disagreement with the Chamber's decision because, insofar as **Vojislav Šešelj** had persistently refused to communicate with any standby counsel, there was no compelling need to maintain knowledge of B/C/S as a requirement for standby counsel. As the counsel assigned by the Registrar did not speak B/C/S, **Vojislav Šešelj** could not communicate with him directly. It seems to me that this situation infringes upon the right of the Accused to benefit from effective assistance of counsel. This right is inviolable and a derogation from it could not be made on the pretext that the Accused seemed, at this stage of the proceedings, to refuse all communication with standby counsel assigned to him.

[97] Article 21 (4) of the Statute.
[98] *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel", 1 November 2004, para. 11.
[99] *Ibid.*, para. 13.
[100] *Ibid.*, para. 17.

At this point, I was fully convinced that, in view of the personality of the Accused, there would be enormous difficulties ahead. Furthermore, in view of the common law procedure followed, I did not expect it would be possible for the trial to commence with the necessary calm, because some form of "co-operation" from the Accused in his trial was absolutely indispensable, otherwise the Judges might find themselves facing an empty chair!

By its decision of 21 August 2006, Trial Chamber I appointed a counsel to represent the Accused at his trial and instructed the standby counsel at the time, Mr Van der Spoel, to continue defending the Accused in the meantime. In its discussion, the Chamber first had to rule on the conduct of the Accused and determine if it warranted the imposition of restrictions, in the interests of justice, on Vojislav Šešelj's right to represent himself. If it decided that question in the affirmative, the Chamber would then have to determine what kind of restrictions to impose, bearing in mind the principle of proportionality between the restrictions imposed on the Accused's right to defend himself, and the guarantee of a reasonably expeditious trial. In examining this issue, the Chamber referred to the Appeals Chamber's decision in the Milošević case; the Appeals Chamber considered that, when the circumstances so required, an accused's right to self-representation may be curtailed "on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial." Consequently, before deciding on possible restrictions of the Accused's right to defend himself, the Chamber has to be satisfied that the conduct of the Accused indicates that, were he to represent himself, it would obstruct the proper and expeditious conduct of his trial. In the Šešelj case, Trial Chamber I noted that the Accused exhibited "deliberate disrespect for the rules applicable before the Tribunal, causing considerable disruption of the proceedings and an unquestionable waste of the Tribunal's resources in dealing with his conduct." The Chamber recalled the abusive language Vojislav Šešelj used both in his submissions and in the courtroom despite the warnings he was given, demonstrating that this behaviour was wilful. The Chamber considered that such behaviour brought into question Vojislav Šešelj's willingness to follow the "ground rules" when representing himself and compromised the dignity of the Tribunal and jeopardised the very foundations upon which its proper functioning was based. The Chamber stressed that the Accused persisted in his tactic of trying to turn the Tribunal into a stage for his private, non-forensic purposes, and that his attacks against persons affiliated with the Tribunal had become increasingly offensive.

In light of the above considerations, the Trial Chamber resolved to assign counsel to the Accused and requested the Registry to assign counsel to Vojislav Šešelj, instructing at the same time the current standby counsel, Mr Van der Spoel, to continue representing the Accused in the interval; the

Chamber ordered that the Accused's participation in the proceedings would be through counsel unless the Chamber determined otherwise.

The **Trial Chamber's Decision of 21 August 2006** was appealed. It was reversed by the Appeals Chamber in its **Decision of 20 October 2006** on the ground of the absence of **a specific warning** to the Accused before assigning him counsel.[101] Firstly, the Appeals Chamber considered preliminary matters concerning, on the one hand, **Vojislav Šešelj**'s submission and, on the other, the validity of the appeal. Concerning **Vojislav Šešelj**'s submission, the Appeals Chamber had to decide whether it considered the submission to have been filed by **Vojislav Šešelj** in person (in violation of the disposition of the 21 August 2006 Decision) or through the intermediary of his Acting Counsel. The Appeals Chamber ruled that the Trial Chamber's order in the Decision of 21 August assigning counsel to act on behalf of the Accused was valid for the remainder of his trial and was to ensure a fair trial. Consequently, the Trial Chamber's decision could not be interpreted so as to bar **Vojislav Šešelj**'s personal participation in these interlocutory appeal proceedings and did not prevent the Chamber from considering the Accused's submission.[102] Secondly, the Appeals Chamber had to rule on the validity of the appeal, specifically to determine whether standby counsel may file an appeal on behalf of an accused against a Trial Chamber decision on assignment of counsel where the accused does not consent to the filing of that appeal.[103] **Vojislav Šešelj** argued that the Appeal should be rejected by the Appeals Chamber because Acting Counsel had never obtained his consent for filing the Appeal and that, therefore, he lacked legal legitimacy. The Accused further stated that the Appeal did not express his will and ran counter to the basic concept of his defence. The Appeals Chamber did not accept this argumentation and considered that an accused does not have a fundamental right to appeal a Trial Chamber decision on assignment of counsel.[104]

The Appeals Chamber then proceeded to consider the appeal lodged by the Acting Counsel for the Accused. The Acting Counsel submitted that the Trial Chamber had committed three errors in its Decision of 21 August 2006: first, that it erred in fact in its qualification of the Accused's behaviour, which entailed the disproportionate decision to deny the Accused his right to self-representation; second, that it erred in law in its interpretation of Articles 20[105] and 21 (4) (d)[106] of

[101] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel", 20 October 2006, para. 52.
[102] *Ibid.*, para. 10.
[103] *Ibid.*, para. 12.
[104] *Ibid.*, para. 16.
[105] Article on the commencement and conduct of trial proceedings.
[106] Article on the minimum guarantees to all persons tried before the international Tribunal. Article 21 (4) (d) stipulates the right of an accused " to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to

the Statute and application of the relevant case-law; and, lastly, that the Trial Chamber's exercise of its discretion in assigning counsel to represent **Vojislav Šešelj** was unreasonable in the circumstances.[107]

While the Appeals Chamber did not accept arguments of the Defence regarding errors of fact and in the exercise of its discretion, it nevertheless partially granted the appeal in relation to **the error of law**. The Appeals Chamber had to determine whether a clear warning must be issued to an accused immediately prior to the imposition of restrictions on the right to self-representation.[108] The judges recalled that the right to self-representation is a fundamental right equivalent to the right to be present at one's trial and consequently, the Accused should be duly warned before restricting those rights.[109] In the *Šešelj* case, the Appeals Chamber found that the Trial Chamber failed to point out that the Accused was entitled to receive a warning that his further disruptive behaviour could result in restrictions on his right to self-representation, prior to assigning him counsel. Nor did it make a finding of fact that such a warning had been issued to **Vojislav Šešelj**. The Appeals Chamber found that the Trial Chamber's decision "did not serve a clear and sufficient notice to **Vojislav Šešelj** that if he persisted with such obstructionist behaviour, it would result in a complete restriction of his right to self-representation".[110] A warning with regard to possible assignment of counsel, however, needs to be explicit, explaining the restrictions of the right to self-representation involved. The Appeals Chamber, considering that **Vojislav Šešelj** had not received a clear warning prior to the assignment of counsel to represent him, **reversed the Decision of 21 August 2006**.

It is noteworthy that, rather than unequivocally upholding, as a general principle, the right of the Accused to represent himself (as he had demanded from the beginning), the Appeals Chamber preferred to cite a procedural ground (prior warning).

Despite **the Appeals Chamber**'s Decision of 20 October 2006 reversing the Trial Chamber's Decision of 21 August 2006 (assigning counsel to the Accused), the **Trial Chamber** issued a new **decision** on **25 October 2006** ordering immediate appointment of standby counsel to assist the Accused.[111] **Vojislav Šešelj** then filed a motion for certification to appeal against the Trial

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him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

[107] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel", 20 October 2006, para. 18.

[108] *Ibid.*, para. 22.

[109] *Ibid.*, para. 23.

[110] *Ibid.*, para. 26.

[111] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial", 25 October 2006 (public).

Chamber's Order of 25 October 2006, which the Chamber rejected.[112] Following this decision, the Accused went on a **hunger strike**, and by an oral decision of 27 November 2006 the Trial Chamber instructed standby counsel to "permanently take over the conduct of the Defence from the accused" pursuant to the Order of 25 October 2006.[113] Attorney **Tjarda Van der Spoel**, whom the Chamber had requested to be appointed by the Registry as independent counsel to the Accused in order to take any necessary action in relation to an appeal against the Oral Decision of 27 November 2006, filed a request for certification to appeal this decision on 4 December 2006.[114] It is noteworthy that standby counsel apparently realised that there was an enormous difficulty involved and so, **of his own accord,** he filed a request for certification to appeal, even though the same motion filed by the Accused on 25 October 2006 had been rejected… The following day, the Chamber granted the request.[115] On **8 December 2006**, the **Appeals Chamber** issued a decision taking note of the extraordinary circumstances related to the Accused's refusal to take food or medicine or to be medically assessed by his doctors.[116] It decided to reverse the Order of 25 October 2006 and directed Trial Chamber I not to impose standby counsel on the Accused, unless he exhibits obstructionist behaviour satisfying the Trial Chamber that, to ensure a fair and expeditious trial, he requires the assistance of a standby counsel.[117] **The Appeals Chamber set aside** all the trial proceedings following the order of the Trial Chamber directing the Registry to appoint standby counsel, and suspended the trial of **Vojislav Šešelj** until such time as "he is fit enough to fully participate in the proceedings as a self-represented accused."[118]

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There is no doubt that the Appeals Chamber issued, in my view, **a vital decision,** rescuing the proceedings and perhaps the life of the Accused who had demonstrated a wish to die. For my part, I insist that it is **from the day the Accused Vojislav Šešelj arrived at the Tribunal, on**

[112] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Application for Certification to Appeal Order of 25 October 2006", 30 November 2006 (public).
[113] Status conference, T(F) of 27 November 2006, p. 825.
[114] "Request for Certification Pursuant to Rule 73 (B) to Appeal against the Trial Chamber Oral Decision to Assign Counsel to the Accused", 4 December 2006 (public).
[115] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Request for Certification to Appeal Decision (No. 2) on Assignment of Counsel", 5 December 2006.
[116] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, "Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel", 8 December 2006, para. 14.
[117] *Ibid.*, para. 28.
[118] *Ibid.*, para. 30.

24 February 2003, that this right of his should have been recognised and the trial would then have been completed years ago …

In this discussion, one should not forget that, as a general rule, it is heads of state, cabinet ministers and high-ranking officers who appear before international criminal tribunals. In most cases, these accused have a sufficient **level of intellect** to be able to represent themselves; especially as they always have the possibility to be **assisted** by counsel, if they express such a need. At the ICTY, we must note that the self-represented accused such as **Slobodan Milošević**, **Radovan Karadžić** and General **Tolimir** coped well during the hearings, even though they were assisted outside the courtroom by highly competent legal staff for the purpose of written submissions. I believe this is **the only way** to ensure a proper legal debate in a calm atmosphere and also to meet the absolute need for **the victims** to feel that the trial is proceeding under the complete control of the judges, and for the Accused to be able to argue the charges against him if he wishes to testify or, at least, cross-examine the Prosecution witnesses himself or examine his own witnesses if he believes he is in a position to do so. Thus, the trial takes place before the judges **in the presence of** the Accused, not in the presence of an empty chair. To fail to understand this absolute imperative is to invite serious setbacks and thus fail to contribute efficiently to the development of a **system of international justice in conformity with its fundamental principles.**

2. THE FINANCING OF THE ACCUSED'S DEFENCE

The question of the **financing of the Accused's defence** was the subject of numerous written submissions from the very outset of the case. This issue is crucial as it concerns the fundamental rights of the Accused and the fundamental principle of the right to a **fair trial**. The right to legal assistance is envisaged by Article 21 (4) (d) of the ICTY Statute, which stipulates that "in the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled […] to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." Nevertheless, **the Appeals Chamber** of the Tribunal affirms, as established jurisprudence, that Article 21 (4) (d) of the Statute "does not support the proposition that an accused who elects to self-represent is nonetheless entitled to legal aid."[119] It states that this Article "does not require that an accused who opts for self-representation receive all the benefits held by an accused who opts for counsel."[120] However, in seeking otherwise to give effect to Article 21 (4) (d), the Appeals Chamber allows for the possibility, depending on specific circumstances, of providing some funding for the legal associates of an indigent accused who opted for self-representation.[121] This was the choice made by **Vojislav Šešelj**. To examine the issue of the financing of **the Accused Vojislav Šešelj**'s defence it is necessary to recall the relevant procedure. The Appeals Chamber's position is understandable insofar as an accused who freely chooses his defence is not *ipso facto* entitled to legal assistance if he has the financial means to fund his defence himself.

On 24 February 2003, **Vojislav Šešelj** surrendered himself to the Tribunal.[122] At his initial appearance on 26 February, he indicated that he intended to **defend himself**.[123] O**n 31 October 2003 Vojislav Šešelj** formally requested **that the Tribunal finance his defence**,[124] and reiterated this request regularly in the course of his trial. Beginning in November 2003, the Registry conducted an investigation into the financial situation of the Accused, and consulted with him on numerous occasions to inform him of the modalities of the legal assistance generally granted to accused before the Tribunal who claim to be indigent or partially indigent. However, **Vojislav Šešelj refused to provide the Registry with the information necessary for the examination of**

[119] *The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, "Decision on Krajišnik Request and on Prosecution Motion", 11 September 2007 (public), para. 40. *See* also *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.8, "Decision on Appeal from Order on the Trial Schedule", 19 July 2010, para. 11.
[120] *The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, "Decision on Krajišnik Request and on Prosecution Motion", 11 September 2007 (public), paras 40-41.
[121] *Ibid.*, para. 42.
[122] Initial appearance, T(E) of 26 February 2003, p. 2.
[123] *Ibid.*, pp. 1-6.
[124] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Registry Submission Pursuant to Rule 33 (B) of the Rules Regarding Vojislav Šešelj's Motion for a Decision by the Trial Chamber on Financing His Defence", 29 June 2007 (public), para. 7.

the financial situation of his close relations, justifying his refusal by explaining that while he was required to provide the Registry with information on his own financial situation, he was by no means obliged to force his close relations to speak to OTP investigators, especially not his wife or his mother.[125]

Parallel to the Registry's investigation into the Accused's **assets**, **Vojislav Šešelj** submitted to the Registry invoices for the work of his team of experts on 23 July and 21 December 2004, then on 3 January 2006 (for the years 2003, 2004 and 2005 respectively). On 31 January 2006, the Registry filed its submission pursuant to Rule 33 (B) of the Rules of Procedure and Evidence.[126]

By letters of 7 and 8 December 2006, the Registry informed the Accused that **three individuals** had been accepted as "legal advisers", and that some of the reasonable costs incurred by the preparation of his defence would be covered by the Tribunal's Office for Legal Aid.[127] The nature and amount of the costs that would be covered were specified by the Registry in a letter dated 19 December 2006, despite the absence of specific information on **Vojislav Šešelj's** financial situation and the impossibility, in the absence of such information, of establishing the indigent status of the Accused.[128] At this point, I must note with satisfaction that the Registry was not opposing the financing, in full or in part, of the Accused's defence.

On 22 December 2006, **Vojislav Šešelj** filed three motions requesting, once again, the reimbursement of costs incurred since 2003 for the preparation of his defence, which amounted to 6,395,000 dollars.[129] The Registry denied the motions on 4 January and 9 February 2007 on the ground that the legal aid system in place at the Tribunal only allowed for cases of demonstrated indigence of an accused and cases in which a counsel was assigned or appointed, which was not the present case.[130] The Accused lodged two appeals against these decisions with the Trial Chamber on 19 February and 2 March 2007.[131]

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[125] *Ibid.*, para. 42.
[126] Rule 33 (B) of the Rules of Procedure and Evidence governing the functions of the Registry stipulates that "[t]he Registrar, in the execution of his or her functions, may make oral and written representations to the President or Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary."
[127] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Registry Submission Pursuant to Rule 33(B) of the Rules Regarding Vojislav Šešelj's Motion for a Decision by the Trial Chamber on Financing His Defence", 29 June 2007 (public), para. 28.
[128] *Ibid.*, para. 30.
[129] *Ibid.*, para. 31. Concerns Requests nos 227, 228 and 229 submitted by Vojislav Šešelj to the Registry.
[130] *Ibid.*, para. 32. *See* also *Ibid.*, p. 34.
[131] "Appeal by Professor Vojislav Šešelj against the Decision of the Registrar of 28 December 2006", 9 January 2007, English translation filed on 19 February 2007; "Appeal of Professor Vojislav Šešelj Against the Decision of the Registrar of 9 February 2007", 22 February 2007. Although it seems from the title that Šešelj's Appeal of 19 February 2007 is against the Registrar's Decision of 28 December 2006, Šešelj states that he received said Decision on 4 January

In addition, on 5 January 2007 the Accused filed an appeal against the Registrar's Letter/Decision of 19 December 2006 specifying the nature and amount of the costs incurred for the preparation of his defence that the Tribunal would cover.[132] The Registry filed its submission on 9 February, pursuant to Rule 33 (B) of the Rules.[133] On 19 February, **Vojislav Šešelj** appealed the Registry Decision of 4 January rejecting his request for the reimbursement of costs incurred since 2003.[134] On 22 February 2007, **Vojislav Šešelj** lodged an appeal against the Registry Decision of 9 February.[135]

In his Decision of 12 March 2007, the President of the Tribunal ruled on the Accused's first appeal against the Decision of 19 December 2006 and decided that **Vojislav Šešelj**'s arguments were to be raised before the Trial Chamber presently seized of the case.[136] In a second Decision issued on 25 April 2007, the President of the Tribunal rejected the Accused's appeals of 19 February and 2 March 2007 against Registry Decisions of 4 January and 9 February 2007, respectively, judging that only the Trial Chamber seized of the *Šešelj* case may consider the issues raised by the Accused.[137]

Following these two decisions of the President of the Tribunal, **Vojislav Šešelj** filed a Motion with the Trial Chamber on 4 June 2007. He requested that the costs incurred for the preparation and presentation of his defence from the beginning of the case be covered by the Tribunal on the ground of his indigence.[138] The Registry filed its submission on 29 June pursuant to Rule 33 (B) of the Rules.[139] In its **Decision of 30 July 2007**, the Trial Chamber **partially granted the Motion of Vojislav Šešelj**. The Chamber ordered the Registry **to implement immediately, in respect of the Accused, the procedures applicable to the provision of legal aid**, and urged **Vojislav Šešelj** to

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2007. *See* Appeal of 19 February 2007, p.1. In his response, the Registrar states that he did not issue any decision on 28 December 2006 and that Šešelj's Appeal of 19 February 2007 refers to his decision of 4 January 2007. *See* Registry Submission Regarding Vojislav Šešelj's Appeals against the Registrar's Decisions of 28 December 2006 and 9 February 2007, footnote 1.

[132] "Appeal by Professor Vojislav Šešelj against the Registrar's Letter/Decision of 19 December 2006", 5 January 2007, translation filed on 22 January 2007.

[133] "Registry Submission Pursuant to Rule 33 (B) of the Rules of Procedure and Evidence Regarding Vojislav Šešelj's Appeal against the Registry's Decision of 19 December 2006", 9 February 2007 (public with confidential annexes).

[134] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Appeal by Vojislav Šešelj against Registry Decision of 4 January 2007", 19 February 2007.

[135] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Appeal of Professor Vojislav Šešelj against the Decision of the Registrar of 9 February 2007", 22 February 2007.

[136] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Appeal against Registry Decision of 19 December 2006", 12 March 2007 (public), para. 6.

[137] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Appeals against Decisions of the Registrar of 4 January 2007 and 9 February 2007", 25 April 2007 (public), paras 12-13.

[138] Original in B/C/S with English translation titled "Professor Vojislav Šešelj's Motion for a Decision by Trial Chamber III on Financing His Defence in Accordance with the Statute" submitted on 4 June 2007 and the English version filed on 14 June 2007, pp. 15-16.

provide the Registry with all the useful information to assess his state of indigence and the requisite qualifications of his associates.[140]

This decision is particularly important in the proceedings relative to the financing of **Vojislav Šešelj**'s defence**.** The Accused **Vojislav Šešelj** requested that the Chamber recognise his entitlement to legal aid given that he had demonstrated his indigence.[141] The Accused explained in his Motion that he had exhausted his financial resources.[142] As regards the amount of legal aid the Tribunal should grant, the Accused requested that he be provided with exactly the same financial resources as the Prosecution at every stage of the proceedings.[143]

The Registry submitted that Article 21 (4) (d) of the Statute does not guarantee legal aid to an accused who defends himself.[144] It pointed out that, despite its duty to guarantee the effective exercise of the Accused's right to defend himself that exercise does not go beyond the time and **facilities necessary** for the preparation of his defence. More specifically, the Registry argued that the effective exercise of the Accused's right to defend himself can in no way cover the payment of fees or the allocation of funds to the Accused. The Registry thus noted that

> "[…] *it is unimaginable that persons who draft legal submissions, analyse evidence and perform other functions normally performed by defence counsel be remunerated under the notion of facilities provided by the Tribunal to a self-represented accused. While the Tribunal will be required to facilitate the self-represented accused's communication with such persons, it cannot be expected to pay them."*[145]

The Registry further stated that the principle of the equality of arms, one of the foundations of the right to a fair trial, guaranteed **procedural equality**, but not **complete equality of resources**.[146] For these reasons, the Registry considered that the assignment or appointment of a counsel paid by the

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[139] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Registry Submission Pursuant to Rule 33 (B) of the Rules Regarding Vojislav Šešelj's Motion for a Decision by the Trial Chamber on Financing His Defence", 29 June 2007.
[140] *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67-PT, "Decision on the Financing the Defence of the Accused", 30 July 2007 (public), para. 66.
[141] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Professor Vojislav Šešelj's Motion for a Decision by Trial Chamber III on Financing His Defence In Accordance with the Statute", 4 June 2007 (public), p. 11. *See* also *Ibid.*, p. 14.
[142] *Ibid.*, pp. 9-11.
[143] *Ibid.*, p. 6.
[144] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on the Financing the Defence of the Accused", 30 July 2007 (public), para. 24.
[145] *Ibid.*, para. 25. *See* also "Registry Submission Pursuant to Rule 33 (B) of the Rules Regarding Vojislav Šešelj's Motion for a Decision by the Trial Chamber on Financing His Defence", 29 June 2007, para. 63.
[146] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on the Financing the Defence of the Accused", 30 July 2007 (public), para. 26.

legal aid system was not incompatible with the right of the Accused to present his own defence and that legal aid to **Vojislav Šešelj** should be contingent on the same conditions as those applicable to other accused before the Tribunal.[147] As regards **the Accused's indigence**, the Registry contended that it was prevented from taking a position on the issue due to the **refusal of the Accused to cooperate with the investigation** conducted pursuant to Article 10 of the Directive on the Assignment of Defence Counsel.[148] Furthermore, the Registry recalled that at least one of the associates of the Accused had to meet the requirements of Rule 45 of the Rules[149] and thus qualify to be assigned to the defence of **Vojislav Šešelj**.[150]

In its analysis of the issue of financing of the Accused's defence, the **Chamber** considered that it was necessary to bridge the existing gap in the law in respect of the payment of the costs incurred for the preparation and presentation of the defence of an accused who claims indigence in order **to ensure the effective exercise of the right of any accused to represent himself**.[151] The Chamber explained its reasoning relying on three basic elements at the heart of the **issue of the payment of the costs incurred by an accused in the preparation and presentation of his defence: ensuring a fair trial, ensuring equality of arms**, and **ensuring the proper administration of justice**.

First, the Chamber stressed that it was the pre-trial Judge who had to ensure that the rules for a **fair trial** were respected. The fact that an accused chooses to represent himself necessarily requires that a team be constituted for this purpose, if only to conduct investigations and search for evidence crucial for the cross-examination of witnesses – tasks that are impossible for an accused held in detention.[152] Otherwise, an accused who claims to lack the means to pay such a team and still wishes to represent himself will therefore find himself forced to go to trial with no other facilities to prepare his defence than the documents disclosed by the Prosecution under Rules 65 *ter*, 66 and 68 of the Rules.[153] Such a situation would inevitably present serious difficulties in ensuring a fair trial and would be inadmissible. Pursuant to Article 21(4) of the Statute, all accused are entitled to

[147] *Ibid*, para. 27.
[148] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Registry Submission pursuant to Rule 33 (B) of the Rules Regarding Vojislav Šešelj's Motion for a Decision by the Trial Chamber on Financing His Defence", 29 June 2007 (public), paras 80-87.
[149] Rule 45 of the Rules of Procedure and Evidence envisages that the Registrar shall maintain a list of counsel who (i) fulfil all the requirements of Rule 44, (ii) possess established competence in criminal law and/or international criminal law/international humanitarian law/international human rights law, (iii) possess at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings, and (iv) have indicated their availability and willingness to be assigned by the Tribunal to any person detained under the authority of the Tribunal lacking the means to remunerate counsel.
[150] *Ibid.*, paras 88-89.
[151] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on the Financing the Defence of the Accused", 30 July 2007 (public), para. 42.
[152] *Ibid.*, para. 49.
[153] *Ibid.*, para. 50.

certain minimal guarantees and the Chamber explains that it is reasonable "to think that guaranteeing a fair trial for an accused who claims indigence and who is self-represented before the Tribunal requires *facilités* /facilities/ which go beyond those necessary in a national setting."[154]

The Chamber further addressed the issue of **equality of arms**, expressing its agreement with the jurisprudence referred to by the Registry in that equality of arms does not require equality of resources but **procedural equality**.[155] The Chamber added that it was the pre-trial Judge who had to ensure that **Vojislav Šešelj**, who claimed indigence, had sufficient means to examine Prosecution witnesses and to obtain the attendance and examination of witnesses on his behalf under the same conditions as were accorded to the Prosecution witnesses. The Chamber emphasised that these rights become ineffective if an accused is in a situation of demonstrated indigence, is provisionally detained or is in the detention unit and without a team to assist him.[156]

Regarding equality of arms, it is indisputable that the Office of the Prosecutor has significant resources available, both in terms of staff and funds to cover the expenses of its investigators. It would be interesting to have a statement of Prosecution expenditures for each individual case. As the system chosen is principally a *common law* system, it would be logical for the Accused, whether defending himself or represented by counsel, to have the **same** financial means. This seems to have eluded many, and certainly the drafters of the first version of the Rules, otherwise they would have included a provision on **equality of arms.**

Finally, the Chamber expounds its reasoning on **ensuring the proper administration of justice**, and the responsibilities of the pre-trial Judge in this respect. The pre-trial Judge considers that this duty can be fulfilled only if a team of associates assists the Accused in preparing and presenting his defence at every stage of the proceedings.[157] However, the pre-trial Judge agreed with the Registry and found it unthinkable that associates who draft the written submissions of the Accused be paid for carrying out the work of a counsel whereas the Accused refused any standby counsel and had chosen to represent himself. Having said this, the Chamber found that it was **in the interests of the proper administration of justice** that the associates of **Vojislav Šešelj,** who played a positive role in his defence – drafting written submissions that were more concise, better argued and reasoned than those previously filed – should be decently paid for the services they performed.[158]

[154] *Ibid.*, para. 51.
[155] *Ibid.*, para. 52.
[156] *Ibid.*
[157] *Ibid.*, para. 53.

For these reasons, the **Chamber partially granted the Motion of the Accused**. It **ordered the Registry to implement the procedures applicable to the provision of legal aid**, while urging **Vojislav Šešelj** to cooperate with the Registry by providing a comprehensive declaration of his resources and allowing the Registry to take the steps it deemed appropriate to determine his financial situation.[159]

Three months later, in its Decision of **30 October 2007**, on the basis of information available to it at the time, **Trial Chamber III**, over which I presided in the *Šešelj* case, noted that **dispositions decreed by the Decision of 30 July could not be implemented owing to the position taken by Vojislav Šešelj, who refused to comply with the formalities imposed by the Registry**, and in particular to provide the justification it required.[160] Accordingly, the Chamber invited the Accused once again to provide the documents requested by the Registry so that it could determine his state of indigence.[161] **Vojislav Šešelj's refusal to provide the Registry with useful information on his state of indigence** led to **the rejection** of the Accused's motions requesting the financing of his defence by the Registry: on 4 March 2008, the Registry reiterated that it would not authorise the financing of the Accused's defence until he fulfilled the conditions set forth in the Chamber's Decision of 30 July 2007.[162]

Following this decision, on **3 February 2009** the Accused submitted a new request to the Chamber, asking again that the financing of his defence be covered by the Tribunal.[163] On 23 April 2009, the Chamber denied **Vojislav Šešelj**'s request to reimburse the costs related to the financing of his defence.[164] On 5 July 2010, the Registry denied the Accused's request for reimbursement of the costs incurred for his defence since 31 October.[165] The Registry reiterated that **Vojislav Šešelj** had not furnished all the information necessary to determine his financial status.[166] It is thus easy to understand that the "stalemate" was due to the fact that the Accused did not wish to provide the Registry with information on his finances.

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[158] *Ibid.*, para. 55.
[159] *Ibid.*, para. 66. *See* also *Ibid*. para. 59.
[160] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Implementing the Financing of the Accused", 30 October 2007 (public), p. 1.
[161] *Ibid.*, p. 2.
[162] Registry Decision, 4 March 2008, p. 2. *See* also *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Decision on Financing of Accused's Defence", 23 April 2009 (public), para. 9.
[163] B/C/S original of which the English translation is entitled: "Submission number 411: Request for the Trial Chamber to Secure the Financing of Professor Vojislav Šešelj's Defense", dated 15 January 2009, and filed on 3 February 2009.
[164] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Decision on Financing of Accused's Defence", 23 April 2009 (public), paras 26-27.
[165] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Decision" issued by the Registry (public redacted version), 5 July 2010.

The Accused's choice not to furnish the Registry with all the information required to make a determination of indigence constituted, therefore, a veritable procedural impasse and it was imperative that the Chamber not allow this problem to fester and paralyse the trial of the Accused. With this in mind, and in preparation for this part of my separate opinion, on **19 May 2010 I sent a letter to** the Serbian authorities requesting, in a personal capacity, that they provide information on **Vojislav Šešelj**'s financial situation in Serbia, notably his movable and immovable properties, as well as the financial situation of his spouse, so that I could form my own opinion on the matter.[167] By a letter dated 31 May 2010, the President of the National Council, **Rasim Ljajić**, informed me that the Serbian authorities had been in contact with the ICTY Registry since January 2005 and that the Registry was already in possession of the information I had requested.

With this new information, my colleagues and I drafted an internal memorandum to the Registry dated 16 June 2010, requesting certain information on **Vojislav Šešelj**'s financial situation and assets.[168] On 25 June 2010, the Registry provided the Chamber with these documents which contained an assessment of the Accused's financial situation, including an evaluation of his personal assets and those of his family members usually residing with him.[169]

The Registry had been conducting its investigation since 2003, when the Accused had first requested that his defence be financed by the Tribunal; it had established the exact volume of the Accused's assets, including his immovable and movable properties.[170] Moreover, the Office for Legal Aid and Defence Matters apparently had rather precise information on the bank accounts held by the Accused in several banking institutions around the world and the funds deposited therein.[171]

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[166] *Ibid.*, pp. 3-4.
[167] Letter dated 19 May 2010 sent by Judge Antonetti to the Serbian authorities.
[168] Internal memo, subject: "Request for Disclosure of Documents to the Chamber" (public), sent to the Registry by the Judges of Trial Chamber III, 16 June 2010.
[169] Internal memo, subject: "Response to Request for Disclosure of Documents to the Chamber", sent to the judges of the Trial Chamber seized of the *Šešelj* case, 25 June 2010.
[170] The Registry established that the Accused Vojislav Šešelj owned several immovable properties valued in total at approximately 300,000 euros: (1) a family residence in Belgrade, at 36 Posavskog Odreda Street, Batajnica, valued at 251,988 euros, and (2) a residence in Belgrade at 133 Vojvodjanskih Brigada Street, valued at 50,677 euros, owned by the Accused's spouse; the Registry was not aware if this was individual or joint property. Furthermore, the Registry noted the existence of four motor vehicles, valued at a total of 21,995 euros: (1) one Toyota Corolla, of which Vojislav Šešelj was thought to be the sole owner; (2) one Fiat Croma 16010 belonging to the Accused's spouse, and previously owned by Šešelj; (3) one Škoda Octavia Elegant TDI, and (4) one Škoda Fabia Ambient 1,4 TDI.
[171] In a letter sent to the Accused Vojislav Šešelj by the Chief of OLAD dated 10 March 2010, the Registry noted that the Accused Vojislav Šešelj held accounts in several banking institutions around the world: (1) a bank account with *Nacionalna Štedionica Banka* (the national savings bank), with a balance of around USD 25,000, i.e. 20,442 euros; (2) a bank account with the *Banque Royale du Canada* with a balance of 42,000 Canadian dollars, i.e. 33,854 euros; (3) a savings account with Citibank, New York, with a balance of USD 70,000, i.e. 57,238 euros; (4) a savings account with an unknown bank in California (United States) with a balance of USD 15,000, i.e. 12,265 euros; and (5) a savings account with *Komercijalna Banka*, Belgrade (held by the Accused and his spouse), with a balance of 3,267.42 euros, USD 3,092.94 (i.e. 2,529 euros) and 2,302.29 Canadian dollars (i.e. 1,856 euros). For the foreign currency, the exchange rates used were those of 16 July 2012: 1 euro = 1.22 USD = 1.24 Canadian dollar = 1.19 Australian dollar.

This information was obtained thanks to the cooperation of the Serbian authorities, as well as through exchanges between the Registry and the Accused.[172]

The issue of the financing of **Vojislav Šešelj**'s defence took a new turn on **29 October 2010** when the **Trial Chamber issued a decision ordering the Registrar to fund 50% of the defence costs of the Accused from the date of the decision**.[173] Following this major development in the Chamber's position, the Registry filed a submission pursuant to Rule 33 (B) of the Rules before the Appeals Chamber,[174] requesting that it invalidate the Decision of 29 October 2010 on the ground of the Trial Chamber's lack of jurisdiction.[175] In its **Decision of 8 April 2011**, the Appeals Chamber concluded that the Registry failed to demonstrate that the Trial Chamber had made a discernible error in rendering the impugned decision and rejected the Registry Submission.[176]

A month later, at the **hearing of 5 May 2011**, **Vojislav Šešelj** made an oral motion requesting that the Tribunal finance the costs incurred for the preparation and presentation of his defence as of 23 February 2003, the first day of his detention.[177] He also contended that the Trial Chamber's Decision of 29 October 2010 was silent on the issue of retroactive reimbursement of defence costs for the eight years of his pre-trial detention.[178] On **9 June 2011, the Trial Chamber** rendered a decision recalling that in its Decision of 29 October 2010, it had ordered that reimbursement for financing of the Defence should enter into effect starting 29 October 2010, but was not supposed to be retroactive and cover the expenses the Defence had incurred since 31 October 2003.[179] The Chamber pointed out moreover that the financing of the Defence had not been ordered on the

[172] On 12 April 2010, the Chief of OLAD sent a new letter to the Accused, with the following updates on the Accused's bank accounts: (1) his account with *Nacionalna Štedionica Banka* with a balance of USD 25,000 was closed following the bank's bankruptcy, and the funds provided a monthly income of around 500 euros, paid by Eurobank EFG (which had bought *Nacionalna Štedionica Banka*), the capital amounting to 16,000 or 17,000 euros; (2) the savings account with *Banque Royale du Canada* had been transferred to *Komercijalna Banka Belgrade* in 2005 or 2006 ; (3) the savings account in a Californian bank was in fact with the Bank of California; the USD 15,000 in that account had been transferred to the *YAS Bank* in Belgrade prior to the indictment of the Accused before the Tribunal; (4) the savings account with the *City Bank of New York* had been blocked by the US authorities; 5) the amounts deposited in the savings account with *Komercijalna Banka Belgrade* had been spent, save for the 10,000 euros transferred to the UNDU in 2010. Vojislav Šešelj was also the registered holder of: (6) an account with the Westpac Bank of Sydney (Australia), with a balance of 117,377.85 Australian dollars, i.e. 98,140 euros. As his account was frozen by the Australian authorities in October 2007, it was not taken into account in the evaluation of the Accused's assets. Finally, the Registry was aware of: (7) a savings account with *Komercijalna Banka Belgrade*, held by Vojislav Šešelj's spouse, with a balance of 10,000 euros.

[173] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Redacted Version of Decision on Financing the Defence, Filed 29 October 2010", 2 November 2010 (public), para. 27.

[174] Registry Submissions before the Appeals Chamber of 19 November 2010.

[175] *Ibid*, para. 52.

[176] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R33B, "Decision on the Registry Submission Pursuant to Rule 33 (B) Regarding the Trial Chamber's Decision on Financing of Defence" rendered on 8 April 2011, para. 29.

[177] Procedural matters, T(E) of 5 May 2011, pp. 16991-17000.

[178] *Ibid.*, pp. 16991-16994.

[179] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Consolidated Decision Regarding Oral Motions by the Accused Concerning the Presentation of his Defence", 9 June 2011 (public version), para. 44.

ground that the Accused was indigent, but rather, **to safeguard the rights of the Defence and to prevent the trial from being paralysed.**[180] As regards the Accused's oral motion made at the hearing of 5 May 2011, the Chamber considered that it could only be analysed as a request for reconsideration of the Decision of 29 October 2010.[181] The Chamber found that, in view of the applicable law, **Vojislav Šešelj** did not argue or establish that the Chamber had committed a discernible error or that particular circumstances justified reconsideration in order to avoid any injustice, and therefore denied the oral motion of the Accused. Finally, the Chamber noted that the system of remuneration for persons assisting indigent self-representing accused had come into effect on 1 April 2010, and that the document stipulating the modalities of financing the defence and the remedies in the event of complaint or disagreement directly applied to the situation of the Accused.

Far from considering the matter settled, the Accused again raised the **matter of the financing of his defence** in the main case during his last contempt trial **before the Trial Chamber presided by Judge Trechsel**.[182] At the pre-trail conference, **Vojislav Šešelj** stated: "*My main trial was absolutely irregular because my right from Article 21 granting me remuneration for the preparation of proper defence was denied.*"[183]

With regard to the financing of his counsel in the last contempt proceedings against him, the Accused vigorously criticised the choice of the Trial Chamber seized of the case. At the pre-trial conference, the Accused requested the Chamber to reconsider its decision concerning the presence at the trial of **Dejan Mirović**, his legal adviser, and to enable his case manager *Nemanja Šarović* to participate at the trial as well.[184] **Vojislav Šešelj** stated:

> "*My wish was to have my Case Manager and legal advisor yesterday so that we can draw up a list of the questions that I'm going to be asked [by my legal advisor], which is the standard procedure at this court. I wanted both of them to be present here in the courtroom and to stay with me tomorrow so that we can agree about the possible appeals […]. As for the issue of travel costs, that's not an issue that is directly related to financing the legal representation. […] I never asked for any money for these*

[180] *Ibid.*, para. 44.
[181] *Ibid.*, para. 46.
[182] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4.
[183] Pre-trial Conference, T(E) of 12 June 2012, p. 67.
[184] *Ibid.*, p. 72.

auxiliary contempt of court proceedings. All I'm asking is for the travel expenses to be covered."[185]

The judges of the Chamber deliberated on **Vojislav Šešelj**'s request and decided to reject it and adhere to the position adopted on 29 May 2012,[186] where the Chamber considered that the nature of the case was straightforward and did not require the presence of a case manager; accordingly, it allowed only the legal adviser, **Dejan Mirović,** to assist the Accused at trial.[187]At the hearing of 18 June 2012 **Vojislav Šešelj** appeared alone before the Tribunal while **Dejan Mirović** was absent.[188]

In the Judgement rendered by the Trial Chamber on 28 June 2012, the judges recalled that the Chamber had closed the trial proceedings as the Accused had refused to defend himself against the charges without the presence of **Dejan Mirović**.[189] The Judges did not revisit the issue of the financing of **Vojislav Šešelj**'s defence or the travel expenses of his associates, considering them as settled.

As we can see, the present Trial Chamber has done **everything** to enable the Accused to have the necessary means to present his defence. Its actions were subsequently upheld by the Appeals Chamber on 8 April 2011.

It is regrettable that the administration of this Tribunal was not more "proactive" by releasing funds for the Accused and his associates from the beginning. This is all the more unfortunate because a trial is costly when the accused is assisted by two counsel and a legal team and, to this day, the Registry has settled next to nothing as regards the costs incurred for the defence of this accused.

And yet, did the Accused suffer from this situation? In the case of a different accused, I would have said 'yes'. In the present case, I affirm that **Vojislav Šešelj,** thanks to his intellectual capacities, the fact that he had behind him a political party (the Serbian Radical Party) and activists loyal to him, did have the **technical ability** to obtain evidence, as he demonstrated to us by presenting witness statements in the courtroom. Thus, he did indeed have **a fair trial,** despite the fact that he did not have UN funding available to him.

[185] *Ibid.*, p. 67.
[186] Order Scheduling Trial, public, 29 May 2012, p. 2.
[187] *Ibid.*, pp. 71-72.
[188] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4, Judgement (public), 28 June 2012, para. 34.
[189] *Ibid.*, para. 35.

3. THE PUBLIC NATURE OF THE TRIAL

According to the **Rules**, the trials are **public,** but there can be **closed sessions**. This was strenuously challenged by the Accused who considered that, after making the solemn declaration, the witnesses should testify publicly.[190] On this issue, my opinion is that protected witnesses, in order to have peace of mind, should be able to testify either in a completely closed session or in private session, with technical protection measures such as **voice** and **image distortion.**

These cases of protected witnesses are not all that numerous and should be limited to rape victims who are entitled to **total protection**, or witnesses who may be subject to pressures or intimidation, but in that event, it is the Trial Chamber's duty to check the veracity of such allegations. The court should not just take the Prosecution's word for it. In my view, there should be a genuine prior investigation and the witness concerned should be questioned in closed session to explain the reality of the threats.

One of the major inconveniences I encountered on many occasions was that, pursuant to the Rules, the witnesses who had enjoyed protective measures in other cases were **automatically** protected when called to testify in a subsequent case. It is regrettable that the ICTY should be confronted with this kind of problem when it has a very sophisticated *Victims and Witnesses Section* and our practice could serve as a reference model.

In my opinion, this is a **major issue** that deserves a case-by-case, detailed response and a judge should precisely calibrate protective measures to suit each specific case.

[190] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, T(E) p. 9156 (closed session), 9 July 2008.

4. THE ACCUSED'S MOTION FOR DISQUALIFICATION OF A JUDGE

Disqualification proceedings were instituted against **Judge Harhoff** after a Danish newspaper published an email message he had sent to 56 of his close friends.

A panel appointed by the Vice-President rendered **two decisions** that I shall refrain from commenting upon or referring to in any way. I shall limit myself to expressing **my point of view** here, as I have done already in part in my report addressed to the ICTY President pursuant to Rule 15 of the Rules of Procedure and Evidence, which I have made public.

Over time, the International Criminal Tribunal for the former Yugoslavia has seen quite a few motions filed before it seeking the disqualification of judges who are, by virtue of the oath of office, supposed to be impartial. This increase in motions for disqualification was notable in high-profile trials such as those of General Mladić and Radovan Karadžić. Since the Rules do not envisage any penalty in the event such a motion is denied, there is an inclination to resort to them. This is a particular cause for concern in international trials where the very fact that a judge is attacked casts **general suspicion** on the whole institution of international justice.

In rare cases, it may so happen that a judge is confronted with a **conflict of interest** because he has a personal interest in the case or some kind of link with it that could compromise his impartiality. In such cases, it is incumbent on the judge to recuse himself. Without waiting for any motion, he must ask himself: can I be part of this Chamber? Upon an examination of his own conscience, if a judge does not raise the issue himself, he is presumed impartial. It is noteworthy that, since the establishment of this Tribunal, no judge has ever recused himself.

The motion for disqualification of Judge Harhoff raised, in my opinion, another important problem, namely - the **tempo** of the trial. The Trial Chamber was engaged in **deliberations,** which means that after the close of hearings it had retired to deliberate in private and should normally not be disturbed by any external event. Admittedly, these deliberations are time-consuming and for this very reason, the privacy of the deliberations could potentially be disrupted. Nevertheless, I believe that, regardless of the length of deliberations, we are supposed to remain sealed off from the outside world and protected from **any possible disruptions**.

I wish to recall here (A) the applicable law, (B) the issue of jurisdiction – residual Mechanism/ICTY – (C) the issue of the competent judge – Presiding Judge or President of the MICT,(D) the merit of the motion and (E) the issue of fair trial in the event that the motion is granted.

4.1. Applicable law

The obligation of impartiality imposed on the judges by the Statute of the Tribunal implies the absence of both real bias and the appearance of bias.[191] An appearance of bias is considered to arise when the circumstances would lead a reasonable observer, properly informed, "*to reasonably apprehend bias"*.[192] The Appeals Chamber held that a reasonable observer must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality of the Tribunal, and also aware of the fact that impartiality is one of the duties that Judges swear to uphold.[193]

There is a presumption of impartiality which attaches to **all** judges of the Tribunal.[194] Accordingly, it is for the party moving for disqualification of a judge to adduce sufficient evidence to prove the judge's partiality.[195] In the view of the Appeals Chamber, "*disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be 'firmly established'*".[196] This is a high threshold to reach[197] due to the fact that "*it would be as much of a potential threat to the interests of the impartial and fair administration of justice if the judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias.*"[198]

Finally, although neither the Statute nor the Rules provide any time-limits, the moving party is certainly under "*a general obligation to act swiftly in order to ensure that the Accused can be tried expeditiously*".[199] The same applies in many national jurisdictions.[200]

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[191] *The Prosecutor v. Anto Furundžija*, IT-95-17/1-A, Judgement (21 July 2000) at para. 189

[192] *Furundžija* Appeal Judgement, para. 189 (B) (ii), citing *The Prosecutor v. Radoslav Brđanin and Momir Talić*, IT-99-36-PT, "Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge" (18 May 2000) (ICTY, Presiding Judge of Trial Chamber II).

[193] *Furundžija* Appeal Judgement, para. 190, citing the Appeal Judgement in R.D.S. v. The Queen (1997), Canadian Supreme Court, delivered on 27 September 1997.

[194] *Furundžija* Appeal Judgement, para. 196.

[195] *Furundžija* Appeal Judgement, para. 197.

[196] *Furundžija* Appeal Judgement, para. 197, citing the Appeal Judgement of the Supreme Court of South Africa in the case of *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, Judgement on Recusal Application*, (1999) 7 B. Const. L.R. 725 (S. Afr. S.C.).

[197] *Furundžija* Appeal Judgement, para. 197.

[198] *The Prosecutor v. Zejnil Delalić (Čelebići* case*)*, IT-96-21-A, Appeal Judgement (20 February 2001) at para. 707 (ICTY, Appeals Chamber).

[199] *The Prosecutor v. Stanislav Galić*, IT-98-29-T, "Decision on Defence Motion for Withdrawal of Judge Orie", 3 February 2003, para. 11, (ICTY, Presiding Judge of Trial Chamber I).

[200] *See* the legal provisions and jurisprudence cited by Judge Orie in his 14 May 2012 report to the ICTY President pursuant to Rule 15 of the Rules of Procedure and Evidence: *The Prosecutor v. Ratko Mladić*, IT-09-02-PT, "Order Denying Defence Motion Pursuant to Rule 15 (B) Seeking Disqualification of Presiding Judge Alphons Orie and for a

4.2. Jurisdiction: Residual Mechanism or ICTY?

As Vojislav Šešelj's motion was addressed to the ICTY President (who was at the same time President of the residual Mechanism), the question arose as to which institution could be seized of this Motion dated **1 July 2013**, the date on which the **residual Mechanism** succeeded the ICTY. As stipulated by the Statute of the residual Mechanism[201] in Article 1, item 1: "*The Mechanism shall continue the material, territorial, temporal and personal jurisdiction of the ICTY and the ICTR as set out in Articles 1 to 8 of the ICTY Statute and Articles 1 to 7 of the ICTR Statute, as well as the rights and obligations of the ICTY and the ICTR, subject to the provisions of the present Statute*." Article 2, item 1 states: "*The Mechanism shall continue the functions of the ICTY and of the ICTR, as set out in the present Statute ("residual functions"), during the period of its operation.*"

The Rules of the Mechanism that have entered into force take over from the Rules of Procedure and Evidence of the ICTY. We were faced with a situation where Rule 15 (B) (i) of the ICTY Rules provides that "*[a]ny party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds.*" However, Rule 18 of the Rules of the Mechanism state in paragraph (B) (i) that "*[a]ny party may apply to the President for the disqualification and withdrawal of a Judge from a proceeding upon the above grounds. The President shall confer with the Judge in question.*"

The case was therefore complex and could only be resolved by taking into consideration a number of other factors. One of these factors, in my view, was the role of the President of the Mechanism. If he is confronted with a motion for disqualification, directly or indirectly, he cannot be qualified to rule on it and, as stated in Article 18 (B) (iv): "*If the Judge in question is the President, the responsibility of the President in accordance with this paragraph shall be assumed by* ***the Judge most senior*** *who is able to act.*" Ultimately, regardless of this issue of jurisdiction, it is the ICTY that retained competence.

4.3. The report of the Presiding Judge

Another underlying issue is whether, on the assumption that competence lies with the Presiding Judge pursuant to Rule 15 of the ICTY Rules, it is the Presiding Judge seized of the case or the

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Stay of Proceedings", 15 May 2012, Annex – "Report Pursuant to Rule 15 (B)", para. 4 (ICTY, President of the Tribunal).

Presiding Judge of the Chamber (of Trial Chamber III in this case) who is competent to write the report? This issue arose in a **previous case** where the President of the Tribunal deemed that it was the Presiding Judge of Trial Chamber III who was competent, although in another case, concerning a Prosecution motion for the disqualification of Judge Harhoff, I drafted the report to the President of the Tribunal myself. From my point of view, the text is unequivocal: it is the Presiding Judge seized of the case who knows the case and its practical implications better than anyone, and not the Presiding Judge of Trial Chamber III who – and I must emphasise this – was himself the subject of a prior motion for disqualification by the Accused Šešelj.

The consequence of a disqualification could be twofold: the first consequence would be the **replacement of a Judge** in the midst of deliberations by a decision to disqualify, which would require the new judge who joined in the midst of deliberations to familiarise himself with thousands of pages of court transcript, hundreds of motions, thousands of decisions, and with close to 1,400 exhibits admitted into evidence. This, in my view, should take at least one year before the Chamber is able to render its Judgement, as the Judges would have to resume the deliberations from the beginning, given that the prior deliberations would by definition have been nullified. This would be the best-case scenario. The other worst-case scenario would be having to organise a retrial before the Trial Chamber in a new composition because, in this event, two of the Judges would have to agree to such a re-trial, which would require a new composition, a new pre-trial procedure, etc…

In view of all the developments to date, I estimate that it would take **between three and five years** for a Trial Judgement to be rendered. If we add to this the time necessary for an appeal, we would be in a situation where the Accused would be detained for 15 to 20 years awaiting judgement. Such a trial would not in fact be fair given the excessive length of the proceedings. A motion for disqualification therefore involves an underlying problem that has to be borne in mind. **A balanced assessment must take into account the need to render a swift Judgement in a case that has already gone on for too many years, and must include the subjective assessment of an email addressed to a few persons in a private correspondence.**

In any event, the successful motion of the Accused resulted in **a delay,** as the delivery of the Judgement had been scheduled for 30 October 2013. The Accused exercised his absolute right to file a motion for disqualification. Nevertheless, one should consider the **timing** of the motion.

[201] S/RES/1966 (2010)

Since the judges were deliberating **in private** at the time, it was technically possible to issue a judgement of complete or partial acquittal. Under these circumstances, was it really reasonable to grant such a motion and risk causing immense harm to the Accused who could have been found not guilty by these deliberations, which would have turned him into a victim of his own motion?

He could have also been sentenced to a term of imprisonment already covered by his time spent in custody.

One can only imagine **the moral quandaries** faced by the **Presiding Judge** who is preparing his **report** but cannot say **everything** in it, even though the Judgement is due within weeks, as he is bound by the **secrecy of deliberations**.

It would be in the interests of justice and even **the interests of the Accused** not to allow this procedure during **deliberations**. The Accused, if convicted, would always have an opportunity on appeal to present his arguments on the presumed or proven bias of a judge. One should also bear in mind that even in the unlikely case of a **biased judge taking part in the deliberations**, the decision on guilt can be made **by the majority**, which makes the risk of a conviction tainted by bias extremely small, considering the majority rule.

Proper consideration of this issue by all international criminal tribunals in the future should lead to rules of procedure that allow motions for disqualification only before the commencement of trial and not during the trial, when a judge can put questions to establish the truth and, depending on the question asked, one or the other party may consider that there is bias. This rule is even more valid during deliberations, when the judge must hold a position which makes it obvious that he is for or against the Prosecution or the Defence. Likewise, I believe that such a decision must be taken by all of the judges of the given tribunal, as is done for example at the International Court of Justice or the International Criminal Court.

5. THE APPLICATION OF RULE 15 OF THE RULES OF PROCEDURE AND EVIDENCE IN THE EVENT OF A REPLACEMENT OF A DISQUALIFIED JUDGE

The disqualification of a judge sitting in this case had a **direct impact** on the proceedings as he needed to be replaced by another judge.

As it was the first case of disqualification of a sitting judge at the ICTY and there was no precedent to rely on, the question arose of what procedure should be applied.

In fact, important questions could arise, namely: would the new judge simply replace the previous judge, thereby allowing the other judges of the Chamber to continue their work, or would the inclusion of the new judge entail a partial or complete re-trial?

Following the Chamber's Decision of 13 December 2013, the Accused **Vojislav Šešelj** lodged an appeal, arguing that the Rule 15 *bis* procedure applied. The Prosecution, for its part, argued that the motion should be denied and the Decision of the Chamber upheld.

The Appeals Chamber upheld the Decision of the Trial Chamber. It is noteworthy that **six months** elapsed between the appointment of the judge, the filing of the appeal and the decision of the Appeals Chamber. One crucial question comes to mind: whether the Rules settle this issue without requiring any discussion, which in the event proved unnecessary.

The Rules make a clear distinction between **Rule 15** and **Rule 15 *bis***. As anyone can see, each bears a different title; the title of **Rule 15** is: **"Disqualification of Judges".** The title of **Rule 15 *bis*** is completely different: **"Absence of a Judge".**

The provisions of these rules unquestionably relate to a specific situation. The **first case** concerns a situation where a judge is disqualified or barred, while the **second case** concerns a judge who is absent and whose absence has to be redressed.

In the **first case**, Rule 15 stipulates that the President shall appoint another judge to replace the judge in question. It is thus perfectly clear that the new judge simply takes over from the judge who is leaving office. This Rule does not envisage **any** possibility of challenging the decision of the President of the Tribunal, and the proceedings continue with a new composition of the Trial Chamber. In my view, this was what should have happened.

Rule 15 *bis*, on the other hand, deals mainly with the absence of a judge **for medical or personal reasons**. As we can easily see, the judge may be absent for a limited period of time (short duration)

and, moreover, the other judges can continue to hear the case, i.e. carry on with the proceedings. If a Judge is unable to continue sitting because his absence is likely to be extended, we then have a situation where the absence will be for a very long duration and, at that moment the question arises of whether he should be replaced.

Bearing in mind the legal debate in our case, the **Vice-President**, in his Order Assigning a Judge dated **31 October 2013**, took care to include the language "**pursuant to Rule 15 of the Rules**"; this put an end to any uncertainty as to the applicable law.

IV. LEGAL ISSUES

1. THE ATTEMPT TO GRANT PROVISIONAL RELEASE *PROPRIO MOTU* PENDING DELIVERY OF THE JUDGEMENT

The process of **provisional release *proprio motu*** of the Accused Vojislav Šešelj at the initiative of the Trial Chamber is an important event in the history of this **Tribunal** because, to date, no provisional release has been granted *propio motu*.

It should be noted that, since the close of hearings on **20 March 2012**, i.e. for more than **two years**, the Accused had not made any motion for provisional release accompanied by guarantees from his State of origin, as required under Rule 65. Therefore, the Trial Chamber had no occasion to rule on such a motion from the Accused.

Although the issue was raised during the trial,[202] the Trial Chamber nevertheless considered that the submissions he made at the hearing allowed it to render a decision **rejecting** the Accused's request[203] on the ground of the absence of State guarantees. At the time, I deemed it necessary to attach a **separate opinion** to this Decision to draw the Accused's attention to this important issue that made his release impossible.[204]

As a general rule, an accused demonstrates his **spirit of cooperation** in advance and provides the judges of the Trial Chamber or the Appeals Chamber with any useful information on his future conduct while still in detention, so that the judges have no hesitation in granting provisional release. In its Decision of 23 March 2012, the Trial Chamber in a different composition writes as follows in paragraph 9: "The Chamber also notes that the Accused not only failed to present personal guarantees, e.g. bail or an undertaking that he would appear before the Tribunal at the Chamber's request, but on the contrary, made provocative remarks by declaring that he had formulated his request 'to bring more pain' to the Chamber and to place it 'in a position in which it [would] have to decide and reject [his] Request'."[205]

After the close of the trial, with a scheduling order already setting **30 October 2013**[206] as the date for the delivery of the Judgement, an **event** beyond my control occurred during the Chamber's deliberations and resulted, at the Accused's request, in the replacement of one of the judges deliberating on the Judgement.[207]

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[202] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Public Hearing of Closing Arguments, 20 March 2012, T(F) pp. 17551-17552.
[203] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Decision on the Accused Vojislav Šešelj's Request for Provisional Release", public, 23 March 2012.
[204] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Separate Concurring Opinion of Presiding Judge Antonetti on the Accused Vojislav Šešelj's Oral Request for Provisional Release", public, 27 March 2012.
[205] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Public Hearing of Closing Arguments, 20 March 2012, T(F) p. 17551
[206] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Scheduling Order", public, 12 April 2013.
[207] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President", public, 28 August 2013.

The fact that the new judge needed additional time raised the question of should the Accused remain in detention although the hearings ended on 20 March 2012? To my mind, the answer was obvious: there was **no need whatsoever to keep him in detention -** he could await his Judgement while on release.

Legally speaking, there is admittedly **no text** that regulates this situation in detail and, moreover, there was **no precedent** in the operation of international tribunals involving a judge who had been disqualified **in the midst of private deliberations**! Nor had there ever been a situation involving the issue of provisional detention that arises when a judge, is replaced after the end of hearings while the deliberations are still ongoing!

I must also deal with another aspect of the instant situation, namely his **health condition** which is a factor in favour of his release while awaiting judgement.

Without any doubt, the **state of his health** is very serious. I refer solely to the material available to the Trial Chamber and notably, to information on the Accused's heart problems,[208] for which he was medically examined, as can be seen from the many articles on the ICTY website.[209]

Regardless of the quality of health care provided in the Netherlands by the UNDU doctor and the hospital, he would certainly have received similar medical treatment in **Belgrade** or **elsewhere** and, moreover, would have had his family close by and been in a free environment. This was also a factor in favour of provisional release.

On this subject, on 27 March 2012, I wrote in my opinion attached to a **decision rejecting** the Accused's oral request for provisional release[210] that I had decided to reject it due to the absence of the guarantees required by Rule 65 of the Rules.
Since that opinion, there have been several major developments:

- the length of deliberations;
- the proceedings for disqualification of one judge of the Chamber;
- the deterioration of the Accused's health;

[208] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Order to Obtain Reports from the United Nations Detention Unit and to Proceed with a New Medical Examination", public, 12 January 2011; "Order to Proceed with a New Medical Examination", public, 12 March 2012.
[209] *See* notably articles entitled "SRS: Šešelj Life at Risk", press, 8 November 2010; "Šešelj Life in the Hands of Prison Guards!", press, 31 October 2010; "Heart Beats for Doctors", *Večernje Novosti*, 26 October 2010.
[210] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Separate Concurring Opinion of Presiding Judge Antonetti on the Accused Vojislav Šešelj's Oral Request for Provisional Release", public, 27 March 2012.

- the period of time for familiarisation with the proceedings by Judge Niang who, after estimating it at six months in his opinion of 13 December 2013,[211] soon announced to the other judges of the Trial Chamber and the ICTY Vice-President that he would need at least until 30 June 2015 before he could usefully commence deliberations in view of his current workload;
- The confirmation by the Appeals Chamber of our Decision of 13 December 2014 ordering continuation of the deliberations;
- The guarantees supplied by the Republic of Serbia;
- The Accused's announcement to the Chamber *via* the Registry on 8 July 2014 that he would not be making any submissions and referring the Chamber to the submissions made in his Motion no. 522.

Regarding provisional detention, one could ask: does it serve any purpose to keep him **in the hands of the law** after the close of hearings? It is obvious that this would serve no purpose since, were he to be released, he could in no way hinder the Chamber's deliberations and, as far as the witnesses and victims who have already testified are concerned, I fail to see why he would be interested in approaching them when a great majority of Prosecution witnesses had declared themselves as witnesses for the Defence.

At this stage, could the question of his presence at the delivery of the Judgement pose a problem? This issue deserves to be carefully examined, which I have done by stating that this Accused has always faced up to his responsibilities and even surrendered to the Tribunal voluntarily, before the arrest warrant was issued; unless he was expected to commit further acts of provocation; even though he had announced recently in the media that they would need to come for him and arrest him.

I am aware that his provisional release poses a problem of a different nature, namely the **scope of his political expression**. He was abundantly clear in his remarks when he said that he wanted to travel, hold rallies and give interviews. In a way, this Accused wants to continue to exercise his civil and political rights guaranteed by international legal instruments.[212]

[211] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Separate Opinion of Judge Mandiaye Niang Attached to the "Decision on Continuation of Proceedings", public, 13 December 2013, p. 44, para. 22.
[212] *See* in particular Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights.

With regard to the ICTY jurisprudence, the case of **Ramush Haradinaj** is **emblematic** as it enables us to assess the problem at hand and the definition of **scope of political expression.** It should be recalled that in this case, on 12 October 2005, following the 6 June 2005 decision to grant the Accused provisional release,[213] the Trial Chamber, by a majority, allowed the Accused a relaxation of the conditions imposed on him, with the Trial Chamber concluding that "particularly in light of the presumption of innocence, that the seriousness of the crimes an accused is charged with is not a reason on its own for not granting provisional release, but merely one of the factors to be taken into account in evaluating whether the Accused will appear for trial (…)."[214]

The Trial Chamber found in this case that it would be appropriate to "empower UNMIK, without having to seek prior approval by the Trial Chamber, to authorise or deny, as the case may be, any request by the Accused to appear in public or to engage in a certain public political activity."[215] Thus, under UNMIK control, the accused could engage in political activities and make public appearances.

The Trial Chamber's approach was upheld by the Appeals Chamber which rejected the Prosecution argument that the Trial Chamber approach would have a negative effect because seeing the Accused in the media would no doubt have a chilling effect on victims and witnesses.[216] The Prosecution contended that victims and witnesses could well gain the impression that their interests had not been taken into account and, in addition, the Accused's supporters would feel emboldened by the re-appearance of their leader, which might encourage them to threaten or intimidate the victims and witnesses.[217] The Prosecution also argued that this decision would dissuade some witnesses from testifying before the Tribunal and that the carte blanche granted the Accused to engage in politics would greatly undermine the authority of the Tribunal and its function to assist in

[213] *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, "Decision on Ramush Haradinaj's Motion for Provisional Release", public, 6 June 2005.
[214] *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, "Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005", public, 12 October 2005, p. 6.
[215] *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, "Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005", public, 12 October 2005, p. 6.
[216] *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, "Prosecution's Appeal against Decision on Defence Motion of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005", public, 19 October 2005, pp. 7-8.
[217] *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, "Prosecution's Appeal against Decision on Defence Motion of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005", public, 19 October 2005, pp. 7-8.

the restoration and maintenance of peace in the region.[218] The Prosecution further submitted that political activity and public appearances were inconsistent with being a **war crime** indictee.

These arguments did not satisfy the Appeals Chamber and I wish to note that, in the present case, they have no standing because the trial is over. I do not see what interest the Accused would have in pressuring witnesses or victims when the Trial Chamber is already in the phase of deliberations. Furthermore, I do not see in what way the authority of the Tribunal could be undermined by a decision that recognises a person's legitimate right to political expression. Contrary to paragraph 32 of the Prosecution's submission in the case of **Ramush Haradinaj**, I believe that reintegrating a politician in social and political life contributes to the **restoration and maintenance of peace** in the region because, by definition, a politician will take part in a democratic political dialogue.

The jurisprudence of distinguished international courts, such as the Inter-American Court of Human Rights and the United Nations Human Rights Committee, established in their appeal decisions in the cases of ***Acosta-Calderón v. Ecuador***, [219] **Vladimir Kulomin v. Hungary**[220] and **Michael and Brian Hill v. Spain,**[221] stated clearly that provisional detention should be **the exception**. The European Court of Human Rights has also recalled this principle.[222]

The fact that the Accused is a leading politician in his country and heads a legitimate political party presents, of course, a number of problems that must be considered. As he observed himself in his remarks, he wants to preserve his right to free political expression through contacts with the media, interviews, conferences etc…[223]

For my part, as he is **presumed innocent** and no punitive measures have been taken to restrict his civil and political rights, I cannot find any textual basis upon which I could limit his political expression. Nonetheless, as is generally the case, such political expression would have to comply

[218] *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, "Prosecution's Appeal against Decision on Defence Motion of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005", public, 19 October 2005, p. 10.
[219] Inter-American Court of Human Rights, *Acosta-Calderon v. Ecuador*, Judgement, 24 June 2005, paras 74 *et seq.*
[220] United Nations Human Rights Committee, *Vladimir Kulomin v. Hungary*, Communication No. 521/1992, 1 August 1996, Doc. UN CCPR/C/56/D/521/1992.
[221] United Nations Human Rights Committee, *Michael and Brian Hill v. Spain*, Communication No. 526/1993, 2 April 1997, Doc. UN CCPR/C/59/D/526/1993. The case-file shows that one of the members of the Committee was Judge **Fausto Pocar** who sat on the Appeals Chamber which rejected Krajišnik's motion for provisional release.
See, The Prosecutor v. Momčilo Krajišnik and Biljana Plavšić, IT-00-39 and 40-AR65, "Decision on Application for Leave to Appeal", 14 December 2001.
[222] *See* for example, European Court of Human Rights, *Ilijkov v. Bulgaria*, no. 33977/96, Judgement of 26 July 2001, para. 85.
[223] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Professor Vojislav Šešelj's Response to the Order of Trial Chamber III of 13 June 2014 Inviting the Parties to Make Submissions on Possible Provisional Release of the Accused *Proprio Motu*", public, 17 June 2014, p. 3.

with certain parameters, principally those related to the existence of the international community and this Tribunal.

In his remarks, the Accused reiterated that he would exercise his freedom of speech to criticise the Hague Tribunal, which he refers to as an illegal tribunal.[224]

He has already made this specific point publicly, both in his submissions and in the courtroom. It is nothing new.

Unfortunately, the process of consultation I advocated in order to arrive at a viable solution, which the Trial Chamber initiated by inviting submissions from the parties[225] and requesting the necessary guarantees from the Serbian authorities,[226] did not enable us to continue with the provisional release procedure due to an **unbridgeable gap** between the express will of the Accused and the guarantees listed by the Chamber and accepted by the Serbian Government.

It cannot be denied that it was the Accused who "blocked" the process of provisional release by demanding loudly and clearly his freedom of movement, without regard for the strict jurisprudence of the Appeals Chamber concerning the Rule 65 guarantees. He also put his own government in an extremely difficult position, as it had to demonstrate that it was cooperating with the Tribunal while at the same time assuming responsibility for internal public order. Therefore, the request for a **written undertaking** was perfectly legitimate and appropriate to the situation created by the Accused and his statements.

Despite my willingness to grant provisional release, I was duty-bound to respect the wishes of the Serbian Government and the well-developed jurisprudence of the Appeals Chamber in the matter of guarantees concerning the protection of victims and witnesses and the Accused's appearance at the delivery of the Judgement.

Nevertheless, I do not believe that the Trial Chamber's order of that day settled this debate before the date of the Judgement. It remained possible for the Accused **himself** to write a motion seeking

[224] *Ibid.*
[225] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Order Inviting the Parties to Make Submissions on Possible Provisional Release of the Accused *Proprio Motu*", public, 13 June 2014; *The Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67, "Professor Vojislav Šešelj's Response to the Order of Trial Chamber III of 13 June 2014 Inviting the Parties to Make Submissions on Possible Provisional Release of the Accused *Proprio Motu*", public, 17 June 2014 **[Submission of the Accused]**; *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Prosecution Submission on Trial Chamber's *Proprio Motu* Provisional Release of the Accused", public, 20 June 2014 **[Submission of the Prosecution].**
[226] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Order Inviting Host Country and Receiving State to Present Their Comments with Regard to Guarantees for a Possible Provisional Release of the Accused *Proprio Motu*", public, 24 June 2014.

provisional release, providing the guarantees required by Rule 65 of the Rules - as the process initiated by the judges did not succeed - or even for the Chamber to release him *propio motu*.

2. RELEASE *PROPRIO MOTU*

2.1. Preliminary remarks

I felt it was my duty to address this issue solely in the context of the Appeals Chamber's Decision of 30 March 2015. This decision, albeit of the **majority**, was of considerable importance in that the Appeals Chamber granted the Trial Chamber discretionary powers. As part of the exercise of these discretionary powers, the Trial Chamber had asked the team in charge at the time of **Vojislav Šešelj's** medical care to provide us with a medical evaluation of the situation.

Prof. Bojić forwarded us his evaluation and stated that he was totally opposed to **Vojislav Šešelj's** return to The Hague, unless of course the intention was to murder **Vojislav Šešelj**. The extreme position he sets forth in his evaluation is based on the fact that chemotherapy would not be possible, given the conditions that would then be imposed on **Vojislav Šešelj**, which he had refused. Under these circumstances, I do not see how we could get **Vojislav Šešelj** to come back and expose him to the same conditions as those that led to his release *proprio motu*.

In the past, the Appeals Chamber had been wise enough to agree with **Vojislav Šešelj** on the issue of **standby counsel**. If at the time the Appeals Chamber had not taken that decision, we would now not be able to issue any decisions at all because the Accused would have pursued his hunger strike until the bitter end, and he would have died since, according to Dutch law, no medical treatment may be imposed. Evidently, we are constantly faced with a quasi dramatic situation, which is why it is essential to issue legal decisions that take into account the context, the fundamental rights of the individual and the absolute necessity of ruling in the end on the guilt or the innocence of an accused, without applying the law simply for the sake of it, and with no consideration for concrete realities.

I agreed with the Trial Chamber's decision to implement the **Appeals Chamber** Decision of 30 March 2015.[227]

Besides the reasons for this decision I feel that, in light of the Chamber's position, I should explain my approach and make it more readily understandable in this opinion. In a concurring separate

[227] *The Prosecutor v. Vojislav Šešelj,* IT-03-67-T-AR65.1, "Decision on Prosecution Appeal against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused", 30 March 2015.

opinion, appended to the interlocutory decision, I was able to give my views, at the time, on why it was necessary to have a **medical report** on Mr Vojislav Šešelj.[228]

The Trial Chamber **and the Appeals Chamber** were as a result in possession of medical documentation provided by the five Serbian doctors, professors of medicine, who were assisting the Accused since his return to Belgrade. It was then possible to issue a decision on whether he should return to The Hague or remain in Serbia.

2.2. The background to the decision of the Trial Chamber on the Accused's release *proprio motu*

As I have had occasion to mention in my previous opinions, I took into account several factors when ruling on the release *proprio motu* of the Accused. The four factors that led to his release were as follows:

- Risk of the Accused's refusal to accept any medical treatment
- The presumption of innocence
- The requirements of provisional detention
- Excessive length of time already served in provisional detention

2.2.1. Risk of refusal to accept any medical treatment

From the first day of his arrival in **The Hague**, the Accused has permanently fought against our institution.[229] He had the opportunity to publicly explain his position and said that he would use the proceedings against our institution and that if he lost one case, he would start a new one and so on and so forth. The deep-seated reason for his hostility towards our institution is due to the fact that, according to him, we are a political court that has been established illegally by the **Security Council**.[230] The Accused nonetheless was careful to say that he was not criticising the Judges directly but the institution they are part of. This was not the Accused's first battle for he had already fought against the assignment of a **standby counsel** which had led to an extreme situation, namely

[228] *The Prosecutor v. Vojislav Šešelj*, IT-03-67-T, "Separate Concurring Opinion of Presiding Judge Jean-Claude Antonetti Attached to Interlocutory Decision Before Ruling on the Merit of the Revocation of the Provisional Release of the Accused", 10 April 2015.
[229] Motion Hearing of 20 March 2012, T(F), p. 17547.
[230] Motion Hearing of 20 March 2012, T(F), p. 17543.

the hunger strike that could have ended in his death. Fortunately, as is customary, the Appeals Chamber was wise enough to find a solution at the time.[231]

Without going into the details of what was a permanent and harassing struggle for the Judges, the question of his **solitary confinement** and his medical treatment was another of his "battle horses" which could have ended in death had he refused to accept any medical treatment. The purpose of his action raises the question of whether he ultimately wished to be considered as a "martyr of international criminal justice." Of course a Judge must not lend credence to this kind of blackmail, but he must ask himself whether the demands that motivated his action were justified or not. In the present case, the medical treatment prescribed by the prison medical authorities amounted to "excluding" him from prison life for quite a long time, which triggered his decision to interrupt his medical treatment. Therefore, I cannot recreate and rekindle a climate of uncertainty by his return through any action of mine by enforcing a committal order as part of the issuance of a new arrest warrant.

Whatever the case may be, it was "out of the question", as far as I was concerned, to comply with such an injunction. I could not, on the one hand, rule on the release of the Accused and, on the other, take a counter decision on the injunction of three out of five Judges. Obedience has its limits, particularly in legal matters. If a person gives an order, one may ask **why** that person who has given the order does not act upon it himself? I am convinced that it was for the majority of the Appeals Chamber to issue the arrest warrant and, of course, to take full responsibility for it.

2.2.2. The presumption of innocence

The drafters of the **Statute** have emphasised the expeditiousness of trials and this goes hand in hand with promptly rendered judgements, otherwise why keep an innocent person in custody for any length of time? This objective, albeit a very legitimate one, as I explained in my previous opinion, was completely **altered** when the Rules of Procedure and Evidence were introduced; the Rules are contrary to this objective and allow the accused to submit preliminary motions at any stage of the proceedings, causing delays in the schedule, when such matters could have been dealt with at the beginning of the trial (*in limine litis*). The limited number of Judges did not allow for the proceedings to be expedited and there was also the established practice of trying individual cases rather than joining them, as could have been done for the **Šešelj case** and the Mrkšić case. These

[231] *The Prosecutor v. Vojislav Šešelj*, IT-03-67-T, "Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel", 20 October 2006, para. 45.

procedural errors led to ever-longer delays, so much so that the person **presumed innocent** must bear the consequences thereof, whether he likes it or not.

In accordance with his fundamental rights, it is not for the person presumed innocent to prove his innocence since the burden of proof rests with the Prosecution. It is undeniable in the present case that, in the eyes of the Prosecution, the Accused is guilty from start to finish, especially since the Prosecutor made sure that the Accused was taken into custody, *inter alia*, by requesting the **Appeals Chamber** to order the detention of the Accused without delay through his motion of 14 April 2015.[232] This written submission is all the more surprising because the Prosecutor seised the **former Appeals Chamber**, no longer competent in strictly legal terms since the case had been assigned to our Chamber, and nothing in the disposition stipulated that it would remain competent in the event of a dispute. An international court worthy of the name must be beyond reproach, for otherwise the accused are perpetually facing legal uncertainty.

When a person is presumed innocent this also means that, at the outcome of the trial, he/she may be declared innocent. The European Court of Human Rights ("ECHR") stated in several of its Judgements that freedom should be the rule and detention the exception, and established, as a general principle, that an accused should be released. Between the ECHR and common law jurisdictions, there are no differences of approach on this matter for in the United States, if a crime is committed, an accused may be released on bail. It is only at the ICTY and the ICTR that the accused, presumed innocent, must be detained for years when, as was the case for a number of accused, they were acquitted in the end after many years in custody…

The Trial Chamber had not yet started its deliberations when the release of the Accused *proprio motu* was decided. As a member of the bench, I must bear in mind the possibility that, at the end of the trial, the Accused may be declared innocent. In relation to my colleagues, as part of the 98 *bis* proceedings, I had already decided on acquittal for several of the counts and only upheld Counts 1, 10 and 11, publicly stating my position.[233] I do not see why my position would be different today. As I explained in my previous opinion, I classified three situations related to provisional detention: first, a not guilty plea from an accused; second, a custodial sentence that is shorter than time already served; third, the accused, presumed innocent, is declared guilty and sentenced to a term in prison that is longer than time already served. As things stand today, it must be clear for all concerned,

[232] *The Prosecutor v. Vojislav Šešelj*, IT-03-67-T, "Urgent Prosecution Motion for Enforcement of Decision on Revocation of Provisional Release", 14 April 2015.
[233] 98 *bis* hearing, 4 May 2011.

including the Prosecution, that the Accused is presumed innocent and that at the end of the trial he could be declared not guilty.

2.2.3. Excessive length of time already served in provisional detention

The Accused has been detained for over 12 years without a judgement. Although, as I have already mentioned, he is not entirely responsible for this length (but only partly), it remains exceedingly long, which in itself warrants his release without further consideration. The ECHR has had several occasions to rule on this matter. The Accused, who is a professor of law, did not fail to mention this in several of his written submissions, by pleading an end to the proceedings instigated against him. The route suggested by the Accused was not followed and the continuation of the trial, notwithstanding the excessive length of his detention, was upheld. As a responsible Judge, I have the duty not to contribute to prolonging this exceedingly lengthy detention.

2.2.4. The requirements of provisional detention

The Statute and the Rules of Procedure and Evidence refer to several conditions set out for the provisional release of an accused, notably the need to ensure the protection of witnesses and victims, the need of holding a trial and the presence of the accused at the sentencing hearing. In light of the case-law of the ICTY and of the human rights institutions, is it really necessary to keep the Accused in custody? The answer is no for, on the one hand, the trial is over and, on the other, the Judges are currently deliberating and there is no need to keep the Accused "in the hands of the law". The Chamber was keen to ensure the highest level of security, namely the surrender of his passport (which he did not even have in his possession) and making sure, if need be, that he would appear for the delivery of the Judgement. In addition, the Accused was not in a position to engage in any activity against witnesses and victims and had I been seised of any complaints from a witness or a victim in that regard, I would have abolished this measure without batting an eyelid, but this is not the situation we find ourselves in. Furthermore, Rule 65 of the Rules of Procedure and Evidence had envisaged this situation by authorising provisional release at **any stage of the proceedings**.

2.3. Conditions set by the Chamber in its decision to release the Accused *proprio motu* in light of the Appeals Chamber's Decision of 30 March 2015

First, it must be noted that the decision was taken **by the majority** since two Judges held that the Trial Chamber had not **erred in law**.[234] In paragraph 18, the Appeals Chamber finds that the Chamber failed to address the Prosecution's argument that the Accused's statements eroded the essential preconditions for his provisional release.

In this respect, in the context of its Decision of 6 November 2014, the present Chamber had decided, *proprio motu,* to release the Accused to allow him to receive treatment in the most suitable environment, while at the same time making certain that the security of witnesses and the integrity of the proceedings would be guaranteed.

The Chamber addressed the matter and stipulated that the situation described by the Prosecution was hypothetical and that there could only be a **triggering factor** if a scheduling order had been issued. As the two dissenting Judges of the Appeals Chamber state, the Trial Chamber took the approach to address the issue *in concreto*.[235]

As regards the use of force, there has clearly been a misunderstanding for the Accused only said that he would not voluntarily return to The Hague, and that one would need to go and fetch him, that he would not use force but would put up passive resistance. The Accused had already expressed this position - typical of him - during a public hearing in The Hague regarding the difficulties of the police escort who took him from the detention unit to the Tribunal.

The main difficulty in addressing some of these issues lies in the fact that the Accused has filed hundreds of motions totalling thousands of pages, and that to understand the texts and the meaning of the Accused's statements one needs to have read all his written submissions beforehand to avoid any error. Unfortunately, those who intervene in these proceedings pick up the record halfway and have not had the time to familiarise themselves with all the material; familiarisation with the record, in my view, takes at least a year. As an example, when the Accused states that he will have to be fetched and brought back to The Hague, this must be looked at in the context of the initial situation:

[234] *See* the joint dissenting opinion of Judges Afande and Tuzmukhamedov appended to *The Prosecutor v. Vojislav Šešelj*, IT-03-67-T, "Decision on Prosecution Appeal against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused", 30 March 2015.
[235] *See* joint dissenting opinion of Judges Afande and Tuzmukhamedov, para. 11.

he came of his own accord and paid for his plane ticket when the arrest warrant had not yet been executed, and he has been awaiting judgement for the last 12 years after having pleaded not guilty.

2.4. Applicable legal framework regarding placement under solitary confinement of an accused

In light of the possible effect on the mental and somatic health and social wellbeing of a detainee, such a measure should be restricted, inasmuch as provisional detention of an accused who is presumed innocent is already "a punishment in its own right and potentially dangerous aggravations of a prison sentence as part of the punishment are not acceptable".[236] A parallel should be drawn between this restrictive concept of placement under solitary confinement and a situation where solitary confinement "further restricts the already highly limited rights of people deprived of their liberty."[237] Such placement also constitutes "a serious restriction of a prisoner's rights which involve inherent risks to the prisoner."[238] The prevailing principle in the matter calls for specific criteria regarding the imposition of solitary confinement, its continuation and termination, namely that it be proportionate, lawful, accountable, necessary and non-discriminatory.[239]

In most European countries, the decision to place an accused under solitary confinement meets very specific requirements that pertain to a particular situation and are corroborated by overall specific and verifiable evidence.[240] Such measures must be **proportionate,**[241] **limited**[242] **and non discriminatory**[243] towards the detainee. It must be said that solitary confinement should never be imposed - or be imposable at the discretion of the court concerned - as part of a sentence. In this regard, the term "solitary" should be understood to mean "whenever a prisoner is ordered to be held separately from other prisoners, for example, as a result of a court decision, as a disciplinary

[236] *See* the sixth General Report of the European Committee for the Prevention of Torture (General Report CPT), CPT/Inf (96) 21, para. 56.
[237] General Report CPT, para. 55.
[238] General Report CPT, para. 55.
[239] General Report CPT, para. 55.
[240] *See* Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment ("Interim Report"), 5 August 2011, UN Doc. A/66/268, para. 93. The report stipulates that "all assessments and decisions taken with respect to the imposition of solitary confinement must be clearly documented and readily available to the detained persons and their legal counsel. This includes the identity and title of the authority imposing solitary confinement, the sources of his or her legal attributes to impose it, a statement of underlying justification for its imposition, its duration, the reasons for which solitary confinement is determined to be appropriate in accordance with the detained person's mental and physical health, the reasons for which solitary confinement is determined to be proportional to the infraction, reports from regular reviews of the justification for solitary confinement, and medical assessments of the detained person's mental and physical health."
[241] Interim report, para. 90
[242] Interim report, para. 91.

sanction imposed within the prison system, as a preventative administrative measure or for the protection of the prisoner concerned".[244]

As a responsible Judge aware of the risks that solitary confinement entails, I hold that this decision should have fallen within the remit of the Chamber that would have had the **judicial authority** to assess the necessity of such a measure. Such a decision points to the real nature of the remand in custody of an accused.

In the present case, the placement under solitary confinement was not decided by the Chamber and it took no part in the decision. According to the information received by the Chamber from the prison medical services, the solitary confinement was warranted by the requirements of intravenous chemotherapy treatment.[245] No document, to the effect that such a measure was warranted, was ever communicated to the Chamber; the Chamber simply noted what treatment protocol was being applied to the Accused. Even if the Chamber does not have sufficient medical authority to assess whether the medical treatment is appropriate or not, the fact is that solitary confinement is what triggered the Accused's decision to interrupt his treatment and put his life in danger.[246]

There are various types of solitary confinement for persons remanded in custody but national legislations do not specifically address the issue of isolation of prisoners for medical reasons. Despite this lacuna, it is interesting to note that in most European countries the law allows for administrative solitary confinement for preventative purposes.[247] Persons to whom such solitary confinement regimes apply would be prisoners who have caused, or who are likely to cause, serious harm to others or who represent a very serious risk to the safety or security of the prison. As opposed to other types of confinement, this regime is the one with the fewest procedural safeguards. Indeed, the European Committee for the Prevention of Torture deems that such a measure should be imposed "as a last resort and for the shortest possible period of time."[248] The generally accepted principle in such cases is that "solitary confinement is only imposed in exceptional circumstances and for the shortest time necessary".[249] A **right of appeal** to an independent authority should also be in place.

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[243] Interim report, para. 92.
[244] General Report CPT, para. 54.
[245] Memorandum of 3 December 2014, para. 22.
[246] Observation made, *inter alia*, by one of the doctors in his report in which he confirms that the interruption of his treatment would have life-threatening adverse effects.
[247] General Report CPT, para. 57 (c).
[248] General Report CPT, para. 57 (c).
[249] General Report CPT, para. 57 (c).

In this case, was **Mr Vojislav Šešelj** accorded all the guarantees associated with his solitary confinement? Was he able to exercise his right of appeal before an independent authority? Further below, I shall analyse in detail the issue of the guarantees afforded to an accused placed in solitary confinement.

2.5. Suitability of the treatment to the medical condition of the Accused

In this case, it is interesting to turn to the medical literature on the subject of metastatic colorectal cancer.[250] With this condition, the medical unit makes a customised diagnosis and, as a rule, a multidisciplinary approach is taken with a view to selecting the best treatment policy. This multidisciplinary approach to the medical condition means that the chronic disorders and the secondary medical treatment of the Accused can be monitored. In this particular case, the most effective treatment is combination chemotherapy every two weeks that includes intravenous chemotherapy and the use of cytotoxic drugs.[251] This was the treatment recommended to the Accused by the medical team; it began in February 2014 and, according to **Doctor Falke**, warranted placing the Accused in solitary confinement.

This kind of treatment using toxic drugs follows a very strict medical protocol that requires the patient to be monitored by dedicated medical staff who is well versed in the treatment techniques for this disease.[252] These treatment procedures are extremely detailed and the healthcare facility administering the treatment to the patient must meet very specific standards.[253] The treatment procedure must be carried out by the medical unit under strict conditions of hygiene, particularly immediately after the intravenous chemotherapy when side effects linked to the treatment may occur.[254] During such a treatment, the period following the intravenous treatment is particularly sensitive since body tissue or fluids can be contaminated by the cytotoxic drugs.[255]

In this regard, according to the standard procedure, the patient is admitted into hospital for intravenous chemotherapy and monitored thereafter for a period of time which varies from one

[250] *See*, *inter alia*, E. Van Cutsem, A. Cervantes, B. Nordlinger, D. Arnold, "Metastatic colorectal cancer: ESMO Clinical Practice Guidelines for diagnosis, treatment and follow-up" ("Guidelines"), *Annals of Oncology* Vol. 25 (Supplement 3), 4 September 2014, Oxford University Press.
[251] Guidelines, paras iii 2 *et seq*.
[252] *See*, *inter alia*, the medical recommendations made by the health authorities in Victoria (Australia) concerning their handling of patients undergoing treatment with cytotoxic drugs ("Treatment protocol"), the manual is available at http://www.escoglobal.com/resources/pdf/Handling_Cytotoxic_Drugs_in_the_Workplace.pdf
[253] Treatment protocol, pp. 27-28.
[254] Treatment protocol, p. 25.
[255] Treatment protocol, p. 27.

patient to another;[256] that said, the medical team monitoring the patient is well versed in these medical techniques and will be able to provide the best treatment in a setting that is conducive to the recovery of the patient. The programme consists in limiting access to the patient by unauthorised persons following the treatment, allowing for enough space to enable medical staff to operate, and a safe waste storage area. The treatment procedure is very precise and the medical staff needs to wear appropriate protective gear.[257] This type of treatment can also be administered in a medical practice, in an outpatient clinic, at home and in a nursing home. However, if the healthcare facilities are unable to provide such a treatment, the patient will have to be transferred to a hospital or a healthcare centre where the appropriate staff and equipment are provided.

2.6. No effective right to appeal after being confined to the isolation unit

In the *Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal* ("Rules of Detention"), the section on confinement to the isolation unit may be found in Rules 45 to 49.

Rule 45 (A) of the Rules stipulates that a detainee may be confined to the isolation unit by **order** of the Registrar, acting **in consultation with the President**; such an order may be based upon a request from any interested person, including the Prosecutor. In such a case, sub-paragraph (B) specifies that a record shall be kept of all events concerning a detainee confined to the isolation unit. Rules 46 and 47 of the Rules attribute a significant role to the **medical officer** who shall confirm the **physica**l and **mental** fitness of the detainee for such isolation. As part of such a measure, it is stipulated in Rule 48 that all cases of use of the isolation unit shall be reported to the Registrar immediately, who shall report the matter to the President who may order the release of a detainee from the isolation unit at any time. As regards the length of time a detainee may be kept in isolation, Rule 49 provides that it must not exceed seven consecutive days.

The decision to place **Mr Vojislav Šešelj** in isolation was based on these Rules. Such an administrative decision should normally have been **approved by the President** as part of a protocol in which the medical officer played an important part by confirming that the Accused was physically and mentally fit for such isolation. It must be noted that, at this stage, the Chamber did not receive the **record** of events that preceded the Accused's confinement to the isolation unit. The only piece of information at the disposal of the Chamber is that the medical officer recommended

[256] Treatment protocol, p. 25.

that the Accused be placed in isolation for a period of seven days due to his chemotherapy treatment.

In the Rules, **no specific provision** points to a possible legal remedy once the detainee has been placed in isolation. The legal provisions on the subject of solitary confinement state that "there shall be no limitations imposed on the request or complaint, such as requiring evidence of both mental or emotional suffering and physical suffering. Prison officials have an obligation to address all requests or complaints promptly, informing the detained person of the outcome. All internal administrative findings must be subject to external appeal through judicial processes."[258]

On the subject, the case-law of the regional courts of human rights and the reports addressed to the UN General Assembly converge in favour of external guarantees afforded in the case of solitary confinement. Thus, "detained persons held in solitary confinement must be afforded genuine opportunities to challenge both the nature of their confinement and its underlying justification through the **courts of law**. This requires a right to appeal all final decisions by prison authorities and administrative bodies to an **independent judicial body** empowered to review both the legality of the nature of the confinement and its underlying justification."[259] I hold that in the case of **Mr Vojislav Šešelj**, the authority ruling on confinement to the isolation unit should have been the Chamber seised of the main case, the **sole** Chamber able to rule on the merits of such isolation. It is worth mentioning that this decision is what triggered the Accused's decision to interrupt his medical treatment.

The European Court of Human Rights ("ECHR") has had occasion to rule on the right to effective remedy in accordance with Article 13 of the European Convention on Human Rights.[260] The remedy granted must be **effective**. It should entitle anyone to secure the rights guaranteed under the Convention.[261] The remedy must be "effective" in practice as well as in law.[262] The remedy must be afforded to the applicant[263] and enable him or her to put forward his or her arguable allegation of violation. Theoretically, in accordance with the requirements of Article 13, it is possible to apply to a non-judicial body but the authority must have real powers and be independent enough from the

[257] Treatment protocol, p. 26.
[258] Interim Report, para. 97.
[259] Interim Report, para. 98.
[260] ECHR *Valsamis v. Greece*, Application No. 21787/93, 18 December 1996; ECHR, *Keenan v. United Kingdom*, Application No. 27229/95, 3 April 2001.
[261] ECHR *Valsamis v.. Greece*, Application No. 21787/93, 18 December 1996, para. 46; ECHR, *Keenan v. United Kingdom*, Application No. 27229/95, 3 April 2001, para. 123.
[262] ECHR, *Keenan v. United Kingdom*, Application No. 27229/95, 3 April 2001, para. 123.
[263] ECHR, *Valsamis v. Greece*, Application No. 21787/93, 18 December 1996, para. 48.

body that initially issued the impugned decision. Remedies before administrative authorities are not *a priori* effective. In the present case, it must be noted that the Accused, in the context of his detention, did not lodge an appeal with any of the Chambers. As part of effective remedy, it would have been appropriate to seise an independent judicial body able to rule **in fact and in law** on the continuation of the solitary confinement of the Accused. In light of the constraints inherent to provisional detention, placing the Accused in solitary confinement was bound to have adverse effects on his health.

Aware of the impact such a measure would have on the Accused's health, the Chamber should have been advised in detail of the conditions of his solitary confinement. In this regard, the CPT has had occasion to specify that there is a need for strict controls in the case of administrative solitary confinement.[264] It considers that placement under administrative solitary confinement should only be authorised by the most senior prison staff. A full written report should be drawn up to this effect. If the prisoner appeals the decision, he should receive a written, reasoned decision from the review body and an indication as to the grounds of appeal.

Even if the Chamber received some information from the Registry, it was not in a position to obtain detailed information on the relevant procedure and justification for the solitary confinement. The issue of a legal remedy is a crucial question which was not recalled in the written submissions of the Deputy Registrar and would certainly have merited being expanded on. When the Accused stopped his treatment, this raised questions as to the treatment protocol. Was the treatment protocol too severe for the Accused's mental and physical condition? Were the material and medical conditions for solitary confinement met? I would like to specify that the treatment protocol calls for the medical staff to consider the physical conditions of the inmate's confinement.[265] In addition, possible symptoms linked to solitary confinement, including anxiety, depression, fear, cognitive disorders, may be observed. [266] In light of the Accused's chronic condition as well as the excessive length of his provisional detention, the said decision should have afforded the Accused the possibility to lodge an appeal before an independent judicial body, which does not seem to have been the case here.

[264] Annual Report CPT, para. 57 (c).
[265] Relevant considerations include the level of hygiene and cleanliness of the facility and the inmate, heating, lighting and ventilation of the cell, suitability of clothing and bedding, quantity and quality of the food and water, and observance of the rules concerning physical exercise. *See* Interim Report, para. 101.
[266] *See* Sharon Shalev, "A Sourcebook on Solitary Confinement", London, Mannheim Centre for Criminology, 2008, pp. 15-17; Peter Scharff Smith, "The effects of solitary confinement on prison inmates: a brief history and review of the literature", Crime and Justice, Vol. 34, 2006, p. 441.

This crucial question was not addressed by the Deputy Registrar in her written submission and I consider that an application for effective remedy before the Chamber seised of the main case would have enabled the Accused to secure all the guarantees accorded to a detainee in the case of an administrative decision to place a prisoner under solitary confinement.

In the absence of an effective remedy for the Accused, his associates seised the **President of the Tribunal** of a motion. The **President of the Tribunal** is not an independent judicial body within the meaning of the European Convention on Human Rights, for in this case he serves as the supervisor of the Registry and is both judge and party. The President must have given his consent to the solitary confinement, so how can he go back on his decision? However, the decision he issued shows that he had doubts, and the Registry's memos pursuant to Rule 33 (B) of the Rules of Procedure and Evidence clearly attest to his awareness that there was a risk of the Accused dying since he had refused treatment. The sensible thing to do would have been to indicate, in the decision to reject, that the Accused or his associates could address the Chamber; however, this was not done…

2.7. Infringement of the Accused's fundamental rights

2.7.1. Relevance of measures of isolation for the purposes of Article 3 of the ECHR

The case of *Ramirez Sanchez v. France*[267] illustrates the material conditions of solitary confinement and highlights the extensive duration of isolation suffered by a detainee. Even though on two occasions the European Court of Human Rights considered[268] that upholding such a measure did not constitute a form of inhuman or degrading treatment for the purposes of Article 3 of the ECHR, its position has the advantage of emphasising the need for a comprehensive analysis of measures of isolation.

In its Judgement, the European Court of Human Rights focused its attention on inhuman and degrading treatment resulting from particularly poor conditions of detention, without examining in detail the nature of the solitary confinement or its duration. The nature of the solitary confinement not only defines the conditions of detention but also allows for a better understanding of the reasons that prompted such a measure as well as its impact on the prisoner and his relations with the outside world. Addressing this question separately would have permitted a comprehensive analysis, as was done in the past.[269]

Our case raises the same question: a separate analysis of the conditions of detention and the nature of the solitary confinement would have highlighted the total **social isolation** of the Accused because of his chemotherapy treatment. Such a measure had direct **psychological repercussions** on the Accused's personality, and he asked to stop his treatment and thereby endangered his life. This raises the question of the compliance[270] of such a measure with Article 3 of the ECHR and the need for such isolation based on medical safety considerations. It must be recalled that solitary

[267] The case of Ilich Ramirez Sanchez, known as "Carlos", indicted in several cases for terrorist activities and convicted to life imprisonment. Detained on 15 August 1994, he was placed in solitary confinement without interruption from that date until 17 October 2002, and then again from 18 March 2004 to 5 January 2006, during which time he was transferred four times to different detention facilities.

[268] In a Judgement of 2005, the ECHR by 4 votes to 3 claimed that there had been no breach of Article 3, and unanimously ruled that there had been a breach of Article 13 resulting from the absence of any remedy to challenge such a measure. *See* ECHR, Judgement of 27 January 2005, case of *Ramirez Sanchez v. France*, Application No. 59450/00. The applicant applied for the referral of the case to the Grand Chamber, which although it replicated almost the entire reasoning of the Judgement of 2005, confirmed, by 12 votes to 5, that Article 3 had not been breached and, unanimously, that Article 13 had been breached. *See* ECHR, Grand Chamber Judgement of 4 July 2006, *Ramirez Sanchez v. France*, Application No. 59450/00.

[269] ECHR, Judgement of 18 January 1978, *Ireland v. United Kingdom*, Application No. 5310/71*;* ECHR Comm., Decision of 8 July 1978, *Ensslin, Baader and Raspe v. Federal Republic of Germany* (admissibility), Application No. 7572/76.

confinement is not a disciplinary sanction and must never go against the **fundamental rights** of detained persons.

Relying on Article 3, the European Court of Human Rights did not fail to recall that this text recognises one of the fundamental values of democratic societies and strictly prohibits torture and inhuman or degrading treatment or punishment.[271] Consequently, although measures involving deprivation of liberty are inevitably accompanied by several limitations of fundamental freedoms, Article 3 nonetheless imposes that a State "**must ensure that a person is detained in conditions which are compatible with respect for his human dignity,** that the manner and method of the execution of the measure do not subject him to distress and hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured".[272] In addition, the measures taken during detention must be necessary to achieve the expected legitimate goal.

Relying on Article 3 of the European Convention on Human Rights,[273] the European Court of Human Rights, in the ***Khider v. France*** cases, issued differing decisions regarding the conditions of detention of the applicants, even though it referred to similar facts and reiterated the same respect for human dignity.[274] In the judgement of 2009, it considered several criteria in its analysis of continued isolation such as the duration of solitary confinement, insufficient grounds for attempted escape,[275] and **the lack of consideration for the deterioration of the health of the prisoner in solitary confinement.**[276] Likewise, in its decision of 2013, the ECHR recalls a series of conditions that could not be considered to have attained the minimum level of gravity,[277] such as interrupted

[270] Even though the ICTY, in light of its international nature, is not subjected to the ECHR or the case-law of the European Court of Human Rights, it is nonetheless located in Europe, the Accused is European and the ECHR case-law is abundantly cited in the Trial Judgements and Appeal Judgements of the ICTY.
[271] ECHR, 5th Section Judgement of 31 October 2013, *S.J. v. Luxembourg*, Application No. 47229/12, para. 49.
[272] ECHR, 5th Section Judgement of 31 October 2013, *S.J. v. Luxembourg*, Application No. 47229/12, para. 50; ECHR, 5th Section Decision of 1 October 2013, *Christophe Khider v. France*, Application No. 56054/12, para. 34. *See* also ECHR, Judgement of 25 April 2013, *Canali v. France*, Application No. 40119/09 – ADL of 29 April 2013.
[273] In 2009, the ECHR held that cumulative conditions of detention, combined and repetitive, amounted to inhuman and degrading treatment within the meaning of Article 3. *See* ECHR, 5th Section Judgement of 9 July 2009, *Cyril Khider v. France*, Application No. 39364/05, para. 133; whereas in 2013 it refused to reach the same conclusion and opted for the inadmissibility of the application by dissociating, in its interpretation, the various measures involved in this regime. *See* ECHR, 5th Section Decision of 1 October 2013, *Christophe Khider v. France*, Application No. 56054/12, paras 51-53. This different approach pertains to a stricter analysis of the conditions of detention and in no way contradicts the European acquis on the subject of protection of the rights of detainees.
[274] ECHR, 5th Section Judgement of 9 July 2009, *Cyril Khider v. France*, Application No. 39364/05, para. 102.
[275] ECHR, 5th Section Judgement of 9 July 2009, *Cyril Khider v. France*, Application No. 39364/05, para. 118.
[276] ECHR, 5th Section Judgement of 9 July 2009, *Cyril Khider v. France*, Application No. 39364/05, para. 119.
[277] ECHR, 5th Section Decision of 1 October 2013, *Christophe Khider v. France*, Application No. 56054/12, para. 47.

periods of solitary confinement,[278] the fact that the applicant "had never been subjected to total social isolation but only to relative social isolation",[279] the lack of (alleged) physical or mental consequences as a result of isolation[280] and, finally, the less strict nature of isolation compared to other cases the Court has had to examine in other applications.[281]

In the present case, it is worth mentioning that the Accused's medical condition could only deteriorate given that no adequate care was provided in the isolation unit. I consider that the Trial Chamber should have been seised **immediately** of the matter; it could then have taken the appropriate decisions, namely having the Accused admitted into **Bronovo Hospital** or a clinic, or even into a Belgrade hospital. Disregard for the Trial Chamber's discretionary powers led to this deadlock and the life of a person presumed innocent was put at risk.

2.7.2. Indefinite detention: capacity to face detention in light of the clinical condition of a detainee

According to the case-law of the ECHR, monitoring the situation of seriously ill prisoners for the purposes of Article 3 of the Convention requires a threefold examination of: (*a) the medical condition of a detainee,(b) the quality of available treatment in prison, (c) possibility of continued detention in light of the applicant's health.*[282]

The first criterion refers to the material conditions of detention that essentially concern hygiene and sanitation facilities in prison, but may also include other aspects such as external medical visits and, more specifically, the security measures in place on such occasions.[283] The second criterion is an important indicator that points to the clear deterioration of health in prison that obviously raises the question of the adequacy of treatment available in prison.[284] Access to specialist consultations and prescription medicine is included here as is secondary care, such as assistance in everyday activities and psychological support that require the intervention of qualified medical staff rather than that of

[278] ECHR, 5th Section Decision of 1 October 2013, *Christophe Khider v. France*, Application No. 56054/12, para. 41.
[279] ECHR, 5th Section Decision of 1 October 2013, *Christophe Khider v. France*, Application No. 56054/12, para. 42; ECHR, 5th Section Judgement of 20 January 2011, *Payet v. France*, Application No. 19606/08 – ADL of 23 January 2011.
[280] ECHR, 5th Section Decision of 1 October 2013, *Christophe Khider v. France*, Application No. 56054/12, para. 43.
[281] ECHR, 5th Section Decision of 1 October 2013, *Christophe Khider v. France*, Application No. 56054/12, paras 44-46.
[282] ECHR, 1st Section Judgement of 2 December 2004, *Farbtuhs v. Latvia*, Application No. 4672/02, para. 53.
[283] ECHR, 1st Section Judgement of 14 November 2002, *Mouisel v. France*, Application No. 67263/01, paras 46 and 47; ECHR, 1st Section Judgement of 27 November 2003, *Henaf v. France*, Application No. 65436/01, paras 49 *et seq.*
[284] ECHR, 5th Section Judgement of 14 March 2013, *Salakhov and Islyamova v. Ukraine*, No. 28005/08.

prison guards or co-detainees.[285] The last criterion, which ties into the previous one, refers generally to a detainee's capacity to cope with detention in light of his or her clinical condition. The European Court of Human Rights found that, at this stage, continued detention in and of itself and irrespective of the quality of the treatment available in prison necessarily has an impact on the individual detained.[286]

This particularly enlightening case-law applies entirely to the case of Vojislav Šešelj. The clear deterioration of his health necessarily casts doubt on the adequacy of the treatment provided.

The case of ***Gulay Çetin v. Turkey*** sheds light on the subject as the European Court of Human Rights for the first time affirms explicitly that a prisoner's ability to handle detention when he is ill, based on his clinical condition, must be taken into account to satisfy the requirements of Article 3.[287] Positive obligations imposed on States are described in detail with regard to terminally ill detainees and appear to be oriented towards the right [of these detainees] **to end their life in a dignified manner**.[288] Lastly, in terms of legal remedies available, it acknowledges discrimination towards a defendant (quasi non-existent), as opposed to what is afforded to convicted detainees.[289] In this case, the applicant's requests, even though she was still a defendant, were systematically denied by the Turkish authorities on the ground that the likely severity of her sentence posed the risk of her evading justice. It is worth mentioning that at the ICTY, this is the standard position adopted by the Prosecution.

In this respect, detention of a person who is ill in inadequate material and medical conditions can, in principle, constitute treatment contrary to Article 3, namely because stress is an inherent part of prison life.[290] No "general" obligation to release a detainee for medical reasons, even if he suffers from an illness that is difficult to treat, has yet been imposed on States.[291] The exception to this rule is when the detainee's medical condition is of a "particular gravity"; in the interests of the proper administration of criminal justice, measures may then be taken on humanitarian grounds, such as provisional release, a suspension of detention, or even pardon. Furthermore, individual measures of detention should take into account the individual situation of each detainee,[292] namely when a detainee's life is at risk and detention would no longer be warranted. When the Trial Chamber

[285] ECHR, 2nd Section Judgement of 5 March 2013, *Gülay Çetin v. Turkey*, Application No. 44084/10, para. 112.
[286] ECHR, 2nd Section Judgement of 5 March 2013, *Gülay Çetin v. Turkey*, Application No. 44084/10, para. 109.
[287] ECHR, 2nd Section Judgement of 5 March 2013, *Gülay Çetin v. Turkey*, Application No. 44084/10, para. 124.
[288] ECHR, 2nd Section Judgement of 5 March 2013, *Gülay Çetin v. Turkey*, Application No. 44084/10, para. 117.
[289] ECHR, 2nd Section Judgement of 5 March 2013, *Gülay Çetin v. Turkey*, Application No. 44084/10, para. 102.
[290] ECHR, 2nd Section Judgement of 5 March 2013, *Gülay Çetin v. Turkey*, Application No. 44084/10, para. 110.
[291] ECHR, 2nd Section Judgement of 5 March 2013, *Gülay Çetin v. Turkey*, Application No. 44084/10, para. 102.
[292] ECHR, 2nd Section Judgement of 5 March 2013, *Gülay Çetin v. Turkey*, Application No. 44084/10, para. 117.

decided to release the Accused *proprio motu* it turned to the case-law of the European Court of Human Rights.

2.7.3. The principle of personal autonomy of an accused in light of the right to respect for private and family life

The European Court of Human Rights considers that **the concept of personal autonomy** set forth in the Judgement of *Pretty v. the United Kingdom* is a matter of interpretation of the guarantees provided for under Article 8 of the Convention,[293] and shows that the extended principle of personal autonomy should be understood to mean "the right to **make choices about one's own body**".[294]

As it clearly arises from this Judgement, ultimately it is the Accused **Vojislav Šešelj** who is the **sole** person to decide to accept or refuse treatment, even if he dies in prison. It seems to me, however, that the Judges must not stand **idle** and should do **all they can** to enable the Accused to live on for as long as he can, and even contribute to his final recovery. Personally, I deemed that by undergoing treatment in **Belgrade**, surrounded by his family and having the possibility of resuming his political activities, the Accused would be able to benefit from the best possible conditions to attain this goal, namely his recovery.

The European Court of Human Rights, composed of many professional Judges, has a wealth of experience on the subject, since it has been seised of many cases in relation thereto. The Judgement *Pretty v. United Kingdom* recognises that a detainee has the right to make choices about his own body, in other words about his own life. It is difficult to imagine that a detainee under solitary confinement, cut off from the rest of the world and having no one to talk to but a prison guard, a nurse or the doctor - about whom it is unclear whether he works for the patient or for the administration of the detention unit - would be encouraged to fight his illness in the same way as if he were surrounded by his family and assisted by a family doctor. Under these conditions, was the Accused **Vojislav Šešelj** able to make a choice about his own body in the sense of the case-law of the European Court of Human Rights?

[293] ECHR, 4th Section Judgement of 29 April 2002, *Pretty v. United Kingdom*, Application No. 2346/02, para. 61.
[294] ECHR, 4th Section Judgement of 29 April 2002, *Pretty v. United Kingdom*, Application No. 2346/02, para. 66.

a. A person's right of refusal to disclose information on his health

According to the case-law of the European Court of Human Rights, the right to respect for private and family life, enshrined in Article 8 of the European Convention on Human Rights, constitutes one of the fundamental rights protected by the Community legal order and includes, *inter alia*, a person's right to keep his state of health secret.[295] In the opinion of the European Court of Human Rights, "respecting the confidentiality of health data [is] a vital principle in the legal systems of all the Contracting Parties to the Convention".[296]

In that sense, if the European Court of Human Rights stipulates that restrictions may be imposed on fundamental rights, on the condition that they meet general interest objectives, it notes however that such restrictions must not amount to an inadmissible and disproportionate interference with the aim pursued which would violate the very substance of the protected right.[297] Relying on its own case-law, the European Court of Human Rights holds that the violation of the confidentiality of personal information concerning health constitutes **interference** with the interested person's right to respect for private and family life within the meaning of Article 8 of the ECHR.[298]

Therefore, the Accused **Vojislav Šešelj** is entitled to refuse disclosure of any information concerning his current state of health to the Judges who, on the matter, have no means of exerting any form of coercion. I must mention that the Accused disclosed all sort of information for several years, and it is only at the end of his trial that he refused to do so.

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[295] CJEC, Judgement of 8 April 1992, *Commission v. Germany*, C-62/90, Rec. p. I-2575, point 23. *See* also CJEC, Judgement of 5 October 1994, *Union Syndical-Brussels and the International Federation for Human Rights v. Commission*, C-404/92, Rec. p. I-4789, point 17.

[296] ECHR, Judgement of 25 February 1997, *Z. v. Finland*, Application No. 22009/93.

[297] CJEC, Judgement of 8 April 1992, *Commission v. Germany*, C-62/90, Rec. p. I-2575, point 23.

[298] *See* ECHR, 5th Section Judgement of 29 June 2006, *Panteleyenko v. Ukraine*, Application No. 11901/02, the applicant complained, *inter alia*, about the disclosure of confidential information concerning his mental health and psychiatric treatment at a judicial hearing. ECHR, 2nd Section Judgement of 10 October 2006, *L.L. v. France*, Application No. 7508/02, the applicant denounced, *inter alia*, the provision and use in court, as part of divorce proceedings, of medical exhibits that concerned him and for which no consent was given; no medical expert had been appointed either. ECHR, 1st Section Judgement of 6 June 2013, *Avilkina et al. v. Russia*, Application No. 1585/09, the applicants were a religious organisation, the administrative centre of Jehovah Witnesses in Russia, and three Jehovah witnesses. They specifically complained about the disclosure of their medical files to the Russian prosecution authorities following their refusal to have a blood transfusion during their stay in public hospitals. ECHR, 1st Section Judgement of 29 April 2014, *L.H. v. Latvia*, Application No. 52019/07, the applicant alleged that the gathering of his personal medical information without his consent by a State body had violated his right to respect for private and family life. ECHR, 1st Section Judgement of 9 October 2014, *Konovalova v. Russia*, Application No. 37873/04. In this case, the applicant alleged that medical students had attended the birth of her child without her consent. She argued that she had not given her written consent to be observed in such a manner and that she was barely conscious when she had been informed of the measure.

We have had to face this problem and **fortunately** the Serbian professors of medicine submitted a joint, signed statement to the Trial Chamber which provided important medical information; I deem that they could no longer remain silent on the issue of Vojislav Šešelj's deteriorating health since a tumour had been found on the left side of his neck in the absence of any chemotherapy. On this issue I note that, according to them, the tumour should be operated on **urgently** (penultimate paragraph on page 2 of their statement).

b. Patient's right to refuse medical treatment

Even though there is no consensus today on the recognition of "**the right to die**", the right to refuse undesired medical treatment has been established. What the Parliamentary Assembly of the **Council of Europe** terms a "right to self-determination"[299] is generally accepted, as attested by Article 5 of the Convention on Human Rights and Biomedicine, which makes any medical intervention conditional upon the "free and informed consent" of the patient. Even when medical treatment is vital, in other words when its interruption would inevitably lead to the patient's death, the patient still retains the right to refuse or, if he is undergoing treatment, to end it. The European Court of Human Rights has ruled that each person's right to consent to or refuse medical intervention arises from the right to respect for private and family life, and that such refusal must be respected.[300]

In support of this conclusion, the European Court of Human Rights has always recognised that "the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8, § 1 of the Convention".[301] Moreover, in the context of a medical intervention against a person's will, the European Court of Human Rights considered, on several occasions, that such intervention would likely violate the physical integrity of a person and, as a result, constitute inhuman and degrading treatment within the meaning of Article 3 of the ECHR.[302]

This is not a trivial question since it has already been raised at the ICTY when the Accused went on a hunger strike. The question resurfaced when the Judges of the Trial Chamber were faced with the Accused's refusal of chemotherapy treatment because he had been placed in solitary confinement. The explanations provided by the medical officer of the UNDU and relayed by the Registry through

[299] Recommendation No. 1418 (1999) mentions the "terminally ill or dying person's right to self-determination" but self-determination in this case only refers to the *right to refuse involuntary treatment*.
[300] CJEC, Judgement of 5 October 1994, *Union Syndical-Brussels and the International Federation for Human Rights v. Commission*, C-404/92, Rec. pp. I-47.
[301] ECHR, 4th Section Judgement of 29 April 2002, *Pretty v. United Kingdom*, Application No. 2346/02, para. 63.
[302] ECHR, Grand Chamber Judgement of 11 July 2006, *Jalloh v. Germany*, Application No. 54810/00.

its written submission pursuant to Rule 33 (B) are not enough to convince me, all the more so since I ask myself whether the Accused **Goran Hadžić,** who has had two chemotherapy treatments in detention according to the Serbian press, had **also** been in the isolation unit? It is worth mentioning that he was provisionally released by the Appeals Chamber, notwithstanding the Prosecution's position.[303]

If the Accused **Vojislav Šešelj** is entitled, despite everything, to refuse medical treatment in prison, I have the duty as a Judge to do whatever is in my power to encourage him to stay alive, even though the final decision is his. My "encouragement" is clear and transparent and consists in leaving him in Belgrade where he can undergo treatment and be surrounded by his family and his five professors of medicine.

2.8. Conclusion

The Rules of Detention, combined with the Rules of Procedure and Evidence, and the practices adopted by the various Presidents of the Tribunal have led to a situation where, when a detainee appeals a decision, the appeal is not lodged with the Judges but with the President of the Tribunal who acts in his capacity as the supreme administrative authority capable of imposing sanctions on the Registrar, if necessary. The same procedure was followed when the Accused challenged his solitary confinement. According to ECHR case-law, effective remedy must be submitted to an independent judicial body, for to be both judge and party is not an option.

The President of the Tribunal and the Registrar communicate on a permanent basis, including on matters relating to staff or detention. The appeal is lodged with the President who, having given his approval from the outset or *ex post facto,* will take a position on the Registrar's decision. Such confusion over roles is detrimental and the only solution would be to let the natural Judge of the Chamber deal with it. The Accused challenged his solitary confinement and his appeal should have been lodged with the Judges of the Chamber. In this regard, I must mention that in the *Tolimir* case, the Accused had been placed under surveillance and the appeal had been lodged with the Chamber, which withdrew the measure as the matter pertained to fair trial rights. In my view, the existing mechanism violates the fundamental rights of the Accused under the aforementioned conditions. **As a Judge, I have the duty to protect the fundamental rights of the Accused which is why I feel he should remain in Belgrade.**

[303] *The Prosecutor v. Goran Hadžić*, IT-04-75-AR65.1, "Decision on Urgent Interlocutory Appeal from Decision Denying Provisional Release", public with confidential annexes, 13 April 2015.

In any case, I would never have condoned an action that would have resulted in the Accused **Vojislav Šešelj**, back in his cell, refusing chemotherapy treatment. We are not dealing with a case study; the Accused has proved in the past that he could take action, and thereby put his life at risk. As things stand today, I do not see what element or judicial decision would make him change his mind. In any tragic situation, there is always a solution, but the Trial Chamber has been deprived of the means to act by the Appeals Chamber Decision of **22 May 2015**. As a result, the decision to transfer the Accused to The Hague lay with the government of the Republic of Serbia, and in the event of a transfer, the Appeals Chamber would be in charge of handling the situation. The health of the Accused Vojislav Šešelj, still undergoing chemotherapy treatment, prompted the government of the Republic of Serbia to draw the attention of the Appeals Chamber and the Trial Chamber to the fact that the Accused should remain in Belgrade to continue his treatment. Even though the Prosecution, who relayed the media frenzy that followed this decision, was unable to secure the immediate return of the Accused into custody, I feel, for my part, that my assignment is now strictly limited to the ensuing deliberations on the innocence or the guilt of the Accused; that said, the Accused has been in detention for approximately 12 years and is still awaiting his judgement.

3. *STARE DECISIS*

May I, as **Judge**,[304] depart from the decisions of the **Appeals Chamber** which has affirmed on several occasions that its decisions were binding upon the Trial Chamber?[305]

While it seems obvious that for **reasons of legal certainty** a **national court of last resort** would impose its judgements on lower courts, does this mean that the same rule must automatically apply to an international court or tribunal?

The way common law works and the various commentaries on what is known as the rule of precedent ("*stare decisis*") raise doubts in my mind.

The rule of precedent or ***stare decisis*** derives from the common law and means, in theory, that a Trial Judge is bound by the judgements that have already been issued.

In **common law** countries, a large part of the law derives from **customary law,** since there were neither **statutes** nor **regulations**. It is the **case-law**, through the accumulation of decisions and reasonings ("*ratio decidendi*") that provides guidance to the lower courts.

Nevertheless, the rule of **precedent**, defined by the **House of Lords** in the case of *London Street Tramways v. London County Council*, was varied in 1966 by the House of Lords, which recognised that it could revoke precedents which were no longer appropriate or which were unjust. This was likewise the position taken by the **United States Supreme Court** in respect of the rule of precedent.

The European Court of Human Rights considered that the imperative of legal certainty and the protection of legitimate expectations do not give rise to law that resembles established case-law.

According to the Appeals Chamber, any **reversal of the case-law** must be validated by a dynamic, progressive construction of the law that is warranted in law and has a reasonable basis.[306] Such a position adopted by the Appeals Chamber does not set case-law in stone, and it considerably diminishes its injunction on the other Judges of the Trial Chamber.

[304] This part of my opinion on the subject is almost identical to that expressed in my opinion in the *Prlić et al.* case. I felt, however, compelled to mention it in the present case.
[305] I wish to thank Ms **Laura Grimaldi**, legal officer, for her contribution to this opinion.
[306] *The Prosecutor v. Zlatko Aleksovski*, Appeal Judgement, 24 March 2000; *Semanza* case (ICTR), Decision on Appeal, 31 May 2000; *Čelebići* case, Appeal Judgement, 20 February 2001.

It should be noted that the concept of JCE was strongly challenged in the Appeals Chamber by **Judge Schomburg**, which is likely to downplay greatly the impact of the case-law; in addition, several Chambers have shown reticence by not upholding the JCE. Moreover, another international tribunal – the **Cambodia** Tribunal - departed completely from JCE III.

Beyond this theoretical issue lies another problem, namely, can a Judge be independent within the meaning of the Statute if he must blindly apply the case-law handed down by other Judges? If so, what is the true extent of his independence? It must then be very limited and tied to the Appeals Chamber case-law. If one were to push the argument further, the question of its purposefulness would arise... why not then replace it with a machine equipped with a case-law software package capable of issuing judgements automatically?

In that context, the Judge would no longer have any room to manoeuvre, and if the Judges who compose the Appeals Chamber considered themselves bound by the rule of precedent initiated by their predecessors, the system would eventually collapse.

Had the dissenting Judges themselves formed the Appeals Chamber ruling in the *Tadić* case, it is almost certain that there would not have been **any *Tadić* case-law**. This should prompt a thorough analysis of the matter.

It is worth mentioning that the first international tribunals ruled in first and last instance without an Appeals Chamber. The idea of introducing a mechanism for appellate jurisdiction is consistent with the spirit of the times and has unquestionable advantages on the condition that it does not create more difficulties and violate the rights of the accused who can legally challenge case-law that harms his interests.

In countries that have a **civil law tradition,** the rule of precedent does not prevail since **the statutes** establish **the law**, not the Judges.

At the ICTY, the Appeals Chamber considered in the *Aleksovski* case[307] that it was bound by its previous decisions and could only depart from them "*in situations where cogent reasons in the*

[307] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeal Judgement, 24 March 2000.

interests of justice require a departure from a previous decision".[308] Mindful of the issue, the Appeals Chamber once again demonstrated its wisdom.

The Judges of the Appeals Chamber held that "*the right of appeal is […] a component of the fair trial requirement, which is itself a rule of customary international law and gives rise to the right of the Accused to have like cases treated alike. This will not be achieved if each Trial Chamber is free to disregard decisions of law made by the Appeals Chamber, and to decide the law as it sees fit*".[309]

The Trial Chamber is thus theoretically bound to follow the precedents established by the Appeals Chamber and to comply with them when a **similar situation** comes before it. Evidently then, the Appeals Chamber applies this rule only in **identical situations**. The interpretation of the terms "**similar cases"** is therefore the determining factor.

This raises the question of whether a Trial Chamber may go against the position of the Appellate Judges without running the risk of being "sanctioned" when an Appeal Judgement is handed down if the case is appealed. Does the rule of precedent, as applied at the Tribunal, entitle Trial Judges to adopt a different position, and **if so, why** and **under what circumstances**?

To try and answer this difficult and delicate question, it is appropriate to analyse the principle of *stare decisis per se* and question whether the interpretation given to it by the Appeals Chamber is open to debate.

3.1. The principle of *stare decisis*

We must examine domestic and international practice in order to draw conclusions as to how the principle is applied by the Judges.

a. In the domestic legal order:

The principle of *stare decisis* derives from common law, and because there are no written rules, for reasons of **legal certainty**, the rule of binding precedent was imposed on courts hearing **similar cases** (it is worth mentioning that this exact same approach was adopted at the ICTY).

[308] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeal Judgement, 24 March 2000, para. 107. This rule was also adopted by the ICTR Appeals Chamber in the case of *The Prosecutor v. Laurent Semanza*, 31 May 2000, para. 92.

However, applying this rule in practice is not so easy, and the path taken by (i) British and (ii) American courts sheds some light on the matter.

i. The English practice[310]

In 1898, the House of Lords laid down the principle whereby the courts must follow the principles of law established by higher judges or even by those of the same rank.[311]

Over the years, this rule has been the subject of increasing criticism and judges have on many occasions drafted opinions in which they advocated a change to the principle of *stare decisis*.[312]

Finally, the House of Lords, by way of a statement from Lord Chancellor Gardiner himself on behalf of all the Lords, considered that a "*too rigid adherence to precedent may lead to injustice in a particular case and also* ***unduly restrict the proper development of the law****. [The Law Lords] propose to modify their present practice and, while treating former decisions of this House as normally binding, to* ***depart from a previous decision when it appears right to do so***."[313]

ii. The American practice[314]

The US Supreme Court attaches great importance to judicial precedent and states that "[l]iberty finds no refuge in a jurisprudence of doubt".[315] The principle of *stare decisis* was thus imposed at the very outset in the famous case of ***Cohens v. Virginia***.[316]

However, if the rule of precedent must be strictly followed, the Judges consider that an exception may be allowed when it favours the accused.[317] This aspect is of particular interest to an accused.

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[309] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeal Judgement, 24 March 2000, para. 113 (iii).
[310] On this topic *see* Gérard DWORKIN, "*Stare Decisis in The House Of Lords*", *The Modern Law Review*, 1962, vol. 25, Issue 2, pp.163-178; and by the same author "*Un adoucissement de la théorie du* Stare Decisis *à la Chambre des Lords*", *Revue internationale de droit comparé*, 1967, vol. 19, No.1, pp. 185-198.
[311] *London Street Tramway v. L.C.C,* [1898] A.C. 375.
[312] Lord RADCLIFFE, "*The Law and it Compass*", 1960, p. 39. *See* the case of *Rookes v. Barnard*, (1964), A.C, and the opinion of Lord Evershed, pp.1184-1185.
[313] This decision on judicial practice was read out by Lord Gardiner prior to the delivery of the appellate judgements of 26 July 1996.
[314] E. ZOLLER, "*Les revirements de jurisprudence de la Cour Suprême des États-Unis*", *Cahiers du Conseil constitutionnel*, No. 20, June 2006.
[315] US Supreme Court, 505 US 833 (1992).
[316] US Supreme Court, 19 US (6 Wheat) 264 (1821).

It was in 1992 that the **Supreme Court** had to adopt a position on the issue of whether it had the authority to reverse its own case-law. The issue put before the Court was whether the ***Roe v. Wade***[318] decision, which legalised abortion, could be overturned or not. On this occasion, the Supreme Court laid down the requirements for reversing case-law:

- whether the rule has proven to be intolerable, defying practical workability;
- whether the rule is subject to the kind of reliance such that would lend special hardship to the consequences of the reversal envisaged;
- whether related principles of law have so far developed that the rule has been abandoned;
- whether the facts have so changed, or come to be seen so differently that the former rule has been robbed of any significant intended application or justification.[319]

This decision paved the way for changes in the case-law that were made on numerous occasions thereafter.[320]

At this point, I note that these four points are very interesting with respect to the issues adjudicated by the ICTY and ICTR Appeals Chamber, particularly with regard to the **lack of reliance.** In light of the numerous decisions handed down by these Chambers, and almost always supplemented by comments, one can hardly say that our Tribunal boasts a high level of reliance.

b. In the international legal order:[321]

We must first examine (i) current practices at the International Court of Justice, whose jurisprudence undoubtedly constitutes the leading source from which international public law is drawn, and then (ii) the reasoning of the Judges of the specialised international courts and tribunals.

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[317] Court of Appeal for Ontario, *RU v. Goderavoc, Popović and Askov*, (1974), 16 C.C.C, 30R (2D) 238.
[318] US Supreme Court, *Roe v. Wade*, 410 US 113 (1973).
[319] US Supreme Court, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833, 854-855 (1992).
[320] *See*, for example, the famous Supreme Court decision in ***Lawrence v. Texas*** wherein the Court found that the *Bowers v. Harwick* decision from 1986, which had held that the Constitution did not guarantee a right to homosexuality, lacked a proper basis in law, 539 US 538 (2003).

i. The rule of precedent at the International Court of Justice

Article 38 (1) (d) of the Statute of the Court provides as follows: "*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply :*
[…] ***subject to the provisions of Article 59***, ***judicial decisions*** *and the teachings of the most highly qualified publicists of the various nations, as a* ***subsidiary means*** *for the determination of rules of law*."

Case-law is therefore considered as a **subsidiary source of international law** and thus can never trump a rule of codified law or well-established custom.

Article 59 of the Statute of the ICJ, moreover, clearly prohibits the principle of *stare decisis* since it stipulates that the Court's appellate decisions have no binding force except between the parties.

The Court itself declared that its previous decisions had no binding force and that it was, therefore, under no obligation to follow its own precedents.[322] The Permanent Court of International Justice even held, as early as 1926, that "*[the object of Article 59 of the Statute] is […] to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes*".[323]

It is nevertheless true that the Judges at the ICJ readily refer to their previous case-law when required to resolve a dispute resembling a case previously addressed, but then merely refer to the existing case-law.[324]

The ICJ, however, recognises that it is preferable that "*[t]he same kind of cases […] must be decided in the same way and* ***[if possible]*** *by the same reasoning*"[325] but that this in no way constitutes an obligation.

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[321] *See* on the subject G. GUILLAUME, "*Le précédent dans la justice et l'arbitrage international*", *Journal du droit international* (Clunet), No. 3, July 2010, doct. 8.
[322] Case of *Continental Shelf Tunisia v. Malta* (International Court of Justice), ICJ Reports, p. 26, para. 42.
[323] *Case concerning Certain German Interests in Polish Upper Silesia* (ICJ), The Merits, Report Series A, No. 7, p. 19. The principle was restated in the *Chorzow Factory* case, 1927, Series A Reports, No. 1, p. 20.
[324] *See*, for example, the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (ICJ), 1980, ICJ Reports, p. 18, para. 33.
[325] *Case Concerning Barcelona Traction, Light and Power Company* (ICJ), Initial pleadings: Preliminary Objections, 1964, ICJ Reports, p. 65.

The rule of *stare decisis* has thus clearly been **discarded** at the ICJ by the Statute as well as by the Court itself.

ii. The rule of precedent in specialised international public law

The European Court of Human Rights stated that it "*is not bound by its previous judgements*" and that it may depart from its jurisprudence if there are cogent reasons for doing so[326] and considers, moreover, that what is needed for legal certainty and to protect legitimate expectations does not imply a law that may be likened to established case-law.[327]

The principle of *stare decisis* has thus clearly also been discarded by the Judges in Strasbourg.

The same holds true for the **International Tribunal for the Law of the Sea** which is under no obligation to follow its own precedents, pursuant to a reading of Article 196 of the Montego Bay Convention which incorporates Article 59 of the Statute of the ICJ.[328]

The principle of *stare decisis* is indeed a fundamental component of a trial in common law, but the Judges frequently allow exceptions in order to render just and fair decisions.

Binding precedent, as a rule, appears to lack widespread support in international law. The reluctance of the Judges to consider themselves bound by their own case-law is understandable because the complexity of the cases they are called upon to handle requires a judgement that is rendered on a case-by-case basis relying on a solid legal foundation. The ICJ has clearly always refused even to engage in any judicial construction of the law, recalling that "*it is not the role of the judge to take the place of the legislator […]* ***the Court must limit itself to recording the state of the law****,"*[329] case-law thus constituting nothing more that a subsidiary source of international law.

The European Court of Human Rights justifies this refusal to comply automatically with its own precedents by the fact that it is "*of crucial importance that the Convention is interpreted and applied in a manner which renders* ***its rights practical and effective*** *… A failure by the Court to*

[326] *Cossey v. United Kingdom* (ECHR), 27 September 1990, Series A Reports, No. 184, para. 35.
[327] *Unedic v. France* (ECHR), 18 December 2008. *See* also *Bournaraf v. France*, 30 August 2011.
[328] DSB, "United States – Final Anti-Dumping Measures on Stainless Steel from Mexico", WT/DS344/AB/R, 30 April 2008.
[329] *See* the statement of Judge G. Guillaume, "Advisory opinion of 8 July 1996 - Legality of the Threat or Use of Nuclear Weapons", separate opinion, 8 July 1996, ICJ Reports 1996, p. 293. In this opinion, it is clear that the Court refused to rule on the question put to it because the state of the law at the time did not make it possible to answer it, p. 266, para. 105.

maintain a dynamic and evolutive approach would risk ***rendering it a bar*** *to reform or improvement.*"[330]

The Appeals Chamber, however, held that it had to take another approach. It is appropriate, therefore, to review its reasons and the merits of its position.

3.2. The authority of the Appeal Judgements of the ICTY and ICTR

The reasoning of the Appeals Chamber may be questioned on certain points.

a. The reasoning of the Appeals Chamber

i. Acknowledgement of mandatory precedent

The Appeals Chamber has found that "*a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice*".[331]

In support of its reasoning, the Appeals Chamber first relied on domestic and international practice. However, as has been shown above, national courts tend to lend greater flexibility to the concept of *stare decisis* in order to render judgements that are just and adapted to each situation. International practice shows a tendency to recognise precedent as a possible source of inspiration but never as a practice that is binding on a Judge. It would be more fitting then to speak of "the rule of precedent as a source of inspiration and interpretation" rather than *stare decisis per se*.

However, it should be noted that the Appeals Chamber acknowledges that it may depart from its earlier decisions in the interests of justice. I wholeheartedly embrace this wise approach.

ii. Submission of Trial Chambers to the decisions of the Appeals Chamber

[330] *Stafford v. United Kingdom* (ECHR), 28 May 2002, paras 67-68.
[331] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeal Judgement, 24 March 2000, para. 107.

In the *Aleksovski* case, the Appeals Chamber thus considered that "*a proper construction of the Statute requires that the* ratio decidendi *of its decisions is binding upon Trial Chambers*".[332] The reasoning of the Appeals Chamber rests on three points:

- The hierarchy between the Chambers of the Tribunal,
- **The need for legal certainty and predictability**,
- The fundamental right of the accused to lodge an appeal.

Relying on this approach, I consider that there is no "hierarchy" between the Chambers of the Tribunal. Hierarchy presupposes authority and subordination. As an independent Judge, I am not subject to any hierarchy inasmuch as every Judge is equal in judicial office.

Concerning the issue of legal certainty, I fully agree with the Appeals Chamber, but legal certainty may be put into practice without requiring subordination. Quite simply, it is sufficient if a decision is recognised for its clarity, quality and reasoning and does not give rise to discussions.

The third point concerns the right to lodge an appeal which, in my view, does not affect the rule of precedent in any way. The right of appeal is a principle of a fair trial and every accused has the right to have his case re-examined by other Judges before an Appeals Chamber, particularly with regard to questions of law.

b. Discussion

Article 25 of the Statute introduces the principle of appeal as a last resort. However, in what respect is the right to appeal the corollary of the principle of *stare decisis* and, in particular, in what respect can *res judicata* become binding upon the Chambers?

Article 25 of the Statute reads as follows:

"*1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:*

(a) an error on a question of law invalidating the decision; or
(b) an error of fact that has occasioned a miscarriage of justice.

[332] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeal Judgement, 24 March 2000, para. 113.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers."

The principle of appellate jurisdiction is recognised in international law. It is indeed enshrined in Article 14-5 of the International Covenant on Civil and Political Rights, which reads: "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law*."

However, I note that nothing in this article or in the Statute implies that the Trial Chambers are bound, when ruling on a point of law previously adjudicated by the Appeals Chamber in another case, to follow the previously established reasoning. The very principle of appeal presupposes that the accused or the victims hope to see their case adjudicated with the utmost fairness and that they may, if necessary, challenge the applied law. The appellate judges make sure that the law is correctly applied and that the interpretation of the facts has not led to a miscarriage of justice.

Moreover, no provision in the Statute expressly states that legal precedent is binding upon the Judges of the Tribunal.[333] Article 25 affords no such presumption – on the contrary, as stated above.

International criminal law has a body of norms, both written and customary, which is sufficiently "ample" and does not need to be supplemented *a priori* by the Judges. A judge's authority to interpret or adapt the norm is obviously not open to question, but as the ICJ put it in its Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*, the authority can be implemented only on the basis of the applicable law, **as the Judge does not have jurisdiction to create the law**.[334]

Therefore, in applying this principle, would the Judges at the ICTY be able to create a form of criminal responsibility not envisioned in the Statute, particularly with regard to the forms of responsibility enumerated in Articles 7 (1) and 7 (3) of the Statute?

The reasoning of the Appeals Chamber in the *Aleksovski* case therefore entirely contradicts Article 38 (1) (d) of the Statute of the ICJ according to which **jurisprudence is a subsidiary source in determining international law**. **Judge Shahabuddeen** himself clearly expressed his disagreement in the dissenting opinion he appended to the ***Semanza*** **decision**. The Judge considered

[333] The Judges of the Appeals Chamber themselves recognise this in the *Aleksovski* Appeal Judgement, para. 99.

that since nothing in the Statute establishes that a precedent is binding, **the solution put forth by the Chamber applies solely to the case before it, not to the future**.[335]

"*I would interpret such a pronouncement not as asserting that the Statute itself lays down a requirement for the Appeals Chamber to follow its previous decisions subject to a limited power of departure, but as asserting that the Statute empowers the Appeals Chamber to adopt a practice to that end and that such a practice has now been adopted*."[336]

The Appeals Chamber itself recognises that an overly strict application of the principle of *stare decisis*, as in the common law system, might lead to injustice in certain cases,[337] and that national courts have evolved in respect of this principle, which has become much more flexible.[338] It even reserves the right to revisit its own jurisprudence "*for cogent reasons in the interests of justice*".[339]

For this reason, the Trial Chamber in the *Kupreškić* case had properly identified the issue when it stated that "*judicial precedent is not a distinct source of law in international criminal adjudication*"[340] but "*a subsidiary means for the determination of rules of law*"[341] and that, therefore, "*the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries*".[342] I fully agree with the position taken by the Chamber in the *Kupreškić* case.

By analogy, it is interesting to observe that in the case of *The Prosecutor v.* ***Germain Katanga*** *and* ***Matthieu Ngudjolo Chui*** before the ICC**, Judge Pikis** considered that Article 21 (2) of the **Rome**

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[334] For a commentary on the ICJ's opinion, *see* M. G. KOHEN, "*L'avis consultatif de la CIJ sur la licéité de la menace ou de l'emploi de l'arme nucléaire et la fonction judiciaire*", 2 EJIL (1997), 336- 362.
[335] *Laurent Semanza v. The Prosecutor* (ICTR), Appeal Judgement, Separate Opinion of Judge Shahabuddeen. *See* also P. WECKEL's very critical commentary, "*Jurisprudence internationale*", *Revue Générale de Droit International Public* (2000), pp 802-804, in which the author says that the Appeals Chamber's reasoning in the *Aleksovski* case with regard to *stare decisis* "ignores Article 38 of the World Court, which has nevertheless been drafted to prevent any transposition into international law of the common law tradition of the legal authority of jurisdictional precedent", p. 803.
[336] *Laurent Semanza v. the Prosecutor* (ICTR), Appeal Judgement, Separate Opinion of Judge Shahabuddeen, 31 May 2000, para. 17.
[337] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeal Judgement, 24 March 2000, para. 101: "The Appeals Chamber […] also recognises that there may be instances in which the strict, absolute application of that principle (*stare decisis*) may lead to an injustice."
[338] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeal Judgement, 24 March 2000, para. 92.
[339] *The Prosecutor v. Zlatko Aleksovski*, "Lašva Valley", Appeal Judgement, 24 March 2000, para. 107. *See* also the *Čelebići* case, Appeal Judgement, 20 February 2001, para. 8; *Semanza* case (ICTR), Appeal Judgement, 31 May 2000, para. 91.
[340] *The Prosecutor v. Kupreškić et al.*, Trial Judgement, 14 January 2000, para. 540.
[341] *The Prosecutor v. Kupreškić et al*., Trial Judgement, 14 January 2000, para. 540.
[342] *The Prosecutor v. Kupreškić et al*., Trial Judgement, 14 January 2000, para. 540.

Statute which allows the Court to refer to its own case-law[343] could not in any way be likened to the *stare decisis* principle, but only offers the Judges the **option**, not the **obligation**, to follow what has been previously adjudicated.[344] **Judge Pikis** in fact stated:

"*Article 21-2 of the Statute provides: '[t]he Court may apply principles and rules of law as interpreted in its previous decisions' [but] this Article does not bind the Court to follow its previous decisions*." [345]

This position that prevails in general international law is one I share entirely.

In light of such considerations, is the Trial Chamber bound to follow the Appeals Chamber's case-law without commentary?

Am I then, as a Judge, bound to apply the jurisprudence of the Appeals Chamber without batting an eyelid? If mandatory precedent must be disregarded at the Tribunal, then there is no reason why a Trial Chamber should feel obligated to follow the previous decisions of the Appeals Chamber when it deems that, in the case before it, another interpretation would lead to more sound administration of justice. In my view, therefore, **the only option** open to the **Trial Chamber** is to show that the **legal principle** it wishes to revisit cannot be applied in the case at hand[346] because the interpretation previously given is flawed.[347] This, I think, is all the more necessary since a decision issued by the Appeals Chamber in the ***Gotovina* case** sparked uproar in the international legal community.[348] Likewise, other decisions were the subject of numerous public comments, notably sparked by the

[343] Article 21-2 of the Rome Statute provides as follows: "The Court **may** apply principles and rules of law as **interpreted** in its previous decisions." It should be noted that it is the word **interpret** which is used, and not "create", which confirms the idea that case-law is not a primary source of international law.
[344] *The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui* (ICC), "Judgement on the Appeal of Mr Matthieu Ngudjolo Against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9'", Dissenting Opinion of Judge Pikis, 27 May 2008, para. 15.
[345] *The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui* (ICC), "Judgement on the Appeal of Mr Matthieu Ngudjolo Against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution Request for Authorisation to Redact Statement of Witnesses 4 and 9'", Dissenting Opinion of Judge Pikis, 27 May 2008, para. 15, p. 9.
[346] The Appeals Chamber holds that "[w]hat is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases […]", para. 110. It appears then that if the issue that arises is not the same, the Trial Chamber may depart from a previous decision.
[347] The Appeals Chamber considers that "instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been wrongly decided, usually because the judge or judges were ill-informed about the applicable law", para. 108.
[348] *See, inter alia*, R. TOÈ, "*Acquittement de Gotovina: pour les Serbes de Bosnie, 'le TPIY a perdu toute crédibilité*'", in *Le Courrier des Balkans*, 16 November 2012; C. VALLET, "*Acquittement de Gotovina: retour au pays en fanfare pour les 'héros'*", *Le Courrier des Balkans*, 17 November 2012; "Acquittal of Gotovina: unanimous outrage in Serbia", *Blic*, 16 November 2012; "*Les ex-généraux croates Gotovina et Markac acquittés en appel par le TPIY*", *Le Monde*, 16 November 2012.

reflections of one individual - reflections covered by the secrecy of correspondence[349] that were unfortunately published in a weekly paper and set off a commotion in the international legal community due to the inappropriate statements of some… It must be noted that the **case-law** of the Appeals Chamber is far from eliciting **unanimity,** which prompts a Judge of the Trial Chamber to be even more cautious.

Changes in case-law regarding aiding and abetting brought about by the Appeals Chamber in the *Šainović* case, as opposed to Appeals Chamber case-law in the *Perišić* case, illustrate the "relative" nature of case-law which means that the Trial Chamber Judges are obligated to state the law to the best of their knowledge and belief, and to consider the relevant case-law **if needed**.

[349] Article published on 13 June 2013 in a Danish newspaper and press conference of the Tribunal's spokesperson on 19 June 2013.

4. REASONABLE DOUBT

The principle of the **presumption of innocence** in criminal trials implies that an individual shall be convicted only if proven guilty. A Judge who is ruling must be certain beyond all reasonable doubt of the guilt of an accused before handing down a custodial sentence.

The Judge who is ruling must be absolutely **certain** of the accused's guilt, and must resolve even the slightest doubt in favour of the accused.

Criminal evidence is, therefore, of paramount importance as a Judge will rely on evidence admitted at trial, or the lack thereof, to determine the guilt or innocence of an accused.

In the civil law system, a Judge has considerable powers when assessing the evidence and "[has the discretion to attribute to the evidence what he or she considers to be its appropriate value and weight, in accordance with the dictates of **his or her conscience**]".[350] Article 427 of the French Code of Criminal Procedure provides that "*offences may be proved by any modes of evidence and the Judge decides according to his intimate conviction*". The Judge's intimate conviction is therefore the key element in civil law criminal proceedings,[351] on the basis of which an accused will be found guilty or not guilty of an offence.

In the **common law system**, guilt must be proven **beyond all reasonable doubt,** which is the "[substantive rule according to which at the time of delivering a Judgement, the Crown must have proven, beyond reasonable doubt, that the accused is guilty, not innocent]."[352]

The Tribunal has adopted this approach, and Rule 87 (A) of its Rules of Procedure and Evidence provides that "**a finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proven beyond reasonable doubt**".

It is worth mentioning that no reference is made to the issue in Article 23 of the Statute, which only states that the sentence is delivered by a majority.

There is no doubt that the Judges who drafted the Rules of Procedure and Evidence opted for the common law system, but which one – the Canadian, British or American system?

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[350] Anne-Marie LA ROSA, "*La preuve*", in H. ASCENSIO, E. DECAUX, A. PELLET (editors), ***Droit International Pénal***, PEDONE Editions, Paris, 2000, p. 765.
[351] With regard to intimate conviction, *see*, *inter alia*, H. LECLERC, "*L'intime conviction du juge: norme démocratique de la preuve*"; FAYOL-NOIRETERRE, "*L'intime conviction, fondement de l'acte de juger*", *Informations sociales,* 7/2005 (No. 127), pp. 46-47.
[352] F. MEGRET, *Droit pénal,* 2007, David Laflamme editions.

It is useful to outline the differences between the three major common law systems to get a better understanding of the similarities and differences between these countries,[353] and to review the ECHR's interpretation of this concept.

4.1. The Canadian system

The Canadian Supreme Court considered that the expression reasonable doubt "has a specific meaning in the legal context […] **the standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence**, the basic premise which is fundamental to all criminal trials, and […] the burden of proof rests with the Prosecution throughout the trial and never shifts to the accused".[354] Thus, according to Canadian criminal law, it is up to **the Prosecution** to prove an accused is guilty, it is not up to the accused to prove his or her innocence, and any doubt should be resolved in favour of the accused.[355]

A trier of fact – whether a single Judge or a jury – must therefore review all the evidence before it and infer from that evidence that the accused may be found guilty beyond all reasonable doubt. Similarly, if criminal law is not sufficiently clear and the Judge is uncertain as to its interpretation, the accused shall be entitled to the benefit of the doubt.[356]

In 1994, the Canadian Supreme Court issued guidelines that a trier of fact must follow in order to interpret the concept of reasonable doubt:[357]

- first, if the trier of fact believes **the testimony of the accused**, the accused should be acquitted;
- if the trier of fact does not believe the statements made by the accused but has reasonable doubt as to the accused's guilt, the accused should be acquitted;
- if the trier of fact has no doubt about the testimony of the accused, he or she must then decide whether the accused's guilt has been proven beyond reasonable doubt.

[353] For a full analysis, *see* D. POIRIER, "*Quelques points de comparaison entre la procédure pénale française et celle de common law*", *Revue de la Common law en français*, 2005, vol. 7, p. 265; PENGPENG SHI, *Le jury Criminel, l'étude comparée en Angleterre, France et Chine*, 2010, Editions universitaires européennes, p. 308.
[354] *R. v. Lifchus* [1997] 3 R.C.S. 320, 18 September 1997.
[355] In the *R. v. W.(D.)* Appeal Judgement [1991] 1 R.C.S. 742, the Canadian Supreme Court held that "the burden is on the Crown to prove beyond a reasonable doubt, while the defence need only create a reasonable doubt".
[356] *Québec (Commission de la santé et de la sécurité du travail) v. Acibec (la rose) inc.*, [1998] R.J.Q. 80 (Q.C C.A.).

- This requires the trier of fact to **follow a three-step procedure** in order to determine beyond reasonable doubt whether the accused is guilty or not.

When the accused is tried by jury, whatever the verdict, it must be rendered **unanimously by the members of the jury**. In the event of a deadlock, the Presiding Judge has the possibility of dissolving the jury and ordering a retrial.[358]

It is interesting to note that there are two types of verdicts in jury trials:

- **jury verdicts**: the 12 jurors must reach a **unanimous** decision as to the guilt of the accused.

- **verdicts directed by the Judge**: at the end of the Prosecution case, the Judge presiding over the trial may consider that there is a **total lack of evidence** pointing to the guilt of the accused. In such cases, the Judge orders the jurors to reach a verdict of acquittal.[359]

As one can see, there is a real difference between the Canadian system and the system at the ICTY, in that a **unanimous** verdict must be reached in a jury trial – which is not the case in The Hague – and the accused plays an important role by virtue of his testimony, which could lead to an acquittal, whereas **Rule 84 *bis* (B) of the Rules** provides that "*[t]he Trial Chamber shall decide on the probative value, if any, of the statement*".

4.2. The American system

Central to criminal trials in the **United States** is the determination of witness credibility. The jury's assessment of the guilt of the accused rests in part on the oral and written testimonies of witnesses. The prevailing principle is "**no witness, no case**". Thus, the parties often call expert witnesses, as their testimony is considered to have more probative value than the testimony of ordinary witnesses.

A criminal trial seeks to find evidence and narrow the scope of the case.[360] The jurors must base their decision on the evidence alone. If there is not enough evidence to prove the guilt of the accused, the accused must be acquitted, even if the jurors believe the accused is guilty.

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[357] *R. v. W.(D.)*, [1991] 1 R.C.S. 742, 757-758.
[358] *See* Criminal Code of Canada, Art. 653.
[359] *United States of America v. Shephard*, [1977] 2 R.C.S. 1067.

The Prosecution has the burden of proving beyond reasonable doubt that the accused is guilty, while the defendant does not have to prove his innocence,[361] and therefore is under **no obligation to testify or call witnesses**.

A trial jury is composed of 12 citizens, chosen by the parties at a stage called *voir dire* or *jury impaneling*,[362] who must reach a **unanimous decision** as to whether the accused could be found guilty beyond reasonable doubt.

There are noteworthy differences here too since the **unanimity rule** applies in full and the system relies almost exclusively on witness testimonies, whereas in international trials, documents are adduced in addition to witness testimonies, and no unanimous decision needs to be taken since only a majority is required.

4.3. The English system

In **Great Britain**, juries are present only in criminal cases and only before the Crown Court.

The Crown Court is composed of 12 jurors and one professional judge. However, if the accused pleads guilty, the case will be heard by a single judge as there can be no doubt as to the guilt of the accused.

The task of the citizen jury is to determine the facts, whereas the judge must state the law based on the facts examined by the jurors.

After the Prosecution witnesses have been heard, the jury and the judge may decide that there is no case to answer due to insufficient evidence.

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[360] The Federal Rules of Evidence of 2004 govern the presentation of evidence before Federal Courts in the United States.

[361] Nevertheless, it is interesting to note that this rule only applies at the level of the court of first instance. *See* for instance the case of Troy Davis, in which at a federal hearing to review the evidence, Judge Moore did not try to determine whether the State could provide irrefutable proof of Troy Davis' guilt, but whether Troy Davis could prove "**by clear and convincing evidence, that no reasonable juror would have convicted him in the light of new evidence**" that was provided after his trial for murder in 1991. As Troy Davis' lawyers failed to produce any proof of his innocence, the first instance verdict of **guilty** beyond reasonable doubt was confirmed.

[362] With regard to jury selection in the Unites States, *see* E. LIDDELL, "*Représentativité et impartialité aux États-Unis. L'exemple de la sélection des jurys de procès*", ***Revue de recherche en civilisation américaine***, 2009.

The judge does not take part in the deliberations, his or her role is limited to providing a summary of the evidence and discussing the credibility of the witnesses in order to provide the jury with all the arguments necessary to reach a decision. After the deliberations stage, the jurors must be in a position to reach a **unanimous** decision beyond reasonable doubt as to whether the accused is guilty. However, if a unanimous decision has not been reached following a deliberation for a period of time the judge considers "*reasonable having regard to the nature and the complexity of the case*" and which may not be less than two hours, a **majority of ten votes** is sufficient.[363]

No reasoned opinion needs to be provided in the event of a conviction, for the jury is supposed to have reached its decision beyond reasonable doubt.

The English system also differs from the system in other countries (United States and Canada) and from the system at the ICTY, since no statement of reasons is provided and the unanimity rule is not absolute as a majority of ten votes may suffice. A statement of reasons is not required since the decision is reached beyond reasonable doubt.

4.4. The European Court of Human Rights

The European Court of Human Rights considered that proof beyond reasonable doubt must be adduced before an accused can be convicted.[364]

The ECHR held that "the burden of proof is on the Prosecution, and any doubt should benefit the accused. It also follows that it is for the Prosecution […] to adduce evidence sufficient to convict him".[365]

It is therefore always the Prosecution that must adduce proof beyond reasonable doubt as to the guilt of the accused, since the accused is presumed innocent until a verdict of guilt is delivered pursuant to Article 6, paragraph 2, of the Convention.[366] The only case in which the burden of proof can shift is when Article 3 of the Convention, which refers to the prohibition of torture and inhuman and degrading treatment, is invoked. Thus, in the *Tomasi v. France* Judgement of 27 August 1992,

[363] 1964 Act of the British Parliament establishing a 10/11 majority rule or a consolidated majority of 12 in certain cases.
[364] *Ireland v. The United Kingdom* (ECHR), Judgement of 18 January 1978, Series A No. 25, paras 160-161. *See* also the *Wolf-Sorg v. Turkey* Judgement (ECHR), Application No. 6458/03, 8 June 2010, para. 63.
[365] *Barbera, Messegué and Jabardo v. Spain* (ECHR), Judgement, 1989, A 146, point 77.
[366] Article 6, paragraph 2, of the European Convention on Human Rights on fair trial rights provides that "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

the Court held that if allegations of mistreatment were made, the applicant did not have the burden of adducing proof of mistreatment, but rather that the burden was on the State to prove the contrary, as the individual was *de facto* considered as being in a position of inferiority.[367]

With regard to the probative nature of the evidence, the Court held that "proof beyond reasonable doubt […] may follow from the **coexistence of sufficiently strong, clear and concordant inferences**"[368] and that States must give priority to material evidence, such as medical certificates and written documents, rather than to oral testimony, in particular the allegations made by the applicant which are not sufficient in themselves if they are not supported by other evidence.[369] The Court held that an applicant's allegations may lack credibility on account of inconsistencies between the testimony and other material evidence.[370] Therefore, in certain cases, the conduct of the parties may be taken into account in order to adduce proof beyond reasonable doubt.[371]

The concept of *conviction beyond reasonable doubt* derives from the common law system and is designed to ensure that the presumption of innocence is respected and that no doubt remains at the time the sentence is handed down.

The Judge's role seems diminished as the conduct of the proceedings is left in the hands of the parties and a guilty verdict is reached by a citizen jury.

To sum up, the guarantees provided to ensure that this task is carried out successfully can be broken down into three categories:

- the **unanimous** decision the jurors are required to reach (subject to waivers that may appear in English and American law);

- the jurors' obligation to rely exclusively on the **evidence and not on their own intuition** (a requirement that may be open to criticism, particularly in the American system where testimony has the highest probative value);

[367] *Tomasi v. France* (ECHR) Judgement, Series A, No. 241-A, 27 August 1992. *See* also *Ribtsch v. Austria* (ECHR), Series A, No. 336-A, 4 December 1995, and *Selmouni v. France* (ECHR), 28 July 1999, Application No. 25803/94.
[368] *Selmouni v. France* (ECHR), 28 July 1999, para. 88; *Ireland v. The United Kingdom* (ECHR), 18 January 1978, Series A, No. 25, pp. 64-65, para. 161; *Aydın v. Turkey* (ECHR), 25 September 1997, Publication 1997-VI, p. 1889, para. 73.
[369] *Martinez Sala et al. v. Spain* (ECHR), 4th Section, 2 November 2004, paras 145 and 146.
[370] *Seyhan v. Turkey* (ECHR) Grand Chamber, 2 November 2004, para. 80.
[371] *Abdurrahman Orak v. Turkey* (ECHR), para. 69, 14 February 2002, and *Mansuroğlu v. Turkey* (ECHR), 26 February 2008, para.76.

- the principle of *in dubio pro reo* requires the acquittal of any individual whose guilt has not been established with certainty.

At the ICTY, the principle of convicting an accused [on evidence] beyond reasonable doubt is enshrined in the Tribunal's Rules of Procedure and Evidence. The Trial Judges must therefore be certain that **the guilt of the accused has been proven beyond reasonable doubt** before finding the accused guilty.

The reasonable doubt standard has been clearly outlined, not in the Judgements, but in Rule 98 *bis*.

In the *Jelisić* case, the Trial Judges considered that to justify a conviction, there must be sufficient evidence to prove guilt beyond reasonable doubt;[372] this principle was confirmed in the *Kunarac* case, in which the Judges considered that **the evidence admitted** must be such that a reasonable Judge could be **satisfied** beyond reasonable doubt of the guilt of the accused.[373]

However, it is not necessary for the evidence to be sufficient to establish guilt beyond reasonable doubt at the end of the Prosecution case. At this stage of the proceedings, "the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the Prosecution evidence (if accepted) **but whether it could**".[374] In the *Jelisić* case, at the close of the Prosecution case the Trial Judges considered that the Prosecution had not adduced sufficient evidence to prove beyond reasonable doubt the guilt of the Accused for specific intent to commit genocide[375] and therefore acquitted the Accused under Rule 98 *bis* of the Rules.[376]

The Appeals Chamber held that the Judges had erred in law by requiring that the Prosecution determine the guilt of the Accused beyond reasonable doubt at the close of its case.[377] This was recognised by the Trial Chamber in the *Kordić* case, in which the Judges stated that "[i]mplicit in Rule 98 *bis* proceedings is the distinction between the determination made at the halfway stage of

[372] *The Prosecutor v. Goran Jelisić*, 14 December 1999, para. 108, page 37.
[373] *The Prosecutor v. Dragoljub Kunarac et al.*, "Decision on Motion for Acquittal", 3 July 2000 ("Kunarac Decision"), para. 3, p. 4.
[374] *The Prosecutor v. Goran Jelisić*, Appeal Judgement, 5 July 2001, para. 37.
[375] *The Prosecutor v. Goran Jelisić*, 14 December 1999, para.108, page 37.
[376] Rule 98 *bis* of the RPE provides that "[a]t the close of the Prosecutor's case, the Trial Chambers shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction".
[377] *The Prosecutor v. Goran Jelisić*, Appeal Judgement, 5 July 2001, para. 37.

the trial, and the ultimate decision on the guilt of the Accused to be made at the end of the case, on the basis of proof beyond reasonable doubt".[378]

Thus, assessment [of the evidence] beyond reasonable doubt is applicable to this stage of the proceedings, but only **in relation to the evidence reviewed** and not in relation to determining the guilt or innocence of the Accused.[379]

Furthermore, this reasoning is consonant with the practice found in common law jurisdictions when the defence files a motion of no case to answer. Thus, Judge McIntyre held that "it is also not for the trial judge to draw inferences of fact from the evidence before him [at the close of the Prosecution case]".[380]

Appeal Judges are triers of **law**, not of fact. However, they have held that this principle can be challenged since they have the discretion to admit new evidence and determine if such evidence "could have been a decisive factor in reaching the decision at trial".[381]

In the ***Stakić*** **case**, the Judges did indeed avail themselves of this prerogative as "**no reasonable trier of fact** could have reached the verdict of guilt beyond reasonable doubt"[382] without such additional evidence. This sentence, therefore, seems to suggest that the Appeal Judges avail themselves of the possibility of acting as triers of fact, since the accused's **right to a conviction beyond reasonable doubt takes precedence over all other formal or substantial considerations.** The Appeals Chamber confirmed this interpretation when it stated further that if it were to apply a lower standard, no conclusion of guilt would be reached beyond reasonable doubt.[383]

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[378] *The Prosecutor v. Dario Kordić and Mario Čerkez*, "Decision on Defence Motions for Judgement of Acquittal", 6 April 2000, para. 11. The Judges even added that if this "decision [taken] on its own particular facts […] was purporting to establish a standard of proof, the Trial Chamber in the instant case declines to follow it", para. 17.
[379] *The Prosecutor v. Goran Jelisić*, Appeal Judgement, 5 July 2001, paras 35 and 36.
[380] *Monteleone v. The Queen* (1987), 25.C.R.154.
[381] Rule 115 of the Rules.
[382] *The Prosecutor v. Milomir Stakić*, Appeal Judgement, 22 March 2006, para. 10.
[383] *The Prosecutor v. Milomir Stakić*, Appeal Judgement, 22 March 2006, para. 23. On the admission of additional evidence on appeal before the International Criminal Tribunals, *see* L. E. CARTER, "The Importance Of Understanding Criminal Justice Principles in the Context of International Criminal Procedure: The Case of Admitting Evidence on Appeal" in Gabrielle VENTURINI, Stafania BARIATTI (eds), Liber Fausto POCAR: Individual Rights and International Justice, Giuffre Editor, 2009. *See* also Linda E. CARTER, "Developing International Criminal Procedure: the Challenge of Blending Civil and Common Law Legal Systems", Cheikh Anta Diop University, Faculty of Legal and Political Science, Laboratory of Legal and Political Studies (LEJPO), 2 May 2009.

As a rule, **the Appeals Chamber** focuses exclusively on points of law, since the facts have already been determined by the trial judges, unless it considers that the probative value of the evidence is insufficient to determine the guilt of the accused beyond reasonable doubt.

A thorough analysis of this issue, in light of the practice in common law countries and the case-law of the Appeals Chamber at the ICTY, establishes that a finding of guilt may only be reached if the Judge is **virtually certain,** and any doubt should benefit the accused. "Virtual certainty" cannot be assumed, but is demonstrated in the Judgement's statement of reasons by weighing the evidence and examining all the possible alternatives.

Beyond the question of reasonable doubt, the blending of the civil and common law systems as regards the issue of determining guilt must also be addressed.

By its resolution 827 (1993) adopted on 25 May 1993, the UN Security Council decided, in accordance with Article 23, that judgements would be delivered in public by a majority of the judges of the Trial Chamber. Unquestionably, the Security Council took a clear stand in favour of the civil law system, for in common law jurisdictions the jury must be unanimous in determining the guilt of the accused.

Therein lies the paradox of the administration of an international criminal court or tribunal that resorts either to the common law system or to the civil law system. Logic would have it that, since the procedure derives almost entirely from the common law system, the Trial Chamber, which acts as the jury, should be unanimous in reaching its decision on the guilt of the accused, and if one Judge is in favour of a not guilty verdict, the accused should be automatically acquitted.

The Security Council decided otherwise when Article 23 of the Statute was drafted, but the question nonetheless merits attention.

5. THE JCE

5.1. The jurisprudence of the Appeals Chamber

In this part of my opinion on JCE, I restate my opinion on the subject in the *Prlić et al.* case and provide a summary thereof.[384]

5.1.1. The common plan

Prior to the establishment of the **Nuremberg Tribunal**, responsibility for participation in **a common plan** existed in various forms under national statutes that recognised this form of co-perpetration, such as the American concept of "conspiracy", of "felony murder rule"[385] as well as the French concept of *association de malfaiteurs* [criminal association].[386]

The **London** Agreement that established the Charter of the International Military Tribunal at Nuremberg was signed on 8 August 1945. Control Council Law No. 6 of this agreement provides that "***[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan***".[387]

Thus, there can be a **common plan** or a **conspiracy**; these two concepts are not identical.

The Nuremberg Tribunal and the tribunals established under Control Council Law No. 10 adopted their own definition of a joint criminal enterprise as a form of responsibility.[388]

Several important factors must be considered. First, it falls to the Judges to say whether the group or organisation is without question **criminal in nature**. Second, any affiliation with this group or organisation will lead to criminal prosecution.

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[384] *See* the separate and partially dissenting opinion of Judge Jean-Claude Antonetti in *The Prosecutor v. Jadranko Prlić et al.*, Trial Judgement of 29 May 2013.
[385] *See*, *inter alia*, David Crump and Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, Vol. 8, Harvard Journal of Law and Public Policy, p. 359 (1985).
[386] It should also be noted that according to Professor Van Sliedregt, the concept of *association de malfaiteurs* purportedly inspired the drafters of the Nuremberg Charter to penalise membership of a criminal organisation. Eliese Van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, Vol. 5, Journal of International Criminal Justice, pp. 184, 199 (2006).
[387] Control Council Law No. 6, Charter of the International Military Tribunal at Nuremberg (London Charter); *see* also Article 5 (c) of the Charter of the International Military Tribunal for the Far East (Tokyo Charter).
[388] Control Council Law No. 10 provides that **"[i]n cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individual[s] to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned"**.

These tribunals established that "the difference between a charge of conspiracy and one of acting in pursuance of a common design is that the first would claim that an agreement to commit offences had been made while the second would allege not only the making of an agreement but the performance of acts pursuant to it".[389]

A conspiracy does not require the acts to be carried out whereas a common design does.

The concept of joint criminal enterprise is frequently considered to be an offshoot of the concept of complot or an adaptation of the common law concept of **conspiracy**, as it primarily involves taking criminal objectives into consideration.

In the common law system, conspiracy consists of an **agreement between two or more persons that violates the law in force**. There is no limit to the number of participants in a conspiracy and in many cases, the actual implementation of the plan is not a requirement for the offence.[390] One of the essential criteria for the characterisation of such an offence is the continuity of the *actus reus*, that is, the parties may join the "group" at a later stage and be held responsible for conspiracy; the ***actus reus*** constitutes the **agreement** between the participants.[391]

Conspiracy comprises **three elements**:[392]

i) an agreement;

ii) between two or more persons sharing a common purpose;

iii) the criminal objective pursued may be either the ultimate purpose of the agreement or simply constitute a means whereby the purpose is realised.

The common law courts have chosen to set out in detail the conditions required for an offence to qualify as conspiracy. These courts, quite reasonably, envisage that responsibility may be incurred in light of the evidence admitted in the case. In their view, the participants in a crime "come and

[389] *XV Law Reports of Trials of War Criminals 97-98*, UN War Crimes Commission, 1948 (summarising the jurisprudence of the Nuremberg and Control Council Law No. 10 trials).
[390] *See, inter alia*, J. HERRING, "*Criminal Law: Text, Cases and Materials*" (3rd edition), Oxford University Press.
[391] *See*, for instance, the Supreme Court of India, *Yash Pal Mittal v. State of Punjab*, AIR 1977 SC 2433; *Suresh Chandra Bahri v. State of Bihar*, AIR 1994 SC 2420.
[392] Supreme Court of India, *Ajay Agarwal v. Union of India*, AIR 1993 SC 1637.

go" and any one of the conspirators may not necessarily know or come to understand every stage of the implementation of the plan that was decided by the other conspiratorial perpetrators.[393]

The concept of **"common criminal plan"** that became a standard at the Nuremberg Tribunals, unlike the concept of JCE that emerged from the *Tadić* Appeal Judgement, based criminal responsibility on the concept of **membership in the criminal enterprise.** The post-war tribunals, through the concept of a "common plan" insisted on **formal membership** in an organisation initially declared criminal by the Nuremberg Tribunal[394] (as were the Nazi Party, the SS, the Gestapo and the SD) that constituted the ***actus reus***, whereas the jurisprudence in the *Tadić* case is less formalistic and requires **mere participation** in a joint criminal enterprise without declaring the organisation criminal. It is therefore clear that in terms of the evidence required, the *Tadić* jurisprudence is less demanding, which makes it easier for the Prosecution to make its case against an accused.

The major difference between the initial concept outlined in **Nuremberg** and the broader jurisprudence in the *Tadić* case lies in the standard of **mere participation**.

It is interesting to draw a parallel between Control Council Law No. 6, which classified into categories persons taking part in the plan or conspiracy, namely the leaders, organisers, instigators or accomplices, and Article 7 of the Statute of the ICTY, which envisages a single form of responsibility concerning **anyone** who plans, orders, instigates, commits or aids and abets.

Direct perpetrators are not listed in Control Council Law no. 6, but are conversely listed in Article 7 of the Statute under the category of perpetrators.

Personally, I consider that **Article 7** of the Statute does not in itself conceal a "lacuna" making it necessary to create jurisprudence. I deem that there has been no **legal lacuna** at any time.

5.1.2. Article 7 of the Statute

Security Council resolution 827 was adopted after many consultations and numerous preparatory documents submitted by the States or international legal scholars. It would be impossible, under

[393] P. MARCUS, "*Criminal Conspiracy: The State of Mind Crime-Intent, Anti-Federal Intent*", College of William and Mary Law School Faculty Publication, 1976, pp. 632-633.
[394] *See* Control Council Law No.10.

such conditions, for all the legal experts involved to have committed the **error** of overlooking certain perpetrators of offences.

One need simply turn to the text and take into consideration the spirit of Article 7 (1) of the Statute which fully grasps the commission of offences resulting from a common plan. There are the **planners** and those who **instigate the commission** of crimes through the media; there are those who **give orders** to translate the common plan into action on the ground, and those on the ground that **carry out** the plan; it is the latter, who commit the crimes on the ground contemplated under the articles of the Statute, who fall into the very specific category of **perpetrators**, and not of planners, instigators or persons giving orders.

For this reason, it seems to me incongruous to place those **committing** the crimes on the same level as those **planning** them, as the JCE theory "the *Tadić* way" would suggest. In my view, the JCE based on a plan of common design falls into the category of planning.

Does the fact that **Tadić** was present at the crime scene make him immune from prosecution? I do not believe so. When one member of a military group carries out an order, and is aware that a crime is being committed before his very eyes, he is duty-bound to intervene to prevent the crime by raising, if necessary, the question of the execution of an unlawful order with a superior officer.

We have no choice but to conclude that the ***Tadić* jurisprudence** and the **concept of JCE** to which it gave rise have produced a degree of legal uncertainty brought about by the **ambiguity** of this concept.

The **Appeals Chamber** did not clearly define the **objective requirements** that must be met to prove the existence of a JCE. It indicated that a JCE exists if several persons share a common purpose without, however, requiring the determination of their identity, the specific purpose they were pursuing, the specific methods they implemented to reach it, the geographical or temporal context …

This problem recurs with **proof of intent** regarding JCE III. The subjective requirements the Chamber sets out are not defined with any greater precision than the objective requirements. Indeed, the Chamber considers that an accused may be declared responsible for a crime other than the one envisaged in the common plan "if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group, and (ii)

the accused willingly took that risk".[395] The Chamber does not specify, however, what it understands by the term foreseeable, and whether this foreseeability must be assessed objectively or subjectively.[396]

In the *Tadić* Appeal Judgement, the Appeals Chamber **relies, in particular, on** A**rticle 7 (1) of the Statute of the ICTY, but also on the Essen Lynching and Borkum Island cases in relation to the extended form of joint criminal enterprise,** and affirms that "the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal". [397]

The Appeals Chamber first recalls the principle of individual responsibility enshrined in Article 7 (1) of the Statute of the ICTY, whereby *"[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.*"

The Appeals Chamber held that the object and purpose of the ICTY Statute are to be interpreted as an extension of the Tribunal's jurisdiction to every person responsible for serious violations of humanitarian law in the former Yugoslavia, regardless of the manner in which they participated in these violations. It infers therefrom that the ICTY Statute does not rule out the possibility of holding a person responsible for crimes committed by one or more persons in circumstances where all of them constituted a group in pursuit of a common purpose, an interpretation it deems justified in light of the nature of the crimes committed in wartime.[398]

This construction of the Statute of the ICTY has been, and still is, the subject of debate. The Statute of the ICTY makes no mention of the term JCE and many consider that the expansive interpretation of the Appeals Chamber in the *Tadić* Appeal Judgement runs counter to the principle of legality of crimes, since in criminal law, statutory texts must be strictly adhered to.[399]

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[395] ICTY, Appeals Chamber, *Tadić* case, *see* above, p. 108.

[396] For comparison purposes, under English law, the theory of "common purpose", whose roots go as far back as the 14th century, makes it possible to find a person responsible for a crime committed in furtherance of a common plan even when the action goes beyond the plan, depending on certain requirements that have evolved over time. According to early case-law, the crime was attributable to such a person if it constituted the probable consequence of the common plan *in the eyes of a neutral third party* ("objective probable consequences test"). Since the decision of the Privy Council in the *Chan Wing-Sui* case in 1985, the test used to assess this is subjective. For further details, *see* above, Barthe, pages 148 *et seq*.

[397] ICTY, Appeals Chamber, *Tadić* case, *see* above, page 102.

[398] *Ibid*, pages 83 *et seq.*

5.1.3. The reasoning of the Appeals Chamber

The Appeals Chamber bases the existence of an extended form of joint criminal enterprise on two decisions in particular: the decisions in the **Essen Lynching** and **Borkum Island cases.**

In the first case, known as the *Essen Lynching* case, brought before a British military tribunal, three British prisoners of war were lynched by a German crowd on 13 December 1944 in Essen. Among the accused were, *inter alia*, the **German captain** who had handed the prisoners over to an **escort** telling him not to intervene if the crowd went after them because they were going or had to die. The order was given in such a way that it could be heard by the civilians present on the site. The prisoners were then subjected to various forms of mistreatment by the soldiers and civilians in the street. Once they reached a bridge, they were thrown from the parapet into the abyss. One of them died on the spot, and the two others were finished off subsequently: one died of gunshot wounds and the other as a result of the beating the crowd gave him.

At trial, the Public Prosecutor argued that the crime had been committed in three stages: the German captain had incited the lynching, the prisoners had been mistreated in the street and acts of violence had caused their death. The Prosecutor held that, inasmuch as it was impossible to determine precisely **who** had administered the fatal blows and that in truth all those who took part in what transpired contributed to the result, each person who had participated in these acts was responsible for the death of the prisoners.

According to the Appeals Chamber of the ICTY, "[i]t would seem warranted to infer from the arguments of the parties and the verdict that the court upheld the notion that all the Accused who were found guilty took part, in various degrees, in the killing: not all of them intended to kill but all intended to participate in the unlawful ill-treatment of the prisoners of war. Nevertheless they were all found guilty of murder, because they were all 'concerned in the killing'. The inference seems therefore justified that the Court assumed that the convicted persons who simply struck a blow or implicitly incited the murder could have foreseen that others would kill the prisoners; hence they too were found guilty of murder."[400]

[399] ICTY, Appeals Chamber, *Martić* case, *see* above Dissenting Opinion of Judge Schomburg; Barthe, *see* above, pages 204 *et seq*.
[400] ICTY, Appeals Chamber, *see* above *Tadić* Appeal Judgement, page 95.

Some authors have criticised this interpretation, finding that it was impossible to know whether the Court **convicted the accused due to the foreseeability** of the murder by the other members of the group or on the basis of a shared willingness to kill.[401]

In the ***Borkum Island* case** (or *Kurt Goebell et al.*), the following facts were adjudicated: on 4 August 1944, an American flying fortress made a forced landing on the island of Borkum, in Germany. The seven crew members were taken prisoner and forced to walk under military escort through the streets of Borkum. First, they were struck by the members of the *Reichsarbeitsdienst*, who were acting on the orders of an officer, then by civilians encouraged by the town's Mayor to kill them "like dogs". Their guards encouraged these acts of aggression and took part in the brutality. The American soldiers were eventually gunned down by German soldiers when they reached the town hall.

Appearing before the American military tribunal in charge of the case were high-ranking officers, soldiers, the **Mayor of Borkum**, policemen, a civilian and the representative official from the *Reichsarbeitsdienst*. All were charged with war crimes, in particular both with "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abet[ting] and participat[ing] in the killing" of the airmen and with "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abet[ting] and participat[ing] in the assaults" on the airmen.

In his closing arguments, the Prosecutor deemed it impossible to determine which act had caused the death of the victims, and that it was therefore necessary to consider the various participants in the crimes committed as cogs in the same machine, with each one of them contributing to make it work. Accordingly, he requested for each accused, whose participation in the acts of violence had been established, a finding of guilt for murder.[402] The American tribunal convicted some of the accused for murder and assault, whereas others were found guilty of assault only.

According to the Appeals Chamber of the ICTY, "[i]t may be inferred from this case that all the accused found guilty were held responsible for pursuing a common criminal design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even when there was no evidence that they had actually killed the prisoners. Presumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have

[401] Barthe, *see* above, page 69.
[402] For citations from the closing arguments by the Prosecutor, *see* above the *Tadić* Appeal Judgement, page 96, and Barthe, above, pages 70 *et seq.*

predicted that the assault would lead to the killing of the victims by some of those particpating in the assault."[403]

These inferences have been criticised by some authors, holding that one could not infer from the judgement of the American tribunal that some of them were convicted of murder and others of assault because the latter group could have foreseen, due to its status, role and conduct, that the attack would lead to the victim's death. The tribunal could also have convicted some of them of murder, because it had been sufficiently well established that they were acting with homicidal intent, not merely with the intent to commit acts of violence.[404] Moreover, the fact that all of the accused were not found guilty of the same crime runs counter to the intended purpose of the JCE concept, which seeks to punish every participant as a perpetrator, regardless of the level of the participant's involvement in the commission of the crime.[405]

Accordingly, those who criticise the jurisprudence in the *Tadić* case consider that the Appeals Chamber has given an **erroneous or at least overly broad interpretation both of the ICTY Statute and of previous case-law**. They hold, therefore, that the concept of JCE lacks an adequate basis in international law, whether in the treaty texts or the case-law, and that this runs counter to the principle of *nullum crimen sine lege*. This conclusion is further supported by the fact that JCE III is based on vague elements that cannot meet the requirements of the strict application of criminal laws.[406]

The **Appeals Chamber** in the ***Stakić* case** found that the concept of co-perpetration put forward by the Trial Chamber had no basis in international criminal law or in the case-law of the ICTY, unlike the concept of JCE it had applied.[407]

On this point, it must be said that the Appeals Chamber, in its decision of 21 May 2003 in the Milutinović case, finally put an end to the uncertainties regarding the status of persons belonging to a JCE (co-perpetrators, accomplices, participants). The Chamber defined JCE as a mode of commission envisaged in Article 7 (1) of the Statute and held that the Prosecutor's proposal in the Indictment to consider that participation in a JCE falls under co-perpetration was correct. In that

[403] ICTY, Appeals Chamber, *see* above the *Tadić* Appeal Judgement, page 98.
[404] *See* above, Barthe, pages 71 and 72; *see* also the position of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia, set out in its Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise, dated 20 May 2010, para. 80.
[405] "The future of extended joint criminal enterprise – will the ICTY's innovation meet the standards of the ICC?" by Linda Engvall, *Nordic Journal of International Law*, 2007, No. 76, pages 241 to 263, here page 245.
[406] *See* para. (1) (b) above.
[407] ICTY, Appeals Chamber, *Stakić* case, *see* above, page 24.

respect, the Appeals Chamber emphasised that this was a **form of criminal responsibility that was distinct from accomplice liability in that, to be held responsible, the accused had to share the common purpose of the JCE**.[408]

For the sake of brevity and accuracy, I must recall that the Statute makes no reference whatsoever to the JCE. Furthermore, **in his report presented on 3 May 1993 to the Security Council,** the **UN Secretary-General** indicated that "*the question arises, however, whether a juridical person, such as an association or organisation, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups*" (cf. paragraph 51).

On reading **paragraph 51** carefully, it appears that the UN Secretary-General dismisses membership in a group as part of criminal responsibility. However, the Trial Chamber in the *Tadić* case chose to take the opposite approach by developing a concept of joint criminal enterprise which is nothing more than a reference to a group (plurality of persons, common purpose, perpetration of a crime).

There can be no **collective responsibility,** as was affirmed by the **Nuremberg Tribunal**: "***Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced***."

I notice, furthermore, that the very mention of **collective responsibility** runs counter to the Tribunal's mandate, which is to promote peace and reconciliation in the former Yugoslavia. How will we achieve reconciliation if we put everyone in the same boat (heads of state, soldiers, generals, administrations, various entities, etc.)?

This jurisprudence is far from being unanimously recognised and has even been challenged by the Judges of this Tribunal.

[408] ICTY, Appeals Chamber, Case No. IT-99-37-AR72, *The Prosecutor v. Milutinović et al.*, "Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise", 21 May 2003, paras 18-20.

5.1.4. The concept of co-perpetration[409]

Judge Schomburg proposes to revisit the "doctrine"[410] of joint criminal enterprise ("JCE") in international criminal law.

He does not, however, call into question the first and second form of JCE whose legal anchoring is well established in customary international law ("CIL"), but stresses that JCE I and JCE II are the result of an academic contest seeking to create a new doctrine in international criminal law whose fundamental principles were included in the forms of criminal liability established and recognised in various jurisdictions. The author notes more specifically that **co-perpetration** displays a similarity of principle to JCE I and asserts that JCE I resembles JCE II. Accordingly, he argues that the concept of co-perpetration constitutes a form of criminal liability more precisely outlined than JCE and established and recognised by a large number of national jurisdictions.

He argues further that JCE III has no basis in the Statutes of the ICTY and ICTR, and more specifically submits that the principle of *nulla poena sine lege stricta* precludes application of the third form of the JCE doctrine.[411]

He recalls that criminal responsibility for commission is provided for in Article 7 (1) of the Statute of the ICTY and Article 6 (1) of the Statute of the ICTR and questions whether it was necessary to translate this form of responsibility into the concept of JCE.[412]

Judge Schomburg identifies a recurring weakness in the analysis of the requisite *mens rea* for JCE III in the case-law. He notes that the second *mens rea* element which is specific to the third form of JCE, namely, the assessment of a voluntary risk taken by an accused that a crime, other than the ones that form the common plan in which he participated, might be perpetrated by one or more members of the group, is frequently omitted in any case-law analysis, except for the *Blaškić* and *Kordić* Appeal Judgements in which the Appeals Chamber expressly clarified that voluntary

[409] I should like to thank **Pierre Fichter,** my assistant, for his help in finding judgements that were issued following the events in the Second World War which led to judgements being handed down in Germany.
[410] The term "doctrine" of the JCE is used by the author himself. The present summary uses the same term.
[411] Wolfgang Schomburg, "Jurisprudence on JCE – Revisiting a Never Ending Story", published on 3 June 2010 on the website of *Cambodia Tribunal Monitor*, pp. 3 and 4.
[412] *Ibid.*, p. 5.

acceptance or approval of the risk taken by the alleged perpetrator of the crime is required in order to meet the standard of *dolus eventualis.*[413]

I must further explore the issue of the third form of JCE which in my view poses more problems than forms I and II.

5.2. The third form of JCE

In the ***Tadić*** **Appeal Judgement**, at paragraphs 204 to 219,[414] the Appeals Chamber quotes several examples from the case-law that may prove useful in analysing the third category of JCE.[415] In particular, at paragraphs 214 to 219, the Appeals Chamber cites and examines the cases brought before the Italian courts between 1946 and 1950 regarding individuals who committed war crimes during the Second World War.

It seemed necessary to me to revisit these examples in greater detail and to recall Italian law on the subject.

As regards the cases referred to in the body of the text, I was only able to find five appeal judgements, namely *D'Ottavio et al.,*[416] *Tossani,*[417] *Bonati et al.,*[418] *Aratano et al.*[419] and *Ferri.*[420] These five appeal judgements are all **handwritten**. However, I was unable to find the full text of the sixth appellate judgement, the *Mannelli* Appeal Judgement.[421]

[413] *Ibid.*, pp. 6 and 7. On this issue, it must be noted that the author provides no specific reference to the two cited appeal judgements or to the trial judgements or appeal judgements in which this second *mens rea* element of JCE III has been omitted.
[414] *The Prosecutor v. Duško Tadić,* Case No. IT-94-1-A, Appeals Chamber, Appeal Judgement, public, 15 July 2009, paras 204 to 219.
[415] The third category of JCE involves cases of common purpose in which one of the perpetrators commits an act which, although it does not proceed from the common purpose, is nevertheless a natural and foreseeable consequence of its implementation.
[416] Court of Cassation, *D'Ottavio et al.* case, 12 March 1947, handwritten (unpublished).
[417] Court of Cassation, *Tossani* case, 17 September 1946, handwritten (unpublished).
[418] Court of Cassation, *Bonati et al.* case, 15 July 1946, handwritten (unpublished).
[419] Court of Cassation, *Aratano et al.* case, 21 February1949, handwritten (unpublished).
[420] Court of Cassation, *Ferri* case, 25 July 1946, handwritten (unpublished). The *Ferri* Appeal Judgement is cited in the text as *Ferrida* Appeal Judgement. This quote is incorrect and refers in fact to the *Ferri* Appeal Judgement.
[421] However, I was able to locate the key passage from this appellate judgement which is contained in the body of the following judgement: Court of Cassation, *Mannelli* case, 20 July 1949, in *Giustizia penale*, 1949, Chapter II, col. 906. It should be noted that the references to this passage in the judgement contain errors. According to footnote 276, the passage referred to should be located in columns 696 to 697 which were not to be found. However, if we look at column 906, referred to moreover in footnote 277, this passage can be found in the *Mannelli* Appeal Judgement.

Concerning the cases referred to in the footnotes, I was only able to find excerpts from the *Mannelli, Montagnino, Solesio* and *Antonini* appeal judgements[422] contained in the law review *Giustizia penale.* I was unable to find and/or access the excerpts from the *Torrazzini*, *Palmia, Peveri*, *Minafò* and *Minapò* appeal judgements or the appeal judgements themselves.

These appeal judgements and/or excerpts are difficult to find, since both the appellate judgements of the Italian Court of Cassation and the excerpts from these judgements which appear in law reviews such as *Giustizia penale* or *Archivio penale* are available to the public on subscription only.[423] Unfortunately, the ICTY has allocated no budget item for that purpose. Given the importance of this issue, it is unfortunate that the Judges in the *Tadić* Chamber, who apparently decided to rely on the Italian Judge, did not have the handwritten appeal judgements translated into French and English, or even into B/C/S, and subsequently archived in the ICTY Library.

Prior to reviewing the appellate judgements, it is interesting to examine the Italian Penal Code.

Articles 110 to 119 of the Italian Penal Code[424] address multiple persons taking part in the commission of an offence. According to Article 110 of the Penal Code, each person taking part in the commission of an offence committed by several persons, as a rule, receives a sentence which accords with the commission of such an offence.

Article 116 of the Italian Penal Code is particularly important. It provides that when the offence committed is different from the one sought by one of the participants, that person must answer for the offence if the event is the consequence of his action or omission. However, if it turns out that the offence committed is more serious than the one originally intended, his sentence will be reduced. There is a similarity with the third form of JCE, but the sentence is reduced…

Article 89 of the Wartime Military Penal Code addresses agreements between servicemen regarding the commission of crimes that would constitute a breach of loyalty or of military defence.[425] It must

[422] Court of Cassation, *Mannelli* case, 20 July 1949, in *Giustizia penale*, 1949, Chapter II, col. 906; Court of Cassation, *Montagnino* case, 24 February 1950, in *Giustizia penale*, 1950, Chapter II, col. 821; Court of Cassation, *Solesio et al.* case, 19 April 1950, in *Giustizia penale*, 1950, Chapter II, col. 822; Court of Cassation, *Antonini* case, 29 March 1949, in *Giustizia penale*, 1949, Chapter II, col. 740 to 742.
[423] In addition, the appellate judgements I was able to find are not easy to read since they are handwritten.
[424] Promulgated in 1930, it remains in force despite several amendments introduced by the Court of Cassation.
[425] Article 89 of the Wartime Military Penal Code. If several soldiers agree to commit one of the crimes by inflicting bodily harm, violating bodily integrity, individual freedoms or liberty as provided in Articles 48 (1) and 49, or one of the crimes covered in Articles 50, 51, 59, 66 and 86, each of the participants shall be punished, for that reason alone, with a sentence not under five years. *See* also Article 77 of the Peacetime Military Penal Code.

be said that, according to this article, a serviceman who withdraws from the agreement before the crime in question is executed and prior to arrest or judicial proceedings cannot be sanctioned.[426]

Objective responsibility seems to flow from the aforementioned articles. However, the Court of Cassation specifies in its jurisprudence that the responsibility of the participants for a crime committed by a group is not objective, but is based on a relationship of material and mental causality, and a requirement of foreseeability.

In the *D'Ottavio et al.* case,[427] the Court specifies that the responsibility of the participants is based on concurrent interdependent causes: all the participants may be held responsible for the crime, whether they were the direct or indirect cause of it, in accordance with the well-known adage *causa causae est causati.*[428]

In the *Tossani* appellate judgement,[429] the Court finds that he did not actively participate in any way in the rounding up of civilians that led to the death of a partisan and, furthermore, that the event charged was unique and unforeseen. There was no nexus of material and mental causality between his participation and the death of the partisan. The *Ferri* Appeal Judgement[430] follows the same reasoning. Material and mental causality likewise form the basis of the Court's reasoning in the *Antonini* Appeal Judgement,[431] where it is asserted that he not only needed to have envisaged the death of the victim, but also to have intended it. Similarly, in the *Bonati et al.* Appeal Judgement,[432] it is stated that a relationship of material and mental causality is required.[433]

The *Mannelli* Appeal Judgement[434] further specifies that the nexus of material causality must be understood in legal terms and must be clearly differentiated from a fortuitous link. For a nexus of material causality to exist between the crime intended by one of the participants and the distinct

[426] Article 89 of the Wartime Military Penal Code.
[427] Court of Cassation, *D'Ottavio et al.* case, 12 March 1947, handwritten (unpublished).
[428] *In casu*, there existed a link of material causality and a link of mental causality. There existed a material causal link given that all the participants had directly contributed to the crime of attempted "unlawful arrest". The crime was the indirect cause of a subsequent event that was different in kind, namely the shot fired at one of the fugitives that wounded him fatally. Moreover, there existed a mental causal link since all the participants shared the awareness and the intent to commit an attempted unlawful arrest, and were able to foresee that a crime of a different kind would be committed, which necessarily resulted from the use of weapons.
[429] Court of Cassation, *Tossani* case, 17 September 1946, handwritten (unpublished).
[430] Court of Cassation, *Ferri* case, 25 July 1946, handwritten (unpublished).
[431] Court of Cassation, *Antonini* case, 29 March 1949, in *Giustizia penale*, 1949, Chapter II, col. 740 to 742.
[432] Court of Cassation, *Bonati et al.* case, 15 July 1946, handwritten (unpublished).
[433] However, in this case, amnesty could not be granted to the appellant because even if the offence committed is more serious than the one sought by certain participants, the appellant is nevertheless responsible because the offence was the indirect consequence of his participation, and amnesty cannot be granted for this kind of offence.
[434] Court of Cassation, *Mannelli* case, 20 July 1949, in *Giustizia penale*, 1949, Chapter II, col. 906.

crime committed by another, the latter must be the **logical and foreseeable consequence of the former**. If, however, the two crimes are totally independent of one another, a purely fortuitous link may be established. In the *Montagnino* Appeal Judgement,[435] the Court specifies that in order to rule out a relationship of material causality between the act and the incident, it is necessary that the incident be considered new, with its own causal autonomy, either due to exceptional circumstances or because it goes well beyond, or is inconsistent with, the limits of the agreed action.

In the *Aratano et al.* case,[436] the crime committed (murder of a partisan) was an unintended occurrence more serious than the intended occurrence; for the participants in this act to be held guilty of voluntary homicide, a deliberate and voluntary act in relation thereto needed to be performed.

Lastly, in the *Solesio* Appeal Judgement,[437] the Court examines the question of **foreseeability** and affirms that a more serious offence may even be attributed to one who did not intend it, if it was not out of the ordinary or an unforeseeable departure from the act that was to be initially committed.[438]

As we conclude this review, it is appropriate to note that the Judges in the *Tadić* Chamber did not depart from the case-law of the Italian Court of Cassation; it should, however, be noted that some of the accused benefitted from mitigating circumstances because the Court of Cassation, on several occasions, mentioned the terms "relationship of material or mental causality", "exceptional and unforeseen event", "different from a formal link", etc., which is not the case at the ICTY and the ICTR.

5.3. The ICC and JCE

At the **International Criminal Court** (ICC), the concept of JCE has been raised repeatedly in various pleadings and decisions.

Joint Criminal Enterprise (JCE) is not mentioned in any of the provisions of the **Rome Statute**. Criminal responsibility for the commission of a crime involving several participants is governed by Article 25 of the **Rome Statute** under **co-perpetration**. Article 25 (3) (d) essentially emphasises

[435] Court of Cassation, *Montagnino* case, 24 February 1950, in *Giustizia penale*, 1950, Chapter II, col. 821.
[436] Court of Cassation, *Aratano et al.* case, 21 February 1949, handwritten (unpublished).
[437] Court of Cassation, *Solesio et al.* case, 19 April 1950, in *Giustizia penale*, 1950, Chapter II, col. 822.

the requirement of the subjective element, in other words, the intent manifested by an individual who, with full knowledge of the facts, contributes to the group's criminal activity or criminal purpose.[439]

It seems to me that in the *Tadić* case, the Appeals Chamber erroneously relied, *inter alia*, on Article 25 (3) (d) of the Rome Statute[440] to establish the customary nature of this form of criminal responsibility.[441] The ICC Pre-Trial Chamber, seised of the ***Lubanga* and *Katanga* cases,** construed Article 25 (3) (a) of the Rome Statute[442] as directed towards joint commission through co-perpetration[443] and Article 25 (3) (d) as a form of criminal responsibility of the accomplice and not of the principal perpetrator.[444] The ICC case-law does not cite the doctrine of the JCE to establish individual criminal responsibility in connection with the group's common criminal plan.

Article 25 of the Rome Statute contains no reference to the question of "foreseeability" for the purpose of determining individual criminal responsibility in the context of co-perpetration. Under Article 25 (3) (d) (ii), the accused can only be held criminally responsible and liable for punishment if he has contributed in any other way to the commission or attempted commission of the crime by a group of persons acting in concert. Such contribution must be intentional and *"be made in the knowledge of the intention of the group to commit the crime"*. For this reason, the notion of foreseeability must be ruled out entirely, because if the person is not fully aware of the criminal intent that drives the criminal group or at least one of its members, that person cannot foresee, in

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[438] Committing homicide or causing bodily injury to persons who are attempting to fight off a robbery is neither out of the ordinary nor unforeseeable to those who decide to get together to commit such an act. If such offences occur in addition to the robbery, the participants are liable for such offences.

[439] For Judge Antonio Cassese, "*this expansive interpretation of Article 25 would be justified by the need to punish criminal conduct that otherwise would not be regarded as culpable. In addition, it would not be contrary to the principle of personal culpability, for in any case the person at issue (i) would be guilty of intentionally participating in a criminal purpose or plan, (ii) his* mens rea *concerning the additional, not previously concerted crime, would have to be proved by the prosecution and (iii) his lesser culpability would have to be taken into account at the sentencing stage.*" *See* Antonio Cassese, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise", p. 132.

[440] Article 25 (3) (d) of the Statute of the ICC reads as follows: "*In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...] (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) [b]e made with the aim of furthering the criminal activity or criminal design of the group, where such activity or purpose involves the commission of the crime within the jurisdiction of the Court; or (ii) [b]e made in the knowledge of the intention of the group to commit the crime […].*"

[441] *Tadić* Appeal Judgement, paras 222-223.

[442] Article 25 (3) (a) of the Rome Statute provides the following: "*In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: a) [c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible [...].*"

[443] *Lubanga* Decision, para 334; *Katanga* Decision, para. 483.

[444] *Lubanga* Decision, para 337; *Katanga* Decision, para. 490.

law or in fact, the crime that the group or one of its members plans to commit, let alone discern the criminal intent allegedly driving one of the members of the group.

Dolus eventualis or recklessness, a requirement for the third form of JCE, is not mentioned in the Rome Statute. In other words, the accused may not incur criminal responsibility on the basis that the criminal plan he was a part of was a "*natural and foreseeable consequence*"[445] of the events.

Even though Article 25 (3) (d) of the Rome Statute seems more apt to expand the legal basis of individual criminal responsibility (with reference to the criminal activity or criminal design of the group facilitated through some form of contribution),[446] the fact remains that this provision neither paves the way for nor regulates recourse to the doctrine of the joint criminal enterprise. On the contrary, it introduces, on the one hand, another form of **individual criminal responsibility** by establishing the criminal responsibility of an accused for a crime committed outside the group and, on the other hand, it purports to establish such criminal responsibility if it is established beyond reasonable doubt that the person contributed to the commission of the crime without being a member of the criminal group. Such a contribution would be distinct from aiding and abetting.[447]

Demonstration of the criminal intent or ***mens rea*** required to establish individual criminal responsibility, pursuant to Article 30 of the Rome Statute,[448] is another obstacle to the application of the doctrine of the joint criminal enterprise at the ICC. JCE III obviates any requirement or reference to criminal intent of the participant in the common criminal plan.[449] The doctrine of JCE III would be inapplicable in the case of genocide that in particular requires the demonstration of *dolus specialis.*[450]

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[445] Some authors believe that Article 30 of the Rome Statute contains an umbrella clause ("unless otherwise provided"). This clause *"leaves other subjective frames of mind unaffected, so long as they are provided for or required by other provisions of the Statute or by customary international law*", G. Werle and F. Jessberger, "Unless Otherwise Provided", in *Journal of International Criminal Justice* (2005), Vol. 3, pp. 35-55. Judge Cassese: "*Hence the contention can be made that* dolus eventualis *or recklessness for the third form of the joint criminal enterprise is not excluded by the ICC Statute*," Antonio Cassese, *International Criminal Law*, p. 212.

[446] Article 25 (3) (d) of the Rome Statute stipulates that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person "*in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose*". In part of the doctrine it is even ascertained that Article 25 of the Rome Statute mentions the doctrine of the joint criminal enterprise under the form of co-perpetration (the same crime is committed by several individuals who commit the same criminal act) and covers joint criminal enterprise (*see* Antonio Cassese, *International Criminal Law*, p. 212).

[447] *Ibid.*

[448] *Lubanga* Decision, paras 322-367.

[449] Article 30 (1) of the Rome Statute provides as follows: "*Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge*."

The doctrine of joint criminal enterprise, as envisioned in the *Tadić* Appeal Judgement and applied by the International Criminal Tribunals, is clearly incompatible with Article 25 of the Rome Statute. Accordingly, the application of this doctrine by the ICC in the future could only be envisaged subsequent to a reform of Article 25 of the Rome Statute[451] which is not presently under discussion.

Any attempt at reform would contain a major handicap since, as in the *Tadić* Decision, the participant in a common criminal plan would be required to make "superhuman efforts to halt the common criminal plan", even though he may be unaware of the criminal intent of each of the members of the group. In other words, this presupposes that the accused may incur criminal responsibility for not having taken measures considered reasonable to halt the commission of the crime, even though he neither gave his approval nor manifested the will to participate in the common criminal design and, in addition, had no knowledge of the criminal intent of each member of the group. Besides, the *Tadić* Appeals Chamber provided no definition of its own for the term **"reasonable measures"**. "**Reasonable measures"** means that the accused possessed the elements that in all likelihood enabled him not only to foresee that the crimes would be committed but, first and foremost, to perceive the criminal intent of each one of the members that formed part of the group. In essence, the burden of such proof rests only with the Prosecution.

The concept of co-perpetration set out in Article 25 (3) (d) of the Rome Statute, even if it may be perceived as a strict limitation of individual criminal liability, nevertheless has the advantage of "circumscribing" criminal liability only to the **co-perpetrators** who contributed to facilitating the joint criminal activity or the group's criminal design. It has the merit of recognising only those co-perpetrators or co-participants who facilitated the common criminal activity, fully aware of the intent of each one of the members of the group.[452] Article 25 of the Rome Statute rules out any application of joint criminal enterprise and enables the Court to establish **individual criminal responsibility of individuals by taking into account primarily their actions and not their affiliation with a criminal group,** which seems to me consistent with a strict construction of international criminal law and the opinion of the UN Secretary-General as set forth above.

By ruling out the application of the joint criminal enterprise, the **Rome Statute** aims at creating a clear distinction between those who are **innocent** and those who are **guilty** and responsible for

[450] It is necessary to prove that the person who takes part in a joint criminal enterprise is motivated by a specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group *per se*. *See* Article 6 of the Rome Statute.
[451] J. David Ohlin, "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise", p. 89.
[452] Arrest Warrant against Laurent Gbagbo, p. 10: "*There is sufficient basis to conclude that the pro-Gbagbo forces that put the policy into effect did so by almost automatic compliance with the orders they received. Finally, there is sufficient evidence that Mr Gbagbo acted with the necessary degree of intent and knowledge*."

criminal acts, without referring to group affiliation, which would allow various interpretations of the principle of criminal liability; this implies an individual being criminally charged only for the criminal acts he has perpetrated. The rejection of the theory of the joint criminal enterprise by the ICC may be seen as a guarantee of the *nullum crimen sine lege* principle and of a fair trial.[453]

To proceed further with a doctrine of automatic group responsibility would amount to involving every member of a group, even if the member joined the group unaware of any criminal plan and did not himself possess any criminal intent. "Putting everyone in the same basket" is not an option in international criminal law.

The doctrine of joint criminal enterprise is considered to be one of the causes behind numerous violations of the rights of the accused, particularly in connection with the presumption of innocence and fair trial rights. The ICTY Appeals Chamber itself recognised that joint criminal enterprise is not "*an open-ended concept that permits convictions based on guilt by association*".[454]

Admittedly, JCE does have some positive points; however, in my view it was broadly defined and awkwardly extended to every aspect of individual criminal responsibility, including its territorial scope, its temporal scope and a range of offences it gave rise to. This form of criminal responsibility in its broad application has been the source of confusion and divergent, even erroneous interpretations, so much so that criminal responsibility extended to participants of a lower rank loosely connected with each other in the alleged common criminal plan. It also caused a **presumption of guilt** to hang over higher ranking participants, even though the initial common plan may not have been criminal but turned out to be such due to lower ranking agents acting out of control or on grounds other than those initially put forward by their superiors, or even by the leader acting against the will of other members of the group by personally taking decisions not submitted in advance to the members of the group in order to secure his position.

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[453] Code of Professional Conduct for Defence Counsel Appearing before the ICTY, as amended on 29 June 2006 (IT/125, REV.2), Article 11; *The Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, "Decision on Lahi Brahimaj's Request to Present Additional Evidence under Rule 115 of the Rules", 3 March 2006, para. 10; *The Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, "Decision on Naletilić's Consolidated Motion to Present Additional Evidence", 20 October 2004, para. 30; *The Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, "Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001", 11 April 2001, para. 12; *The Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, para. 631: "*The failure of counsel to object or call attention […] will usually indicate that counsel formed the view at the time that matters to which the judge was inattentive were not of such significance to his case that the proceedings could not continue without attention being called thereto.*"

[454] *Brđanin* Appeal Judgement, para. 428.

Therefore, it is reasonable to conclude that the doctrine of the joint criminal enterprise should be abandoned in the future in favour of co-perpetration within the meaning of the Rome Statute that establishes criminal responsibility of the accused in strict and precise terms in the context of his participation in the group's criminal acts. This raises a legitimate question: on what legal basis should the doctrine of the joint criminal enterprise be established in customary international law if it is not specifically acknowledged in the practice of the ICC, purportedly the only criminal court of a universal nature, even though many of the most important states (Russia, United States, China) have not ratified the Rome Statute yet?

Having reviewed the practice at the ICC, I shall turn to the case-law of the Cambodian Courts with regard to the third form of JCE.

5.4. The Cambodian Courts and the third form of JCE

In its Decision on the Appeals against the **Co-Investigating Judges Order on Joint Criminal Enterprise (JCE)** dated 20 May 2010, the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia reviewed the third category of JCE. The Appellants claimed that the finding in the *Tadić* Appeal Judgement, namely that JCE III is firmly based on customary international law, was unfounded and ran counter to the rule that customary international law can only be determined with reference to consistent, widespread state practice and *opinio juris*. According to the Appellants, its application at the Extraordinary Chambers in the Courts of Cambodia (ECCC) would violate the principle of legality.[455] One of the Appellants, moreover, specified that the *Tadić* Appeal Judgement relied on precedents such as the *Borkum Island* and *Essen Lynching* cases in which the military tribunals did not venture into an in-depth discussion of the law as regards the common criminal plan or acts of collective violence. He submitted that for a large part the *Tadić* Appeal Judgement relied on unpublished cases that had been primarily adjudicated in Italy. According to him, among these Italian cases, only the *D'Ottavio et al.* case could be cited in support of JCE III. He quotes the following passage devoted to the Italian cases in the *Amicus Curiae* Brief of **Kai Ambos**: "[i]n this trial – in contrast to the trials before British and American military tribunals – no international law was relied upon, but exclusively the national law [of Italy]

[455] Pre-Trial Chamber of the ECCC, Case No. 002/19-09-2007-CETC-CP/BCJI (CP 38) No. D97/15/9, "Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE)" ("Decision on JCE III of 20 May 2010"), para. 75.

was applied. In addition, this case-law is not uniform since the Italian Supreme Court […] has adopted two dissenting decisions."[456]

The Co-Prosecutors responded to this argument by saying that "many advanced jurisdictions" recognised modes of criminal participation similar to the third category of JCE. They cited, *inter alia*, the **felony murder doctrine**, *association de malfaiteurs*, and conspiracy. According to them, the argument that the finding in the *Tadić* Appeal Judgement on JCE forming part of customary international law was based on too few cases from too few courts ignores substantial evidence in support of the ICTY Appeals Chamber finding.[457]

Having reviewed the case-law upheld in the *Tadić* Appeal Judgement on the extended category of JCE, the Chamber was of the view that these cases did not provide sufficient evidence of consistent state practice or *opinio juris* in relation to category III at the time relevant to Case 002 and concluded, for the reasons set out below, that JCE III was not recognised as a form of responsibility applicable to violations of international humanitarian law (IHL).[458]

The Chamber noted that neither the **Nuremberg Charter** nor Control Council Law No.10 provide specific evidence in support of the existence of the third category of JCE. It found, moreover, that the two international instruments referred to in the *Tadić* Appeal Judgement, which did not exist at the time of the facts relevant to Case 002, could not be used to establish the existence of the extended category of JCE in customary international law between 1975 and 1979.[459]

With regard to case-law, the Chamber referred in turn to the cases that the ICTY Appeals Chamber had relied on in the *Tadić* Appeal Judgement, namely the cases of *Borkum Island* and *Essen Lynching* and several other cases brought before Italian courts after the Second World War. Among the accused in the first case, there were senior officers, soldiers, the Mayor of Borkum, policemen, one civilian and the official from the Reich's Labour Service (*Reichsarbeitsdienst).* All had to answer charges of war crimes and specifically for both "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abet[ting] and participat[ing] in the killing" of the airmen and for "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abet[ting] and participat[ing] in the assaults" on the airmen.

[456] Kai AMBOS, *Amicus Curiae* Brief Concerning Criminal Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 4 November 2008, p. 33.
[457] Decision on JCE III of 20 May 2010, para. 76.
[458] *Ibid.*, para. 77.

The ICTY Appeals Chamber assumed that the military tribunal had "upheld the common design doctrine, but in a different form, for it found some defendants guilty of both the killing and the assault charges while others were only found guilty of assault".[460] In the second case, the same Appeals Chamber stated it was in a position to "assume" that the tribunal had accepted the argument that all the accused who had been found guilty had taken part, in varying degrees, in the killing; not all of them intended to kill, but all intended to participate in the mistreatment inflicted upon the prisoners of war. Nevertheless, they were all convicted of murder, because they were "all concerned" in the killing.[461]

The Chamber noted that these two cases might in fact contain aspects that relate directly to the applicability of the extended JCE. However, absent any reasoned judgement in these cases, one cannot say with certainty which form of responsibility was actually applied.[462]

As for the cases brought before the Italian courts, these involved **war crimes** committed between 1943 and 1945 by civilians or by members of the armed forces of the *Repubblica Sociale Italiana* (RSI). The latter was a *de facto* government under German control that was set up by the fascist authorities in Central and Northern Italy following Italy's declaration of war against Germany on 13 October 1943. The victims of these crimes were prisoners of war, Italian resistance fighters, and members of the Italian Army who were fighting against the Germans and the RSI.[463]

The Chamber held that it was unable to consider these cases valid precedents for describing the status of customary international law. According to the Chamber, these cases did not fall within the ambit of international jurisprudence because they were adjudicated under domestic law.[464]

For the foregoing reasons, the Chamber held that the precedents upheld in the *Tadić* Appeal Judgement, and consequently in the disputed Order, did not constitute a sufficiently solid foundation for finding that the extended JCE existed under customary international law at the time of the facts relevant to Case 002.[465]

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[459] *Ibid.*, para. 78.
[460] *Ibid.*, para. 79.
[461] *Ibid.*, para. 81.
[462] *Ibid.*, para. 79.
[463] *Ibid.*, para. 82.
[464] *Ibid.*
[465] *Ibid.*, para. 83.

In the ***Tadić*** **Appeal Judgement**, while considering that it could not turn to domestic law and case-law for the purpose of identifying international principles and rules that would help explain the status of JCE under customary law, the Appeals Chamber relied on national statutes and cases and concluded that the doctrine of the JCE was recognised by the national laws of several states. The Chamber noted variations from one country to another, as regards the *mens rea* required for the accused to incur criminal responsibility for a crime carried out by a person who acted in concert with him but who went beyond the intent of the accused.[466]

In the same judgement, the Appeals Chamber once more underscored that it only referred to domestic statutes or case-law for the purpose of proving that the notion of common purpose was supported in numerous domestic systems.[467] The Chamber considered that it was not required to decide whether a number of national legal systems, regarded as representative of the world's major legal systems, recognised that a standard of *mens rea* lower than direct intent may apply in relation to crimes committed outside the common criminal purpose and amount to commission.[468] Even if this were the case and the Chamber were to find that the third category of JCE sufficed for responsibility to attach to international crimes, the Chamber would nonetheless not be satisfied that, between 1975 and 1979, the indictees could have foreseen that they would incur such responsibility, in other words, that crimes exceeding the scope of the common purpose, but which were the natural and foreseeable consequence of the furtherance of that purpose, could render them liable as co-perpetrators. **Given that under the third category of JCE the accused may be held liable for crimes committed outside the common purpose that were the natural consequence of its furtherance and were foreseeable to the accused, the principle of legality opposes its application in proceedings before the ECCC.**[469]

As a result, the Chamber granted the appeals insofar as they refuted the applicability of the third category of JCE before the ECCC.[470]

On 12 September 2011, the **Trial Chamber of the ECCC** ruled on the Co-Prosecutors' request for the Chamber to consider JCE III as a mode of participation for which the accused in Case 002

[466] *Ibid.*, para. 84.
[467] *Ibid.*, para. 85.
[468] *Ibid.*, para. 87.
[469] *Ibid.*
[470] *Ibid.*, para. 88.

might incur criminal responsibility. It likewise ruled on another motion filed by **Ieng Sary** on 24 February 2011 seeking that several portions of the Closing Order be struck out due to defects.[471]

The Co-Prosecutors asserted that **Ieng Sary** misconstrued the Closing Order and that the facts included in the Closing Order supported the reasonable inference that **Ieng Sary** shared the intent to perpetrate crimes in the context of the implementation of a joint criminal enterprise. **They submit that, at the time relevant to the Closing Order, the JCE in all its forms was considered a mode of participation within customary international law and that an offender could incur criminal responsibility on this basis.**[472]

It must be said that the Prosecution sought to challenge the Decision of 20 May 2010. This is unfortunately common practice at international tribunals and affects judicial stability in that decisions are permanently challenged, including through requests for review.

With respect to the applicable law, the Trial Chamber notes that where crimes of specific intent are concerned, proof is required that the accused possessed not only the intent to commit the underlying crime but also the special intent required by these offences.[473] The Trial Chamber further notes that joint criminal enterprise is a mode of participation and not a crime in itself. As a result, to confirm the responsibility of an accused as a participant in a JCE, it is sufficient to show that the accused participated in some way in the common plan, and that this participation either amounts to or involves the commission of a crime that falls within the jurisdiction of the court in question, either by perpetrating one of the crimes or by aiding and contributing to the furtherance of the **common plan**. In this regard, the case-law of other international tribunals has consistently found that the plan forming part of the joint criminal enterprise need not be criminal in nature so long as crimes are contemplated as a means of bringing the plan to fruition.[474] In the *Brima et al.* case, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) held that the common plan, design or purpose of a criminal enterprise must either have as its objective the commission of a crime or contemplate crimes as the means of achieving its objective. The ICTY Appeals Chamber in the *Kvočka* case similarly noted that the Prosecution's case relied on the existence of a JCE, the common purpose of which was "**the creation of a Serbian State within the former Yugoslavia**".[475]

[471] ECCC Trial Chamber, Case No. 002/19-09-2007/ECCC/TC, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, paras 2 and 3.
[472] *Ibid.*, para.10.
[473] *Ibid.*, para.16.
[474] *Ibid.*, para. 17.
[475] *Ibid.*

In relation to the nature of the common plan alleged in Case 002, the Closing Order fully accords with the above jurisprudence and does not support the argument that charging **Ieng Sary** under the "committing" mode of participation would rely solely on the fact that he took part in a non-criminal common plan.[476]

The Co-Prosecutors essentially based their case on JCE I. **They also sought to retain JCE III as a possible mode of participation, but only if, for certain incriminating acts within Case 002, the nexus between these criminal acts and the accused could not be established through the application of the first category of JCE.**[477] They argue that there is a possibility – even if only remote – that a very limited number of criminal events alleged in the Closing Order might not fall within the scope of the common criminal plan as originally conceived. Should this be the case, they ask the Trial Chamber to apply its discretion in such matters and rule that the accused may have to answer for this very limited number of acts for which they have been charged as participants in a JCE III.[478]

It is appropriate to note that the Prosecution's position is that JCE III should be considered a supplemental means of prosecuting certain accused in the event that it does not have enough evidence to bring against them under form I. For the Prosecution, this is just an opportunity to dispose of an array of forms of liability which would enable it to proceed in any direction depending on the evidence at hand.

The Trial Chamber found that the Co-Prosecutors' request for re-characterisation did not breach the Accused's right to be adequately informed of the nature of the charges against them or any other fair trial principle. The Trial Chamber accordingly rejected **Ieng Sary's** later request to determine this issue solely on grounds of admissibility.[479]

On the merits of the Co-Prosecutors' motion, the Trial Chamber noted, at the outset, that the applicability of the theory of JCE III has been extensively litigated before the ECCC. This issue has also undergone appellate scrutiny before the Pre-Trial Chamber in Case 002. Although the Trial Chamber does not hear appeals against decisions of the Pre-Trial Chamber, it noted that the motion it was asked to rule on was substantially similar to the one that was previously before the Pre-Trial

[476] *Ibid.*, paras 18 and 19.
[477] *Ibid.*, para. 23.
[478] *Ibid.*
[479] *Ibid.*, para. 25.

Chamber. The Pre-Trial Chamber's JCE Decision extensively reviewed pre-1975 legal instruments, including the Nuremberg Charter and Allied Control Council Law No. 10. It concurred with the findings of the Trial Chamber in the *Duch* Judgement that JCE I and JCE II were recognised modes of participation in customary international law during the period relevant to the Closing Order. However, it held that these international instruments did not specifically recognise JCE III.

It also examined the post-Second World War cases cited in the *Tadić* Appeal Judgement, including *Borkum Island* and *Essen Lynching,* to determine whether customary international law included the extended form of JCE as a form of criminal responsibility of an accused at the time of the incriminating facts relevant to Case 002. It concluded that the cases decided pursuant to Allied Control Council Law No.10 did not support an inference that these convictions were based on participation in an extended form of JCE. The Pre-Trial Chamber further noted that several cases adjudicated by national courts and cited in the *Tadić* Appeal Judgement to justify the application of JCE III provided insufficient evidence that this third category arose out of consistent state practice or widespread *opinio juris* at the time of the events relevant to Case 002.[480]

Finally, it considered whether the **third category of JCE** could be upheld as a mode of participation for which the accused might incur criminal responsibility due to the fact that it formed part of the "general principles of law recognised by civilized nations" at the time of the crimes charged.

The Pre-Trial Chamber first noted the conclusion of the ICTY Appeals Chamber in the *Tadić* Appeal Judgement that a single concept of common purpose liability was not adopted by most domestic legal systems. It then held that it would serve no purpose for it to determine whether the extended form of JCE amounted to a general principle of law between 1975 and 1979, on the grounds that, in any case, it was not satisfied that it was sufficiently foreseeable to the Accused at the time that the crimes exceeding the scope of the common purpose may result in the Accused incurring responsibility as co-perpetrators or that the relevant statutes for convicting them were sufficiently accessible to them, given that there was no basis for JCE III liability within Cambodian domestic law.[481]

The Trial Chamber agreed in substance with the Pre-Trial Chamber's analysis of the above-mentioned post-Second World War cases. The Trial Chamber additionally considered other relevant

[480] *Ibid.*, para. 27.
[481] *Ibid.*, para. 28.

cases cited in a recent decision of the Special Tribunal for Lebanon issued subsequent to the Pre-Trial Chamber's JCE Decision concerning the JCE. This involved two cases: ***United States v. Ulrich and Merkle*** and ***United States v. Wuelfert et al.,*** which were heard by the United States Military Tribunal at Dachau. These cases involved businessmen who owned factories near the Dachau concentration camp and employed prisoners for forced labour. They were held responsible for acts of mistreatment of the prisoners at the Dachau camp and at the factories, including killings, beatings, torture and starvation.

It must be noted that the Interlocutory Decision of the **Special Tribunal for Lebanon** cited review judgements which do not provide the legal reasoning behind the affirmed convictions. These cases appear to support JCE I or JCE II because the accused were part of the concentration camp apparatus and personally participated in the mistreatment of prisoners. By contrast, the events to which these cases are directed make it difficult to affirm the theory of responsibility resulting from participation in an extended JCE, that is, responsibility for crimes which were outside the scope of the common plan but which were nonetheless the natural and foreseeable consequence of it.[482]

The Trial Chamber eventually concluded that this theory could not be considered as constituting a general principle of law between 1975 and 1979.[483]

The Chamber did not rule on the issue of whether the extended form of JCE constituted a general principle of law at the time of the facts relevant to the Closing Order. It confirmed the assessment of the ICTY Appeals Chamber in the *Tadić* Appeal Judgement that the practice of states with regard to the concept of common purpose lacked sufficient uniformity to be considered a general principle of law.[484]

The Trial Chamber found that the Co-Prosecutors failed to establish that JCE III formed part of customary international law between 1975 and 1979. It therefore denied the Co-Prosecutors' request for re-characterisation seeking the application of the extended JCE theory to the facts of the case.[485]

After conducting this review, I have come to the conclusion, as did the Cambodian Courts, that JCE III has no valid existence and must be discarded.

[482] *Ibid.*, para. 34.
[483] *Ibid.*, para. 35.
[484] *Ibid.*, para. 37.
[485] *Ibid.*, para. 38.

It must be said that **Judge Cassese**, former Judge at the ICTY who sat in the *Tadić* case, distanced himself from this case-law a few years later.

On 16 February 2011, the Appeals Chamber of the Special Tribunal for Lebanon ("STL"), presided over by **Judge Cassese**, issued an interlocutory decision that defined several aspects of the applicable law at the Tribunal. In its analysis of the various forms of criminal responsibility provided for in the Statute of the STL, the Appeals Chamber examined the third form of JCE. The Appeals Chamber observed that the possibility that a person could be held criminally responsible for a special intent crime – such as terrorism – under JCE III leads to a "legal anomaly", since a conviction under JCE III does not require proof that the accused shared the intent of the perpetrator of the crime and consequently, he could be convicted for a *dolus specialis* crime without possessing the requisite *dolus specialis.*[486] The Appeals Chamber noted that ICTY case–law allows for convictions under JCE III for specific intent crimes, but held that this case-law did not accord with international criminal law;[487] instead, the Appeals Chamber favoured participation in a form of responsibility rather than a mode of perpetration:

"*In such a case, the 'secondary offender' should not be charged with the commission of terrorism, but at the utmost only with a form of accomplice liability, in that he foresaw the possibility that another participant in the criminal enterprise might commit a terrorist act, willingly accepted that risk and did not drop out of the enterprise or prevent the perpetration of the terrorist offence. This person's attitude should therefore be assessed as a form of* assistance *to the terrorist act, not as a form of* perpetration *[…].*" [488]

On forms I and II of JCE, however, I agree with the position expressed by many, and in particular by the Judges of the Appeals Chamber, but it should be **transferred** to the form of responsibility set out in Article 7 of the Statute under **"a person who planned"**. Thus, it was not necessary to create this concept which, instead of providing the judges and the parties with a clear and precise instrument, renders the task enormously complicated and forces the judges constantly to make adjustments over time to the detriment of legal certainty.

[486] Case No. STL-11-01/I, "Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging" (16 February 2011), para. 248 (STL Appeals Chamber).
[487] Case No. STL-11-01/I, "Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging" (16 February 2011), para. 249 (STL Appeals Chamber).
[488] Paragraph 249.

5.5. Analysis of the Duško Tadić case

*The question therefore arises of whether it was **absolutely necessary** for the Appeals Chamber to turn to this construction of the case-law not provided for in the Statute.*

Providing an answer to this question inevitably leads to an examination of the issue in the ***Duško Tadić*** case.

What was the issue raised before the Appeals Chamber that led it to adopt this jurisprudential concept that some have presented as a landmark in jurisprudence and others as a heresy?

The relatively simple issue was set out in Chapter V of the Appeals Chamber Judgement of 15 July 1999 with regard to the finding that there was insufficient evidence that the Accused **Duško Tadić** had participated in the massacre at **Jaskići.**

On trial before the International Criminal Tribunal for the former Yugoslavia and charged, *inter alia,* with the crime of murder of **five** Bosnian Muslim **men** who were found dead in the village of Jaskići after an attack on the village by an armed group that included **Tadić,**[489] the Accused argued in his defence that he had lived continuously in Banja Luka without leaving it after returning on the evening of 4 June 1992 from the second of two visits which he made to Kozarac to collect possessions from his house and café and before departing for Prijedor early on the morning of 15 June 1992.[490]

He was found criminally responsible by the ICTY pursuant to Article 7 (1) of the Statute. Although the Trial Chamber entered convictions for violations of the laws or customs of war and for crimes against humanity under several other counts, and despite its finding that **Tadić** had been a member of an armed group, the Chamber found that it could not, "on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part in the killing of the five men or any of them [at Jaskići]".[491]

According to the Trial Chamber:

[489] *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-I, Second Indictment, 14 December 1995, para. 12.
[490] *Tadić* Judgement, para. 364.
[491] *Tadić* Judgement, para. 373.

> "*The fact that there was no killing at **Sivci** could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in which the accused took part; it is accordingly a distinct possibility that it may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered Sivci, for which the accused cannot be held responsible, that caused their death.*"[492]

Hence, the Trial Chamber found the Accused not guilty for it found no evidence in support of his role in the killing of the five men, or any of them, in the village. The Prosecution appealed this noteworthy conclusion in its ground of cross-appeal (cf. para.172 of the Appeal Judgement):

> "*The Trial Chamber, at page 132 para. 373 [of the Judgement], erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part in the killing of the five men or any of them, from the village of Jaskići.*"

5.5.1. The grounds of the Prosecution in the appeals proceedings

The Prosecution submitted that the central tenet of the **common purpose doctrine** is that if a person knowingly participated in a criminal act together with other persons, he or she may be held responsible for any unlawful act that is the natural consequence of the common purpose (cf. para. 175).

By adopting this approach, the Prosecution overrode the Trial Chamber's finding and invited the Appeals Chamber to follow its *common purpose theory*.

In its reply, the Defence submitted that it must be established that the common purpose – in which the appellant allegedly participated - planned the killings (whereas ethnic cleansing could have been achieved through other means) (cf. para. 177). In paragraph 181, the Judges of the Appeals Chamber based their findings on the fact that five people were found dead after the armed troops had left, but specified that nothing else was known as to the circumstances of the killings. Logically, the Appeals Chamber should have concluded that the Prosecution had not established **beyond reasonable doubt** that the killings were attributable to the members of the group to which

[492] Judgement, para. 373.

the Accused **Duško Tadić** belonged and that the benefit of the doubt should have gone to the Accused.

This was not the approach taken by the Appeals Chamber in this case since it "eluded" this issue and focused on the question of whether under international criminal law the appellant could be held criminally responsible for the killing of the five men in Jaskići even though there was no evidence that he personally killed any of them (cf. para. 185).

After raising this issue, the Appeals Chamber relied on Article 7 (1) of the Statute that sets forth the standards for individual criminal responsibility. Appealing to a general principle of law, it indicated that it was appropriate to determine whether criminal responsibility for participation in a criminal purpose falls within the ambit of Article 7 (1) of the Statute. It should be noted that this assertion is not supported by a single footnote, since the Appeals Chamber simply stated: "[proceeding on] the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all of the [other] members of the group" (cf. para. 195).

The Appeals Chamber further expanded its reasoning and rightly observed that many international crimes are committed in wartime and that most of them "*do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act […], the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question*" (cf. para. 191).

The Judges added that "*[u]nder these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act*" (cf. para. 192) and "*[a]t the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility*".

Does this conclusion imply that the Appeals Chamber holds that the perpetrator, the accomplice and the instigator have the same criminal responsibility?

I cannot share this view, for **criminal behaviour** must be sanctioned in keeping with the **specific role** of the **accused**.

Intent on prosecuting anyone who has committed a crime, the Appeals Chamber stipulates that "*[t]his interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design*" (cf. para. 193). Without any context, the Appeals Chamber affirms that a group needs to be targeted and, on this basis, holds that the members of the group to which **Duško Tadić** belonged were acting with a *common purpose*.

It seems regrettable to me that in order to sanction at all cost a participant in a group for which there is no evidence, the Appeals Chamber resorted to this **intellectual construction** when it would have been much simpler to concentrate **solely** on the forms of responsibility provided for under Article 7 (1) of the Statute and apply such forms of responsibility to the case of *Duško Tadić*.

5.5.2. Conclusion

Lastly, it seems that this concept has been articulated to fly to the rescue of a faltering Prosecution. This, in my view, is not the role of the Judge, who must **strictly** apply the very specific forms of responsibility provided for in the Statute rather than craft theories or hypotheses to fill a void in the investigation.

Incidentally, it should be noted that the Accused was found guilty of a series of other counts and that it was not necessary to "focus" on this particular event, despite the fact that it was particularly serious as it led to the death of five victims.

The approach of the Appeals Chamber in the *Tadić* case, further to the Prosecution's written submissions on the theory of the common plan, created this jurisprudence to ensure that a person will **not lie beyond the reach** of prosecution in the event that his conduct does not fall within one of the forms of responsibility defined under Article 7 (1) of the Statute.

The approach of the Judges of the Appeals Chamber was therefore based on the concern that a participant in the crimes defined under Articles 2, 3, 4 and 5 of the Statute should not be granted

impunity. On the face of it, one can only embrace such an approach if there is a legal void because crimes must not go **unpunished.**

From my point of view, the only "snag" with this approach is that a **group** is prosecuted to the detriment of **individual criminal responsibility**, while a lax approach is taken towards the evidence.

However, after a careful analysis of this case-law, one realises that the Judges of the Appeals Chamber created a **form of "umbrella responsibility"** not contemplated by the Statute (JCE) which incorporates the various forms of responsibility related to planning, instigating to commit, ordering, committing, and aiding and abetting.

This "umbrella responsibility" stems from the idea - a point of view I share - that the commission of a crime on the ground is only the result of a common plan initiated long ago as part of the planning process, of instigating to commit relayed through the media and of orders given to the military or civilian authorities; [such] crimes [are] committed by order-takers generally far removed from the instigators and/or through aiding and abetting by other persons acting as accomplices.

I may be able to follow the Appeals Chamber's **abstract concept** of this form of responsibility, but I have a **different** view of the way this form of responsibility ties into the commission of crimes. If it had to be attached to a specific form of responsibility, it ought to have been attached **only to planning**. If indeed a **criminal plan** exists, initially there can be only one main instigator assisted in his thinking by other "brains" who can be persuaded to devise the plan in its political, administrative, media-oriented and military aspects. As a rule, the "brain trust" will be led by a mastermind who will be the *charismatic leader* of the group (**Hitler**, for instance). The instigator cannot do everything alone, he needs people who can forward information and execute orders, and this explains why the members of the JCE are positioned at different levels.

Some persons will promote the plan in the media and among those concerned (incitement to commit), while others will be giving orders to the administrative and military authorities – these will be primarily the ministers and generals. And then, during a conflict, the plan will be implemented on the ground through concrete military operations that are not the result of mere blunders, but of the commission of crimes that form part of the common plan (killings, forcible transfers, inhumane treatment, etc.).

Likewise, at certain stages of the implementation of the plan, some persons might be needed to act as relays in the furtherance of the plan through aiding and abetting.

It seems to me, therefore, that the theory that was elaborated by the Trial Chamber in the *Tadić* case - which, may I recall, was well intended - was not correctly applied, because, in my view, it should have been applied to planning and not to the commission of crimes; the "umbrella" form of responsibility need not have been created, and it would have sufficed to say that the common plan could be devised only within the context of a "rudimentary planning process".

5.6. The notion of a one-person enterprise

Having given the preceding account, I am led to evoke, for the first time, a situation in which there is an enterprise apparently involving a **plurality of perpetrators**, but which in **fact has only one architect** who does not share the **same intent** as the other members of the enterprise. There may indeed be situations in which a group **apparently** acts in furtherance of a **common objective** identified by all of the members, but the **architect** or some other member of the group deliberately concealed his **personal ultimate objective, which could be either political or criminal**.

Thus, he may have guided the group in a certain direction at preparatory meetings, or even by the statements he made, although the **plan** he had was **completely different**. This was quite clear to me at the opening of the ***Milošević*** **case** when the most senior members of the Prosecution took the floor in turns. **Ms Carla del Ponte** stated that the **Accused Milošević** was driven by his thirst for power.[493] The most striking thing about her speech was that she did not once mention the objective,

[493] *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, T(F), 12 February 2002, p. 11. During the Prosecution's opening statement, the Prosecutor, Ms Carla del Ponte, stated the following about Milošević: "*An excellent tactician, a mediocre strategist, Milošević did nothing but pursue his ambition at the price of unspeakable suffering inflicted on those who opposed him or who represented a threat for his personal strategy of power. Everything, Your Honours, everything with the Accused Milošević was an instrument in the service of his quest for power. One must not seek ideals underlying the acts of the Accused. Beyond the nationalist pretext and the horror of ethnic cleansing, behind the grandiloquent rhetoric and the hackneyed phrases he used, the search for power is what motivated Slobodan Milošević. These were not his personal convictions, even less patriotism or honour or racism or xenophobia which inspired the Accused but, rather, the quest for power and personal power at that.*"

which was **ethnic cleansing**. She then gave the floor to her deputy, **Mr Nice**, who did not refer to a thirst for power but, rather, to the plan pursued through **ethnic cleansing**.[494] Having made this observation, I asked myself whether, in line with **Ms Carla del Ponte's** reasoning, **Slobodan Milošević** was **only** thirsty for power and embroiled his supporters in a different plan which entailed the creation of a "Greater Serbia" in order to seize power.

Unfortunately, we will never know the truth because he died during his trial. But with this question in mind, I am applying the same line of reasoning to the present case. This issue is particularly interesting if one examines Exhibit **P01012** which, according to the words of **General Panić,** reveals that **Vojislav Šešelj's** objective was to **seize power.** Thus, one could be faced with a situation in which the objective that the Accused **Vojislav Šešelj** was pursuing was either seizing power or creating a linguistic territory in the former Yugoslavia, while participating in an enterprise with the objective of creating a "Greater Serbia".

The Indictment charges the **Accused Vojislav Šešelj** with being a member of an enterprise whose ultimate personal objective was **ethnic cleansing.** The Accused **Vojislav Šešelj** disputes this view and states that his only objective was a Serbia, or even a "**Greater Serbia**", in which the inhabitants spoke the same language. One immediately notes a difference in the alleged plan: **Slobodan Milošević** did not want the same thing as **Vojislav Šešelj.** What makes the case more complicated is that it was the Prosecution witnesses - members of the Serbian Radical Party – who for the most part stated that they had joined this party not for the sake of a "Greater Serbia", nor for the sake of using one language, but because they were **royalists**,[495] which is, in fact, confirmed by the Serbian

[494] *Ibid*. T(F) pp. 52-53 According to Mr Nice, with regard to the case as a whole, "the Prosecution's case is that the overall transaction that links the three indictments together is to be found in a transaction that from first to last has the Accused being concerned by forcible removal of non-Serbs from areas of the former Yugoslavia, to have and to control a centralised Serbian state, to do so by gaining from Croatia and Bosnia or retaining in Kosovo territory that fell within his plan. In language created by the facts of this case, he did that by ethnic cleansing."

[495] *See*, for example, VS-033, T(F) pp. 5502-5505, 5556 (private session); VS-007, T(F) pp. 6036-6037 (closed session); VS-022, T(F) p. 6562. *See* also: Witness C-047, P 01129 under seal, *S. Milošević* case, T(E) p. 21588.

Radical Party's manifesto.[496] That being the case, the question that this clearly raises for me is whether by establishing his linguistic territory – which was his ultimate objective - **Vojislav Šešelj** used the **unwitting** members of his political party to attain his objective while being aware of the fact that their views, or even objectives, were different.

Bearing this in mind, there may appear to be a plurality of individuals involved in a JCE when viewed from the outside; however, the leader may have failed to inform his supporters or henchmen of the **precise nature** of the objective pursued. A review of all of **Vojislav Šešelj's** political speeches referred to in the present Judgement and recalled in my opinion leads me to the conclusion that the speeches **Vojislav Šešelj** gave were of a completely different nature and did not address the issue of language, but made public reference to the abusive acts of the Croats who were expelling the Serbs, who then had to react. Following this line of reasoning, it is possible that members of the Serbian Radical Party participated in military operations in the field without being aware of the political leaders' real reasons.

Therefore, there are situations in which a leader gets other perpetrators or accomplices embroiled but leaves them in the dark with regard to the **real objective** pursued. Thus, in a certain sense, this would involve a **one-person enterprise** which would be different from a **joint enterprise**, even if all the conditions established by the *Tadić* case-law were met: **a common plan**, **a plurality of perpetrators**, etc… This observation does create a few problems with regard to *mens rea*, because in such a case, the **original planner** and the co-perpetrators or aiders and abettors would not share the same *mens rea*, as the original planner concealed his objective from them.

This would have no direct consequences in terms of responsibility, as the crimes that were committed have to be punished. However, in terms of appropriate sentencing, there might be

[496] *See* P00033, p. 4; P 00153, p. 10. *See* also: C 00018, para. 9; P00634, para. 28.

evidence that is beneficial to the co-perpetrators or aiders and abettors who were unwittingly used for an objective they did not share, as they had acted for different reasons. The matter is therefore a complicated one, but if the idea of a one-person enterprise is not envisaged - as is the case in the Tribunal's case-law – the problem does not arise, since in that case, the **planner** is liable under the "**person who planned**" form of responsibility, and the co-perpetrators or aiders and abettors are liable under other forms of responsibility, which do not require that they share the same ***mens rea***, as they have either instigated, ordered, aided and abetted or themselves committed the crime. It is sufficient for them to have acted for a different reason. This observation provides further support for the conviction that a person should be prosecuted only for his individual conduct and not for being a member of a group.

On the other hand, if the JCE form of responsibility, as defined in the ***Tadić* case-law**, is applied, the crucial issue of ***mens rea*** must be examined to determine, beyond all reasonable doubt, whether it was **the same** for all of the participants. It should be noted that there may be cases in which the leader has an entirely different objective, concealed from other members of the JCE, or in which the members of the JCE misunderstood the common plan. This is therefore a particularly complex issue and, in my opinion, it is absolutely necessary to provide a clear description of the **common plan** and of the precise mode of participation of each member of the alleged JCE, while at the same time establishing the *mens rea* of each JCE member with certainty for cases considered to involve a group of individuals who had established a common plan.

In any event, the evidence adduced by the Prosecution in this case is not even sufficient to establish the existence of a joint criminal enterprise with a plurality of perpetrators sharing the same criminal objective.

On the other hand, in my opinion, there is no doubt that a clear distinction must be made between a **political plan** and a **criminal plan**.

A political plan may have a criminal component, which will thus form the basis of the joint criminal enterprise as defined by the Tadić case-law. In the present case, the Prosecution did not succeed in drawing this distinction and, moreover, it failed to provide evidence showing that Vojislav Šešelj participated in a common criminal plan.

On the other hand, I am convinced that as far as politics is concerned, Vojislav Šešelj held personal views that, to a large extent, were not shared by other members of his party, and thus, he may have formed a one-person enterprise within the very framework of a collective political plan, yet one which was not criminal.

6.HATE SPEECH

The Accused **Vojislav Šešelj,** an important politician in his own country, has made numerous **speeches**, given numerous interviews to the press and on television, and has also written numerous articles that are likely to constitute the crime of **persecution**.

The Prosecution makes the following allegations in its Closing Brief:

Vojislav Šešelj pursued a propaganda campaign against non-Serbs.[497] In order to conduct this campaign, the Accused made speeches in which non-Serbs were threatened and denigrated. The campaign consisted of the following stages: firstly, propagating a climate of fear and hatred of non-Serbs;[498] secondly, encouraging retaliation against them for crimes committed in the Second World War;[499] and thirdly, legitimising recourse to force and violence against them in order to gain and retain what he considered as Serbian lands outside of Serbia.[500]

The Accused Vojislav Šešelj used the media to conduct his campaign calling for persecution. The means used to disseminate his speeches included television,[501] radio,[502] press conferences,[503] SRS/SČP publications and speeches made before volunteers at rallies and during visits to the front line.[504] His words had a marked effect on the Serbian nationalists and *volunteers* who heard them.[505] His audience was motivated by his racist and violent speeches. They would fire shots in the air in support of the words he had uttered. **Vojislav Šešelj** undoubtedly realised that his words provoked a violent reaction in the fighters, as they fired their guns and sang anti-Croat songs.[506]

Vojislav Šešelj conceded in an interview that his statements against non-Serbs and calls for the expulsion of non-Serbs could have caused those who listened to him to hate non-Serbs.[507] Shortly after **Vojislav Šešelj's** visit to Vukovar, the combined Serbian forces that he addressed transformed his words into action by perpetrating the mass killings and abuses of the detainees at Ovčara and Velepromet.[508]

[497] *The Prosecutor v.Vojislav Šešelj*, Case No. IT-03-67-T, Prosecution Closing Brief, April 2012 (public), para. 50.
[498] *Ibid*., paras 51 and 53.
[499] *Ibid*., para. 54.
[500] *Ibid*., paras 54 and 55.
[501] *Ibid*., para. 120.
[502] *Ibid*.
[503] For example, the ones in Šid (para. 157), Belgrade (para. 595) or Bijeljina (para. 596), *inter alia*.
[504] *Ibid*., paras 57-61.
[505] *Ibid*., paras 54 and 56.
[506] *Ibid*., paras 160 and 163.
[507] *Ibid*., para. 163.
[508] *Ibid*., para. 167.

Vojislav Šešelj committed forcible displacement of the non-Serbs in Hrtkovci and other surrounding villages through a speech inciting hatred made on 6 May 1992 in this village.[509] The evidence indicates that this speech was the predominant cause of the departure of a number of Croats from Hrtkovci. Šešelj's speech was effective precisely because he deliberately took advantage of historical grievances and existing tensions in Hrtkovci. Those grievances and tensions should be viewed as part of the context of Šešelj's speech, which he exploited to his advantage, rather than as operative causes of the displacement in themselves.[510]

After the 6 May 1992 rally, **Vojislav Šešelj**'s supporters and associates began a massive campaign of discrimination, harassment and intimidation directed at the non-Serbs in Hrtkovci. Groups of militant Serbs committed other acts of abuse against the non-Serb inhabitants of this village and the surrounding area.[511] **Vojislav Šešelj** is directly responsible for the departure of a certain number of non-Serbs who left the village following his public "hate speech". He physically committed the crimes of persecution, deportation and forcible transfer in Hrtkovci.[512]

The Accused's **hate speech** exacerbated inter-ethnic tensions, which increased by the day. The hate speeches and other acts of persecution reached a level of gravity equivalent to that of the other crimes against humanity enumerated under Article 5 of the Statute. It therefore constituted in itself the underlying acts of persecution. It follows that this campaign calling for persecution reached a level of gravity equivalent to that of the other crimes against humanity listed under Article 5 of the Statute.

The Accused made vitriolic speeches relating to **Vukovar** and **Hrtkovci**. By making those speeches, **Vojislav Šešelj** physically committed **persecution** through hate speech. When considered without reference to other acts of persecution, these hate speeches *in themselves* reached the requisite level of gravity, given the context in which they were given. To those in Vukovar who heard **Vojislav Šešelj** say that "[n]ot one Ustasha must leave Vukovar alive" and "[t]his entire area will soon be cleared of Ustasha", and to those who heard him urge the bussing of "Ustashas" from Hrtkovci, his message was clear: all Croats were enemies who should fear for their security and would be harmed if they stayed where his volunteers and sympathisers were.

[509] *Ibid*., paras 506-512.
[510] *Ibid*., paras 525-526.
[511] *Ibid*., para. 513.
[512] *Ibid*., para. 486.

Vojislav Šešelj's discriminatory intent is evidenced by the inherently hateful, ethnic content of his words and the fact that he explicitly called for discriminatory and violent action against Croats in Vukovar and Hrtkovci.[513]

Vojislav Šešelj denigrated Croats in **Vukovar** and **Hrtkovci** by describing them with the offensive, derogatory and dehumanising "Ustasha" term. He used the word "**Ustasha**" to associate all Croats with the "Ustashas" from the Second World War, who had committed terrible crimes against Serbs. This conduct violated the Croats' right to dignity.[514] These speeches further violated the Croats' right to personal security. **Vojislav Šešelj** made his **Vukovar** and **Hrtkovci** speeches in the midst of extreme tension: in **Vukovar**, days before the Serbian takeover of Vukovar and shortly before violent crimes were committed by the Serbian forces, including **Šešeljevci**; and in **Hrtkovci**, while war raged in Croatia and Bosnia and Serbian refugees fled to **Vojvodina**, where tensions were volatile between Serbian refugees and local Croats. The particularly inflammatory context of these speeches rendered them overt calls for expulsion of and violence against Croats. These speeches in particular rise to the level of gravity equivalent to other Article 5 crimes and thus constitute persecution in themselves.[515]

Vojislav Šešelj instigated the direct perpetrators to commit the crimes charged, *inter alia*, by using inflammatory and denigrating propaganda against non-Serbs in his speeches, publications and public appearances.[516] **Vojislav Šešelj's** instigation substantially contributed to the crimes charged in the Indictment.[517] **Vojislav Šešelj** is responsible under Article 7 (1) of the Statute for having instigated the crimes charged in the Indictment.[518]

Vojislav Šešelj is responsible under Article 7 (1) of the Statute for aiding and abetting the crimes charged in the Indictment in which the **Šešeljevci** participated. **Šešelj's** persecutory speeches throughout the Indictment period, advocating the use of force, repeatedly impressed the need for ethnic separation and sought to justify and legitimise the crimes being committed. These speeches are examples of conduct which satisfy the *actus reus* for aiding and abetting.[519] The Accused was fully aware of the likelihood that the charged crimes would be committed. He had this knowledge (and he also knew that the perpetrators of the indicted crimes acted with the required intent).

[513] *Ibid.*, para. 562.
[514] *Ibid*., para. 563.
[515] *Ibid*., para. 564.
[516] *Ibid*., para. 589.
[517] *Ibid*., para. 590.
[518] *Ibid*., para. 602.
[519] *Ibid*., para. 606.

Vojislav Šešelj's awareness of his own influence with Serbian volunteers, and in particular the **Šešeljevci**, is probative also of his knowledge that his words and acts did in fact substantially assist in the commission of the crimes by the physical perpetrators.[520]

In his Final Brief, the Accused refutes this argument in the following manner:

As an opposition politician, he was not in a position to plan any of the crimes with which he has been charged. He rejects the expression "inflammatory speeches" as used by some of the witnesses and mentioned several times in the Indictment; he emphasises the absence of convincing and consistent evidence proving that any volunteer was the principal perpetrator of any crime; from Šešelj's point of view, the idea of his planning in relation to a principal perpetrator is "pure fiction of the Prosecution". With regard to this issue, the Accused points out that there is no evidence to support the Prosecution's arguments concerning the planning of crimes.

The Accused relies on national and international legislation, as well as on the ICTY Statute, to make the following claim: "***Discriminatory or hate speech was not listed as a crime in the ICTY, and the important point is that it does not reach the same degree of gravity as other acts listed in Article 5 of the Statute***." The Accused also argues that numerous countries, such as **the United States of America**, adopt a special position with regard to guarantees protecting freedom of speech. Under the Constitution, American jurisprudence provides a narrow definition of hate speech, as long as it does not rise to the level of instigation.

In support of his position, the Accused points out that the general opinion on this issue under conventional law is varied, and he shows that speeches of this kind are not necessarily considered as crimes under international customary law. According to the Accused, "*[s]ince all of* ***Vojislav Šešelj's*** *speeches, statements and phrases (speeches) have been analysed at the ICTY, they must be sorted out according to several criteria.*" Relying on the temporal framework as a criterion, the Accused stated the following in his defence: "**Speech which contains the truth, which has been historically proven and confirmed to this day, must be instigation in the opinion of the Prosecution.**" **According to him, he is on trial "*for telling the truth and warning about the consequences which really came true*".**

By rejecting the charge of instigation or aiding and abetting through speech, he provides a "further" refutation of the allegation that he physically committed crimes through speech.

[520] *Ibid.*, para. 608.

With regard to the *actus reus*, the Accused claims that it is inconceivable that one should seek the *actus reus* of a crime within the framework of legal activities. "*[A]s an opposition politician, only he was prohibited from commenting on events.*" With regard to the issue of volunteers from his political party, the Accused stated that there was no official document prohibiting the act of calling on volunteers to carry out their legal obligations, and that in any case, "*[t]here is no point in commenting [on] the Prosecution's allegation that the volunteers used all means necessary to implement Professor* ***Vojislav Šešelj's*** *ideology.*"

With regard to the *mens rea*, the Accused recognises that it is "*an undisputable fact that everyone engaged in politics influences public opinion. It is indisputable that every politician is aware of this influence*." However, this influence has to be "measured", that is to say, the popularity of the man and his position in the power structure has to be determined, which "*the Prosecution failed to prove […] during the proceedings*".

With reference to his position as leader of a political party and the issue of the orders given, the Prosecution points to the speech he gave in **Hrtkovci** on **6 May 1992** and the statement that "*[n]ot one Ustasha must leave Vukovar alive*". According to the Accused, these words were "**constructed**" by the Prosecution so as to lead to the conclusion that this speech constituted an order. According to the Accused, this speech was made in an electoral campaign and had no impact on the exchanges of real estate; these exchanges had taken place before the speech and continued for years thereafter.

Before I express my opinion on the **crime charged**, it is necessary to examine the crucial issue of **freedom of expression**, to determine its limits and understand the system of protection that has been put in place in Europe and the rest of the world.

6.1. Freedom of expression

It is thus necessary to examine the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the European Convention for the Protection of Human Rights, the American Convention on Human Rights, the African Charter on Human Rights, the Constitution of the United States, the United Kingdom Bill of Rights, the Canadian Charter and the texts in force in

a number of countries, and to conduct a detailed analysis of the *Streicher*, *Fritzsche* and *Geert Wilders* cases.

Freedom of expression is considered to be "one of the most precious rights of man".[521]
Article 19 of the Universal Declaration of Human Rights of 10 December 1948 provides that:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

This idea of **freedom of expression** includes not only the right to express oneself, but also the right to receive and seek information and ideas.[522]

The principles of the Universal Declaration of Human Rights have been adopted in the International Covenant on Civil and Political Rights of 16 December 1966, the European Convention for the Protection of Human Rights and Fundamental Liberties of 4 November 1950, the American Convention on Human Rights of 22 November 1969 and the African Charter on Human and Peoples' Rights of 27 June 1981.

Article 19 of the International Covenant on Civil and Political Rights of 1966 reaffirms the importance of **freedom of expression** in terms very similar to those used in the Universal Declaration of Human Rights:
"1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that:
"[…] States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to

[521] Declaration of the Rights of Man and of the Citizen of 26 August 1789 (DRMC), Article 11.
[522] Patrick Auvret, "*Liberté de communication*", *JurisClasseur Communication*, Fasc. 1200, Classification no. 03, 2011 (January 2011) ("Patrick Auvret - *Liberté de communication*"), para. 6.

equality before the law, notably in the enjoyment of […] (viii) The right to freedom of opinion and expression."[523]

Article 10 of the European Convention for the Protection of Human Rights provides that:
"Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

For the European Commission on Human Rights, freedom of expression constitutes "*a cornerstone*[524] *of the principles of democracy and of human rights, which is protected by the Convention*"[525] and the European Court of Human Rights considers that in a democratic society, it "***constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man***".[526] **The European Court does not focus exclusively on the individual aspect** of the right to freedom of expression, but considers freedom of expression to be a **guarantee for the proper functioning of a democratic society**, the existence of which is conditional upon a plurality of opinions.

The value and role that the European jurisdiction attaches to freedom of expression is the reason for which it is afforded substantial protection.[527] The European Court of Human Rights stated in terms that are now very familiar that its **intention was to protect** "***not only […] 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also […] those that offend, shock or disturb the State or any sector of the population***. *Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.*"[528]

[523] International Convention on the Elimination of all Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 A (XX) of 21 December 1965. Entry into force: 4 January 1969.
[524] Moreover, this expression has been adopted on numerous occasions, notably by the Human Rights Council ("HRC") in its *Adimayo M. Aduayom et al. v. Togo* Decision: "*[T]he freedoms of information and of expression are cornerstones in any free and democratic society*", *Adimayo M. Aduayom et al. v. Togo*, A/51/40, HRC nos 422 to 424/1990, Decision of 12 July 1996, p. 18.
[525] Case of *Vogt v. Germany*, European Commission on Human Rights, Series A/323, report of 30 November 1993, para. 71.
[526] Case of *Handyside v. The United Kingdom*, European Court of Human Rights, Series A/24, Judgement of 7 December 1976, para. 49 ("Handyside Judgement").
[527] Michel Levinet, "*L'incertaine détermination des limites de la liberté d'expression. Réflexion sur les arrêts rendus par la Cour de Strasbourg de 1995 - 1996 à propos de l'article 10 de la Convention européenne des droits de l'homme", Revue Française de Droit Administratif*, no. 5 – 1997 (1997), pp. 999-1009.
[528] *Handyside* case, para. 49, and many other judgements: Case of *Open Door and Dublin Well Woman v. Ireland*, European Court of Human Rights, Series A/246-A, Judgement of 29 October 1992, para. 71; Case of *Vogt v. Germany*, European Court of Human Rights, Series A/323, Judgement of 26 September 1995, para. 52; Case of *Lehideux and Isorni v. France*, European Court of Human Rights, Series A/24662/95, Judgement of 23 September 1998, para. 55.

Freedom of expression is enshrined in **Article 13** of the American Convention on Human Rights in the following terms:

"1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kind, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."
The Inter-American Court of Human Rights defined freedom of expression in an Advisory Opinion of 13 November 1985 in which it stated that "*[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests.*"[529]

It articulated the nexus between the individual aspect of freedom of expression and freedom of expression in terms of general interest.[530] Freedom of expression is an **individual right as a result of which no one may be arbitrarily deprived of the right to express his opinion or impart information**.[531] Freedom of expression has a **collective or social dimension,** which means that everyone has the right to receive information of any kind and be informed of the thoughts of others.[532] It would thus be a means of facilitating the exchange of ideas and information.[533]

Article 9 of the African Charter of Human Rights provides that: "*1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law*."

[529] IACHR, Advisory Opinion OC-5/85, 13 November 1985, para. 70.
[530] *See* Patrick Wachsmann, "Participation, Communication, Pluralism", *Current Legal Issues in Administrative Law*, 1998-0720/08-20 (1998), pp. 165 to 176 ("Patrick Wachsmann").
[531] *See* Rodolfo Brenes Vargas, "Freedom of Expression and Criminal Law before the Inter-American Court of Human Rights", *Revue de sciences criminelles et de droit pénal comparé,* Vol. 2, 2007 (2007), pp. 363 *et seq*. ("Rodolfo Brenes Vargas").
[532] *Ibid*.
[533] IACHR, Advisory Opinion OC-5/85, 13 November 1985, paras 30 to 33: "*[W]hen an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to 'receive' information and ideas. The right protected by Article 13 [of the American Convention on Human Rights] consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. […] The two dimensions mentioned (supra 30) of the right to freedom of expression must be guaranteed simultaneously. […] [T]hat same concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard. […] It is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected. Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a conditio sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free*."

This right is also guaranteed by the **Declaration of Principles on Freedom of Expression in Africa**,[534] which further elaborates on the scope of Article 9 of the African Charter.

The African Commission of Human and People's Rights adopted a clear position on the fundamental character of this right when stating that paragraph 2 of Article 9 provides that "*[f]reedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country*."[535]

Both common law systems and civil law systems afford special protection to **freedom of expression**. But the reasoning behind the protection of this freedom is not the same in both systems.

Contrary to civil law countries, common law countries generally adopt a "negative" approach, since **Constitutions** establish a principle prohibiting lawmakers from regulating freedom of expression.

The **First Amendment** to the United States Constitution of 15 December 1791, which forms the **Bill of Rights** and is the foundation on which freedom of expression in the United States rests, states the following:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" (without risking punishment or reprisals)

This amendment is not a direct endorsement of absolute **freedom of expression**, but it is an injunction not to legislate in matters pertaining to freedom of expression if the effect of the proposed text is to "abridge" it. Consequently, any attitude that infringes on **freedom of expression** is considered unconstitutional. On the other hand, it is recognised that any text protecting freedom of expression comes within the purview of the legislators.[536] Thus the principle established by the First Amendment is clear: legislators may not intervene to **restrict the scope of freedom of expression;** on the other hand, they have **the right to legislate** in order **to protect** freedom of expression. This, therefore, involves a delicate balancing act, as one may not intervene for the purpose of **prohibiting**, but one must intervene **in order to protect**.

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[534] Declaration of Principles on Freedom of Expression in Africa, 23 October 2002.

[535] Case of *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples' Rights, Communications nos 140/94, 141/94 and 145/95, Thirteenth Activity Report of 15 November 1999, para. 36; Case of *Amnesty International v. Zambia*, African Commission on Human and Peoples' Rights, Communication no. 212/98, Twelfth Activity Report of 5 May 1999, para. 46.

[536] The First Amendment was to be applied to the laws promulgated by Congress, which are federal laws. However, in the *Gallow v. New York* Judgement (268 US 652 (1925)), the United States Supreme Court decided that, on the basis of the due process clause provided for in the Fourteenth Amendment, the First Amendment was also applicable at the state level, that is to say, to the legislator of each state.

This Amendment has to be interpreted in the light of the "**marketplace of ideas**" doctrine.[537] According to this doctrine, the "**marketplace of ideas**" guarantees individual freedom as the individual is sufficiently well informed to form his own opinion and make his own choices. It is therefore essential not to obstruct the circulation of ideas. By allowing all manners of expression to circulate, those expressions which have the least value would be naturally eliminated.[538] **The State must not interfere with the process of discovering the "right" ideas or opinions**.[539] On the contrary, it is incumbent on the State to guarantee the broadest possible **freedom of expression** to ensure that each and every idea can be measured against its opposite.

This Amendment protects the **freedom of expression** of **each and every** individual as it is a right inherent to human dignity which cannot be infringed on by the State without the risk of hampering the development and restricting the autonomy of each individual.[540]

The United Kingdom does not have a written constitution. However, the greatest part of the customary Constitution is made up of a combination of basic documents,[541] judgements from tribunals and courts and European and international laws and treaties. In the **United Kingdom,** the first document in which freedom of expression is enshrined is the **Bill of Rights,** which proclaimed the right to **freedom of expression in Parliament**.

The **United Kingdom** is party to a number of European and international conventions which protect individual liberties. Thus, the **United Kingdom** has incorporated the provisions of the European Convention on Human Rights into its domestic law through the Human Rights Act of 9 November 1998, Article 10, which provides that:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority

[537] Laurent Pech, "*Approche européenne et américaine de la liberté de l'expression dans la société de l'information*", *Communication commerce électronique* no. 7, July 2004, Study 20 ("Laurent Pech, *Approches européenne et américaine*"), item 2.
[538] *Whitney v. California*, 274 US 357, 375-6 (1927).
[539] *See* Laurent Pech, *Approche européenne et américaine*, item 2.A.
[540] *See* Laurent Pech, *Approche européenne et américaine*, item 3.A.
[541] The main texts forming the written component of the British Constitution are the Magna Carta of 1215, the Habeas Corpus of 1679, the Bill of Rights of 1689 - which establishes the English constitutional monarchy by granting fundamental rights to citizens and residents - the Act of Settlement of 1701 and, finally, the Parliament Act of 1911, amended in 1949.

> and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."[542]

In **Canada,** rights and liberties were protected under British customary law, as it had been a British dominion for a long time.[543] It was not until 1982, when Canada adopted a Constitution,[544] that the Canadian Charter of Rights and Freedoms was incorporated into the Constitution.

In the *Keegstra* Judgement of 13 December 1990, prior to the adoption of the Canadian Charter, the Supreme Court of Canada had already recognised the right to freedom of expression as a fundamental right in Canada's parliamentary democracy, and one which is of crucial importance in a free and democratic society.[545] The pre-Charter jurisprudence confined itself to the political dimension of freedom of expression as it served to maintain "the operation of the institutions of democratic government".[546]

Article 2 (b) of the Canadian Charter guarantees "the following fundamental freedoms: […] freedom of thought, belief, **opinion and expression** […]".[547]

It should be noted that the structure of the Canadian Charter seems to bear a greater resemblance to the conception of Human Rights found in the European Convention on Human Rights than to the American model. Article 1 of the Canadian Charter sets a general limit which is applicable to all the rights set out in the other provisions and is formulated in the following manner:

> "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[548]

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[542] "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema.*"
[543] Marie-Laure Dussart, "*L'influence de la Convention Européenne des Droits de l'Homme sur le contentieux canadien des droits fondamentaux*" ("Marie-Laure Dussart"), accessible on the website of the French Association of Constitutional Law, p. 2.
[544] Composed of the constitutional law of 1867 and the constitutional law of 1982, which includes the Canadian Charter.
[545] *R. v. Keegstra* [1990], 3 S.C.R. 697, section 6, para. 3 ("*Keegstra* Judgement").
[546] *Ibid*., section 6, para. 5.
[547] Canadian Charter of Rights and Freedoms, Article 2 (b).
[548] "*The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable [limits] prescribed by law as can be demonstrably justified in a free and democratic society*," Canadian Charter of Rights and Freedoms, Article 1.

Freedom of expression is not formally recognised in Australia. To be more precise, the **Australian Constitution** does not refer to freedom of expression, and it is not enshrined in any laws or declarations of rights. Furthermore, as Australia is a State signatory to the International Covenant on Civil and Political Rights, some of the provisions of the Covenant have been incorporated into domestic law, but not the provisions on freedom of expression. Freedom of expression is thus not a right guaranteed by the basic texts, **but an implicit right recognised by the courts.**

In terms of the jurisprudence, the two main judgements on the issue are ***Australian Capital Television v. Commonwealth***[549] and ***Nationwide News Pty Ltd v. Wills***.[550] The Supreme Court of Australia considered that there is **an implicit constitutional right to the freedom of political communication.** Freedom of political communication is thus limited to what is necessary in order to ensure the proper functioning of the representative and responsible government as provided for by the Constitution.[551] The recent ***Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd*** Judgement has divided many commentators.[552] For some, this Judgement widens the scope of freedom of political expression with a view to recognising a general freedom of expression. However, the predominant view rejects this analysis and refuses to consider that this Judgement broadens the scope of the right to freedom of expression.

Enshrining the right to freedom of expression in legislation is a reflection of the "positive" approach adopted in Europe, given that a **general principle of freedom** is proclaimed, although subject to **exceptions**.[553]

Thus freedom of expression in **France** is a constitutional right protected under **Article 11** of the Declaration of the Rights of Man and of the Citizen of 1789 which provides that: "*The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely […]*."[554] The Constitutional Council defined freedom of expression as "*a fundamental freedom which is especially precious as it is one of the essential guarantees for the respect of other rights and freedoms and national sovereignty*".[555]

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[549] *Australian Capital Television v. Commonwealth* (1992), 177 CLR 106.
[550] *Nationwide News Pty Ltd v. Wills* (1992), 177 CLR 1.
[551] *Lange v. Australian Broadcasting Corporation* (1997), 189 CLR 520.
[552] *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd* (2002), PLPR 45.
[553] Laurent Pech, *Droit comparé*, para. 8.
[554] Declaration of the Rights of Man and of the Citizen of 26 August 1789. The fact that the Declaration of the Rights of Man and of the Citizen forms part of the constitutional acts makes this a constitutional liberty.
[555] Constitutional Council, Decision no. 84-181 DC on the law on limiting the concentration of newspaper publications and ensuring their financial transparency and diversity, 11 October 1984, para. 37.

However, it should be noted that Article 11 of the Declaration of the Rights of Man and of the Citizen adds that a person "***shall be responsible for such abuses of this freedom as shall be defined by law***".[556]

In **Italy** the right enjoyed by each and every individual to "*freely express thoughts in speech, writing and by other communication*"[557] is enshrined in, and protected under, **Article 21** of the Italian Constitution. This provision guarantees freedom of expression both as the right to express oneself freely and as the right to use any means to express one's thoughts and those of others.

The Italian Constitution sets express restrictions on freedom of expression, which are based on respect for "public morality".[558]

The European Convention on Human Rights, ratified by law no. 848 of 4 August 1955, forms an integral part of the Italian legal system, and therefore, the norms found therein are the source of laws and obligations for state organs and for all public and private subjects acting within the State.[559]

Freedom of expression in **Denmark** is guaranteed under Article 77 of the Constitution of the Kingdom of Denmark: "**Any person shall be entitled to publish his thoughts in printing, in writing, and in speech, provided that he may be held answerable in a court of justice. Censorship and other preventive measures shall never again be introduced**."[560]

In **Serbia**, as in the former Yugoslavia, freedom of expression has long been enshrined in the Federal Constitution[561] and in the constitutions of the federal republics.[562]

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[556] Declaration of the Rights of Man and of the Citizen of 1789, Article 11.

[557] Article 21 of the Constitution of the Italian Republic of 27 December 1947.

[558] Article 21, last paragraph, of the Constitution: "*Publications, performances and other exhibits offensive to public morality are prohibited. Preventive measures and sanctions against such violations are provided by law.*"

[559] Andreana Esposito*, "Le discours raciste et la liberté d'expression en Italie*", *Revue Trimestrielle des Droits de l'Homme*, no. 2001/46 ("Andreana Esposito"), p. 404.

[560] Article 77 of the Constitution of the Kingdom of Denmark of 5 June 1953.

[561] Article 35 of the Constitution of the Federal Republic of Yugoslavia, adopted on 5 April 1992, provides that "*[f]reedom of confession, conscience, thought and public expression of opinion shall be guaranteed*", and Article 36 further specifies that "*[f]reedom of the press and other forms of public information shall be guaranteed*" and "*[c]itizens shall have the right to express and publish their opinions in the mass media*". Pursuant to Article 40 of the Constitution of the Socialist Federal Republic of Yugoslavia of 7 April 1963, "*[f]reedom of the press and other media of information, freedom of association, freedom of speech and public expression, freedom of meeting and other public assemblage shall be guaranteed*".

[562] Article 45 of the Constitution of Serbia of 28 September 1990 provides that "*the freedom of conscience, thought and public expression of opinion shall be guaranteed*". Article 46, paragraph 6, provides that "*the censor[ship] of press and other public information media shall be prohibited*".

The wording of the Constitution of the Republic of Serbia, adopted on 30 September 2006, which defines Serbia as an independent country for the first time, has been marked by the recent ethnic conflicts. In fact, it provides very solid guarantees for the right to freedom of expression, while being particularly circumspect in respect of preventing hatred and ethnic discrimination. To be more specific, while **Article 46** of the Constitution provides generally that "***freedom of thought and expression shall be guaranteed, as well as the freedom to seek, receive and impart information and ideas through speech, writing, art or in some other manne****r*", Article 47 consists of a specific provision guaranteeing the freedom of all persons to express their national affiliation:

> "**National affiliation may be expressed freely. No person shall be obliged to declare his national affiliation**."

In accordance with European tradition, States have both a "positive" and a "negative" obligation. On the one hand, the authorities in Europe have the obligation to guarantee respect for political and cultural pluralism, which presupposes the pluralism of the media.[563] On the other hand, marked by the determination to avoid any preventive State control, most of the constitutions of European countries prohibit prior censorship, or at least require that the judiciary exercise its power to prevent any attempts at state censorship.[564]

Thus, having completed this review of constitutional and legislative provisions and of the jurisprudence, it appears that freedom of expression is not absolute: the law and international jurisprudence, as well as national constitutions and legislation, set certain restrictions on freedom of expression, whether it is for the purpose of protecting public interests or the rights of individuals.

Although it is recognised that **freedom of expression** is not absolute, there is no unanimous consensus with regard to its restrictions. It is incumbent upon the authorities to reconcile the exercise of this liberty with respect for other basic rights or public interests. Thus, **depending on the State concerned, legislation against hate speech is an integral part of protecting the right to freedom from discrimination, the right to dignity, and the right to freedom of religion and/or preserving public order**.

[563] Laurent Pech, *Droit comparé*, para. 13, citing the Council of Europe, Recommendation CM/Rec (2007) of the "Committee of Ministers to member states on media pluralism and diversity of media content", 31 January 2007.
[564] *See* with regard to France: Article 5 of the law of 29 July 1881; with regard to Germany: Article 5 (1) of the Basic Law; with regard to Italy: Article 21 of the Constitution, and for Denmark: Article 77 of the Constitution of the Kingdom of Denmark of 5 June 1953.

Therefore, a certain number of strict conditions established by international norms must be respected in the event of any restrictions to such a fundamental freedom. This is the case with regard to **the principle of proportionality** applied to State infringement upon the rights protected under various conventions. This general principle of international law is applied by the European Court of Human Rights, the Council of Human Rights and the Inter-American Commission for the Rights of Man.[565]

Depending on the legal system, the expression of certain thoughts or ideas considered to be dangerous may be unlawful. **The Venice Commission**[566] warned States of the potential pernicious effects of restrictions intended to protect minorities against humiliation, extremism or racism, effects such as "***muzzling opposition and dissenting voices, silencing minorities and reinforcing the dominant political, social and moral discourse and ideology***".[567] On the other hand, **excessive permissiveness could disrupt the harmony between citizens or, even worse, foster extremist ideologies**.[568]

6.2. Definition of hate speech

Although there is no **unanimous agreement on the definition of hate speech**, in my opinion the definition provided by the **Council of Europe** Committee of Ministers in Recommendation 1997/20 should be taken into consideration, as it sheds light on the various forms such speech may take. It covers "***all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin***".[569]

[565] Wibke Kristin Timmermann, "The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law towards Criminalization of Hate Propaganda", *Leiden Journal of International Law*, Vol. 18 (2005), Issue 2, p. 259, citing A. H. Robertson and J. G. Merrills, *Human Rights in the World* (1996) ("Wibke Kristin Timmermann"), p. 29.
[566] European Commission for Democracy through Law, consulted on 11 April 2012 ("Venice Commission").
[567] Venice Commission, CDL-AD (2008) 026, "Report on the Relationship between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred", study no. 406/2006 (2008)", adopted by the Venice Commission at its 76th Plenary Session (23 October 2008) ("Venice Commission Report 2008"), para. 58.
[568] Patrick Auvret, "*Messages racistes ou discriminatoires*", *JurisClasseur Communication*, Fasc. 3150, Classification no. 01,2010 (December 2009) ("Patrick Auvret – *Messages racistes*"), para. 1.
[569] Council of Europe, Recommendation no. R (97) 20, "Committee of Ministers to Members States on Hate Speech", 30 October 1997. *See* Appendix to Recommendation no. (97) 20, Scope. Furthermore, in this recommendation, the Committee notes that hate speech may have a greater and more damaging impact when disseminated through the media, and that its impact may be even greater in situations of tension and in times of war and other forms of armed conflict.

The means of dissemination of such speech and the context are two potentially aggravating factors into which **international criminal jurisprudence** and, more generally, international criminal law provide valuable insight.

At the end of the Second World War, the international community recognised **the dangers of inciting genocide**; first**, during the Streicher and Fritzsche trials in Nuremberg**,[570] and then at the time of **the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide** in 1948, which in **Article 3 (c) makes direct and public incitement to commit genocide a crime**. On the other hand, **the Convention does not refer to hate speech** as such, **although initially it seemed that a draft of Article 3 intended to proscribe such speech**.[571]

Hate propaganda was not explicitly condemned at the international level until 1966 with the adoption of the International Covenant on Civil and Political Rights[572] and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD").[573]

Article 20 (2) of the ICCPR prohibits "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence […]".

The ICERD is more precise and stipulates, under **Article 4**, **that the signatory States have undertaken to make the following a punishable offence:** "***all propaganda*** *and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form […]*."

These texts do not make incitement to racial hatred a crime under international law.[574] As the ICTY Trial Chamber emphasised in the *Kordić and Čerkez* Judgement,[575] **and Judge Meron in his**

[570] Although the accused were charged with crimes against humanity, these charges were based on acts that could now be described as incitement to genocide, International Military Tribunal (Nuremberg), Judgement and Sentences, 1 October 1946.
[571] "*All forms of public propaganda tending by their systematic and hateful character to provoke genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished*," Convention on the Prevention and Punishment of the Crime of Genocide – the Secretariat and Ad Hoc Committee Drafts, Secretariat Draft, First Draft of the Genocide Convention, Prepared by the UN Secretariat, UN Doc. E/447 (May 1947), Art. III.
[572] International Covenant on Civil and Political Rights, United Nations, Treaty Collection, Vol. 999, p. 171 (16 December 1966).
[573] International Convention on the Elimination of All Forms of Racism, adopted on 7 March 1966 in New York.
[574] The various drafts of Article 20 of the ICCPR considered incitement to hatred as an international crime, but only the obligation of states to prohibit it by law was maintained in the final version.
[575] *Kordić and Čerkez* Judgement, para. 209 and fn. 272.

partially dissenting opinion appended to the *Nahimana et al.* Appeal Judgement,[576] **Article 4 of the ICERD and Article 20 of the ICCPR require signatory States to prohibit certain forms of hate speech in their domestic laws,** but do not criminalise hate speech in international law. Furthermore, **a significant number of States** have entered **reservations with respect to the application of these provisions,**[577] which indicates that there is no consensus on whether **hate speech as such should be criminalised**.

At an international level, it is also necessary to refer to, *inter alia*,[578] the **Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations**,[579] which states that "*States shall co-operate in the promotion of […] the elimination of all forms of racial discrimination and all forms of religious intolerance*", which clearly implies prohibiting particularly vitriolic hate propaganda.

[576] *Nahimana et al.* Appeal Judgement, "Partly Dissenting Opinion of Judge Meron", paras 5 to 8. Judge Meron underscored the reservations expressed by the United States in light of the fact that the American Constitution protects the same vituperative and abusive language which is not considered as a "true threat" to commit violence (*ibid.*, para. 5).

[577] Committee on the Elimination of Racial Discrimination, "Declarations, Reservations, Withdrawals of Reservations, Objections to Reservations and Declarations Relating to the International Convention on the Elimination of All Forms of Racial Discrimination – Note by the Secretary-General", UN Doc. CERD/C/60/Rev. 4, 16 May 2001. For example, with regard to Article 20 of the ICCPR, certain signatory parties went so far as to claim the right not to introduce legislation precisely because such laws could enter into conflict with their national protection of political freedom. *See* Human Rights Committee, "Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols Thereto", UN Doc. CCPR/C/2/Rev. 3, in Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, Appendix at 749 (Australia), 762 (Malta), 765 (New Zealand), 770 (United Kingdom), 770 (United States) (1993).

[578] An international Convention on Combating Cybercrime, prepared under the auspices of the Council of Europe, was signed in Budapest on 23 November 2001. An additional protocol concerning the criminalisation of the dissemination of racist and xenophobic propaganda was opened for states to sign on 28 January 2003. It criminalises "*distributing, or otherwise making available, racist and xenophobic material to the public through a computer system*" *(Art. 3, para. 1)*, threats on grounds of race (*Art. 4, para. 1*), "*insulting publicly, through a computer system*" on the same grounds *(Art. 5, para. 1)* and distributing "*material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity*" *(Art. 6, para. 1)*.

[579] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations adopted on 24 October 1970, A.G. 25th Session, Supplement no. 28, p.131, UN Doc. A/5217 (1970).

6.3. The jurisprudence of the Nuremberg Military Tribunal

The Charter[580] and the Judgement of the Nuremberg International Military Tribunal[581] establish an **important precedent** with regard to the limits international criminal courts impose on **freedom of expression**. The Indictment[582] and the Judgement of the International Military Tribunal establish that the means of propaganda used by the Axis Powers enabled them to launch a war of aggression and perpetrate war crimes, crimes against humanity and genocide.[583]

The ***Streicher*** **and** ***Fritzsche*** **cases** are particularly relevant as both the accused were prosecuted before the IMT solely for speeches and influence exercised through the media. **Julius Streicher** was sentenced to death by hanging, while **Hans Fritzsche** was acquitted on all charges.

6.3.1. The Julius Streicher *case*

Streicher, the publisher and chief editor of *Der Stürmer*, an anti-Semitic weekly newspaper, was indicted on counts of crimes against peace and crimes against humanity.[584] The International Military Tribunal found the Accused - who was widely known for his anti-Semitic convictions and persecution of Jews, and had the reputation of "Jew-baiter number one"[585] - guilty under Article 6 (c) of the International Military Tribunal's Charter of crimes against humanity for inciting murder and extermination.[586]

The International Military Tribunal recognised that **through his speeches and publications "*he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution*"**.[587] The International Military Tribunal proceeded to underscore the significant

[580] Charter of the International Military Tribunal of 8 August 1945.
[581] International Military Tribunal (Nuremberg), Judgement and Sentences, 1 October 1946 ("IMT Judgement").
[582] International Military Tribunal (Nuremberg), Indictment.
[583] Michael G. Kearney, *The Prohibition of Propaganda for War in International Law*, Oxford University Press, 2007, p. 34.
[584] International Military Tribunal (Nuremberg), Indictment, Appendix A: Statement of Individual Responsibility for Crimes Set Out in Counts One, Two, Three and Four, 66. With regard to crimes against peace, the IMT determined that his propaganda was aimed at inciting the German people to hatred and violence against the Jewish people, an identifiable ethnic group, and not at a war of aggression, as a result of which he was acquitted on these charges.
[585] In French "*leur ennemi le plus acharné des juifs*", Judgement, IMT, 294.
[586] IMT Charter, Article 6 (c): "*Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated. Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.*" Control Council Law no. 10.
[587] IMT Judgement, 294.

number of declarations of hatred[588] made against the Jews and targeted persons, as well as the length of time during which he preached hatred.[589] It further added that as the German Army invaded more and more territory, **Streicher** intensified his efforts to incite the Germans to fight against the Jews, and it described the propaganda at the time as "***the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination***".[590] On 25 December 1941, Streicher published the following: "*If the danger of the reproduction of that curse of God in the Jewish blood is finally to come to an end, then there is only one way – the extermination of that people whose father is the devil*."

The International Military Tribunal also underscored the knowledge **Streicher** had of the crimes committed by the Nazis. He had in fact continued to write and publish this "propaganda of death" with knowledge of the extermination of the Jews in the territory of Eastern Europe occupied by the Nazis.[591]

Thus in view of the content of his writings, his knowledge of the ongoing persecution of the Jews and the dates of his publications, the **International Military Tribunal** demonstrated that Streicher had the requisite *mens rea* to be found guilty of inciting murder and extermination as crimes against humanity.[592]

The International Military Tribunal convicted **Streicher** and found him guilty on the count of a crime against humanity, stating that "*Streicher's* ***incitement to murder and extermination****, at the time when Jews in the East were being killed under the most horrible conditions, clearly constitutes* ***persecution*** *on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity*".[593]

[588] Twenty-two different articles published in *Der Stürmer* between 1938 and 1941 preaching the extermination of the Jews "root and branch" were produced in evidence.
[589] Thus, he called for a boycott of Jews as early as 1933. He advocated the adoption of the Nuremberg Decrees of 1935. In 1935, each issue of *Der Stürmer* reached a circulation of 600,000. Moreover, Streicher also disseminated his doctrines outside of Germany.
[590] IMT Judgement, 294-5: 26 articles from *Der Stürmer* published between August 1941 and September 1944, 12 of which were written by Streicher himself, demanded annihilation and extermination of the Jews in unequivocal terms.
[591] IMT Judgement, 295.
[592] Michael G. Kearney, *The Prohibition of Propaganda for War in International Law*, Oxford University Press, 2007, p. 41.
[593] *Ibid.*, 296.

6.3.2. The Hans Fritzsche *case*

Hans Fritzsche was indicted on counts of crimes against peace, war crimes and crimes against humanity, and was charged with having disseminated and exploited the principal doctrines of the Nazi conspirators, and with advocating, encouraging and inciting the commission of war crimes and crimes against humanity, including, in particular, anti-Jewish measures and the ruthless exploitation of occupied territories.[594] In both the Indictment and the Judgement, the Prosecution and the IMT refer only to his propaganda activities.[595]

Fritzsche was in charge of a German government news agency which had been incorporated into the Nazi Ministry of Popular Enlightenment and Propaganda in 1933. In 1938, he was appointed head of the Home Press Division of the Ministry, where he supervised 2,300 daily newspapers. He was best known as a radio commentator who had his own weekly programme, "***Hans Fritzsche Speaks***".[596]

When explaining the role of **Fritzsche** in the spreading of propaganda, the Judgement specified that although at the beginning of his career **Fritzsche** had no control over the formulation of the propaganda policies,[597] towards the end of his career he became the sole authority within the Ministry of Propaganda for radio activities and "*he formulated and issued daily radio paroles to all Reich Propaganda Offices [...]*".[598] However, they remained subject to the directives and personal supervision of **Goebbels**. Thus, the Tribunal considered that "*[h]is position and official duties were not sufficiently important, however, to infer that he took part in originating or formulating propaganda campaigns*".[599]

The Tribunal thus recognised that **Fritzsche did spread his anti-Semitic ideology through his speeches**, stating for example that the war had been caused by the Jews and that their fate had turned out "*as unpleasant as the Fuhrer had predicted*".[600] However, **the IMT held that Fritzsche's speeches "*did not urge persecution or extermination of Jews*"**.[601]

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[594] International Military Tribunal (Nuremberg), Indictment, Appendix A, para. 68.
[595] *Ibid.*
[596] IMT Judgement, para. 327.
[597] He was merely following the instructions of the Director of the Reich Press, Otto Dietrich, IMT Judgement, para. 327.
[598] IMT Judgement, para. 327.
[599] *Ibid.*, para. 328.
[600] *Ibid.*, para. 328.
[601] *Ibid.*, para. 328.

According to the Judgement, there was also no evidence that he had been aware of the extermination of the Jews in the territories of Eastern Europe under Nazi occupation.[602] Thus, in spite of his propaganda statements, the Tribunal did not find that their goal had been to incite the Germans to commit atrocities against conquered peoples, notably against the Jews.

The Tribunal thus **made a distinction between propaganda as direct incitement to commit crimes and propaganda that creates a general climate of war**.[603] As the latter is not punishable as a crime against humanity or a war crime, **Fritzsche** was acquitted both on the count of war crimes and on the count of crimes against humanity. This is a particularly important distinction, and it should be noted that creating a "**climate of fear**" is not sufficient to constitute a crime against humanity; **direct incitement** to commit crimes is required.

Furthermore, it should be noted that **Fritzsche** also stood trial before a domestic German court.
In fact, **Fritzsche** faced another trial before the **Spruchkammer I in Nuremberg**,[604] which was part of the Denazification Courts established to deliver judgements for Nazi regime officials in accordance with the Law for Liberation from National Socialism and Militarism.[605]

On 31 January 1947, **Spruchkammer I** sentenced Fritzsche **to 9 years of hard labour** as a "*Hauptschuldige*", the 1st category for major offenders, as the speeches he made on the radio reflected **Nazi ideology**, and **Fritzsche** was one of the most active and influential propagandists of this ideology. **Fritzsche's** influence was indeed considerable: he was head of the Political Organisation of the German Radio and had been appointed Head of the Radio Division of the Propaganda Ministry (*Ministerialdirektor*). His propaganda exerted an influence on the German people by convincing them of the value of Nazi ideology. **Fritzsche** was thus one of the persons who bore primary responsibility for the wartime events.[606]

Fritzsche lodged an appeal with the Berufungskammer I, which rejected it on 30 September 1947 on the following grounds:[607]

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[602] *Ibid.*, para. 328.
[603] According to the IMT, Fritzsche's "*aim was rather to arouse popular sentiment in support of Hitler and the German war effort*", *ibid.*, para. 328.
[604] *Ibid.*, p. 829.
[605] In German: "*Gesetz zur Befreiung von Nationalsozialismus und Militarismus*" of 5 March 1946.
[606] *Ibid*., p. 829. "*Hans Fritzsche* Judgement, Aktenzeichen I/2398, Spruchkammer I, Stadtkreis Nurnberg, 31 January 1947, Staatsarchiv Munchen, SpKa Karton 475".
[607] *Ibid.*, p. 829. "*Hans Fritzsche* Appeals Judgement, Ber.-Reg.-Nr. BKI/695, Berufungskammer I, Nurnberg-Furth, 30 September 1947, Staatsarchiv Munchen, SpKa Karton 475".

- **Through his speeches on the radio, Fritzsche exerted a huge influence over a sizeable section of the German people.**[608]

- He **supported Goebbels' propaganda based on lies** (*Lugenpropaganda*) by **spreading false news, and he made use of "*Schimpfpropaganda*", which consisted of defamation of enemy leaders. Furthermore, he was the author of anti-Semitic propaganda inciting hatred of the Jews by declaring them responsible for a war the purpose of which was to destroy the German people.**[609] **Fritzsche predicted that the Jews would soon be killed throughout the world, as in Europe, because it was difficult to believe that the nations of the New World would forgive the Jews the misery of which the Old World did not acquit them.**[610]

- Even if **Fritzsche's** propaganda did not call directly for the **persecution of the Jews**, it exacerbated **the hatred** against this race. Perhaps he did not directly call for the extermination of the Jews, but his actions instilled in the people a German voice calling for these persecutions and exterminations. He was involved in creating a **state of mind** which made the persecution and extermination of the Jews possible. When engaging in propaganda, **Fritzsche** knew that the Nazi press and the party had systematically set the Germans against the Jews; he also knew that there were concentration camps in which the prisoners were being treated in an inhumane way.[611]

The Appeals Court went even further than the International Military Tribunal, as it held **Fritzsche** criminally responsible for **anti-Semitic propaganda**, which need not have involved a direct call for acts of violence, but **could**, **nevertheless, have created a violent and hostile mood** among the future perpetrators of such crimes. It was necessary to criminalise propaganda *per se* in order to prevent creating an atmosphere conducive to murder, or worse, to genocide.[612]

Thus it would appear that, according to this high German court, creating a violent and hostile atmosphere among the perpetrators of crimes, even in the absence of any direct calls for violence, is sufficient to constitute persecution through hate speech. However, I note that in this specific case, the person concerned had predicted that the Jews would soon be killed throughout the world.

[608] *Ibid.*, p. 830.
[609] *Ibid.*, p. 830. Moreover, he stated that the Jewish people encouraged the American and British soldiers.
[610] *Ibid.*, p. 830.

6.4. The Geert Wilders jurisprudence

The **Berufungskammer** jurisprudence, which seems very broad to me, should be examined in relation to a recent decision rendered by a Dutch district court regarding the ***Wilders* case**. The Dutch Court seems to take a different approach to that of the **Berufungskammer** by, as it claims, **taking context into account**, which the German court did not do. Although **context** should be taken into account, I believe that in terms of international criminal law, not everything can be justified by the context, and sometimes the "poison" has been administered and a state of mind created.

The Amsterdam District Court first determined the words that could be attributed to the Accused.[613] It then focused on defamation (Count 1),[614] and finally it analysed incitement to hatred and discrimination against Muslims on the basis of their religion (Counts 2 and 3)[615] and their race (Counts 4 and 5).[616] The Court acquitted **Geert Wilders** as there was no evidence to support a finding that he was guilty of the crimes with which he had been charged.

The Dutch Criminal Code sets out provisions on defamation.[617] This Article makes it a criminal offence to discredit **a group because of their race, religion or particular beliefs**. Criticism, even if harsh, of a certain type of behaviour or of a specific religion, is not sanctioned.[618] **Wilders** stated: "*You will see that all the evil that the sons of Allah will inflict on us and on themselves comes from that book, the Koran*." According to the Court, this statement does not refer to Muslims, but to their behaviour, and is not punishable.[619]

The Court referred to Article 10 of the European Court of Human Rights which pertains to freedom of expression,[620] and Article 137 (d) (1) of the Criminal Code.[621] A statement is punishable if the following conditions have been met:

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[611] *Ibid*., p. 830.
[612] *Ibid*., p. 830.
[613] *Geert Wilders* Judgement, Amsterdam District Court, 23 June 2011, pp. 4-5.
[614] *Ibid*., pp. 5-6.
[615] *Ibid*., pp. 7-16.
[616] *Ibid*., p. 16.
[617] *Ibid*., p. 5. According to Article 137 (c) of the Criminal Code, any person who in public, either verbally or in writing or through images, intentionally makes an [insulting] statement about a group of persons because of their race, religion or beliefs, their sexual orientation or their physical, mental or intellectual disability shall be guilty of defamation.
[618] *Ibid*., pp. 5-6. A statement about a religion which is insulting to its practitioners does not constitute defamation.
[619] *Ibid*., p. 6. This also applies to other statements referring to Islam or the Koran.
[620] *Ibid*., p. 7.

a. **People** are attacked.[622] The Dutch judges are of the view that **attacking a religion is not punishable**.

b. The statement is "**provocative**". There is incitement to something intolerable.[623]

c. The statement must contain an "**exacerbating**" factor, inducing people to entertain extreme emotions, for it to constitute incitement to hatred.[624]

Any **distinctions, exclusions, restrictions or preferences** that aim at, or result in, **limiting or denying the recognition, enjoyment or the exercise of a right constitutes incitement to discrimination**.[625]

When analysing a statement, it is necessary to take into consideration **the context and the specific circumstances surrounding the case**.[626] **Freedom of expression** must be guaranteed, and the offensive character of a statement may be rendered innocuous in a given context. It is necessary to establish whether there is a need to set limits to freedom of expression in a democratic society, as freedom of expression is important, especially for a politician.[627]

The Accused claimed that his statements were not directed at people, but at **Islam**, because **Islam** is dangerous. According to the Court, the statements the Accused made were primarily about the evils of **Islam** and the **Koran**.[628] Thus, the Accused referred to **religion** and not to **people**. When speaking of people, he was referring to people who failed to see the evil nature of **Islam**. Therefore, these statements do not incite hatred or discrimination against persons on account of their religion.

When speaking about his political ambitions, the Accused stated that the "tsunami" of Islamisation had to be stopped, and he proposed a number of measures in the statements he made:[629]

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[621] *Ibid*., p. 7. According to Article 137 (d) (1) of the Criminal Code, any person who in public, either verbally or in writing or through images incites hatred of or discrimination against persons […] because of their race, religion or beliefs, their sex, sexual orientation or their physical, mental or intellectual disability, shall be liable to punishment.
[622] *Ibid*., p. 7.
[623] *Ibid*., p. 8.
[624] *Ibid*., p. 8.
[625] *Ibid*., p. 8.
[626] *Ibid*., pp. 8-9. The Court reviewed the statements *per se*, their context, how they were linked to the other provisions of the Article and the other statements that the Accused made on the same subject.
[627] *Ibid*., pp. 9-10. It is possible to make offensive, disturbing or shocking statements, but it is not an absolute right and publicly using words that provoke intolerance should be avoided.
[628] He used conciliatory words with regard to the Muslim population, for example, the Iranians (*ibid*., p. 10).
[629] *Ibid*., p. 11.

- "*Everyone adapts to our dominant culture. Who does not do so will no longer be here in 20 years' time. They will be deported*."

- "*The borders have to close […] for non-Western residents*."

- "*We have a gigantic problem with Muslims; […] it's going too far and we present solutions […]*."

The Accused was referring to persons when he spoke about "non-Westerners" and "everyone". Therefore, the first condition for incitement had been satisfied.[630]

However, according to the Dutch Court, these statements did not incite hatred, as they did not contain any **exacerbating factors**.[631]

When taken out of context, these statements are discriminatory: the Accused made a distinction between **non-Muslims** and **Muslims** in relation to the issue of immigration and residency. But, according to the Court, these statements **fall within the sphere of a public debate**. Politicians enjoy considerable freedom of expression, and the statements the Accused made must be considered as suggestions that he would make good on once in power. Multicultural societies and immigration are at the heart of the debate, and the Court held that in the case of heated debates, freedom of expression is allowed extensive latitude. It stated that on such occasions statements could be offensive, shocking or disturbing, but the statements the Accused made did not transgress the limits of the law. Not only did the Accused not target all Muslims - the context was also such that it cancelled out the discriminatory character of the statements.[632]

- "*The demographic composition […] is the biggest problem in the Netherlands. I am talking about what comes to the Netherlands and reproduces here. If you have a look at the figures and the developments therein … Muslims will move from the big cities to the country. We must stop the 'tsunami of the Islamisation'. This hits us in the heart, in our identity, in our culture. If we do not defend ourselves […]*."[633]

[630] *Ibid*., p. 11.
[631] *Ibid*., p. 11.
[632] *Ibid*., pp. 11-12. The Accused made numerous suggestions ranging from the deportation of Muslims who failed to integrate to the suggestion that all non-Western residents should sign a contract of integration.

The Accused claimed that it was necessary to halt the **rise of Islam.** However, the Court held that this was not provocation and that he was not inciting hatred or direct or indirect discrimination.

- *"These young Moroccans are really violent. They hit people because of their sexual orientation. I have never resorted to violence*."[634]

Thus, his statement refers directly to people.[635]

- *"Close the borders, no more Islamists in the Netherlands, many Muslims leaving the Netherlands in droves, denaturalisation of Islamist criminals*."[636]

The Accused **Wilders** was referring to Muslims but, according to the Court, as there were no exacerbating factors, there was no incitement to hatred. Although the suggestions are discriminatory, they were nevertheless made in the context of a public debate.

- "[…] *I know that there will be no Islamic majority in 20 years' time. But the number is increasing, and there are aggressive, imperialistic elements. Take a walk in the streets and see where this is going. You no longer feel like you are living in your own country. There is a battle going on and we have to defend ourselves. Before you know it, there will be more mosques than churches*."[637]

This statement targets people, Muslims, and gives the impression that there will be adverse consequences for society if the number of Muslims increases. Moreover, it incites people to defend themselves. There is an element of provocation but, in the same interview, the Accused claimed that he was not against Muslims, but against Islam. Thus, the Court found that when viewed in the context of the interview as a whole, the statement does not incite hatred or discrimination.[638]

Images from the film show Muslims behaving badly, inciting violence and attacking non-Muslims. People are therefore being targeted.[639]

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[633] *Ibid*., p. 12.
[634] *Ibid*., p. 12.
[635] *Ibid*., p. 13.
[636] *Ibid*., p. 13.
[637] *Ibid*., p. 13.
[638] *Ibid*., p. 14.
[639] *Ibid*., p. 14.

The film shows passages from the Koran and attacks by Muslim extremists. According to the Court, these images are not provocative. However, it is then claimed that an increasing number of Muslims is living in the Netherlands, and the question is raised of what will happen in the future. Images are shown of women who had been killed and homosexuals who had been hanged. These images are provocative and it is suggested that an increase in the number of Muslims will lead to an increase in violence. Consequently there is a risk that these images could incite hatred,[640] but they must be analysed in relation to the film as a whole and in the context of a public debate. The film's message is about the evils of Islam. Nevertheless, the Court held that multicultural societies and immigration were at the heart of a public debate, and shocking or disturbing statements may be made in the course of a debate, which is what the Accused did against Islam, but not against Muslims.[641] The Accused is free to express himself in this manner. The film incites neither hatred nor discrimination in the context of a public debate, since the Accused wishes to warn the public about the dangers of Islam.[642]

Statements relating to the discrimination against Moroccans and non-Westerners[643] were not considered to be based on race.[644]

This decision took the context into account and acknowledged that a politician has very broad freedom of expression on condition that he is not targeting people. It can help us to understand our case because **Vojislav Šešelj**, like **Geert Wilders**, is a politician. It should nevertheless be noted that, in relation to the German court's Fritzsche decision, it is a step backwards because of the requirement to contextualise what could be described as hate speech, the use of the notion of "**exacerbating factors**" and the reference to the broad **freedom of expression** that politicians are allowed in the context of **public debates**.

6.5. Jurisprudence of the International Criminal Court (ICC)

There are no specific provisions in the Statute of the International Criminal Court (ICC) sanctioning hate speech, with the exception of criminalising direct and public incitement to commit genocide.[645]

[640] *Ibid*., pp. 14-15.
[641] *Ibid*., p. 15. It has been said that the Muslims themselves should eliminate some passages from the Koran.
[642] *Ibid*., p. 16.
[643] *Ibid*., p. 16.
[644] *See* the following statement: "*These young Moroccans are really violent. They hit people because of their sexual orientation. I have never resorted to violence*." (*Ibid*., p. 12).
[645] Article 25 (3) (e).

Nevertheless, anyone accused of making hate speeches may be held responsible under the various modes of liability.[646]

The case of **Joshua Arap Sang**, a Kenyan journalist who appeared before the Court on charges of crimes against humanity, more specifically of persecution, is interesting and worth examining in detail.

The journalist appeared before the ICC on charges of crimes against humanity, including persecution. The Prosecutor of the Court alleged that from 30 December 2007 until the end of January 2008, journalists **Joshua Arap Sang, William Samoei Ruto and Henry Kiprono Kosgey**,[647] acting as co-perpetrators, or alternatively, as members of a group of persons pursuing a common objective, committed, or contributed to the commission of, crimes against humanity by way of persecution. The Prosecutor alleged that the co-perpetrators and/or members of their group deliberately targeted and discriminated against civilians on the grounds of their political affiliation in the Kenyan towns of Turbo, Kapsabet and Nandi Hills in Gishu Uasin, the Nandi districts and the wider Eldoret region,[648] in violation of Articles 7 (1) (h) and 25 (3) (a) or (d) of the Rome Statute.[649]

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[646] Article 3: "*In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:*
(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
(ii) Be made in the knowledge of the intention of the group to commit the crime."

[647] Ruto and Kosgey were both senior Orange Democratic Movement ("ODM") politicians. Ruto was a member of the five-person ODM leadership called "the Pentagon". Kosgey was the Chairman of the ODM. Ruto and Kosgey were running for re-election as Member of Parliament ("MP") in their respective constituencies. While not a politician, Sang was a prominent member of the community due to his position as a broadcaster on the most popular vernacular radio station, Kass FM. Sang was a vocal supporter of ODM and its candidates. *See* "Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", Public Redacted Version of Document ICC-01/09-30-Conf-Exp, ICC-01/09-30-Red2, 15 December 2010, para. 17.

[648] *Ibid*, p. 17.

[649] Article 7 (l) (h) of the Rome Statute provides that: "*For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court."
- Article 25 (3) of the Rome Statute provides that: *"In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:*
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.
Such contribution shall be intentional and shall either:

The Chamber held that there were substantial grounds to believe that **Mr Sang**, by virtue of his position as a key broadcaster within Kass FM, intentionally contributed to the commission of this crime by: (i) placing his show *Lee Nee Emet* at the disposal of the organisation; (ii) advertising the meetings of the organisation; (iii) fanning the violence through the spread of hate messages explicitly revealing the desire to expel the Kikuyus; (iv) broadcasting false news regarding alleged murders of Kalenjin people in order to inflame the atmosphere in the days preceding the elections; (v) broadcasting instructions during the attacks in order to direct the physical perpetrators to the areas designated as targets.[650]

Having found that **Sang's** contribution had been **intentional**, the Chamber turned to the evidence concerning the aim of furthering the criminal activity or **criminal purpose of the group**, as required under Article 25 (3) (d) (i) of the Statute.[651]

The Chamber considered that on the basis of the available evidence, **Sang's** contribution was also made with the aim of furthering the criminal activity and purpose of the group established by **Ruto** to commit crimes against humanity. **Sang** participated in five preparatory meetings between 15 April 2007 and 14 December 2007. The evidence shows that in the course of these meetings, the different facets of the plan to attack the supporters in some of the targeted towns were developed. The evidence examined by the Chamber also supports the finding that **Sang** aimed to further not only the criminal purpose of the group but also its criminal activity.[652] I also note that the Chamber mentions instructions given to the perpetrators of the crimes.

6.6. International texts

International criminal courts for prosecuting persons who bear the greatest responsibility for war crimes, crimes against humanity and genocide naturally strive to prosecute the "masterminds" who incited international crimes and without whom no conflicts would have broken out. They are aware that the culpability of politicians or other public figures who exert an influence over the "masses" may be even greater than that of mere underlings – the soldiers bearing arms. Nevertheless, the

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(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court, or
(ii) Be made in the knowledge of the intention of the group to commit the crime."

[650] Pre-Trial Chamber II, "Decision on the Confirmation of Charges pursuant to Article 61 (7) (a) and (b) of the Rome Statute", ICC-01/09-01/11-373, para. 355.

[651] *Ibid.*

value attached to freedom of expression and, without a doubt, the specific nature of international conflicts give rise to differences between jurisprudences. These differences are also apparent in the various regional systems, and even more so within the regional systems themselves.

In Europe, sanctioning hate speech is part of broader measures for combating discrimination and is linked to other legislation.[653] This is notably the case in relation to sanctioning the denial of genocides, insults on the grounds of group affiliation, attacks on religious beliefs, blasphemy and attacks against national unity.

As a result of the influence of the jurisprudence of the European Court of Human Rights and, more recently, of European Union legislation, the views of European nations on racist speech have been gradually converging.

The ratification on 23 November 2001 of the **Additional Protocol to the Convention on Cybercrime** criminalising acts of a racist and xenophobic nature committed through computer systems was the first stage in harmonising measures sanctioning incitement to hatred and hate speech.

In 2002, the Council of Europe Commission against Racism and Intolerance (ECRI) adopted Recommendation no. 73 on national laws combating racism.[654] In that respect, in Recommendation 1805 (2007)[655] entitled, "Blasphemy, Religious Insults and Hate Speech against Persons on Grounds of Their Religion", the Parliamentary Assembly of the Council of Europe defined hate speech as "***statements that call for a person or group of persons to be subjected to hatred, discrimination or violence on grounds of their religion as on any other grounds***".[656] The Assembly also considered that *"as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2, of the Convention, national law should only penalise expressions about*

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[652] *Ibid.*

[653] The severity of sanctions against hate speech is also based on the aggravating circumstances of hate crimes.

[654] According to this Recommendation, "*[t]he law should penalise the following acts when committed intentionally: (a) public incitement to violence, hatred or discrimination; (b) public insults and defamation or; (c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin. The following should also be penalised: the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes*."

[655] Council of Europe Parliamentary Assembly, Recommendation no. 1805 (2007), "[S]tatements that call for a person or group of persons to be subjected to hatred, discrimination or violence on grounds of their religion as on any other grounds", adopted by the Assembly on 29 June 2007 ("Recommendation 1805 (2007)"), accessible on the Council of Europe website.

[656] Recommendation 1805 (2007), paras 12 and 17.2.2.

religious matters which intentionally and severely disturb public order and call for public violence."[657]

No consensus was reached on sanctioning **incitement to hatred and hate speech** and **a majority of the 27 Member States of the European Union did not support [penalising] revisionist statements**.[658]

It was not until the Council of Europe's **Framework Decision** 2008/913/JAI of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law[659] that the laws in this field were harmonised.[660] The goal was to combat more effectively particularly serious forms of racism and xenophobia by adopting common European-wide criminal sanctions, without however fully harmonising criminal law in this field, given the strong opposition from countries concerned about protecting broad freedom of expression.[661]
Thus the Member States agreed to penalise *inter alia*:

- publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, descent or national or ethnic origin;
- the dissemination or distribution of tracts, pictures or other material of a racist or xenophobic nature;
- publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes when the conduct is carried out in a manner likely to incite to violence or hatred against a group of persons or a member of such a group.

However, a unanimous agreement could only be reached by allowing states that so wished to choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting. It is also possible for a Member State to make a statement that it will make the act of denying or grossly trivialising crimes punishable only if these crimes have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.[662] Finally, the Framework Decision also provides that it shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of

[657] *Ibid*., para. 15.
[658] Laurent Pech, *Droit comparé*, para. 67.
[659] Framework Decision no. 2008/913/JAI, 28 November 2008, *Official Journal of the European Union*, 6 December 2008.
[660] Laurent Pech, *Droit comparé*, para. 67.
[661] L. Pech, "The Law of Holocaust Denial in Europe: Towards a (Qualified) European-Wide Prohibition" in L. Hennebel and T. Hochmann, *Denials and the Law*, Oxford University Press, 2010, p. 185.
[662] Laurent Pech, *Droit comparé*, para. 67.

expression, in particular freedom of the press, as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for the press or other media.[663]

Article 11 of the Charter of Fundamental Rights of the European Union (2010/ C 83 / 02) of 30 March 2010 provides that: "***1. Everyone has the right to freedom of expression***."[664] In addition, Article 54, entitled "*Prohibition of Abuse of Rights*", provides that: "*Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein*."

General reservations concerning freedom of expression, pertaining to public order, are set out under Article 10, paragraph 2, of the ECHR.[665] According to this paragraph, the right to freedom of expression may be subject to restrictions if two conditions are satisfied: **the restrictions must be prescribed by law and be necessary and proportionate to the pursuit of certain objectives in a democratic society** enumerated in this article. Freedom of expression is therefore not absolute, since limits are necessary.

6.7. Jurisprudence of the European Court of Human Rights

The Court considers that Article 10 contains some of its most important provisions and that **freedom of expression** is one of the essential foundations of a democratic society:[666]

> "*49.Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.*"[667]

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[663] *Ibid.*
[664] "*This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected*."
[665] This Article provides that: "*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*."
[666] *See*, for example, the *Handyside* Judgement.
[667] *Supra* note no. 141.

Thus, allowance is made for very few restrictions, and **judges** will exercise **full supervision**. Judges will therefore have to provide narrow interpretations:[668]

> "*65.Whilst emphasising that it is not its function to pronounce itself on an interpretation of English law adopted in the House of Lords (see,* mutatis mutandis*, the Ringeisen judgement of 16 July 1971, Series A, no. 13, p. 40, para. 97), the Court points out that it has to take a different approach. The Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted (see* mutatis mutandis*, the Klass and others judgement of 6 September 1978, Series A, no. 28, p. 21, para. 42). In the second place, the Court's supervision under Article 10 (art. 10) covers not only the basic legislation but also the decision applying it (see the Handyside judgement, p. 23, para. 49). It is not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10 (2) (Art. 10-2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and the circumstances prevailing in the specific case before it*."

When supervising the need to impose restrictive measures, the Court is supposed to seek the **"right balance"** between the interests concerned and must not establish a hierarchy of competing rights.[669] Thus restrictions on freedom of expression are allowed under three categories: **to protect the general interest, to protect other individual rights and to guarantee the authority and impartiality of the judiciary**.[670] The Court exercises its supervision to determine the degree of protection for freedom of expression in light of the content of the protected information and considers three cumulative criteria: the content, the author and the medium. Nevertheless, the restrictions set forth in Article 10, paragraph 2, of the ECHR relate to less explicit hate speech for which there are specific provisions.[671]

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[668] Case of *The Sunday Times v. The United Kingdom*, European Court of Human Rights, Series A/30, Judgement of 26 April 1979.
[669] Frédéric Sudre, *Droit européen et international des droits de l'homme*.
[670] *Ibid.*
[671] *Ibid.*

Article 17 of the European Convention for the Protection of Human Rights also sets limits to freedom of expression.[672] The purpose of its specific provisions is to protect the internal public order of the contracting States against the dangers of totalitarianism, fascism or communism, and to punish violations of a State's internal security.[673] Nowadays, Article 17 is applied to prevent freedom of expression being invoked to incite hatred or racial discrimination.[674] The ECHR fully applied this clause on the prohibition of abuse of rights in the ***Garaudy v. France*** decision.[675] In this case, the ECHR judges held that the author of a book with a "markedly revisionist" tenor could not invoke protection of freedom of expression.[676] Limits may be imposed on freedom of expression when the contentious words aim to spread, incite or justify **hatred based on intolerance**.[677] Conversely, "*the mere fact of defending Sharia, without calling for violence to establish it*" cannot be described as hate speech that is not protected under Article 10.[678]

The ECHR considers that **hate speech** that can be subject to proportionate restrictions includes "***all forms of expression which spread, incite, promote or justify hatred based on intolerance, including religious intolerance***" but has not, however, committed itself to a definitive definition.[679] Furthermore, this is an "autonomous" concept since the Court does not consider itself bound by the definitions provided by domestic courts.[680]

In the case of ***Féret v. Belgium***,[681] the ECHR circumscribed the provisions governing **incitement to hatred.** In this case, at the time of elections, the President of the Belgian "*Front National*" - and member of the Belgian Parliament – had distributed leaflets in which he stigmatised foreign nationals, describing them as delinquents who were only interested in obtaining social benefits. The

[672] Article 17 provides as follows: "*Nothing in this Convention may be interpreted as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention*."
[673] Frédéric Sudre, *Droit européen et international des droits de l'homme*, 9th enlarged and amended edition, June 2008, p. 211.
[674] Case of *Gerd Honsik v. Austria*, European Commission of Human Rights, Application no. 25062/94, 18 October 1995.
[675] Case of *Garaudy v. France*, European Court of Human Rights, Application no. 65831/01, Decision of 24 June 2003.
[676] Prior to this Decision, the ECHR had refused to apply Article 17 in relation to an advertisement in a well-known daily newspaper glorifying the acts of Marshall Pétain between 1940 and 1945, in the *Lehideux and Isorni v. France* Judgement, case of *Garaudy v. France*, European Court of Human Rights, Application no. 24662/94, Judgement of 23 September 1998.
[677] Frédéric Sudre, *Droit européen et international des droits de l'homme*, 9th enlarged and amended edition, June 2008, p. 532.
[678] Case of *Müslüm Gündüz v. Turkey*, European Court of Human Rights, Application no. 59997/00, Judgement of 4 December 2003, para. 51.
[679] Expert workshop on the subject of incitement to national, racial or religious hatred, Study for the workshop on Europe (9-10 February 2011, Vienna), Léon-Louis Christians, Catholic University of Louvain (Belgium) ("Léon-Louis Christians"), p. 4.
[680] Léon-Louis Christians, p. 4.
[681] Case of *Féret v. Belgium*, European Court of Human Rights, Application no. 15615/07, Judgement of 16 July 2009 ("*Féret* Case").

applicant was subsequently punished for these statements, which the domestic courts qualified as public incitement to discrimination or hatred. Although, as is customary, the Court stressed the particular importance of freedom of expression in the context of public debate (especially for a representative of the people),[682] in light of international instruments and its case-law, it was adamant that **tolerance** and respect for the equal dignity of all human beings constituted the foundation of a **democratic and pluralistic society**,[683] and reiterated its condemnation of all forms of expression inciting racial hatred.[684] The Court emphasised that when expressing themselves in public, politicians should avoid **"*comments likely to foster intolerance*"**, especially in **an electoral context which can magnify the impact of such statements**.[685]

According to the Court:

> "*64. Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic and pluralistic society. Therefore, democratic societies might in principle consider it necessary to sanction or even prevent all forms of expression which spread, incite, advocate or justify hatred based on intolerance (including religious intolerance, on condition that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued (with regard to hate speech and advocating violence, see,* mutatis mutandis, Sürek v. Turkey *(no. 1) [GC], no. 26682/95, para. 62, ECHR 1999-IV, and, in particular,* Gündüz v. Turkey*, no. 35071/97, para. 40, ECHR 2003-XI).*
>
> *73. The Court considers that incitement to hatred does not necessarily involve calling for specific acts of violence or other offences. Violations against persons committed through insulting, ridiculing or defaming sections and specific groups of the population, or incitement to discrimination – as in the present case – provide sufficient grounds for the authorities to give priority to combating racist speech when confronted with the irresponsible use of freedom of expression which undermines the dignity and safety of these segments or groups of the population. Political speeches that incite hatred based on religious, ethnic or cultural prejudices are a threat to social peace and political stability in democratic states.*

[682] Case of *Castells v. Spain*, European Court of Human Rights, Application no.11798/85, Judgement of 23 April 1992.
[683] *Féret* case, para. 64.
[684] The European Court stated that "political speech that incites hatred based on religious, ethnic or cultural prejudice is a danger for social peace and political stability in democratic states", *Féret* case, para. 73.
[685] *Féret* case, paras 75 and 76.

*75. The fact that the applicant was a member of parliament cannot be considered as a circumstance mitigating his responsibility. In this respect, the Court recalls that it is of vital importance for politicians to avoid making public statements likely to foster intolerance (*Erbakan v. Turkey*, no. 59405/00, 6 July 2006, para. 64). It considers that politicians must pay particular attention to the defence of democracy and its principles, as their ultimate objective is to assume power. In the present case, and in accordance with the detailed recommendation made by the Public Prosecutor of the Brussels Court of Appeal, the House of Representatives considered that the proscribed statements justified lifting the applicant's parliamentary immunity. The Court held that fostering the exclusion of foreigners was a fundamental violation of individual rights, and consequently, this should provide reasons for everyone, politicians in particular, to exercise particular caution.*

76. The Court attached particular importance to the means of transmission used and the context in which the proscribed words were disseminated in this case, and consequently, to their potential impact on public order and social cohesion. Yet, this was a case of leaflets being distributed by a political party during an election campaign - a form of expression aimed at reaching a broad-based electorate, namely, the overall population. Although in the context of an election, political parties should enjoy broad freedom of expression so as to try and win over their electorate, in the event of racist or xenophobic speech, such a context stokes the flames of hatred and intolerance because the positions of the running candidates become necessarily more entrenched, and stereotyped slogans or formulas tend to override reasonable arguments. The impact of a racist or xenophobic speech thus becomes greater and more harmful."

It seems to me that the scope of this judgement is particularly relevant to the Accused Šešelj's case as the Court stressed that it was incumbent on politicians to avoid making statements expressing intolerance, that incitement aiming to exclude foreigners constituted a violation of human rights and that the means of transmission used, as well as the context, have an impact on social cohesion.

It is thus not necessary to establish that the public was encouraged to commit a precise and specific act of discrimination. The scope of proscribing, which under Belgian law is fairly wide, is thus

declared legitimate and the penalty issued[686] is considered proportionate as "***the fact that the applicant was a member of parliament cannot be considered as a circumstance mitigating his responsibility***".[687] This observation could be made in relation to **Vojislav Šešelj** who cannot take refuge by claiming to be a member of parliament or a politician.

On the contrary, having recalled that political parties played a key role in forming public opinion in a democracy, the Court found that Article 10 had not been violated.[688]

Noting that the contentious leaflets clearly incited discrimination and racial hatred, it found that Article 10 had not been violated since the content of the leaflets did not provide grounds for applying Article 17. In this manner, the Court strictly limited the scope of the clause on the prohibition of abuse of rights. In principle it may therefore be considered necessary in **democratic societies** to sanction, or even prevent, all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)[689] provided that any "**formalities**", "**conditions**", "**restrictions**" or "**penalties**" **imposed** are proportionate to the **legitimate aim pursued**.[690] The mere fact that contested language might provoke a feeling of rejection and hostility towards a particular community suffices to justify a conviction for inciting discrimination, hatred and violence[691] directed at a group of people.[692]

However, it should also be pointed out that according to European jurisprudence, speech that encourages superstition, intolerance and obscurantism **cannot be characterised as hate speech**[693] if it does not incite **physical violence** and does not foster hatred of persons who do not belong to the speaker's religious community.[694] Some commentators have wondered about the meaning of this jurisprudence and asked themselves whether in this case the European Court has refused to look beyond appearances and **admit that calls to violence can be inherent in a speech**, thereby rejecting the broad definition of the notion of hate as upheld in Recommendation no. 97 (20) of the Council of Europe Committee of Ministers.[695]

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[686] The Belgian courts sentenced Mr Féret to 250 hours of community service in the sector dealing with integration of foreign nationals and declared him ineligible for ten years.
[687] *Féret* case, para. 75.
[688] *Féret* case, paras 77 to 82.
[689] *Féret* case, para. 81.
[690] Anne Weber, "Manual on Hate Speech", Council of Europe, 2009, p. 2.
[691] Laurent Pech, *Droit comparé*, para. 65, citing as an example the case of *Le Pen v. France*, European Court of Human Rights, Application no. 18788/09, Judgement of 20 April 2010.
[692] Case of *Le Pen v. France*, European Court of Human Rights, Application no. 18788/09, Judgement of 20 April 2010.
[693] Case of *Kutlular v. Turkey*, European Court of Human Rights, Application no. 73715/01, Judgement of 29 April 2008.
[694] Jean-François Flauss, "*Actualité de la Convention européenne des droits de l'homme*" (March-August 2008), AJDA no. 35/2008, p. 1929 ("Jean-François Flauss").
[695] Jean-François Flauss.

In the ***Vajnaï v. Hungary*** case,[696] the European Judges considered that a political leader displaying a political symbol at a peaceful meeting was, *a fortiori*, a form of expressing political speech. Therefore, he is afforded additional protection under Article 10 of the Convention, even if the symbol in question is a fetish from a communist totalitarian or dictatorial regime. Merely wearing the **five-pointed red star** cannot be criminally punishable on the ground that such a symbol amounts to totalitarian propaganda. More generally, the European Court considered that the prohibition of totalitarian symbols by the Hungarian Criminal Code was too broad. **It is legitimate for fascist and/or national socialist symbols, but not *de plano* for those that do not convey racist and/or xenophobic opinions.**

In accordance with the notion of a democratic society, the **European Court in Strasbourg** rejected any restrictions on freedom of expression, and more broadly, any restrictions on any other human rights resulting from public sentiment.

The criterion of **contextual impact** seems to have become predominant in the jurisprudence on incitement to hatred developed by the European Court of Human Rights.[697] That being the case, certain texts which are considered likely to incite hatred are protected under freedom of expression when their form (for example, poetic or literary form) neutralises their content or impact. Occasionally social impact has been gauged by considering the current situation and the immediacy of the risk, without there being jurisprudence on principle.
As in the Wilders case, it is necessary to take into account the impact of context. Furthermore, it would appear that the European Court has set an additional condition for hate speech whereby there can be no hate speech without calls for physical violence.

6.8. Jurisprudence of the Inter-American Court of Human Rights

Article 13 of the American Convention on Human Rights defines freedom of expression very narrowly:

> "2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent

[696] Case of *Vajnaï v. Hungary*, European Court of Human Rights, Application no. 33629/06, Judgement of 8 July 2008.
[697] Léon-Louis Christians, p. 5.

necessary to ensure: a. respect for the rights or reputation of others; or b. the protection of national security, public order, or public health or morals.

3. The right of expression **may not be restricted by indirect methods or means**, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offences punishable by law."

According to its interpretation of Article 13 of the American Convention on Human Rights and a line of reasoning which is a hybrid of the civil and common law conceptions, the Inter-American Court of Human Rights protects freedom of expression in two cases:

Article 13 of the American Convention on Human Rights may be violated in the event of "radical suppression" of freedom of expression which occurs when governmental power puts in place the means of impeding the spread of information, ideas or opinions.[698] Examples of this type of violation are prior censorship, the seizing or barring of publications and any procedure that subjects the expression or dissemination [of information] to governmental control.[699] In such cases, "*the violation is extreme not only in that it violates the right of each individual to express himself, but also because it impairs the right of each person to be well informed, and thus affects one of the fundamental prerequisites of a democratic society.*"[700]

[698] Rodolfo Brenes Vargas. p. 2.
[699] IACHR, Advisory Opinion of 13 November 1985 OC-5/85, para. 54.
[700] IACHR, IACHR, Advisory Opinion of 13 November 1985 OC-5/85, para. 54.

A violation of Article 13 of the IACHR occurs when restrictions are imposed which go beyond the limits allowed for by the Convention.[701] In fact, freedom of expression is not absolute; it must be exercised in a responsible manner and its abuse may be subject to subsequent imposition of liability.[702] However, these limits must be strictly necessary if they are to be prevented from becoming an obstacle to the full exercise of freedom of expression or a direct or indirect means of prior censorship.[703] Liability may be subsequently imposed for the exercise of freedom of expression provided the following three cumulative requirements have been met: **the grounds for liability have been previously established, that is to say, they were given an express and precise definition by law (principle of legality), the ends they seek to achieve are legitimate, and the grounds of liability are necessary to ensure the aforementioned ends**.[704] This reasoning is similar to that of the ECHR according to which any subsequent imposition of liability for abuse of freedom of expression must be prescribed by law and have the objective of guaranteeing respect for the rights or reputation of others, protecting national security, public order, public health and morality, and be "necessary" and proportionate for the purpose of achieving the desired end (which is a factor to be assessed in the light of the need for a democratic society).[705]

Particular attention should be paid to the Judgement of 31 August 2004 in the case of ***Ricardo Canese v. Paraguay***.[706] Mr **Canese**, a candidate in the presidential elections of 1993, told the media that his opponent, **Juan Carlos Wasmoy,** had become rich during **Alfredo Stroessner's** dictatorship. He was charged with the offences of **slander and defamation** and sentenced in the first instance for both offences. However, the appellate court modified the decision and only upheld the charge of slander.

The Inter-American Court of Human Rights placed particular emphasis on the importance of an open debate in the context of democratic elections. It considered that "*[e]veryone must be allowed to question and investigate the competence […] [of the candidates] and [compare] proposals, ideas and opinions so that the electorate may form its opinion in order to vote*".**[707]** If freedom of expression is one of the fundamental preconditions for the existence of a democracy, it must be afforded special protection in times of paramount importance to the existence and survival of such a

[701] IACHR, IACHR, Advisory Opinion of 13 November 1985 OC-5/85, para. 35.
[702] Rodolfo Brenes Vargas, p. 4.
[703] IACHR, Advisory Opinion of 13 November 1985 OC-5/85, paras 35 to 39.
[704] IACHR. Advisory Opinion of 13 November 1985 OC-5/85, para. 39; IACHR, *Herrera Ulloa v. Costa Rica*, 2 July 2004.
[705] Rodolfo Brenes Vargas, p.2.
[706] Case of *Ricardo Canese v. Paraguay*, IACHR, Series C no. 111, Judgement of 31 August 2004 ("Case of *Ricardo Canese v. Paraguay*").
[707] Case of *Ricardo Canese v. Paraguay*, para. 90.

political system, namely, when presidential elections are held. Within this particular context, debates must be free, open and vigorous. Discussing issues of interest to society should not be impeded, not even indirectly. However, the Judges of the Court set strict limits to this concession, recalling that in the instant case the "*statements referred to matters of public interest*"**[708]** and that "*there was no imperative social interest that justified the punitive measures*".**[709]**

6.9. Jurisprudence of the African Commission on Human and Peoples' Rights

The African Charter does not contain any direct references to inciting national, racial or religious hatred, but stipulates that "***[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest***".[710]

In addition, the last section of Article 9, paragraph 2 – "*within the law*" – seems to contradict the previously affirmed right and is a particularly restrictive clause governing violations. The African Commission also recognised limits to freedom of expression. In accordance with its interpretation of Article 9 of the Charter, it states the following: "*Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society*."[711]

The rules on freedom of opinion are less clear. Freedom of opinion as such is not in fact explicitly recognised, but the African Commission endorses it indirectly by invoking freedom of conscience - provided for under Article 8 of the African Charter – as a substitute.[712] However, the African Commission has never yet made a ruling that directly concerns a violation of freedom of opinion as such, and therefore, the question of its limits remains undecided.

The Declaration of Principles of Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights, only refers to restrictions on the exercise of freedom of expression for the purpose of protecting the reputation of others.[713] On the other hand, it does not

[708] IACHR, *Ricardo Canese v. Paraguay*, 31 August 2004, Series C no. 111, para. 106.
[709] IACHR, *Ricardo Canese v. Paraguay*, 31 August 2004, Series C no. 111, para. 106.
[710] African Charter of Human and Peoples' Rights, Article 27, para. 2.
[711] Declaration of Principles on Freedom of Expression in Africa II. 2.
[712] However, in the *John D. Ouko v. Kenya* case, the applicant alleged that he had been forced to flee his country "*due to his political opinions*" (para. 2). But the African Commission did not take this opportunity; it based its reasoning on Article 9, and followed an approach falling under freedom of expression by considering that the Government had resorted to disproportionate measures (arresting the applicant, detention without trial, and inhumane or degrading treatment), although it could have opted for a procedure for defamation (*John D. Ouko v. Kenya*, Communication no. 232/99, 6 November 2000, 14th Activity Report, para. 28).
[713] Declaration of Principles on Freedom of Expression in Africa, Article 12.

accept restrictions on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

6.10. Hate speech and national legislation

It is necessary to review **protection against hate speech in a number of countries.**

6.10.1. France

In France, Article 11 of the Declaration of the Rights of Man and of the Citizen states that a person shall be held accountable for "*the abuse of this liberty in cases determined by law*".[714] Abuse is constituted by violations of individual rights, human dignity or certain fundamental public rights. Hate speech and racist speech also constitute an abuse of freedom of expression.
Since the Decree Law of 21 April 1939, known as the "*Marchandeau*", anti-racist law in France has never ceased evolving, passing through strictly defined categories to embrace broader ones.[715] As most of these offences pertain to discriminatory speech and not to discriminatory acts as such, they come within the ambit of the exceptional provisions of the **Law of 29 July 1881 on freedom of the press**, which was itself amended as legislation evolved and provides for a number of punishable offences involving racist speech committed through the press.[716]

It should be noted that the commission of these types of crimes presupposes a certain degree of publicity.[717] In this case, **the means** through which **these offences** may be committed are clearly set out under Article 23 of the Law of 1881, and include "*speeches, shouts or threats expressed in public places or meetings, or by written words, printed matter, drawings, engravings, paintings, emblems, pictures or any other written, spoken or pictorial aid, sold or distributed, offered for sale or displayed in public places or meetings, either by posters or notices displayed for public view or by any other means of electronic communication*".[718]

Defamation in the strict sense of the term is defined under Article 29 of the Law of 1881 as "*any statement or allegation which undermines the honour or reputation of the person or body to which*

[714] Declaration of the Rights of Man and of the Citizen of 1789, Article 11.
[715] This Decree Law of 21 April 1939 "*sanctioned the defamation of persons belonging to a specific race or religion when its purpose was to arouse hatred among citizens or inhabitants*", Patrick Auvret, *Messages racistes*, para. 6.
[716] Law of 29 July 1881 on freedom of the press, last amended on 24 July 2010 ("Law of 29 July 1881").
[717] Article R. 625-7 stipulates that when incitement to racial hatred is not public, it is an offence of the 5th category.
[718] Law of 29 July 1881, Article 23, amended by Law no. 2004-575 of 21 June 2004. Such acts amount to incitement to commit acts of discrimination if they produce an effect.

the act is attributed".[719] Thus, public defamation as provided for under Article 32 of the said Law is subject to special and harsher sanctions when it is committed "*against a given person or group of persons on account of their origin or membership or non-membership in an ethnic group, nation, race or particular religion*".[720] Therefore, a person who has committed defamation cannot exonerate himself by providing evidence of the truth of his allegations or by claiming that he acted in good faith.[721]

A racial insult (Article 33, paragraph 3, of the Law of 1881) means "*any expression causing outrage or any term of contempt or abuse*" which, as opposed to defamation, "*does not involve the allegation of a specific fact*".[722] A racial insult is a specific offence subject to harsh penalties,[723] which the *Cour de Cassation* defines in very broad terms.[724]
The offence of "inciting racial hatred"[725] (Article 24, paragraph 6, of the Law of 1881) aims at punishing "*any person who [publicly] incites discrimination, hatred or violence with regard to a person or group of persons by reason of their origin or their membership or non-membership in an ethnic group, nation, race or particular religion*".[726]

As "direct" provocation is not stipulated in the legislation, the courts and tribunals have been able to convict for indirect provocation.

In a broader sense and without considering the discriminatory aspect of the act, any person who publicly and "directly" incites the commission of a crime may be subject to severe penalties.
Under recent legislation, **incitement to commit genocide** is subject to specific and **harsh** sanctions.[727]

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[719] Under Article R. 624-3 of the Criminal Code, defamation on grounds of race, religion, ethnicity or nationality not carried out in public is an offence of the 4th category.
[720] Up to one year in prison and a fine of 45,000 euros, or only one of the two sanctions, instead of a fine of 12,000 euros for so-called simple defamation.
[721] Law of 29 July 1881, Article 32, amended by Law no. 2004-1486 of 30 December 2004.
[722] Law of 29 July 1881, Article 29.
[723] Up to six months in prison and a fine of 22,500 euros instead of 12,000 for simple insults.
[724] *See* for example the *Cour de Cassation* Appeal Judgement of 16 February 2007, Appeal no. 06-81785. In the case of the comedian Dieudonné, the Court held that identifying Jews with a "*sect*" and "*fraud*" constituted a racial insult "*the sanctioning of which is a necessary restriction to freedom of expression in a democratic society*".
[725] Under Article R. 625-7 of the Criminal Code, inciting discrimination, hatred or violence on grounds of race, ethnicity, nationality or religion, when such incitement is not public, is an offence of the 5th category. Added by Law no. 72-545 on "Combating Racism" of 1 July 1972 (known as the Pleven Law), and punishable with one year in prison and a fine of 45,000 euros, or with only one of the two penalties.
[726] Law no. 2004-1486 of 30 December 2004 - establishing a high authority to combat discrimination and protect equality - prohibited speech which incites discrimination, hatred or violence directed at persons on grounds of their sex, sexual orientation or handicap.
[727] Article 211-2 of the Criminal Code (Law no. 2010-930 of 9 August 2010): "*Public and direct incitement, through any means, to commit genocide is punishable with life imprisonment if such incitement was acted on. In the event that such incitement was not acted on, it is punishable with seven years in prison and a fine of 100,000 euros*." Genocide is defined in Article 211-1 of this Criminal Code (Law no. 2004-800 of 6 August 2004): "*Genocide occurs where, in the*

Although a list is provided of the categories of people protected by the criminalisation of such acts, it only appears to be exhaustive and the jurisprudence could have broadened the notion of groups "*not belonging to […] a nation*" to include "*immigrants*" in general as a group not belonging to the French nation.[728]

The law of 13 July 1990, known as the "**Gayssot law**",[729] is one of the few European laws making **revisionism** a punishable offence. Article 24 *bis*, appended to the Law of 1881, makes it an offence, punishable by one to five years' imprisonment and/or a fine of 45,000 euros, "*to* ***question****, by any of the means set out in Article 23, the existence of one or more crimes against humanity - as defined by Article 6 of the International Military Tribunal Charter annexed to the London Agreement of 8 August 1945 - committed either by a member of an organisation declared to be criminal under Article 9 of the said charter, or by a person found guilty of such crimes by a French or international court*".

Although it is only questioning crimes against humanity committed during the Second World War that is made a criminal offence, the law nevertheless specifies that "*questioning one or more crimes against humanity*" should be taken to mean "*denying, doubting or trivialising them*"[730] or holding any discussions that cast doubt on their reality.[731]

According to the jurisprudence, the crime of questioning crimes against humanity can involve questioning the conditions under which the facts were studied (trivialising the facts, discrediting institutions and testimonies on the subject, disputing the meaning of words, etc.), as well as questioning the facts themselves (casting doubt on the final solution, the number of victims[732] and the cause of their death).[733]

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enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed, or caused to be committed, against members of that group: wilful attack on life; serious attack on psychic or physical integrity; subjection to living conditions likely to entail the partial or total destruction of that group; measures aimed at preventing births; enforced child transfers."

[728] Crim. 24 June 1997, Crim. Bull. no. 253.

[729] Bertrand de Lamy, *Jurisclasseur Communication*, Fasc. 3160: *Révisionnisme*. *See* also Law no. 90-615 of 13 July 1990 under which any racist, anti-Semitic or xenophobic act is a punishable offence.

[730] *JO Sénat*, report submitted on behalf of the Law Commission, no. 337, p. 56.

[731] Thus the expressions "*alleged holocaust*" and "*alleged gas chambers*" are classified as offences (Paris Court of Appeal, 21 May 1992: JurisData no. 1992-021334 – Paris Court of Appeal, 27 May 1992: JurisData no. 1992-021860; Gaz. Pal. 1992, 2, *somm.* p. 321).

[732] According to the *Cour de Cassation*, "*although questioning the number of victims of the extermination policy in a specific concentration camp does not fall within the ambit of Article 24* bis *of the Law of 29 July 1881, drastically minimising this number amounts to the crime of denying crimes against humanity, as prescribed and sanctioned by the said article, when this is done in bad faith*" (*Cour de Cassation*., 17 June 1997, no. 94-85.126 - solution confirmed by the *Cour de Cassation*, 29 January 1998, no. 98-88.200). However, it also specified that "*merely referring to a number of victims that might be far lower than even the most moderate estimates does not constitute a denial of crimes against*

According to the Paris Court of Appeal, questioning crimes against humanity is one of the most serious forms of racial defamation closely linked to inciting hatred and dishonouring the memory of victims.[734]

The Human Rights Committee[735] has found that making the denial of the holocaust a criminal offence under French law is consistent and in conformity with Article 20 of the ICCPR, while the European Court has found it to be consistent with Article 10 of the ECHR.[736]

After the Second World War, under the law of 5 January 1951, it is a criminal offence to **justify** crimes committed during this conflict, namely, war crimes and the crime of collaborating with the enemy and, under the law of 31 December 1987, to justify crimes against humanity.

According to Article 24, paragraph 3: "*Any person who resorts to one of the means referred to in Article 23 to justify the crimes set out in the first paragraph, war crimes, crimes against humanity or the crime and offence of collaborating with the enemy, shall be subject to the same penalties (five years in prison and a fine of 45,000 euros).*"[737]

The jurisprudence defines justification - within the meaning of Article 24, paragraph 3, of the Law of 29 July 1881 - very broadly.[738] It is in fact **not necessarily synonymous with praise or direct incitement**.[739] The *Cour de Cassation* held that the following constitutes a justification of war crimes: attempting to justify murder or assassination committed during the Second World War by the Nazis,[740] inciting the reader to judge favourably the leaders of the German National Socialist Party convicted by the International Tribunal in Nuremberg as war criminals - which represents an

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humanity as prescribed by law, which law does not define the number of victims as a constitutive element of the offence, neither directly nor through the decisions to which it refers" (*Cour de Cassation*, 17 June 1997: D. 1998, jurispr. p. 50, note J.-Ph. Feldman; Rev. sc. crim. 1998, p. 577, obs. J. Francillon). "*The bad faith of the defendant*" is the element of crucial importance.

[733] Paris Court of Appeal, 16 December 1998: JurisData no. 1998-024112; *Légipresse* 1999, no. 159, III, p. 30.

[734] Paris Court of Appeal, 16 December 1998, *Garaudy*, several appeal judgements.

[735] HRC, *Robert Faurisson v. France*, Application no. 550/1993, 2 January 1993, UN Doc. CCPR/C/58/D/550/1993 (1996), published in the Report of the Human Rights Council, Vol. II GAOR, 52nd session, Supp., no. 40, UN Doc. A/52/40, Appendix (1999) 84.

[736] Decision of the European Commission of Human Rights on the admissibility of the application, *Marais v. France*, no. 31159/96, 24 June 1996: in response to the applicant's argument that making the denial of the holocaust a criminal offence under French law was a violation of Article 10, para. 2, of the ECHR, the Commission considered that "*the applicant's article runs counter to the basic ideas of the Convention [...] namely justice and peace*" (para. 190).

[737] Wilful attacks on life, wilfully causing bodily injury and sexual assault, as defined in Book II of the Criminal Code; theft, extortion and wilful destruction, defacement and damage endangering persons, as defined in Book III of the Criminal Code.

[738] The crime of justifying crimes against humanity may be committed simply by tracing a swastika on the front of a kosher grocery shop in a public street, Patrick Auvret, *Messages racistes*, para. 39.

[739] Paris Court of Appeal, 11th Correctional Chamber, 25 April 2003.

[740] *Cour de Cassation*, 11 February 1954, Crim. Bull no. 71.

attempt to justify their crimes, even if only partially[741] - and attempting to justify the use of torture or summary executions on account of their effectiveness.[742]

Article 14 of the law of 16 July 1949 on publications that represent a danger for youths provides that restrictions may be imposed on licentious or pornographic publications, or on publications in which crime, violence, discrimination or racial hatred, incitement to use, possess or traffic in drugs, feature prominently. Such restrictions may also be imposed on cinematographic or audio-visual material.[743]

The French laws governing sanctions for inciting racial hatred[744] or for defamation and insults on grounds of the race or religion of victims are consistent with the Convention. The European Court recognised that Article 10, paragraph 2, can be interpreted to mean that there is "*an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs*".[745]

6.10.2. Italy

In Italy, the only limits the Constitution explicitly sets to freedom of expression relate to accepted standards of behaviour.[746] However, the Constitutional Court has recognised implicit limits stemming from the constitutional protection of the legal status of individuals or social groups or from the need to protect public interests.[747] What makes these limits legitimate is the fact that it is not the mere expression of opinions that is sanctioned under these proscribed provisions, but rather "***incitement to act or initiate action***".[748] Prior to the entry into force of the new anti-racist laws, the Constitutional Court made a point of specifying that for the conduct in question to be considered as punishable it had to be **such that it led to the commission of the offences**.[749]

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[741] *Cour de Cassation*, 14 January 1971, Crim. Bull no. 14.
[742] *Cour de Cassation*, Application no. 03-82832, 7 December 2004.
[743] Law no. 89-25 of 17 January 1989 amending Law no. 86-1067 of 30 September 1986 concerning freedom of communication.
[744] ECHR, *Seurot v. France*, 18 May 2004, Application no. 57383/00; ECHR, *Soulas v. France*, 10 July 2008, Application no. 15948/03.
[745] ECHR, *Giniewski v. France*, 31 January 2006, Application no. 64016/00, para. 43. However, such a threshold had not been reached in this case.
[746] The current Italian Constitution was promulgated on 27 December 1947 and entered into force on 1 January 1948; Article 21: "*Publications, performances and other exhibits offensive to public morality shall be prohibited. Measures of prevention and repressive measures against such violations shall be established by law*."
[747] Andreana Esposito, pp. 403 to 414.
[748] *Corte Costituzionale*, 2 May 1985, 1985, no. 126, in *Giurisprudenza Costituzionale*, 1985, p. 894 *et seq*.
[749] *See*, in particular, *Corte Costituzionale*, 23 April 1974, no. 108, in *Rivista Italiana di Diritto e Procedura Penale*; *Corte Costituzionale*, 4 May 1970, no. 65, in *Giustizia Costituzionale*, 1970.

As a result of the deep scars left by fascism and the Second World War, the laws adopted included very substantive provisions on punishing hate speech,[750] in addition to more general proscribed provisions.[751] The so-called **"Scelba Law"**[752] prohibits the reorganisation of the dismantled fascist party in any form whatsoever (Article 1) and makes justifying fascism (Article 4), instigation and using any form of expression characteristic of the dismantled fascist party (Article 5) an offence.[753] The legislation, which adopted the international convention on genocide, penalises **public incitement and the justification of genocide**.[754] There are two conflicting interpretations with regard to determining the link between the speech and the crimes to be committed. According to the Constitutional Court, justifying one or several crimes (Article 414, paragraph 3, of the Criminal Code) is only punishable when it is no longer the mere expression of an opinion but, in view of the form it takes, amounts to **an act that is likely to incite** the perpetration of crimes.[755] On the other hand, the Court of Cassation holds that - given its intolerable inhumanity and the odious cult of racist intolerance of which it is an expression - justifying genocide must be sanctioned **regardless of whether the existence of a concrete threat** to incite genocide has been **demonstrated**.

Although punishing hate speech is of fundamental importance in Italy, less severe penalties were recently introduced under Law no. 85/2006, which provides a narrower definition of hate speech and reduces the maximum sentence.[756] Thus, the following acts shall be punishable: "**propaganda**",[757] through any means, **of ideas based on the superiority of a race or on racial or ethnic hatred**;[758] "**instigation**"[759] **to commit, or the commission of, acts of discrimination** on

[750] It should be noted that Article 2 of Decree Law no. 122/93 introduced two new offences: on the one hand, it is an offence for anyone to exhibit or display visibly at public meetings the characteristic or customary symbols of organisations, associations, movements or groups referred to in Article 3 of Law no. 654/75; and, on the other hand, it is an offence to enter places where sports events are being held with these emblems and symbols. Under Article 3 of the Decree Law, committing such acts for reasons of discrimination or ethnic, national, racial or religious hatred constitutes an aggravating circumstance.

[751] Articles 414 and 415 of the Criminal Code prohibit incitement to commit crimes and break the law. Articles 594 and 595 of the Criminal Code sanction insult and defamation, and consider that the mere fact of insulting a person for belonging to a particular racial group may demonstrate that a person's honour and reputation have been insulted. Articles 402 to 405 contain specific provisions relating to expressing contempt for and insulting religions. Finally, inciting and assisting suicide is sanctioned under Article 580 of the Criminal Code.

[752] Law no. 645/52 of 20 June 1952 ("Scelba Law").

[753] Andreana Esposito, p. 408.

[754] Article 8 of Law no. 962/67 adopting the Convention against genocide: "*Whoever publicly incites to commit any crimes provided for under Articles 1 to 5 shall be punished, simply because of the instigation, with imprisonment from three to 12 years. The same penalty applies to anyone who publicly advocates any of the crimes enumerated in the preceding paragraph.*"

[755] *Corte Costituzionale*, 4 May1970, no. 65, in *Giustizia Costituzionale*, p. 1955 *et seq*.

[756] The initial punishment of three years' imprisonment was reduced to a fine of 6,000 euros or 18 months' imprisonment.

[757] But no longer dissemination.

[758] Article 3, paragraph 1 (a), of amended Law no. 654/75.

[759] But no longer "incitement".

racist, ethnic, national or religious grounds;[760] **incitement to racist violence**, namely, any behaviour that incites violence or the commission of acts of violence, or acts that incite violence on grounds of race, ethnicity, nationality or religion;[761] and finally, **being a member of a racist group**.[762]

This new definition seems to confirm the interpretation of the Italian Court of Cassation which holds that for an act to constitute the offence of inciting the commission of violent acts on grounds of race, it is of little consequence that the defendants did not have incitement in mind.[763] Thus, the Court of Cassation took into account the danger of having aggressive messages incompatible with the fundamental values of any democratic society in circulation.[764] Furthermore, the Court of Cassation considered that incitement to racial discrimination constitutes a potential case of "indirect incitement" and amounts to incipient action. Thus, for the Court of Cassation, incitement - which, depending on the form it takes, is conduct likely to cause acts of discrimination or violence - is subject to punishment.[765]

Italian laws against hate speech should thus make it possible to punish not only acts inciting racial discrimination or the commission of discriminatory acts, but also opinions and their dissemination when they are the expression of racist intolerance. Although that may be the case, the increase in the number of political hate speeches has been denounced by international and European observers,[766] which makes one doubt whether these laws are being applied in full. Nevertheless, it is necessary to point out that there have been a few exemplary convictions.[767]

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[760] Up to one and a half years in prison or a fine of 6,000 euros.

[761] Article 3, paragraph 1 (b), of Law no. 654/75.

[762] Article 3, paragraph 3, of Law no. 654/95: "*Any person who is part of such an organisation, association, movement or group, or lends assistance to their activities, shall be sentenced to between six months and four years in prison on account of his participation or assistance. Any person who encourages or is in charge of such an organisation, association, movement or group shall be sentenced, for this very reason, to between one and six years in prison*."

[763] *Cassazione penale*, 26 November 1997, in *Cassazione penale*, p. 983. In this judgement, the Court of Cassation upheld the conviction of the applicant, under Article 3 (b) of Law 654/75, for having displayed a banner with the inscription "Billions in the ghetto and the suburbs?" at a football match in the Olimpico stadium in Rome and for having burnt a flag with the star of David at the same time.

[764] *Cassazione penale*, 7 May 1999, in *Rivista penale*, p. 725: "*In the appeal judgement in question, the Court of Cassation quashed and referred the judgement against which the applicants had appealed. The appealed judgement was quashed on the grounds of the new legal qualification that the court believed it had applied to the criminal conduct for which courts of first and second instance had issued convictions. The trial and appeal courts had convicted the applicants for having established, organised and led a movement known as the National Front, which had anti-democratic objectives characteristic of the fascist party (a crime under Articles 1 and 2 of the so-called Scelba law). The Court considered that the characteristics of the conduct in question fell within the scope of Article 1, paragraph 3, of Law 654-75, which sanctions the establishment of organisations whose aims include inciting racial discrimination*" (Andreana Esposito, pp. 412 and 413).

[765] Andreana Esposito, pp. 412 and 413.

[766] *See* the report of Thomas Hammaberg, Council of Europe Commissioner for Human Rights (2009) 16, 16 April, and the Third ECRI Report on Italy adopted on 16 December 2005 – Council of Europe (CRI) (2006) 19 ("Third ECRI Report on Italy"), para. 86: the ECRI reported that locally and nationally elected representatives of the Northern League had intensified their racist and xenophobic discourse in the political arena, and were mainly targeting immigrants and

6.10.3. Denmark

In **Denmark**, freedom of expression is particularly well protected under Danish law, to the extent that punishing racist speech is less prevalent than in other European states.[768]

In addition to the criminal standards in general law regarding insult to honour[769] and defamation,[770] paragraph 266 (b) of the Danish criminal code contains without a doubt the most important provisions penalising racist speech. Under this paragraph, any person who **publicly or with the intention of wider dissemination** expresses and spreads racial hatred, that is to say, **makes statements that threaten, insult or degrade on account of race, colour, national or ethnic origin, religion or sexual inclination**, is liable to punishment.[771]

These provisions were rarely applied as they were given a narrow interpretation in light of the constitutional guarantee of the freedom of expression.[772] However, on several occasions, courts have convicted journalists for aiding and abetting the propagation of racial hatred by giving extremists the opportunity to spread racist messages.[773]

A journalist working for Danish radio and television gave members of a group of young extremists known as the "Green Jackets" the opportunity to express themselves in a documentary. While the

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minorities such as Roma, Sinti and, above all, Muslims. In some cases, this discourse consisted of "*generalisations concerning these minority groups or in their humiliating and degrading characterisation*"; members of these groups have even been presented as a threat to security, public health and the preservation of local or national identity, and such discourse has even taken the form of propaganda aimed at holding non-citizens, Roma, Sinti, Muslims and other minority groups collectively responsible for a deterioration of security in Italy. The ECRI therefore denounced a number of cases of incitement as discrimination, violence and hatred.

[767] Third ECRI Report, para. 87: "*[I]n December 2004, the first instance Court of Verona found six local members of the Northern League guilty of incitement to racial hatred in connection with a campaign organised in order to send a group of Sinti away from a local temporary settlement. These persons were sentenced to six-month jail terms, the payment of 45,000 euros for moral damages and a three-year suspended ban from participating in campaigns and running for national and local elections*."

[768] Third ECRI Report on Denmark – Council of Europe (CRI (2006) 18), adopted on 16 December 2005 ("Third ECRI Report on Denmark"), para. 18.

[769] Under paragraph 267 of the Criminal Code, it is an offence to insult the personal honour of another by offensive words or conduct, or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens. Disseminating the insult widely is considered as an aggravating circumstance.

[770] Under paragraph 268 of the Criminal Code, defamation is an offence defined as making or disseminating malicious allegations, or making an allegation without any reasonable ground to regard it as true. However, Article 269 provides that any person making such an allegation shall not be subject to punishment if its truth has been established or if it was made in good faith.

[771] Under Article 179, paragraph 2, of the Code of Criminal Procedure, proceedings for the crime of disseminating racial hatred shall be initiated *proprio motu*, and the crime is punishable with up to two years in prison.

[772] Legal measures to combat racism and intolerance in the member States of the Council of Europe.

[773] Legal measures to combat racism and intolerance in the member States of the Council of Europe, p. 7, citing UfR 1980 1065, and in particular, UfR 1989 389.

young racists were convicted for expressing and spreading racial hatred, the journalist himself was convicted by the Danish courts for aiding and abetting by disseminating the racist statements. The Danish Supreme Court (Højesteret) upheld this conviction in an appeal judgement rendered on 13 February 1989, according to which protection against racial discrimination constituted a valid restriction of freedom of expression.[774]

The European Court of Human Rights distinguished between the protagonists on the basis of their role. Thus, acting in the capacity of a *journalist* was a significant feature: *"[T]he applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme […]."*[775] According to this high court, the journalist had respected freedom of expression which consists of disseminating information, allowing the press to play its role of "*public watchdog*". The ECHR therefore considered that **Denmark** had violated Article 10. On the other hand, the Court stated that the unacceptable remarks of the three youths were more than insulting to the members of the targeted groups and did not enjoy the protection of Article 10 of the ECHR.[776]

Under Danish law, the intention to spread propaganda constitutes an aggravating circumstance in the case of expressing and spreading racial hatred;[777] propaganda is taken to mean the intent to influence a section of the population, particularly by using mediums that make it possible to reach a broad part of the population.[778]

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[774] "*The defendants have caused the publication of the racist statements made by a narrow circle of persons and thereby made those persons liable to punishment and have thus, as held by the City Court and the High Court, violated Article 266 (b) in conjunction with Article 23 of the Penal Code. [We] do not find that an acquittal of the defendants could be justified on the ground of freedom of expression in matters of public interest as opposed to the interest in the protection against racial discrimination. [We] therefore vote in favour of confirming the judgement [appealed from]*," quoted in the *Jersild v. Denmark* Judgement, European Court of Human Rights, Series A/298, Judgement of 23 September 1994 ("*Jersild* Judgement"), para. 17.
In order to justify this decision, Judge Herman set out the grounds in the Judicial Review (*Ugeskrift for Retsvoesen*), 1989, p. 399, published on 20 January 1990: "*[T]he majority had attached importance to the fact that they had caused the racist statements to be made public. The applicant's item had not been a direct report on the meeting. He had himself contacted the three youths and caused them to make assertions such as those previously made in Information, which he knew of and probably expected them to repeat. He had himself cut the recording of the interview, lasting several hours, down to a few minutes containing the crude comments. The statements, which would hardly have been punishable under Article 266 (b) of the Penal Code had they not been made to a wide circle (*"videre kreds"*) of people, became clearly punishable as they were broadcast on television on the applicant's initiative and with Mr Jensen's approval. It was therefore beyond doubt that they had aided and abetted the dissemination of the statements*."

[775] *Jersild* Judgement, para. 31.

[776] *Jersild* Judgement, para 35.

[777] Article 266 (b), paragraph 2, of the Penal Code.

[778] Legal measures to combat racism and intolerance in the member States of the Council of Europe, p. 8. The jurisprudence considers that the statements made on television (U 1999 1113) and providing information on an internet site (U. 2003.1428Ø) constitute such an aggravating circumstance.

However, although specific provisions were adopted in order to prevent the dissemination of hate messages through the media,[779] the ECRI notes with regret that certain politicians, in particular members of the Danish People's Party and a part of the media, continue to make "***incendiary statements about Muslims***".[780] It added that they were largely responsible for the growing climate of intolerance and xenophobia in Denmark.[781]

The case of the Mohammed cartoons is particularly revealing with regard to the scope of freedom of expression allowed in Denmark, which is modest when compared to many other European countries.[782]

6.10.4. Serbia

Article 46 of the Constitution of the **Republic of Serbia** of 30 September 2006 provides that generally "[f]reedom of expression may be restricted by law if necessary to protect the rights and reputation of others, uphold the authority and objectivity of the court and protect public health, the morals of a democratic society and the national security of the Republic of Serbia". However, Article 1 of the Constitution provides that the "Republic of Serbia is a state of Serbian people and all citizens who live in it", thereby - according to the ECRI - "indirectly distinguishing between a native population (Serbs) and other citizens […]".[783]

The Constitution of Serbia is marked by the desire to avoid repeating the mistakes of the 20th century and imposes restrictions on freedom of expression when it is used to disseminate an ideology of hatred.[784] Article 49 of the Constitution explicitly provides that "any inciting of racial,

[779] *Ibid*., p. 10. According to Article 5, paragraph 3, of Decree 2003/350 on the Danish Radio Broadcaster, Article 3, paragraph 3, of Decree 2003/1031 on the TV 2 broadcaster and Article 4, paragraph 3, of Law 2004/104 on local radio broadcasting, inciting hatred on the programmes is prohibited.
[780] Third ECRI Report on Denmark, para. 105.
[781] Third ECRI Report on Denmark, para. 104.
[782] "*In September 2005, with the stated intention of verifying whether freedom of speech was respected in Denmark, a widely-read Danish newspaper called on cartoonists to send in caricatures of the Prophet Mohammed; such drawings are considered to be offensive by many Muslims. This newspaper thus published 12 such cartoons, one of which portrayed the Prophet as a terrorist. The issue has caused widespread condemnation and a protest march was organised in Copenhagen as a result. The fact that, according to a survey carried out regarding the publication of these drawings, 56% of the respondents felt that it was acceptable is a testimony of the current climate in Denmark. ECRI considers that the goal of opening a democratic debate on freedom of speech should be met without resorting to provocative acts that can only predictably elicit an emotional reaction*" (Third ECRI Report on Denmark, para. 89).
[783] ECRI Report on Serbia adopted on 23 March 2011 (Fourth Monitoring Cycle) – Council of Europe (CRI (2011)21) ("Fourth ECRI Report on Serbia"), published on 31 May 2011.
[784] Nevertheless, it should be noted that the Yugoslav constitutions of 1963 and 1992 also allowed for such restrictions to freedom of expression when it was used to incite hatred. Thus, Article 40 of the Constitution of the Socialist Federal Republic of Yugoslavia of 7 April 1963 provides that "*freedoms of speech and public expression […] shall not be used by anyone […] to disseminate national, racial or religious hatred or intolerance or to incite to crime*". In addition, Article 38 of the Constitution of the Federal Republic of Yugoslavia, adopted on 5 April 1992, provides that "*no one*

ethnic, religious or other inequality or hatred shall be prohibited and punishable". In addition, Article 50 allows for restrictions on the freedom of the media when "this is necessary in a democratic society to prevent … propagation of war, or instigation to direct violence, or to prevent advocacy of racial, ethnic or religious hatred [i]nciting discrimination, hostility or violence".

Nevertheless, such constitutional provisions notwithstanding, Serbia was slow to adopt adequate legislation.[785] The ECRI in fact invited Serbia to adopt strict legal provisions against hate speech. Following the Law on Public Information of 2003,[786] the Law on the Prohibition of Discrimination, adopted on 26 March 2009, sanctions the following acts and speech acts:[787]

- victimisation;[788]

- hate speech;[789]

- "severe forms of discrimination" which are constituted by inciting hatred on the grounds of national, racial or religious affiliation, or language; discriminatory acts or acts advocating or exercising discrimination on the part of State organs, or in the course of proceedings conducted before State organs; advocating discrimination through public organs; advocating slavery, trafficking in human beings, apartheid, genocide and ethnic cleansing.[790] In accordance with these provisions, the Criminal Code provides that inciting national, racial or religious hatred or intolerance may be punishable with up to **ten years in prison**.[791] Nevertheless, **hate speech as such**

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may prevent the distribution of the press or dissemination of other publications unless it has been determined by a court decision that they […] foment national, racial or religious intolerance and hatred".

[785] Report compiled by the Human Rights Commissioner, Thomas Hammarberg, on his visit to Serbia (13-17 October 2008), 11 March 2009 ("Hammarberg Report on Serbia").

[786] Article 38 (Ban on Hate Speech) of the Law on Public Information (2003) provides as follows: "*It is unlawful to publish ideas, information or opinions that encourage discrimination, hatred or violence against people or a group of people by reason only of their belonging or not belonging to a particular race, religion, nation, ethnic group, sex or because of their sexual orientation, regardless of whether a criminal act was committed as the result of such publication*."

[787] *See* also the Fourth ECRI Report on Serbia, para. 20.

[788] Article 9 (The Prohibition of Calling to Account): "*Discrimination shall exist if an individual or a group of persons is unwarrantedly treated worse than others are treated or would be treated, solely or predominantly on account of requesting or intending to request protection from discrimination, or due to having offered or intending to offer evidence of discriminatory treatment*."

[789] Article 11 (Hate Speech).

[790] Article 13 (Severe Forms of Discrimination).

[791] Article 317 (Instigating National, Racial and Religious Hatred and Intolerance) of the Criminal Code of the Republic of Serbia (which, moreover, includes the crimes contained in the Rome Statute), entered into force in January 2006:
"*(1) Whoever instigates or exacerbates national, racial or religious hatred or intolerance among the peoples and ethnic communities living in Serbia, shall be punished by imprisonment of six months to five years.*
(2) If the offence specified in paragraph 1 of this Article is committed by coercion, maltreatment, compromising security, exposure to derision of national, ethnic or religious symbols, damage to other persons, goods, desecration of monuments, memorials or graves, the offender shall be punished by imprisonment of one to eight years.

is not punishable under the Criminal Code, making it impossible to prosecute on that count.[792] The first case relating to such hate speech occurred in 2009: a complaint was filed against **Dobrica Ćosić**, the first President of the Federal Republic of Yugoslavia and an author, for inciting national, racial and religious hatred and intolerance (Article 317) and racial discrimination.[793]

The Serbian Criminal Code also provides that:

- the publication and distribution of texts inciting racial hatred or violence shall be punishable with a prison term of between three months and three years;[794]
- ruining the reputation of a person or group of persons on grounds of their race, colour, religion, nationality, ethnic origin or other personal characteristics shall be punishable with up to one year in prison.[795]

Non-governmental organisations frequently call on Serbia[796] to ensure that the law is applied, that prosecution is initiated and that the punishment is appropriate.[797]

Punishing hate speech in Europe demonstrates that persons making racist, revisionist and liberticidal statements are denied the right to freedom of expression because "such statements run counter to the fundamental values of European legal systems and are a threat to public peace and

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(3) Whoever commits the offence specified in paragraphs 1 and 2 of this Article by abuse of position or authority, or if these offences result in riots, violence or other grave consequences to co-existence of peoples, national minorities or ethnic groups living in Serbia, shall be punished for the offence specified in paragraph 1 of this Article by imprisonment of one to eight years, and for the offence specified in paragraph 2 of this Article by imprisonment of two to ten years."

[792] Fourth ECRI Report on Serbia, para. 17; Hammarberg Report on Serbia, para. 113.

[793] The Committee of Lawyers for Human Rights and the Helsinki Committee for Human Rights in Serbia have filed at the District Public Prosecutor's Office in Belgrade criminal charges against Dobrica Ćosić because in his book *Vreme zmija – Piščevi zapisi* 1999 - 2000 ("The Time of the Snakes - A Writer's Notes 1999 – 2000"), published by *Službeni glasnik* [*The Official Gazette*] in 2009, on p. 211, among other things, he wrote about the Albanian people a text with the following content: "That social, political and moral residue of the tribal, barbarian Balkan have allied themselves with America and the European Union in a fight against the most democratic, the most civilized, the most enlightened Balkan nation - the Serbs."

[794] Article 387 of the Criminal Code of the Republic of Serbia (Racial and Other Discrimination):
"*(4) Who spread or otherwise make publicly available texts, images or any other representation of ideas or theories advocated or encourages hatred, discrimination or violence against any person or group of persons based on race, colour, religious affiliation, nationality, ethnic origin or other personal property, shall be punished by imprisonment from three months to three years.*
(5) Whoever publicly threatened that, against a person or group of persons because of a particular race, colour, religion, nationality, ethnic origin or because of other personal property, committed a criminal offense punishable by imprisonment of four and more years, shall be punished by imprisonment from three months to three years."

[795] Article 174 (Ruining the Reputation for Racial, Religious, Ethnic or Other Affiliation):
"*Whoever publicly ridicules a person or group because of a particular race, colour, religion, nationality, ethnic origin or other personal characteristics, shall be punished with a fine or imprisonment up to one year*."

[796] The ECRI is alarmed by the persistent high degree of intolerance for religious and ethnic minorities. "*Some newspapers recurrently use derogatory terms for Albanians and Bosniaks. ECRI has further been informed that Roma are targeted in the media and that there is a general climate of intolerance against them*", Fourth ECRI Report on Serbia, para. 84.

the existence of all democratic societies".[798] European countries consider that tolerating racist and anti-democratic statements would lead to trivialising racist behaviour.[799]

Such a restrictive notion of freedom of expression can also be dangerous, which is why the **Venice Commission** warned that "*the application of hate legislation must be measured in order to avoid an outcome where restrictions which potentially aim at protecting minorities against abuses, extremism or racism, have the perverse effect of muzzling opposition and dissenting voices, silencing minorities, and reinforcing the dominant political, social and moral discourse and ideology*".[800]

6.10.5. The United States

The American Constitution exemplifies an **approach** that could be described as "**negative**" insofar as the **First Amendment** merely prohibits federal legislation from interfering in any manner whatsoever.[801] Nevertheless, imposing an absolute ban on federal lawmakers regulating the exercise of freedom of expression was never made possible under the First Amendment.[802]

The State must respect the ability of individuals to make free and rational choices. The Supreme Court considers that the authorities fail to do so when they attempt to limit the right of certain individuals to express themselves because they want to present a point of view that is not generally accepted.[803] The courts require that points of view not shared by the majority be tolerated, since, in their opinion, a democratic **society must be open to all opinions - even unpopular, minority or extremist opinions**.[804] The Supreme Court refuses to apply a standard of "dignity" or to accept that a speech should be punished merely because it is "shocking", which is a notion thought to be intrinsically linked to the particular norms of a specific community.[805]

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[797] Hammarberg Report on Serbia, para. 34.
[798] Laurent Pech, *Droit comparé*, para. 106. The author mentions that this formulation has been taken from the European Court of Human Rights.
[799] *Ibid*.
[800] Venice Commission Report, 2008, para. 58: "*The application of hate legislation must be measured in order to avoid an outcome where restrictions which potentially aim at protecting minorities against abuses, extremism or racism, have the perverse effect of muzzling opposition and dissenting voices, silencing minorities, and reinforcing the dominant political, social and moral discourse and ideology.*"
[801] Laurent Pech, *Approches européenne et amércaine*, item 1.
[802] Laurent Pech, *Droit comparé*, para. 16.
[803] Laurent Pech, *Droit comparé*, paras 16 and 47.
[804] Laurent Pech, *Droit comparé*, para. 86.
[805] Laurent Pech, *Droit comparé*, para. 66.

In the United States, the courts have refused to proscribe racist *opinions*, and the Supreme Court made a point of emphasising the importance of freedom of expression, recalling **the risk of a** "***standardisation of ideas*** *either by legislatures, courts or dominant [political or community] groups*".[806] By acknowledging that the press should be granted considerable freedom, **freedom of expression is given precedence over all other considerations** and, in particular, over considerations such as combating racial discrimination or inciting racial hatred.

When **opinions** are concerned, and not just the allegation of a fact, public speech must be afforded the most extensive protection possible. Such protection even goes so far as to allow insults or offending statements to be made in public *"**to give adequate 'breathing space' to the freedoms protected by the First Amendment**"*.[807] For example, in the case of *McCalden v. California Library Association,*[808] the Federal Court did not contest the right of the revisionists to express their opinion "repugnant though [their] message be".[809]

According to the **doctrine of "no prior constraint**"[810] - which is faithful to the view of the lawyer Blackstone for whom freedom of speech and of the press only implies the absence of prior censorship – a person may say or write what he wishes.[811] On the other hand, subsequent control may be imposed.

There are limits to freedom of expression which are based on a **categorical approach**. The Supreme Court defined certain categories of speech which are protected by the First Amendment and others which are not,[812] such as **obscenity**,[813] **child pornography**,[814] **true threats**[815] and **incitement to law violation**.[816]

There are **no limits to freedom of expression based on the content of the information**[817] **or on the message spread** (content based).[818] This was upheld in the case of ***R.A.V. v. Coty of Saint Paul***

[806] *Terminiello v. Chicago*, 337 US. 1 (1949).
[807] *Hustler Magazine Inc. v. Falwell*, 485 U.S. 56 (1988).
[808] *McCalden v. California Library Association*, 955 F.2d 1214, 9 Cir. 1990.
[809] *Ibid.*
[810] Howard Zinn, "*Liberté d'expression"* (Agone, 31-32 2004), Clip VIII, paras 23 and 24. This document was put on line on 3 November 2008. URL:http//revueagone.revues.org/255.
[811] William Blackstone, *Commentaries on the Laws of England*, Vol. IV, Beacon Press, 1962.
[812] Chip Hutzler, "A Paradoxical Approach to the First Amendment and Hate Speech", Maryland Journal of Contemporary Legal Issues, Issue 1993-2 (1993) (Chip Hutzler).
[813] Obscenity, *Miller v. California*, 413 US 15, 36 (1973).
[814] Child Pornography, *New York v. Ferber*, 458 US 747, 774 (1982).
[815] True Threats, *Watts v. United States*, 394 US 705, 707 (1969).
[816] Incitement to Law Violation, *Texas v. Johnson*, US 397 (1989).
[817] *Miller v. California*, 413 US 15, 36-37 (1973).

in which the Supreme Court refused to consider the **content** of speeches or impugned messages, and criticised texts which proscribe speech simply on the basis of its content.[819] In this case, a group of adolescents living in Saint Paul in Minnesota had made a cross out of pieces of wood and went to the garden of a black family living in Saint Paul where they erected the cross and set it on fire. The adolescents were not charged with arson or interference with private property, but on the basis of an ordinance making it an offence to arouse anger or resentment in others on the basis of their race, colour, creed, religion or gender. The Supreme Court considered that this ordinance violated the First Amendment by virtue of the doctrine of "neutral content". It was therefore declared unconstitutional. The Court refused to examine the issue of the content of a speech or message and proscribed any law which appeared to set limits to freedom of expression.

"***Fighting words***"[820] (violent words)[821] is the exception. These are abusive words or epithets that are likely to provoke a violent reaction when addressed to an ordinary citizen and which are therefore not protected by the First Amendment.[822] A law that relates to "fighting words" alone is not unconstitutional on account of being vague or too broad in scope,[823] and as it does not impinge on freedom of expression.[824] Nevertheless, in its subsequent judgements, the Court gradually scaled down the doctrine of "fighting words". It focused more on the circumstances in which words were spoken than on the words themselves.[825]

For example, in the ***Virginia v. Black*** case of 7 April 2003, **the majority of the judges of the Supreme Court acknowledged that the First Amendment was compatible with all legal provisions punishing any "expressive" conduct motivated by an intent to intimidate a person or a community**.[826] In this case, burning a cross constituted a threat of physical violence, which is therefore punishable without violating the First Amendment. What needs to be underscored is that in determining whether the expression of an opinion may be penalised without violating the First Amendment, **the Supreme Court always seeks to establish whether the words or "expressive" conduct were acted on, or could potentially be acted on, thereby physically endangering an individual and posing a threat to public order** (compelling state interest).

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[818] Pankaj Sharma, *Hate Speech Laws: Walking the First Amendment Fence*, Howard Scroll, *The Social Justice Review*, no. 130 (1993).
[819] *R.A.V. v. City of Saint Paul*, 112 Ct. 2538, 2542 (1992).
[820] *Chaplinsky v. New Hampshire*, 315 US 568 (1942); *Miller v. California*, 413 US, 15, 36-37 (1973).
[821] Those words which by their very utterance inflict injury or tend to incite an immediate breach of peace. *Chaplinsky v. New Hampshire*, 315 US 568 (1942).
[822] *Virginia v. Black*, 538 US 343, 123 S; Ct. 1536, 155L; Ed. 2d 535 (2003).
[823] *City of Billings v. Batten*, 218 Mont 64, 705 P 2d 1120 (1985).
[824] *Sate v. Authelet*, 120R.I 42, 385 A 2d 642, 5 A.L.R. 4th 942 (1978).
[825] *Lewis v. City of New Orleans*, 414 US, 130, 94 S. Ct. 970, 39 L Ed. 2d. 214 (1974); *Gooding v. Wilson*, 405 US 518, 92 Ct. 1103, 31, L. Ed. 2d 408 (1972).

With regard to ***political speech***, the Supreme Court has repeatedly recalled that it is afforded the highest level of First Amendment protection,[827] since the First Amendment refers directly to this type of speech.[828] In other words, the First Amendment was adopted to protect political speech.[829]

These provisions on freedom of speech which differ from those in civil law countries may have particular consequences in practice, especially when information is disseminated on the Internet. Thus, the Federal District Court of North Carolina considered that it could not comply with the interlocutory injunction from a judge of the Paris Tribunal, dated 22 May 2000, without violating the First Amendment of the Constitution of 1787. In fact, the order demanded that the **company "Yahoo!"** block access from France to a pro-Nazi site it hosted.[830]

A letter dated 5 April 2000 sent by the International League against Racism and Anti-Semitism (LICRA) to the headquarters of the American company in Santa Clara, California, informed the American Internet giant that the sale of thousands of items and insignia glorifying the Third Reich on its "*Auction*" website violated French laws, and that it risked being prosecuted by the League if it failed to take measures to stop such sales within eight days.[831]

In May 2000, an interlocutory summons was served on Yahoo by LICRA and the French Union of Jewish Students (UEJF) before the Paris Tribunal de Grande Instance, requesting that the court order the company to use the technical means necessary to block the links allowing French internet users to access neo-Nazi sites.[832]

The judge's order of 22 May 2000 stated that "*[d]isplaying Nazi objects for sale is not only a violation of French law (Article R. 645-2 of the Criminal Code), but also an insult to the collective memory of the country which has been deeply affected by the atrocities committed by, and in the name of, the Nazi criminal enterprise against its citizens and, above all, against its Jewish citizens.*" It considered that it had jurisdiction to hear the case, it partially granted the requests and ordered *Yahoo! Inc.* to "*[t]ake all necessary measures to deter and render impossible any access via*

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[826] *Virginia v. Black*, 538 US 343, 123 S; Ct. 1536, 155 L; Ed. 2d. 535 (2003).
[827] *Buckley v. Valeo*, 424 US I, 14 (1976); *Texas v. Johnson*, 491 US 397, 411 (1989).
[828] Chip Hutzler.
[829] Chip Hutzler.
[830] Patrick Auvret, *Messages racistes*, para. 15.
[831] Valérie Sédallian, "*Commentaire de l'affaire Yahoo!: À propos de l'ordonnance du Tribunal de Grande Instance de Paris du 22 mai 2000*", published on 24 October 2000, accessed on 14 May 2012 at 0826 hours.
[832] Alexis Guedj, "*Nature transfrontière du réseau internet et ordre public*", in *Droits fondamentaux*, no. 1, July–December 2001, p. 201.

Yahoo.com to the Nazi artefact auction service and to any other site or service that may be construed as vindicating Nazism or as denying Nazi crimes."[833]

Yahoo contested this decision, notably by invoking **freedom of expression** for internet users; the company considered that it was under no obligation to intervene in a process in which it was merely an intermediary between sellers and buyers. It also denounced the **risk of "creating borders" on the Internet which would result in national filtering**. It considered that the legal system under which it operated was one that allowed for the expression of all kinds of opinions, even opinions that were offences under French law, and stressed that the legal system in the United States favoured the **confrontation of ideas rather than the prohibition of certain ideas, regardless of how extreme they may be**. It claimed that it would therefore be difficult to impose such extensive measures on a company subject to American laws which at no time wished to violate French law. Furthermore, its operations only targeted American users and complied with its country's laws.[834]

Yahoo filed a motion before the **San Jose Court in California** requesting a declaratory judgement stating that the orders from the French court were neither admissible nor binding under the laws of the United States.[835]

The Californian court granted the American company's request, stating that its ruling in the case had to be based on the Constitution and American legislation.[836] It stated that the prohibition under French law of the sale of items belonging to a particular political organisation and the ban on displaying websites was based on the legislator's point of view with respect to the Holocaust and anti-Semitism. The First Amendment to the American Constitution does not permit the federal government to engage in viewpoint-based regulation of speech absent of compelling government interest, such as averting a clear and present danger of imminent violence.[837]

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[833] Decision on line on the Juriscom website.
[834] Defence submissions, accessible on the Juriscom website, published on 24 July 2000.
[835] A declaratory judgement: A request for a declaratory judgement can follow a cease and desist letter from a party. The party sending the letter runs the risk of the recipient filing a request for a declaratory judgement in his own jurisdiction. This might require the sender to appear in a distant court at his own expense. Upon receiving such a letter, the recipient may seek a tactical advantage by instituting declaratory judgement litigation in a more favourable jurisdiction. *See* D. Peter Harvey and Seth I. Appel, "The Declaratory Judgement Response to a Cease and Desist Letter: 'First to File' or 'Procedural Fencing'" in *Official Journal of the International Trademark Association*, Vol. TMR 96, no. 3, May-June 2006, p. 693.
[836] Édouard Launet, "*Yahoo se sort d'affaire par une pirouette*", in *Libération*, 4 January 2001, accessible on *Libération*'s website.
[837] "*The First Amendment does not permit the government to engage in viewpoint-based regulation of speech absent of compelling government interest, such as averting a clear and present danger of imminent violence*", "Order Granting Motion for Summary Judgement", published on 7 November 2001, p. 13, accessible on the Juriscom website.

6.10.6. Canada

Prior to the Second World War, the Canadian Criminal Code contained few provisions proscribing speeches made with the intent of inciting racial, ethnic or religious hatred.[838] The Criminal Code merely sanctioned, very restrictively, the knowing spreading of false news likely to cause injury or mischief to a public interest (section 181) and defamation as harm inflicted on a third party.

In January 1965, the Minister of Justice, **Guy Favreau**, established a special committee of seven experts - the Special Committee on Hate Propaganda in **Canada**[839] (the "Cohen Committee") - tasked with assessing the need to introduce legislation and, if need be, proposing amendments to the Criminal Code.[840] It is in this context that in 1970, following three years of parliamentary debate, new provisions to combat hate propaganda were introduced in the Criminal Code, notably Article 318 on **advocating genocide** under which "[e]veryone who advocates or promotes genocide is guilty of an indictable offence".[841] Furthermore, the crime must have been "*committed with intent to destroy in whole or in part any identifiable group […]*".[842]

Article 319 (1) stipulates that "*every one who, by communicating*[843] *statements*[844] *in any public place,*[845] *incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace*" is liable to punishment. This concerns the offence of **public incitement of hatred**. Under the second paragraph of this article "*every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group*" is guilty of a punishable offence. This concerns **wilful promotion of hatred**. The term "wilful" has been defined as an element of mens rea, as it is necessary that "*an individual who commits an act does so with the certainty, or moral certainty, of the consequences of promoting hatred*".[846] Finally,

[838] *Keegstra* Judgement, p. 11.
[839] Called the Cohen Committee, after its chairman emeritus, Maxwell Cohen, dean of the law faculty, Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada, Queen's Printer, Ottawa, 1966 ("Cohen Report").
[840] W. Kaplan and D. McRae, (eds.), *Law, Policy and International Justice: Essays in Honour of Maxwell Cohen*, Montreal: McGill-Queen's University Press, 1993, p. 248.
[841] Pursuant to Article 318 of the Criminal Code, "*genocide means killing members of any identifiable group or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction*".
[842] In all of the articles of the Canadian Criminal Code, an "identifiable group" means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.
[843] The Criminal Code specifies that "communicating" includes communicating by telephone, broadcasting or other audible or visible means.
[844] The Criminal Code specifies that "statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.
[845] The Criminal Code specifies that "public place" includes any place to which the public have access as of right or by invitation, express or implied.
[846] *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369.

the third paragraph of this article specifies **the means of defence** of the accused.[847] It should be noted that it is not possible to institute proceedings for any of these offences without the consent of the Attorney General.

Article 13 (1) of the Canadian Human Rights Act of 1985 provides for a particular legislative measure in order to prevent hate propaganda which is defined as follows: "*[It] is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination*."[848]

Article 3 of the law specifies that "*[f]or all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*" Section 13 (1) is only applicable in cases where telephone communication is established under the legislative authority of the Canadian Parliament. In addition, it is applicable only to the person communicating the message, and not to the person disseminating it.

In January 2002, a human rights court relied on the above-mentioned Article 13 to order **Ernst Zundel** to cease publishing racist messages on his Internet site.[849] However, the "Zundelsite", which is now based in the United Sates, outside of Canadian jurisdiction, continues to disseminate hate propaganda.

The rights proclaimed by the Charter are not absolute, contrary to the American model.[850] Article 1 of the Charter provides that the rights and freedoms set out in it are "***subject only to such***

[847] Means of defence: an accused may establish that the statements communicated were true; that he acted in good faith when he expressed or attempted to establish by argument an opinion on a religious subject or an opinion based on a religious text in which he believes; that the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and that he believed them to be true on reasonable grounds; that he acted in good faith when drawing attention, for the purpose of removal, to matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.
[848] Canadian Human Rights Act, L.R.C. 1985, Ch. H-6, amended. The most recent amendments were made on 18 June 2008.
[849] *R. v. Zundel* (1992), 2 S.C.R. 731.
[850] Marie-Laure Dussart, p. 9.

reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This restrictive clause is applicable to all the rights and freedoms set forth.[851]

In order to assess whether a legal limitation to a fundamental right is constitutionally legitimate, a Canadian judge must consider three factors: the "**rational connection**" between the measure and the objective pursued (establishing whether the measure is an appropriate means of achieving the objective), the "**minimal**" nature of the limitation and the specific "**proportionality** between the effects of the limiting measure and the [legislative] objective".[852] According to the *Oakes* test, the legal measure should impair the Charter right or freedom as little as possible.[853]

In the ***Keegstra***,[854] ***Andrews***[855] and ***Taylor***[856] **judgements,** which were all rendered on 13 December 1990, the Supreme Court of Canada had to consider whether Article 319 of the Criminal Code proscribing the dissemination of hate propaganda constituted a reasonable limit upon freedom of expression within the meaning of Article 1 of the Charter.[857] **The *Keegstra* Judgement** is of most relevance to this issue.

James Keegstra was a teacher in a secondary school in Alberta. He made numerous anti-Semitic statements in the lessons he gave, describing persons of Jewish faith as "treacherous", "subversive", "sadistic", "money-loving", "power hungry" and "child killers", and claimed that the holocaust was a Jewish conspiracy. **James Keegstra** was dismissed in 1982. Two years later, he was accused of unlawfully inciting hatred against an identifiable group under Article 319 (2) of the Criminal Code.[858] According to **Keegstra**, Article 319 (2) of the Criminal Code violated his right to freedom of expression guaranteed under Article 2 (b) of the Canadian Charter.

The Supreme Court of Canada ruled on whether Article 319 (2) constituted a restriction on freedom of expression and, if so, whether it was a limitation that was justified in a free and democratic society.[859]

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[851] Marie-Laure Dussart, p. 9.
[852] Marie -Laure Dussart, p. 11.
[853] *R. v. Oakes* (1986), 1 S.C.R. 103.
[854] *Keegstra* Judgement (1990), 3 S.C.R. 697.
[855] *R. v. Andrews* (1990), 3 S.C.R. 870.
[856] *Canada v. Taylor* (1990), 3 S.C.R. 892.
[857] Under this article, "*[e]very one who by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace*" is guilty of the offence of public incitement to hatred.
[858] Former Article 281. 2 (1) of the Criminal Code.
[859] The Court of Queen's Bench found him guilty of inciting hatred. Mr Keegstra lodged an appeal with the Court of Appeal of Alberta which unanimously accepted the grounds of his appeal (Court of Appeal of Alberta (1988), 43 C.C.C. (3d) 150). The Public Prosecutor then filed an appeal against this decision before the Supreme Court.

The test created in the **Irwin Toy** case, which consists of first assessing whether the impugned activity is protected under Article 2 (b) of the Canadian Charter, is the one applied to determine whether this provision of the Criminal Code is constitutional.[860] No form of expression shall be evaluated solely on the basis of its content since "*if the activity conveys or attempts to convey a meaning it has expressive content and prima facie falls within the scope of the guarantee*".[861] At this stage of the analysis, the content of the message is irrelevant, and it is only the violent form of expression which is not afforded protection by paragraph 2 (b). In the case of Article 319 (2) of the Criminal Code, limits are imposed on communicating certain statements if they incite hatred against an identifiable group.

The **Irwin Toy** case-law then established that it was necessary to determine whether government action had the effect of interfering with the right to freedom of expression. Even if the meaning of the expression is considered odious or disagreeable in terms of inciting hatred, this is of no consequence when seeking to determine whether freedom of expression has in fact been infringed. Article 319 (2) directly prohibits conveying messages with certain meanings, as a result of which this legal provision significantly restricts expression. Thus, **Judge Dickinson** found that **Article 319 (2) of the Criminal Code was a violation of the right to freedom of expression.**[862] **The question that then arises is whether this violation is justifiable under Article 1 of the Canadian Charter.**

According to the **Oakes** test,[863] the measures adopted must first be justified by a pressing and substantial concern in a free and democratic society.[864] It is then necessary to determine what a free and democratic society is, as well as the values underpinning it, namely "***respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society***".[865]

These are the values on which the rights and freedoms guaranteed by the Canadian Charter are founded and the standard on the basis of which it is possible to determine whether a restriction to a

[860] *Irwin Toy Ltd v. Quebec* (A.G.) – 1989 SCC.
[861] *Ibid*., p. 969.
[862] Keegstra, "I thus find s.319(2) to constitute an infringement of the freedom of expression guaranteed by s.2 (b) of the Charter."
[863] *R. v. Oakes* (1986), 1 S.C.R. 103 ("*Oakes* Judgement").
[864] *Ibid*., p. 138.
[865] *Oakes* Judgement.

right or freedom is reasonable.[866] Therefore, when analysing the objective pursued by the legislation, it is necessary to verify whether the **harm** that hate propaganda causes to an identifiable group - including **emotional harm**, as words can have grave psychological and social consequences, especially since such serious attacks on targeted groups can cause them to feel "humiliated and degraded" - is such that government interference is required.[867] In addition, hate propaganda has a further negative effect which makes it a pressing and substantial concern, as it can have **a real impact on society**, and as the **Cohen** Committee pointed out, individuals can be persuaded to believe almost anything if information is communicated in the proper circumstances.[868]

Judge Dickinson remarked that the Criminal Code had been amended following recommendations made in the **Cohen** Report. At the time, the real objective of Parliament was to prevent harm caused by expressive activity inciting hatred. **Judge Dickinson** concluded that, as the Government was seeking to prevent the harm that inciting hatred could cause to members of identifiable groups, and considering the international commitment to eradicate hate propaganda and the principles of equality and multiculturalism enshrined in the Charter, the objective of the adopted legislation was legitimate. **Judge Dickinson** stressed the need to protect identifiable groups against the promotion of hatred, and described the objective as being of "*the utmost importance*", claiming that there existed a "*powerfully convincing legislative objective*".[869]

The second stage of the **Oakes test** relates to the **proportionality** between the measure and objective pursued. At this stage of the analysis it is necessary to take into consideration the type of expressions that the State wishes to restrict. As stated in the so-called "dentists" case,[870] certain restrictions on expressions might be easier to justify.[871] In this Judgement, the Supreme Court stated that "*[o]ne must ask whether the expression prohibited by s. 319 (2) is tenuously connected to the values underlying [freedom of expression] so as to make the restriction easier to justify than other infringements.*"[872] The Court concluded that expressions which consisted of inciting hatred against identifiable groups were of limited importance when compared to the values underlying the right to freedom of expression. The prohibition on inciting hatred set out in Article 319 (2) of the Code is

[866] *Ibid*., p 136.
[867] Moreover, in the *Keegstra* Judgement, the Supreme Court recalled that there had been numerous acts of hate propaganda in Canada and that Government interference was necessary since hate propaganda caused immediate harm to the victim.
[868] Cohen Report, p. 29.
[869] *Keegstra* Judgement, p. 750.
[870] *Rocket v. Royal College of Dental Surgeons of Ontario* (1990), 2 R.C.S. 232.
[871] *Rocket v. Royal College of Dental Surgeons of Ontario* (1990), 2 R.C.S. 232, p. 247.
[872] *Keegstra* Judgement.

intended to directly protect the rights of persons who belong to vulnerable groups and who could therefore be harmed. Finally, the standard of minimal impairment was evaluated in the light of the stringent standard of the requisite mens rea, the numerous means of defence allowed and the fact that the statements communicated must be public and target an identifiable group. Therefore, in the *Keegstra* Judgement, the Court found that, with regard to the issue of proportionality, the advantages of this article of the Criminal Code outweighed the effects of restrictions on freedom of expression.

The Court ruled that, given the universal harm caused by hate propaganda, restricting freedom of expression in a democratic society is justifiable under Article 1 of the Canadian Charter, since preventing its dissemination helps people of diverse origins to live together and could even reduce the incidence of violence in Canada. It is for these reasons that the Supreme Court ruled that **the crime of deliberately inciting racial hatred is "spared" by Article 1 of the Charter**.

Finally, with regard to **political speech**, there is one case in particular that is worth focusing on: ***Mugesera v. Canada***.[873] The Mugesera case is of particular interest in relation to the *Šešelj* case as the Rwandan authorities charged **Léon Mugesera** with inciting murder, genocide, and hatred and with crimes against humanity on the grounds of delivering a particularly violent speech. It is relevant to point out that the speech he was charged with was not made in 1994, but **two years** before the most serious crimes against the Tutsi were first committed (since the International Criminal Tribunal for Rwanda had temporal jurisdiction from 1 January 1994).

Mugesera was an active member of a **Hutu** political party opposed to the Rwandan peace process negotiations. He delivered a **speech** at a party meeting in Rwanda attended by about one thousand people, the content of which led the Rwandan authorities to issue an arrest warrant against him.[874] **Mugesera** then managed to flee Rwanda and go to **Canada** in 1993 where he obtained permanent residence.[875] Two years later, following the ICTR's Akayesu Appeal Judgement[876] in which the judges considered **Mugesera** to be the most notorious agent of propaganda, the Canadian Minister of Immigration instituted **deportation proceedings** against him on the allegations of incitement to murder, genocide and hatred and a crime against humanity.[877]

[873] *Mugesera v. Canada (Minister of Citizenship and Immigration* (2005), 2 S.C.R. 100, 2005 SCC 40 ("*Mugesera* Judgement").
[874] *Mugesera* Judgement, para. 2.
[875] *Mugesera* Judgement, para. 3.
[876] *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Judgement").
[877] *Mugesera* Judgement, para. 4.

The Federal Court (first instance) considered that it was not necessary to conduct an analysis of the words **Mugesera** uttered in his speech and confined itself to examining the crime against humanity. The Court of Appeal reversed the decision, finding that none of the charges made against the Accused had been confirmed in the case. In this appeal judgement, **Judge Décary** conducted an interesting analysis of the type of expression at issue, and thus, of the level of constitutional protection that it should be afforded. Firstly, he cited the words of **Judge Dickson** in the Keegstra case: "*The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2 (b) guarantee [of the Canadian Charter] and the nature of this connection is largely derived from the Canadian commitment to democracy.*"[878] The emphasis is laid on the fact that the expressive activity took place in a political context, and it is recalled that, under Canadian law, political speech is at the heart of the right to freedom of expression. Thus, according to the Supreme Court, the level of constitutional protection that should be afforded to an expression depends on the type of expression, and **political expressions should be afforded substantial protection**. Having analysed the message delivered by Mr **Mugesera**, the Court of Appeal found that, objectively speaking, Mr Mugesera had not delivered a speech inciting murder, genocide and hatred.

Nevertheless, the Canadian Supreme Court criticised this reasoning. Contrary to **Judge Décary**, the majority of the Supreme Court found **Mugesera** guilty of inciting hatred, genocide and murder on the ground that the Federal Court of Appeal had misinterpreted the standard of "**reasonable listener**". In fact, **the direct character of incitement should be analysed in the light of its cultural and linguistic content**.[879] Thus, depending on the audience, a speech may be perceived as **direct** in one country, and **indirect** in another. However, the words used must be immediately clear to the **intended audience**; innuendo and obscure language do not suffice to qualify incitement as direct.[880]

On 4 November 2010, as part of the "completion strategy" according to which cases of average or lesser importance should be transferred to national courts, the Prosecutor filed a motion for the transfer of the priest to the Rwandan courts. On 28 June 2011, the referral chamber granted the motion.

[878] *Keegstra* Judgement, pp. 763 and 764.
[879] *Mugesera* Judgement, para. 87. The Supreme Court relied on the ICTR case-law and, more specifically, on the *Akayesu* Judgement (*Akayesu* Judgement, para. 557).
[880] *Ibid.*

The transfer was confirmed on 16 December.

Minister Kenney stated that "Canada should not be a dumping ground or a safe haven for the world's evildoers. We are happy that we have finally managed to remove Mr **Mugesera** from Canada. We hope that his ilk will never set foot on our soil again. It is unfathomable that it takes nearly two decades to deport an architect of the Rwandan genocide from our country."[881]

Upon arriving at Kigali airport, **Léon Mugesera** was officially arrested by the Rwandan police who escorted him to a prison for war criminals.[882]

6.10.7. The United Kingdom

In the United Kingdom, as the number of written provisions on freedom of expression is limited, it is the courts that oversee the restrictions that may be imposed on it. A Privy Council judge summarised what constitutes freedom of expression in the following manner: "*Free speech does not mean free speech [...] it means freedom governed by law*."

As a result of the Human Rights Act which incorporates the ECHR, the British judge's reasoning on restricting freedom of expression is very similar to that of the judges in Strasbourg.

Nevertheless, there is a specific text on restrictions to freedom of expression in the case of hate speech: the **1986 Public Order Act**, which, in Section 17, defines the offence of inciting racial hatred as "*hatred against a group of persons defined by reference to colour, race, nationality [...] or ethnic or national groups*". Section 23 defines what constitutes an offence, namely, being in possession of written material which is threatening, abusive or insulting with a view to its being displayed, published or distributed, shown, played, or included in a cable programme service if racial hatred is likely to be stirred up thereby. Finally, Section 27 provides that no proceedings may be instituted for the offences set out in the Public Order Act except with the consent of the Attorney General.

6.10.8. Australia

[881] "Statement by Ministers Toews and Kenney on Removal of Léon Mugesera"; S*ee* the Public Safety Canada communiqué, Ottawa, 24 January 2012.
[882] Anabelle Nicoud, "*Léon Mugesera: aussitôt arrivé à Kigali, aussitôt arrêté*", in *La Presse*, published on 25 January 2012, consulted on 16 May 2012 at 1610 hours.

Although Australia does not have any legislation directly related to hate speech, victims of discrimination or defamation can seek redress on the basis of certain state laws or international law.

The **Racial Hatred Act** of 1995 **prohibits acts that offend the public when they are based on racial hatred**. Such conduct is illegal when it is likely to offend, insult, humiliate or intimidate a person or group of persons and the act is carried out on the grounds of the race, colour or ethnic origin of the person or group of persons, in whole or in part.

Nevertheless, certain types of discourse are not punishable and are protected under freedom of expression when they occur in a genuine academic, artistic or scientific context or are in the public interest.[883]

Under section 18c, Part 2A of the **1975 Racial Discrimination Act**, *"[i]t is unlawful for a person to do an act, otherwise than in private, if (a) the act is reasonably likely, in all circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.*" The Australian Human Rights Commission, which is responsible for reviewing any complaints filed on the basis of this text, was established in order to make this text binding.

The 2002 ***Toben v. Jones*** case was the first one in which the Supreme Court ruled on "racial hatred" on the Internet. In this case, an Internet site had published articles and documents denying the Holocaust.[884] The Supreme Court ruled that their contents violated the legal provisions on racial discrimination, thereby affirming that the same standards were applicable to Internet sites as those applicable to all other means of communication, such as television or radio. Finally, there are other internal anti-racist laws such as the Tasmania Anti-Discrimination Act of 1988, the New South Wales Anti-Discrimination Act of 1977, the Queensland's Anti-Discrimination Act of 1991, the Racial and Religious Tolerance Act of 2011 and the Racial Vilification Act of 1996.

[883] For example, the publication of fair and accurate reports on any event or matter of public interest and comments on any event or matter of public interest if the comment is an expression of a belief of the person making the comment.
[884] *Jones v. Toben* (2002), FCA 1150, (106).

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Having completed this analysis, it would appear that the utmost importance should be given to freedom of expression in the context of political debate, although it may be restricted for compelling reasons.[885]

It is necessary to bear in mind the context in which a speech is made. It therefore follows that at the time, the Accused Vojislav Šešelj enjoyed broad freedom of expression, and it is necessary to examine, as the ECHR does, the content of each specific speech in the light of the context.

Furthermore, I note that several national courts have introduced various criteria such as "exacerbating effects" or specific references to criminal conduct, which implies that there is no case-law that can be automatically applied. It is therefore necessary to conduct a case-by-case – not to say word-by-word – analysis, in order to determine whether a given speech can be qualified as hate speech, while recognising that a politician is granted considerable latitude in the name of freedom of expression and in the context of public debates in which, as a politician, he is duty-bound to participate.

My deeply held conviction is that a judge must take into account both the substantial freedom of expression granted to politicians and the impact that a politician's words can have on the public, especially in the event of calls or evident incitement to commit crimes or offences. In a certain sense, a politician enjoys complete freedom of expression provided he does not incite his audience to commit criminal offences. Thus, it is for the judge to verify whether the words uttered constitute an evident call to commit offences. It is in this context that I will now proceed to examine the totality of the evidence.

[885] S*ee* on this issue ECHR, *Erbakan v. Turkey*, Case No. 59405/00, 6 July 2006, para. 56.

V. CRIMINAL RESPONSIBILITY

1. PROSECUTION'S ARGUMENTS ON THE CRIMINAL RESPONSIBILITY OF THE ACCUSED

According to the Prosecution, **between August 1991 and September 1993, Vojislav Šešelj** participated in the preparation and execution of a **criminal enterprise**, the criminal purpose of which was to **forcibly create ethnically separate Serbian territories in Croatia and Bosnia and Herzegovina**.[886]

Vojislav Šešelj had absolute power[887] over the SRS/SČP, as described by his close associates.[888] Two witnesses who recanted their statements described him initially as an autocrat who dictated all SRS actions and who took decisions independently of the party's central board.[889]

Vojislav Šešelj proclaimed himself the commander of the Crisis Staff, which he later renamed the SRS **"War Staff"**. Witnesses confirmed, amongst other things, that **Vojislav Šešelj** was always informed of the operations conducted on the ground and that the crisis staff/war staff carried out his orders.[890] He ordered the War Staff to recruit as many volunteers as they could.[891] These volunteers considered **Vojislav Šešelj** to be their **supreme commander**.[892] He also had the authority to promote persons within his party and to assign military ranks to his **Šešeljevci**.[893] Moreover, he boasted saying, "**I organise interventions by our guerrilla organisations, define aims of attack and points that have to be won**."[894]

The witness stated that **Vojislav Šešelj** was "regularly informed" and "well informed" of the situation on the front line and of all important events relating to the volunteers.[895] He himself stated that he had also visited the **Šešeljevci** in the field to reinforce his doctrinal authority and moral support even after his volunteer units had been deployed.[896]

Vojislav Šešelj pursued a persecutory propaganda campaign against non-Serbs. He thus propagated a climate of fear in which the Serbs believed themselves to be under threat and proclaimed, for example, that "relentlessly pressing a threat message is the strongest and most important stimulus for raising fear in an audience and driving that audience to back action to remove the threat".[897]

He referred to all Croats as "Ustashas" with the purpose of rekindling the memories of the atrocities committed against the Serbs during the war and conveying the message that a threat still existed. He

[886] Prosecution Closing Brief, para. 1.
[887] Exhibit P01074.
[888] Glamočanin, Exhibit P01704, para. 56.
[889] Exhibit P01074.
[890] Prosecution Closing Brief, para. 43.
[891] Exhibit P01074, paras 29 to 31.
[892] VS-033, T, p. 5532.
[893] Prosecution Closing Brief, paras 47-48.
[894] Exhibit P00039.
[895] Exhibit P00580.
[896] Prosecution Closing Brief, para. 49.

even requested from the volunteers that they expel the Ustashas wherever they found them[898] and labelled the once predominantly Croatian areas of Vukovar and Hrtkovci as Ustasha strongholds or as being populated by the worst Ustashas.[899] **Vojislav Šešelj** encouraged retaliation for crimes committed in the past, notably stating that the "Croats must be punished"[900] and that "revenge and violence [were] morally legitimate and necessary due to the past victimization and genocide of the Serbs".[901]

He advocated force and violence to gain and retain what he considered Serbian lands outside of Serbia, all the while attacking anyone who proposed a peaceful solution. He declared before the Serbian Assembly that "**in order to achieve their territorial objective, only a military and not a political solution in Croatia would suit us Serbs".**[902]

Vojislav Šešelj was extremely popular as a result of his appearances in the media and his influence, of which he boasted. Furthermore, he was voted Man of the Year in 1991 by radio listeners in Serbia.[903]

The Prosecution deems that his powerful propaganda campaign mobilised and inspired Serbs throughout the territory of Yugoslavia to support his cause and to fight. Through his media rhetoric, **Vojislav Šešelj** encouraged ethnic division, created fear among the Serb people, exaggerated the threat posed by non-Serb authorities and dehumanised non-Serbs. He even created his own media outfits, such as the *Srbija* newspaper, to better disseminate his propaganda.[904]

Well before his indictment by the Tribunal, **Vojislav Šešelj** publicly confessed to having cooperated with other members of the JCE such as **Bogdanović, Milošević**,[905] **Simatović** and General **Domazetović**. The members designated territories that should be Serbian, and created parallel Serbian institutions and Serbian combat forces. By taking part in the JCE, **Vojislav Šešelj** recruited and deployed volunteers, disseminated his propaganda, encouraged the Serbs to cooperate and act, and reinforced the goal of creating ethnically separate Serbian territories in Croatia and BiH.[906]

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[897] Exhibit P00005.
[898] Stanović, Exhibit P00528.
[899] Exhibit P00298.
[900] Exhibit P01297.
[901] Exhibit P00074.
[902] Exhibit P01257.
[903] Prosecution Closing Brief, para. 56.
[904] *Ibid*., paras 57-58.
[905] Šešelj stated that Milošević, Bogdanović and Domazetović had addressed their requests to him (…). "*They would say: 'We need so and so many volunteers for this and that location', and we would gather that many volunteers* (…)."
[906] Prosecution Closing Brief, paras 62, 63 and 66.

1.1. Croatia

According to the Prosecution, before August 1991, the **common purpose** of the JCE members to create a territory dominated by the Serbs was implemented in **Vukovar**.

Vojislav Šešelj committed, instigated, aided and abetted and significantly contributed to the commission of crimes in **Vukovar**. He declared this municipality to be of primary importance to the creation of a **"Greater Serbia"** and the fight against the **"Ustashas**". In articulating his plan to undertake the ethnic cleansing of Vukovar, **Vojislav Šešelj** travelled to the area to motivate the Serbian forces (JNA, **Šešeljevci**, paramilitaries and local TO) notably repeating that **"[n]ot a single Ustasha must leave Vukovar alive**".[907]

The Serbian forces thus operated in a coordinated manner to take control of **Vukovar**, raze the town to the ground and destroy the non-Serb population. The Croats and other non-Serbs were imprisoned in "collection centres" before being expelled to Serbia or forcibly transferred to "Croatian" territory without military necessity. On 19 and 20 November 1991, the Serbian forces prevented humanitarian evacuations, for example at the Vukovar hospital, and participated in the torture, abuse and murder of unarmed soldiers and civilians at Ovčara farm, Grabovo and Velepromet.[908]

In **Vukovar**, after months of incessant shelling and with the climate of hate created by the **Šešeljevci** and the **Chetniks**, the non-Serb civilians had no choice but to leave. **Vojislav Šešelj** admitted that the destruction of schools, public buildings, offices, wells, roads and hospitals (…) was without any military necessity, yet did not acknowledge his responsibility in the operations.[909]

The treatment that **Vojislav Šešelj** received during a visit to Vukovar lent further legitimacy to him, his speeches and his ethnic agenda. He arrived at the front line accompanied by between 50 and 100 reporters, journalists and others, and carrying cameras. When **Šljivančanin** briefed him on the situation, he called **Vojislav Šešelj** "President" in front of those gathered.[910] The JNA and the police organised his transport and a camouflage uniform worn by high-ranking officers was made for him.[911]

The Prosecution deems that **Vojislav Šešelj** was the **architect** and **propagandist** of the common purpose of the JCE and the supplier and leader of the forces that executed the criminal enterprise.

[907] *Ibid.*, para. 127.
[908] *Ibid.*, para. 128.
[909] Exhibit P01225.
[910] Rankić, Exhibit P01074.
[911] Prosecution Closing Brief, para. 158.

Vojislav Šešelj was informed through numerous reports that his men and the other paramilitary groups were committing crimes against non-Serbs in Croatia.[912]

1.2. Bosnia and Herzegovina

According to the Prosecution, the members of the JCE, including **Vojislav Šešelj**, wanted to establish ethnically separate Serbian territories in Bosnia and Herzegovina in the same way as in Croatia. In late March 1992, the members of the JCE launched a massive campaign of persecution against the non-Serb civilian population. They knew that, as in Croatia, the creation of ethnically pure Serbian territories would necessarily entail the use of force and terror. Witnesses reported that the operating instructions for the Serbian forces were to "**burn down**", "**destroy everything**" and "make the villages and people **disappear**".[913]

During a press conference in 1992, **Vojislav Šešelj** promised to send an "unlimited number of volunteers" to join the Serbian forces in BiH. Subsequently, he estimated to have contributed approximately **10,000** volunteers to achieve the common purpose in BiH.[914] Some of the JCE members, such as **Ratko Mladić** and **Radovan Karadžić**, received reports on the "exceptional success" enjoyed by the units led by **Arkan** and **Vojislav Šešelj**.[915]

Vojislav Šešelj travelled to BiH and to some border areas of Serbia to ignite Serbian nationalist sentiment, meet the Bosnian Serb leadership and visit his men on the front line. **Plavšić** testified about the significant impact of his visits: "(…) his presence meant a lot to the men. The troops would talk about his visits long after he would leave (…)."[916]

Following the model used in Croatia, the Serbian forces (JNA, **Šešeljevci**, Sern TO and MUP units and paramilitary groups) shelled towns and villages, burned, destroyed and plundered houses, expelled, arrested, illegally detained, mistreated, brutalized and murdered non-Serbs, until the towns and villages were purely Serbian.[917]

1.2.1. Zvornik

According to the Prosecution, **Vojislav Šešelj** admitted that the capture of **Zvornik** by the Serbs had been planned in **Belgrade** and that he had "a very high degree of control" over the **Šešeljevci**

[912] *Ibid.*, para. 130.
[913] *Ibid.*, para. 197.
[914] *Ibid.*, para. 250.
[915] Exhibit P01347.
[916] Prosecution Closing Brief, paras 272 and 274.
[917] *Ibid.*, para. 276.

who had taken part in the operations.[918] Groups of victims identified some members of the groups as the perpetrators of expulsions, looting and acts of mistreatment and killings.[919] The volunteers who had taken part in the attacks on the town were incorporated into the Serbian police and TO after the town was captured.[920]

The attack on 9 April 1992 by the Serbian forces caused many of the non-Serbs to flee the town in fear, and those who remained were forced across the Serbian border or killed.[921] The **Šešeljevci** detained non-Serbs in **Zvornik** and its environs (Standard Shoe Factory, Ekonomija Farm, Ciglana Factory, Drinjača Dom Kulture, Karakaj Technical School, Čelopek Dom Kulture) and subjected them to illegal detention, robbery, forced labour, serious bodily and mental harm, sexual assault, torture and murder.[922] After capturing the **Zvornik** municipality, the Serbian forces destroyed and looted property and religious buildings for ethnic and not military reasons.[923]

1.2.2. Greater Sarajevo area (Ilijaš, Vogošća, Novo Sarajevo, Ilidža and Rajlovac)

According to the Prosecution, the division of Sarajevo and the creation of an ethnically separate Serbian territory in Greater Sarajevo were key aspects in achieving the strategic goals and the common purpose of the JCE.[924]

From April 1992, the Serbian forces (**Šešeljevci**, JNA, VRS forces, Serbian municipal authorities and crisis staffs, members of the Serbian TO and Serbian MUP) took control of the municipalities or parts of municipalities and carried out forcible transfers, persecutions, murder, torture, cruel treatment, destruction and looting against non-Serbs in "Greater Sarajevo" throughout the period relevant to the Indictment. Moreover, restrictive or discriminatory measures were imposed against non-Serbs with the intent of driving them out or preventing their return.[925] As an example of this, the Prosecution presented an RS presidential decision providing that those citizens who did not return to their place of residence without justification would be denied the right of citizenship of the Serbian Republic of BiH.[926]

Vojislav Šešelj spoke publicly and explicitly about the Serbian forces and their conquest of areas in Greater Sarajevo, and the key role that the **Šešeljevci** played in this enterprise. He was aware of the

[918] *Ibid.*, para. 282.
[919] *Ibid.*, para. 296.
[920] *Ibid.*, para. 297.
[921] *Ibid.*, paras 299-300.
[922] *Ibid.*, para. 313.
[923] *Ibid.*, para. 345.
[924] *Ibid.*, para. 352.
[925] *Ibid.*, para. 420.
[926] Exhibit P00967.

actions of his men through the Vojvodas, among others, and travelled to Sarajevo on numerous occasions to encourage them and to meet with military commanders.[927]

Consequently, the Prosecution argues that the Serbian forces, including **Vojislav Šešelj**'s men, carried out organised and systematic attacks in the same manner as those in Croatia and Bosnia and Herzegovina, thereby proving that these crimes were a part of the JCE common purpose to cleanse the non-Serb populations from the territories targeted by the Serbs in BiH and create Serb-controlled areas.[928]

1.2.3. Mostar and Nevesinje

Starting in the fall of 1991, the Serbian forces (JNA, VRS, MUP and members of the local Serb TO, **Šešeljevci**) carried out a persecutory campaign against the Bosnian Muslim and Bosnian Croat populations who lived in these two municipalities. They expelled them using violence and threats, and by shelling and burning areas inhabited by non-Serbs. They also committed acts of violence such as beatings, torture, sexual assault, murder, the restriction of movement, forced labour, and the plunder and destruction of homes and religious institutions.[929] Moreover, these forces cooperated with the regional and national Serbian leadership and local Serbian authorities to implement the JCE.[930]

The acts of violence were notably committed in the Zalik shelter, the Vrapčići stadium, Uborak, the Sutina cemetery, and in Nevesinje and its environs.

1.2.4. Hrtkovci

According to the Prosecution, **Vojislav Šešelj**'s public **hate speech** on 6 May 1992 in **Hrtkovci** directly caused numerous Croats to flee. His speech triggered and facilitated a campaign of intimidation, harassment and violence against the Croatian population of Hrtkovci and the neighbouring villages.[931] The Croats perceived this speech to be a "warning sign" that "could not be

[927] Exhibit P01230.
[928] Prosecution Closing Brief, para. 429.
[929] *Ibid.*, para. 430.
[930] *Ibid.*, para. 431.
[931] *Ibid.*, para. 486.

ignored" and a number of them fled as a direct result.[932] The attacks on the Croatian inhabitants in **Hrtkovci** led to the forcible removal of at least 700 to 800 Croats.[933]

According to the Prosecution, **Vojislav Šešelj** therefore bears individual criminal responsibility under Article 7 (1) of the Statute for committing, instigating and otherwise aiding and abetting the crimes set out in the Indictment. In terms of "committing", **Vojislav Šešelj** is also charged with participating with others in a joint criminal enterprise with the objective of the permanent forcible removal of the majority of non-Serbs from targeted areas of Croatia, BiH and Serbia through the commission of crimes. He is also charged with physically committing the following crimes:

- Persecution, through his expressions of "hate speech", in Vukovar and in Hrtkovci, and through deportation and forcible transfer in Hrtkovci.

- Deportation and forcible transfer in the context of the events in **Hrtkovci**.[934]

a. War crimes (Article 3)

According to the Prosecution, **Vojislav Šešelj** has to answer for **six counts of war crimes**, the elements of which have been met: **murder** under Article 3 (Common Article 3 (1) (a) of the Geneva Conventions) (Count 4); **torture** under Article 3 (Common Article 3 (1) (a) of the Geneva Conventions) (Count 8); **cruel treatment** under Article 3 (Common Article 3 (1) (a) of the Geneva Conventions) (Count 9); **wanton destruction** under Article 3 (b) (Count 12); **destruction or wilful damage done to institutions dedicated to religion or education** under Article 3 (d) (Count 13); and **plunder** of public or private property under Article 3 (e) (Count 14).[935]

According to the Prosecution, the crimes with which **Vojislav Šešelj** is charged are linked to the armed conflict. They were committed for the purpose of achieving the plan for a "Greater Serbia". At the relevant time, **Vojislav Šešelj** was one of the most prominent Serbian politicians and he was aware that his acts were closely linked to the armed conflict. Through his speeches, in which he called for the creation of a "Greater Serbia", he was one of the main framers of the ideological context in which the armed conflict in Croatia and BiH took place. He directly participated in the

[932] *Ibid.*, para.506.
[933] Exhibit P00558.
[934] Prosecution Closing Brief, paras 527 to 529.
[935] *Ibid.*, para. 530.

creation of a Serbian armed force by mobilising the **Šešeljevci**, who were then sent to conflict areas, and he coordinated and supported them throughout the conflict.[936]

In support of its arguments, the Prosecution offers as an example the fact that, on several occasions, **Vojislav Šešelj** repeatedly spoke of the strategic importance of Vukovar. He notably received reports from his commanders and communicated with them directly on the Vukovar battlefield. He spoke publicly about the acquisition of areas in Greater Sarajevo thanks to the Serbian forces and the key role that the **Šešeljevci** played therein. He visited the front lines and the commanders on several occasions, and was also aware of the presence of the Serbian forces, including his men, in Mostar and Nevesinje and that their crimes were linked to the armed conflict.[937]

He demonstrated his knowledge of the conflict when, the day after the attack on Zvornik, he stated that the functions of the JNA and later the VRS were not to prevent inter-ethnic conflict, but to clearly demarcate what was Serbian.[938]

i. Murder

The Prosecution refers to the evidence listed in Annex B attesting to the Serbian forces, including **Vojislav Šešelj**'s men, deliberately killing non-Serb civilians as part of organised, mass-scale executions or in detention camps.[939]

ii. Torture and cruel treatment

The Prosecution refers to the evidence listed in Annex C attesting to the torture and cruel treatment that the Serbian forces, including **Vojislav Šešelj**'s men, committed in the municipalities covered by the Indictment. Serbian forces systematically and deliberately rounded up non-Serbs to transfer them to detention camps where they were held in inhumane conditions. They were severely beaten for a prohibited purpose, namely to obtain information and because of their ethnicity. They were forced to recite Christian prayers and crosses were carved into their skin. They were, among other things, sexually assaulted and humiliated, and were forced to work in extremely dangerous conditions.[940]

[936] *Ibid.*, para. 533.
[937] *Ibid.*
[938] Exhibit P01363.
[939] Prosecution Closing Brief, para. 536.
[940] *Ibid.*, para. 537.

According to the Prosecution, the civilian or *hors de combat* status of the victims was apparent from the prevailing conditions, more specifically, non-Serbs were detained or placed under house arrest and they were not armed when subjected to the abuses.[941]

iii. Wanton destruction, destruction or wilful damage to institutions dedicated to religion or education, plunder of public or private property

According to the Prosecution, the crimes listed in Annex E were committed intentionally and were not justified by military necessity, such as the shelling of the towns of Mostar and Svrake.[942]

b. Crimes against humanity

According to the Prosecution, **Vojislav Šešelj** must answer on three counts of crimes against humanity, the elements of which have been established: **persecution** under Article 5 (h) (Count 1), **deportation** under Article 5 (d) (Count 10) and **inhumane acts (forcible transfer)** under Article 5 (i) (Count 11).

i. An armed conflict existed throughout the period relevant to the Indictment

The Prosecution submits that an **armed conflict existed** in **Croatia** and **BiH.** Serbian refugees started fleeing the conflict in **Croatia** and arrived in **Vojvodina** in 1991-1992, where inter-ethnic tensions in **Hrtkovci** intensified. **Vojislav Šešelj's** speech on 6 May 1992 took place in this context and was directly linked to the armed conflict in Croatia. It caused the Croats to flee Hrtkovci and it triggered a massive campaign of intimidation against those who did not flee.[943]

ii. Widespread and systematic attacks directed against the civilian population

According to the Prosecution, the evidence demonstrates the existence of a **widespread** and **systematic attack** directed against the **civilian population** in Croatia, Bosnia and Vojvodina. The means and methods of attack, the crimes committed and the discriminatory nature of the attack prove that the attacks were directed against the civilian population. The presence of some military personnel and persons *hors de combat* in the municipalities where the crimes were committed does not negate the civilian nature of these populations for the purposes of Article 5. Large numbers of

[941] *Ibid.*
[942] *Ibid.*, para. 538.
[943] *Ibid.*, para. 541.

non-Serbs were systematically expelled from their homes, subjected to brutal treatment, detained and killed.[944]

- **Croatia (Vukovar)**

The Serbian forces carried out expulsions and a policy of terror against non-Serb civilians in the territories falling under **Vojislav Šešelj**'s plan for a "Greater Serbia". The systematic nature of the attacks is established by the coordinated conduct of the perpetrators – JNA, TO and the **Šešeljevci** – and the evident pattern of their suppression of non-Serbs. The destruction of numerous villages, the shelling and destruction of Catholic churches, the forcible displacement of non-Serb civilians and the destruction of civilian homes and property and hospitals, massacres and other abuse of non-Serb detainees and/or civilians *hors de combat* prove that these attacks were targeted against the civilian population. The victims of these attacks numbered in the thousands.[945]

- **Bosnia**

In Bosnia, the Serbian forces followed a coordinated pattern to expel and terrorise the non-Serb civilian population. The systematic nature of the attacks is apparent from the evidence showing the regularity of the attacks against BiH and the commonality of the perpetrators of these attacks.[946]

- **Vojvodina, Hrtkovci**

Vojislav Šešelj's crimes in Hrtkovci also formed part of a widespread and systematic attack against the civilian population. **Vojislav Šešelj** pointed out the connection between the expulsion of Croats from this town and the vision of a homogenous "Greater Serbia". The attacks against the Croatian inhabitants of Hrtkovci in May-August 1992 led to the departure of 700 to 800 Croats. They were victims of systematic discrimination, harassment and acts of violence during this period, as described by witnesses.[947]

iii. The crimes with which Šešelj is charged were part of the widespread and systematic attacks directed against the civilian populations

According to the Prosecution, the crimes with which **Vojislav Šešelj** is charged in Croatia, Bosnia and Serbia are linked to the widespread and systematic attacks against the civilian population in

[944] *Ibid.*, para. 543.
[945] *Ibid.*, para. 545.
[946] *Ibid.*, para. 547.

terms of their nature and consequences (crimes committed on an ethnic basis in order to remove non-Serbs and create a Serb-dominated state), in terms of the means and methods used (expulsions, repression and terrorisation), in terms of their perpetrators (Serbs) and temporally.[948]

Vojislav Šešelj's position as the head of the SRS/SČP and his statements calling for the expulsion of non-Serbs make it clear that he was aware of the attacks targeting the non-Serb civilian population.[949]

- **Vukovar**

Vojislav Šešelj is responsible for the crimes perpetrated by the JNA, TO and his men against the non-Serb population in Vukovar. **Vojislav Šešelj** repeatedly confirmed the link between Vukovar and the attacks on the non-Serb population as he spoke of the strategic importance of Vukovar. As a political leader and public advocate of the forced transfer out of the area, he was present in Vukovar and knew that the widespread and systematic attacks were directed against the non-Serb civilian population.[950]

- **Bosnia**

Vojislav Šešelj is responsible for the crimes committed in BiH by the JNA (later VRS), TO, MUP and his men, in cooperation with paramilitary groups, the aim of which was to remove the non-Serbs. His speeches and his role in the coordinated mobilisation and deployment of volunteers demonstrate that **Vojislav Šešelj** was aware of the existence of these attacks.[951]

- **Hrtkovci**

Vojislav Šešelj's speech of 6 May 1992 was decisive for the widespread and systematic attack against the civilian population. In his speeches, **Vojislav Šešelj** denigrated Croats, advocated hate, discrimination and violence, and called for their expulsion. This speech was the direct cause of the flight of numerous Croats from Hrtkovci.[952]

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[947] *Ibid.*, para. 548.
[948] *Ibid.*, para. 549.
[949] *Ibid.*, para. 550.
[950] *Ibid.*, paras 551-552.
[951] *Ibid.*, paras 553-554.
[952] *Ibid.*, para. 556.

He notably appeared on television advocating the expulsion of Croats from towns and villages in Vojvodina, including Hrtkovci, which he claimed were home to "the worst Ustashas". He even declared that the Croats should move out of Serbia according to the principle of reciprocity.[953]

Vojislav Šešelj was aware of the context in which his speech was made. He frequently emphasised the connection between the expulsion of Croats from Hrtkovci and the armed conflict in Croatia and his vision of a homogenous "Greater Serbia", which was apparent from his speech of 1 April 1992. He continued to instigate, encourage and facilitate their expulsion from Serbia, as shown in his interview from November 1992.[954]

iv. The elements of the specific crimes charged have been met

- **Persecution (Article 5 (h))**

According to the Prosecution, **Vojislav Šešelj** committed all of the counts in the Indictment with discriminatory intent, which constitutes persecution under Article 5 (h).

The evidence listed in Annex A proves that Serbian forces and/or **Vojislav Šešelj** deliberately committed the crimes charged in the Indictment. He had the discriminatory intent to implement the common purpose by forcing the non-Serbs to leave certain parts of Croatia, BiH and Serbia. Systematically, the non-Serbs were removed from their jobs, their freedom of movement was restricted, and they were forced out of their homes, detained, abused and killed. Their homes and their cultural monuments were destroyed and looted. Other measures were taken to prevent their return. The non-Serbs were the targets of these attacks because of their ethnicity.[955]

According to the Prosecution, **Vojislav Šešelj** engaged in a campaign of persecution of the non-Serbs through his speeches given in Croatia, Bosnia and Vojvodina. These speeches exacerbated inter-ethnic strife given the historical context, his influence and his reputation as a political statesman and leader of the SRS/SČP. The hate speeches constituted underlying acts of persecution and reached the level of gravity of other crimes against humanity in Article 5 of the Statute.[956]

Vojislav Šešelj physically committed **persecutions** through at least **three speeches** that were extremely vitriolic, two of which related to **Vukovar and Hrtkovci**. In **Vukovar**, he declared that "Not a single Ustasha must leave Vukovar alive" and "this […] area will soon be cleared of Ustasha". In Hrtkovci, he urged that the Ustashas be moved out. According to the Prosecution, the

[953] *Ibid.*
[954] *Ibid.*, para. 558.
[955] *Ibid.*, paras 559-560.

message was clear: all Croats were enemies who should fear for their security and would be harmed if they stayed where his volunteers and sympathizers were. These calls to hate in themselves reached the requisite level of gravity given their context.[957]

In these two speeches, **Vojislav Šešelj** used the term "**Ustasha**" to denigrate and dehumanise the Croats and associate them with the Croats who had committed crimes against the Serbs during the Second World War.[958]

- **Deportation and forcible transfer (Articles 5 (d) and 5 (i))**

The evidence listed in Annex D shows that the Serbian leadership knowingly organised and executed the forcible displacement of non-Serbs from areas of Croatia, BiH and Serbia and that this was carried out by the Serbian forces, including the **Šešeljevci**. The forcible transfer and deportation of non-Serbs was part of a widespread or systematic attack directed against the civilian population. Before attacking towns and villages, the Serbian authorities took discriminatory measures against non-Serbs and created an atmosphere of fear causing many non-Serbs to flee. Others were either expelled or fled after the first shells began falling. Some victims were deliberately transferred across borders and others were displaced within Bosnia and Croatia.[959]

1.3. Criminal responsibility and Article 7 (1) of the Statute

1.3.1. The joint criminal enterprise

According to the Prosecution, the members of the JCE did not physically commit all of the crimes alleged in the Indictment, but rather used members and groups of the Serbian forces, including the JNA, VRS, local TO, MUP and other paramilitary groups, including **Vojislav Šešelj**'s men, as "tools" to implement the criminal purpose.[960]

[956] *Ibid.*, para. 561.
[957] *Ibid.*, para. 562.
[958] *Ibid.*, para. 563.
[959] *Ibid.*, para. 565.
[960] *Ibid.*, para. 568.

In the alternative, members and groups of the Serbian forces, including the JNA, VRS, local TO, MUP and paramilitary groups, were also members of the JCE and shared the intent to implement the common purpose.[961]

The common purpose shared by **Vojislav Šešelj** and the other members was to permanently and forcibly remove non-Serbs from targeted areas in Croatia and Bosnia from August 1991.[962]

The common criminal purpose was pursued through the commission of crimes enumerated in Articles 3 and 5 of the Statute, as shown by the evidence. The members of the JCE accepted the commission of these crimes in the implementation of the common criminal purpose and failed to take steps to prevent the commission of these crimes.[963]

Numerous witnesses described the plan to forcibly expel the non-Serbs and specifically the massive crimes committed to further that goal, as well as the consequences of the campaign waged by the Serbs.[964]

The members of the JCE admitted on numerous occasions that not only was their goal common, but also that the results could not have been achieved without the participation of others.[965]

The same scenario of arming men, creating separate ethnically Serbian structures and forces and ensuring cooperation between the Serbian forces was replicated in Bosnia under the command of many members of the JCE and established the existence of the common purpose.[966]

Vojislav Šešelj contributed significantly to the common purpose in, *inter alia*, the following ways:

- He helped establish, organise and motivate Chetnik organisations in Croatia and BiH.
- He participated in the recruitment, formation, financing, supply, support and direction of the **Šešeljevci.**
- He used his power and influence to provide political support to the other members of the JCE.
- His inflammatory statements concerning the forceful formation of a Greater Serbia encouraged members of the JCE and their "tools" to commit crimes against the non-Serbs.

[961] *Ibid.*, para. 571.
[962] *Ibid.*, para. 572.
[963] *Ibid.*, para. 573.
[964] *Ibid.*, para. 574.
[965] *Ibid.*, para. 575.
[966] *Ibid.*, para. 578.

- His visits to the Serbian communities in Croatia and BiH, where he held rallies and gave interviews, stoked the flames of fear and hatred.

- **Vojislav Šešelj** and his commanders met Serbian military and political leaders in Croatia and BiH in respect of the implementation of the common purpose and coordinated their actions.[967]

In the alternative, Šešelj is liable for having participated in a JCE III for each of the crimes other than deportation, forcible transfer and persecutions based on forced displacement.[968]

1.3.2. Physical commission of the crime

Through his hate speeches, **Vojislav Šešelj** physically committed persecution in Šid, Vukovar and Hrtkovci and crimes of deportation and forcible transfer in Hrtkovci.[969]

a. Instigation

According to the Prosecution, **Vojislav Šešelj** directly instigated the perpetrators to commit the crimes charged in essentially four ways:

- By using inflammatory and denigrating propaganda against the non-Serbs in his speeches, publications and public appearances;

- By travelling to the front lines to visit and encourage the Serbian forces and the **Šešeljevci** to fight the non-Serbs;

- By sending high-ranking SRS/SČP members or commanders to spread his message of hate, revenge and ethnic cleansing;

- By failing to take any measures against the **Šešeljevci** who participated in crimes against non-Serbs.[970]

Furthermore, **Vojislav Šešelj** understood the power of his propaganda, as he himself expressed: "Words can be a very dangerous weapon. Sometimes they can pound like a howitzer." Thus, **Vojislav Šešelj** used propaganda techniques as a "threat stimulus".[971]

[967] *Ibid.*, para. 580.
[968] *Ibid.*, para. 587.
[969] *Ibid.*, para. 588.
[970] *Ibid.*, para. 589.
[971] *Ibid.*, para. 591.

In his speeches, **Vojislav Šešelj** used symbols from the past and war traumas suffered by both groups to stoke hatred and fear. His propaganda campaign helped condition the Serbs to accept that non-Serbs were enemies and to justify using force against them. The campaign led by **Vojislav Šešelj** created a coercive environment that forced the non-Serbs to flee their homeland. Taking advantage of the insecurity caused by the disintegration of Yugoslavia, he harnessed the forces of nationalism, hatred and fear to advance his vision of an ethnically pure Serbian territory. Consequently, he participated in creating conditions conducive to the commission of the crimes charged, and provided encouragement and moral support to the perpetrators.[972]

Vojislav Šešelj exercised ideological and moral authority over his men as the undisputed and revered leader of the SRS and the SČP, and his political prominence allowed him to address thousands of people. He used all possible media resources (television, radio, newspapers and monthly periodicals) and his public appearances to make hate speeches. For example, he took advantage of a press conference in March 1992 to threaten and intimidate Bosnian Muslims by promising "bloodshed", a "bloody civil war" and "rivers of blood" in BiH if they rejected the Serbian territorial ultimatums. **Vojislav Šešelj** took part in rallies, accompanied by **Nikola Poplašen**, to encourage the cleansing of the Drina bank by declaring that "the only thing left in Bosnia and Herzegovina is to clean up the left bank of the Drina, secure the corridor between the Bosnian Krajina and Semberija and liberate the Serbian part of Sarajevo. Everything else is in our hands already."[973]

Vojislav Šešelj knew that his words instigated his listeners to commit acts of violence, as was the case with Serbian nationalists and his men. Therefore, he instigated his listeners to seek revenge and knew that innocent people would be killed.[974]

When he declared that the Ustashas should not leave Vukovar alive, the Serbian forces raised their rifles in a sign of approval, began chanting about slaughtering Croats and fired into the air. Soon after this rally, the **Šešeljevci** and other members of the Serbian forces committed atrocities in Vukovar, Velepromet and Ovčara. In Hrtkovci, **Vojislav Šešelj**'s speech was met with applause and chants of "Ustashas out" and "this is Serbia". Following his speech, the inhabitants of this village began a mass exodus believing that they had no other choice if they wanted to stay alive.[975]

b. Aiding and abetting

[972] *Ibid.*, para. 592.
[973] *Ibid.*, paras 593 to 596.
[974] *Ibid.*, para. 598.
[975] *Ibid.*, paras 600-601.

Vojislav Šešelj aided and abetted the commission of crimes charged in the Indictment. His propaganda substantially contributed to the commission of the indicted crimes by encouraging and morally supporting their perpetration, and by recruiting and deploying volunteers to commit them. He knew (and intended) that this would aid and assist the commission of crimes.[976]

i. Vojislav Šešelj's conduct fulfils the *actus reus* of aiding and abetting

The Prosecution provides examples of **Vojislav Šešelj**'s conduct that it deems satisfy the *actus reus*:

- His persecutory speeches throughout the period relevant to the Indictment that advocated the use of force, repeatedly impressed the need for ethnic separation and sought to justify and legitimise the crimes being committed. Not only did this constitute moral support, but also the endorsement of crimes already committed and encouragement for further criminality.

- **Vojislav Šešelj** cooperated with others to recruit, arm, train and deploy his men, who either directly committed the crimes or took part in their commission. He continued supporting his men after their deployment, including by visiting them in the field.

- He redeployed his men to conflict areas, even though his unit was known to have committed crimes, which constitutes moral support and endorsement of the crimes already committed and encouragement for further criminality.

- He sent his men to Vukovar where they directly perpetrated crimes. In his incendiary speeches, he recalled historical injustices, and thereby justified the criminal acts of revenge, and he visited his men on the front line. Each of these acts constitutes examples that had a substantial effect on the commission of these crimes.

- **Vojislav Šešelj** deployed his men to **Zvornik** where they also directly perpetrated numerous crimes and he urged the Serbian forces to "clean up" the Drina bank. He publicly endorsed the crimes perpetrated in Zvornik and qualified them as spontaneous population exchanges.

- He coordinated the training of prominent SRS/SČP commanders who directly participated in the crimes and publicly supported and endorsed them. Each of these acts clearly had a substantial effect on the commission of the crimes, as evidenced by the statements of the *Vojvodas* themselves.

[976] *Ibid.*, para. 603.

- **Vojislav Šešelj** deployed his men to Mostar and Nevesinje, and adopted an even more threatening rhetoric in his statements against non-Serbs. Moreover, he visited these locations, which had a significant impact on the commission of the crimes.

- With respect to Hrtkovci, **Vojislav Šešelj**'s speech was so virulent that it could be described as amounting to direct commission of the crimes of persecution, deportation and forcible transfer, which constitutes moral support and encouragement.[977]

ii. Šešelj knew he was aiding and abetting the charged crimes

According to the Prosecution, **Šešelj** was fully aware of the likelihood that the charged crimes would be committed and he intended their commission. It was not necessary for him to have known the precise crime that was intended and actually committed (the precise location, the number of victims, the date); it is sufficient that he was aware of the type of crimes likely to be committed.[978]

The fact that **Šešelj** knew that he had an influence over the Serbian volunteers, notably the **Šešeljevci**, also shows that he was aware that his words and acts did substantially assist in the commission of the crimes by the physical perpetrators. Furthermore, he made explicit statements that made it clear that his acts were designed to assist the criminal campaign. Thus, **Šešelj** admitted: "*I'm trying to be present as much as possible in places where I can help, to really help. I'm conscious of my humble capabilities, and they really mustn't be exaggerated. But it's my fundamental desire now to participate in the final operation to liberate Sarajevo*."[979]

[977] *Ibid.*, para 606.
[978] *Ibid.*, para. 607.
[979] *Ibid.*

2. THE ACCUSED'S ARGUMENTS ON HIS CRIMINAL RESPONSIBILITY

The Accused claims that his trial was politically motivated. He argues that the Chamber violated his right to self-representation by rendering decisions imposing or designating counsel. It was not until 8 December 2006, after he went on a hunger strike, that the Appeals Chamber ruled for a second time, rendering a decision that fully reinstated his right to self-representation. The Prosecution continuously renewed its request for counsel to be imposed on him, thereby demonstrating its need to have control even over his defence.[980]

Vojislav Šešelj claims that the numerous contempt of court proceedings initiated against him by the Prosecutor were conducted with the aim of imposing counsel on him and justifying, among other things, the violation of the right to an expeditious trial. These contempt of court proceedings were also a way for the ICTY to instil "reverence".[981]

Referring to the Prosecution's violation of its disclosure obligations, he mentions, on the one hand, the fact that he had requested that the Prosecution discloses its material in Serbian and in hard copy. This problem only started being resolved from 8 December 2006 and in a more acceptable way in mid-2007. On the other hand, during May 2008 the Prosecution disclosed only 400 binders and had yet to disclose video recordings lasting 6,600 hours. Moreover, the Accused recalls that the Prosecution should have discharged its disclosure obligation during the pre-trial phase and not during the presentation of the Prosecution's case, as was done for many documents.[982]

The Accused alleges the violation of the obligation to finance defence expenses. The Trial Chamber rendered a decision ordering the Registry to finance the defence costs using UN funds, but to this day the Registry has not acted on this decision.[983]

Moreover, **Vojislav Šešelj** raised the violation of his right to communicate with his legal associates. It was not until 21 December 2006, after four years of provisional detention, that he was able to have his first privileged communication with them, and was forbidden from having any contact with persons on the outside for more than two months in 2006, but also in December 2008.[984]

[980] Accused's Final Brief, p. 3.
[981] *Ibid.*, pp. 4-5.
[982] *Ibid.*, pp. 5-6.
[983] *Ibid.*, pp. 6-7.
[984] *Ibid.*, p. 7.

2.1. The Indictment and the counts

According to the Accused, Trial Chambers I and II had misled him for over a year by rejecting his first objection and claiming that the second objection had not been submitted on time. Finally, it was established that the first and the second objections had been premature as the Prosecution had failed to disclose, as it should have done, the material accompanying the Modified Amended Indictment. Moreover, the Prosecution presented its evidence pursuant to the Third Amended Indictment. However, the numbering of paragraphs and counts follows the Initial Indictment, even though some paragraphs and counts no longer exist.[985]

2.2. Evidence presented by the Prosecution

Vojislav Šešelj submits not only that the trial began on the day that the first Prosecution witness testified, and not on the day of the Prosecution's opening statements, but that the Prosecution's witness list was repeatedly changed. He also denounces the Trial Chamber's choice to admit into evidence the initial statements given by the witnesses – despite the witnesses testifying in court so that the statements could be selected on their probative value – and the differing treatment of accused before the ICTY.[986]

He deems that Rule 92 *ter* was erroneously applied to the testimony of Prosecution witnesses. On the one hand, the application of this rule violates the principle of adversarial procedure and represents an abuse that denies the right to a defence. Moreover, Rule 92 *ter* was added to the Rules after his arrival and therefore cannot be applied retroactively, as specified in Rule 6 (D) of the Rules. Furthermore, the Accused believes that these statements were written by the Prosecution. In addition, all that was admitted into evidence were witness statements and oral confirmations of these statements in lieu of the *viva voce* testimony before the Chamber, which would have entailed an examination-in-chief and a cross-examination.[987]

On the other hand, **Vojislav Šešelj** mentions an erroneous application of Rule 92 *quater*. According to him, the statements and testimonies of deceased witnesses admitted into evidence are irrelevant

[985] *Ibid.*, pp. 8-9.
[986] *Ibid.*, p. 11.
[987] *Ibid.*, pp. 11-12.

because they were not verified by the Defence and, during the trial, a large number of witnesses withdrew the statements they had given to the Prosecution's investigators.[988]

During the presentation of the Prosecution case, the Accused also stated that all of the witnesses denied what they said to investigators of the Office of the Prosecutor in their initial statements. **Vojislav Šešelj** argues that these statements were drafted in English, read back to the witnesses before they signed them and then translated into Serbian following very long interviews with the witnesses. He raises the possibility that the Prosecution used this method in order to lay the grounds for and reinforce its charges, and that this was not in fact a case of translation errors. Likewise, he recalls having filed criminal reports against 44 Prosecution witnesses for false testimony resulting from consent or threats, coercion and blackmail.[989]

The Prosecution also disclosed statements in the hope that they would be automatically admitted into evidence with the intention of ensuring that these exhibits could not be contested (exhibits stemming from examination-in-chief and cross-examination in other trials before the ICTY) or of introducing a considerable amount of deception. The Accused mentions Witness VS-026 as an example.

2.3. Evidence on which the Prosecution relied and which was presented with the intention of confirming the Prosecution's charges

Following an analysis of the Prosecution Closing Brief, **Vojislav Šešelj** notes that the Office of the Prosecutor did not adhere to the shortened Indictment resulting from the Trial Chamber's decision of 8 November 2006. Consequently, certain locations continued to be listed as crime bases whereas they should have only appeared in relation to the consistent pattern of conduct.[990]

The Accused points out that the revised final witness list does not correspond to the Prosecution's Final Pre-Trial Brief, and the documents (as well as the evidence) submitted by the Prosecution are not in order and were not presented in a systematic manner in order to ensure that the charges remain uncertain until the very end of the presentation of the Prosecution case.[991]

[988] *Ibid.*, p. 13.
[989] *Ibid.*, pp. 15 to 19.
[990] *Ibid.*, pp. 20 to 29.
[991] *Ibid.*, pp. 29 to 32.

Vojislav Šešelj deems that during the initial phase of the trial (presentation of the Prosecution case), the Prosecution did not adhere to the principles governing the presentation of evidence imposed by the Trial Chamber.[992]

2.4. Have the conditions for forms of responsibility under paragraph 5 of the Indictment been met?

2.4.1. Planning

Vojislav Šešelj claims that as an opposition politician he was not in a position to plan any of the crimes with which he is charged in the Indictment. Likewise, he never gave any speeches in Vukovar or in Mali Zvornik. In addition, there is no convincing evidence, apart from false testimonies, showing that he sent volunteers to the field.[993]

The Prosecution claims:
"*With respect to [his]* mens rea *for planning the crimes in Hrtkovci, the Accused's intent is evident from his statements during meetings with SRS supporters and members prior to and during the persecution campaign in Hrtkovci, as well as the fact that the criminal actions encouraged by [him] during those meetings eventually took place in Hrtkovci.*"[994]

Regarding the commission of crimes in Vojvodina and Hrtkovci, **Vojislav Šešelj** submits that there is no proof that these meetings were held or that there was any so-called encouragement. Moreover, the Prosecution made no distinction between the *actus reus* and *mens rea*, and failed to present any evidence to support the accusations.[995]

2.4.2. Ordering

Vojislav Šešelj wonders what sort of authority he could have had to issue orders when the volunteers entered JNA, VRS, VRSK and TO units, thereby depriving him of any influence over armed operations in the field. Likewise, none of the witnesses was able to corroborate this.

The Prosecution notes that:

[992] *Ibid.*, p. 32.
[993] *Ibid.*, p. 34.
[994] *Ibid.*

"*'Ordering' entails a person in a position of authority using that position to convince another to commit an offence. No formal superior-subordinate relationship is required for a finding of 'ordering' as long as the accused possessed the authority to order.*"[996]

The Accused then wonders about the possibility of determining his criminal intent if it has been established that he did not issue orders to commit crimes. The same question is asked regarding the volunteers integrated into state organs.[997]

According to the Prosecution:
"*It is not necessary to prove that the subordinate who executed the order shared the* mens rea *of the accused; it is therefore irrelevant whether the order was illegal on its face.*"[998]

Vojislav Šešelj claims that no witness stated having carried out any such alleged order. Likewise, the Prosecution did not attempt to show the existence of a relationship between him as a superior and any specific person as a subordinate. The Prosecution insinuates at times that this concerned an unidentified SRS volunteer or an unidentified member of the Serbian forces. Moreover, he claims that he was never in the chain of command, despite the false testimonies connecting him to the JCE.[999]

The Prosecution states:
"*The giving of an order may be proven circumstantially, and the order need not be in writing, need not be given by the superior directly to the person who commits the crime, and may be express or implied.*"[1000]

According to the Accused, there is no evidence proving that any orders were issued directly or indirectly, or in any other form.[1001]

The Prosecution submits:
"*In addition to the other modes or criminal liability contained in Article 7 (1), the Accused ordered the crimes of persecution, murder, torture and other inhumane acts, cruel treatment and forcible*

[995] *Ibid.*, pp. 34-35.
[996] *Ibid.*, p. 36.
[997] *Ibid.*
[998] *Ibid.*
[999] *Ibid.*, p. 37.
[1000] *Ibid.*
[1001] *Ibid.*

transfer in Vukovar (Counts 1 to 9 and 11, paragraphs 15 to 18, 20 and 28 to 32 of the Indictment) by his instruction that 'Not a single Ustasha must leave Vukovar alive!'" [1002]

According to **Vojislav Šešelj**, that phrase was never uttered either in this case or in the case against **Mrkšić, Šljivančanin and Radić**.[1003]

The Prosecution claims:
"*In addition, the Accused ordered the crimes of persecution, deportation and forcible transfer in Hrtkovci (Counts 1, 10 and 11, paragraphs 15 to 17, 27 and 31 to 33 of the Indictment) during his meetings with associates and supporters in Vojvodina in 1991 and in 1992, and, implicitly, in his speech in Hrtkovci on 6 May 1992. The intent of [the Accused] to order the crimes in Vukovar and Hrtkovci can be inferred from the content of:*
– his speeches and discussions, and
– from the fact that the crimes subsequently occurred."

Vojislav Šešelj asserts that there is no proof regarding 1991 and that the speech in Hrtkovci on 6 May 1992 was falsely interpreted. It is impossible to consider the content of the speech to be an order, because immovable property in Hrtkovci was exchanged between the second half of 1991 and late 1995. Moreover, the exchanges were done with the agreement of the participants and, during this time, he was imprisoned several times. The Prosecution's evidence consists of two witnesses whose statements were not found to be relevant by any court: a witness who did not testify in court and who expressed his wish to testify for the Defence, and a witness who appeared to be lying.[1004]

2.4.3. Instigation

The Prosecution claims:
'Instigating' requires that [the Accused] provoked, prompted or otherwise induced the conduct of another. Instigation is a contribution to the crime as a co-perpetrator either before or during the commission of the crime. Thus, instigation may take many forms such as promises, threats or abuse of power.[1005]

On this point, **Vojislav Šešelj** states that he was not in a position to make promises or to threaten anyone. According to him, the Prosecution did not present witnesses who were instigated but

[1002] *Ibid.*
[1003] *Ibid.*
[1004] *Ibid.*, p. 38.

excerpts from speeches, wherein there is confusion between the *actus reus* and the *mens rea*. The speeches were deemed to be both material and mental elements. This would be possible to accept had members of the armed forces been listening to the radio in the trenches, which instigated them to commit a crime. It should be noted that during this period, he was arrested and censored in the media by **Slobodan Milošević**'s regime.[1006]

According to the Prosecution:
"*The conduct of the Accused must have been a clear contributing factor to the conduct of the other person(s).*"[1007]

Vojislav Šešelj claims that the Prosecution did not prove that he had instigated the commission of crimes; it merely engaged in interpreting his words.[1008]

According to the Accused, the Prosecution argues that the instigation to commit crimes is mainly evident in his speeches, so much so that the same speech is put forward as instigation under a specific form of responsibility, as instigation under participation in the JCE and as a form of direct commission of a crime.[1009]

Consequently, the issue of speech as instigation is a broad one, which allows the Prosecution to use the statement of any witness as evidence thereof. The Accused cites paragraph 827 of the Kordić Judgement.[1010]

2.4.4. Aiding and abetting

For **Vojislav Šešelj**, there is no evidence to show that he expressed sympathy for a crime that was committed. It has been proven that he publicly criticised those who had committed crimes and called for them to be held accountable. As an example, he welcomed the arrest of the **Yellow Wasps in Zvornik**, criticised Arkan, etc.[1011]

[1005] *Ibid.*, p. 39.
[1006] *Ibid.*, pp. 39-40.
[1007] *Ibid.*
[1008] *Ibid.*, p. 40.
[1009] *Ibid.*, p. 41.
[1010] "*The Trial Chamber has already held that the allegations relating to the encouragement and promotion of hatred, etc., and the dismissal of Bosnian Muslims from employment do not amount to persecution for the purposes of this case or, in the case of the latter allegations, at all. Although the charges of instigation are unfounded and Professor Vojislav Šešelj's speeches have been manipulated or given a significance they did not have in reality, the Office of the Prosecutor did not present any evidence to support the charges for this mode of responsibility.*"
[1011] *Ibid.*, p. 43.

Moreover, there is no evidence to show that he was present during the commission of a crime or that he was at the location when a crime was found to have been committed or that he had the status of a superior. During the cross-examination of expert **Anthony Oberschall**, the expert himself was also surprised by some of the facts.[1012]

The Prosecution referred to witnesses (VS-007/011/015/017//026/027/034) who confirmed that he had aided and abetted. Some of these witnesses were shown to be false witnesses, while others, witnesses for the Defence, stated that there had been neither aiding nor abetting.[1013]

2.4.5. Commission as participation in a JCE

Vojislav Šešelj claims that there is no evidence that a link existed between him and the other alleged members of the JCE. In fact, evidence shows that there was antagonism between the various members, including the Accused, which proves that communication, and *a fortiori* agreement, was impossible. In addition, he was also a political opponent of all the alleged members of the JCE throughout the period relevant to the Indictment.[1014]

Some of the individuals named in the Indictment as members of the JCE were never charged (**Kadijević, Adžić, Bogdanović, Stojčić**) and the Accused himself was not mentioned as a member of a JCE in other trials (**Ražnatović**).

The Accused also argues that if the Prosecution did not draw up indictments charging **Martić, Stanišić** and **Simatović** of involvement in a JCE in the same way (Decision of Trial Chamber III of 10 November 2005 denying the Prosecution's request for a joinder of the cases), it means that the ICTY judges were debating even before the start of the trial whether a JCE had indeed been possible.[1015]

The Prosecution also used the notion of "related cases by geographical area" and listed numerous cases. According to **Vojislav Šešelj**, the Prosecution must show that the events that occurred in a specific location are identical, that there is a link between these persons, that crimes were committed in these areas and that, for each of the locations in question, each of the participants in the JCE should be held individually criminally responsible, which is impossible to demonstrate.[1016]

[1012] *Ibid.*, pp. 43-44.
[1013] *Ibid.*, pp. 45-46.
[1014] *Ibid.*, p. 52.
[1015] *Ibid.*, pp. 52-53.
[1016] *Ibid.*, p. 54.

The Accused lists various cases related to the JCE:

a. Stanislav Galić and Dragomir Milošević

According to the Accused, there are no charges or any convictions for participation in a JCE in these two cases.

b. Momčilo Krajišnik

Vojislav Šešelj is not listed as one of the participants in the JCE in the Indictment against **Krajišnik**, whereas the latter is mentioned as a member of the JCE in the Indictment against the Accused. The Accused explains this by the fact that **Zoran Đinđić** demanded from Prosecutor Carla Del Ponte that he be sent to The Hague. Consequently, this is a sort of catch-all indictment.[1017]

Furthermore, if we accept the participation of the Accused in the JCE together with **Krajišnik**, the crimes that were dropped against the latter as constituting the main purpose of the JCE must also then be dropped in respect of the Accused.[1018]

The *Krajišnik* Judgement and the evidence presented by the Prosecution during the trial show that the Accused was neither in the "leadership" of the JCE nor in its "local component".

With respect to the locations in the Indictment against the Accused, the Prosecution failed to present any evidence establishing the link required by ICTY case-law for participation in a JCE.[1019]

c. Milan Martić

None of the locations mentioned in the Indictment against **Martić** appears in the Indictment against the Accused. Likewise, the time frames relevant to the Indictments only partially overlap.[1020]

[1017] *Ibid.*, pp. 55-58.
[1018] *Ibid.*, pp. 59-60.
[1019] *Ibid.*, p. 61.
[1020] *Ibid.*, pp. 61-62.

According to the Amended Indictment against **Martić**, the Accused submits that **Martić** was charged with participation in a JCE together with, among others, **Jović, Kostić, Bulatović** and **Simović**, who were never indicted before the ICTY.[1021]

In the *Martić* Trial and Appeal Judgements, there is no evidence indicating that the Accused was a member of the JCE. It is stated that **Slobodan Milošević** pressured the Serbian leadership in the RSK and pushed it to seek a peaceful solution under the auspices of the UN. The Accused claims that **Babić** never stated that **Milošević** campaigned for the creation of a Serb state from the summer of 1990 until the end of 1991.[1022]

d. Mile Mrkšić, Veselin Šljivančanin and Miroslav Radić

In the above case, the Prosecution claimed that the accused had participated in a JCE for the purpose of persecuting the Croats and other non-Serbs who were at the Vukovar hospital after the fall of the town through the commission of murder, torture, cruel treatment, extermination and inhumane acts.[1023]

According to **Vojislav Šešelj**, the Trial Chamber in the above case determined that there was no direct evidence of the existence of a JCE and, consequently, that there had been no JCE in Vukovar. If the judges of the Trial Chamber determined this in respect of the highest-ranking leaders, the Accused wonders how it was possible to charge him with participation in a JCE in, among other places, Vukovar.[1024]

Vojislav Šešelj claims that it was decided that "it has not been established that [on 21 November 1991 **Radić**] knew or had reason to know that his subordinates had committed offences in Ovčara" when he was a JNA captain and the commander of a JNA unit in Vukovar. Thus, how could he have been charged when he was an opposition politician and had been in Banja Luka and Western Slavonia at the time of the events in Ovčara?[1025]

Furthermore, the locality of Vukovar was also reviewed with the aim of determining whether crimes against humanity had been committed there. It was established and decided that this had not been the case and, therefore, the Accused cannot be charged with having participated in the JCE

[1021] *Ibid.*, p. 64
[1022] *Ibid.*, pp. 64-65.
[1023] *Ibid.*, p. 68.
[1024] *Ibid.*, p. 68.

and with having committed crimes against humanity in Vukovar.[1026] Likewise, **the Accused** claims that he cannot be charged with counts that did not appear in the Indictment in the above case.[1027]

e. Blagoje Simić et al.

According to the Accused, participation in the JCE was not defined as a form of responsibility in this case. Consequently, he wonders how this form, which did not exist at the time, could be considered as a consistent pattern of conduct in his case.[1028] It is also impossible to claim that the events that occurred in Bosanski Šamac were the result of a JCE.[1029]

f. Other cases linked according to geographical area

Vojislav Šešelj mentions cases that were said to be connected (*Babić, Dokmanović*, *Hadžić, Karadžić, Mladić, Naletilić and Martinović, Plavšić, Prlić et al., Simić, Todorović, Perišić, Stanišić and Simatović,* and *Milošević).* He claims that he could not have participated in a JCE alongside **Slobodan Milošević** until December 1995 seeing as, among other things, he was a political opponent and was arrested three times by him. Moreover, the dates on which the Accused and **Slobodan Milošević** allegedly participated together in the JCE differ in the Indictments.[1030]

[1025] *Ibid.*, p.69.
[1026] *Ibid.*, p. 70.
[1027] *Ibid.*, pp. 70-71.
[1028] *Ibid.*, p. 71.
[1029] *Ibid.*, pp. 71-72.
[1030] *Ibid.*, pp. 72 to 79.

3. THE CRIMES

In order to be able to take a position on the criminal responsibility of Vojislav Šešelj, I must first examine the key matter of "Šešelj's men" (3.1.) and subsequently discuss the crimes attributable to the Serbian forces (3.2.).

After classifying the crimes attributable to the Serbian forces, I will examine in depth the crimes that could be attributed to Vojislav Šešelj (3.3. Persecution, 3.4. Forcible transfer and deportation).

3.1. Šešelj's men

The evidence admitted into the record fully establishes that numerous crimes were committed in **Croatia** and **Bosnia and Herzegovina** by "**Serbian forces**". These crimes were mentioned in the Prosecution's written briefs and in court. It is significant to note that the Accused **Vojislav Šešelj** never denied that these crimes had been committed, save for a few occasions regarding purely technical matters, and stated that the perpetrators of these crimes were under military command and that it was up to these military commanders to hold them accountable.[1031]

Likewise, it is also significant to note that when the victims testified, he never questioned their **status of victim** or the substance of their testimonies.[1032]

Consequently, it appears without a shadow of a doubt that these crimes were committed by perpetrators who were members of an armed force described as the "**Serbian forces**".

In my view, a distinction should be made regarding the "**Serbian forces**" based on the key dates marking the independence of **Croatia** and the **Republic of Bosnia and Herzegovina**.[1033] Likewise, another key date that should be taken into consideration is the date on which the **JNA** withdrew from **Bosnia and Herzegovina**.[1034] The legal consequence of this withdrawal was that it left in place either the **Municipal Territorial Defence** or another army that would replace it, namely the

[1031] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Vojislav Šešelj's Final Brief", 30 January 2012, p. 240 not sufficiently precise, consult transcripts.
[1032] T(E) of 25 March 2008 (open session), p. 5263; T(E) of 1 July 2008 (open session), p. 8788; T(E) of 17 July 2008 (closed session), pp. 9557-9558; T(E) of 10 March 2010 (open session), p. 15731.
[1033] Croatia declared its independence on 25 June 1991 and Bosnia and Herzegovina on 1 March 1992.
[1034] The date is 9 May 1992.

VRS in the case of the Republic of Bosnia and Herzegovina, which was commanded by General **Ratko Mladić**.[1035]

Consequently, the soldiers belonging to the **JNA** either went back to Serbia or remained, but under another name. The trickiest issue is to know **at which moment** the crimes were committed because it is common knowledge that an army does not withdraw overnight: there is a whole series of logistical measures to be taken and this requires time. Therefore, an official withdrawal does not automatically imply that the official army leaving the territory ceases to bear any responsibility as it can still remain in place for a few days or even weeks, and crimes could still be committed during this period by the members of this army.

Although I am aware of this issue, I deem however that a soldier who stays with the official army comes under the responsibility of the departing army, unless he is immediately demobilised on the ground. With the departure of the **JNA** from **Vukovar**, the question arises of when it was replaced by the **Territorial Defence** of **Goran Hadžić**. The situation becomes more complicated when a volunteer from the Serbian Radical Party who had been assigned to a **JNA** unit decides, on his own, to remain where he is and to join up with another unit. Given his individual decision (even though he has not been officially demobilised), who then bears responsibility: the former structure or the new structure? In the absence of evidence proving otherwise, this could lead to a finding that, *de facto,* this soldier had left the **JNA**, and the case could be the same for those who committed crimes in **Vukovar**, namely **Kameni, Kinez**, etc.

In the commission of crimes, the victims, witnesses and international experts mentioned either the "**Serbian forces**" or the "**Chetniks**" or **"Šešelj's men**". The Accused challenged the terms Chetniks and "**Šešelj's** men" during the testimony of several witnesses in order to highlight that those who were described as being Chetniks or "**Šešelj**'s men" belonged to the "Serbian forces" and were actually either JNA or VRS soldiers who belonged to a specific unit, or members of paramilitary forces such as **Arkan**'s men, the Red Berets, the White Eagles, the Yellow Wasps, etc. The evidence has established that these various groups were affiliated with political parties other than **Vojislav Šešelj**'s party or, as in the case of **Arkan**'s men, with the Ministry of the Interior.[1036]

[1035] *See* notably *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, "Third Amended Indictment", 31 October 2011, para. 3.
[1036] Exhibit P261, pp. 94, 103, 104 and 105; Exhibit P1144 under seal, para. 53; Exhibit P132; Exhibit P204, para. 7. *See* also Prosecution Expert Witness Reynaud Theunens, T(E) of 14 February 2008, pp. 3651 to 3653, and T(E) of 19 February 2008, p. 3755.

With regard to the issue of **Šešelj's men**, I would like to reproduce here in its entirety the answer that Šešelj gave to a female radio listener, quoting both the **question** and the **response** (P1215):

> – I'd like to say hello to *Vojvoda* Šešelj, a really big hello to him, and I'd like to ask him something. I've met a lot of people who, when someone asks them, say, "I'm a Šešelj man". But these are Šešelj men with knives and who behave arrogantly and so on, while the *Vojvoda* is a gentleman who wields facts and arguments and so on. Now in that Radical Party which is being formed in our parts, is it possible to achieve the kind of order that he wants? What is it with those people and that behaviour? Because in one place they'll show one thing, while here in Banja Luka it's something else, some big courage and this and that. How far is it in Šešelj's power to really be what he stands for? Because if we were all in the Radical Party like the gentleman, that would be something ideal, too ideal, really. So I'd just ask him to answer that, is there any possibility, and what's going on with those people?
>
> **Šešelj :** Well you see, madam, if people appear who claim to be Radicals or members of the Serbian Chetnik Movement, but their behaviour is that of drunkards, immoral and so on, you can be assured they're not our members, and if they do join then we exclude them from our party and movement very swiftly. If you saw those guys who were with us today, you would have been assured that these are men of utterly decent conduct, very nicely dressed in immaculate uniforms and so on. And all our volunteers are like that on whatever front, that's how they act. Now, from time to time in some places there are these self-formed gangs of one-time robbers that invoke our party and movement, taking our name for themselves, and inflicting great moral and political damage on us. For example, in Zvornik someone calling himself Žućа appeared, who was a volunteer with us at Vukovar, and we kicked him out back in September 1991 for theft, looting and other such immoral behaviour. Well he showed up in Zvornik, formed a group called "Yellow Ants", and they claimed to be members of our movement, but they were just looting. And what's more, they were robbing Serbian people, seizing cars and other property. Several times we prepared to ambush them, to be honest with you, to liquidate them. Once they were actually arrested by the Republika Srpska military police and held at the Bijeljina prison for a while, but then they were later released – I don't know why. I don't know whether they've shown up again somewhere in Republika Srpska now. But in any case, if people who behave like that show up, the army and police have to act forcefully and stamp it out, and bring them to justice. And they'll have the full support of us in the Serbian Radical Party in all such cases. On the other hand, we don't have any kind of military organisation of our own. All of our volunteers are part of the Army of Republika Srpska or the Army of the Republic of Serbian Krajina, and at times they act as intervention platoons, intervention companies, special operations units and the like, but they only receive orders from the Command of the Army of Republika Srpska or the Army of the Republic of Serbian Krajina. So they're not waging some kind of private war of their own, and they don't take the initiative in terms of that kind of command. And on the battlefield they really do perform the toughest combat tasks. We've had a large number of casualties among them. They are among the most courageous. And soldiers from other units who have been in action alongside them in this war can also back that up. Now, those who falsely claim to be our men are creating the biggest problems for us, and we would be very happy to put an end to it.

In reality, it seems to me that it has been established beyond all reasonable doubt that with respect to the period before **22 May 1992**, at certain times, units consisting of volunteers from the Serbian Radical Party were under **no one else's command** except for the Accused **Vojislav Šešelj**'s. On the

other hand, with regard to the other events explicitly mentioned in the Indictment – which took place in **Mostar**, **Nevesinje**, etc. – the "Serbian Forces" were under a clear military command[1037] and not under the command of **Vojislav Šešelj** who, moreover, was not charged under Article 7 (3) of the Statute.

The crucial point of the issue of "**Šešelj**'s men" mentioned on numerous occasions in the Prosecution Closing Brief resulted from the description given by several witnesses who described certain individuals as being "**Šešelj's** men". In describing them in this way, the witnesses based themselves on very specific points: they sometimes wore a beard, a *šajkača*, a cockade or insignia.[1038] In this respect, a chart of insignia was shown to these witnesses so that they might recognise amongst them those worn by "**Šešelj**'s men".[1039] However, no convincing evidence emerged in respect of this. Furthermore, the two video stills below should be examined.[1040] It is quite clear that the soldiers making up the "Serbian forces" are dressed differently and that no reasonable trier of fact could conclude that these were "**Šešelj**'s men". Consequently, the only finding that can be reached is that this disparate unit was under the command of a military authority.

A particularly important subject for the Prosecution was the title of *vojvoda* that was conferred on Vojislav Šešelj by Momčilo Đujić, as it recalled in its brief.

According to the Prosecution, this was no more no less than a title denoting a military commander.

I found it particularly interesting to extract one of Vojislav Šešelj's sentences from document P1215:

> **Šešelj :** … the way we expected. Because hardly a single volunteer has come from across the ocean to defend the Serbian people here, either in Republika Srpska or in the Republic of Serbian Krajina. At least not through the organisation. Some men came at their own initiative, but the organisation isn't like that, it hasn't sent anyone. However, the

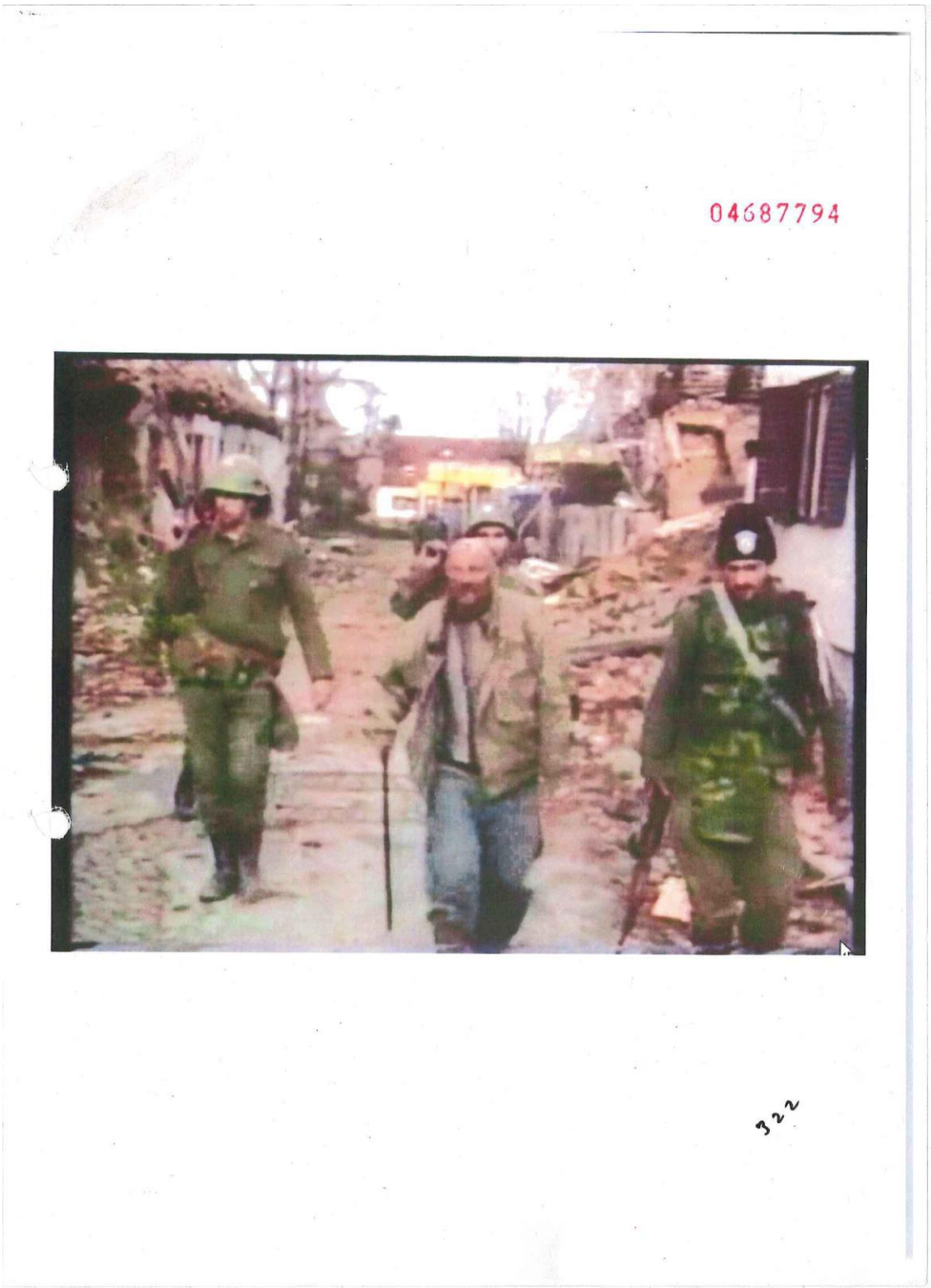
[1037] Exhibit P880 under seal, pp. 26 and 27; Exhibit P1052 under seal, p. 5; Exhibit P843, para. 51; Exhibit P843, paras 52 to 54.
[1038] Perica KOBLAR, Vilim KARLOVIĆ, T(E) of 11 March 2008 (open session), p. 4675; VS-1013, T(E) of 25 March 2008 (open session), p. 5193; VS-1062, T(E) of 10 April 2008 (private session), p. 5970; VS-064, T(E) of 25 June 2008 (open session), p. 8719; Redžep KARIŽIK, T(E) of 1 July 2008 (open session), p. 8803; VS-1051, T(E) of 2 July 2008 (closed session), pp. 8851-8852; Katica PAULIĆ, T(E) of 19 November 2008 (open session), pp. 11903-11904; Ljubiša VUKAŠINOVIĆ, T(E) of 27 November 2008 (open session), p. 12391; Jovan GLAMOČANIN, T(E) of 11 December 2008 (private session), p. 12999; VS-1066 and VS-2000, T(E) of 4 February 2009 (closed session), pp. 13936 and 14025; Vojislav DABIĆ, T(E) of 26 January 2010 (public session), pp. 15116 to 15118; VS-1067, T(E) of 2 February 2010 (open session), p. 15320.
[1039] Exhibit P00455.
[1040] Exhibits P00273 and P00274.

> movement has provided, according to the latest information I have, approximately 300,000 dollars for the Knin television station, so that's still a significant amount and it will be of great benefit for the Serbian people there and their propaganda efforts.
>
> As for my relations with *Vojvoda* Momčilo Đujić, I still respect, esteem and admire him. But we're not on such good terms now as we used to be, because we've taken a different line to *Vojvoda* Đujić over the issue of the monarchy. In the opinion of the Serbian Radical Party, after everything that has happened with Prince Aleksandar, after all of his treasonous activities and openly taking sides with the Western powers, and their local experiments in Belgrade, he has completely disqualified himself as a potential claimant of the Serbian throne and has discredited the very idea of a monarchy. At the same time, we're a party with a distinctly democratic character, and we believe that democracy inherently implies a republican state arrangement and framework of governing. This is something that Momčilo Đujić, as the leader of the old school simply cannot grasp. And he thinks that a monarchy is the ideal form of rule that we should favour. We simply can't find any common ground on this issue. And that's the only point on which we disagree.

So, it emerges from the above that **Momčilo Đujić** was striving for the return of the monarchy by supporting Prince Aleksandar, who was a traitor in Vojislav Šešelj's eyes.

Consequently, it is ruled out that this title could have given him any type of military command because how could these two opposing ideas stand side by side?

The following photo shows that during the fall of Vukovar there were many soldiers all dressed differently.



Likewise, document P00455 shows that soldiers also wore different insignia. It should be borne in mind that the **material element** that could enable a positive identification is the insignia of the Serbian Radical Party volunteers.

White Eagles

Rajko Janković Unit

Yellow Wasps

Vaske's Unit

Arkan's Tigers

Šešeljevci

Petrova Gora

Karađorđe Unit

Gogić's Unit

Leva Supoderica

Red Berets

Pivarski's Men

Dušan Silni Unit

"Serbian Guard"

Mauzer's Unit

Serbian Radical Party

I enclose with my opinion the following table providing a chronological overview of the military units present on the ground up to May 1992, the date on which these units were effectively integrated into the Army of Republika Srpska:

- Leva Supoderica (October 1991)
- Petrova Gora (September 1991)
- Karađorđe Unit (late 1991- May 1992)
- Milorad Gogić's Unit (1992)
- Pivarski's Men (1992)
- Vaske's Unit (late 1991- May 1992)
- Yellow Wasps (1992)
- White Eagles (1992)

The paramilitary units were the subject of multiple charges in the Prosecution's briefs.

I found it interesting to go over what Vojislav Šešelj stated on 6 April 1992 about these groups, as seen in Prosecution Exhibit P1202:

> The Serbian Radical Party applauds the authorities of the Serbian Republic of Bosnia and Herzegovina in their drive to disarm all sorts of, as they are called, paramilitary units – essentially gangs of bandits harassing peaceful civilian population, regardless of their nationality and religious affiliation, and to disrupt the smuggling channels, war profiteering, etc.
>
> We believe that it is about time for such a move to be made, to disarm those bandit gangs, bring them in before the law to answer for everything they have done in these past few months in the territory of the Serbian Republic of Bosnia and Herzegovina, and which caused great political, economic and moral damage, primarily to the Serbian people.

As we can see, there is no ambiguity here, all the more so because these statements were made in April 1992 – an important month when it comes to the commission of several crimes.

In support of this observation, it is important to read a subsequent answer given by Vojislav Šešelj regarding the crimes committed by the paramilitary units:

> I believe that the Serbs should arrest anyone who has looted, in the war, anyone who has killed civilians or harassed civilians. We Serbs have always had a chivalrous military which has fought the enemy in the battlefield, but which has never been distinguished for their "/?heroism/" against women, children, civilians of any nationality. And I think that the Government of Bosnia and Herzegovina has done the right thing by starting to bring order in

> their territory. After all, such gangs of bandits have attempted to take over the government in Zvornik. That /kind of thing/ used to happen too! No one could do anything to them. Sometimes you can easily get into a situation which has not happened yet but could happen, whereby those gangs of bandits violate the ceasefire some place where /the ceasefire/ has been announced, and stage a conflict. If you cannot keep under control some military formation in your territory, then you have simply lost. You have lost the battle. Discipline must be respected and the government's authority must be respected too. You know, if a Serb government is established, then all the military formations must report to and obey that Serb government, and execute their orders. If anyone does not do that, then he is standing in the way of that Serbian government, especially in those cases where they did not rob Muslims or Croats, but primarily Serbs living in their territories. To rob Croats and Muslims, they would have to go over into their territory. They are, in principle, all big cowards. They are not in the mood for that. And then they grab whatever it is they come across. That is where they operate. They have moved various property over here.

It seems to me that this answer says it all.

In conclusion, it seems to me that despite some witness statements, it is almost impossible to have absolute certainty regarding the affiliation of a paramilitary unit to a political group that would issue operational orders to it.

On the other hand, it is certain that the majority of the paramilitary units depended on the JNA until its withdrawal from the Republic of Bosnia and Herzegovina and, subsequently, on the regular army of Republika Srpska (VRS), commanded by General Mladić. Furthermore, it appears that these acts of violence were committed by small groups consisting of a few members who managed to avoid any sort of **legal** command.

3.2. Crimes attributable to the Serbian forces

Indisputably, the evidence established that murders (crimes against humanity – Count 4) attributable to the Serbian forces took place in **Vukovar, Zvornik, Greater Sarajevo, Mostar and Nevesinje**.

Likewise, the crime of torture (Count 8, violations of the laws and customs of war) was proven for Vukovar, Zvornik, Greater Sarajevo, Mostar and Nevesinje.

The crime of cruel treatment (Count 9, violations of the laws and customs of war) was also proven for Vukovar, Zvornik, Greater Sarajevo, Mostar and Nevesinje.

The crime of wanton destruction of villages (Count 12, violations of the laws and customs of war) was proven for the most part for Vukovar, Zvornik, Greater Sarajevo, Mostar and Nevesinje.

The crime of destruction or wilful damage of institutions dedicated to religion or education (Count 13, violations of the laws and customs of war) was proven in all its elements for Vukovar, Zvornik, Greater Sarajevo, Mostar and Nevesinje.

Lastly, the crime of plunder (Count 14, violations of the laws and customs of war) was proven beyond all reasonable doubt for Vukovar, Zvornik, Greater Sarajevo, Mostar and Nevesinje.

However, given the absence of evidence, I cannot establish a link between these crimes and **Vojislav Šešelj** under any form of responsibility. **Vojislav Šešelj** never ordered these crimes, especially since there is not a single document showing that he played either a direct or indirect role in these crimes.

The Serbian forces, including the paramilitary units, were under a **single command**, while **Vojislav Šešelj** was outside of this system of command.

In its annexes, the Prosecution classified by Count the events that led to the commission of crimes. The following tables refer to Counts 4, 8-9, 12, 13 and 14 show my own position on the crimes attributable to the Serbian forces.

On the other hand, I indicated in the *mens rea* column whether the evidence shows the element of intent, as concerns each act, with respect to Vojislav Šešelj. Where I did not establish the presence of *mens rea*, I noted the number 0 in the table.

Consequently, in the last column entitled "guilt", the acronym "NG" signifies not guilty.

Count 4: Murder

Vukovar

(a) Ovčara/Grabovo

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**
2. … 195.	**+**	**0**	**NG**

Zvornik

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**
2.	**+**	**0**	**NG**
3.	**+**	**0**	**NG**
4.	**+**	**0**	**NG**
5.	**+**	**0**	**NG**
6. … 168.	**+**	**0**	**NG**

Greater Sarajevo

(a) Ilijaš

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**
2.	**+**	**0**	**NG**
3.	**+**	**0**	**NG**
4.	**+**	**0**	**NG**
5.	**+**	**0**	**NG**
6.	**+**	**0**	**NG**
7.	**+**	**0**	**NG**
8.	**+**	**0**	**NG**
9.	**+**	**0**	**NG**
10.	**+**	**0**	**NG**
11.	**+**	**0**	**NG**
12.	**+**	**0**	**NG**

13.	**+**	**0**	**NG**
14.	**+**	**0**	**NG**
15.	**+**	**0**	**NG**
16.	**+**	**0**	**NG**
17.	**+**	**0**	**NG**
18.	**+**	**0**	**NG**
19.	**+**	**0**	**NG**
20.	**+**	**0**	**NG**
21.	**+**	**0**	**NG**
22.	**+**	**0**	**NG**
23.	**0**	**0**	**NG**

(b) Vogošća

No.	***Actus Reus***	***Mens rea***	**Guilt**
1.	**+**	**0**	**NG**
2.	**+**	**0**	**NG**
3.	**+**	**0**	**NG**

(c) Novo Sarajevo

No.	***Actus Reus***	***Mens rea***	**Guilt**
1.	**0**	**0**	**NG**

(d) Ilidža

No.	***Actus Reus***	***Mens rea***	**Guilt**
1.	**+**	**0**	**NG**
2.	**+**	**0**	**NG**
3.	**+**	**0**	**NG**

Mostar

No.	***Actus Reus***	***Mens rea***	**Guilt**
1. … 88.	**+**	**0**	**NG**

Nevesinje

No.	*Actus Reus*	*Mens rea*	Guilt
1. … 79.	**+**	**0**	**NG**

Counts 8 and 9: Torture and cruel treatment

Vukovar

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**
2.	**+**	**0**	**NG**

Zvornik

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**
2.	**+**	**0**	**NG**
3.	**+**	**0**	**NG**
4.	**+**	**0**	**NG**
5.	**+**	**0**	**NG**
6.	**+**	**0**	**NG**
7.	**+**	**0**	**NG**

Greater Sarajevo

(a) Ilijaš

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**

(b) Vogošća

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**
2.	**+**	**0**	**NG**

Mostar

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**
2.	**+**	**0**	**NG**
3.	**+**	**0**	**NG**
4.	**+**	**0**	**NG**

Nevesinje

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**
2.	**+**	**0**	**NG**
3.	**+**	**0**	**NG**
4.	**+**	**0**	**NG**

Count 12: Wanton destruction

Vukovar

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**
2.	**+**	**0**	**NG**
3.	**+**	**0**	**NG**
4.	**+**	**0**	**NG**
5.	**+**	**0**	**NG**
6.	**+**	**0**	**NG**
7.	**+**	**0**	**NG**
8.	**+**	**0**	**NG**
9.	**0**	**0**	**NG**
10.	**+**	**0**	**NG**
11.	**0**	**0**	**NG**

Greater Sarajevo

(a) Ilijaš

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**

(b) Vogošća

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**

Mostar

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**

Nevesinje

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**

Count 13: Destruction

Zvornik

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**

Greater Sarajevo

(a) Ilijaš

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**

(b) Vogošća

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**

Mostar

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**

Nevesinje

N°	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**

Count 14: Plunder

Vukovar

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**
2.	**0**	**0**	**NG**
3.	**0**	**0**	**NG**
4.	**0**	**0**	**NG**

Zvornik

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**
2.	**0**	**0**	**NG**

Greater Sarajevo

(a) Ilijaš

No.	*Actus Reus*	*Mens rea*	Guilt

1.	**0**	**0**	**NG**

(b) Vogošća

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**

(c) Novo Sarajevo

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**

Mostar

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**

Nevesinje

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**

3.3. Crimes that could be attributed to Vojislav Šešelj

3.3.1. Count 1: Persecution through speeches

Having found in the tables above that crimes had been committed by the Serbian forces (*actus reus*), I could not link them to **Vojislav Šešelj**.

I stated this position publicly during the Rule 98 *bis* proceedings when, at the hearing, I explained in my dissenting opinion that **Vojislav Šešelj** should be acquitted of Count 4 (Murder), Counts 8-9 (Torture and cruel treatment), Counts 12 and 13 (Destructions) and Count 14 (Plunder). So, I now have to examine the crimes that could be attributed to Vojislav Šešelj concerning Counts 1, 10 and 11. This exercise led me to a finding of not guilty with respect to these Counts due to the lack of the element of intent (***mens rea***). As in the case of the crimes attributed to the Serbian forces, an enclosed table will provide the reader with an overview of these crimes.

a. Applicable law

According to the charters of the Nuremberg and Tokyo tribunals, **persecution** as a **crime against humanity** was provided for separately.[1041] **Christian Le Gunehec**, counsellor at the *Cour de Cassation* in the ***Klaus Barbie*** case, described a **crime against humanity** in general, including persecution, as follows: "*[...] above all these crimes offend the fundamental rights of mankind; the right to equality, without distinctions of race, colour or nationality, and the right to hold one's own political and religious opinions. Such crimes not only inflict wounds or death, but are aggravated by the voluntary, deliberate and gratuitous violation of the dignity of all men and women: these are victimised only because they belong to a group other than that of their persecutors, or do not accept their dominion.*"[1042] It is also interesting to examine the way in which the Nuremberg Judgement described the persecution of the Jews by the Nazi Government: "*With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws was passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and*

[1041] Article 6 of the Nuremberg Charter states*:* "*The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be no individual responsibility: […] (c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or* ***persecutions on political, racial or religious grounds*** *in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated*," Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945. The Charter of the International Military Tribunal for the Far East of 19 January 1946 repeats the same terms in its Article 5 (c).

[1042] Report of Counsellor Le Gunehec, p. 24, cited in A. CASSESSE, *Violence and Law in the Modern Age*, Cambridge, Polity Press, 1988, p. 112.

their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organised which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish businessmen. A collective fine of 1 billion marks was imposed on the Jews, the seizure of Jewish assets was authorised, the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of the ghettos was carried out on an extensive scale, and by an order of the Security Police Jews were compelled to wear a yellow star to be worn on the breast and back."[1043]

In the ***Tadić*** **Judgement**, the ICTY Trial Chamber included this quote, considering that it "encapsulate[s] ***the essence of the norm of persecution***".[1044] It also relied on the work of the International Law Commission to develop its case-law on the crime of persecution. The Chamber considered that this crime encompasses various acts, including those of a **physical, economic or judicial nature**, from murder to limiting the types of professions open to the targeted group.[1045] It specified in this decision that "***other inhumane acts***" characterised as crimes against humanity under Article 5, the crimes listed in the Statute under Articles 2 and 3, that is, acts characterised as violations of the laws and customs of war and grave breaches of the Geneva Conventions, as well as other acts not listed in the Statute, could also be considered as persecution.[1046]

In the ***Kupreškić*** Judgement, the Trial Chamber specified the types of acts that fall under the definition of **persecution**. It stated, firstly, that such acts must present the **same degree of gravity** as the acts enumerated in Article 5 and pointed out that only **gross or blatant denials of fundamental human rights** could constitute crimes against humanity.[1047] However, the Chamber deemed that even though these acts viewed in isolation could not be considered inhumane, their overall consequences "*must offend humanity in such a way that they may be termed 'inhumane'*".[1048]

The ***Kordić and Čerkez*** case examined the specific issue of **hate speech** as an **act of persecution**. The Trial Chamber found that it was not mentioned as a crime in the Statute of the International

[1043] Trials of the Major War Criminals before the International Military Tribunal, Nuremberg Military Tribunals, 1947, ("Nuremberg Judgement"), pp. 247 to 249.
[1044] *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgement, 7 May 1997, para. 705.
[1045] *Ibid.*, paras 706 to 710.
[1046] *Ibid.*, paras 710 to 726.
[1047] *The Prosecutor v. Zoran Kupreškić et. al.*, Case No. IT-95-16-T, Judgement, 14 January 2000, paras 619-620.
[1048] *Ibid.*, para. 622. Findings in ICTY and ICTR judgements: *Blaškić*, para. 218; *Ruggiu*, para. 19; *Kordić and Čerkez*, para. 188; *Semanza*, para. 347; *Nahimana*, para. 1069; *Serugendo*, para. 10; and the Appeal Judgements in *Krnojelac*,

Tribunal but, most importantly, it did not rise to the same level of gravity as the other acts enumerated in Article 5. Furthermore, the criminal prohibition for this act had not attained the status of customary international law. Consequently, the Chamber considered that convicting the Accused of such an act would **violate the principle of legality**.[1049]

On the contrary, in the ***Nahimana*** case, the Appeals Chamber found that **hate speech and calls for violence in themselves constituted acts of persecution**. The Chamber stated: "*In the present case, the hate speeches made after 6 April 1994 were accompanied by calls for genocide against the Tutsi group and all these speeches took place in the context of a massive campaign of persecution directed at the Tutsi population of Rwanda, this campaign being also characterised by acts of violence (killings, torture and ill-treatment, rapes …) and of destruction of property. […] In addition, as explained below, some speeches made after 6 April 1994 did in practice substantially contribute to the commission of other acts of persecution against the Tutsi; these speeches thus also instigated the commission of acts of persecution against the Tutsi.*"[1050]

The Appeals Chamber in its judgement in the ***Kvočka*** case went even further with regard to the acts considered as persecution. It stated that **acts underlying persecution need not constitute a crime in international law.**[1051] In so doing, it reverses the principle set by the ***Kupreškić*** and ***Kordić and Čerkez*** judgements according to which the acts qualifiable as acts of persecution must have the same level of gravity as the acts enumerated under Article 5. The Appeals Chamber deemed that the acts must be considered in their context and their cumulative effect must be observed in order to determine whether they present the required level of gravity.[1052] In that particular case, it found that harassment, humiliation and psychological abuse constituted persecutions with respect to their level of gravity.[1053]

It should be noted that the *mens rea* of the crime of persecution is of a particular nature. In addition to the mental element specific to other crimes, that is, the intent to commit the act, there is also a **special intent**, namely the **discriminatory nature**. The perpetrator of the persecution must have deliberately committed the acts of persecution for **political, racial or religious reasons**.[1054] In the ***Kupreškić*** Judgement, the **Trial Chamber** stated that the *mens rea* requirement for persecution is

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para. 185; *Vasiljević*, para. 113; *Kordić and Čerkez*, para. 101; *Blaškić*, para. 131, *Kvočka*, para. 320; *Stakić*, paras 327-328; *Simić*, para. 177; and *Nahimana et al.*, para. 970.

[1049] *The Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 209.

[1050] *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007, para. 988.

[1051] *The Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Appeal Judgement, 28 February 2005, para. 323.

[1052] *Ibid.*, para. 321.

[1053] *Ibid.*, para. 325.

[1054] Article 5 (h) of the ICTY Statute.

higher than for the other crimes against humanity.[1055] It goes on to explain the distinction that must be made between **persecution as a crime against humanity** and **genocide**. According to the Chamber, in both categories what matters is the **discriminatory intent**. It is a question of targeting persons on account of their ethnic, racial or religious affiliation (as well as, in the case of persecution, their political affiliation). However, while in the case of persecution discriminatory intent can take multifarious forms and manifest itself in a plurality of inhumane acts, including murder, **in the case of genocide, intent must be accompanied by the intention to destroy, in whole or in part, the group**.[1056] Consequently, the Chamber notes that from the viewpoint of *mens rea*, **genocide is the most extreme and inhumane form of persecution**.[1057]

The ICC Statute takes a more narrow approach with regard to persecution. Article 7, paragraph 1 (h) provides as follows: "*1. For the purpose of the present Statute, **crime against humanity** means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

"*(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, **gender** as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, **in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court***."[1058]

Despite the restriction stated in this article, we can consider that the enumeration of crimes remains non-exhaustive due to Article 7, paragraph 1 (k), which grants the Court the authority to punish as crimes against humanity "*other inhumane acts of a similar characteristic intentionally causing great suffering, or serious injury to body or to mental or physical health*". In the ***Kupreškić*** Judgement, the ICTY Chamber found furthermore that despite the restrictions placed on persecution in the Rome Statute, the ICC had the jurisdiction to punish a large number of crimes considering the broad range of the crimes enumerated in its Statute.[1059]

b. Prosecution's arguments

According to the Prosecution, all of the crimes attributable to **Vojislav Šešelj** were committed with **discriminatory intent** and can therefore be qualified as **persecution**. Consequently, **persecution**

[1055] *The Prosecutor v. Zoran Kupreškić et. al.*, Case No. IT-95-16-T, Judgement, 14 January 2000, para. 636.
[1056] *Ibid.*
[1057] *Ibid.*
[1058] Article 7 (1) (h) of the Rome Statute.

encompasses all of the crimes covered by other counts in the Indictment, in addition to persecutory acts which are not in and of themselves crimes under the Statute.[1060] The Prosecution includes therein murder, unlawful imprisonment and confinement, establishment and perpetuation of inhumane conditions, torture, beatings and killings (in detention), forced labour, sexual assaults, imposition of restrictive and discriminatory measures (restrictions of movement, removal from positions of authority in local government institutions and the police, dismissal from jobs, denial of medical treatment, and arbitrary searches of houses), torture, beatings and robbery during and after arrest, deportation or forcible transfer, destruction of property and cultural and religious sites and hate speech.[1061] The Prosecution attributes all of these crimes to the Serbian forces and/or to **Vojislav Šešelj**, who committed them deliberately for the **purpose of forcibly removing non-Serbs from large parts of Croatia, BiH and Serbia**.[1062]

With regard to his hate speech, the Closing Brief accuses **Vojislav Šešelj** of having engaged in a campaign of **hate speech** calling for the persecution of non-Serbs and denigrating them in a systematic manner.[1063] According to the Prosecution, due to his reputation and status as a political statesman and leader of the SRS/SČP, the historical context of the region and the climate of ethnic distrust that prevailed and of which **Vojislav Šešelj** was fully aware, **his hate speech reached the same level of gravity as the other crimes against humanity under Article 5 of the Statute**.[1064] Moreover, the Prosecution submits that three of the speeches (two in **Vukovar** and one in **Hrtkovci**) were particularly vitriolic and thus **Vojislav Šešelj can be considered to have physically committed persecutions through hate speech**.[1065] The Prosecution argues that statements such as "*Not a single Ustasha must leave Vukovar alive*" or "*The entire area will soon be cleared of Ustasha,*" were an **explicit call for discrimination and violence**.[1066] It adds that the word "***Ustashas***" is an "*offensive, derogatory and dehumanising*" term and that its use violated the Croats' right to dignity.[1067] Furthermore, it emphasises that due to the particularly tense context and the fact that **Vojislav Šešelj**'s speeches were made just days before violent crimes were committed in the municipalities in question, these speeches constituted a violation of the Croats' right to

[1059] *The Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000, para. 580.
[1060] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Prosecution Closing Brief, 5 February 2012, para. 559.
[1061] *Ibid.*
[1062] *Ibid.*, para. 560.
[1063] *Ibid.*, para. 561.
[1064] *Ibid.*
[1065] *Ibid.*, para. 562.
[1066] *Ibid.*
[1067] *Ibid.*, para. 563.

security and grave persecutions in the same manner as the crimes enumerated under Article 5 of the Statute.[1068]

c. Vojislav Šešelj's arguments

In order to refute the Prosecution's charges of persecution, **Vojislav Šešelj** chiefly relies on the **Kordić** case wherein the Trial Chamber found that the allegations relating to the encouragement and promotion of hatred and the dismissal of Bosnian Muslims from employment did not amount to persecution.[1069] **Vojislav Šešelj** recalls that in that case, the Chamber found that **incitement to hatred** on political or other grounds is not enumerated as a crime in the Statute of the International Tribunal but, more importantly, it does not rise to the same level of gravity as the other acts enumerated in Article 5.[1070] Furthermore, he states that this has not attained the status of a crime under customary international law. Therefore, he deems that to convict him of such an act under the count of persecution would violate the principle of legality.[1071] He argues that the only crime sanctioned by both the Charter of the International Military Tribunal of Nuremberg and the Statutes of the ICTY, ICTR and the ICC is **direct and public incitement to commit genocide**, with which he is not being charged in this case.[1072] Consequently, he submits that **it is impossible to indict someone for the physical commission of a crime through speech and that such a speech cannot constitute a crime against humanity**. Therefore, he concludes that "*the charges against Vojislav Šešelj for his speeches as constituting physical commitment of persecution, deportation and forcible transfer do not hold*".[1073]

Secondly, **Vojislav Šešelj** refers to the *Mrkšić, Šljivančanin and Radić* cases. He remarked that the accused were **acquitted of the crime of persecution** on political, racial or religious grounds, of extermination, murder, torture and inhumane acts, because it was established that **the acts of the perpetrators of the crimes were so remote from the attack that it was impossible to establish that they had intended for their acts to be a part of the attack directed against the civilian population of Vukovar**.[1074] According to **Vojislav Šešelj**, this means that there had been no persecution, forcible transfer and deportations in Vukovar.

[1068] *Ibid*., para. 564.
[1069] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Vojislav Šešelj's Final Brief", 30 January 2012, p. 42.
[1070] *Ibid*., p. 93.
[1071] *Ibid*.
[1072] *Ibid*., p. 94.
[1073] *Ibid*., p. 95.
[1074] *Ibid*., p. 139.

With respect to **Hrtkovci**, **Vojislav Šešelj** submits that there were **no extensive or widespread attacks on the civilian population in this location**.[1075] He recalls that in order for an attack to be deemed "*extensive*", the size of the population subjected to persecutions must be significant. In the present case, he notes that the Prosecution presented witnesses who were unable to provide more than a handful of names of civilians who had been pressured into leaving **Hrtkovci** (eight people in total, according to the Accused). Hence he concludes that such a low number cannot be deemed significant.[1076] He adds that the Prosecution should have established **a nexus between his speech and the alleged attack** – that the statements influenced the perpetrators of the attack or expressed his intention of being part of the attack – but that it was unable to prove this.[1077] Moreover, he argues that the evidence shows that **spontaneous exchanges of real estate** had taken place in **Hrtkovci** that can in no way be considered as acts of persecution.[1078] He also mentions the existence of contracts that governed this exchange of property.[1079]

In respect to Zvornik, **Vojislav Šešelj** states that there was no rally in **Mali Zvornik** in **March 1992** and that, consequently, he never gave any speeches. Therefore, there could not have been any direct and public denigration through hate speech in this municipality.[1080]

Lastly, **Vojislav Šešelj** refers to the **Krajišnik** Appeal Judgement wherein the Accused's responsibility as a participant in the joint criminal enterprise was not established for **Greater Sarajevo and Nevesinje**. According to **Vojislav Šešelj**, as he does not acknowledge participating in any sort of joint criminal enterprise, he could not be held responsible for persecution, deportation and forcible transfer in these municipalities, given that the Prosecution declared him a member of a **JCE** that **included Krajišnik**.[1081] He adds furthermore that **Mostar** was also not mentioned in the Indictment against the latter.[1082]

[1075] *Ibid*., p. 146.
[1076] *Ibid*.
[1077] *Ibid*., p. 161.
[1078] *Ibid*., p. 146.
[1079] *Ibid*., p. 162.
[1080] *Ibid*., p. 154.
[1081] *Ibid*., pp. 59-60.
[1082] *Ibid*.

d. Conclusion regarding Count 1

In order to find whether there was a **crime of persecution** (Count 1) or not, I need to undertake an **in-depth** examination of the documentary evidence.[1083]

For this purpose, I examined the documents consisting of the Accused's interviews for the years 1990, 1991, 1992 and 1993. I also deemed it necessary, before I examined the document(s), to bring up the political context that gave rise to the remarks made.

i. Interviews and speeches from 1990 to 1993

1. 1990

I am taking the **year 1990** into account even though the part of the Indictment that concerns the JCE commences from **August 1991**. I find it impossible to examine only those speeches given after August 1991. These speeches trace a particular **logic** and **follow on** from one another. They can only be understood and assessed if compared to one another. Taking into account the **temporal scope**, we can notice that there was a reorientation and a marked radicalisation over the months and years. The elements in question were described in the media at the time and mentioned in the numerous documents admitted into the record, notably in the expert reports, or by the Accused himself (**Vuk Drašković**, the **Karađorđević** royal dynasty, **etc.)**. I did not consider it necessary to provide specific references in footnotes so as to avoid overburdening this opinion with unnecessary details.

On 6 January 1990, the "Serbian Movement for Renewal" (SNO) was formed. This new party was headed by **Mirko Jović**, the president, while **Vuk Drašković** and **Žarko Gavrilović** held the posts of vice-president.

The SNO was described as a nationalist opposition party advocating the "de-Titoisation" of Yugoslavia, the repudiation of the communist heritage and the rehabilitation of **Mihajlović**'s Chetnik movement. This party also advocated the return of the **Karađorđević** royal dynasty and the creation of a new Serbian state with territorial borders defined along ethnic and historical lines.

[1083] In analysing and summarising Vojislav Šešelj's numerous speeches and interviews I was helped immensely by my legal assistant **Flor de Maria Palaco Caballero** and, thanks to this assistance, all of the speeches were analysed word by word and sentence by sentence and placed in the context at the time.

Vuk Drašković, the author of the party's political programme, quickly parted ways with **Mirko Jović** and left the SNO on 10 March. Following this separation, **Vuk Drašković** fused his political faction with the Serbian Freedom Movement (SSP) of **Vojislav Šešelj**, which became the **Serbian Renewal Movement** (SPO) on 14 March.

Before becoming the SPO, **Vojislav Šešelj**'s SSP presented itself as a party with a moderate platform. This party notably called for an end to the political monopoly held by the **League of Communists**, an end to censorship, freedom of the media and the "renewal of the national, spiritual, cultural, economic and political unity of the Serbian people and the mutual understanding and brotherhood between Serbian Catholics, Muslims and Protestants".

The collaboration between **Vojislav Šešelj** and **Vuk Drašković** ended on **31 May 1990** when **Šešelj** left the SPO. On **18 June 1990**, **Vojislav Šešelj** founded the **Serbian Chetnik Movement**. This movement was not officially registered with the authorities.

The year 1990 was thus marked by the emergence onto the Serbian political scene of a fragmented opposition, consisting of numerous political parties with shaky alliances, which called for multi-party elections to take place.

In mid-1990, the opposition called for multi-party elections and negotiations with the authorities with the aim of determining the form that a new democratic constitution should take.

On 25 June 1990, the governing authorities decided that a **referendum** would take place on 1 and 2 July in order to allow the people to decide whether to define the new Constitution before or after the multi-party elections. The opposition's calls for a boycott of the referendum did not resonate and the government received 97% of the votes in favour of its right to promulgate **the new Constitution** on its own.

It was promulgated on **28 September 1990** and elections were announced on that same day. On 9 December, **Milošević's SPS** won the elections with **65.34% of the votes, Vuk Drašković** secured only **16.4%** and **Vojislav Šešelj**, whose party had not been officially registered, ran under his own name and received **96,277 votes**.

At this stage, it should be noted that **Vojislav Šešelj's** party was an **ultra-minority** party whose "impact" on civil society was insignificant.

- **Interview of 25 June 1990**

During an **interview with a journalist from *Večernji List* on 25 June 1990**, the Accused said that the Croats hated the Serbs and that they had megalomaniacal ambitions. He added that **hate** arose solely in newly formed nations.[1084]

Consequently, there is no incriminating element here.

- **Interview of 1 July 1990:**[1085]

Vojislav Šešelj spoke about the split with **Vuk Drašković** and the division within the SPO. The birth of the Chetnik Movement was a reaction to this split.

He brought up the referendum. He sees it as a move by the government at the time to hold on to power and to silence the opposition. He is in favour of electing a **constituent assembly** to draw up a new constitution and then, in line with this constitution, to hold parliamentary elections.

Vojislav Šešelj is of the opinion that the future of Yugoslavia should be decided by a constituent assembly. His party believes that if Yugoslavia is to continue to exist as a state, then it should be a state composed of three federal entities: Serbia, Croatia and Slovenia. **It should be noted that he does not mention the fate of Bosnia and Herzegovina …**

For **Vojislav Šešelj**, the people of Montenegro and Macedonia do not historically constitute "nations" and do not have the right to organise themselves into a state.

Just as all other national minorities in Kosovo, the Albanians do not have the right to political or territorial autonomy and are exposing themselves to criminal sanctions if they participate in separatist activities. They enjoy the same civic rights as the Serbs.

[1084] P1169, pp. 4 and 5.
[1085] P1170.

With regard to the issue of borders: **Vojislav Šešelj** declared *a priori* that he was against the war. In case of a difference of opinion with Croatia, negotiations or arbitration were possible options.

This interview does not contain any hate speech, but it does already obscure the existence of the Republic of Bosnia and Herzegovina.

- **Interview of 1 November 1990**

During a **televised interview for "TV Studio B" on 1 November 1990**, the Accused declared **"I am a Serb. Genetically, ethnically"**.[1086]

During an **interview with journalist Miroslav Peranović from *Naši Dani*, a Bosnian weekly, on 1 December 1990,** the Accused stated that the Ustasha movement was a **typically fascist** movement responsible for committing genocide against the Serbian people. Moreover, according to him, Croatia was a totalitarian state.[1087] He also advocated the abolition of universities in the "Shiptar" language.[1088]
He added:

> "We are in favour of moving out all members of the Shiptar national minority from a 20-50 km swath along the Albanian border, because that border area is of high strategic importance and **the Shiptar national minority is very unreliable**. With dreadfully steep financial compensation, we would move them to other parts of Yugoslavia, for example, the territory of today's Slovenia and Croatia, because they love them the best there."[1089]

Upon reading this interview, I note that it deals with the issue of Albanians, which is not included in the Indictment.

- **Interview of 6 December 1990:**[1090]

[1086] P1172, p. 11.
[1087] P1173, p. 3.
[1088] *Ibid.*, pp. 5 and 6.
[1089] *Ibid.*, p. 6.
[1090] P32.

For **Vojislav Šešelj**, **Communism** and **Yugoslavia** are 20th century illnesses of the Serbian people. The Serbian people must also realise that "neither the Croats nor Slovenes have ever been our friends or brothers and that we have to split with them as soon as possible".

The Serbian people should not spare any efforts to help and assist the Slovene people in gaining their independence: "For us the Serbs, it should, before all, mean a million and five hundred thousand [...] enemies less within the boundaries of a joint state."

The Serbian territories in Croatia must never be separated from Serbia:

> **"The Croats may separate themselves from Yugoslavia, in other words, they may have an independent state, may merge with someone else, however they must know at all times that at all costs, at the price of new rivers of blood, we shall not let them separate any territory that contains Serbian villages, Serbian mass graves, (...)."**[1091]

The Accused equates the **Croats** with the **Ustashas** (all Croats are Ustashas, save for a few exceptions). For **Vojislav Šešelj**, much like the Germans were punished following the Second World War, so should the **Croatian people** be punished for the crimes they committed.

Vojislav Šešelj supports the cessation of financial aid paid by the federal state to the Kosovo Albanians:

> "**Those assets have mainly been used to finance their excessive breeding and expulsion of Serbs** from this vital historic territory of ours. We support an immediate discontinuation of the University in Albanian language as well as all cultural institutions financed from the state budget. We have nothing against the Albanian minority having all the mentioned, however let them finance it on their own, by their own means. Furthermore, we advocate an immediate discontinuation of production in all factories that operate irrationally, due to the ethnic Albanian boycott of production, and that those people simply be fired, so let them take care of themselves. Should it be needed, we can distribute passports to them all, but we do not want to support them while they do nothing."[1092]
>
> "Furthermore, **we advocate that all 360,000 Albanian emigrants who crossed from Albania to Serbia after 6 April 1941, as well as their offspring, be urgently expelled from Serbia** and delivered to the United Nations High Commissioner, and there are so many incomparably richer

[1091] *Ibid.*, p. 8.
[1092] *Ibid*., p. 13.

> and more spacious countries in the world, so let them take them, let them show their humanity for a bit."[1093]

The SČP called for a referendum to be organised to allow the Serbian people to vote on the form of government that they wished to have.

Unlike the interview of 1 July 1990, this one goes much further because it implicitly advocates the annexation of Serbian cantons in Croatia to Serbia. Moreover, it mentions the existence of enemies outside of the territory (the Slovenes). At this stage, a reasonable trier of fact might conclude that Vojislav Šešelj is demonstrating intolerance and increasing the number of comments by referring to the context of the Second World War, but his remarks actually do not overstep the limits of allowed political discourse, which is particularly evident in his remarks on the migration of Albanians to Serbia. They are similar to some of the current statements about the Syrian migrants arriving in Europe en masse.

- **Interview of 27 December 1990**[1094]

With regard to the future of Yugoslavia after 1992, he says the following:

> "I do hope there will be no Yugoslavia. I hope that at least Slovenia will step out of the SFRY. This is what would make us Serbs happiest because we have nothing in common with the Slovenes. [...] The most important thing is that the Slovenes and the Croats do not leave at the same time."[1095]

With regard to **Greater Serbia**, he points out:

> "We believe that this policy is a winner in the long term […]. What matters to us is that our ideas should win irrespective of who will be implementing them in the future. I am personally proud and happy that many of those who persecuted me yesterday, today implement my ideas as laid down in my 'What to Do?' paper, which six years ago earned me a sentence of eight years imprisonment. Only by now I have left behind many of these ideas, and **today I am much more radical in my political demands**."[1096]

He adds furthermore:

[1093] *Ibid*., p. 15.
[1094] P1175.
[1095] *Ibid.*, p. 2.
[1096] *Ibid.*

> "First the Slovenes. And then whoever is in power in Belgrade at the time will amputate Croatia cutting it off at the old Serbian borders which run along the Karlobag – Karlovac – Virovitica line."[1097]

In this interview, Vojislav Šešelj advocates the exit of Slovenia from Yugoslavia and says in passing that the Serbs would be happier and that they have nothing in common. Continuing in this vein, he brings up the issue of Croatia and resolves it by amputating a part of its territory to create an area defined by the Karlobag – Karlovac - Virovitica line. I do not see any statements here that would lead to crimes, all the more so because the issue regarding this line was to be dealt with by whoever was in power in Belgrade and that was not Vojislav Šešelj.

2. 1991

Due to the failure in the elections of **9 December 1990**, an opposition led by **Tomislav Nikolić** was formed against the leader of the National Radical Party (NRS), **Veljko Guberina**. The fusion of **Tomislav Nikolić**'s **NRS** faction and **Vojislav Šešelj's SČP** gave birth to the **Serbian Radical Party (SRS).**

With regard to the year 1991, I will examine 15 exhibits numbered from 1 to 15:

- **23 February 1991**

In the minutes of the Assembly of the Serbian Radical Party held in Kragujevac **on 23 February 1991**, **Vojislav Šešelj guaranteed** the following:

> "We shall no longer cast the bodies and blood of Serbian sons and daughters upon the altar of Yugoslavia. We shall not defend Yugoslavia, this great Serbian delusion that we must finally acknowledge. The blood spilled for Yugoslavia is Serbian blood spilled in vain. And we shall no longer seek to prove that it was not spilled in vain by spilling new blood. We are prepared for a bloodbath should it be necessary, but solely for the sake of the Serbian lands."[1098]

[1097] *Ibid.*
[1098] P1255, p. 9.

There is mention here of a bloodbath. However, there is a very clear evocation of the past and the possibility that there will be bloodshed once again, but only if the Serbian lands and Serbian people are attacked. In this case, we cannot characterise these statements as hate speech, and the notion of "blood spilled" should be taken with caution because it indicates that the blood already spilled was spilled in vain and that it is unnecessary to spill blood again.

- **5 April 1991**

During a **televised interview given to "TV Politika" on 5 April 1991**, the Accused stated that the Croats were attempting to use the Muslims against the Serbs.[1099] He said that the creation of a unified Serbian state would give the Serbian people **1.5 million fewer enemies**.[1100] He also stated that the Serbs were making one of their biggest mistakes by thinking of the Croats as their equals.[1101] The Accused added:

> "The Croats can wage no war with the Serbs, should the Serbs be united. […] They will never be capable of waging the war on their own, without the help from abroad. We, the Serbs, are making the biggest mistake when we think of the Croats as our equals. The Serbs are a historical people to the true meaning of those words. According to Hegel's definition, it is before all the people who knows what the state is, who is capable of creating its own state and of renewing it, should they accidentally lose it in the course of history. The Croats are not a historical people. That said, we actually cannot treat them as a people with all elements of a historical awareness, statehood, etc."[1102]

Undoubtedly, Vojislav Šešelj is referring to the Croats as not constituting a people compared to the historical Serbian people.

- **Video of 21 April 1991**[1103]

Vojislav Šešelj recalls the **genocide** against the Serbian people and warns the Croats against committing a new genocide. In particular, he calls for **revenge**:

[1099] P1176, p. 2.
[1100] *Ibid.*, p. 9.
[1101] *Ibid.*, p. 34.
[1102] *Ibid.*, p. 35.
[1103] P179.

> "**Should they attempt a new genocide against the Serbian people, we say to them: we shall take revenge for each Serbian life, and we shall also ask them to pay up for crimes (…).**"[1104]

According to **Vojislav Šešelj**, the Croats propose granting autonomy to Croatian Serbs in exchange for organising the republics in the form of a Yugoslav confederation. He points out that this would lead to transforming the administrative borders between the republics into international borders between sovereign states. In his opinion, the Croatian "plan" consists of granting the Croatian Serbs autonomy which will then be abolished once Croatia becomes a sovereign state. **Vojislav Šešelj** repeats that the Croats can separate and become independent, but they must not appropriate any Serbian territory. He calls for the unity of all Serbs.

The main element here concerns the mention of "revenge" with respect to the Croats, but this word must be placed in the overall context, namely the existence of a Serbian genocide allegedly committed by the Croats. In this case, this is a hypothesis and not an action to be taken.

- **Speech of April 1991**

In a **speech given by the Accused in Jagodnjak in April 1991,** he brings up **General Tuđman** and the new "Ustasha" authorities who, according to him, have once again **placed a knife to the throat of the Serbian people** and should they attempt to provoke a new genocide, the Accused says, "we shall take revenge for each Serbian life".[1105]

The past is invoked here and this must be considered as a warning to the Croatian authorities in order to lead them to pacifism. The words used are indeed strong, but the context of the statement is essential and, in any case, this is a hypothesis.

- **Interview of 1 May 1991**

During an **interview given to "TV Novi Sad" on 1 May 1991**, the Accused explains that Serbian revenge against the Croats implies the killing of Croatian civilians and that he cannot prevent this;

[1104] *Ibid.*, p. 2.
[1105] P14, p. 1.

likewise, he thinks that the Serbs cannot assume responsibility for this because, in his opinion, this revenge is justified.[1106]

He also states the following:

> "The new Ustasha *Poglavnik* /fascist leader/ and Tito's general, Franjo TUĐMAN, has pulled out his Ustasha dagger and has placed it under the throat of the Serbian people. The Serbs and the women there are saving their bare lives. **And it is the duty of all Serbs to help them in defending themselves from the frenzied Ustasha beast**."[1107]

With regard to the sending of Serbian volunteers, he adds:

> "The Serbian Chetnik Movement is organising the sending of volunteers, Serbian Chetniks, to those areas where the Serbs are in the greatest danger. We have already sent many – I cannot tell you the number – Serbian volunteers to different areas in the western Serbian territories, to Slavonia, Baranja, Western Srem, Dalmatia, Lika, Banija, Kordun and Borovo Selo."[1108]

His statement regarding the Croats is also more violent:

> "We have infiltrated our units into Zagreb and many other Croatian cities. These are special groups of men equipped and trained for sabotage and **terrorist activities**. If the Croats mistreat the Serbs and conduct genocide in those areas where we cannot protect the Serbs, we shall apply measures of reprisal there where the Croats are the weakest. **And you know that when there is reprisal, when there is revenge, it is blind and that many innocent Croats will perish**, but what can you do? They should be thinking in time what the consequences are going to be instead of reaching for the Ustasha knife and placing it under the throats of the Serbs. **This is their last warning**."[1109]

Lastly, he addresses the issue of Macedonia:

> "**They will never tear Macedonia away, never, even if rivers of blood were to flow there**. And let them not forget, the first Chetnik operations took place in the area of southern Serbia, that is, Macedonia. That's where the Serbian Chetnik Movement has its roots and we will not allow what

[1106] P1177, p. 10.
[1107] *Ibid.*, p. 7.
[1108] *Ibid.*, p. 8.
[1109] *Ibid.*, pp. 11 and 12.

was won in wars of terrible bloodshed, we will not let those areas of Serbian territory ever belong to someone else."[1110]

Vojislav Šešelj made very alarmist statements by saying that he would not be able to prevent the murders of civilians and that justice would be blind. However, these statements are tempered by the fact that he took care to add: "This is their last warning."

These statements taken out of context and the use of strong words such as "revenge", "blind", "knife", "throats", etc… could constitute the *actus reus* of the offence. Yet, in reading the text we can note that there is a general warning given to the Croats in order to avoid a killing spree. Could we then condemn this kind of warning, which might be necessary in certain cases to avoid a catastrophe?

- **Excerpt from the video of 6 May 1991**[1111]

"Our western enemies are attempting to carry out a new genocide against the Serbian people. Brother and sister Serbs, it is our task to stop it, and we are sending this message to our enemies [who are again putting the Ustasha knife under the Serbian throat]: **not only shall we avenge the present victims, but we shall avenge the previous ones too** […].
"The Serbian Chetnik units will be active in all other areas of Western Serbia: in Serbian Krajina, in Serbian Slavonia, Baranja and Western Srem. We shall not give up a single inch of Serbian territory."[1112]

This video attests to an escalation of the situation. We must not forget the context at the time and the problems associated with the presence of Serbs in Croatia. Once again, these are alarmist statements inviting the adversary to de-escalate the situation.

- **11 May 1991**

During a **televised interview given to** "**TV Novi Sad" on 11 May 1991**, the Accused spoke about the effectiveness of the Serbian Chetnik Movement's activities:

"So we have certainly made our presence felt in the area, we are very active there – the fact that in certain places Croats and Muslims haven't slept in their homes for days shows that the activities of the Serbian Chetnik Movement are not taken lightly."[1113]

[1110] *Ibid.*, p. 13.
[1111] P1003.

He then addresses the Croats and the Muslims:

> "After the events in Sarajevo, I said that all those who had participated in the Ustasha and pan-Islamist demonstrations in the centre of Sarajevo would be punished. As far as **IZETBEGOVIĆ** is concerned, we have warned him that he mustn't allow the Croats, this time as well, to use a great number of Muslims for their own criminal purposes, which is what happened in the First and Second World Wars. If history repeats itself, **the Serbian revenge will be terrible this time, they won't stop running even when they reach Anatolia and the story of the Serbs' terrible vengeance will be transmitted from generation to generation.** They shouldn't play with their lives. It would be best if the Muslims kept out of the conflict between the Serbs and the Croats if they wish well for themselves and their children."[1114]

There is a direct threat against the Muslims, inviting them to keep out of the conflict between the Serbs and the Croats. In this case, I fail to see how these statements could be incriminatory. These statements are announcing the possible consequences should the adversary take action.

- **Interview of 24 May 1991**[1115]

With regard to the sending of volunteer troops, the Accused says the following:

> "We have already deployed several Chetnik groups in Zagreb and other towns across Croatia, which are trained in sabotage and **terrorist activities**. If Serbian civilians start to be massacred, the Chetniks will strike at Zagreb and other concentrations of Croats, using their full strength. You know, **when one retaliates, revenge is blind**. There would be innocent victims but what can you do. Let the Croats think about that first. We shall not strike first, but if they should strike, **we are not even going to bother where our blows land**. Also, unless the army disarms the Ustashas immediately, there will be a lot of blood."[1116]

Regarding the possibility of a peaceful solution to the conflict, he points out:

> "**How is one supposed to negotiate with the Ustashas? Did you see today that the Croatian people are entirely Ustasha?** There are very few exceptions. [...] The Ustashas who have been

[1112] *Ibid.*, p. 1.
[1113] P1254, p. 33.
[1114] *Ibid.*, pp. 38-39.
[1115] P34.
[1116] *Ibid.*, p. 3.

going crazy, we shall defeat them in no time. I guarantee you, with one division of 10,000 Chetniks, we would reach Zagreb in 48 hours."[1117]

In this speech, he once again calls on the Croats not to massacre Serbian civilians. He says that if this message is not heard, then groups could take action in the form of retaliation. The situation appears serious because he doubts that the Croats are even able to negotiate. Once again, the Croatian side is invited not to cross the line.

- **Speech of 4 June 1991 in Rakovica**[1118]

This speech concerned the Slovenes, Muslims, Croats and the volunteers:

With regard to the Slovenes:

"Could it be the Slovenes – who have never had their own state or fought any wars – who are going to fight against the Serb people? Anyway, they do not have a reason to go to war, even if they wanted to and were able to, because we the Serbs support the will of the Slovenian people to break away from Yugoslavia and form their own independent state or join another state. The sooner the Slovenes leave, the better it is for them and also for us. To us Serbs it means one-and-a-half million bitter enemies less within the borders of a single state."[1119]

With regard to the Muslims:

"Could the Bosnian pan-Islamists fight a war against us Serbs? Recently we told them: do not let the Muslim majority become a tool of Croatia like it did in World War One and World War Two. Take care and [do] not interfere in the Serbo-Croatian conflict. If the Croats use you again, Serbian revenge will be terrible, and you will end up farther than Anatolia."[1120]

With regard to the Croats:

"Are the Croats capable of fighting a war against us Serbs? They have not had a state for 900 years nor did they fight any wars. The Croats themselves handed their state over to the Hungarians in a treaty in 1102, following the death of the last Croatian king on Mt Gvozd in 1097. However, they did take part in some foreign wars. For example the 30-year European war. In that period they regularly proved themselves as cowards on the battlefield, and the commanders were hesitant to

[1117] *Ibid.*, p. 7.
[1118] P35.
[1119] *Ibid.*, p. 2.
[1120] *Ibid.*, p. 3.

> use them for operations. They mainly deployed them as crew troops on already occupied territories, where they proved their worth by mistreating innocent civilians, women, children and the elderly. It is no coincidence that the following saying has been preserved in some southern German provinces: May God keep us safe from the plague and from the Croats.
> "In principle, we have nothing against the new Ustasha leader who is also Tito's general, Franjo Tuđman, planning an independent state of Croatia, but we constantly warn him that we shall never allow him, at any cost, to take away a single piece of Serbian territory into the borders of such a state, such a criminal entity."[1121]

In this interview, he issues another warning to Franjo Tuđman.

On the sending of volunteer troops:

> "We shall continue to enrol Serbian volunteers and send them wherever they are needed the most. It is our objective to protect each Serbian village, each Serbian settlement. We only enrol as Serbian volunteers those who are older than 25; only those who know how to hit the ground and take shelter, those who do not act too heroically. […] We do not want to send people who are too young, because experience tells us that they act overly heroic, they all want to make a mark in battle, and none of them want to dig in, all they want to do is charge. Well this is not what we want."[1122]

He does not say anything significant on the issue of volunteers.

Speaking generally, he states:

> "They have reason to fear us. Us Serbs have forgotten and forgiven too much in history. We have told the Croats: should they ever again /resort to/ genocidal activities against the Serbian people, not only shall we take revenge for every victim but we shall also settle scores for the victims from World War I and World War II."[1123]

The main element concerns the mention of possible "revenge" against the Croats, if they ever again undertake another genocide. These words were addressed to the adversary to invite them to practice moderation and to point out the risks if any action is taken.

[1121] *Ibid.*, p. 3.
[1122] *Ibid.*, p. 4.
[1123] *Ibid.*, p. 15.

- **Interview of 18 June 1991**[1124]

Vojislav Šešelj encourages the Slovenes to secede as soon as possible.

As in his speech of 4 June, he repeats that a war would be impossible because:

> "[…] there is nobody who could fight us Serbs. How could you Slovenes for instance ever fight a war against the Serbs? Or how could the Croats fight a war? Or the Macedonians or the Sqiptars? There is nobody who could fight the Serbs in a war. Another armed clash with the Croats would be possible, but that's all."[1125]

However, he points out that an absence of war does not necessarily imply that the means of resolving the conflict will not be physical:

> "It could be physical. Not all physical settlements are tantamount to war. You know, the use of armed force is one thing, war is quite another. Not all use of armed force necessarily means war."[1126]

About the Croats, he says:

> "They slaughtered one million Serbs in World War II and if the opportunity presented itself, they would be prepared to slaughter one million more Serbs. They are a genocidal nation."[1127]

Once again this is a warning to the Croats.

- **Interview of 25 July 1991**

During a **televised interview given to "TV Novi Sad" on 25 July 1991**, the Accused stated that it was in the Croats' nature to be cowards and to send mercenaries to fight in place of their armed forces to defend their interests. He added that, in his opinion, the Croats were genetically afraid and he accused them of being a criminal people.[1128]
He also stated the following:

[1124] P37.
[1125] *Ibid*., p. 7.
[1126] *Ibid*., p. 7.
[1127] *Ibid*., p. 10.

> "The Croats are procuring weapons on all sides of the world. This embargo by the European Union is not effective enough. However, the Croats do not know how to use those weapons. That is their main problem. In the military sense. **When armed Serbs show up, Croats run like headless chickens**. Even when they have a fantastic quantitative superiority they are not able to win."[1129]

These are extremely harsh words about the Croats, who are described as criminals and cowards. However, the viciousness of these words does not lead to the conclusion that this is hate speech because they merely call into question the ability of the Croats to use weapons.

- **Video of September 1991**[1130]

The Accused **Vojislav Šešelj** addressed the famous **Karlobag-Ogulin-Virovitica** line:

> "The Karlobag-Ogulin-Virovitica line **has to be our goal**, and that is the border to which the Army has to **withdraw all its troops**. **If the Army is unable to withdraw them from Zagreb without fighting**, then it should withdraw them while fighting and bombing Zagreb. The army still has resources which it has not used. If its troops are endangered, it has the right to use napalm bombs and anything else it has available. **We must not play games here. It is more important to save one military unit than to worry if there will be some accidental victims. Who's to blame here? They wanted war, so now they have it**."[1131]

He states that this famous line corresponds to the deployment demanded from the Yugoslav Army.

- **Interview of 13 September 1991**

During an **interview on 13 September 1991 with a journalist from *Duga*, a bi-monthly Serbian magazine**, the Accused proposed establishing borders based on ethnicity. He also stated that "the Croats are genetically cowards".[1132]

[1128] P1181, pp. 1 and 11.
[1129] *Ibid.*, p. 19.
[1130] P56.
[1131] *Ibid.*, p. 1.
[1132] P1182, p. 6.

There is nothing new here compared to his previous statements, but I do note that there is a rise in tension due to his statements about the Croatian people being cowards.

- **Speech at the National Assembly on 26 September 1991**

On 26 September 1991, the Accused gave a speech at the National Assembly of the Republic of Serbia during which he advocated forming a temporary Yugoslav government capable of establishing a military junta, if necessary, so that the world would be angry when faced with such changes:[1133]

> "In Croatia, only a military solution suits us Serbs. Why? Because the world will never recognise a million Jasenovac victims, because the world will recognise, after all, if we force them by military force to recognise as Serbian only those territories where there is a Serbian majority, but we also want those territories where Serbs make between 30 and 50 %, as well as those where today there are no Serbs at all thanks to the Second World War genocide, because of some strategic reasons. We cannot defend the borders if they are only ethnic borders, if we are not led also by some strategic reasons in determining them. This can also be done by the Army leadership and to say – Slovenia has seceded, the Army is not capable of defending it, therefore it will not defend it. Factually, Croatia has seceded as well, but the Army will defend this line, because on this line live the people who do not want to secede from Yugoslavia, so let it be the line Karlobag – Ogulin – Karlovac – Virovitica. Because the greatest danger for us, that we haven't even discuss[ed] yet, is that the world might force us to keep on living with the Croatians and Slovenians in the same country."[1134]

Vojislav Šešelj is opposed to co-existence with the Croats and the Slovenes. There is no incriminating element here.

- **Interview of 24 November 1991**

Finally, in an **interview given to a journalist from *Ratne Novine* on 24 November 1991**, the Accused stated that the Slovenes were thieves who had always let the Serbs down when the two peoples cohabitated.[1135]

Regarding the conquest of Croatian territories, he added:

[1133] P1257, p. 54.
[1134] *Ibid.*, pp. 54-55.
[1135] P1186, p. 5.

> "I think our army should take Dubrovnik as soon as possible and destroy every last Ustasha stronghold there."
> "A huge number of people already left Osijek, almost 100,000. How nice of them, we should thank them, they have nowhere to return to. Osijek remains a Serb town."[1136]

Vojislav Šešelj makes no reference to Vukovar, which might seem surprising. There are no incriminating statements in this interview.

3. 1992

Following the conclusions of the **Arbitration Commission** in its opinion no. 1 of 7 December 1991 that the "Socialist Federative Republic of Yugoslavia is in the process of dissolution", on 16 December the foreign affairs ministers of the European Community adopted a **common position** on recognising the Yugoslav republics.

This position consisted of calling on the republics to declare whether they wanted to be recognised as independent states and, where necessary, whether they were ready to meet the conditions set out in the **Guidelines** on the Recognition of New States in Eastern Europe and in the Soviet Union. In light of the opinion of the Commission, the 12 member states of the EC decided on **15 January 1992** to proceed with recognising **Slovenia** and **Croatia**. In March, after announcing the results of the referendum held on 29 February and 1 March 1992, **Bosnia and Herzegovina declared its independence.**

The declarations of independence of the former republics and their recognition by the European Community rekindled debates in **Serbia** on the "**national question**". Serbia turned its attention to constructing a Yugoslavia composed of Serbia and Montenegro. A new constitution was declared on **27 April 1992,** creating the FRY, and elections were announced for 31 May 1992. The Republics of Serbia and Montenegro, unified into the FRY, presented themselves as the legal successor of the SFRY on the international scene. Consequently, on 27 April 1992, the FRY stated before the **United Nations**:

> "Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federative Republic of Yugoslavia in international relations, including its

[1136] *Ibid.,* p. 6.

> membership in all international organisations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations, doc.A/46/915, Annex I.)

However, both the United Nations and the European Community rejected this statement. The international community considered the FRY as a **successor** state and not as a **continuation** of the SFRY. This means that the former republics did not secede but, rather, emerged from the dissolution of Yugoslavia as new states.

- **Speeches of 1 and 7 April 1992**[1137]

During debates in the **Parliament concerning** the Croats, **Vojislav Šešelj** said the following:

> "[I]f the Croats are expelling Serbs from their homes on a large scale, then what are the Croats waiting for, here in Belgrade, what are the Croats in Serbia waiting for? An exchange of population: we expel as many Croats from Belgrade as Tuđman has expelled Serbs from Zagreb. Any Serbian family, which arrives from Zagreb, can go to the address of a Croat in Belgrade, and give him his keys and say, go over to Zagreb, an exchange."[1138]

In response to an objection from **Skenderović** during the debates, he stated:

> "Mr **Skenderović** should know that, in International Law, there is the principle of retortion, which in the Serbian language means retaliation. If one state expels members of an ethnic minority from its territory, to another state, where the majority of this expelled nation lives, it is permissible under International Law to implement this retaliation, and execute a counter-expulsion of the ethnic minority of the state that was the first to expel. Anyway, such population exchanges are not a world novelty."[1139]

This was a parliamentary debate that considered hypotheses regarding the expulsion of Serbs by Croatia and the possible consequences thereof.

The legal aspect of retortion in international law was brought up in the context of the historical exchanges of populations. It would seem then that Vojislav Šešelj's statements fall under the right to political expression of a member of parliament, all the more so because there were no calls to commit crimes.

[1137] P892.
[1138] *Ibid.*, p. 3.

- **Interview of 8 April 1992**

In an **interview given to** "**TV Studio B" on 8 April 1992,** the Accused said that he had **not met a good Croat in his entire life** and that the **Croats were the Serbs' worst enemy**.[1140]

Once again, this is a disparaging comment about the Croats, who are not good and are the Serbs' worst enemy. I do not see that these comments amount to an abuse of the freedom of speech or that they are calling for the commission of crimes.

- **Interview of 21 April 1992**

On 21 April 1992, the Accused gave an interview to a journalist from the Serbian daily *Unity*. He called on the state radio stations to dismiss their Macedonian, Bulgarian and Croatian employees for opposing the defence of the Serbian people's interests.[1141]

This was a call for dismissals which could have been a problem if it had been followed by actions. However, there is no evidence to show that any action whatsoever was taken. I interpret this interview as the right of a state to dismiss people who have a public status and who might jeopardise the interests of the country.

- **Speech of 22 April 1992**[1142]

Vojislav Šešelj explained the legitimacy of the expulsion of Croats:

> "I would expel the Croats for several reasons. First and foremost, because **the Croats are extremely disloyal as inhabitants of Serbia**, because the vast majority of them are members of the HDZ or act as their [foreign] collaborators, and that they are doing everything they can to destabilise the internal situation in Serbia.
>
> "In addition to that, the Croats have proved to be **direct collaborators of the Ustasha**, they made possible the transfer thereof from Vukovar to Hungary via Bačka. Furthermore, **we must apply the measures of retaliation** against the Croats because Tuđman has expelled 160,000 Serbs […]"[1143]

[1139] *Ibid*., p. 4.
[1140] P1195, p. 3.
[1141] P1197, p. 3.
[1142] P43.

This is a hypothetical speech from a politician who is not in power. He offers a hypothesis and presents this measure as a measure of reprisal for the expulsion of Serbs by the Croats.

- **Speech of 6 May 1992 in Hrtkovci**[1144]

Vojislav Šešelj supported the ambition of the FRY to present itself as the state continuing from the SFRY, and stated in his speech of 6 May:

> "Our enemies outside – the European Community, Germany, the US – and our home-grown traitors, primarily the Serbian Movement of Deceit, have tried to force us and lure us into agreeing to proclaim an independent and sovereign Serbian state, as if we were stupid enough to declare an independent Serbian state […] within the present […] borders […] We realised all this in good time and that is why all of us Serbs rallied around that concept of a **truncated Yugoslavia** as a transitional solution […]."[1145]

Strangely, he advocated a truncated Yugoslavia instead of a sovereign and independent Serbia!

For **Vojislav Šešelj**, maintaining the legal existence of the SFRY would facilitate the annexation of the Serbian communities of Bosnia and Herzegovina to the FRY:

> "We have preserved the international legal continuity of the **Yugoslav state**. The Germans and Americans rage and make threats, but that continuity has been recognised by China, Russia, India, [Egypt], Mexico – almost half of all humanity. They cannot remove us from the United Nations, and as to whether they will strike us from the OSCE and other European fora – we don't care much, we are capable of withstanding much worse blockades, challenges and threats, because the Serbian people is today, despite everything, united and in harmony. **We have to preserve that continuity of Yugoslavia because then it will be much easier for the Serbs of the Serbian Krajina and Serbian Bosnia and Herzegovina to join Yugoslavia as federal units, much easier than if we had declared ourselves as Serbia and had them join Serbia later**. As it is, when they join Yugoslavia, they can simply say – we never left Yugoslavia in the first place. That makes their positions much stronger at the international level."[1146]

[1143] *Ibid*., p. 1.
[1144] P00547.
[1145] *Ibid.*, p. 3.
[1146] *Ibid.*, p. 3.

This positioning is tactical because maintaining Yugoslavia intact would allow the Serbs from Krajina and BiH to be integrated as federal units. In a way, the concept of a "Greater Serbia" corresponds to the former Yugoslavia, nothing more, nothing less.

With regard to the Serbian refugees and the expulsion of Croats, the Accused **Vojislav Šešelj** said:

> "Serbian brothers and sisters, now that Tuđman has expelled more than 200,000 Serbs, a part of them will return to the area of Serbian Krajina, but another part cannot settle there. We have to give those Serbs a roof over their heads and feed the hungry mouths. We have no money to build new housing. We do not have the capacity to create new jobs for them. Very well, then, if we cannot do that, then **we should give every Serbian family of refugees the address of one Croatian family. The police will give it to them, the police will do as the government decides, and soon we will be the government. Fine, then. Every Serbian family of refugees will come to a Croatian door and give the Croats they find there their address in Zagreb or other Croatian towns**. Oh, they will, they will. There will be enough busses, we will drive them to the border of Serbian territory and they can walk on from there, if they do not leave before of their own accord."
>
> "I firmly believe that you, Serbs from Hrtkovci and other villages around here, will also know how to preserve your harmony and unity, that you will **promptly get rid of the remaining Croats** in your village and the surrounding villages, that you will know how [to] appreciate the fruits of freedom and democracy."[1147]

He specifically mentions the departure of non-Serbs and invites the Serbs to get rid of them.

At the time of this speech, the Accused did not hold any position of authority. These are political statements made during rallies. It appears from the evidence that a part of the audience consisted of Serbs who had been expelled from Croatia. The entire speech was hypothetical and could not be considered as instigation.

- **Interview of 12 June 1992**

In an **interview given to** "**TV Politika" on 12 June 1992,** the Accused stated that there were **no good Croats**, neither in Imotski nor anywhere in Western Herzegovina.[1148]

[1147] *Ibid.*, pp. 4 and 8.
[1148] P1201, p. 3.

Once again, Vojislav Šešelj mentions that there are no "good Croats". This statement is not incriminatory in itself because in every society distinctions have always been made between the good and the bad.

4. 1993

In the context of the search for a solution to put an end to the conflict in the former Yugoslavia, the Secretary-General of the United Nations, **Mr Boutros-Ghali**, put pressure on the international community on 1 January 1993 to organise talks between the leaders of the three sides in **Geneva**.

From 3 January 1993, meetings between the representatives of the three parties to the conflict commenced in Geneva. **Radovan Karadžić, Mate Boban** and **Alija Izetbegović** were present as were the President of the Federal Republic of Yugoslavia, Ćosić, and the President of Croatia, **Franjo Tuđman**. The two co-Chairs of the Conference, **Lord Owen** and **Cyrus Vance**, presented **a draft peace plan** for Bosnia and Herzegovina. Four main points were proposed: the reorganisation of Bosnia and Herzegovina into ten provinces, the establishment of five corridors between the provinces to allow the passage of humanitarian aid, the establishment of constitutional principles for the Republic that would confer significant autonomy on the provinces within a decentralised system, and a cease-fire and the start of the process of demilitarisation.

On **22 February 1993**, the **United Nations Security Council** envisaged, by the adoption of resolution 808, **the establishment of an international tribunal** to prosecute the persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991. With this in mind, the **Security Council** went on to adopt several successive resolutions calling for a cessation of hostilities and a return to calm. Pursuant to Chapter VII of the Charter of the United Nations, it notably asked the parties to cease all military attacks and all other hostile acts in Srebrenica and in other territories of Bosnia and Herzegovina, and for the Serbian paramilitary forces stationed there to withdraw.

Despite repeated appeals from the international community and the adoption of **Security Council** resolution 827 of 25 May 1993 creating the **International Criminal Tribunal for the former Yugoslavia**, the **Vance-Owen** peace plan ended in failure as the three parties were unable to agree on any of the points in the final document discussed at the negotiations.

It is within this international context that the speech of 13 May 1993 and the interview of 21 May 1993 should be examined.

- **Speech of 13 May 1993**

In a **speech given on 13 May 1993 during a visit by the Serbian Radical Party leadership to Banja Luka**, he said that "[t]he next time they [Muslims and Croats] strike, we should finish them off, so they never strike back".[1149]

This is a clear statement about a military objective and such statements are permissible within the context of a military conflict. Once again, this is a case of warnings being issued to other parties.

- **Interview of 21 May 1993**

In **an interview given to a journalist of the weekly *NIN* on 21 May 1993**, the Accused stated that the Croats were the greatest enemies of the Muslims.[1150]

Once again, he raised the issue of the Croats being the enemies of the Serbs, even though there was a significant Croatian minority in Serbia. To assist the reader, I have summed up all of his speeches given in 1990, 1991, 1992 and 1993 in the chart below.

In conclusion, it is clear that in his many speeches listed above, given throughout 1990, 1991, 1992 and 1993 (27 speeches and interviews), the Accused Vojislav Šešelj, in his capacity as a politician, sometimes gave statements that, when taken in isolation, could be considered as violent. However, when they are put in the military and political context of the time, these statements are not incriminating in the sense of Count 1 of the Indictment.

[1149] P18, p. 1.
[1150] P1221, p. 30.

YEAR	DATE	Exhibit no.
1990	1 July 1990	P1170
	1 November 1990	P1172
	6 December 1990	P32
	27 December 1990	P1175
1991	23 February 1991	P1255
	5 April 1991	P1176
	21 April 1991	P179
	April 1991	P14
	1 May 1991	P1177
	6 May 1991	P1003
	11 May 1991	P1254
	24 May 1991	P34
	4 June 1991	P35
	18 June 1991	P37
	25 July 1991	P1181
	September 1991	P56
	13 September 1991	P1182
	26 September 1991	P1257
	24 November 1991	P1186
1992	1 and 7 April 1992	P892
	8 April 1992	P1195
	21 April 1992	P1197
	22 April 1992	P43
	6 May 1992	P547
	12 June 1992	P1201
1993	13 May 1993	P18
	20 May 1993	P1221

It is appropriate, however, to examine in depth the speeches given in Vukovar and Mali Zvornik that were cited by the Prosecution. In the Indictment and in its pre-trial and closing briefs, the Prosecution described the statements made by Šešelj in these two speeches as particularly revealing, while the Accused for his part denies their very existence.

ii. The speech in Vukovar

The **Indictment** against **Vojislav Šešelj** alleges that he gave a speech on or around 8 November 1991 and said: "***The entire area will soon be cleared of Ustasha.***"[1151] The Prosecution also mentions a second speech, given on or around 13 November 1991, in which the Accused said: "***Not a single Ustasha must leave Vukovar alive.***"[1152] According to the Prosecution, these words led to the persecution of Croats in Vukovar and, in particular, to two significant events. The first event occurred on 20 November 1991. The Serbian forces, which included volunteers recruited by **Vojislav Šešelj**, drove out hundreds of Croats from the Vukovar hospital, transported them to the Ovčara farm where they beat and tortured them, and executed some of them. The total number of victims reached 264 and the Prosecution provided their names in Annex III of the Indictment.[1153] The second event concerns the fact that hundreds of people, including presumed prisoners of war, took shelter in the Velepromet warehouse following the capture of Vukovar. The JNA began to transfer the presumed prisoners of war to a detention centre, the Serbian forces, including **Vojislav Šešelj**'s volunteers, then killed individuals selected from amongst these prisoners and threw their bodies into a mass grave.[1154]

The Prosecution alleges in its pre-trial brief that **Vojislav Šešelj** was in Vukovar on 12 November 1991, a few days before the town fell into the hands of the Serbian forces. Witnesses VS-008, VS-017 and VS-027 stated that the Accused, speaking before a rally of SRS/SČP volunteers, JNA officers (including **Radić** and **Bojkovski**) and members of the local Serbian TO (**Vujović, Vujanović**), said: "*We are all one army. This war is a great test for Serbs. Those who pass the test will become winners. Deserters cannot go unpunished.* ***Not a single Ustasha must leave Vukovar alive****. We have accepted the concept of a federal army so that there is no legal basis for interference of foreign powers in our conflict. The army is fighting rebel Croats. The army has shown that it was able to cleanse its ranks. We have a unified command consisting of military*

[1151] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Third Amended Indictment", 7 December 2007, para. 20.
[1152] *Ibid.*
[1153] *Ibid.*
[1154] *Ibid.*, para. 21.

experts who know what they're doing."[1155] According to the Prosecution, these statements of **Vojislav Šešelj** are responsible for the crimes committed against the non-Serbs during the capture of Vukovar which occurred a few days later.[1156] During the trial, Witness VS-017 went back on his written statement and said that the Accused had never uttered the words, "*Not a single Ustasha must leave Vukovar alive.*"[1157] Witnesses VS-008 and VS-027 confirmed having heard **Vojislav Šešelj** say these words.[1158]

In its closing brief, the Prosecution claims that during his visit to Vukovar, **Vojislav Šešelj** spoke to a large audience of JNA officers, members of the local TO and ***Šešeljevci***, and made several speeches wherein he said that "*Not a single Ustasha must leave Vukovar alive*".[1159] According to the Prosecution, the soldiers who heard these words subsequently killed or mistreated non-Serbs, chiefly Croats, both during and after the siege of Vukovar.[1160] The Prosecution continues by basing its arguments on the statements of Witnesses VS-017, VS-008 and VS-016, who claimed that **Vojislav Šešelj** held a meeting with the local officials at 81, Nova Ulica in Vukovar (RADIĆ's house) on or around 8 November 1991.[1161] According to VS-027, on that occasion the Accused said the following: "*We are all one army. This war is a great test for Serbs. Those who pass the test will become winners. Deserters cannot go unpunished.* ***Not a single Ustasha must leave Vukovar alive****. We have accepted the concept of a federal army so that there is no legal basis for interference of foreign powers in our conflict. The army is fighting rebel Croats. The army has shown that it was able to cleanse its ranks. We have a unified command consisting of military experts who know what they're doing.*" The witness recorded these words in writing.[1162] The Prosecution states that VS-016 and VS-017[1163] also heard the words "*Not a single Ustasha must leave Vukovar alive*".[1164] Moreover, it also relies on the testimony of Witness VS-034,[1165] who recalls that **Vojislav Šešelj** addressed the soldiers and said that the "*Ustasha should be expelled*", to which the volunteers replied by chanting: "*Croats, we shall slaughter you, slaughter you a bit but give you to the dogs*

[1155] *Ibid.*, paras 26 and 66.
[1156] *Ibid.*, paras 67 to 71.
[1157] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, open session, T(E) of 12 May 2010, p. 16058.
[1158] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67. Witness VS-008, T(F) of 13 January 2009, pp.13287, 13289, 13290, 13329 and 13330 (closed session). Witness VS-027, T(E) of 7 July 2009, pp. 14579 and 14580 (closed session), T.(E) of 8 July 2009, pp. 14673 and 14674 (closed session) and T(E) of 7 July 2009, pp. 14579 and 14580 (closed session).
[1159] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Prosecution Closing Brief, 5 February 2012, para. 154.
[1160] *Ibid.*
[1161] *Ibid.*, para. 159.
[1162] *Ibid.*
[1163] During his testimony, Witness VS-016 confirmed that he had heard that sentence and pointed out that Šešelj used this term to refer to Croatian soldiers. *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, T(E) of 28 October 2008, pp. 11120, 11170, 11171 and 11290 (closed session).
[1164] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Prosecution Closing Brief, 5 February 2012, paras 160 and 161.
[1165] VS-034 did not testify. The Prosecution relies on Exhibit P01058 (under seal).

more often."[1166] Lastly, the Prosecution, relying on Exhibit P01074 – which is the Rule 89 (F) written statement of VS-017 – claims that during his visit to the Vukovar front, **Vojislav Šešelj** spoke through a megaphone and addressed the Croats as "*Ustashas*" saying: "*Ustasha, you are surrounded. Surrender because you have no way out.*"[1167] VS-007[1168] confirmed that **Vojislav Šešelj** had told the Croats to surrender or die, telling the volunteers to "*show them no mercy*" and to "*just kill them*".[1169]

In his pre-trial brief, **Vojislav Šešelj** stated the following with regard to the claim that he had given a speech calling for persecutions in Vukovar: "*The charge refers to November 1991 and to Professor Vojislav Šešelj's speech to soldiers gathered at a meeting in a house on 12 November 1991. Nobody else could have heard the speech even if he had wanted to, let alone anyone who could be the victim of persecution.*"[1170]

In his final brief, **Vojislav Šešelj** firstly casts doubt on the credibility of the witnesses. In his opinion, VS-008 had never been to Vukovar and, for that matter, did not know where the town was located.[1171] Witness VS-017 is a Defence witness, while Witnesses VS-027, VS-007 and VS-016 are false witnesses.[1172] As for Witness VS-034, he was not allowed to testify by the Chamber, otherwise he would have been a Defence witness.[1173] He then states that he had never given a speech in Vukovar,[1174] arguing that had there been a speech, it would have been established, recorded or at least mentioned in ICTY judgements, such as in the *Mrkšić, Šljivančanin and Radić* judgement.[1175] According to **Vojislav Šešelj**, these judgements established that there had been no direct and public denigration through hate speech.[1176] Moreover, he notes that the Prosecution did not provide a single piece of evidence to support its claims about the alleged speech in Vukovar.[1177]

In my opinion, the only incriminating sentence to take into consideration is: "*Not a single Ustasha must leave Vukovar alive.*" Nevertheless, this sentence must be placed in its context,

[1166] *Ibid.*, para. 160.
[1167] *Ibid.*, para. 162.
[1168] Words confirmed during the trial. *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, T(F) of 15 April 2008, p. 6072 (closed session).
[1169] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Prosecution Closing Brief, 5 February 2012, para. 162.
[1170] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Professor Vojislav Šešelj's Pre-Trial Brief", 2 November 2007, p. 52.
[1171] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Professor Vojislav Šešelj's Final Brief", 30 January 2012, p. 24.
[1172] *Ibid.*, pp. 24, 25 and 30.
[1173] *Ibid.*, p. 285.
[1174] *Ibid.*, notably pp. 34, 37, 93, 144, 153, 155, 176 and 316.
[1175] *Ibid.*, p. 144.
[1176] *Ibid.*, p. 153.
[1177] *Ibid.*

which is the conflict between the Croats who were fiercely supporting independence and the Serbs who wished to maintain Yugoslavia and considered these Croats to be rebelling against the Yugoslav state.

There is uncertainty as to whether the speeches were really given, because the Accused contests this claim and the witnesses are far from being reliable.[1178]

Even if this sentence had been uttered, it should be considered that a part of it might have been forgotten because there was fighting and men were dying. The law of war does not prohibit the killing of one's enemy in combat. What is prohibited, however, is to kill him after he has surrendered. Was there a cause-and-effect link between these words and the events that occurred in Ovčara and the Velepromet farm? I think that it is difficult to be certain about this matter. With regard to the speech given in Vukovar, in light of the aforementioned reasons, I consider that there is no basis upon which to hold the Accused responsible. Consequently, I am dismissing this speech from the charges.

iii. The speech in Mali Zvornik

The Prosecutor alleges in the Indictment that the Accused **Vojislav Šešelj** gave a speech during a rally in March 1992 organised in Mali Zvornik, a place located across from Zvornik, on the opposite bank of the Drina. **Vojislav Šešelj**'s statements, as presented by the Prosecution, are as follows: "*Dear Chetnik brothers, especially you across the Drina river, you are the bravest ones. We are going to clean Bosnia of pagans and show them a road which will take them to the east, where they belong.*"[1179] Consequently, it is alleged that with this speech, the Accused directly targeted the non-Serb population of Zvornik and called for its persecution, thereby leading directly to the attack on the town one month later by "**Šešelj**'s men" and "**Arkan's** Tigers", accused of having committed crimes against non-Serb civilians there.[1180] In respect of this, the Prosecution cites examples of the crimes that ensued following **Vojislav Šešelj**'s speech. It mentions notably the execution of approximately 20 Muslim and Croatian men and boys on 9 April 1992 by **Arkan**'s men, the unlawful detention of non-Serb civilians at the "Standard" shoe factory, the "Ciglana" factory, the Ekonomija farm, the Drinjača and Čelopek cultural centres between April and May

[1178] In this respect, it is appropriate to note that Witness VS-008 was "withdrawn" by the Prosecution because ultimately his testimony contained exaggerations.
[1179] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Third Amended Indictment", 7 December 2007, para.22.
[1180] *Ibid.*

1992, and the many acts of torture and murder of non-Serb civilians committed by **Šešelj**'s men between May and June 1992.[1181]

In its pre-trial brief, the Prosecution also mentions the Mali Zvornik speech, citing the same statements made by **Vojislav Šešelj** and recalled by Witness VS-1104.[1182] In addition, the Prosecution mentions a second speech given by **Vojislav Šešelj** during an SRS rally in Zvornik or in Mali Zvornik, a speech that was allegedly given shortly after the capture of the town on 8 and 9 April 1992. According to the Prosecution, this speech was mentioned by Witness VS-017.[1183] As in the Indictment, the Prosecutor links this speech to the crimes: murder, torture, ill-treatment and detention of non-Serb civilians, destruction of mosques, forced displacement, deportation, looting, the proceeds of which went to finance the SRS, etc.[1184]

Regarding the witnesses cited by the Prosecution in its pre-trial brief, we can note that during the trial, Witness VS-017 stated that **Vojislav Šešelj** had never been in Zvornik in the spring of 1992, but that he had visited there before the conflict in 1990.[1185] According to the testimony of VS-1104, however, **Vojislav Šešelj** gave a speech in Mali Zvornik on or about 17 or 18 March.[1186] Having seen posters in Zvornik announcing his arrival, the witness decided to go there. He explained that all this had taken place at the culture and youth hall in the presence of many people.[1187] According to him, **Vojislav Šešelj** stated: "*Brothers, Chetniks, Chetnik brothers, the time has come for us to give the balijas tit for tat.*"[1188] The witness continued, claiming he that was literally quoting **Vojislav Šešelj**'s words: "*The Drina, the River Drina, is not a boundary between Serbia and Bosnia. It is the backbone of the Serbian state. Every foot of land inhabited by Serbs is Serbian land. Let's rise up, Chetnik brothers, especially you from across the Drina. You are the bravest."*[1189] *"Let us show the balijas, the Turks and the Muslims.*"[1190] "*The direction to the east. That's where their place is.*"[1191]

Lastly, in its closing brief, the Prosecution recalls **Vojislav Šešelj**'s presence in the Zvornik area. According to the Prosecution, he arrived there in August 1990 to hold a rally and establish a branch

[1181] *Ibid.*
[1182] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Prosecution's Final Pre-Trial Brief, 31 July 2007, para. 91.
[1183] *Ibid.*, para. 93.
[1184] *Ibid.*, paras 93-94.
[1185] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, open session, T(E) of 11 May 2010, pp. 15951-15952.
[1186] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, open session, T(E) of 4 February 2009, p. 13992.
[1187] *Ibid.*
[1188] *Ibid.*, para. 13994.
[1189] *Ibid.*, para. 13995.
[1190] *Ibid.*
[1191] *Ibid.*

of the SČP.[1192] He then returned there in March or April 1992, this time to Mali Zvornik.[1193] The Prosecution subsequently relies on interviews given by **Vojislav Šešelj** or newspaper articles mentioning his speeches in Mali Zvornik**,** Exhibits P01263, P00034 and P00037, wherein he stated that he and his sympathisers would "*spill new rivers of blood, if necessary*", that all "*Muslim fundamentalists […] will have to pack their suitcases and leave*" and also that "*[w]hile the Serbs are well-disposed towards you, you can walk. Afterwards, you will not be able to*".[1194] Lastly, according to the Prosecution, in May 1992, **Vojislav Šešelj** urged a clean up of "*the left bank of the Drina*".[1195]

Vojislav Šešelj claims that the allegations that he gave a speech in Mali Zvornik calling for persecutions are false. In his pre-trial brief, the Accused states that he was not in Mali Zvornik in March 1992.[1196] He reiterates this statement in his final brief[1197] saying that no evidence was presented to show that a rally did indeed take place in Mali Zvornik in March 1992.[1198] According to him, the only time he gave a speech at a rally that he held in Mali Zvornik was in August 1990, as part of a promotional campaign for the Serbian Chetnik Movement.[1199] He notes in this respect that neither this event nor the moment when it happened was mentioned in the Indictment.[1200] **Šešelj** notably casts doubt on the credibility of Witness VS-2000 who, in his opinion, turned a rally held by the Serbian Chetnik Movement on 4 August 1990 in Mali Zvornik into a rally of the Serbian Radical Party supposedly held in March 1992.[1201] He warns of the inconsistencies in this testimony, which is not corroborated by material evidence, and points out the importance of not referring to this testimony, especially as it constitutes the basis for practically all of the Prosecution's allegations concerning Zvornik.[1202]

The existence of this rally is contested even by the Accused! The doubt is increased by the fact that there is no evidence to confirm the statements of VS-2000. The witness could have been confused about the exact dates of the rally.

[1192] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Prosecution Closing Brief, 5 February 2012, para. 272.
[1193] *Ibid.*
[1194] *Ibid.*, para. 599.
[1195] *Ibid.*, para. 601.
[1196] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Professor Vojislav Šešelj's Pre-Trial Brief", 2 November 2007, p. 52.
[1197] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Professor Vojislav Šešelj's Final Brief", 30 January 2012, notably pp. 34, 93, 116, 140, 142, 144, 145, 154, 155, 171, 176, 373, 421 and 422.
[1198] *Ibid*., p. 145.
[1199] *Ibid*., p. 154.
[1200] *Ibid.*
[1201] *Ibid*., p. 373.
[1202] *Ibid*., pp. 421-422.

Consequently, I will not hold Vojislav Šešelj responsible for the allegations in the Indictment relating to statements made in Vukovar and Mali Zvornik, because the witnesses are unreliable as concerns Vukovar, and there is an error regarding the date of the speech in Mali Zvornik that significantly undermines the testimony of the witnesses.

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* *

In conclusion, regarding Count 1 (Persecution), I have reached the finding that the Prosecution failed to prove beyond all reasonable doubt that persecutions in the forms listed in paragraphs (A), (B), (C), (D), (E) , (F), (G), (H), (I) and (J) of paragraph 17 of the Indictment were committed.

Concerning the murders listed in paragraph (A), which are described in paragraphs 18 to 27 of the Indictment.

I have found no evidence of any murders committed by Vojislav Šešelj under the forms of responsibility described in Article 7 (1) of the Statute.

Although it is true that murders corresponding to the acts listed in these paragraphs were committed by Serbian forces, the fact remains that no other forms of criminal responsibility against the Accused can be established.

With regard to the more specific form of instigation to murder, was there a document or a witness that could have allowed a reasonable trier of fact to establish a link between a speech and a murder? My answer is no.

It seems to me that after the capture of Vukovar by the JNA, 194 Croatian prisoners of war were executed by individuals, some of whom distinctly appeared to belong to a military unit within the JNA, and, under orders emanating from another authority, these victims were executed. Likewise, it has been established that in Zvornik, following the capture of the town by the Serbian forces, 88 Muslims were tortured and beaten at the Dom Kulture, while 150 Muslim men at the Karakaj technical school, 150 men at the Gero slaughterhouse and 40 men

at the Čelopek cultural hall were victims of crimes; these victims are listed in Annex 5 of the Indictment.

There is no evidence to link Vojislav Šešelj to the perpetrators of these murders, and no orders in this sense were discovered.

Likewise, the victims in Greater Sarajevo (para. 24), Mostar (para. 26) and Nevesinje (para. 27) were killed by Serbian forces. With respect to these victims, there is no evidence that links their execution to Vojislav Šešelj.

In my opinion, neither Vojislav Šešelj's speeches nor his interviews had an instigating effect on the perpetrators of these crimes, all the more so because there is no evidence that allows a reasonable trier of fact to find that the physical perpetrator of a crime acted upon the instigation of Vojislav Šešelj.

Evidence on the modus operandi of these executions reveals that the victims were captured by legal forces acting on the military front and that they were subsequently executed by individuals charged with that task, without there being any link that could be established with Vojislav Šešelj.

Consequently, I consider that Vojislav Šešelj must be acquitted of Count 1.

3.3.2. Counts 10 and 11: Deportation and forcible transfer

a. Applicable law

The first references to **deportation** and **forcible transfer** of a population appear in the **Fourth Hague Convention**, which codifies the conduct to be adopted in wartime.[1203] We can deduce from Articles 42 to 56, which address **military authority** in the territory of the hostile state, that there is implicit protection against the transfer of populations. Pursuant to Article 43, the occupant has the obligation to take "*all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country*". Article 46 sets out that "*family honour and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.*" Subsequently, it is the **Geneva Conventions of 1949** that codified the ban on the **expulsion –** referred to as **deportation** therein – and **forcible transfer** of a population. Article 49 of the Fourth Convention relative to the protection of civilian persons in time of war prohibits "*individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not*".[1204] With respect to **non-international armed conflicts**, it is Article 85 of Additional Protocol I to the Geneva Conventions that makes **deportation** and **forcible transfer** an offence.[1205]

Deportation was also prohibited in the **Statute of the International Military Tribunal at Nuremberg**, and is qualified as a **crime against humanity** in Article 6, paragraph (c).[1206] The Rome Statute of the International Criminal Court, for its part, provides a precise definition of expulsion (deportation) and the forcible transfer of a population as being "*the forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law*".[1207] The Statute includes them under crimes against humanity[1208] but also, referring to the **Geneva Conventions**, as war

[1203] Convention (IV) respecting the Laws and Customs of War on Land, adopted in 1899 and revised in 1907.
[1204] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
[1205] Article 85, paragraph 4, (a) reads as follows: "*In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol: (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention,*" Additional Protocol I to the Geneva Conventions of 12 August 1949.
[1206] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945.
[1207] Article 7 (2) (b) of the Rome Statute.
[1208] Article 7 (1) (b) of the Rome Statute.

crimes.[1209] Likewise, the Statutes of the ICTY and the ICTR qualify deportation[1210] as a crime against humanity in Articles 5 (d) and 3 (d) of their Statutes, but do not explicitly mention forcible transfer.[1211]

The distinction between **forcible transfer** and **deportation** lies in the fact that the former occurs **within the borders** of one and the same state.[1212] It implies the displacement of a population and is determined by its "*forcible*" nature, meaning that it is **not voluntary**, even if it might be **consensual**.[1213] Like deportation, **forcible transfer** infringes upon an entire series of rights: the right to self-determination, the right to housing, the right to the inviolability of a person's home, the right to enjoy goods, the right to private and family life, the freedom of movement, etc.

In the ***Krstić*** case, the Trial Chamber clearly distinguished **deportation** from **forcible transfer**. It stated that "*both deportation and forcible transfer relate to the **involuntary and unlawful evacuation of individuals from the territory in which they reside**. Yet the two are not synonymous in customary international law. Deportation presumes **transfer beyond State borders, whereas forcible transfer relates to the displacements within a State***".[1214] In that case, the Chamber therefore found that the **Muslims in Srebrenica and Potočari were victims of forcible transfer and not deportation because the displacement occurred within the borders of Bosnia and Herzegovina**.[1215] In that case, the Chamber also looked at the "forcible" nature of the transfer. In order to do that, it relied on the finalised draft text of the elements of crimes adopted by the Preparatory Commission for the International Criminal Court,[1216] which states that **the term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by psychological oppression, duress, abuse of power, etc**.[1217] The Chamber noted in that case that there were intimidations, threats and other physical pressure during the campaign to force the Muslims to leave **Srebrenica**, thereby giving the transfer a forcible character.[1218] In its judgement, the Trial Chamber also addressed the possibility that in certain cases the forcible

[1209] Article 8 (2) (a) (vii) of the Rome Statute.
[1210] We note here a difference in vocabulary, most likely linked to the translation from English into French. The English version of the ICTY and ICTR Statutes uses the term "*deportation*". The Chambers have found the two terms to be similar.
[1211] Apart from the forcible transfer of children within the context of genocide under Article 4 (2) (e) of the ICTY Statute and Article 2 (2) (e) of the ICTR Statute.
[1212] *See* in this sense the Draft Code on Crimes against the Peace and Security of Mankind of the ILC of 1996.
[1213] O. DE FROUVILLE, "*Droit international pénal. Sources, Incriminations, Responsabilité*", published by A. Pedone, 2012, p. 171.
[1214] *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001, para. 521. Our emphasis.
[1215] *Ibid.*, para. 531.
[1216] Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of Crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 6 July 2000, p. 7.
[1217] *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001, para. 530.
[1218] *Ibid.*

removal was justified in accordance with domestic and international law. The Chamber noted that Article 49 of the Fourth Geneva Convention and Article 17 of the Additional Protocol allow "***the total or partial evacuation of the population 'if the security of the population or imperative military reasons so demand"***".[1219] However, here it considered that there had not been any military threat to **Srebrenica** and that the evacuation was the very aim of the operation[1220] and could not be justified by the protection of civilians or military necessity.[1221]

The distinction between **deportation** and **forcible transfer** was subsequently reduced significantly by the ICTY in the ***Stakić*** case. Firstly, the Trial Chamber found that deportation (expulsion) could also encompass displacements **beyond** "***de facto boundaries*** *such as constantly changing frontlines, which are not internationally recognised*".[1222] The Trial Chamber went even further by considering, ultimately, that these two crimes were, **in reality, one and the same crime**.[1223] In the same case, the Appeals Chamber moderated the Trial Chamber's statements without backtracking completely. It admitted that "***under certain circumstances, displacement across a* de facto *border may be sufficient to amount to deportation. In general, the question whether a particular* de facto *border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law***".[1224] However, it rejected the theory of "***constantly changing frontlines***" on the grounds that the Trial Chamber thereby expanded criminal responsibility, giving greater scope to deportation than existed under customary international law, thus violating the principle of *nullum crimen sine lege*.[1225] In this respect, I have serious questions regarding the notion of "***de facto* frontlines**". In my opinion, the case in question should be placed in a general context of the borders recognised by the great powers in Yalta.

In the ***Krajišnik*** case, the Appeals Chamber deemed that the Trial Chamber erred by failing to find the Accused responsible for forcible transfer under "*other inhumane acts*" for acts of forcible displacement, and instead qualified them as **deportation**, failing to conclude that any borders were crossed, be they *de jure* or *de facto* borders.[1226] Consequently, the Appeals Chamber in that case followed the same logic as in the *Stakić* Appeal Judgement.

In the ***Popović*** Judgement, the Trial Chamber established that there was a distinction between forcible transfer and deportation. To prove the latter, it is necessary to demonstrate the existence of

[1219] *Ibid.*, para. 524.
[1220] I issued a dissenting opinion in the Tolimir case because I found that there had been no forcible transfer.
[1221] *Ibid.*, para. 527.
[1222] *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003, para. 679.
[1223] *Ibid.*, para. 680.
[1224] *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeal Judgement, 22 March 2010, para. 300.
[1225] *Ibid.*, para. 302.

a material element and an additional mental element to implement it, namely that the victims were displaced by force across a border.[1227] The Chamber stated, moreover, that not only must the victims be deported across a border, but it must be the act of the perpetrator of the displacement which determined that destination. Therefore, it required evidence of a **link between the use of force by the Accused and the destination of the victims across a border**.[1228] In that case, the Chamber did not accept the charge of deportation on the grounds that although the victims had been forced to flee the **Žepa enclave** to save their lives, those who went to Serbia made the **choice** to flee across the border and had not been forced to do so by the Accused.[1229] In terms of the legality of the transfer, the Chamber noted however that although the displacement was escorted or supervised by humanitarian organisations, **UNPROFOR** and the **ICRC,** in this case **this did not render the displacement lawful** nor did it change its forcible nature.[1230] It deemed that in this case the agreement reached by the parties to the conflict was nothing more than **an attempt by the VRS to legitimise unlawful forcible transfer**.[1231] The ***Popović* Chamber**[1232] also made an interesting distinction regarding the issue of force. It noted that in **Srebrenica**, the group that fled the town in the direction of the Bosniak zone could be divided into **civilians**, who were **victims of forcible transfer**, and **soldiers, who made the strategic choice to flee whereas they could have remained to fight, to surrender or to retreat**.[1233] According to the Chamber, while the risks of battle and the difficult conditions for prisoners of war may have motivated their decision to leave, it was in the end their **choice** and, consequently, it could not be considered as **forcible transfer**.[1234] With respect to this issue, it is obvious that a distinction must be made between **civilians** and **combatants**.

In the ***Krnojelac*** case, we can note that the Appeals Chamber concluded that **both displacement as well as forcible transfer can constitute persecution as a crime against humanity if they are committed with the requisite discriminatory intent**.[1235] In its judgement, the Appeals Chamber also considered the forcible character of displacement. It noted in that case that the non-Serb detainees, due to the living conditions at KP Dom, were held in a coercive prison regime. Consequently, they did not have a **genuine choice**. It found that the detainees were under coercion

[1226] *The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009, paras 316 to 318.
[1227] *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010, para. 892.
[1228] *Ibid.*, para. 893.
[1229] *Ibid.*, para. 959.
[1230] *Ibid.*, para. 945.
[1231] *Ibid.*
[1232] I do not agree with the Popović Chamber in this respect (Cf. my opinion in the Tolimir case).
[1233] *Ibid.*, para. 927.
[1234] *Ibid.*
[1235] *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeal Judgement, 17 September 2003, para. 222.

and that the Trial Chamber erred when it found that they had freely chosen to be displaced across the national border with Montenegro.[1236]

b. The Prosecution's arguments

In its closing brief, the Prosecution accuses the Serbian leadership of having organised and executed the **forcible displacement of the non-Serb population** of BiH, Croatia and Serbia by using Serbian forces, including the **Šešeljevci**.[1237] The Prosecution points out that the **perpetrators intentionally displaced the victims, by force and without grounds permitted under international law, from locations where they were lawfully present**.[1238] According to the Prosecution, there was a strategy to adopt **discriminatory measures** against the non-Serbs for the purpose of creating a **climate of fear** that would incite them to leave. Subsequently, those who did not leave the areas concerned were expelled from their homes during and after the take-over of the municipalities.[1239] The method used was to "**round-up"** the able-bodied men and place them in detention and forcibly displace the rest of the non-Serb population.[1240] The Prosecution mentions the fact that some of the victims were displaced across borders, that is to say deported, while others were displaced inside Bosnia and Croatia, meaning forcibly transferred.[1241] It then described the **threat of direct physical violence** to characterise the forcible nature of the displacement, stating that thereby **it was impossible for the victims to give their consent or to have a choice**.[1242] Lastly, the Prosecution argues that the deportations and forcible transfers could also be considered as the underlying crimes of persecution. It submits that these two crimes are of a **similar gravity** as the other crimes against humanity and that **their perpetrators had the intent to discriminate against the targeted persons because of their ethnic affiliation** and, after the deportations, took steps to prevent non-Serbs from returning.[1243] As for the specific involvement of **Vojislav Šešelj**, the Prosecution accuses him of having **called for deportation and inhumane acts** (forcible transfer) in the speeches he gave in Hrtkovci, thereby physically committing these two crimes.[1244] The Prosecution points out that on 26 May 1992 in the area of Zvornik, following a speech by **Vojislav Šešelj**, approximately 500 Muslim inhabitants of Divić village were expelled from their homes.[1245] Moreover, the Prosecution mentions that the Muslims from Šetići received an order to

[1236] *Ibid.*, paras 227 to 233.
[1237] *The Prosecutor v.. Vojislav Šešelj*, Case No. IT-03-67-T, Prosecution Closing Brief, 5 February 2012, para. 565.
[1238] *Ibid.*
[1239] *Ibid.*
[1240] *Ibid.*
[1241] *Ibid.*
[1242] *Ibid.*
[1243] *Ibid.*
[1244] *Ibid.*, para. 588.
[1245] *Ibid.*, para. 303.

go to Klisa where other Muslims (approximately 4,000) from 13 villages were gathered.[1246] They were then ordered to return to their villages, collect their belongings and follow the Serbian forces to Klisa. Subsequently, the Muslims were taken to Đulići. On the way, the Serbian forces separated the men from the rest of the group and sent them in the direction of Bijeli Potok.[1247] The Prosecution attributes these acts to Serbian military and paramilitary forces, including the **Šešeljevci**.[1248] With respect to Sarajevo, the closing brief mentions several locations where non-Serbs were the victims of forcible transfers in which the **Šešeljevci** were involved: Svrake, Novo Sarajevo, Ilidža.[1249] In Vukovar, the Prosecution notes that the Serbian forces forced the population to flee by **shelling them incessantly** for months.[1250] In Borovo Komerc, in the municipality of Vukovar, **the women and children were forcibly transferred to other areas of the Croatian territory**.[1251] Consequently, according to the Prosecution, 14,798 persons were deported from Vukovar before 18 November 1991 and 5,478 were deported between 18 November 1991 and 1 May 1992. In the Vukovar-Srijem county, 20,593 persons were expelled before 20 October 1991 and 6,268 between 20 October 1991 and 1 May 1992.[1252] The Prosecution states that these **forcible transfers were not done out of military necessity**, but rather for the purpose of replacing the local population with an exclusively Serbian population.[1253] In Nevesinje, the Serbian forces waged a **campaign of terror, persecuting, attacking, arresting and threatening the non-Serb population, and committing murders and massacres that led to the inhabitants fleeing the town**.[1254] The Prosecution thus points out that in mid-June 1992, the Serbian forces expelled the majority of the non-Serbs from the southern part of the municipality.[1255] The **shellings** and **ultimatums** by the Serbian forces (including the **Šešeljevci**) also forced the non-Serbs to leave the area.[1256] The Serbian forces subsequently attacked villages, looted and torched houses and expelled the remaining inhabitants.[1257]

c. Vojislav Šešelj's arguments

With regard to the deportations and forcible transfers, **Vojislav Šešelj** reiterates his arguments that, in accordance with the judgements and appeal judgements rendered in the ***Mrkšić, Šljivančanin***

[1246] *Ibid.*, para. 305.
[1247] *Ibid.*
[1248] *Ibid.*
[1249] *Ibid.*, paras 382, 387, 388.
[1250] *Ibid.*, para. 148.
[1251] *Ibid.*, para. 151.
[1252] *Ibid.*, para. 152.
[1253] *Ibid.*, para. 153.
[1254] *Ibid.*, paras 463 to 466.
[1255] *Ibid.*, para. 467.
[1256] *Ibid.*, paras 468-469.

and Radić case, **Vukovar** was not the site of a **crime against humanity** and, consequently, of deportations or forcible transfers.[1258] In the **Krajišnik** case, the charges relating to Greater Sarajevo and Nevesinje were also rejected.[1259] Therefore, according to the Accused, all that is left for him to do is to examine the allegations concerning **Zvornik and Hrtkovci**. With regard to Zvornik, **Vojislav Šešelj** claims that in no way did he support the events that occurred there. He states that the **perpetrators of those crimes caused harm to the Serbs and that he publicly denounced their actions**.[1260] He argues that no **causal link** can be established between him and the direct perpetrators of the crimes in the municipality of Zvornik.[1261] Therefore, according to him, **the transfer of Muslims from Kozluk village (located in the municipality of Zvornik) must be attributed to a group that was operating outside of anyone's control and against which the authorities in power could do nothing**.[1262] Moreover, **Vojislav Šešelj** adds that **at the time of the events, there were no SRS volunteers present in Zvornik**, which was confirmed by witnesses.[1263] With respect to Hrtkovci, **Šešelj** mentions the fact that the departures from Hrtkovci were a part of **an exchange of property** process which was ongoing from the second half of 1991 and lasted until 1995.[1264] The Accused claims that the **exchanges were voluntary** and that no threats or force were used.[1265] Returning to the scope of his speech, he also argues that **his aim was not to issue orders or to incite to violence**.[1266] The speech was given within the context of **promoting his political party**. **It cannot be interpreted as an appeal to his followers to commit reprehensible acts**.[1267] **Vojislav Šešelj** adds that there were very few followers of his party at the rally because there was no party organisation in the village at that time and, moreover, **he could not influence the local government** because it was in the hands of another political party.[1268] Lastly, **Vojislav Šešelj** mentions the testimony of a witness who stated that approximately **200,000 Serbian refugees** arrived in Serbia from Croatia, while the number of Croats in Hrtkovci who exchanged property with them was only **800**.[1269] According to him, such a discrepancy can only be regarded as **individual and isolated cases of violence**, and not as these people being the victims of persecutions, deportations and forcible transfers.[1270]

[1257] *Ibid.*, para. 470.
[1258] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Professor Vojislav Šešelj's Final Brief", 30 January 2012, p. 165.
[1259] *Ibid.*
[1260] *Ibid.*, p. 375.
[1261] *Ibid.*
[1262] *Ibid.*
[1263] *Ibid.*, p. 413.
[1264] *Ibid.*, p. 443.
[1265] *Ibid.*, p. 444.
[1266] *Ibid.*, p. 441.
[1267] *Ibid.*
[1268] *Ibid.*
[1269] *Ibid.*, p. 454.
[1270] *Ibid.*

d. Conclusion

Determining the exact role of the Accused in these crimes is difficult. Firstly, I do not share the Prosecution's view that he was a **perpetrator** in these transfers and deportations. Unlike almost all of the Accused prosecuted before this Tribunal, **Vojislav Šešelj did not hold any official governmental office** at the time of the commission of the crimes; he was neither a minister nor a military person. He was merely a politician of the opposition who had, however, supported the Milošević government for a few months in 1993 until a motion of censure was filed.

This political support cannot in itself be considered as active participation in the crimes. He could not issue orders and he did not have authority over the military or police forces that carried out the arrests, transfers and deportations. Likewise, the evidence does not prove beyond all reasonable doubt that the volunteers or followers of his political party themselves committed the forcible transfers or deportations.

I do not agree with the form of responsibility for instigation set out in Counts 10 and 11. Although, indeed, certain words were said and, and these strong words did at times have a violent connotation, I have no evidence to conclude that Vojislav Šešelj instigated his audience to commit crimes. I note, furthermore, that in the majority of the cases, these statements were given as warnings in case the adversary committed a certain act. Moreover, we have no record of the commission of such acts by the adversary and we have still less evidence of any action by anyone admitting to having been instigated by Vojislav Šešelj's statements. Before going down that road, it is necessary to establish first, beyond all reasonable doubt, that the statements amounted to hate speech and that they instigated the commission of a crime.

Consequently, I must conclude that Vojislav Šešelj should be acquitted of Counts 10 (Deportation) and 11 (Forcible transfer).

In order to provide the reader with a complete overview, I hereby include a comprehensive table regarding Counts 1, 10 and 11 as alleged by the Prosecution in detail in its final brief.

Accordingly, I have provided in the left-hand column the references to the crimes listed in the annex and I indicated my position for each of the crimes in relation to the *actus reus* and the *mens rea* in order to determine guilt in the last column.

Count 1

(A) Forced labour

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**
2.	**+**	**0**	**NG**
3.	**+**	**0**	**NG**
4.	**+**	**0**	**NG**
5.	**+**	**0**	**NG**
6.	**0**	**0**	**NG**
7.	**0**	**0**	**NG**
8.	**0**	**0**	**NG**

(B) Sexual assaults

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**
2.	**+**	**0**	**NG**
3.	**+**	**0**	**NG**
4.	**+**	**0**	**NG**

(C) Torture, beatings and rape

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**
2.	**0**	**0**	**NG**
3.	**+**	**0**	**NG**
4.	**0**	**0**	**NG**
5.	**+**	**0**	**NG**
6.	**+**	**0**	**NG**
7.	**+**	**0**	**NG**
8.	**+**	**0**	**NG**
9.	**+**	**0**	**NG**
10.	**+**	**0**	**NG**
11.	**0**	**0**	**NG**
12.	**+**	**0**	**NG**

(D) Application of restrictive or discriminatory measures

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**+**	**0**	**NG**
2.	**0**	**0**	**NG**
3.	**+**	**0**	**NG**
4.	**0**	**0**	**NG**
5.	**0**	**0**	**NG**
6.	**0**	**0**	**NG**
7.	**0**	**0**	**NG**
8.	**0**	**0**	**NG**
9.	**0**	**0**	**NG**
10.	**0**	**0**	**NG**
11.	**0**	**0**	**NG**
12.	**0**	**0**	**NG**
13.	**+**	**0**	**NG**
14.	**+**	**0**	**NG**
15.	**0**	**0**	**NG**
16.	**+**	**0**	**NG**
17.	**0**	**0**	**NG**

(E) Public and direct denigration through speeches

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**
2.	**0**	**0**	**NG**
3.	**0**	**0**	**NG**

Count 10: Deportation

Vukovar

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**
2.	**0**	**0**	**NG**
3.	**0**	**0**	**NG**
4.	**0**	**0**	**NG**
5.	**0**	**0**	**NG**
6.	**0**	**0**	**NG**

Zvornik

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**
2.	**0**	**0**	**NG**
3.	**0**	**0**	**NG**

Count 11: Forcible transfer

Vukovar

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**
2.	**0**	**0**	**NG**
3.	**0**	**0**	**NG**
4.	**0**	**0**	**NG**
5.	**0**	**0**	**NG**
6.	**0**	**0**	**NG**

Zvornik

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**
2.	**0**	**0**	**NG**
3.	**0**	**0**	**NG**
4.	**0**	**0**	**NG**
5.	**0**	**0**	**NG**

Greater Sarajevo

(a) Ilijaš

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**
2.	**0**	**0**	**NG**

(b) Vogošća

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**

(c) Novo Sarajevo

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**

(d) Ilidža

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**

Nevesinje

No.	*Actus Reus*	*Mens rea*	Guilt
1.	**0**	**0**	**NG**

Hrtkovci

No.	*Actus Reus*	*Mens rea*	Guilt

1. … 679.	**0**	**0**	**NG**

4. CHOICE OF THE FORM OF RESPONSIBILITY

4.1. JCE

4.1.1. The Prosecution's arguments

According to the Prosecution, there are three requirements that must be satisfied with regard to **JCE** liability: (i) a plurality of persons; (ii) the existence of a common purpose which amounts to or involves the commission of a crime under the Statute; (iii) and the participation of the Accused in the common purpose. The common purpose may, as in this case, be nation wide. According to the Prosecution, in addition to **Vojislav Šešelj**, other Serbian leaders participated in the effort to achieve the **common purpose.** The Prosecution cites, *inter alia*, **Slobodan Milošević**, General **Blagoje Adžić**, **Goran Hadžić** and **Radovan Karadžić.**[1271]

The Accused has acknowledged that in 1991, 1992 and 1993, when he was sending volunteers, they had a good working relationship with **Slobodan Milošević**. The latter provided him with uniforms, weapons, buses, and put the barracks in Bubanj Potok at the disposal of the Serbian Radical Party [...] and all the technical equipment that was needed. That worked much better, according to **Vojislav Šešelj.**[1272]

As in Croatia, JCE members established parallel Serbian structures in BiH: political, TO and police structures. As tensions in BiH escalated, **Vojislav Šešelj** redeployed combat-hardened **Šešeljevci** from Croatia to BiH. Among them were **Šešeljevci** commanders who were particularly brutal and notorious for their criminal conduct in Croatia. **Vojislav Šešelj s**ubsequently promoted many of them to the highest Chetnik military rank of *vojvoda.*[1273]

Vojislav Šešelj has openly admitted that he cooperated extensively with other JCE members: the SRS/SČP received weapons from the MUP of Serbia, he had close and regular contacts with JCE member **Radmilo Bogdanović** from at least July 1991, and he cooperated with, *inter alia*, **Milošević, Bogdanović, Simatović** and **General Domazetović** of the JNA in order to arm, equip and transport the **Šešeljevci.** Concerning the deployment of the **Šešeljevci, Vojislav Šešelj** stated the following:

[1271] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Prosecution Closing Brief, 20 April 2012 (public), para. 8.
[1272] *Ibid.*, para. 11.
[1273] *Ibid.*, para. 13.

"***Milošević** would ask us, **Radmilo Bogdanović** would ask us, some General would ask us, **Domazetović** for example, or somebody else. They would say: '[W]e **need so and so many volunteers for this and that location**' and we would gather that many volunteers […] I mean one did not have to convince us very much.*"[1274]

Vojislav Šešelj's statements provide a clear illustration of the extensive collaboration and cooperation between JCE members in **Belgrade**, including **Šešelj**, and of the fact that they were pursuing a common purpose. **Vojislav Šešelj** acknowledged Belgrade's role and particularly the role of what he called "key people" from the DB of Serbia in the attack on Zvornik, including the participation of well-equipped units, such as the Red Berets and "volunteers from the SRS".[1275]

The intent of JCE members is evident from the systematic commission of crimes by forces under their control (or used by them). These forces committed crimes repeatedly and persistently throughout the former Yugoslavia during the two-year Indictment period. Members of the joint criminal enterprise were aware of the massive expulsions, destruction and massacres that resulted from their campaign and continued to use the same forces and strategies, lauding their effectiveness. The only reasonable inference the Prosecution can draw is that those systematic crimes were intended by JCE members and were part of the common purpose.[1276]

JCE member **Milan Babić** and others activated the **policy of autonomy** by forming the Association of South Dalmatia and Lika. On 25 July 1990, 100,000 Croatian Serbs, including SDS leaders and representatives of the Municipal Assemblies, Serbian members of parliament of the Republic of Croatia and the Serbian Orthodox Church participated in a Serbian Assembly in Srb. **Vojislav Šešelj** was also present. The Assembly adopted a declaration on the autonomy and sovereignty of the Serbian people affirming the right of the Serbian nation to political and territorial autonomy.[1277]

In October 1991, the criminal means by which the common purpose was being implemented in **Croatia** was clear. **Vojislav Šešelj** intensified his media campaign, insisting that more television and radio programmes be produced in which he could disseminate his version of Serbian history and culture under the guise of raising "national awareness". **Vojislav Šešelj's** media appearances

[1274] *Ibid.*, para. 62.
[1275] *Ibid.*, para. 63.
[1276] *Ibid.*, para. 65.
[1277] *Ibid.*, para. 71.

included the incessant use of the derogatory term **"Ustasha"** and publicly invoked the spectre of a Serbian genocide.[1278]

Vojislav Šešelj, the JNA and other participants in the JCE realised the importance of **Vukovar** to the implementation of their common goal to create a Serb-dominated territory. **Vojislav Šešelj** repeatedly spoke about the importance of Vukovar as a Serbian town within Greater Serbia. He described the "liberation of **Vukovar"** as being of "exceptional significance" to Serbia and the Serbian people. On multiple occasions, he described **Vukovar** as "the most powerful Ustasha's stronghold" upon which Serbian victory depended. Asked about the impending fall of Vukovar in November 1991, he stated that "***that town will be the capital of the Serbian Slavonia, Baranja and Western Srem***".

In explaining the goal of a single Serbian State encompassing all of the "Serbian territories", he also stated that "the Serbian Radical Party believes that Knin, Vukovar, Trebinje, Banja Luka and other Serbian towns in the western Serbian Krajinas are equally Serbian as Belgrade, Novi Sad, Kragujevac, Priština, Niš".[1279]

The prevailing mindset in **Vukovar** was that every Croat was an "Ustasha" and an enemy. **Milan Lančužanin** (aka "**Kameni**"), Commander of the Leva Supoderica Detachment, issued orders to kill all Croats. When volunteers found Croats, they killed them, even if they were unarmed, so as not to waste additional time bringing them to the detention centre at **Velepromet**. The routine nature and widespread acceptance of these methods was such that no precaution was taken to hide their actions, for example, when the **Šešeljevci** killed unarmed captured Croats in front of a crowd of approximately 30 people.[1280]

Croatian civilians, as well as fighters, were routinely detained at **Velepromet** where they were interrogated, robbed of their valuables and abused. Chetniks and **Šešeljevci** robbed and murdered non-Serb detainees and abused detainees during interrogation. These frequent summary executions of unarmed people created an environment in which "no clever Croat would surrender, because he knew he would not stay alive".[1281]

[1278] *Ibid.*, para. 120.
[1279] *Ibid.*, para. 131.
[1280] *Ibid.*, para. 137.
[1281] *Ibid.*, para. 138.

The Commander of the **Leva Supoderica** Detachment, **Kameni**, reported to **Vojislav Šešelj** from the battlefield. **Vojislav Šešelj** described receiving "regular" and "exhaustive" reports about the conduct of his **Šešeljevci**. During the armed conflict, **Vojislav Šešelj** communicated directly with **Kameni** and *Vojvoda* **Miroslav Vuković,** "**aka Čele**". Both **Katić and Kameni** treated **Vojislav Šešelj** as their commander and went to SRS headquarters to speak with him. Fighters in the detachment were referred to as ***Šešeljevci***, even in official JNA communications. Members of the Leva Supoderica Detachment included "**Kinez**", who was **Kameni's** deputy, "**Predrag**"**, Dragović,** "**Mare**" **and Slobodan Katić**. While the unit grew gradually, by the time the town fell it included "about 550 to 600 soldiers" and had incorporated a second SRS unit sent under **Branislav Vakić**, as well as a grenade launching detachment under **Čučković.**[1282]

Vojislav Šešelj was kept well apprised of events in **Vukovar**. As he said:

"***I went to Vukovar twice while the struggle for liberation was going on. I saw everything. I was at the front lines. I visited almost every street. It's impossible that there was something there that I didn't see.***" Neither **Vojislav Šešelj** nor the other JCE members meted out any punishment to the perpetrators of these atrocities. Rather, despite his admission that he would undoubtedly have been aware of any crimes involving his volunteers, and his certain knowledge of the atrocities at Ovčara and Velepromet, **Vojislav Šešelj** lauded the Serbian forces, **promoted** the major players in Vukovar and the **known perpetrators of crimes there**, including Kameni, t**o the status of *vojvoda,* and made Topola commander of the SRS in Brčko**. **Vojislav Šešelj** then deployed these **known** perpetrators of crimes **in the Vukovar** m**unicipality to other fronts, where they would continue their crimes.**[1283]

Vojislav Šešelj envisaged BiH as "very simply, a Serbian land" which "will be part of one single Serbian country". For General **Kadijević**, "***the Serb people in Bosnia and Herzegovina, by its geographical position and size, was one of the keystones for the formation of a common state for all Serb people***".

BiH's strategic significance stemmed not only from its proximity to the Republic of Serbia and its large Serbian population, but also from the important access it provided to Serb-controlled areas in Croatia. During the war in Croatia, cooperation with the Serbian leadership in BiH enabled the JNA to manoeuvre and to transfer JNA troops to Croatia through BiH. When leaving Croatia, the JNA

[1282] *Ibid.*, para. 144.
[1283] *Ibid.*, para. 195.

leadership assessed that it should retain strong forces in BiH because this "corresponded with every realistic political option for developments in Bosnia-Herzegovina and with the need to have strong and ready forces on the Serbian Krajina border".[1284]

Vojislav Šešelj met with **Karadžić in Pale** in March 1991 to discuss cooperation between the **SRS/SČP and the SDS**. In April and May 1991, **Vojislav Šešelj,** together with an **SRS** delegation, **met with Karadžić on at least two further occasions**. **Vojislav Šešelj** later recounted how, even at their first meeting:

"***he and Karadžić knew then that it would come to a conflict, to a war. In any case, I had already met with my Chetniks there. We had a detailed map of the eastern part of Bosnia in front of us and we were considering actions for a takeover of Višegrad, the Višegrad Bridge, Zvornik, etc. At that time it was obvious that there was going to be war***".[1285]

On 6 May 1991, **Vojislav Šešelj and Radovan Karadžić** attended a Serbian Orthodox celebration on Mount Romanija in BiH. **Vojislav Šešelj** invoked "the bill" that had to be paid for past crimes committed against Serbs. He publicly pledged his political support to Karadžić's SDS and to the Serbs of BiH: "Bosnia and the brave Serbian Herzegovina, it is particularly you who must not allow [yourselves] to be divided. You have one political party, the Serbian Democratic Party."[1286]

Vojislav Šešelj also cooperated directly with **Slobodan Milošević's** regime and the DB of Serbia in implementing the common purpose in BiH. He admitted that **Slobodan Milošević** had specifically asked the SRS to intensify their deployment of **Šešeljevci** across the Drina into Bosnia, telling **Šešelj** that he would arrange assistance with weapons, uniforms and vehicles.[1287]

Vojislav Šešelj admitted that this cooperation with **Milošević** in respect of BiH continued "perfectly" until September 1993.[1288]

The **Šešeljevci** continued to be an integral part of the war effort that had begun in Croatia. JCE member and leader of the Serbs in Bosnia **Plavšić** admitted that she had sought to gather all those

[1284] *Ibid.*, para. 198.
[1285] *Ibid.*, para. 202.
[1286] *Ibid.*, para. 203.
[1287] *Ibid.*, para. 227.
[1288] *Ibid.*, para. 231.

who wanted to fight for "Serbianhood" and therefore had reached out directly to **Vojislav Šešelj** requesting him to deploy his volunteers to BiH.[1289]

By early 1992, as part of his contribution to the common purpose, **Vojislav Šešelj** began to prepare for the imminent armed conflict by redeploying his volunteers from Croatia to BiH. **Šešeljevci** were deployed in each of the crime bases. Commanders included **Vasilije Vidović, aka "Vaske", Miroslav Vuković, aka "Čele", Branislav Gavrilović, aka "Brne" and Branislav Vakić.**[1290]

In February 1992, **Vojislav Šešelj** made it clear that he was ready for war in BiH. After asserting that the Serbian people would never allow BiH to become an independent or sovereign state, he announced: "**We are ready for war and our Serbian Radical Party and Serbian Chetnik Movement act in all areas of Bosnia and Herzegovina.**"[1291]

At a press conference in 1992, **Vojislav Šešelj** promised to send "an unlimited number of volunteers" to join Serbian forces in BiH. He later estimated that in total he contributed around **10,000 volunteers** to the common purpose in BiH. According to **Vakić**, 1992 was a year of "big clashes between SČP volunteers against Ustashas and Muslims" in Eastern Herzegovina. During the course of the conflict, JCE members, such as **Radovan Karadžić** and **Ratko Mladić**, received reports on the "exceptional success" enjoyed by volunteer formations "led by '**Arkan**' and **Vojislav Šešelj**".[1292]

Vojislav Šešelj acknowledges that his **Šešeljevci** were sent to **Mostar** and **Nevesinje** and operated in those areas together with the JNA.[1293]

Around April 1992, **Božidar Vučurević**, President of the SDS and "war staff commander" for the region of Eastern Herzegovina, made a "dramatic appeal" to **Vojislav Šešelj** "to dispatch a large group of volunteers to this part of the front".[1294]

Šešeljevci arriving in the **Mostar** area were stationed either at **Buna** to the south of the town, or in the town at Bjelušine or Šehovina. On 7 April 1992, around 60 **Šešeljevci** comprising Serbs from Serbia and BiH and led by **Mićo Dražić** arrived in Bjelušine, a suburb of Mostar, in three JNA

[1289] *Ibid.*, para. 247.
[1290] *Ibid.*, para. 248.
[1291] *Ibid.*, para. 249.
[1292] *Ibid.*, para. 250.
[1293] *Ibid.*, para. 264.
[1294] *Ibid.*, para. 266.

trucks. They wore new camouflage uniforms and had beards and long hair. The **Šešeljevci** admitted that their main commander was **Vojislav Šešelj**, and that he had sent them there. They were joined by local Serbs who were attracted by their ideology and behaviour.[1295]

In 1995, **Vojislav Šešelj** acknowledged **Belgrade's** role and particularly the role of what he called "key people" from the DB of Serbia in the attack on **Zvornik,** including the participation of well-equipped units such as the Red Berets and "volunteers from the SRS". **Vojislav Šešelj** admitted contributing to the execution of the plan by providing the **Šešeljevci** who participated in the attack on **Zvornik** together with **Arkan's** men, the JNA, the police and other units. Furthermore, he admitted that he had a "very high degree of control" over the **Šešeljevci** who had taken part in operations in and around **Zvornik**.[1296]

According to the Prosecution, **Vojislav Šešelj's** admissions to the BBC are corroborated by the evidence before the Trial Chamber, which demonstrates that the crimes committed in **Zvornik** were part of the implementation of the common purpose of the JCE.[1297]

The common criminal purpose was implemented in **Zvornik** by JCE members and forces under their control, including **Vojislav Šešelj**, senior members of the DB of Serbia, the JNA, the TO/VRS and the SDS in BiH. On 24 March 1992, when **Radovan Karadžić** announced that the old and new Serbian municipalities would take control and would be ready to establish a Serbian police force within days, he referred to **Zvornik** municipality **as an example**.[1298]

According to the Prosecution, the "Serbian forces" who participated in the attack on **Zvornik** on 8 and 9 April 1992 and in the subsequent crimes perpetrated against the non-Serb population included the **Šešeljevci,** who formed part of the hierarchical SRS/SČP structure headed by **Vojislav Šešelj**, and operated in cooperation with, or under the command of, Serbian forces under the control of other JCE members; and the Zvornik Serbian TO, which worked in close cooperation with the Crisis Staff, JNA/VRS and MUP forces as well as the **Šešeljevci**, and was incorporated into the VRS after its formation and commanded by Marko Pavlović who reported to the Serbian DB.[1299]

A series of intercepts from 21 April 1992 shows that **Vojislav Šešelj** directly intervened to save members of Brne's **Šešeljevci** unit who were ambushed during the implementation of the plan for

[1295] *Ibid.*, para. 270.
[1296] *Ibid.*, para. 280.
[1297] *Ibid.*, para. 281.
[1298] *Ibid.*, para. 282.

"the liberation of Serbian Grbavica". He was almost immediately made aware of their predicament and he made multiple phone calls demanding that his **Šešeljevci** be rescued. **Šešelj** and an employee of the Serbian News Agency acting on his behalf attempted to make contact with **Radovan Karadžić** in Pale. **Šešelj** left a message threatening that if his **men** were not extracted the SRS/SČP would "withdraw all our men from the frontlines and we'll never deploy them again". He also telephoned **Momčilo Mandić**, RS Minister of the Interior, who in turn made contact with MUP forces on the ground and directed that TO and MUP pull out the encircled group of **Šešeljevci**. **Vojislav Šešelj** then instructed "Brne" to find as many men as possible in order to get the group out and to keep him informed of further developments.[1300]

Vojislav Šešelj is responsible for the crimes alleged in the Indictment under **JCE I.** The elements of JCE I are:

a. a plurality of persons;
b. the existence of a common design, plan or purpose which amounts to or involves the commission of a crime provided for in the Statute;
c. the Accused must participate in the common design, plan or purpose involving the perpetration of a crime; and
d. shared intent: the Accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission.[1301]

JCE members did not physically carry out all the crimes charged in the Indictment. Rather, they used members and groups of the Serbian forces, including the JNA, VRS, local TO, MUP and paramilitary formations (including **Šešeljevci**) as "tools" to implement the common criminal purpose.[1302]

The common purpose, which was shared by Šešelj and other JCE members, was to permanently and forcibly remove non-Serbs from targeted areas in Croatia and Bosnia.[1303]

The evidence shows that **Vojislav Šešelj** participated in the common purpose and that his participation significantly contributed to its implementation. An accused's participation in the JCE need not involve the commission of a specific crime. Consequently, while **Vojislav Šešelj's**

[1299] *Ibid.*, para. 291.
[1300] *Ibid.*, paras 370 and 371.
[1301] *Ibid.*, para. 566.
[1302] *Ibid.*, para. 568.

physical perpetration of crimes constitutes a contribution to the common purpose, his other forms of contribution are equally and independently sufficient grounds upon which the Trial Chamber can find that **Vojislav Šešelj** significantly contributed to the common purpose. These forms of contribution include the following:

• **Vojislav Šešelj** helped establish, organise, motivate and assist Chetnik organisations in Croatia and BiH.

• **Vojislav Šešelj** participated in the recruitment, formation, financing, supply, support and direction of the **Šešeljevci** who participated in the implementation of the common purpose, including the crimes for which **Vojislav Šešelj** is charged in Croatia and BiH. Many of the **Šešeljevci** units established, recruited and organised by **Vojislav Šešelj** participated both during 1991 in combat operations to seize and cleanse Croatian areas, and in 1992 to seize and cleanse Bosnian Muslim areas. The **Šešeljevci** were deployed to strategically vital and difficult areas, and other JCE members, suffering manpower shortages, sought out **Vojislav Šešelj's** support.

The scope of **Vojislav Šešelj's** volunteer recruitment and deployment was vast, not only in terms of the significant numbers of volunteers mobilised to the front line or the geographic area they covered, but also in terms of their widespread notoriety for brutality against non-Serbs. Although it was not the subject of his expert report, Witness **Theunens** was asked by the Trial Chamber to estimate the number of **Vojislav Šešelj's** volunteers: he guessed there may have been **1,000**. Other evidence shows that the number was certainly much higher. **Vojislav Šešelj** himself has put the number of volunteers as high as almost **30,000** and admitted that he contributed around **10,000** volunteers to the common purpose in BiH alone. According to the Prosecution, Witness Petković, the Chief of the SRS War Staff, recounted that, as early as May 1991 (around the time of the Borovo Selo murders in Croatia), there were already **15,000** "Chetniks" in **Vojislav Šešelj's** ranks**.** Witness Petković personally assigned approximately **500** volunteers to Okučani and Western Slavonia and Witness Rankić accompanied about 1,000 further **Šešeljevci** to the same region. Between January and July 1992, more than 6,000 volunteers were stationed and trained at 4 July Barracks in Belgrade before being deployed to the front. *Vojvoda* **Branislav Gavrilović, aka "Brne",** established volunteer training centres through which at least 1,500 **Šešeljevci** passed during the course of the war. The only reasonable inference is that **Vojislav Šešelj** made a very significant contribution of thousands of **Šešeljevci** to the implementation of the common purpose.

[1303] *Ibid.*, para. 572.

Vojislav Šešelj consistently publicly acknowledged the presence of **Šešeljevci** at front lines throughout the region, particularly noting their presence at key locations where conditions were toughest. He also acknowledged that he had significant political influence and that "several thousand Serbian volunteers listen [to him]".

Vojislav Šešelj estimated that during the war, the SRS had influence over one third of Serbian public opinion in RS. In 1994, he said that **"the Serbian Radical Party has spread over all areas in Republika Srpska and it has great influence among the people, the people have great confidence in it"**.

Tellingly, **Vojislav Šešelj** described the SRS as "not one of those parties which held more press conferences than they fired bullets on the battlefield".

• **Vojislav Šešelj** used his power and influence to provide political support to other JCE members, for example, by directing members of the SRS/SČP to join and cooperate with **Slobodan Milošević**, **Milan Babić**, **Radovan Karadžić's** SDS and others in pursuit of the common purpose.

• **Vojislav Šešelj's** inflammatory statements concerning the forceful formation of **a Greater Serbia** covering large portions of Croatia and BiH encouraged members of the JCE and their tools to commit crimes against non-Serbs.

• **Vojislav Šešelj** travelled around Serbian communities in Croatia and BiH holding rallies, giving press interviews and stoking the flames of fear and hatred. **Šešelj** himself visited the front lines to bolster the morale of the Serbian forces that implemented the common purpose in Croatia and BiH.

• **Vojislav Šešelj** and his unit commanders met and coordinated with Serbian military and political leaders in Croatia and BiH in respect of the implementation of the common purpose. For example, **Vojislav Šešelj** quickly established contacts with **Radovan Karadžić and the SDS,** and cooperated with Serbian leaders in deploying outside forces to implement the common purpose in BiH. He whole-heartedly supported their efforts to unite the Serbian areas of the former Yugoslavia into a single Serbian state. The most emblematic manifestation of that support was his magazine, *Velika Srbija* (Greater Serbia), and its constant public reminder of his territorial vision.[1304]

[1304] *Ibid.*, para. 580.

From the earliest stages of the conflict, **Vojislav Šešelj** was an active proponent of ethnic separation. He had begun advocating his project for Greater Serbia before 1990 and, in June 1990, he created his Serbian Chetnik Movement to prepare to fight a war in Croatia.[1305]

Vojislav Šešelj's desire for **Greater Serbia** entailed the removal of the non-Serb population from targeted areas. For instance, when it was pointed out that his **Greater Serbia** would include towns such as **Osijek** in SAO SBWS, where the Croats had been a majority, **Vojislav Šešelj** stated that he did not care if Serbs had not been a majority and that Osijek had become part of Serbian territory. He rejoiced that almost **100,000 Croats** had fled **Osijek,** adding: "They have nowhere to return to. Osijek remains a Serbian town."[1306]

Vojislav Šešelj accompanied his calls for the expulsion of non-Serbs with threats of violence, calls for revenge and suggestions that **Europe** would not come to BiH's aid in the event of bloodshed. He spoke of BiH "bath(ing) in rivers of blood" and of "blind" revenge, stating that "innocent Croats will suffer". Even after the period covered in the Indictment, he continued to call on his followers to "finish them off", meaning non-Serbs living within his "**Greater Serbia**".[1307]

Vojislav Šešelj's intent for the violent crimes and expulsion of non-Serb populations from the targeted areas in Croatia and BiH is apparent not only from his statements but also from his actions, as shown by his continued participation in the implementation of the common purpose knowing that it encompassed the commission of such crimes. **Vojislav Šešelj** was aware of the activities of the Serbian forces in Croatia and BiH, and particularly those of his volunteers deployed there. These activities included killing members of the civilian population. His knowing and voluntary contribution to the implementation of the common purpose, including providing volunteers to the Serbian forces operating in Croatia and BiH, his assistance in establishing Serbian structures in Croatia and BiH to carry out the JCE aims, and his cooperation with other JCE members operating in Croatia and BiH, demonstrate that he shared the common criminal purpose.[1308]

It is clear from **Vojislav Šešelj's** actions that he not only intended but also advocated the destruction of non-Serb cultural and other property.

[1305] *Ibid.*, para. 582.
[1306] *Ibid.*, para. 583.
[1307] *Ibid.*, para. 584.
[1308] *Ibid.*, para. 585.

For example, **Vojislav Šešelj** participated in, and subsequently boasted of, the destruction by SČP members of a Macedonian plaque at the monastery of Prohor Pčinjski. In addition, **Vojislav Šešelj's** magazine *Zapadna Srbija* (Western Serbia) published cartoons depicting the destruction of Muslim religious property, in a manner clearly symbolic of the expulsion of the people as a whole.

In the alternative to liability under **JCE I for all crimes charged in the Indictment, Vojislav Šešelj is liable for each of the crimes other than deportation, forcible transfer and persecutions based on forced displacement under JCE III.**

The common purpose to forcibly displace the non-Serb population necessitated at least the commission of **deportation, forcible transfer and persecutions based on forced displacement.** It was foreseeable that acts of persecution (other than forced displacement), murder, torture, cruel treatment, plunder and wanton destruction might be committed in the implementation of the common purpose to forcibly displace the non-Serb population. **Vojislav Šešelj** was aware that these other crimes were possible consequences of the implementation of the JCE to create an ethnically pure "Greater Serbia" and willingly participated in the JCE. **Vojislav Šešelj** foresaw many of the crimes committed during the conflict. He acknowledged that "innocent people get killed during revenge" and, nonetheless, encouraged Serbs to avenge present and past attacks against them. He was informed of the ill-discipline of his **Šešeljevci**. As autocratic leader of the SRS/SČP, he was informed of the activities of his volunteers and the Serbian forces in Croatia and BiH, but nonetheless sent them there, where they committed crimes. It was further foreseeable to **Vojislav Šešelj** that murder would be committed as part of the campaign of forcible transfer, deportation and persecutions based on forced displacement. **Vojislav Šešelj** was aware that Serbian forces would commit those crimes due to ethnic animosity and thus was aware that they might commit persecutions.[1309]

The massive ethnic cleansing campaign was grave. Vojislav Šešelj and his fellow JCE members expelled more than 200,000 Croatian civilians from their homes and succeeded in fundamentally redrawing the ethnic map of Bosnia and Herzegovina to create an ethnically-separated Serbian territory. Vojislav Šešelj played a critical role, both in providing fighters to carry out this criminal enterprise and in serving as the public voice of the quest for forcibly creating an ethnically-separated Serbian territory.[1310]

[1309] *Ibid.*, para. 587.
[1310] *Ibid.*, para. 614.

4.1.2. Position of the Accused

In his **Final Trial Brief,** the **Accused Vojislav Šešelj** submits the following with regard to the **Prosecution's** arguments concerning his participation in the **JCE**:

When the **Prosecution** was presenting its case during the initial stage of the trial, it did not respect the schedule the Trial Chamber had set for the presentation of evidence on locations, the crime base evidence, the consistent pattern of conduct or on involvement in the **JCE.** The **Prosecution** made various excuses to summon its witnesses at random. This was done deliberately to avoid presenting all the evidence on one location without interruption before moving on to presenting evidence on another location; for if the Trial Chamber's order had been respected, the counts and locations would have fallen one by one due to the lack of evidence.

According to the **Accused**, when the evidence is presented **randomly** instead of in coherent units, the charges remain uncertain until the very end of the presentation of the Prosecution case.

The **Prosecution** did not even attempt to show the existence of **a superior-subordinate relationship** between the Accused as the superior and a specific person as the subordinate. According to the Accused, it is not clear who the subordinate is, and the **Prosecution,** in fact, has little need of a subordinate with a first and last name. At times, the Prosecution insinuates that this concerns an unidentified volunteer of the Serbian Radical Party, but more often it presents the subordinate as an unidentified member of the colloquially named "Serbian forces". However, the condition requires the superior to belong to a chain of command. **Vojislav Šešelj** states that he was never in a chain of command, except in the words of the false witnesses who made insinuations regarding his participation in a **JCE.**

Vojislav Šešelj claims that **instigation**, according to the **Prosecution's** argument, is manifested primarily through the **Accused's** speeches, so that the same speech can be found cited as instigation as a special form of responsibility, instigation as part of participation in the **JCE** and as a form of direct perpetration of a crime.

There is absolutely no evidence that he had the status of a superior, especially not for any of the people who were alleged to have been members of the **JCE** or the principal perpetrator of the crime, if the principal perpetrator is even known (he could not have had the status of a superior

under any count of the Indictment). It seems that the **Prosecution** claims that **Vojislav Šešelj** was an unfettered authority and supreme superior for everyone, that he could even choose when he would be arrested and go to prison during the period covered by the Indictment.

According to the **Accused**, it would seem that he personally wrote the orders for his imprisonment and that, through his words and speeches, he aided and abetted **Slobodan Milošević's** regime in persecuting him. It is as if there were two **Vojislav Šešeljs**, one who aided and abetted, and the other one who was politically persecuted. This is what the Accused has been wondering about!

The evidence presented by the **Prosecution** is standard and was repeated for every form of criminal responsibility, with the aim of establishing a *mens rea* through fictions about a psychological relationship. Aiding and abetting must be specific and involve a causal link between the aider and abettor and the principal perpetrator; the aider and abettor must act deliberately and with the knowledge of what he is aiding and protecting through the support provided. In this sense, the consequences of the crime are identical with regard to both the aider and the principal perpetrator. If the **Prosecution** is presenting a speech by **Vojislav Šešelj** which does not express support for any crimes as a substitute for all these elements, then there is no need to philosophise about the psychological relationship.

The analysis of the plurality of persons requirement demonstrates that the **Prosecution** did not present any evidence to show any type of link between **Vojislav Šešelj** and any of the people mentioned as having participated with him in a **JCE** in paragraph 8 (a) of the Indictment or between him and the "Serbian forces" (added subsequently), which is the joint name.

In his opinion, in addition to the arbitrary way in which the **Prosecution** decided who the participants in the **JCE** were and the fact that some of them have not had indictments raised against them, but are nonetheless mentioned as participants in the **JCE**, it must also be noted that his name is not mentioned as a participant in the **JCE** in the cases of some of the individuals who were indicted and convicted.

It is claimed that the participants in the **JCE** mentioned in the Indictment brought against him participated in a **JCE** with some other persons.

The **Accused** considers that there needs to be a **link** between the people participating in a **joint enterprise**, and what links them is probably the purpose of the **JCE**. However, it must be said that

it is impossible to establish any sort of **link** between these people or between these people and **Vojislav Šešelj**. When did some of them meet, when did they get to know each other, when did they talk, when and where did they communicate with each other, was it directly or indirectly? This poses a string of questions regarding any possible or even potential contacts linking them to the Accused. The **Prosecution** did not present any evidence. **However, the court record is full of evidence showing that there was antagonism between Šešelj and these people, that they criticised, accused and argued with each other in public, and there is too much evidence that suggests that communication was not possible, let alone any sort of agreement.**

Therefore, despite the fact that the purpose of a **JCE** has to be the dominant factor in the **link** between these alleged participants in the JCE, we should also bear in mind other factors, such as circumstance, status, position and mutual relationships.

It may be worth mentioning as part of the analysis of whether a common purpose of the **JCE** existed, and within the framework of the analysis of the plurality of persons requirement – due to the special overlap of these requirements – that in its decision of 10 November 2005, while ruling on the Prosecution's motion for joinder of the cases of **Milan Martić, Jovica Stanišić** and **Franko Simatović** and **Vojislav Šešelj**, Trial Chamber III denied the Prosecution's motion.

Therefore, the Accused considers that, before the start of the trial, it was debatable for the ICTY judges whether a **JCE** comprising the aforementioned persons was even possible, since the **Prosecution** did not describe the **JCE** in the same way for these persons in their Indictments. This doubt was not removed by the **Prosecution** during the presentation of the Prosecution evidence in the case against **Vojislav Šešelj**.

The phrase "**cases related by geographical area**" was also used during the trial. The **Accused** points out that through cases related by geographical area, the **Prosecution** needs to show the identical nature of events at a specific location and the link between the persons who allegedly participated in the **JCE,** that crimes were committed in these areas and that each of the **JCE** participants should bear individual responsibility for each of these locations based on their participation in the same **JCE**. An entire string of factual and legal fabrications followed from the **Prosecution's** erroneous argument based on the alleged **JCE**, as a result of which it is simply impossible to bring charges against **Vojislav Šešelj**.

The Accused considers that if the **Prosecution'**s argument on the existence of a **JCE** and his participation therein were to be accepted, everything that comes under persecution, apart from forcible transfers and deportation as the main objective of the **JCE**, would be dropped in relation to Bijeljina, Brčko, "Greater Sarajevo", Zvornik and Nevesinje (Šamac and Mostar were not in the Indictment against **Momčilo Krajišnik**). Extermination and murder as crimes against humanity would also be dropped. If **Momčilo Krajišnik** was not convicted for this, then **Vojislav Šešelj** cannot be held accountable for this either. Of course, he states that all of this is presented purely hypothetically, if we were to believe the **Prosecution** that he participated in some **JCE** together with **Momčilo Krajišnik.**

With regard to the form of responsibility for participation in a **JCE** with **Momčilo Krajišnik or others**, the **Accused** points out that the following position of the Appeals Chamber in the *Krajišnik* case is important, not only in relation to the locations in Bosnia and Herzegovina mentioned in the corresponding Indictments, but also in relation to all other locations mentioned in the Indictment against the **Accused**.

"**The Appeals Chamber notes that the Trial Chamber failed to conclude on many occasions on the link between the principal perpetrators of the original crimes of deportation, forcible transfer and persecution that are based on these crimes, and the members of the JCE. Therefore, the Appeals Chamber concluded that the Trial Chamber only concluded that the members of the JCE committed the following original crimes using the principal perpetrators in order to achieve a common purpose**."

With regard to the form of responsibility for participation in the **JCE,** due to the lack of the required link between **Momčilo Krajišnik** or **some other participant in the JCE and** a "local" participant in the **JCE** as the principal perpetrator, persecution as deportation, persecution as forcible transfer, deportation and forcible transfer for the Zvornik and Bijeljina municipalities are ruled out.

By applying the same principle, it can be concluded that the **Prosecution** has not presented evidence for any of the locations in the Indictment against **Vojislav Šešelj** that would establish this or any other link, as required by ICTY case-law to establish participation in a **JCE**. Therefore, there is no evidence of this **vital connection** between the **Accused** and the other alleged participants in the **JCE**, nor has any evidence been presented as to **Vojislav Šešelj's** alleged link with any other person belonging to the "local" **JCE**. Similarly, there is no evidence to show any link between other **JCE** participants and "local" members. In addition, there is no evidence linking the **Accused -** or

any other alleged participants in the **JCE** with which he is charged - to the principal perpetrator of a crime.

In the Indictment against **Momčilo Krajišnik**, **Vojislav Šešelj** is not mentioned as one of the participants in the JCE along with **Momčilo Krajišnik**, and in the Indictment against **Vojislav Šešelj**, **Momčilo Krajišnik** is allegedly a participant in the JCE with **Vojislav Šešelj**.

This discrepancy is not a consequence of the simple fact that the Indictments against **Momčilo Krajišnik** and **Vojislav Šešelj** were not raised on the same day, but a consequence of the fact that in February 2003, **Zoran Đinđić** demanded that Prosecutor **Carla Del Ponte** take **Vojislav Šešelj** away and not bring him back, and it was therefore necessary to put all and sundry into the Indictment against **Vojislav Šešelj.** This is why there is real confusion with respect to the participants of the JCE and there are also huge differences in the purpose of the JCE.

With regard to the plurality requirement in the **JCE**, in the Indictment against **Vojislav Šešelj** it is presented as a fiction, premise or supposition and not as a fact to be proved. This is indeed why the Prosecution did not offer any evidence on the plurality of persons requirement when presenting its case.

Both the Trial Chamber and the Appeals Chamber in the ***Mrkšić et al.*** **case** have established that there was no immediate evidence for the existence of such a JCE. Therefore it was definitively established that there was no **JCE** in **Vukovar**, and that there could therefore be no participants in any **JCE** there. If this has been established by the judges of the Trial Chamber in relation to the highest ranking members of the military and commanders, then one may wonder about the mental state of the person who thought it possible to charge **Vojislav Šešelj** for his participation in an alleged **JCE** of any kind, let alone a JCE concerning Vukovar. **Is not a final judgement supposed to be binding on the ICTY judges and should they not therefore be especially mindful, from the point of view of abuse of proceedings, of all that the Prosecution has done with regard to accumulating the charges against Vojislav Šešelj?** Furthermore, what can be said about a situation in which the charges of participating in a JCE in Vukovar are dropped in a final decision, but the Prosecutor nevertheless persists with charges against **Vojislav Šešelj** for participation in a JCE? This is what the Accused has been pondering.

The *Simić et al.* – Bosanski Šamac case reveals the flawed arguments on which the Prosecution based its charges against **Vojislav Šešelj**. Thus, no one can allege that the events in **Bosanski**

Šamac were the result of a **JCE**, and if the accused in the *Simić et al.* case did not participate in a **JCE**, it is then impossible to charge **Vojislav Šešelj** with participating in a non-existent **JCE** or, *a fortiori*, with participating in that JCE along with the accused in the *Simić et al.* case. Hence, in this instance, the **Prosecution** unnecessarily hounded the witnesses for **Bosanski Šamac** in its effort to prove a pattern of conduct consistent with participation in a **JCE,** although a final judgement had already established that there was no **JCE** in Bosanski Šamac.

The Trial Chamber rejected an application for a joinder of the case against **Vojislav Šešelj** with those against, *inter alia*, **Goran Hadžić, Radovan Karadžić, Mićo Stanišić, Ratko Mladić and Slobodan Milošević since the Prosecution had tried to present the different descriptions of the alleged JCE in the indictments as a single transaction with an identical objective.**

In basing all these charges against **Vojislav Šešelj** on the fundamental premise of his participation in a **JCE**, the Office of the Prosecutor has failed dismally. The requirement of a plurality of persons is completely implausible, not only on account of the selective nature of the charges, but also with respect to the overall circumstances, such as the status, position of authority and interpersonal relations of the alleged participants in the same **JCE.**

The requirement of a common criminal goal or criminal means to achieve the common goal is totally implausible in the Indictment in the case at hand.

The Office of the Prosecutor did not provide a single piece of relevant evidence of the existence of a common goal. In numerous judgements, the Prosecution and the judges at the ICTY have presented the goal of the JCE differently according to the various persons, locations and events, producing custom-made constructions and expecting to somehow sneak it all into the case against **Vojislav Šešelj.** For this reason, the Prosecution's thesis is unfathomable.

In the ***Blagoje Simić et al.*** **case** ("Bosanski Šamac"), the Trial Chamber considered that the goal of unification with other areas with a similar ethnic structure did not constitute, in itself, a common goal for a JCE within the meaning of the legal provisions set out in Article 7 (1) of the Statute. However, if the intent to create such territories involves the commission of crimes punishable under the Statute, this can be sufficient to constitute a common criminal goal.

This finding is important because it demonstrates in substance that the theory of **JCE** should not exist. The commission of crimes and the organising of groups for the commission of crimes should

be punished, but that is different from the controversial **JCE theory**, according to which even valid political goals may be incriminated and, consequently, every act is automatically qualified as criminal.

Unlike the Charter of the International Military Tribunal in Nuremberg, the **ICTY** Statute does not require organisations to be declared criminal, but focuses on the individual criminal responsibility of persons who have breached the provisions of International Humanitarian Law. It must be noted here that there is a big difference **between conspiracy under the Charter of the International Military Tribunal in Nuremberg and the invented and alleged JCE under the ICTY Statute,** if there is any mention at all of the **JCE** in Article 7 (1) of the ICTY Statute. Article 7 (1) of the ICTY Statute does not include JCE as a form of criminal liability nor does it refer to participation in a JCE as an act of commission of a crime.

The crucial question is whether he could be held responsible as a co-perpetrator and aider and abetter in the **JCE** - if only for having shared the common criminal purpose and therefore, for having participated in the **JCE** - or, more simply, whether he could be held responsible for crimes committed by other persons, including members of the Serbian forces. The **Accused** treated this question as a side issue, albeit a sufficiently relevant one for the **Prosecution** to fall into a trap and invalidate its own evidence. **Vojislav Šešelj induced the Prosecution and its witnesses to clearly identify the direct perpetrators of all the crimes. For almost every count of the Indictment, the perpetrator of the crime (murder, torture, looting, destruction, etc.) was identified and described, the group he belonged to was established, as well as when and how the crime was directly committed.** The Defence notes a key point: it was not possible to establish any link of any kind between the names of the direct perpetrators of the crimes, or their physical descriptions as provided by witnesses, and the volunteers of the Serbian Radical Party or **Vojislav Šešelj**.

The location of Zvornik was dealt with by the Trial Chamber judgement in the ***Krajišnik*** **case** (IT-00-39-T) of 27 September 2006, which **does not mention the volunteers of the Serbian Radical Party or Vojislav Šešelj**. The judgement refers to "**Arkan's** men", but there is no mention of the volunteers of the Serbian Radical Party who were allegedly with those men. Paragraphs 359 to 374 of the aforementioned judgement are proof thereof. It must be said that it would not be possible to rely on the *Krajišnik* case to draw conclusions on **Vojislav Šešelj's** alleged participation in a **joint criminal enterprise** in Zvornik. The situation is almost identical with regard to the Belgrade judgements that accurately identified the direct perpetrators of the crimes, which grouped together may constitute a crime under the ICTY Statute.

The **Accused** adds that under no circumstances could an elementary link be established between the direct perpetrators of crimes and **himself** on the basis of the objective of a **JCE**. The direct perpetrators of crimes were a threat to the Serbs as well, as they looted whatever they could find, and all this was publicly criticised by **Vojislav Šešelj**. Legal proceedings were instituted for the crimes committed by the direct perpetrators soon after they had been committed. Even assuming that a **JCE** actually existed, the acts committed by the direct perpetrators of crimes could not be attributed to a common objective, nor is it possible to infer participation in a **JCE 3** from these acts. With this in mind, the transfer of Muslims from the village of Kozluk takes on a completely new dimension, because the authorities could not guarantee their safety and protect them from groups that were operating without any supervision. In order to have a clear understanding of that group, it should be recalled that after its members had been arrested and expelled from the territory of Republika Srpska, they continued with their criminal activities in Serbia.

There is no evidence to support the testimony of Expert Witness **Reynaud Theunens**, since there was not a single independent volunteer unit under the control of the Serbian Radical Party, nor is there a shred of evidence showing that a Serbian Radical Party volunteer committed a crime. Thus a different strategy was required which consisted of referring to the participation of those same volunteers in armed action with members of other units from the Serbian forces who had committed the crimes. This is obviously the principal theme, and this expert only served to clarify the situation so that members from other units of the Serbian forces might be accused of the crimes, which would be quite sufficient.

In addition to demolishing the credibility of this witness, who publicly demonstrated himself to be ridiculously ignorant, other objectives, touching upon the very essence of the charges for the **JCE,** were also accomplished during the cross-examination.

4.1.3. Conclusion

a. The Prosecution's application of JCE

As the ***Tadić*** Appeal Judgement was rendered on 15 July 1999, I thought it would be interesting to see **how** the Prosecution has applied the **theory of joint criminal enterprise** in its indictments against those of the accused who were Serbs. The first indictment which clearly mentions JCE was

the "Croatia" Indictment against **Slobodan Milošević**, dated **27 September 2001**. It thus took the Prosecution **close to two years** to implement this theory. This Indictment, the first to include JCE, indicates that there are **16 Serbs,** including **Vojislav Šešelj,** in the JCE.

I recall that the alleged joint criminal enterprise in this case covers three regions, namely Bosnia and Herzegovina, Croatia and Serbia. **There are 19 indictments** that refer to the existence of a JCE in one of those regions. I have examined each of the 19 indictments in order to determine **who** was listed in the various joint criminal enterprises.

The picture that emerges is particularly interesting as it bears witness to "hesitations" on the part of the Prosecution. At least several questions arise from the fact that **Šešelj** does not appear in some of the indictments, more specifically, in the cases of ***Krajišnik, Plavšić*** **and** ***Stanišić and Župljanin***. In the Indictment against **Vojislav Šešelj**, **Momčilo Krajišnik, Biljana Plavšić, Mićo Stanišić** and **Stojan Župljanin** are all four mentioned as being members of the alleged JCE. However, there is no mention of **Vojislav Šešelj** in any of the cases involving those four individuals.

i. The Stanišić and Simatović case

The Accused **Šešelj** is mentioned in the ***Stanišić*** **and** ***Simatović*** **case**. However, he does not appear in the ***Lukić et al.*** case.

According to the Indictment in the ***Stanišić*** **and** ***Simatović*** case, the accused individuals participated in a JCE by providing "channels of communication" between its principal members.

The Chamber, by a majority, with **Judge Picard** dissenting, was unable to conclude that Stanišić had enabled or greatly facilitated contact between the alleged members of the JCE. In point of fact, although Stanišić had passed on messages and information between Milošević and Martić, and between Milošević and Karadžić, the evidence indicated that Milošević was at times in direct contact with Martić and Karadžić, without any involvement by Stanišić or evidence that he facilitated those exchanges.[1311]

[1311] Paragraph 2302 of the Judgement.

With regard to **Simatović,** the evidence indicated that he received information from various sources but the Trial Chamber was unable to conclude that he acted as a channel of communication between members of the JCE.[1312]

The Chamber analysed a telephone conversation between **Stanišić** and **Karadžić**. The Chamber, by a majority, with Judge Picard dissenting, considered that **Stanišić's** reference to crimes and his remark that "we'll exterminate them completely" were too vague to be construed as support for the allegation that Stanišić shared the intent to further the alleged common criminal purpose.[1313]

The Prosecution argued that **Stanišić** shared the intent to advance the common criminal purpose by his words and actions during a meeting in Belgrade on 13-14 December 1993. The Chamber concluded that Stanišić neither initiated nor chaired that meeting and that his participation was no more than limited. Thus, the majority of the Chamber concluded that **Stanišić's limited participation** in that meeting did not show that he shared the intent to further the common criminal purpose.[1314]

The Prosecution submitted that Stanišić demonstrated his intent to further the common criminal purpose by personally involving himself in the **Vukovar operation in 1991** and, more specifically, by holding a meeting in Dalj in September 1991. The Chamber did not receive evidence on what was discussed at the meeting called by **Stanišić.** Without such information, the majority, with Judge Picard dissenting, was unable to find that **Stanišić's** presence at the meeting was in itself evidence that he shared the common criminal purpose.[1315]

The Chamber concluded that it may have been reasonably foreseeable to **Stanišić** that Unit members would commit crimes in Doboj municipality in 1992.[1316] The Chamber also considered that it was likely that **Stanišić** knowingly deployed them in operations in which they cooperated with other forces and were subordinate to other persons who may have had the intent to further the alleged common criminal purpose. However, the majority did not consider that the **only reasonable inference** from **Stanišić's** actions with regard to the Unit's operations was that he shared the intent to further the alleged common criminal purpose of forcibly and permanently removing the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina. In point of fact, the majority, Judge **Picard** dissenting, did not exclude the possibility that Stanišić's intent in relation to the

[1312] Paragraph 2304 of the Judgement.
[1313] Paragraph 2309 of the Judgement.
[1314] Paragraphs 2310 to 2312 of the Judgement.
[1315] Paragraphs 2313 to 2315 of the Judgement.
[1316] Reference is made to the Serbian Unit of the MUP DB formed by the accused between May and August 1991.

Unit's operations was limited to establishing and maintaining Serbian control over large areas of Croatia and Bosnia and Herzegovina. The evidence indicated that it was reasonably foreseeable that crimes would be committed while Serbian control was being established and maintained. However, the evidence was insufficient to establish the first form of JCE liability. Stanišić's actions in relation to the Unit's operations were not sufficient to establish beyond any reasonable doubt that Stanišić shared the intent to further the JCE through the commission of crimes.[1317]

The majority considered that **Stanišić's** actions with regard to the training of the Serbian forces Unit did not demonstrate that he shared the intent to further the purpose of the JCE, which was to forcibly and permanently remove the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina.[1318]

According to the Chamber, the knowledge and acceptance of the risk that crimes would be committed was insufficient for the first form of JCE liability.[1319]

The majority of the Chamber considered that the fact that Stanišić financed the SDG (Serbian Volunteer Guard) did not demonstrate that the Accused's intent went beyond the intent to support these forces in establishing and maintaining Serbian control over Banja Luka. The Accused's intent to further the common criminal purpose through the commission of crimes could not be established beyond any reasonable doubt.[1320]

The majority did not consider the evidence regarding the Accused's provision of ammunition to the Scorpions sufficient to establish that Stanišić's intent went beyond the intent to support those forces in establishing and maintaining Serbian control over Treskavica/Trnovo.[1321]

The majority was unable to conclude that the only reasonable inference from the evidence on Stanišić's actions is that, from April 1991 to 1995, he shared the intent to further the common criminal purpose of permanently removing the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina through the commission of the crimes of deportation, forcible transfer, persecution and murder.[1322]

[1317] Paragraph 2326 of the Judgement.
[1318] Paragraph 2330 of the Judgement.
[1319] Paragraph 2332 of the Judgement.
[1320] Paragraph 2333 of the Judgement.
[1321] Paragraph 2334 of the Judgement.
[1322] Paragraphs 2335 and 2336 of the Judgement.

The Prosecution submitted that **Simatović** personally participated in the attack on **Vukovar**. The Chamber concluded, by a majority, that the mere presence of **Simatović** at a meeting prior to the attack and at the celebration following the fall of Vukovar did not indicate his intent to participate in the JCE. His presence could also reasonably be interpreted to indicate that his intent was limited to support for the military takeover by the Serbian forces.[1323]

Simatović took part in a planning meeting for Operation *Udar*, but the evidence did not establish what was discussed in relation to the objectives of that operation. Therefore, the Chamber, by a majority, did not consider **Simatović's** actions with regard to Operation *Udar* sufficient to establish beyond any reasonable doubt that he shared the intent to drive the Muslim population out of eastern Bosnia and Herzegovina.[1324]

The evidence indicated that **Simatović** was aware of **Martić's** intent and may have shared the intent to forcibly remove Croatian civilians from the village of Lovinac in June 1991. However, in light of the totality of the circumstances, the majority of the Chamber was unable to establish beyond any reasonable doubt that **Simatović's** actions showed that he shared the common criminal purpose to remove forcibly and permanently the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina, through the commission of the crimes of deportation, forcible transfer, persecution and murder.[1325]

Vojislav Šešelj is also mentioned in the ***Babić case*** and the ***Hadžić case,*** which is still ongoing but is currently adjourned on account of the Accused's state of health.

On the other hand, he is not included in the *Tolimir* case and the cases of *M. Stanišić* and *Miletić/Gvero*.

At least several questions arise from the fact that **Vojislav Šešelj** does not appear in some of the indictments mentioning JCE.

The Appeals Chamber has ordered a retrial of the *Stanišić* and *Simatović* case. Under the circumstances, the President of the Mechanism appointed a new Chamber composed of Mechanism judges without first consulting all of the judges of the Mechanism.

[1323] Paragraphs 2343 and 2345 of the Judgement.
[1324] Paragraph 2351 of the Judgement.

ii. The Stanišić and Župljanin case

Stojan Župljanin was Chief of the Regional Security Services Centre of Banja Luka and, between May and July 1992, he was a member of the Crisis Staff of the Autonomous Region of Krajina. **Mićo Stanišić** was the Minister of Internal Affairs of Republika Srpska.

In its Judgement of 27 March 2013, the Trial Chamber stated that during 1992, **Stojan Župljanin** organised the disarming of the non-Serb population of the Krajina municipalities. He created a unit, the "Banja Luka CSB Special Police Detachment", which was in charge of assisting Serbian forces in taking control of the Krajina municipalities.[1326] According to the Chamber, he took part in the unlawful arrests of non-Serbs and their forcible removal. He was also responsible for having created a climate of impunity by failing to take any steps to punish his subordinates who had committed crimes against non-Serbs, thereby encouraging them to continue to commit such acts.[1327] **Župljanin** significantly contributed to the common purpose to remove permanently Bosnian Muslims and Bosnian Croats from territories considered to be Serbian.[1328] The Chamber noted **Župljanin**'s strong ties with the Serbian Democratic Party (SDS), demonstrated notably by the unreserved support given to him by party leaders on his appointment as Chief of the CSB, his regular interactions with members, his attendance at meetings and his contribution to the implementation of party policies in Banja Luka and in Krajina.[1329] The Trial Chamber recognised that **Župljanin** issued orders to protect the non-Serb population of Krajina and filed some criminal reports for crimes committed against non-Serbs. However, it noted that even though he continued to receive information that crimes, including unlawful detention, were still being committed on a large scale, he did not take the necessary steps to ensure that these orders were in fact carried out.[1330] The Chamber considered therefore that through his inaction, he contributed to the policy of discriminating against Bosnian Muslims and Bosnian Croats and to their expulsion, and that his failure to punish those responsible for crimes could not be regarded as simple negligence.[1331] What is more, **Župljanin** was informed of the unlawful arrests and even actively contributed to this operation. He set up a feigned commission and provided false information to the judicial authorities in order to shield his subordinates from criminal prosecution for the murder, unlawful arrests, looting and cruel treatment of non-Serb prisoners, thus creating a climate of impunity that

[1325] Paragraph 2354 of the Judgement.
[1326] *The Prosecutor v. Mićo Stanišić & Stojan Župljanin,* Case No. IT-08-91-T, Judgement, 27 March 2013, para. 518.
[1327] *Ibid.*
[1328] *Ibid.*
[1329] *Ibid.*, para. 519.
[1330] *Ibid.*
[1331] *Ibid.*

encouraged the perpetration of crimes against non-Serbs and prompted the non-Serbs to leave the Krajina municipalities.[1332] As a consequence, the Trial Chamber found that **Župljanin's** acts and omissions demonstrated that he intended, with other members of the JCE, to achieve the permanent removal of Bosnian Muslims and Bosnian Croats from the territory of the Serbian State and thus committed the crimes of deportation, inhumane acts (forcible transfer) and persecution in the Krajina municipalities.[1333] Moreover, under the third form of JCE liability, the Chamber deemed that the possibility of crimes being committed by members of the JCE was sufficiently substantial and foreseeable to **Župljanin**, and it could therefore be considered that he willingly took that risk. This involved the imposition and maintenance by Serbian forces of restrictive and discriminatory measures against non-Serbs,[1334] the unlawful and arbitrary detention of large numbers of Bosnian Muslims and Bosnian Croats in prisons and improvised detention centres or camps,[1335] as well as the use of torture, cruel and inhumane treatment and the perpetuation of inhumane living conditions inside those centres,[1336] the murder and extermination of Muslims and Croats,[1337] the looting of Muslim and Croatian property[1338] and the wanton destruction of religious and cultural property.[1339] Furthermore, the Chamber found that the crime of persecution could likewise be attributed to **Župljanin,** as it was noted that considering the ethnically charged character of the armed conflict, the existence of a widespread and systematic attack against the Muslim and Croatian population and **Župljanin's** knowledge of such an attack, he willingly took the risk that the Serbian forces might commit those crimes with discriminatory intent.[1340]

With regard to **Mićo Stanišić's** responsibility, the Trial Chamber first noted that he was a close associate of **Radovan Karadžić**, one of the leading members of the JCE.[1341] **Stanišić** was appointed Minister of Internal Affairs of Republika Srpska in March 1992, which made him a key member of the decision-making authorities.[1342] He thus became responsible for the appointment of key positions in the police and in the administration, and had the sole authority to appoint, dismiss and discipline the chiefs of the "Banja Luka CSB Special Police Detachment". He also had the sole authority to establish special police units and the authority to decide when and how a special unit

[1332] *Ibid.*
[1333] *Ibid.*, para. 520.
[1334] *Ibid.*, para. 522.
[1335] *Ibid.*, para. 523.
[1336] *Ibid.*, para. 525.
[1337] *Ibid.*, para. 524.
[1338] *Ibid.*, para. 526.
[1339] *Ibid.*, para. 527.
[1340] *Ibid.*, para. 528.
[1341] *Ibid.*, para. 730.
[1342] *Ibid.*, para. 732.

could be used.[1343] He promoted the interests of the SDS, he participated in important meetings and implemented the decisions taken by the party.[1344] The Chamber concluded that **Stanišić** thus had overall command and control over the MUP police forces.[1345] He issued orders for police forces and reserve units to participate in coordinated actions with the armed forces and supplied them with equipment, weapons and training.[1346] He consistently approved the deployment of MUP forces to combat activities along with the Serbian forces, despite being aware of the commission of crimes in the field.[1347] The Trial Chamber noted that JCE members such as **Todorović**, **Župljanin and Savić, among others,** who were part of the police force, or reserve or special units, and who had been directly appointed by **Stanišić**, were involved in the widespread and systematic takeovers of municipalities.[1348] The Chamber further noted that, although **Stanišić** had issued quite a few orders relieving of their duties some officers who had committed crimes, or requested the transmission of reports regarding the treatment of prisoners or procedures used during arrests,[1349] it considered that he had not adequately ensured the implementation of these orders, and he had been aware that only limited action had been taken subsequent to his orders. Therefore, he failed in his duty to protect the civilian population in the territories under his control.[1350] According to the Chamber, **Stanišić** contributed to the continued existence of the detention camps and the dire living conditions of the prisoners by failing to take the measures required to close those facilities, even though he was aware of the unlawful detention of Muslims and Croats.[1351] The Chamber stated that **Stanišić's** knowledge of the commission of crimes against Muslims and Croats, as well as his participation in SDS meetings where JCE members expressed their criminal intent against non-Serbs, proved that he intended the crimes to be committed.[1352] He was also present at sessions where the relocation of the population was discussed.[1353] The Chamber also noted that **Stanišić** approved of the operation of **Arkan's** men in Bijeljina and Zvornik.[1354] Considering his position at the time, his close relationship with **Radovan Karadžić**, and his continued support and participation in the implementation of the policies of the Bosnian Serbs and the SDS, the Trial Chamber found that **Stanišić** was aware of their intent to persecute, forcibly transfer and deport Muslims and Croats from territories of Bosnia and Herzegovina, and that consequently he shared the same intent.[1355]

[1343] *Ibid.*, para. 733.
[1344] *Ibid.*, para. 734.
[1345] *Ibid.*, para. 736.
[1346] *Ibid.*, para. 740.
[1347] *Ibid.*, para. 743.
[1348] *Ibid.*, para. 744.
[1349] *Ibid.*, paras 745 to 759.
[1350] *Ibid.*, paras 751, 753, 754.
[1351] *Ibid.*, paras 761 to 765.
[1352] *Ibid.*, para 767.
[1353] *Ibid.*, para 768.
[1354] *Ibid.*
[1355] *Ibid.*, para 769.

The Chamber also found **Stanišić** responsible under the third form of JCE for the crimes of unlawful detention, imposition and maintenance of discriminatory measures against non-Serbs, murder, torture, cruel treatment and inhumane acts, establishment of inhumane living conditions in the detention facilities, plunder of private property and the wanton destruction of religious and cultural institutions, since these crimes had been committed with a discriminatory intent and thus constituted the underlying acts of persecution.[1356] In point of fact, according to the Chamber, the possibility that those crimes would be committed was sufficiently substantial and foreseeable, and it therefore found that **Stanišić** willingly took that risk. However, the Chamber stated that **Stanišić** was not responsible for the crime of extermination, as the possibility that this crime could be committed in the execution of the common plan was not sufficiently substantial so as to be foreseeable to **Stanišić.**[1357] Likewise, with regard to the same count, it did not find him responsible for aiding and abetting or on the basis of command responsibility.[1358]

The table in the Annex provides an overview of all the indicted Serbs involved in a JCE. The table was drawn up in alphabetical order and according to the Indictment date. It is thus apparent in line 46 that the Accused Šešelj was mentioned in the Indictments against Babić, Hadžić, etc., but was not mentioned in the Indictments against Beara, Borovčanin and so forth.

b. Slobodan Milošević and Greater Serbia

Slobodan Milošević was **President of Serbia** from **26 December 1990**, and President of **the Federal Republic of Yugoslavia from 15 July 1997 to 6 October 2000**. As President, from 15 July 1997, he was the Head of the **Supreme Defence Council of the Federal Republic of Yugoslavia,** and the **Supreme Commander of the Yugoslav Army**. He was arrested on 1 April 2001 in Belgrade and transferred to the ICTY on 29 June 2001.

Three Indictments were issued by the ICTY Prosecutor against **Slobodan Milošević.** With regard to Kosovo, the initial Indictment was filed on 24 May 1999,[1359] and the second amended Indictment was filed on 29 October 2001.[1360] For the acts pertaining to Croatia, the initial Indictment is dated

[1356] *Ibid.*, para 779.
[1357] *Ibid.*, para 782.
[1358] *Ibid.*, paras 783 to 798.
[1359] *The Prosecutor v. Slobodan Milošević*, Case No. IT-99-37, Initial Indictment, 24 May 1999.
[1360] *The Prosecutor v. Slobodan Milošević*, Case No. IT-99-37, Second Amended Indictment, 29 October 2001.

8 October 2001[1361] and the second amended Indictment, 28 July 2004.[1362] Lastly, with regard to Bosnia and Herzegovina, the initial Indictment was filed on 22 November 2001[1363] and the amended Indictment was filed one year later on 22 November 2002.[1364]

By way of an oral decision issued on 11 December 2001, the Trial Chamber dismissed the motion from the Office of the Prosecutor for joinder of the cases. It decided to join the Indictments relating to **Bosnia and Croatia**, and to keep the Kosovo Indictment separate, thus maintaining a separate trial for the acts pertaining to Kosovo.[1365] The Prosecution lodged an appeal against that decision, and the Appeals Chamber of the Tribunal rendered a decision on 1 February 2002.[1366] The Appeals Chamber granted the Prosecution's appeal and thereby ordered a **joinder of the cases.** Consequently, the three Indictments would be tried in **a single trial** and were deemed to constitute a single Indictment.

There were three initial appearances in the case of **Slobodan Milošević**. The first - concerning the counts of the Indictment relating to Kosovo - took place on 3 July 2001 and the Accused pleaded not guilty to each count of the Indictment.[1367] With regard to Croatia, the Accused appeared on 29 October 2001 and pleaded not guilty to each count of the Indictment.[1368] Lastly, **Slobodan Milošević's** appearance on 11 December 2001 concerned acts pertaining to Bosnia, and the Accused pleaded not guilty to each count of the Indictment.[1369] The trial of **Slobodan Milošević** thus opened on **12 February 2002** and, following the death of the Accused in the Detention Unit on 11 March 2006,[1370] the Trial Chamber terminated the proceedings in a hearing held on 14 March 2006.[1371]

During the trial of the Accused **Milošević**, the Prosecution presented its evidence concerning acts pertaining to Kosovo between 12 February 2002 and 11 September 2002. From 26 September of the

[1361] *The Prosecutor v. Slobodan Milošević*, Case No. IT-01-50 Initial Indictment, 8 October 2001.
[1362] *The Prosecutor v. Slobodan Milošević*, Case No. IT-01-50 Second Amended Indictment, 28 July 2004.
[1363] *The Prosecutor v. Slobodan Milošević*, Case No. IT-01-51 Initial Indictment, 22 November 2001.
[1364] *The Prosecutor v. Slobodan Milošević*, Case No. IT-01-51 Amended Indictment, 22 November 2002.
[1365] Transcript of the hearing (T(E)) of 11 December 2001, p. 226.
[1366] *The Prosecutor v. Slobodan Milošević*, Case No. IT- IT-99-37-AR73, IT-01-50- AR73, and IT-01-51- AR73 "Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder", 1 February 2002.
[1367] T(E) of 3 July 2001, initial appearance of Slobodan Milošević in the case IT-99-37-I, p. 4.
[1368] T(E) of 29 October 2001, initial appearance of Slobodan Milošević in the cases of IT-99-37-PT and IT-01-50-I, pp. 122-123.
[1369] T(E) of 11 December 2001, Case No. IT-99-37-PT.
[1370] Partly confidential submission filed by the Registry on 13 March 2006 pursuant to Rule 33(B) of the Rules ("Submission of the Registrar Pursuant to Rule 33 (B) on the Death of Slobodan Milošević").
[1371] *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, "Order Terminating the Proceedings", 14 March 2006.

same year to 25 February 2004, the Prosecution presented its evidence concerning Croatia and Bosnia and Herzegovina. The Defence started presenting its case on 31 August 2004.

The Office of the Prosecutor, and in particular the Senior Trial Attorney, **Mr Nice**, presented the allegations of "Greater Serbia" against the former President **Milošević** (I). The Accused **Milošević** then responded to the Prosecution's theory of a Greater Serbia (II). **Vojislav Šešelj** testified **as a witness** in **Slobodan Milošević's trial.** The Prosecutor addressed the theory of a "**Greater Serbia"** during his testimony and **Šešelj** responded (III).

Insofar as **Vojislav Šešelj's** testimony was admitted in the present case, I thought it necessary to place the theory of a **Greater Serbia** within the general context of the trial by relying on **Slobodan Milošević's** words and written documents, which are in the **public domain** as they are available on the ICTY website and were, moreover, mentioned during Vojislav Šešelj's testimony, which was admitted into evidence at the request of the Prosecution. **Vojislav Šešelj's** testimony can only be understood and evaluated in the light of Slobodan Milošević's various official submissions and his utterances in the courtroom during his trial, but also in the light of the Prosecution's various written submissions, such as its indictments and briefs. It is unfortunate that due to the pressing need for an expeditious trial, the Prosecution never thought it useful to summarise its position on the basis of the written submissions it had produced on a Greater Serbia in all of the proceedings.

c. The theory of a "Greater Serbia" presented by the Prosecution (Milošević case)

The Office of the Prosecutor submitted a motion to the Chamber for joinder of the three cases initiated against **Slobodan Milošević.**[1372] This issue was addressed before the Chamber at a hearing on 11 December 2001.[1373] Pursuant to Rule 48 of the Rules, joinder may be granted where persons are accused of the same or different crimes committed in the course of the same transaction.[1374] **Mr Nice from the Office of the Prosecutor relied on the definition of the word "transaction" adopted by the ICTR**: a single transaction is a number of acts or omissions, whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan.[1375] According to the Prosecutor, the three Indictments against **Milošević**

[1372] *The Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-PT, "Prosecution's Motion for Joinder", 27 November 2001, and "Prosecution's Corrigendum to Motion for Joinder Filed 27 November 2001", 10 December 2001.
[1373] T(E) of 11 December 2001, hearing on the Prosecution's Motion for Joinder of the Indictment.
[1374] Rule 48 of the Rules of Procedure and Evidence of the Tribunal, "Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried."
[1375] T(E) of 11 December 2001, p. 154.

fall under this definition in that they involve one and the same transaction.[1376] In fact, Mr Nice defines that **transaction** as the Accused **Milošević's** plan to create a **Greater Serbia**, **an essentially centralised Serbian state encompassing the Serb-populated areas of Croatia, Bosnia and Herzegovina and Kosovo by forcibly removing non-Serbs from large geographical areas of the former Yugoslavia through the commission of crimes in violation of Articles 2 to 5 of the Statute of the Tribunal.**[1377] At the hearing of 11 December 2001, **Judge Robinson** expressed reservations about the Prosecution's theory by pointing out that **the places and times dealt with by the three Indictments were different, and that therefore it was difficult to rely solely on the plan of a "Greater Serbia" in order to determine that it was one and the same transaction, a plan which, moreover, was absent in the Kosovo Indictment**.[1378] **Mr Nice** responded to this by saying that according to his understanding of the concept of a "**Greater Serbia**", it was a **strategy to achieve a centralised Serbian state encompassing Serb-populated areas.**[1379] **He defined Greater Serbia as "*the centralised Serbian state incorporating those parts of both Croatia and Bosnia where Serbs lived or where Serbs could be located*."**[1380] More specifically, **Mr Nice's theory relied on the fact that since it was impossible to preserve Yugoslavia as a Federal State, it was the Accused S. Milošević's intention to have all the Serbs living in one State**,[1381] and that amounted to planning for a **"Greater Serbia"**. In support of his theory, **Mr Nice** claimed that:

> "***The evidence about his understanding and intention in the late 1980s and in the late 1990s to have, as we put it here, 'Serbs [in Bosnia] should remain part of [one state] linked territorially and politically to Serbia and to [Serb] designated territories in Croatia amounted de facto to planning for a Greater Serbia*'.**"[1382]

However, when the concept of a **"Greater Serbia"** was addressed in more detail in the courtroom, in particular on 25 August 2005, the Prosecutor was directed by the Chamber to elaborate on his theory. According to the Prosecution, the Accused's plan was not the realisation of the concept of a "Greater Serbia", but his objectives were in fact similar. Nevertheless, the

[1376] *Ibid.*
[1377] *The Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-PT, "Prosecution's Motion for Joinder", 27 November 2001, para. 13. *See* also T(E). of 11 December 2001, pp. 154-155.
[1378] T(E) of 11 December 2001, p. 169.
[1379] *Ibid.*
[1380] T(E) of 25 August 2005, p. 43253.
[1381] T(E) of 25 August 2005, p. 43219.
[1382] T(E) of 25 August 2005, p. 43256.

Prosecutor did not maintain that **S. Milošević** espoused the theory of a "**Greater Serbia**"; he relied on the idea that the Accused desired that all Serbs should live in one State:

> "***[T]here is a historical concept to a Greater Serbia to which [the Accused] never associated himself or read, as far as I can see, never, with his taking power. Maybe with his being put in the driving seat of movements of others that did espouse Greater Serbia he pursued policies that may have had a similar effect. But have we ever said that that was his driving force the historical concept of a Greater Serbia; no, we haven't.***"[1383]

The Prosecutor did not focus on the concept of a "**Greater Serbia**" from a historical perspective, but relied on the fact that this **concept made it possible for all Serbs to live in one and the same State**.[1384] He stressed that his plan was to have all Serbs living in one and the same State which was not necessarily the one advocated by the theory of a "Greater Serbia"; **S. Milošević** however left the field open to other individuals such as **Vojislav Šešelj** to express and defend the plan for a "**Greater Serbia**".[1385] Yet, Mr **Nice** concurred that the Accused's objective was, *de facto*, similar to that of a "Greater Serbia",[1386] even if he did not rely on the historical and philosophical concept of a "Greater Serbia".[1387] The Prosecutor defined his theory as follows:

> "***I've always understood our position to be that it's the express desire to have all Serbs in one state,* de facto *Greater Serbia if you will, co-extensive geographical extension in practical terms with what had been achieved by those specifically espousing Greater Serbia.***"[1388]

I thought it was necessary to recall **the** position of **Slobodan Milošević** expressed during his **opening statement**, in his public submissions and during the hearing of **Vojislav Šešelj**.

The Accused **Slobodan Milošević** categorically denied that he had taken part in a JCE whose objective was the establishment of a "**Greater Serbia**" (through the commission of crimes). **Milošević**'**s** position consisted in explaining that, contrary to the Prosecutor's theory, the establishment of a united State where Serbs would live was not a new political project but, in his

[1383] T(E) of 25 August 2005, p. 43225.
[1384] T(E) of 25 August 2005, p. 43232.
[1385] T(E) of 25 August 2005, p. 43226.
[1386] T(E) of 25 August 2005, p. 43226.
[1387] T(E) of 25 August 2005, p. 43228.
[1388] T(E) of 25 August 2005, p. 43249.

opinion, a historical reality, since it was from the creation of Yugoslavia that this united Serbian State had emerged.[1389] **Slobodan Milošević** claimed that it was his intention to preserve that unity.

In procedural terms, the Defence challenged the Prosecution's motion requesting joinder of the three cases against the Accused **Slobodan Milošević** on the basis that they dealt with one and the **same transaction**, namely the creation of a "Greater Serbia". In fact, according to the Defence, the three Indictments **concerned different acts in different locations at different times, and these differences disprove the theory that the events mentioned in the Indictments stemmed from a common thread which was allegedly the creation of a "Greater Serbia"**.[1390] During his opening statement, the Accused **Slobodan Milošević** described the Prosecution's theory as "***this so-called plan of a Greater Serbia***"**.**[1391] In order to implement this guiding principle, the Accused's intention was allegedly to kill Croats, Muslims and Albanians, "*not only to expel them, to kill them*".[1392] The Accused challenged the very existence of this idea. Furthermore, he pointed out that "Greater Serbia" was not a Serbian plan, **but an Austro-Hungarian policy to conquer the Balkans and thus advance towards Turkey**.[1393]

With regard to his alleged participation in a JCE, **Slobodan Milošević** referred to his influence and authority as a basis for his argument. He thus denied that he had played a role in controlling the troops on the ground and giving them orders. In his capacity as **President of Serbia**, he was unable to put an end to the conflicts between the **Croatian paramilitary** and **the Yugoslav People's Army**. According to him, the **Minister of Defence** did not have the authority to intervene with the army. His main job was to keep lists of conscripts, that is to say, to perform administrative duties.[1394] According to **Milošević**, **trials** for **war crimes** had been taking place in Serbia since 1992, which demonstrated that the authorities took these matters seriously[1395] and were not united by a common criminal purpose. **Slobodan Milošević** maintained that neither the regular meetings with the political leadership of all the Yugoslav republics nor the fact that he represented the SDS abroad could be considered criminal. They were normal events and displayed a willingness on his part to promote democracy and justice.[1396] With regard to the displacement of the population, he stated that in a war "***of course the inhabitants of that village will flee to a neighbouring village***

[1389] T(E) of 25 August 2005, p. 43264.
[1390] T(E) of 11 December 2001, p. 212.
[1391] T(E) of 15 February 2002, p. 419.
[1392] *Ibid.*
[1393] *Ibid.*, p. 420 *et seq.*
[1394] *The Prosecutor v. Slobodan Milošević*, Case IT-02-54-T, Defence Opening Statement, Mr Milošević, T(E) of 14 February 2002, p. 264.
[1395] *Ibid.*, p. 269.
[1396] *Ibid.*, pp. 280-281.

to stay with their friends or to the town. Or if they had no relatives there, to a collection centre organised by the authorities," [1397] thus denying any charges of a concerted plan to displace the population.[1398]

Regarding the issue of a **Greater Serbia**,[1399] **Slobodan Milošević** acknowledged that he had hoped to create a **united State**, but one which included the various minorities present in the territory concerned, that is to say, Croats as well as Muslims, Albanians and any other nationalities. He claimed that at the time he was speaking there were **more Muslims in Serbia than in Bosnia** and that his objective had always been to safeguard the interests and guarantee the equality of the various populations cohabiting in the same territory.[1400]

I must point out here that this argument could have been supported by either **Slobodan Milošević** or the Accused **Vojislav Šešelj,** because if that was the demographic reality, it is difficult to understand - if indeed there was a JCE - why **Slobodan Milošević** and the alleged JCE members did not focus their efforts on ethnic cleansing in Serbia, rather than in Croatia and then Bosnia and Herzegovina. It is difficult to understand the logic.

Slobodan Milošević argued that the concept of a **Greater Serbia** had never existed. He stated that it had never been a Serbian plan but was, in fact, an expression of the Austro-Hungarian wish to conquer the Balkans dating back to 1878.[1401] **Slobodan Milošević** further explained that **Goluchowsky**, the Austro-Hungarian Foreign Minister at the time, wanted to gain control of Serbia with a view to expanding the Empire towards the East. The idea was to dominate the region, and the strategy involved establishing a system of small mutually-hostile states that would not have the ability to create alliances and resist Austria.[1402] The purpose of this system of small States was to create **a balance** in the Balkans, ensure the domination of Austria-Hungary and allow it to pursue its conquest towards Turkey. **Slobodan Milošević** thus concluded that the concept of a "**Greater Serbia"** and the "Serbian threat" in Yugoslavia was no more than a myth created by the Austro-Hungarian Empire for its own ends, that is, to divide the region. This concept was subsequently taken up again in the 20th century and during the Second World War by **Hitler** and **Mussolini**.[1403]

[1397] *Ibid.*, p. 265.
[1398] *See* in this sense, the Prosecution's allegations in the Šešelj case regarding the participation of Milošević and Vojislav Šešelj in a JCE whose purpose was to carry out ethnic cleansing. *The Prosecutor v. Vojislav Šešelj*, Case IT-03-67-T, Prosecution Closing Brief, 5 February 2012, paras 196, 197, 227, 231, 291 and 356.
[1399] Also mentioned in the Prosecution Closing Brief against Šešelj, *ibid.*, in paragraph 99.
[1400] *Ibid.*, pp. 278 to 280.
[1401] *The Prosecutor v. Slobodan Milošević*, Case IT-02-54-T, Defence Opening Statement, Mr Milošević, T(E) of 15 February 2002, p. 420.
[1402] *Ibid.*, p. 421.
[1403] *Ibid.*, p. 422.

Thus, **Slobodan Milošević** maintained that the idea that the Serbs wanted to conquer the region at any cost was systematically disseminated under the Austro-Hungarian Empire's occupation so that it could justify its presence in Bosnia, which in turn enabled Austria-Hungary to move forward with its own conquests.[1404] Furthermore, he added that the liberation wars of 1912-1913, which resulted in the Serbs' liberation from Turkish domination, had reinforced the erroneous idea that some people had according to which the Serbs then intended to embark on the creation of a Greater Serbia.[1405]

Slobodan Milošević claimed that the concept of a Greater Serbia had never been part of any political programme whatsoever.[1406] Thus, he stated that: "***[on] the day when the Federal Republic of Yugoslavia was established on the 28th April 1992, […] it was made public that the Federal Republic of Yugoslavia, Serbia and Montenegro do not have any territorial aspirations towards any one of the former Yugoslav Republics.***"[1407] Conversely, he put forward the idea that it was – and still is – the Albanians who aspire to creating an ethnically-pure **"Greater Albanian" state**.[1408]

Slobodan Milošević stated that the Serbian leadership helped their people in Bosnia and Herzegovina because they were in a difficult situation and it was a matter of their survival, and indeed freedom, but there was never any question of the secession of Bosnia and Herzegovina.[1409] He added that in 1991, the Serbs had fought for independence in Croatia. However the reason was that "***they did not wish to live under the authority of people who, not so long ago, massacred their parents***".[1410]

After Prosecutor **Nice clarified** that the Prosecution was not claiming that **Slobodan Milošević** had supported and advocated the establishment of a Greater Serbia, but that, *de facto,* his plan to create a Serbian State was similar to the establishment of a Greater Serbia, the Accused **Slobodan Milošević** highlighted what according to him was legally incoherent in the Prosecution's theory. During the hearing of 25 August 2005, he stated:

[1404] *Ibid.*
[1405] *Ibid.*, pp. 422-423.
[1406] *Ibid.*, p. 425.
[1407] *Ibid.*
[1408] *Ibid.*, p. 426.
[1409] *The Prosecutor v. Slobodan Milošević,* Case IT-02-54-T, Defence Opening Statement, Mr Milošević, T(E) of 18 February 2002, p. 451.
[1410] *Ibid.*, p. 453.

"***For the duration of 15 minutes here Mr Nice has been explaining that I did not advocate a Greater Serbia. And then that I did advocate a Greater Serbia. I don't see how it is possible to have a coherent conversation if one doesn't know what the accusations are. He is now talking about the historical idea and separating out from the non-historical idea and so on.***"[1411]

d. Witness Vojislav Šešelj's position in the Milošević case on the theory of a "Greater Serbia"

Vojislav Šešelj was mentioned in the **Slobodan Milošević** proceedings as of 12 February 2002.[1412] At the hearing held on the following day, Prosecutor **Nice,** made a further reference to **Vojislav Šešelj** as President of the Serbian Radical Party, founder of the Serbian Chetnik Movement and Deputy Prime Minister of Serbia until 2000.[1413] **Vojislav Šešelj** was moreover described as a fervent supporter of the plan for a "**Greater Serbia**" and of the concept of ethnic cleansing in Kosovo.[1414]

From Friday 19 August 2005 until 20 September 2005,[1415] the Accused **Šešelj** testified as a **witness** before the Trial Chamber in the **Slobodan Milošević** case**.**[1416] During his examination, **Vojislav Šešelj** was asked to outline his vision of a "Greater Serbia", which the Serbian Radical Party was striving to establish.[1417] The plan advocated by **Vojislav Šešelj** and the Serbian Radical Party aspired to establish a unified Serbian State which included the lands where the Serbian language was spoken,[1418] a State whose western borders extended along the Karlovac-Virovitica-Karlobag-Ogulin line.[1419] According to the President of the SRS, "*the concept of Greater Serbia implies a unified Serbian state including all Serbian lands where Serbs are a majority population*."[1420] **Vojislav Šešelj** defined the "Greater Serbia" plan in these terms:

[1411] T(E) of 25 August 2005, p. 43229.
[1412] T(E) of 12 February 2002, during the Prosecution's opening statements, the Office of the Prosecutor represented by Mr Nice referred to Vojislav Šešelj as "*President of a radical party*", whose creed "*went by the title of Greater Serbia*".
[1413] T(E) of 13 February 2002, pp. 146-147.
[1414] *Ibid.*
[1415] T(E) of 20 September 2005.
[1416] T(E) of 19 August 2005, p. 42878.
[1417] T(E) of 19 August 2005, p. 42885.
[1418] T(E) of 25 August 2005, p. 43219.
[1419] T(E) of 30 August 2005, p. 43426.
[1420] T(E) of 25 August 2005, pp. 43216 and 43217.

> "***[a] united Serbian State including all Serbs lands and the greatest majority of the Serb people, regardless of their faith, which means brotherhood and unity of Orthodox Serbs, Catholic Serbs, Muslim Serbs, Protestant Serbs and atheist Serbs.***"[1421]

Vojislav Šešelj denied that **Slobodan Milošević** had been involved in the implementation of a plan for a "Greater Serbia". When asked by the Accused **Slobodan Milošević**: "*In view of the main points of the Prosecution case, did you have occasion to see or hear [Mr Nice] making a claim that the leitmotif of all my policies was to create a Greater Serbia?*"[1422] **Vojislav Šešelj** answered that this was impossible and denied any joint involvement with **Slobodan Milošević** in a plan for a "Greater Serbia". He explained that neither **Slobodan Milošević** nor his party promoted a "Greater Serbia" as their **objective was to preserve the former Yugoslavia.**[1423] He continued in this vein by claiming:

> "***What the Orthodox Serbs wanted was the preservation of Yugoslavia, not an enlarged Serbia. Most of [the] Serbs didn't even want a Greater Serbia. It was only the Serbian Radical Party that wanted it.***"[1424]

Document P1199, dated 28 May 1992, is another piece of decisive evidence for determining that a JCE did not exist.

Following the events in Sarajevo, Vojislav Šešelj – speaking on behalf of the Serbian Radical Party – said the following in an interview:

> "The Serbian Radical Party finds that the Presidency of Yugoslavia and the Yugoslav Army Command are to blame for what had happened because they did not withdraw forces from non-Serbian parts of Bosnia and Herzegovina on time and because they pretended that the Yugoslav Army was an army of Serbs, Croats and Muslims. It should not have happened at all that the army units were surrounded. It should have been prevented by all means."

This statement indicates that a common plan with Slobodan Milošević could not have existed.

This document provides further evidence to this effect, given that when he was questioned on 4 June 1992 about the election results, he indicated that numerous ballot papers in favour of the

[1421] T(E) of 19 August 2005, p. 42885.
[1422] T(E) of 24 August 2005, p. 43200.
[1423] T(E) of 24 August 2005, pp. 43200 and 43201.

Serbian Radical Party's candidate had been declared invalid and that, according to him, the Serbian Radical Party had been deprived of several thousand votes.

I find it difficult to understand how there could have been such discord between members of a JCE sharing a common purpose, unless one draws the conclusion that a common purpose never existed, and therefore, nor did a JCE. It is the sole conclusion to be drawn beyond any reasonable doubt.

One other piece of evidence to be found in this document is his interview of 11 June 1992 wherein he made the following comments on sanctions against Serbia:

> "I think that these sanctions against Serbia empower the regime in Serbia, the regime of Slobodan Milošević and the Socialist Party."

After reading such words, who could reasonably conclude that Slobodan Milošević and Vojislav Šešelj shared a common purpose?

This sentence alone invalidates the entire Prosecution theory.

It is unfortunate that during the presentation of its evidence, the Prosecution focused primarily on the victims and on some so-called "insider" witnesses who it believed went in favour of its theory, whereas it strikes me that it failed to confront the question of the documents to avoid jeopardising its case.

Any judge conducting a thorough study of the documents would find that there was no common purpose.

Some time before 20 February 2012 (P1192), he had clearly indicated the following:

> "The Serbian Radical Party expresses this time as well its profound disagreement with and criticism of the steps taken by the government of Serbia which with its economic measures insists on even stricter control of the process of production and distribution and this actually takes us back to a period which we thought was definitively over."

[1424] T(E) of 25 August 2005, p. 43275.

Thus, as there is no support for the government, neither is there any for Slobodan Milošević. I seriously wonder whether staff from the Office of the Prosecutor studied these documents while they were preparing the Indictment. It is clear from each and every page that a common purpose could not have existed.

In this document he claimed that he supported the Vance-Owen Plan, which invalidates the theory of the creation of a Greater Serbia, which could not in any case have been part of the blueprint for the Vance-Owen Plan.

In its written submission, the Prosecution maintained that there was a common purpose in which Milan Babić was an active participant.

The following question was put to him during the interview: "Specifically, do you support Babić?"

He answered by saying: "I don't support Babić or anyone else," and added: "We don't agree with Babić on one question and this disagreement continues."

Shortly afterwards he condemned the rift that had occurred in the Krajina Assembly.

In this same document, Vojislav Šešelj was asked a key question concerning Ljubiša Petković, who had new insignia. The interviewer asked him if he would be fully integrated into the army.

He replied that the circumstances in the area of the Serbian Krajina had forced them to organise themselves militarily in order to defend the Serbian people who were under the leadership of the traitor Kadijević at the time, and stated that they had to fight unbeknown to that army. He added that at the present time, events had changed because the army was defending Serbian national interests, and volunteers had been placed under the command of army officers within the territorial defence of the Serbian Krajinas, while others had been placed under the direct command of military officers.

The sole conclusion is that there was no army led by Vojislav Šešelj.

e. Radovan Karadžić and his participation in the JCE

In his Pre-Trial Brief, **Radovan Karadžić** chose to oppose the Prosecution's position regarding his responsibility under the JCE from a **legal rather than factual** perspective. He addressed the issue by first recalling that it was for the Prosecutor to prove not only that he participated in the JCE with at least one other person listed in the Indictment, but also that there was an arrangement or understanding amounting to an agreement between two or more persons that a crime would be committed and that the Accused made a significant contribution to the JCE.[1425] **Radovan Karadžić** first refuted the position whereby omission can be an element of **significant contribution**.[1426] The second point of his argument relied on **JCE III** under which an Accused can be held responsible for a crime that was not part of the agreement if it can be proved that it was a natural and foreseeable consequence of that agreement. According to **Radovan Karadžić,** JCE III could not be applied to genocide and persecution, which require special intent on the part of the perpetrators.[1427]

In his opening statement, **Radovan Karadžić** also denied that he had participated in a JCE. He expounded **four objectives** which had been mentioned during the period covered by the Indictment and concerned the fate of Serbs in Bosnia.[1428] The first was the **preservation of Yugoslavia with its six constituent republics**. The second was that **the Serbs in Bosnia would form an integral part of Yugoslavia**, and the part of the population concerned would join that State, while **the rest of Bosnia would obtain independence**. The third objective was to **create an independent Serbian state within BiH**. Lastly, the fourth solution, which was a sort of compromise between the second and third objective, was for **the Serbs in Bosnia and Herzegovina to leave Yugoslavia on condition that they obtained a constitutional unit within a kind of confederation of Bosnian states**.[1429] **Radovan Karadžić** stated that these possibilities were the only ones that had been considered and that "*every one of these variants ensured the preservation of peace and the achievement of Croat and Muslim optimal objectives through Serb lenience*".[1430] He thus denied any assumption that these solutions might be described as **a common criminal purpose**.

[1425] *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-PT, Karadžić Pre-Trial Brief, 29 June 2009, paras 102-103.
[1426] *Ibid.*, para. 103.
[1427] *Ibid.*, para. 105. Karadžić reiterates this argument in his Respondent's Brief, *cf. Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-AR98*bis*.1, Respondent's Brief, 23 November 2012, paras 255 to 302.
[1428] *See, The Prosecutor v. Vojislav Šešelj*, Case IT-03-67-T, Prosecution Closing Brief, 5 February 2012, para. 222 regarding the question of a concerted plan between Karadžić and Šešelj for the purpose of creating a Greater Serbia.
[1429] *The Prosecutor v. Radovan Karadžić*, Case IT-95-05-18-T, Defence Opening Statement, T(E) of 1 March 2010, pp. 815-816.
[1430] *Ibid.*, p. 816.

Similarly, **Radovan Karadžić** insisted that a JCE could not have existed, as it was never his intention for the Muslims and Croats to be expelled from Republika Srpska.[1431] For example, to substantiate this claim he referred to remarks he allegedly made on 14 February 1992 at a party meeting where he stated that they had to ensure that the population did not flee *en masse*.[1432] The only plan he acknowledged having was that of protecting his people and his territory when under attack; however, he had always attended peace negotiations.[1433]

He added that he was opposed to the **partition of Bosnia**. However, once secession was underway, he was in favour of turning Bosnia into a country based on the Swiss model, that is to say, divided into **several cantons**, the important factor being that the new organisation would prevent any futile internal clashes or desire for domination.[1434]

Radovan Karadžić pointed out that the Prosecutor accused the Serbian Democratic Party (SDS) of intending to expel the non-Serb ethnic population from Bosnia. However, he observed that in Bosnia, the SDS had won almost all the votes of the Serbs, but that this had also been the case with the other national parties, as a result of which power was divided between the various ethnicities. Thus, the Muslims obtained the posts of President and Prime Minister, and the Serbs, that of President of the Assembly and some ministries (agriculture, information, etc.).[1435]

f. The 10th Session of the Supreme Defence Council held on 5 July 1993 and the JCE

The Prosecution claimed that **Vojislav Šešelj** and other members of the alleged JCE committed crimes in the context of that enterprise.

The main question that springs to mind is whether, considering the large number of crime sites, the crimes could be subsumed under a **common plan** and were no more than the outcome of that plan. This is all the more relevant as the time frame within which the events took place covered the years 1991, 1992 and 1993.

[1431] *See* in this sense, the Prosecution's assertions to the contrary which include ethnic cleansing in the common criminal objective shared by Šešelj, Karadžić and other protagonists. *The Prosecutor v. Vojislav Šešelj*, Case IT-03-67-T, Prosecution Closing Brief, 5 February 2012, paras 196, 197, 200, 282, 287, 291, 315, 352, 356, 367.
[1432] *Ibid.*, p. 817.
[1433] *Ibid.*, pp. 819-820.
[1434] *Ibid.*, p. 876.
[1435] *Ibid.*, pp. 877-878.

Further to the Prosecution's theory, the **common plan** allegedly came into existence in **August 1991** and continued over the following years. Both in the Indictment and in its Pre-Trial and Closing Briefs, the Prosecution stated that the common plan came into being when the Serbian Radical Party sent volunteers who committed crimes while participating in combat operations under military command (JNA or VRS).

This theory is an extremely attractive one, however it does not stand up when confronted with **conclusive** evidence such as **Exhibit P01012,** which is the transcript of the **10th Session of the Supreme Defence Council** held on **5 July 1993**. I believe I should quote **General Panić's statement in full** here, as well as the subsequent observations made by **President Bulatović of Montenegro** and **Slobodan Milošević's** evaluation of the Serbian Radical Party, Šešelj and the volunteers.

Života PANIĆ:

I would say several things.

The Serbian Radical Party is more and more offensive [and open in its activities], and penetrating ever deeper into the Yugoslav Army. Also it is making intensive preparations in the area and commencing the job of establishing Chetniks' detachments. The leaders of the Serbian Radical Party are having direct contacts with certain generals, mainly with DOMAZETOVIĆ, BIOČEVIĆ and high-ranking officers. Through them they exercise their influence on other commanding officers as well. In this respect, the 12th Corps is especially characteristic, where the [Serbian Radical] Party has made some significant infiltration. Thus, for example, in the 16th Mixed Anti-Armour Brigade in Bačka Topola, the radicals have infiltrated 200 of their devoted followers into the reserve ranks in agreement with the Brigade Commander. And the commanding organs keep communication with the group leaders who, in case of mobilization, would become members of the Brigade together with their men.

In a number of barracks we have registered the illegal organising and connecting of one part of commanding personnel on the basis of the platform of the Serbian Radical Party with a task of taking over the command in those units.

There are obvious efforts of the radicals to infiltrate their military units under guise of being under command of the Yugoslav Army. That is the case in Aranđelovac and Valjevo. They are exerting pressure on certain officers and commanders.

The Radical Party is very impertinent in its approach, especially towards commanders. They motivate themselves to such activities by the alleged common obligation, but their real goal actually is the breaking and taking over of the barracks and units from within at a certain point of time. In their addresses they use manipulations claiming that such activities have been agreed at the level of the Republic.

Through General DOMAZETOVIĆ, radicals have made some significant infiltration into the military districts, hiring their "trusted" personnel, by which they are creating conditions to exert their influence on the mobilisation and drafting system of the Yugoslav Army.

At a number of districts — namely, Novi Sad, Šid, Sremska Mitrovica, Karlovac and other places — we have already registered activities of the representatives of the Serbian Radical Party, who, through letters of the authorised Party for security issues, are asking to get insight into all data and documentation.

The information that we have confirms that the Serbian Radical Party has begun hurriedly to establish Chetniks' detachments in the area of Baranja and Srem, and probably in other areas too. The commander of the Serbian Chetniks' detachment in Šid is Milenko PEPIĆ. They are preparing black uniforms with a sign of skull and cross-bones. They choose only young, healthy and skilful people with war experience. This particularly applies to special units. They are directly connected with certain extremists from Republika Srpska who, for the needs of the Serbian Radical Party, come to the territory of the FR /Federal Republic/ Yugoslavia, threatening and exerting pressure on those who do not think like them.

A directive of the Serbian Radical Party is to have as many as possible of young members of the Party apply for and get the job of soldiers on contract in the Yugoslav Army.

The strategy of the Serbian Radical Party is the creation of the alliance of all Serbian states and gaining absolute power. In that respect, they believe that in the Republic of Serbian Krajina they have all prerequisites already fulfilled to take over the power. In Republika Srpska they are establishing connections with the Serbian Democratic Party, and they are estimating that some 80%

of the members of that Party have the same positions as the radicals. The fact that ŠEŠELJ has recently promoted 18 new *vojvodas* in Pale supports this claim.

In military terms, the radicals especially count on the 12th Corps, considering the strong ties and merits of the commanding structure of that formation.

According to some information, it is a plan of the radicals that the command of the 12th Corps could grow into a supreme command during the creation of that alliance. They seriously count on General DOMAZETOVIĆ who, according to them, has done a lot for them and to whom they must repay somehow. Even today he is still maintaining close relations with the Deputy President of the Assembly PETKOVIĆ. Probably that is the reason why he is not leaving his cabinet; nor has he terminated his contacts with Deputy President PETKOVIĆ.

Two months ago the Security Service of the Yugoslav Army indicated that there were preparations of a number of followers of the SPO /Serbian Renewal Movement/ — who are volunteers in the Army of Republika Srpska — to gather with weapons in case of demonstrations in Belgrade. It has been confirmed now that Major Boro ANTALJ and his 40 men took part in the act of vandalism of SPO members during the assault on the Assembly of FRY /Federal Republic of Yugoslavia/. The MUP arrested some of them.

There are terror and robberies in the area of eastern Herzegovina. According to our information, the General Staff of the Army of Republika Srpska does not have control over them. But they tolerate those phenomena instead of taking energetic action against them.

A question is raised — how do such people cross the state border so easily? It is not insignificant to mention that, during the riots in front of the FRY Assembly, ŠEŠELJ had some 200 of his armed men on certain points in town. One part of them were brought from the area of Pljevlja by Duke /*vojvoda*/ ČEKO.

For the preparation of the interview with the Commander of the Air Force and Anti-Aircraft Defence published in the latest issue of *Duga* magazine under the headline, "Who Silenced the Serbian General?", General STEVANOVIĆ — based on the conversation with journalists on 20 June 1993 — engaged a team which was spearheaded by him and General M. PAVLOVIĆ, the Chief of Staff at the Command of Air Force and Anti-Aircraft Defence. I can say that PAVLOVIĆ's mother is a Croat and his wife is a Slovenian.

What was not published in that issue — and what will be done, according to our information — are open aspirations of General STEVANOVIĆ to the post of the Chief of General Staff, his attacks on the Chief of General Staff, his aggressive distancing from the retired General BOŠKOVIĆ and the "Opera" affair and especially his attacks on the President of the Republic of Serbia, Slobodan MILOŠEVIĆ. General STEVANOVIĆ said that President MILOŠEVIĆ was a dictator and an autocrat, and that he was focusing on the police in order to destroy the Army. He threatened openly that, if he came to the post of Chief of General Staff, he would initiate a [criminal] report against me immediately, and settle accounts with many in the General Staff.

The difficult economic situation in the society and the social standing of most members of the Yugoslav Army are threatening to cause a mass "brain drain" of commanding officers and special units' personnel.

During the last six months, 287 soldiers on contract and 12 active officers have left the Corps of Special Forces, primarily because of the difficult working conditions and dissatisfaction with salaries, that is, because they are offered more favourable conditions in other structures after their training — primarily in terms of finances.

If the existing trend of the poor social position of the members of the Yugoslav Army is not stopped soon, there may be a widespread and uncontrolled show of dissatisfaction with serious consequences not only for the Yugoslav Army but for the society as a whole.

I have received this [information] from our Security Service and it was my duty to present it here.

The General Staff has received a request from the Vice-President of the People's Party from Vojvodina, Stevan ALBULIJA, who talked to our general who works in the Third Department. He is asking that a special detachment should be formed and incorporated in the Yugoslav Army. Its one part should be transferred to [Raka] and one part to Kosovo. Further, all the commanding officers in that detachment should be their officers and under their command, while they should be performing the tasks of the Yugoslav Army. In a given moment, they could be deployed to carry out certain tasks in Sandžak and Kosovo.

So, parties have begun to ask directly that paramilitary formations and paramilitary units be formed. The matter is quite serious and we should take our standpoint in that regard. I am not asking that this issue should be clarified and resolved now, but we would have to discuss it on Monday.

Momir BULATOVIĆ:

I would like to present one impression here. The representatives of the DPS /Democratic Party of Socialists/ and Serbian Radical Party held talks in Igalo on Friday. I was not present at those talks. But the impression that the people conveyed to me was very surprising for me. Namely, Vojislav ŠEŠELJ shows in these talks — and it surprises me that he reveals it before people from the DPS — a complete deliberateness in all of his activities — in long term goals and plans. He is expressing his readiness to build a "bridge" even with the DEPOS /?Serbian Democratic Opposition/ at a certain point in time when it is necessary, in order to destabilise the political conditions and to come to power.

What is especially new for me — and maybe you have heard it before — was his idea and calling addressed to the rest of the opposition, even before the 1992 election, to support Slobodan MILOŠEVIĆ and at the same time to discredit the Socialist Party of Serbia. For he realises where his main danger and obstacle come from.

In any case, ŠEŠELJ is leaving his populist phase now, as he himself says. It seems that he is preparing very deliberately and skilfully to seize power. Whether he is going to destabilise the conditions within the Yugoslav Army or opt for some other methods remains for us to watch and see. But these are very dangerous indications, the ones which we've heard just now.

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Slobodan MILOŠEVIĆ:

I think that we have to analyse all the paramilitary formations in Yugoslavia and make a decision that they simply should be eliminated in accordance with the law. That is the matter for judicature, the police, and even the Army, if it is necessary in some cases. That is in conflict with our laws.

General Panić stated that the Serbian Radical Party was conducting **operations to penetrate** into the Yugoslav Army and gave specific examples thereof. He indicated that this infiltration had caused problems in some of the units and barracks and provided examples of this. He added further details such as that a number of Chetniks were wearing black uniforms bearing the skull and cross bones sign; these units were directly connected to extremists from Republika Srpska, and, moreover, a Serbian Radical Party directive was inciting young members of this party to join the army where they would be on contract.

From my point of view, this statement is extremely interesting as it sets out clearly the issue of the **volunteers of the Serbian Radical Party** and **their role of penetrating into the army.**

But the most important question this statement raises is *why that meeting was held: was it to **develop a common plan***? That could not have been the case because **General Panić condemned** it; there is also another reason, which is that **Vojislav Šešelj** wanted to seize power. **Bulatović's** position was along those same lines. **Slobodan Milošević's** reply was very interesting as it can be noted that he was opposed to this situation and intended to put an end to it by initiating legal proceedings or police and military operations, and he even went as far as to say they had violated the laws of the Republic. Given **Slobodan Milošević's** position, I find it difficult to believe that he had participated in a JCE with **Vojislav Šešelj**.

In reality, it was clear that **Vojislav Šešelj's** sole objective was to **seize power**. According to the Chief of General Staff of the Yugoslav Army, in order to achieve this, **Vojislav Šešelj** had infiltrated his supporters into the Yugoslav Army, thereby creating serious difficulties at the command level, as mentioned by General **Života Panić**. This document is crucial because it runs counter to the Prosecution's theory regarding the **common purpose** with which all the members of the JCE were in agreement. It can be seen that, in reality, there was no such thing and that **Vojislav**

Šešelj, who held no official position within the Serbian Government, was a **political opponent** who wanted to seize power by relying on both a nationalist platform and on supporters who were infiltrating the Yugoslav Army for reasons other than ethnic cleansing or a Greater Serbia!

The question of whether the common purpose of the JCE was a Greater Serbia was clarified by document P1194 in which, in reply to a question put by a television viewer on the issue of Greater Serbia, he said: "I am in favour of the Greater Serbia."

The most extraordinary aspect of this response is the fact that "those borders of that shortened Yugoslavia, […] are actually the borders of Greater Serbia". Thus, contrary to the Prosecution's submission, a common purpose to expand the territory could not have existed.

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* *

Paragraph 6 of the Indictment states that "*Vojislav ŠEŠELJ participated in a **joint criminal enterprise**. The purpose of this joint criminal enterprise was the permanent forcible removal, through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal, of a majority of the Croat, Muslim and other non-Serb populations from approximately one-third of the territory of the Republic of Croatia ('Croatia'), and large parts of Bosnia and Herzegovina, and from parts of Vojvodina, in the Republic of Serbia ('Serbia'), in order to make these areas part of a new Serb-dominated state*."

Paragraph 8 goes on to list the participants in this enterprise: **Slobodan Milošević**, **General Veljko Kadijević, General Blagoje Adžić, Colonel Ratko Mladić, Radmilo Bogdanović, Jovica Stanišić, Franko Simatović, also known as "Frenki", Radovan Stojičić, also known as "Badža", Milan Martić, Goran Hadžić, Milan Babić, Radovan Karadžić, Momčilo Krajišnik, Biljana Plavšić, Željko Ražnatović, also known as "Arkan", other political figures from the (S)FRY, the Republic of Serbia, the Republic of Montenegro and the Bosnian and Croatian Serb leadership.**

This list also includes the "Serbian forces", collectively defined as members of the Yugoslav People's Army ("JNA"), later renamed the Yugoslav Army ("VJ"), the Serbian Territorial Defence in Croatia and Bosnia and Herzegovina, the Army of the Republika Srpska Krajina ("SVK") and the Army of Republika Srpska ("VRS"), as well as members of the TOs of Serbia and Montenegro,

local Serbian police forces, police forces of the Republic of Serbia and the Serbian special police forces of the SAO Krajina and the RSK commonly referred to as "**Martić's** Police", **Martićevci**, "SAO Krajina Police" or "SAO Krajina *Milicija*", as well as members of Serbian, Montenegrin, Bosnian and Croatian Serb paramilitary forces and volunteers, notably the "Chetniks" or the **Šešeljevci** (that is to say "**Šešelj**'s men").

In addition to the evidence it refers to in its oral submissions, the Prosecution supports the allegation of a **joint criminal enterprise** by invoking, in paragraph 4 *et seq.* of the Indictment, the Accused's participation in a joint criminal enterprise consisting of three major components:

- Firstly, he allegedly used his power as a political figure to promote his project for the creation of a **Greater Serbia** by force in the media;

- Secondly, as President of the SRS and Head of the SČP, Vojislav Šešelj allegedly supervised the recruitment, indoctrination, financing, training, creation, coordination, supply and allocation of the volunteer units, which frequently led to the forcible transfer of non-Serbs living in the targeted territories;

- Thirdly, the Accused allegedly significantly contributed to the implementation of the joint criminal enterprise by committing crimes of persecutions (by way of speeches inciting hatred) in Vukovar (Croatia), in Zvornik (BiH) and in Hrtkovci (Serbia), and crimes of deportation and inhumane acts (forcible transfers in Hrtkovci).

The main documents mentioned in the Pre-Trial Brief and the Closing Brief in support of the alleged JCE are: the Tomić report, Exhibits P00255, P01200, P00032, P01176, P00034, P00035, P01196, P01197, P00040, P01185, P01176, P01196, P01220, P01186, P00163, P00034, P00035, P00644, P01003, P00059, P00513, P00221 and P00915.

Similarly, the **Prosecution** refers primarily to the following witnesses: VS-014, VS-026, VS-1104, VS-1133, VS-007, VS-010, VS-011, VS-017, VS-027, VS-038, VS-1008 and VS-1136.

In instances where there are no formal documents establishing the existence of this common plan, the Judge has a duty to search for **indicia** in order to try to characterise this JCE. As an illustration, I would like to cite the indicia listed in the ***Đorđević*** **Judgement delivered by this Tribunal:**

- (a) Demographic indications;
- (b) The misuse of force by Serbian forces and the FRY in violation of the October 1998 agreements;

- (c) The motives of the crimes;

- (d) The coordinated management of the MUP and VJ units;

- (e) The disproportionate use of force in "anti-terrorist" operations;

- (f) The systematic verification of identification documents and vehicle licence plates of Kosovo Albanians;

- (g) Efforts made to conceal crimes committed against Kosovo Albanian civilians.

As can be seen, "fishing" for indicia in the present case may not yield any results because, at first sight, only the demographic indications and the motives of the crimes can be considered as such indicia.

No reasonable trier of fact could conclude that a plan existed which brought together all the aforementioned key figures. Although, according to the Prosecution, the inference that must be drawn is that all these key figures were linked by way of this plan, in point of fact, this argument is not categorically substantiated by the evidence underpinning the Prosecution's allegations.

It is evident that there must be some apparent **link** between members of a criminal enterprise derived from work-related meetings, conversations, common articles, shared points of view or affiliation to the same party or government. This has not escaped the notice of the Accused, who raised the issue **of a link** in his Final Brief.

It would be incongruous to claim that they are **automatically** members of a JCE on account of their creed, their ethnicity, their religion or their thoughts (if only a judge was able to analyse the inner thoughts of an individual …).

This being so, it is important in my view to have **incontrovertible evidence** which establishes a link between the members. This did not escape the attention of the Office of the Prosecutor, since it

limited the temporal scope of the JCE to the period running from 1st August 1991 until September 1993. It is interesting to know why September 1993 was chosen.

In paragraph 8 of the Indictment, the Prosecution states that "*[t]he aforesaid joint criminal enterprise came into existence before l August 1991 and continued at least until December 1995. Vojislav ŠEŠELJ participated in the joint criminal enterprise until September 1993* ***when he had a conflict with Slobodan Milošević***."

The Prosecution therefore acknowledges the need for this link because there was clearly no common plan after the conflict with **Slobodan Milošević**.

The Indictment against **Radovan Karadžić,** the temporal scope of which extends until December 1995, makes the incoherent claim that **Vojislav Šešelj** was a member of this JCE without any interruption!

The Prosecution explained its position in its Motion of **26 March 2010** for the admission of evidence from the Bar Table. For the Prosecution, the exhibits were relevant because they concerned the joint criminal enterprise, the Accused's intent and his contribution to the JCE.

However, the Prosecution developed its point of view at some length stating that as Serbian nationalism gained currency during the disintegration of the former Yugoslavia, the Accused became an ally of **Slobodan Milošević** and other Serbian leaders and together they pursued the goal of the unification of all Serbs within the same State, which the Accused called "**Greater Serbia**" and the creation of which entailed the forcible transfer of the non-Serb population and the commission of other crimes against non-Serbs.[1436]

The Accused embraced the ideology advocated by the Serbian Cultural Club and the Serbian Chetnik Movement.[1437] **Vojislav Šešelj** was awarded the title of *Vojvoda*.

According to the Prosecution, the JCE came into existence in February 1991. In 1990, the Accused founded the SČP and attempted to register it but was unsuccessful.[1438] He therefore created the SRS in February 1991, which was then recognised as a political party.[1439]

[1436] P01321, P01167, P01169, P01170, P01263, P01264, P01175, P01301, P01206, P01388 and P01364.
[1437] P01170 and P01172.
[1438] P01322.
[1439] P01265.

The Prosecution states that the Accused admitted that his party considered that the fight for Serbian national interests could serve as a basis for establishing co-operation with **Slobodan Milošević's** SPS and with the SDS, although the Prosecution quotes the following phrase: "*We differ on everything else, but we must cooperate in defending Serbhood. This is our common fight and we must not be divided in any way on this issue*."

In support of this line of reasoning, the Prosecution referred principally to Exhibits P01282, P01187, P01233, P01312, P01243, P01251, P01252 and P01327.

According to the Prosecution, the criminal intent was revealed in the wake of the assassination of several Croatian policemen (Borovo Selo, P01303 and P01252).

In addition to this evidence, the Prosecution had sought the admission of the Accused's testimony in the Milošević case (Exhibit P00031) which, in its opinion, describes the joint criminal enterprise. On examining the transcript from pages 42678 to 44370, it appears that the Accused **Vojislav Šešelj** did not know some of the JCE members (**Simatović**) or that he had had no more than sporadic contacts with others (**Babić**) and did not become acquainted with **Slobodan Milošević** until April 1992, which is after the start of the alleged JCE.

Admittedly, **Vojislav Šešelj's** statements, which he made under oath, may be false or only partially true, or might even be designed to create confusion. However, during its cross-examination, the Prosecution did not rebut those statements and, as they stand, a reasonable trier of fact can consider that the points made by Witness **Vojislav Šešelj** in the *Milošević* case are particularly relevant and probative.

For example, on page 43932, the Accused stated that: "**And I insist that never in my life have I ever met Franko Simatović.**"

On page 43943, he stated the following with regard to **Slobodan Milošević** in particular and the links he had with him: "***In May 1992, I began having intensive meetings with Milošević on a more regular basis***."

In the absence of any relevant evidence concerning each member cited in the JCE list, the Prosecution failed to demonstrate that there was **a link** between those persons within the meaning

of the case-law of the Appeals Chamber, as previously set out, or that they shared the same intent. Thus, there should have been evidence establishing that the JCE members shared the Accused's intent to remove permanently the non-Serbs, notably the Muslims and the Croats, from approximately one third of the territory of the Republic of Croatia ("Croatia"), large parts of the territory of the Republic of Bosnia and Herzegovina and some parts of Vojvodina in the Republic of Serbia ("Serbia") in order to integrate these regions into a Serb-dominated State.

Thus for the Prosecution, the ultimate aim of the JCE was to integrate those regions into a new Serb-dominated State. On that basis, a reasonable trier of fact must determine the boundaries of a **Greater Serbia** as mentioned in the Indictment. The Indictment states that the Accused "propagated a policy of uniting all Serbian lands in a homogeneous Serbian state. He defined the so-called **Karlobag-Ogulin-Karlovac-Virovitica line** as the western border of this new Serbian state (which he called 'Greater Serbia') which included Serbia, Montenegro, Macedonia and considerable parts of Croatia and Bosnia and Herzegovina."

The Prosecution's Pre-Trial and Closing Briefs also state that "**Vojislav Šešelj** substantially contributed to the JCE by serving as the chief propagandist for the establishment by force of 'Greater Serbia', a unified, Serb-dominated state. By the middle of 1990, **Vojislav Šešelj** was constantly calling for the creation of a Serbian state comprising the current borders of the Republics of Serbia and Montenegro as well as much of Croatia, Macedonia and BiH."

In support of this argument, the Prosecution cites for the most part Exhibits P01321, P01170, P01169, P00150, P01171, P01172, P01173 and P00039.

It should be noted that the Accused's speeches, writings or interviews were spread over time, and even the Prosecution made a distinction between the different types of speeches in its Pre-Trial Brief:

- The speeches made in the mid-1990s (P01321, P01170, P01169, P00150, P01171, P01172, P01173 and P00039). It should be noted that they present the demand for the unification of all the Serbian territories into a single state entity.

- The speeches made at the end of 1990 which became more radical (P0075 and P00037). It should be noted that they include a demand to prevent Serbian territories and the Serbian people from being separated from the motherland. Similarly, it is stated that Orthodox

Serbs, Muslims, Catholics and Protestants would live together in unity within that Serbian State. There is no hint of any ethnic stance.

With regard to the Croats, they could leave **Yugoslavia** and create their State to the west of the Karlobag-Ogulin-Virovitica line and there would be a "**Serboslavia**".
The alleged radicalism does not seem sufficiently pronounced to have directly or indirectly affected the crimes that were committed.

- During the period covered by the Indictment, the Accused took advantage of the situation and exacerbated it in order to implement the creation by force of a Serbian State (P01264, P01338, P00056, P00255, P00256, P00644, P00179, P00034, P00062 and P00056).

It seems to me that the very concept of a joint criminal enterprise including the various protagonists was challenged in the decision rendered on 10 November 2005 by Chamber III following the Prosecution's Motion for Joinder of the cases of *Milan Martić, Jovica Stanišić and Franko Simatović* and *Vojislav Šešelj*.

In **paragraph 23** of the Motion of 1 June 2005, the Prosecution stated the alleged objective of the joint criminal enterprise contained in the three Indictments.

Chamber III, presided by **Judge Robinson** with **Judges Agius** and **Liu**, dismissed the Motion for Joinder, stating in **paragraphs 20 and 21** of their decision that the alleged joint criminal enterprise was not identical in each of the Indictments, while noting that the counts, the mode of liability, the time frame and the location of the crimes overlapped to a certain extent.

Incidentally, I would like to point out that the alleged joint criminal enterprise in the case of ***Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*** was mentioned in the following terms in **paragraph 569** of the Judgement which is in the **public domain**:

"*The Indictment alleges that the three Accused, together with other individuals including Miroljub Vujović and Stanko Vujanović, participated in a joint criminal enterprise the purpose of which was the persecution of Croats or other non-Serbs who were present in the Vukovar hospital […]. It is alleged further that the crimes charged in the Indictment were within the object of the joint criminal enterprise, and that each of the Accused held the state of mind necessary for the commission of each of these crimes.*"

The findings of the Chamber in **paragraph 608** are precise and clear and establish that "*[T]he facts, as the Chamber has found them to be established by the evidence, do not support the Prosecution case that there was a joint criminal enterprise involving any of the three Accused, together with others […]*."

As far as I am concerned, this Judgement, which **constitutes *res judicata,*** cannot be subject to judicial examination. Therefore, if there was no JCE with members of the Serbian Radical Party in **Vukovar**, how could such an enterprise exist in the present case?

The objective of this alleged JCE between the participants in **Vukovar** was the persecution of non-Serbs. Yet, the objective of the joint criminal enterprise was allegedly a **Greater Serbia** in the geographical sense. Consequently, is there not some confusion as to the real purpose of the alleged JCE?

Bearing that in mind, before conducting a further analysis of the requirements set out by the *Tadić* Appeal Judgement, it would be appropriate to determine whether there did indeed exist a **common purpose between the Accused and the other JCE members.**

In short, the purpose of the JCE plan as defined in paragraph 6 of the Indictment was "*the permanent forcible removal […] of a majority of the […] non-Serb populations from approximately one-third of the territory of the Republic of Croatia [...] and large parts of Bosnia and Herzegovina, and from parts of Vojvodina, in the Republic of Serbia […] in order to make these areas part of* ***a new Serb-dominated state***."

It thus appears that the ultimate purpose of the enterprise was the creation of a **Serb-dominated state**.

Is this the plan that drove each and every one of the participants, or were there not in fact two plans: the creation of a "**Greater Serbia**" (as claimed by the Accused) and the preservation of a **truncated** Yugoslavia within the former borders of the **Federal Yugoslavia (Milošević)?**

Was the removal of non-Serbs from Croatia, parts of the Republic of Bosnia and Herzegovina and Vojvodina a means of achieving this ultimate goal, or were there other reasons behind this removal which have nothing to do with the creation of a State?

The Prosecution's evidence must therefore be analysed through the prism of these fundamental questions.

In the first instance, it is obvious that there are two concepts which form the basis of the **political actions of Slobodan Milošević and Vojislav Šešelj**.

The obvious conclusion is that **the plan was not exactly the same**, and consequently the form of responsibility stemming from the JCE cannot be applied.

Regarding the second question, which concerns the permanent removal of non-Serbs, it must be noted that even if the Croats from the Krajina region had left the areas concerned, the fact remains that on **15 January 1992** the Republic of Croatia was internationally recognised within its borders inherited from the Federal Yugoslavia.

Likewise, with regard to the **Republic of Bosnia and Herzegovina**, a new state could not have been created after **April 1992**, as the Geneva Conference and the Vance-Owen Plan recognised the existence of the Serb-dominated territories which constitute present day Republika Srpska.

Lastly, with regard to **Vojvodina, which it should be noted belongs to Serbia**, there was no need for deportation of any kind in order to integrate it into a new Serbian state, as it was already a part of it!

An initial analysis of the Accused's speeches made primarily against the Croats, and of the less frequent speeches against the Muslims, shows that the removal of Croats could have been a retaliatory measure or reprisal following the deportation of Serbs in Croatia, while the deportation of Muslims appears to have been disputed even by the Accused, who considered them to be Serbian Muslims. However, as I indicated earlier, it should be stressed that what was at issue was the threat of aggressive action that could be taken by the potential adversary.

The Prosecution addressed this matter at length when the Accused testified about the concept of a Greater Serbia in the *Milošević* case. **Vojislav Šešelj** replied to **Slobodan Milošević's** question on this concept in the following manner:

"*This is an ideological concept, and it was first mentioned in public all the way back in 1683 when the Turks were defeated [at the gates of Vienna]. [I am relying on] the concept of Greater Serbia as it was originally understood and designed in the 17th century. However, in many trials that took place before The Hague Tribunal, and I must say I read most of the judgements, many witnesses […] speak of Greater Serbia without knowing what it means. And in the judgements later, their words are taken unquestioningly. I, as a leading nationalist and [the principal] ideologist [of Serbian nationalism] […] can give you the original meaning of the concept of Greater Serbia, and I think it would be useful for this trial and other trials conducted here as well. Nobody here, none of those accused of taking part in the joint criminal enterprise, [apart from myself], ever [spoke of] a Greater Serbia. It never crossed their mind [to support a Greater Serbia]. [My commitment to a Greater Serbia, which goes back 30 years] is being ascribed in this indictment to other people who had nothing to do with it. [I am ready to die for the idea of a Greater Serbia]*."

He added, on page 43216 of the transcript that "the concept of Greater Serbia implies **a unified Serbian state including all Serbian lands where Serbs are a majority population.** However, it is opposed to [century-long] Vatican, Austrian and other attempts to reduce the Serbian people only to members of the Orthodox Christian religion because the Serbian people in its ethnic being includes Orthodox, Catholic, and Muslim Serbs equally."

Nevertheless, that is different from persecution on religious grounds since the Accused specified the following on page 43222 of the same transcript:

"*[T]he concept of Greater Serbia can by no means be identified with any sort of practice of persecuting [the] Catholic [or] Muslim […] population. In all the proclamations [of the Serbian Chetnik Movement], of the freedom-loving Serbian movement, the Serbian Radical Party […] we keep appealing for the unification of Protestant, Catholic, Orthodox, Muslim, and [atheist] Serbs. That cannot be linked with the concept of Greater Serbia. [Ethnic cleansing] is not in line with the concept of Greater Serbia, but you won't let me say it. That's why we insist on including Catholics, […] [and] Muslims into our party and giving them high positions*."

The description of his endeavour establishes that rebel Serbs were fighting the Croats and that apparently the action was, in principle, not undertaken for the purpose of ethnic cleansing, but rather, the objective pursued was simply to gain control of an autonomous region.

According to the Indictment, a ceasefire was established between the JNA and Croatia. The JNA withdrew leaving military equipment behind, and thus the Republic of Serbian Krajina ("RSK")

was created. **Arkan's** group established its base in the former JNA military camp in Erdut in Croatia.

The Indictment states that the situation in Bosnia and Herzegovina **degenerated into open conflict**, and **Arkan's** Tigers were deployed in various communities with large non-Serb populations. Bijeljina and Zvornik were among those towns.

It is important to note that it was "**the situation**" that degenerated into open conflict and no reference has been made to a specific plan on the part of one of the warring parties to embark on any program of ethnic cleansing.

The same Indictment states that between 1992 and September 1995, a large part of the **Muslim** and **Croatian** population fled from Sanski Most - a municipality not covered in our Indictment - while those who remained were subjected to a draconian regime.

In the absence of any evidence, this reference to the flight of the Muslim and Croatian population does not provide exact information as to whether the population fled out of fear of the hostilities or for some other reason …

It is particularly interesting to note that in **footnote 429 of the Pre-Trial Brief**, the Prosecution states that: "*During this time, a Special Police Unit from Sremska Mitrovica was placed in Hrtkovci to prevent expulsions, attacks, and harassment*." This event amply demonstrates that at the time, **Vojislav Šešelj and JCE members were not acting in collusion, as the governing authorities, far from cooperating with a view to implementing a joint plan, were actually preventing it from happening. Thus, it is difficult to uphold the theory that Šešelj and Milošević were acting in collusion within a JCE, especially since this collusion between Vojislav Šešelj and Slobodan Milošević was undermined by General Života Panić's remarks recounted in Exhibit P01012.** This may go to proving that the Accused conducted his political campaign by himself and was assisted in this endeavour by some of his volunteers, as suggested by a number of witnesses, which is not to say, however, that the persecutions were part of the common purpose of the joint enterprise which was to force non-Serbs to leave that municipality. This will be further examined in the section on the crimes physically committed by the Accused (persecutions, deportation and forcible transfer).

Ultimately, to gain a better understanding of the JCE, it is necessary to examine Exhibit P00031 which is an essential piece of evidence consisting of the transcripts of **Vojislav Šešelj**'**s** testimony in the case of *The Prosecutor v. Slobodan Milošević*.

A detailed examination of the transcript pages shows that there was an *inter partes* debate on the alleged JCE between the Prosecutor (Mr **Nice**) and the witness under oath (**Vojislav Šešelj**), the Accused **Slobodan Milošević** and the judges.

This evidence (P 00031) is considerably more important than the words of a number of witnesses who were either victims, figures far removed from political power or witnesses employed by the Prosecution. Consequently, I am inclined to accord more probative value to this evidence.

According to the Prosecution, represented by Mr Nice,[1440] **Vojislav Šešelj** and **Slobodan Milošević** allegedly shared the common goal of creating a "**Greater Serbia**" and removing most of the non-Serb population from that area.

It was in this vein that during the trial of **Slobodan Milošević, Mr Nice** said the following:

> "*Although the wording differs slightly, the import of the purpose is the same to remove the majority of the non-Serb civilian population from areas which the Serbs wished to make or maintain as Serb-controlled territory. The Prosecution explained in its written submissions as well as during the hearing that the phrase 'Greater Serbia' was merely descriptive of the plan by the accused to create and maintain a centralised Serbian state*."

The Prosecution's theory relied on the premise that the Greater Serbia Movement, founded during the Second World War, was the precursor of, and driving force behind, the objective pursued by both **Vojislav Šešelj's** SRS and the SPS of **Slobodan Milošević**.[1441]

The Prosecution submitted that the theoretical foundations of the two parties diverged in certain respects, but in terms of achieving their goals, the two plans were very similar.[1442]

[1440] T. p. 43248.
[1441] T. p. 44240.
[1442] T. pp. 43255, 43260, 43262, 43263.

The Prosecution submitted that **Slobodan Milošević's regime** purportedly gave the Accused privileged access to the media to enable him to broadcast his message of hatred, thereby exploiting him for its own interests.[1443]

The Prosecution's view was challenged by both **Vojislav Šešelj** and **Slobodan Milošević**.

The concept of a "**Greater Serbia**" has a long history, as it was forged from the successive invasions of the Balkans by the Ottoman, Austrian and Russian empires. It is thought that the term "Greater Serbia" first appeared in a memorandum addressed to the Emperor of Russia in 1803. Later, Serbian intellectuals and political organisations used the expression on several occasions, and it was revived by **Vaso Čubrilović** and **Dragan Vasić** before being prohibited under the communist regime.

The idea of a "Greater Serbia" seems to run counter to the **Federation of Yugoslavia** in that it is first and foremost based on the idea of a **unified Serbian State,** whereas the Federation brought together states which did not necessarily have a Serbian majority. "**Greater Serbia**" was to be a centralised and united State which, while according considerable recognition for the rights of ethnic minorities, would abolish autonomous provinces.[1444]

"Greater Serbia" encompassed all "Serbian lands", namely territories with a Serb majority. According to the Accused, the Serbian people are not defined by their **religion** but by the **language** they speak: **Shtokavian**.[1445] There were **three dialects** in the former Yugoslavia:

- **Shtokavian**
- **Chakavian**
- **Kajkavian**

According to the Accused, all people speaking the **Shtokavian dialect** were **Serbs**, irrespective of their religion.[1446] In his opinion, throughout Serbian lands, all Serbs spoke the same language, Serbian, which is derived from Shtokavian.[1447] Thus, for the Accused, the "Croats" and the "Bosnians" are in reality Catholic Serbs and Muslim Serbs, and the creation of a **Greater Serbia**

[1443]T. pp. 44052, 44053.
[1444] T. p. 43322.
[1445] T. p. 43113.
[1446] T. p. 43217.

consisted in persuading the Croats and Muslims that they were part of the Serbian people.[1448] At this stage, it should be noted that he equates the **people** to the **language**.

"Serbian lands" did not correspond entirely to Yugoslavia.[1449] **Shtokavian** is spoken throughout Serbia, Bosnia and Herzegovina, Montenegro and in a large part of Croatia. This was the area which constituted the territorial base of a **Greater Serbia** as conceived by **Vojislav Šešelj**.

Thus "Greater Serbia" correlated to what the Accused renamed "**Serboslavia**", that is to say, a Yugoslavia from which Slovenia and the **Kajkavian part of Croatia** would be severed.[1450] **The Karlobag-Virovitica-Ogulin-Karlovac line** corresponded to the western border of **Greater Serbia** as imagined by the Accused. That line marked the extent of the "Serbian lands", to the West lay the three provinces of Zagreb, Križevci and Varaždin which formed Kajkavian Croatia, the cradle of the real ethnic Croats. That line is not a border as such, but rather seems to conform to a historical and linguistic vision of the region.[1451]

Thus, the issue underlying the Accused's testimony in the Milošević case concerns the meaning of the "common purpose" of the alleged JCE.

Is the existence of a common purpose limited to the Prosecution's demonstration that the alleged JCE members shared the intent to have a Serbian State which brought together all Serbs? Or, on the contrary, does the common purpose have to be specific and, for example, include a convergence of views as to the state model being espoused and the political ideology underlying it?

The Prosecution admits that the objective according to which all Serbs should live in one and the same State differs from the historical and philosophical concept of a Greater Serbia.

The Prosecution added that the Accused Slobodan Milošević never used the term "Greater Serbia" as such, nor was he ever associated with it. Owing to his position, Slobodan Milošević simply allowed individuals defending that concept, including Vojislav Šešelj, to discuss and espouse it.[1452]

[1447] T. p. 43219.
[1448] T. p. 43220.
[1449] T. p. 43219.
[1450] T. p. 43837.
[1451] T. p. 43437.
[1452] T. pp. 43224-43226.

However, for the Prosecution, the fact that **Slobodan Milošević's** objective was to allow all Serbs to live in the same State meant that the Accused's objective could be characterised **as a *de facto* Greater Serbia.**

In this respect, the Prosecution added: "*the practical effects for which the accused sought are similar in geographical scope to the effects of the implementation of a formal Greater Serbia plan of the kind that this witness might have wanted*."[1453] In fact, for the Prosecution, the determining factor is: "*the express desire to have all Serbs in one state,* de facto *Greater Serbia if you will, co-extensive geographical extension in practical terms with what had been achieved by those specifically espousing Greater Serbia*."[1454]

The Prosecution submitted furthermore that *"[o]nce the possibility for preserving federal Yugoslavia was gone […] then a second plan has to come - or doesn't have to come into effect, but it does come into effect, and that's the stage at which a Greater Serbia became the reality in his mind, we would argue.*"[1455]

That vision was challenged by both **Slobodan Milošević** and **Vojislav Šešelj**. The Prosecution's approach - as represented by **Mr Nice** - was to pinpoint the fact that all Serbs were living within the confines of one and the same State, Yugoslavia, which he identified with a Greater Serbia. This was a statement of fact and had been the case for as long as Yugoslavia had existed. It was a fact of life. "*It's a material fact.*"[1456]

According to **Slobodan Milošević**, such a conception of the "common purpose" is inconsistent with the fact that Yugoslavia brought the Serbian population together in one and the same State which had an international legal personality. He noted in this respect that "*Serbs in one state is no slogan. That was and had been a reality for a full 70 years, from the creation of Yugoslavia until 1991 [...]. And if Mr Nice accuses anyone of trying to preserve a state that was the only internationally recognised entity and a founding member of the United Nations from the First World War, then I suppose the list of those who can be accused of the same is really long*."[1457]

For his part, the Accused **Vojislav Šešelj** added that "*[th]e Serbian Radical Party made a geographical map of […] Greater Serbia, and from that map which we published countless times*

[1453] T. p. 43246.
[1454] T. p. 43249.
[1455] T. p. 43259.
[1456] T. p. 43240.

on the cover page of the colour back side of our Greater Serbia *magazine, one can say that the western border of the Greater Serbia is on the Karlobag-Ogulin-Virovitica line. That does not contain only territories where [Orthodox] Serbs are in the majority*."[1458]

He continued by stating that "*[n]o one ever expressed a position about territorial pretensions on the part of Serbia. Serbs in the [Croatian] federal territorial unit clearly said to the Croats, 'If you want to secede from Yugoslavia, we don't want to. We will remain in Yugoslavia.' […] This was stated clearly at the beginning of every war. 'We do not want to leave Yugoslavia, but you do.'*"[1459] *[…].What the Orthodox Serbs wanted was the preservation of Yugoslavia, not an enlarged Serbia. Most of [the]Serbs didn't even want a Greater Serbia. It was only the Serb Radical Party that wanted it*."[1460]

On that basis, according to **Slobodan Milošević**, the former Yugoslavia was a state which included all the Serbs and the disintegration of that state raised the **question of the political reconstitution of the Serbian people**. Thus with regard to the Prosecution's position in the *Milošević* case and the positions adopted by the Accused **Slobodan Milošević** and **Vojislav Šešelj**, the question of whether there was a common purpose or a criminal purpose could be put in the following manner:

Should this criminal purpose be defined by its ultimate objective, bringing all Serbs together into a common state, or should it be defined by the plan to set up a particular state model based on a specific political ideology?

In the first case, it could be said that there were **ideological differences** between **Vojislav Šešelj** and **Slobodan Milošević** but that it is, *prima facie*, possible that they shared a common purpose with others, the intended result of which was either the creation of a Serbian State, or the preservation of a state structure which included all the Serbs.

However, this concept comes up against **major obstacles** as it fails to take into account the pre-existence of **Yugoslavia** and is consequently inconsistent with the fact that all Serbs were, in reality, included in the Yugoslav State whose existence **Slobodan Milošević** was trying to preserve. That concept would also entail placing individuals, who had no more than **relatively sporadic**

[1457] T. p. 43264.
[1458] T. pp. 43274-43275.
[1459] T. p. 43275.
[1460] *Ibid.*

contact with each other, in the same enterprise as they pursued an ultimate objective **notwithstanding periodic conflicts of interest between them**.

In the second case, it would seem that the **goals pursued by Vojislav Šešelj and Slobodan Milošević were different**. For **Slobodan Milošević**, the goal was to preserve the pre-existing model of a federal state which would have allowed the Serbs to remain in the same state. For **Vojislav Šešelj**, on the other hand, it was to establish a **unified centralised state** bringing together lands which were historically Serbian and in which the inhabitants spoke the same language: **Shtokavian**. What is more, it is evident that **Vojislav Šešelj's** ultimate goal was to seize power, as can be clearly seen in document P1012.

Bearing in mind all these variables, a reasonable trier of fact could not find, beyond all reasonable doubt, that the Accused Šešelj had the same objective as other JCE members.

Therefore, I cannot conclude that the Accused participated in a JCE whose purpose was the permanent forcible removal, through the commission of crimes, of non-Serbs from a third of Croatia, large areas of the Republic of Bosnia and Herzegovina and some parts of Vojvodina in order to make these areas part of a new Serb-dominated State.

Consequently, I do not find him responsible under Article 7.1 of the Statute on the basis of JCE.

4.2. Commission

Commission of a crime means that the **perpetrator committed the *actus reus* of the offence**. However, this does not necessarily mean the physical perpetration of a crime. The case-law of the international criminal tribunals has developed the concept of "personal participation", which corresponds to commission without physical participation, as well as the idea of commission by omission. The Statute of the ICC has, for its part, introduced the concept of indirect commission, which is commission through another person.

The international criminal tribunals have adopted a broad interpretation of the concept of individual commission. They understand committing to mean the "***direct personal or physical participation** of an accused in the actual acts which constitute the material elements of a crime under the Statute*",

as defined in the *Vasiljević*[1461] and *Semanza* Judgements.[1462] The definition of individual commission was broadened in the Appeal Judgements rendered thereafter by the two criminal tribunals.

In the ***Gacumbitsi*** Appeal Judgement, the Appeals Chamber recalled that the term "committed" generally refers to the "*direct and physical perpetration*" of a crime by the offender himself. However, in the context of genocide, **direct and physical perpetration need not mean physical commission; other acts can constitute direct participation in the *actus reus* of the crime**.[1463] In that particular case, the Accused was physically present at the scene of the Nyarubuye Parish massacre. The Appeals Chamber noted that he "*directed*" the massacre and "*played a leading role in conducting and, especially, supervising*".[1464] It was he who personally directed the Tutsi and Hutu refugees to separate, and that action was as much an integral part of the genocide as the killings.[1465] Relying on these findings, the Appeals Chamber concluded that holding the Accused responsible for ordering and instigating did not fully capture his criminal responsibility. In fact, the Accused did not simply order and plan the genocide from a distance leaving it to others to execute his orders. On the contrary, he was present at the crime scene in order to supervise and direct the massacre and thus participated actively in genocide, notably by ordering the separation of the Tutsi refugees so that they could be killed. As a consequence, in the opinion of the Appeals Chamber, he should also be held responsible for commission.[1466]

In the Appeal Judgement of 12 March 2008 rendered in the ***Seromba*** case,[1467] the Appeals Chamber was a little more specific regarding the question of determining whether or not an Accused can be found guilty for commission even if he was not physically present when the crimes were committed. **It applies a "*legal standard*" for determining whether the Accused can be considered the principal perpetrator of the crime. The Chamber has to determine whether he approved and embraced as his own the decision to commit genocide, even though he did not physically commit the crimes.**[1468] In this case, **Athanase Seromba** had ordered a bulldozer driver to destroy the Nyange church where some 1,500 Tutsis had taken refuge and had shown him a weak point in the building wall so that it would collapse on to the persons inside.[1469] The Trial Chamber

[1461] *The Prosecutor v. Mitar Vasiljević,* Case IT-98-32-T, Judgement, 29 November 2002, para. 62.
[1462] *The Prosecutor v. Laurent Semanza*, Case ICTR-97-20-T, Judgement, 15 May 2003, para. 383.
[1463] *Sylvestre Gacumbitsi v. the Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, para. 60.
[1464] *Ibid.*
[1465] *Ibid.*
[1466] *Ibid.*, para. 61.
[1467] *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement, 12 March 2008.
[1468] *Ibid.*, para. 161.
[1469] *Ibid.*, paras 164 to 166 and 170.

found **Seromba** guilty of aiding and abetting the murder of the Tutsis as an act of genocide. The Appeals Chamber, for its part, held the Accused responsible for commission on that basis.[1470] It relied on the fact that **Seromba's** conduct was not limited to giving practical assistance or moral support and that he was a principal perpetrator, and not a mere aider and abetter, on account of his conduct. It likewise recalled that he had **the intent to commit that crime** and not merely to assist in its commission, and thus evinced the requisite *mens rea* for committing a crime.[1471]

In the ***Čelebići*** case, the Trial Chamber addressed the notion of commission through omission. In that case, **Zdravko Mucić** had omitted to provide the detainees in the Čelebići camp with food, water, health care and toilet facilities, and was thus guilty of wilfully causing great suffering or serious injury to body or health of the detainees. Consequently, the Chamber found him directly responsible for the inhumane conditions in the Čelebići prison-camp.[1472] This was thus an **intentional omission for which he incurred responsibility for the commission of the crime.**

In the ***Blaškić*** case, the Appeals Chamber held that a **commander incurs responsibility for the perpetration of a crime by omission if he fails to act or punish a subordinate**.[1473] It thus held that the commission of a positive act was not a requirement for responsibility for commission to be incurred. In this case the Appeals Chamber noted that, with regard to the use of civilians as human shields, General **Blaškić** was aware that persons were under the control of his subordinates and he had a duty to care for them.[1474] It stated that "*[t]he Appellant was under a duty, imposed upon him by the laws or customs of war, to care for the protected persons put in danger, and to intervene and alleviate that danger. He did not. The consequential breach of his duty, leaving the protected persons exposed to danger of which he was aware, constituted an intentional omission on the part of the Appellant*."[1475]

Article 25 (1) (a) of the ICC Statute refers to indirect perpetration as [acting] "*through another person, regardless of whether that other person is criminally responsible*".[1476] The Court's recent case-law makes plain the fact that an accused may be considered the principal perpetrator of a crime that he did not physically commit when he allows another person to perpetrate the crime. In its decision on the confirmation of the charges in the ***Katanga Ngudjolo Chui*** case, Pre-Trial Chamber

[1470] *Ibid.*, paras 171-172.
[1471] *Ibid.*, paras 172-173.
[1472] *The Prosecutor v. Zejnil Delalić, Zdravko Mucić "Pavo", Hazim Delić, Esad Landžo "Zenga"*, Case No IT-96-21-T, Judgement, 16 November 1998, para. 1123.
[1473] *The Prosecutor v. Tihomir Blaškić*, Case IT-95-14-A, Appeal Judgement, 29 July 2004, para. 663.
[1474] *Ibid.*, paras 662-663.
[1475] *Ibid.*, para. 668.
[1476] Rome Statute of 17 July 1998.

I stated that *"[t]he commission of a crime through another person is a model of criminal responsibility recognised by the world's major legal systems. The principal (the 'perpetrator-by-means') uses the executor (the direct perpetrator) as a tool or an instrument for the commission of the crime*."[1477] It thus introduced the concept of control, holding that **the perpetrator of the crime is the person who has "*control over the crime*"**, which he commits physically, jointly with another or through another person.[1478] The Chamber however pointed out that this does not necessarily involve direct control. In fact, it noted that if the individual "*acts jointly with another individual – one who controls the person used as an instrument – these crimes can be attributed to him on the basis of mutual attribution*".[1479] Pre-Trial Chamber I had previously addressed the issue of control over a crime in the same way in the ***Lubanga*** case, and considered that this concept enabled it to distinguish between principals and accessories to a crime.[1480] It thus stated that "*[t]he most typical manifestation of the concept of control over the crime, which is the commission of a crime through another person, is expressly provided for in Article 25 (3) (a) of the Statute*."[1481]

4.2.1. The Prosecution's arguments

The Prosecution Closing Brief devotes one paragraph to **Vojislav Šešelj's** responsibility for commission. It states that the Accused **physically** committed **persecution** (Count 1) in **Šid, Vukovar** and **Hrtkovci,** as well as **deportation and forcible transfer (Counts 10 and 11) in Hrtkovci**.[1482] The Prosecution characterises this form of responsibility by relying on **three speeches made by Vojislav Šešelj** (notably those in Vukovar and Hrtkovci), **which were so vitriolic that it can be concluded that they each independently constitute Vojislav Šešelj's physical commission of persecution through hate speech.**[1483] In Vukovar, he stated: "*Not a single Ustasha must leave Vukovar alive.*"[1484] The Prosecution claimed that the message was clear: "*[A]ll Croats were enemies who should fear for their security and would be harmed if they stayed where his volunteers and sympathizers were*."[1485] According to the Prosecution, the Vukovar speeches were given a few days before the Serb takeover of the town, and numerous crimes were

[1477] *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case ICC-01/04-01/07, "Decision on the Confirmation of Charges", Public Redacted Version, 30 September 2008, para. 495.
[1478] *Ibid.*, para. 490.
[1479] *Ibid.*, para. 493.
[1480] *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Case ICC-01/04-01/06, "Decision on the Confirmation of Charges", Public Version with Annex 1, 29 January 2007, para. 338.
[1481] *Ibid.*, para. 339.
[1482] *The Prosecutor v. Vojislav Šešelj*, Case IT-03-67-T, Prosecution Closing Brief, 5 February 2012, para. 588.
[1483] *Ibid.*, para. 562.
[1484] *Ibid.*
[1485] *Ibid.*

subsequently committed by the Serbian forces, including the **Šešeljevci.**[1486] In Šid, **Vojislav Šešelj** stated: "*This entire area will soon be cleared of Ustasha*."[1487] With regard to Hrtkovci, the Prosecution claims that **Vojislav Šešelj** gave a speech on 6 May 1992 at a political rally held during the Serbian celebration of St George's day. He gave a discriminatory speech before a large audience of Croats and Serbs which other Croatian inhabitants heard about by word of mouth and through the press.[1488] According to the Prosecution, **this speech directly caused a large number of Croats to leave the village, as well as causing the displacement of other Croats from Hrtkovci and surrounding areas**.[1489] **Vojislav Šešelj stated** that: "*In this village, too, in Hrtkovci, in this place in Serbian Srem, there is no room for Croats. Who are the only Croats for whom there is room among us? […] There will be enough buses, we will drive them to the border of Serbian territory and they can walk on from there, if they do not leave before of their own accord. I firmly believe that you, Serbs from Hrtkovci and other villages around here, will also know how to preserve your harmony and unity, that you will promptly get rid of the remaining Croats in your village and the surrounding villages*."[1490] Furthermore, the Prosecution claimed that **Vojislav Šešelj** described the Croats as "*disloyal*", asserting that they were enemies of the Serbian people, and declared that mixed marriages should be dissolved and advocated the use of violence.[1491] He suggested that the Serbs should move into the homes of Croats in Hrtkovci, while the Croats would go and live in Croatia, whether they wanted to or not.[1492] According to witnesses, **Vojislav Šešelj** read out a list of names of prominent Croats whom he considered disloyal, and he stated that his party knew the names of those from Hrtkovci who were members of the Croatian National Guard and who should therefore leave the village with their families.[1493] The Prosecution states that the Croats took the Accused's threatening words extremely seriously, especially because of what had happened in Vukovar and in some Bosnian towns.[1494] Subsequently, the Croatian population started leaving Hrtkovci, and the Prosecution quotes numerous witnesses who mentioned queuing in embassies so that they could obtain documents to move to Croatia with their families.[1495] According to the Prosecution, after the rally of 6 May 1992, the supporters and associates of **Vojislav Šešelj** led a campaign of discrimination, harassment and intimidation directed against the Croats in Hrtkovci who were harassed over the telephone, threatened with violence, death and bodily harm, and put

[1486] *Ibid.*, para. 564.
[1487] *Ibid.*, Annex p. 6.
[1488] *Ibid.*, para. 485.
[1489] *Ibid.*, para. 486.
[1490] *Ibid.*, para. 496.
[1491] *Ibid.*, para. 499.
[1492] *Ibid.*, para. 500.
[1493] *Ibid.*, para. 501.
[1494] *Ibid.*, para. 506.
[1495] *Ibid.*, paras 510 to 512.

under physical and psychological pressure so that they would abandon their homes.[1496] This caused the Croats to leave en masse. The data provided suggests that the Croatian population declined by 76.3% in 1992, with an overwhelming majority [leaving] between May and June which, according to the Prosecution, was a direct result of **Vojislav Šešelj's** speeches.[1497]

4.2.2. Vojislav Šešelj's arguments

In his Final Brief, **Vojislav Šešelj's** position is based on the fact that nowhere in the ICTY Statute is discriminatory or hate **speech** characterised as a criminal act. In his opinion, it is therefore impossible to indict a person for having physically committed a crime by relying on the speeches that person gave. This means that his speeches cannot be considered as the ***actus reus*** of the commission of the crimes of persecution, deportation or forcible transfer, as alleged by the Prosecution.[1498] With regard to **Hrtkovci, Vojislav Šešelj** claims that what the Prosecution characterises as persecution, deportation and forcible transfer was in reality **an initiative to exchange property**.[1499] In his words, there was an influx of Serbian refugees coming from territories in western Slavonia, and these refugees exchanged their property with the Croats in Hrtkovci.[1500] Regarding the speech he gave, he stated that his objective was "*not an order or anything that could be interpreted as an incitement to violence; rather, it was purely a pre-election political speech advertising the party and calling on voters to vote for the Serbian Radical Party in 20 days*".[1501] Thus, **Vojislav Šešelj claims that** he never called on his followers to take action of any kind, and he could not influence the local government because it was in the hands of another political party.[1502] With regard to the speech in Vukovar, **Vojislav Šešelj** stated that it had never taken place and cited moreover the *Mrkšić, Šljivančanin* and *Radić* appeal judgements which examined the crimes against humanity committed in **Vukovar** and established definitively that no such crimes had taken place.[1503] With regard to Šid, **Vojislav Šešelj** relied on a witness statement which established that the first rally of the Serbian Radical Party took place on **15 May 1992** as part of the election campaign and not, as the Prosecution alleged, during the **summer of 1991**. He stated that the Municipal Board of the Serbian Radical Party was established on 5 November 1991, which

[1496] *Ibid.*, paras 513 to 519.
[1497] *Ibid.*, paras 520 to 523.
[1498] *The Prosecutor v. Vojislav Šešelj*, Case IT-03-67, Professor Vojislav Šešelj's Final Brief, 30 January 2012, p. 95.
[1499] *Ibid.*, pp. 163 and 167.
[1500] *Ibid.*, p. 159.
[1501] *Ibid.*, p. 441.
[1502] *Ibid.*
[1503] *Ibid.*, pp. 70 and 316.

means that the witness in question could not have left for combat either because of his speech or because of the Serbian Radical Party.[1504]

4.2.3. Conclusion

According to the case-law of the Appeals Chamber, the perpetrator must commit the *actus reus* of the offence for that form of responsibility to be incurred.

The Prosecution considers that the Accused physically committed persecution (Count 1) and deportation and forcible transfer (Counts 10 and 11).

With regard to Counts 10 and 11, I have indicated in this Opinion that Vojislav Šešelj held no official position, which means that he could not have committed the crimes of forcible transfer and deportation, as he had neither signed any order nor conducted any deportation or transfer operations using the force of arms.

With regard to Count 1 of persecution, the Prosecution claimed that the *actus reus* had in fact been fulfilled in Šid, Vukovar and Hrtkovci. For reasons explained in one of the sections of my Opinion, I consider that there are no grounds to refer to **Šid** and **Vukovar** as sites where the Accused committed persecution.

On the other hand, the case of **Hrtkovci** is more sensitive. However, his speech did not have an immediate impact, especially as **Slobodan Milošević's police** came to the location to maintain order. I do not see how the *actus reus* could be attributed to **Vojislav Šešelj** under such circumstances**.**

Therefore, I cannot hold the Accused responsible for commission.

4.3. Aiding and abetting

The concept of **aiding and abetting** in the statutes of the ICTY and the ICTR provides for **someone** who aids the principal perpetrator of a crime. Whereas the statutes of the international criminal tribunals consider the two terms coextensive, the Statute of the ICC tends to make a distinction

[1504] *Ibid.*, p. 476.

between them. In fact, the provisions on aiding and abetting of Article 25 (3) of the Rome Statute provide as follows:

"*In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:*

[…]

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; […]"

Thus the Rome Statute makes a distinction between **complicity through collaboration, that is to say, through aiding, abetting or assisting (paragraph (c)) and inducing in the sense of inciting, which therefore amounts to instigation under Article 25 (3) (b).**[1505]

This allows for a **clear distinction between aiding and abetting and inciting**, in the sense that a person who aids and assists, supports the **principal perpetrator**, who already has the intent to commit the crime, and is **merely abetting him**. On the other hand, the instigator "*induces*" the commission of the crime, which means that the **principal perpetrator did not necessarily possess the clear intent to commit the crime before being incited to do so by the instigator, even though he may have already entertained the idea**.[1506]

Article 7 (1) of the ICTY Statute provides that *"[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime*." The same provisions are contained in ICTR Article 6 (1). However, in the *Akayesu* Judgement, the Trial Chamber drew a distinction between **aiding** and **abetting**. It thus stated the following: "*Aiding and abetting, which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto. The issue here is whether the individual criminal responsibility provided for in Article 6 (1) is incurred only where there was aiding and abetting at the same time. The Chamber is of the opinion that either aiding or abetting alone is sufficient to render the perpetrator criminally liable*."[1507] Subsequent case-law of the international criminal tribunals,

[1505] O DE FROUVILLE, *Droit international pénal. Sources, Incriminations, Responsabilité*, published by A. Pedone, 2012, p. 390.
[1506] *Ibid.*, p. 391.
[1507] *The Prosecutor v. Jean-Paul Akayesu*, Case ICTR-96-4-T, Judgement, 2 September 1998, para. 484.

however, made it possible to clearly distinguish between aiding and abetting and instigation as modes of participation and to establish the *mens rea* and *actus reus* required to incur such responsibility.

The ***Orić*** Judgement is quite clear on the distinction between **aiding and abetting and instigation.** The idea that the Trial Chamber develops in the Judgement is that instigation, contrary to aiding and abetting, must be more than merely facilitating the perpetration of the primary offence. Although the plan to commit the crime is not necessarily generated by the instigator, the principal perpetrator is finally moved to take action as a result of instigation. On the other hand, **in the case of aiding and abetting, the principal perpetrator has already decided to commit the crime, and the accomplice does no more than provide him with moral or logistical support**.[1508] It further states that **aiding and abetting** is as a rule considered a less grave mode of participation.[1509] In addition, the Chamber makes clear that so long as the principal perpetrator is not definitely determined to commit the crime, any acts of requesting, convincing or encouraging commission of the crime may constitute instigation (and even qualify as ordering, if a superior-subordinate relationship exists). As soon as the principal perpetrator is already prepared to commit the crime but may still need or appreciate moral support or assistance in performing the crime or aid in its planning, preparation or execution to make the crime possible or at least to facilitate it, that constitutes aiding and abetting.[1510]

In the ***Akayesu*** case, the Trial Chamber declared that **it is necessary to prove the commission of a crime by the principal perpetrator**, as aiding and abetting is an accessory form of responsibility.[1511] It is therefore necessary to establish beyond any reasonable doubt that a crime was committed in order to subsequently **hold the accessory responsible**. However, the Chamber makes clear that the **accomplice can be tried even when the guilt of the principal perpetrator has not been proven** or if he or she has not been identified.[1512] It further observes that what follows from this conclusion is that the same person cannot be both the **accomplice** and the **principal perpetrator.** The Trial Chamber states: "*An act with which an accused is being charged cannot, therefore, be characterized both as an act of genocide and an act of complicity in genocide as pertains to this accused. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act*."[1513]

[1508] The *Prosecutor v. Naser Orić*, Case No IT-03-68-T, Judgement, 30 June 2006, para. 271.
[1509] *Ibid.*, para. 281.
[1510] *Ibid.*
[1511] *The Prosecutor v. Jean-Paul Akayesu*, Case ICTR-96-4-T, Judgement, 2 September 1998, para. 529.
[1512] *Ibid.*, para. 531.
[1513] *Ibid.*, para. 532.

In the **Tadić** case, the Trial Chamber raised the question of the definition of the physical element in aiding and abetting. The Trial Chamber first focused on the required degree of participation,[1514] relying *inter alia* on the Draft Code of Crimes of the International Law Commission and its commentary,[1515] as well as on the examination of certain post-Second World War cases.[1516] It thus declared that **the accomplice's participation must be substantial and must have an effect on the perpetration of the crime.**[1517] The Trial Chamber noted in the cases it referred to that if the accused had not provided such **substantial assistance**, the crimes would probably not have been committed in the same way. The Trial Chamber added that "*even in these cases, where the act in complicity was significantly removed from the ultimate illegal result, it was clear that the actions of the accused had a substantial and direct effect on the commission of the illegal act, and that they generally had knowledge of the likely effect of their actions*."[1518] The Chamber then addressed the *actus reus* proper, which consists of **assistance by words or acts that lend encouragement or support to the principal perpetrator of the crime**.[1519] It further stated that it is not necessary for the assistance to have been provided at the time the crime was committed and that the actual physical presence at the time the crime was perpetrated is not necessary to incur responsibility for aiding and abetting.[1520] **However, mere physical presence may be considered as being aiding and abetting if it is proven that it had a substantial effect on the commission of the crime**.[1521]

In the ***Furundžija*** case, the Trial Chamber conducted a more focused review of the notion of a **causal link** between the aid and assistance provided by an accomplice and the commission of the crime by the principal perpetrator. It stated that it was thus necessary for **the acts of the Accused to be such that they significantly influence the perpetration of the crimes by their principal**

[1514] *The Prosecutor v. Duško Tadić*, Case IT-94-1-T, Judgement, 7 May 1997, paras 681 to 689.
[1515] Article 2 (3) (d) of the ILC Draft Code of Crimes against the Peace and Security of Mankind of 1996: "An individual shall be responsible for a crime in article 17, 18, 19 or 20 if that individual **knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime**, including providing the means for its commission," (emphasis added). The commentary notes that "the accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way," ILC Draft Code, p. 24.
[1516] For example, a German tribunal in the *Auschwitz* trial considered that the fact that the accused Robert Mulka obtained Zyklon B gas and participated in the construction of the gas chambers – thereby providing substantial assistance making the mass extermination of the Jews possible – made him an accomplice in murder by incineration. *See* Vol. II, *War Crimes Reports*, p. 418. Similarly, a French tribunal considered that by providing a list of names to the German authorities, a Nazi party administrator made a substantial contribution to the perpetration of a war crime. *Gustav Becker, Wilhelm Weber and 18 Others*, Vol. VII, *Law Reports* 67, 70.
[1517] *The Prosecutor v. Duško Tadić*, Case IT-94-1-T, Judgement, 7 May 1997, para. 688.
[1518] *Ibid.*
[1519] *Ibid.*, para. 689.
[1520] *Ibid.*, paras 691-692.
[1521] *Ibid.*, paras 689-690.

perpetrators.[1522] Nevertheless, there is no requirement that assistance constitute a *sine qua non* condition of the crime. Therefore, the Chamber found that the *actus reus* of aiding and abetting consists of practical assistance, encouragement or moral support that has a **substantial effect** on the perpetration of the crime.[1523]

The ***Mrkšić*** Appeal Judgement focuses more particularly on the psychological element of aiding and abetting in relation to complicity by omission. The Appeals Chamber stated that the fact that omission must be directed to assist, encourage or lend moral support to the perpetration of a crime forms part of the *actus reus* and not the *mens rea* of aiding and abetting.[1524] It thus found that the *mens rea* required for complicity by omission implies that **the aider and abettor must know that his omission assists in the commission of the crime** of the principal perpetrator and that he must **be aware of the essential elements of the crime** which was ultimately committed by the principal. However, the Chamber further noted that it is not necessary for the aider and abettor to know the precise crime that was intended and was actually committed. If the Accused was aware that one of a number of crimes would probably be committed, and one of those crimes is ultimately committed, he has intended to facilitate the commission of that crime and, therefore, will be found guilty for aiding and abetting.[1525]

The Appeals Chamber further recalls that it had previously rejected an elevated *mens rea* requirement for aiding and abetting, namely the proposition that the aider and abettor needs to have intended to provide assistance, or at a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.[1526]

On 28 February 2013, the Appeals Chamber rendered an Judgement in the ***Perišić*** case wherein it examined in detail the conditions for holding an accused responsible for aiding and abetting. It recalled firstly the notion of "[acts] **specifically directed […] to the perpetration of a […] crime**", which they defined as a constituent element of aiding and abetting responsibility. It relied on the **Tadić** Judgement in which a distinction was made – on the basis of **specific direction** – between the modes of responsibility of aiding and abetting and that of a joint criminal enterprise (JCE): "*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,*

[1522] *The Prosecutor v. Anto Furundžija*, Case IT-95-17-1/T, Judgement, 10 December 1998, para. 233.
[1523] *Ibid.*, para. 235.
[1524] *The Prosecutor v. Mile Mrkšić & Veselin Šljivančanin*, Case No 95-13/1-A, Appeal Judgement, 5 May 2009, para. 159.
[1525] *Ibid.*
[1526] *Ibid.*

wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime."[1527] Furthermore, the Chamber noted that not a single Appeal Judgement appears to have departed from this view, even if the formulations used may have differed, and that the ICTR and other tribunals have also adopted the case-law on specific direction.[1528] Thus, the Chamber first established that **the notion of "specific direction" constitutes the necessary link between assistance provided by an accused and the crime committed by the principal perpetrators**.[1529] It follows that a finding of guilt for aiding and abetting is not possible if **specific direction** has not been proven beyond any reasonable doubt.

The Chamber further noted that previous appeal judgements did not necessarily conduct an in-depth analysis of specific direction. However, it noted that this may be explained by the fact that prior convictions for aiding and abetting **involved acts that were in close geographical proximity to the crimes committed by the principal perpetrators,** which implicitly demonstrated the existence of specific direction. Where an Accused is not physically present at, or proximate to, the scene of a crime, **the Chamber held that explicit consideration of specific direction was required**.[1530] In such cases, it is necessary to consider **the individual circumstances of the case,** although the Chamber's jurisprudence does offer some guidance such as, for example, the significant temporal distance between the actions of the Accused and the crime he or she allegedly assisted. This does in fact decrease the likelihood of a connection between the crime and the accused individual's actions.[1531]

In this case, the Appeals Chamber considered that the Trial Chamber committed **an error of law** when it failed to examine whether specific direction had been proven.[1532] The Chamber noted that **the assistance provided by Perišić was remote from the relevant crimes** committed by the principal perpetrators. The VRS was independent of the VJ, and the two armies were based in two separate geographical regions.[1533] In addition, the Trial Chamber did not prove that **Perišić** was physically present at the scene of the crimes. Accordingly, the Chamber **ought to have conducted an explicit analysis** to prove that there was **specific direction**.[1534]

[1527] *The Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-A, Appeal Judgement, 28 February 2013, para. 26.
[1528] *Ibid.*, paras 28-29.
[1529] *Ibid.*, para. 37.
[1530] *Ibid.*, paras 38-39.
[1531] *Ibid.*, para. 40.
[1532] *Ibid.*, para. 41.
[1533] *Ibid.*, para. 42.
[1534] *Ibid.*

The Appeals Chamber noted that the Trial Chamber had found that the VRS was not *de jure* or *de facto* subordinated to the VJ, as it had a separate command structure.[1535] It accepted that **Perišić** was the highest-ranking officer in the VJ and was responsible for combat preparations and organising VJ operations. However, he was subordinated to the President of the FRY, and it was the SDC that took the final decisions concerning the VJ.[1536] Accordingly, the SDC took the decision to provide VJ assistance to the VRS even before **Perišić** assumed the position of Chief of General Staff, but also during the entire period of his tenure. The Accused actively participated in the meetings and had the authority to administer assistance to the VRS, although the authority to decide on the provision of assistance rested with the SDC.[1537]

Nevertheless, the Appeals Chamber acknowledged that all of these findings did not in themselves exempt **Perišić** from criminal liability. It considered that it was necessary to analyse the SDC policy of assisting the VRS in order to figure out whether this facilitated the commission of criminal acts.[1538] It first noted that the Trial Chamber ultimately concluded that the **VRS was not a criminal organisation** but an army fighting a war. Although the VRS strategy was linked to crimes against civilians, not all of its activities were criminal in nature.[1539] In the light of these elements, the Appeals Chamber considered that **a policy of providing assistance to the VRS's overall war effort did not in and of itself demonstrate that assistance provided by Perišić was specifically directed at facilitating the commission of crimes** by the VRS in Sarajevo and Srebrenica.[1540]

The Appeals Chamber noted that while the Trial Chamber took the **volume** of assistance provided to the VRS into consideration, this does not necessarily allow one to infer that it was specifically directed at the commission of crimes.[1541] Volume is an element of circumstantial evidence that may show that crimes were facilitated, but **a reasonable interpretation would be that large-scale military assistance was provided to support the war effort, not crimes.** Thus, the claim that the assistance tended to go towards or was specifically directed at the commission of the crimes cannot be the only possible finding.[1542]

The Appeals Chamber then addressed the exact role of General **Perišić** in order to determine whether he confined himself to implementing the SDC policy of assisting the VRS or took separate

[1535] *Ibid.* para. 46.
[1536] *Ibid.* para. 49.
[1537] *Ibid.* para. 50.
[1538] *Ibid.* para. 51.
[1539] *Ibid.* para. 53.
[1540] *Ibid.*
[1541] *Ibid.* para. 56.
[1542] *Ibid.* paras 57-58.

measures, independently of the SDC, directed at facilitating the crimes. The Appeals Chamber noted that the evidence does not suggest that he recommended that the assistance provided should be specifically directed at facilitating the crimes. At SDC meetings, he spoke out in favour of sustaining aid to the VRS and of adopting financial measures to facilitate this aid, but there is no evidence that he supported the provision of assistance specifically directed at facilitating VRS criminal activities. The Appeals Chamber thus found that **Perišić's intention was to assist the general VRS war effort**.[1543] Although he enjoyed considerable discretion in providing VJ assistance, and could have used this power to direct this aid towards VRS criminal activities, the Appeals Chamber, after reviewing the evidence, held that **Perišić** quite simply directed assistance towards the war effort within the parameters set by the SDC.[1544]

In its analysis of the precise categories of aid provided by the Accused, the Appeals Chamber found that neither **the secondment of soldiers** nor **the provision of logistical aid** seemed **incompatible with the conduct of lawful military operations**. Although the Accused was behind the establishment of the 30th Personnel Centre, which provided practical assistance to the VRS and facilitated the integration of personnel, according to the Appeals Chamber, there is no evidence that this assistance was provided for the specific purpose of facilitating the commission of crimes.[1545] Similarly, even if the VJ provided the VRS with substantial aid in the form of materiel and military equipment, as well as with military training and communications assistance – all of which was administered by **Perišić** – the Appeals Chamber held **that evidence proving a substantial contribution does not necessarily demonstrate specific direction towards the commission of crimes**.[1546] The evidence in fact suggests that **Perišić** reviewed the requests from the VRS as a whole, and that the aid the VJ provided was distributed to numerous locations in Bosnia and Herzegovina in order to assist the general VRS war effort.[1547] The Chamber also noted that **Perišić** refused requests for assistance submitted outside of official channels and urged the SDC to punish VJ personnel who were providing unauthorised assistance.[1548] The Appeals Chamber thus found that the Prosecution had failed to identify any evidence suggesting that **Perišić** had specifically directed assistance towards VRS crimes committed in Sarajevo and Srebrenica.[1549] Finally, the Appeals Chamber recalled that **proving knowledge of the crimes does not by itself establish specific direction**. In its opinion, the indicia demonstrating that **Perišić** knew of the VRS crimes in

[1543] *Ibid.*, para. 60.
[1544] *Ibid.*, para. 61.
[1545] *Ibid.*, para. 63.
[1546] *Ibid.*, para. 65.
[1547] *Ibid.*, para. 66.
[1548] *Ibid.*, para. 67.
[1549] *Ibid.*

Sarajevo and Srebrenica may serve as circumstantial evidence of specific direction, **however, a finding of specific direction must be the sole reasonable inference after reviewing the totality of the evidence**.[1550] In the light of this evidence, it considered that **Perišić** may have known of crimes committed by the VRS, but the VJ aid he facilitated was directed towards the general **war effort** rather than towards the **commission of these crimes**.[1551]

The Appeals Chamber thus found that the assistance from one army to another army's war efforts is insufficient in itself to trigger individual criminal responsibility for individuals who provided such aid, absent proof that it was specifically directed towards the commission of crimes.[1552] **As specific direction is an element of the *actus reus* of aiding and abetting liability, it is necessary to establish an adequate nexus between an individual's acts of aiding and abetting and the crimes committed if an accused individual is to be held criminally liable**.[1553] With regard to **Perišić's** acts, the existence of such a link has not been proven beyond all reasonable doubt. Therefore, the Chamber did not hold **Perišić** liable for aiding and abetting. Counts 1, 2, 3, 4, 9, 10, 11 and 12 were dismissed due to the absence of a legal basis.[1554]

***Šainović* case-law**

In the **Šainović Appeal Judgement** rendered on 23 January 2014, the ICTY Appeals Chamber had further occasion to examine the criteria required for perpetrated acts to come under the form of *aiding and abetting* liability.

According to the Defence, the Trial Chamber **erred** in failing to determine whether the alleged acts or omissions were **specifically** directed to assist the commission of deportation and forcible transfer. The Prosecution, however, stated that specific direction was not required as an element of the *actus reus* of aiding and abetting liability and that the Appeals Chamber should depart from its findings in the Appeal Judgement recently rendered in the Perišić case.

In this case, the Appeals Chamber chose to review the conclusions in its Appeal Judgement in the **Perišić case** according to which "**no conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt**".[1555] In contrast to

[1550] *Ibid.*, para. 68.
[1551] *Ibid.*, para. 69.
[1552] *Ibid.*, para. 72.
[1553] *Ibid.*, para. 73.
[1554] *Ibid.*, para. 74.
[1555] 1618.

other decisions it had rendered on that mode of responsibility, the Appeals Chamber recognised that there was a divergence in terms of the legal standards used. To resolve this divergence, the Appeals Chamber was resolved to determine "which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice".[1556]

In this regard, the Appeals Chamber examined, in particular, its prior case-law, the case-law of the ICTR and customary international law so as to ascertain the legal standard applicable to the concept of *specific direction*. Furthermore, the Appeals Chamber conducted an exhaustive and comparative examination of judgements rendered after the Second World War, as well as of the jurisprudence of domestic courts.

Based on that analysis, the Appeals Chamber set aside *specific direction* as a criterion for determining aiding and abetting liability. Relying in particular on the Furundžija Appeal Judgement, it based this form of responsibility on **a substantial contribution, on the one hand, and, on the other, on knowledge (either implicit or explicit) of the criminal activities**.

The Appeals Chamber also dismissed the possibility of there being a general principle of applicable law in this case on the grounds that the ICTY and ICTR case-law which analyses this form of responsibility does not explicitly consider this criterion, nor do national courts provide any guidelines.[1557]

4.3.1. The Prosecution's arguments

The Prosecution charges **Vojislav Šešelj** with having aided and abetted the commission of crimes on the basis of the speeches he gave and on the recruitment of volunteers from his party for the perpetration of those crimes.[1558]

According to the Prosecution, the *actus reus* of aiding and abetting is based on the fact that **Vojislav Šešelj was present and provided moral support at the crime bases**, and that the perpetrators of those crimes were in numerous instances the **Šešeljevci**.[1559] The Accused's acts had a substantial effect, whether during his visits to the front lines or when directing the SRS War Staff

[1556] 1622.
[1557] 1644.
[1558] *The Prosecutor v. Vojislav Šešelj*, Case IT-03-67-T, Prosecution Closing Brief, 5 February 2012, para. 603.
[1559] *Ibid.*, para. 605.

in Belgrade.[1560] **Vojislav Šešelj's** conduct constituting aiding and abetting is based on his **speeches advocating persecution, the use of force and ethnic separation**.[1561] The Prosecution states that this constituted moral support and justification and legitimisation of the crimes already committed, as well as encouragement to commit others.[1562] According to the Prosecution, **Vojislav Šešelj** also aided and abetted by **recruiting, arming, training and deploying troops**, the ***Šešeljevci,*** who in a number of cases directly committed the crimes.[1563] Furthermore, it noted that the Accused continued to support the volunteers he had recruited after their deployment by visiting them in the field.[1564] **Vojislav Šešelj** also redeployed his volunteers to other conflict areas despite it being established that they were involved in the commission of crimes, which constituted encouragement to commit other crimes.[1565]

In its Closing Brief, the Prosecution also mentions the specific locations of the crimes. For example, **Vojislav Šešelj** is accused of having deployed his volunteers to **Vukovar** as well as of having visited the front line shortly before the town was taken, thus encouraging the commission of crimes in the field.[1566] He gave a speech in Zvornik in May 1992, urging the "clean up" of the left bank of the Drina. The **Šešeljevci** were sent there and perpetrated crimes.[1567] **Vojislav Šešelj** later publicly endorsed those crimes, thus encouraging the commission of further ethnic cleansing.[1568] With regard to the Sarajevo area, the Accused participated in the training and deployment of prominent SRS commanders through the SRS War Staff. He publicly supported and endorsed them and made visits in the field to support the troops.[1569] In Mostar and Nevesinje, **Vojislav Šešelj** gave hate speeches against Muslims**,** he deployed the **Šešeljevci** to those towns and visited the region to lend his support. In this respect, the Prosecution notes that the SRS volunteers were accused of having killed, detained and tortured Muslim civilians in those regions.[1570] Lastly, **Vojislav Šešelj** visited Hrtkovci, where he lent his moral support and encouraged the physical perpetrators of the crimes committed there.[1571]

With regard to the *mens rea* of aiding and abetting, **the Prosecution alleges that Vojislav Šešelj was aware of the likelihood that crimes would be committed on account of his actions and**

[1560] *Ibid.*
[1561] *Ibid.*, para. 606.
[1562] *Ibid.*
[1563] *Ibid.*
[1564] *Ibid.*
[1565] *Ibid.*
[1566] *Ibid.*
[1567] *Ibid.*
[1568] *Ibid.*
[1569] *Ibid.*
[1570] *Ibid.*

words.[1572] It deems that it is not necessary for **Vojislav Šešelj** to have known that the crimes were actually committed (in terms of precise location, number of victims, date), but it is sufficient that he was aware of the type of crimes likely to be committed on account of his conduct (deportation, forcible transfer, murder, torture, cruel treatment, destruction and plunder of property and other persecutions).[1573] According to the Prosecution, **Vojislav Šešelj** was aware of his influence with the SRS volunteers, as well as of the fact that they heard his words, and this encouraged them to commit criminal acts which demonstrates that he knew that he was aiding and abetting the commission of the crimes by the physical perpetrators.[1574] Consequently, the Prosecution considers that **Vojislav Šešelj** is responsible under Article 7 (1) for aiding and abetting the crimes charged in the Indictment.[1575]

4.3.2. Vojislav Šešelj's arguments

Vojislav Šešelj claims that there is no evidence that he expressed sympathy for the commission of criminal acts. In his opinion, the evidence demonstrates that, on the contrary, he was **profuse** in his **criticism of** the perpetrators and requested that they should be held to account for their actions. He noted, in particular, that he welcomed the arrests of the "Yellow Wasps" in Zvornik, that in Bijeljina he gave a statement regarding activities targeting Muslims, and that he was constantly criticising **Arkan** and his actions.[1576] He also dismisses the Prosecution's arguments that he was present at the crime scenes in order to lend his support.[1577] He claims moreover that **he cannot be considered to have had the status of superior** with respect to the principal perpetrators of the crimes. In his opinion, he was **politically persecuted** by **Slobodan Milošević's** regime, which made it impossible for him to have any power or authority over the events that took place and the individuals participating in them.[1578] For example, he did not have the means to discipline the SRS volunteers.[1579]

4.3.3. Conclusion

[1571] *Ibid.*
[1572] *Ibid.*, para. 607.
[1573] *Ibid.*
[1574] *Ibid.*
[1575] *Ibid.*, para. 608.
[1576] *The Prosecutor v. Vojislav Šešelj*, Case IT-03-67, Professor Vojislav Šešelj's Final Brief, 30 January 2012, p. 43.
[1577] *Ibid.*
[1578] *Ibid.*, p. 44.
[1579] *Ibid.*, p. 46.

With regard to **aiding and abetting** as a form of liability to be attributed to **Vojislav Šešelj,** I believe that he did not, through his conduct and action, aid and abet anyone in the commission of a specific crime. Moreover, it should be noted that the Accused was not present at the crime scenes and that an explicit examination of **specific direction** would therefore be appropriate.

As with the **Perišić case-law**, I consider that **Vojislav Šešelj provided** actual assistance through the deployment of volunteers. However, the JNA, the VRS or the Territorial Defence selected those volunteers to join a unit. It was not the Accused who assigned them to combat units.

The Prosecution failed to provide any evidence that those combat activities in themselves had a criminal purpose each and every time. In the case at hand, the **Accused** was far removed from the combat areas; however, it should be noted that he did go to Vukovar in November 1991 in what seems to me to have been the context of a political propaganda exercise in which he explicitly demonstrated his support for the JNA by wearing a military uniform.

With regard to **substantial contribution,** I find it difficult to believe that the deployment of a few volunteers was likely to change the military situation in Vukovar while the air force, artillery and thousands of men were engaged in combat operations.

Thus, with regard to this form of responsibility, I cannot find beyond any reasonable doubt that there was a link between the crimes committed and the Accused.

4.4. Instigation

The two cases dealing with instigation before the **Nuremberg Tribunal** were those of ***Julius Streicher*** and ***Hans Fritzsche***. The first was convicted of having incited Germans to persecute, murder and exterminate the Jews; the second was acquitted by the international tribunal before being convicted by the Denazification Court.

Julius Streicher was a firm adherent of the Nazi regime; he was elected to the Reichstag in 1933 and became an honorary general of the SA. Between 1923 and 1945, he edited the weekly newspaper *Der Stümer*, and was its editor-in-chief until 1933. This newspaper was an important platform for anti-Semitic propaganda.[1580] With this in mind, **Streicher** himself acknowledged that the aim of the paper was to "***unite Germans and to awaken them against Jewish influence which might ruin our noble culture***".[1581] The Prosecutor of the IMTN charged **Streicher** with two counts: **crimes against peace** and **crimes against humanity**.

The Accused was acquitted of the count of crime against peace. The Tribunal had effectively deemed that there was insufficient evidence to establish that he had been one of **Hitler's** close advisers or that he had taken part during his carrier in developing policies that led to the war. Conversely, he was convicted of the **crime against humanity**. The ruling stated that **Streicher had incited Germans to persecution, but also to murder and the extermination of Jews through the letters and articles he wrote and published** in *Der Stümer*. He was sentenced to death on 10 October 1946 and executed six days later. The IMTN found that it had been proven beyond reasonable doubt that **Streicher** had had knowledge of the extermination of the Jews in the occupied eastern territories, but did not specify whether such knowledge was part of the required *mens rea* to qualify as a crime against humanity.[1582]

Hans Fritzsche was a journalist and radio commentator. In 1938 he became the director of the Home Press Division of the Ministry of Public Enlightenment and Propaganda.[1583] In 1942 he was appointed director of the Ministry's radio division under **Goebbels**' control. In this capacity, he was

[1580] Trial of the Major War Criminals before the International Military Tribunal at Nuremberg, official text in French, published at Nuremberg, Germany, 1947, p. 198.
[1581] TIMMERMANN, W. K., *Incitement in International Law*, *Revue Internationale de la Croix-Rouge*, Volume 88, number 864, December 2006, p. 827, (translated from English).
[1582] TIMMERMANN, W. K., *Incitement, Instigation, Hate Speech and War Propaganda in International Law*, LLM thesis in International Humanitarian Law, *Centre universitaire de droit international humanitaire*, Geneva.
[1583] Trial of Major War Criminals before the International Military Tribunal at Nuremberg, official text in French, published at Nuremberg, Germany, 1947, p. 231.

in charge of the media when the government introduced its anti-Semitic message. As Director of the Home Press Division, he was in control of all the German press.[1584]

The Prosecutor of the IMTN charged him with the following three counts: **conspiracy, crimes against peace** and **war crimes**. In particular, **Fritzsche** was charged with having incited and encouraged the commission of war crimes by deliberately falsifying news to arouse and provoke in the German people hatred for the Jewish population, which led some to commit atrocities. On 1 October 1946, he was acquitted of all three counts with which he was charged in the Indictment.[1585] On the matter of instigation, the Tribunal declared that despite being a committed anti-Semite, his speeches did not encourage the persecution or the extermination of the Jews. The Tribunal thus reached the finding that **the statements of the Accused were nothing more than propaganda as it did not establish that the aim of his speeches was to incite the Germans to commit atrocities**.[1586] Thus, the speeches made by the Accused were not sufficiently direct or clear on the matter of incitement to commit the crimes against the Jewish population for him to be convicted of the charges of war crimes or crimes against humanity.[1587]

Following his acquittal by the IMTN, **Fritzsche** was tried before the German Denazification Court, the *Spruchkammer I*.[1588] This Court ruled that **Fritzsche** belonged to the *Hauptschuldige*, in other words, the group of Nazi criminals with the most senior responsibility.[1589] In this regard, it deemed that **his speeches corresponded to Nazi ideology and, in his capacity as the head of the radio division of the Propaganda Ministry, he had much greater influence on public opinion**. On 31 January 1947, he was convicted to nine years of forced labour.[1590]

Subsequently, the need to prevent such serious crimes from occurring in the future inspired the creation of the Convention on the Prevention and Punishment of the Crime of Genocide. Following countless discussions in the course of the preparatory work, the notion of ***direct and public incitement to commit genocide*** was retained as one of the crimes punishable by the Convention, in the same way as conspiracy to commit genocide, attempt to commit genocide and complicity in

[1584] *Ibid.*, p. 232.
[1585] *Ibid.*, p. 231.
[1586] *Ibid.*, pp. 231-232.
[1587] TIMMERMANN, W.K., *Incitement in International Law*, *Revue Internationale de la Croix-Rouge*, Volume 88, number 864, December 2006, p. 829.
[1588] *Ibid.*
[1589] *Ibid.*
[1590] *Hans Fritzsche* Judgement, Aktenzeichen I/2398, Spruchkammer I, Stadtkreis Nuremberg, 31 January 1947, Staatsarchiv Munchen, SpKa Karton 475.

genocide.[1591] This Convention was adopted unanimously by the United Nations General Assembly, with no abstentions.[1592]

The Statutes of the International Criminal Tribunals generally distinguish between **instigation** in itself and the **direct and public incitement to commit genocide**. Instigation is set out in Article 6 (1) of the Statute of the International Criminal Tribunal for Rwanda[1593] and Article 7 (1) of the Statute of the International Criminal Tribunal for the Former Yugoslavia.[1594] The International Criminal Tribunals equally set out their competence to sanction direct and public incitement to commit genocide under Articles 2 (3) (c) and 4 (3) (c). Unlike instigation, which is punishable solely when it results in the actual perpetration of the crime willed by the instigator, incitement to genocide has been interpreted differently. Genocide is in fact considered to be in a category of crimes that are so serious that direct and public incitement to commit genocide should be punishable in itself, even when this incitement did not result in the outcome desired by the perpetrator.[1595] Another difference lies in the fact that, unlike incitement to genocide, instigation as a form of responsibility does not have to be "*direct and public*". Various judgements and appeal judgement rendered by the International Criminal Tribunals have led to a more precise elaboration of the concept of instigation.

In the ***Blaškić*** case, the ICTY relied on the ICTR ***Akayesu*** case-law to define instigation as "*prompting another to commit an offence*".[1596] The Chamber deems that this broad formulation allows the inclusion of both express and implied conduct.[1597] In this case, it also broaches the notion of **failure**. **It** effectively **considers that Article 7 (1) entails responsibility of a superior, whether political or military, for instigation when he has failed to take measures against his subordinates in order to prevent the crimes from recurring.** Consequently, command responsibility does not come under Article 7 (3) (superior) except for **past crimes**. Therefore, the difference lies in the criteria of the date of the commission of the crime. If the commander has not taken measures subsequently to punish those responsible, his conduct will incite new crimes and

[1591] Article III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide, resolution 260 A (III) of 9 December 1948, which entered into force on 12 January 1951.
[1592] UN Doc. A/PV.179.
[1593] Article 6 (1) on individual criminal responsibility: "*A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime*."
[1594] Article 7 (1) on individual criminal responsibility: "*A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.*"
[1595] *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 482. *See* also *Blaškić* Judgement, para. 280; *Kordić* Judgement, para. 387; *Brđanin* Judgement, para. 269; *Limaj* Judgement, para. 514; *Mrkšić* Judgement, para. 549; *Boškoski* Judgement, para. 399; *Milutinović* Judgement, Volume I, para. 83.
[1596] *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement (public), 3 March 2000, para. 280.

this time he will be liable for instigation under Article 7 (1).[1598] The Chamber adds that the existence of a **causal link** must be established between the **instigation** and the **perpetration** of the crime. If, for example, the superior has failed to act, it must be established that the subordinates would not have committed the crimes at a later date had the commander not failed in his duty to punish the first crimes.[1599]

In this case, it is ultimately **Blaškić** as the superior who was found liable, and was not held accountable for the first form of individual criminal responsibility under Article 7 (1) of the Statute.[1600]

Thus, it follows that for a senior political official (in this case, the Accused **Vojislav Šešelj**), his criminal responsibility under Article 7 (1) could be founded on instigation for not having taken measures against his subordinates (members of his party) to prevent the crimes from being committed again. This presupposes that he had knowledge of these crimes. Moreover, a link between instigation and the perpetration of the crime must also be proved.

In the ***Kordić and Čerkez*** case, the Trial Chamber specified that the Indictment against **Kordić** was the first in the history of the Tribunal to allege that **hate speech** constituted a **crime against humanity**.[1601] The Chamber notes that hate speech in itself does not constitute persecution as a crime against humanity.[1602] The Chamber found **Kordić** guilty pursuant to Article 7 (1) of the Statute for having planned, instigated and ordered the crimes committed in the municipalities of Travnik, Vitez, Busovača and Kiseljak and sentenced him to **25 years in prison**.[1603]

Kordić appealed the guilty verdict against him. On the matter of instigation, the Appeals Chamber recalls that the *actus reus* of "instigating" means to prompt another person to commit an offence. It highlights that **while it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, it is sufficient to demonstrate that the**

[1597] *Ibid.*
[1598] *Ibid.*, paras 337-338. *See* also *Karadžić* Decision on preliminary motions challenging jurisdiction, para. 73: "*[A] military commander could be responsible as an instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units to continue to commit the acts.*"
[1599] *Ibid.*
[1600] *Ibid.*, para. 808.
[1601] *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 209.
[1602] *Ibid.*
[1603] *Ibid.*, para. 854.

instigation was a factor substantially contributing to the conduct of another person committing the crime.[1604]

This case-law implies therefore that instigation was a substantial factor in the conduct of the perpetrator of the crime; this **substantial** factor must therefore be shown.

The ***Galić*** Appeal Judgement revisits in particular the **notion of the failure to act**. The Appeals Chamber notes, first and foremost, that **there must be a legal duty to act, where such an omission constitutes failure to comply with this obligation**.[1605] It further recalls that the failure to act of a person in a position of authority, who is in a superior-subordinate relationship with the physical perpetrator, may give rise to liability for instigation.[1606] It distinguishes this from the form of responsibility of ordering, which requires a positive action by the person in a position of authority. Conversely, the failure to act is an omission encompassing instigation and can carry with it command responsibility when those responsible for committing the crimes were not punished[1607] (subject to the distinction set out in the *Blaškić* case between past crimes that engage command responsibility under Article 7 (3) and the new crimes resulting from instigation).

This Appeal Judgement raises the issue of superior authority. Can a political leader thus be considered as having superior authority over the supporters of his party?

In the ***Ndindabahizi*** Appeal Judgement, the Appeals Chamber specifies that in order for a person to be liable for instigation, the existence of a **causal link** between conduct and the crime must be shown, **with the instigation having contributed substantially to the conduct** of the person committing the offence. It thus stated: "*The Prosecution failed to establish a link between the murder of Mr Nors at the Gaseke roadblock and a substantial contribution of the Appellant. Without that crime being committed, the Appellant cannot be held liable for instigating [...]. Instigating means prompting another person to commit an offence, thus requiring a subsequent criminal action.*"[1608]

[1604] *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Appeal Judgement, 17 December 2004, para. 27.
[1605] *The Prosecutor v. Stanislav Galić,* Case No. IT-98-29-A, Appeal Judgement, 30 November 2006, para. 175.
[1606] *Ibid.*, para. 176.
[1607] *Ibid.*
[1608] *Emmanuel Ndindabahizi v. The Prosecutor,* Case No. ICTR-01-71-A, Appeal Judgement, 16 January 2007, para. 117.

Based on this case-law, it therefore seems that, in addition, this instigation must have **substantially contributed** to the conduct of the perpetrator of the offence.

The Appeal Judgement of 28 November 2007 in the ***Nahimana*** case[1609] recalls in the first instance the definition of the *actus reus* of instigating: "*The* actus reus *of 'instigating' implies prompting another person to commit an offence. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crimes.*" **On the matter of *mens rea* for this form of responsibility, it involves "*the intent to instigate another person to commit a crime or at a minimum the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated*".**[1610] Two alternative elements are thus established by the Appeals Chamber: **direct intent** or **awareness**.

The separate opinions of **Judge Pocar** (p. 426), Judge **Shahabuddeen** (p. 428) and Judge **Meron** (p. 459) are attached to the Appeal Judgement. They wanted to set out clearly the **difficulties encountered in international criminal law with regard to the understanding of hate speech** by international justice and its prevention. **Judge Meron** in particular broaches in his opinion the criminalisation of hate speech by domestic legislation and, in particular, recalls the provisions of the American Constitution.[1611]

Thus it appears to me that the Appeals Chamber has added - to past case-law - an additional requirement: that the instigator must have **awareness of the substantial likelihood** that a crime will be committed in the execution of the acts or omissions instigated.

It is interesting to note the difference in the vocabulary used by the Statutes of the International Criminal Tribunals and the ICC. Whereas the first use the term **instigating**, the second uses the term **induce**. The Rome Statute actually describes instigation in the following terms: "*In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [..] (b) Orders, solicits or **induces** the*

[1609] *The Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007.
[1610] *Ibid.*, para. 480. Also: *Blaškić* Judgement, para. 280; *Kordić* Appeal Judgement, para. 32; *Brđanin* Judgement, para. 269; *Limaj* Judgement, para. 514; *Mrkšić* Judgement, para. 549; *Boškoski* Judgement, para. 399; *Milutinović* Judgement, Volume I, para. 83.
[1611] *The Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007, Partly Dissenting Opinion of Judge Meron, para. 11.

commission of such a crime which in fact occurs or is attempted."[1612] The Rome Statute states that the term incitement is used only "*in respect of the crime of genocide,* [where a person] ***directly and publicly incites*** *others to commit genocide*".[1613] The same wording is to be found in the Convention on the Prevention and Punishment of the Crime of Genocide and in Article 4 (3) (c) of the ICTY Statute and Article 2 (3) (c) of the ICTR Statute on the crime of genocide.

4.4.1. The Prosecution's arguments

In its Closing Brief, the Prosecution dedicates a significant part of its showing to **instigation**. It charges the Accused **Vojislav Šešelj** with having instigated the physical perpetrators to commit crimes in several ways.

In the first instance, in his **speeches, publications and public appearances, Vojislav Šešelj made inflammatory comments, denigrating the non-Serb population**.[1614] He has been accused of spreading an atmosphere of fear and anxiety by claiming that a threat against the Serbs exists, being aware all the while of the weight of his words. He stated on this matter: "*Words can be a very dangerous weapon. Sometimes they can pound like a howitzer*."[1615] Therefore, according to the Prosecution, **Vojislav Šešelj's main purpose was to encourage the commission of crimes against non-Serbs**. In order to achieve this, he referred in his speeches to the suffering of the Serbs as victims, especially in the Second World War.[1616] His goal was to establish an "ethnically pure" territory that included Serbia and significant parts of Croatia and Bosnia. For this purpose, he used hate speeches and provided his moral support to the perpetrators of the crimes.[1617] **He used, in particular, his position as head of the Serbian Radical Party (SRS) and as someone with political authority to address thousands of people, to appear on television, and communicated through newspapers and the radio.** His status also enabled him to be "*recognized as an equal by high-level military and political figures*",[1618] thereby rendering his words even more significant. The Prosecution also referred to the projection during the trial of videos showing crowds that had assembled to hear the words of **Vojislav Šešelj.**[1619] His speech is described in the Closing Brief as being a "*denigrating hateful and violent speech about non-Serbs*" and it also mentions "*his use of*

[1612] Article 25 (3) (b) of the Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998. Our emphasis.
[1613] Article 25 (3) (e) of the Rome Statute. Our emphasis.
[1614] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Prosecution Closing Brief, 5 February 2012, para. 589.
[1615] *Ibid.*, para. 591.
[1616] *Ibid.*, para. 592.
[1617] *Ibid.*
[1618] *Ibid.*, para. 593.
[1619] *Ibid.*, para. 594.

brutal, vulgar language".[1620] The Accused is also alleged to have praised the crimes committed by the perpetrators, thus instigating the commission of further offences.[1621] The Prosecution also notes that **Vojislav Šešelj**'s speeches became increasingly violent as time went on and coincided with an increase in the persecution of non-Serbs. Some of the speeches against Muslims and Croats were cited, such as the call for a "*bloodshed*", a "*bloody civil war*" and "*rivers of blood*".[1622] **Specific examples of the Accused's speech, which had led directly to violence**, were also presented. This concerns in particular the press conference held by **Vojislav Šešelj** on **26 March 1992**, a few days before the attack on Bijeljina, in which he threatened the Muslims with "***a bloodshed of wider proportions***".[1623] Similarly, according to the Prosecution, the speech in Vukovar in which he states that "*[n]ot a single Ustasha must leave Vukovar alive*" had a direct influence on the Ovčara massacre that followed.[1624] The Hrtkovci speech is also considered revealing, as **Vojislav Šešelj** stated that the inhabitants had no choice but to **leave or be killed**. This led to a campaign of Serbs intimidating and harassing Croats.[1625] The Closing Brief also mentions the make-up of his audience, which mainly consisted of Serbian nationalists. The Prosecution deduces that this proves that **Vojislav Šešelj understood the likelihood of his words leading to crimes being committed**, as this was precisely the message that he delivered to the nationalists when he called on them to take revenge against the injustices suffered by the Serbs in the Second World War by using powerful historical terms such as "*Ustashas*" or "*Shiptars*", which systematically denigrate and humiliate Croats, Muslims and other non-Serbs.[1626]

In the second instance, the Prosecution considers that **Vojislav Šešelj instigated the commission of crimes by recruiting volunteers – the Šešeljevci - through his political party, the SRS, and sending them into the field to take part in the clashes.** According to the Prosecution, the **Šešeljevci** were recruited with the aim of fighting for an ethnically pure Serbian territory.[1627] **Vojislav Šešelj supported them by going to the front lines where he encouraged them to fight against the non-Serbs**, "*imbu[ing] them with his [...] extremism*".[1628] The volunteers were therefore sent to BiH and the Prosecution links **Vojislav Šešelj**'s speeches and the presence of the

[1620] *Ibid.*
[1621] *Ibid.*
[1622] *Ibid.*, para. 595.
[1623] *Ibid.*, para. 596.
[1624] *Ibid.*, para. 600.
[1625] *Ibid.*, para. 601.
[1626] *Ibid.*, paras 597-598.
[1627] *Ibid.*, paras 589 and 597.
[1628] *Ibid.*, para. 595.

Šešeljevci at the front lines with the crimes committed in Bosnian municipalities.[1629] In this way, the Accused allegedly directly incited the volunteers to violence against the non-Serbs.

Finally, **Vojislav Šešelj is charged with not having taken any measures against the Šešeljevci who participated in the commission of crimes.**[1630] This represents an omission. The Prosecution considers that **Vojislav Šešelj** had authority over the volunteers and that by refusing to punish the recurring crimes, he instigated them to continue committing them. Consequently, the Prosecution holds **Vojislav Šešelj responsible under Article 7 (1) of the Statute for instigating the crimes charged in the Indictment.**

4.4.2. Vojislav Šešelj's arguments

In his Final Brief, **Vojislav Šešelj** denies responsibility for instigation by challenging the **powers** accorded to him by the Prosecution. He denies having **a political or moral position by virtue of which he could have made speeches that would have incited anyone, or that his alleged position would have allowed him to abuse it in order to provoke the commission of crimes**.[1631] He also criticises the Prosecution for having introduced **confusion** between the *actus reus* and the *mens rea* of instigation, with his speeches being considered both as the material element and the mental element.[1632] **Vojislav Šešelj** also cites the fact that in his speeches **he never said that he wanted crimes to be committed**.[1633] He considers that for him to have been able to instigate members of the Serbian forces, they would have had to have had access to the media and to have taken notice even though they were engaged in combat and had **preoccupations other than the speeches he was giving**.[1634] Furthermore, **Vojislav Šešelj** considers that the Prosecution's arguments in respect of instigation are unfounded as it was not able to present witnesses who had actually been influenced by his speeches and acted on them.[1635] The Prosecution's entire argument relies on **Vojislav Šešelj**'s speeches, but he considers that the importance attributed to them does not correspond to the reality.[1636] In his Final Brief, the Accused further covers the speeches he gave. His argument in this matter relies on **freedom of expression** and on the fact that had the ideology of the Serbian Radical Party been contrary to the Constitution or the standards of international law,

[1629] *Ibid.*
[1630] *Ibid.*, para. 589.
[1631] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Professor Vojislav Šešelj's Final Brief", 30 January 2012, pp. 39-40.
[1632] *Ibid.*, p. 40
[1633] *Ibid.*
[1634] *Ibid.*
[1635] *Ibid.*
[1636] *Ibid.*, p. 42.

it would have been banned.[1637] According to the Accused, **having a nationalist ideology does not in itself constitute a crime. Vojislav Šešelj** stated: "*[T]his means that the goal is to win power and be elected to office in order to implement an ideology and the way to do it is by promoting this ideology, enlisting as many followers as possible and winning elections. There is nothing unlawful about promoting one's ideology, although it may be nationalistic, both with respect to the ideology itself and the means used for its promotion*."[1638] **Vojislav Šešelj** stated that he had **at no point advocated, encouraged or incited** in his speeches the killing of women and children, unlawful imprisonment of civilians, torture, cruel treatment, wanton destruction of villages and neighbourhoods which was not justified by military necessity, attacks on sacred sites, churches or mosques, institutions dedicated to education, or the plunder of public or private property.[1639] He also maintains that he had not created a climate of fear, as he had only **commented on the events**. According to him, the atmosphere of fear already existed because of the war.[1640] Furthermore, on the matter of volunteers recruited by his party, **Vojislav Šešelj** claims that **he cannot see how their deployment to the zone of conflict to join military units could constitute incitement to commit crimes**.[1641] On the matter of *mens rea* of aiding and abetting, **Vojislav Šešelj** states that he was simply one of 250 deputies in his country and that he knew that his political influence was limited. He also says that he had no knowledge of the crimes that were committed before he came to The Hague.[1642]

4.4.3. Conclusion

Having rejected the various forms of responsibility above, I deem that the most appropriate would have been that of **instigation**. Nevertheless, **Vojislav Šešelj** was not part of the state apparatus, as he did not have any political, administrative or military responsibility. He simply delivered **words**. The evidence amply demonstrates that he had given interviews and made speeches during the electoral campaigns. His remarks principally focused on non-Serbs, who were expected to leave Serbia or the zones under control of the Serbs.

A study of the evidence shows beyond all reasonable doubt that Vojislav Šešelj's speeches, which were at times violent in nature, were always first prompted by the activity of an opponent. These words of warning were therefore in themselves not of a nature that would

[1637] *Ibid.*, p. 98.
[1638] *Ibid.*, p. 101.
[1639] *Ibid.*, in particular pp. 171 to 174.
[1640] *Ibid.*, pp. 102-103.
[1641] *Ibid.*, p. 103.
[1642] *Ibid.*, pp. 105-106.

incite his audience to take action and to commit offences. Furthermore, I have found no trace of any words calling on his audience to commit an offence. Similarly, his words could not have had a substantial effect on the commission of an offence. In this respect, it must be noted that the Prosecution did not present any evidence to demonstrate such a substantial effect.

To avoid any misunderstanding, before offering my general conclusion, I attach herewith a summary table of all the Counts with all the forms of responsibility set out by municipality, with my own position being indicated with the word "no".

VI. GENERAL CONCLUSION

This Judgement could finally be rendered even though serious concerns of a possible failure overshadowed this case.

When taking up a case that got off to a bad start, there are no guarantees that it can get back on the right track and be completed.

In my opinion, this case got off to a bad start when Counsel was imposed on the Accused against his wishes.

The insistence of Trial Chamber I on continuing the trial despite the "blemish" of having standby counsel almost ended in disaster because of the Accused's hunger strike.

The Appeals Chamber was able to get the case "back on track" and as the Pre-Trial Judge, I set about realigning all the factors so that the trial could be held in the best possible conditions. Unfortunately, the Judges' differing approaches - especially in respect of the admission of evidence tendered by Vojislav Šešelj and the interruption of the proceedings for almost a year against my wishes - were the signs heralding the problems to come.

These problems were amplified by the incessant replacements of legal officers who were responsible for assisting the Judges. There were clear management failures for which the Head of Chambers at the time was responsible and not the Judges.

Judge Harhoff's disqualification is a perfect example of the convoluted progress of this case. We were supposed to render our Judgement on 30 October 2013, however, the President of the Tribunal felt that he had to withdraw and left the disqualification proceedings to run their course. Indeed, that is what happened, and it resulted in the majority of the panel deeming that the Judge should be disqualified. In my report I had clearly indicated the consequences of a disqualification for the trial. Thus, the disqualification resulted in over two years being wasted and in additional costs being incurred by the budget for the functioning of the Tribunal.

The Judges of this Chamber showed good will and chose the most expeditious solution, which meant that we avoided a complete retrial; this solution was then upheld by the Appeals Chamber. If we had reopened the trial *ab initio*, it is clear that it would now be suspended like the *Goran Hadžić* case.

The risk of yet another death in detention, because Vojislav Šešelj refused treatment, led the Trial Chamber to grant him provisional release *ex officio*. At the end of this process, I considered the evidence and arrived at the finding that the Prosecution had not proved its charges beyond all reasonable doubt, which led to the acquittal of Vojislav Šešelj.

Some will note that it took over 12 years to reach this conclusion. I would go along with their criticism, but in order to avoid a repeat of this situation in an international court in the future, a professional judge should take charge of the case from the very start and should have the legal means to permit him to expedite the schedule of the trial and to have total control of the proceedings during the trial, which is not the case according to the current Rules of Procedure and Evidence.

The Security Council will have to assess the problem and will then be able to resolve the difficulty easily by imposing more expeditious proceedings in the future while bestowing more powers on the Presiding Judge.

In a few months, the Office of Internal Oversight Services (OIOS) will publish its recommendations and, by taking these recommendations into account, a new era will dawn for international justice with considerable changes to methods, proceedings and to those in charge.

Unless we come to this awareness, we run the risk in the future of other international trials also ending in fiascos.

Done in The Hague, on thirty-first day of March 2016

/signed/

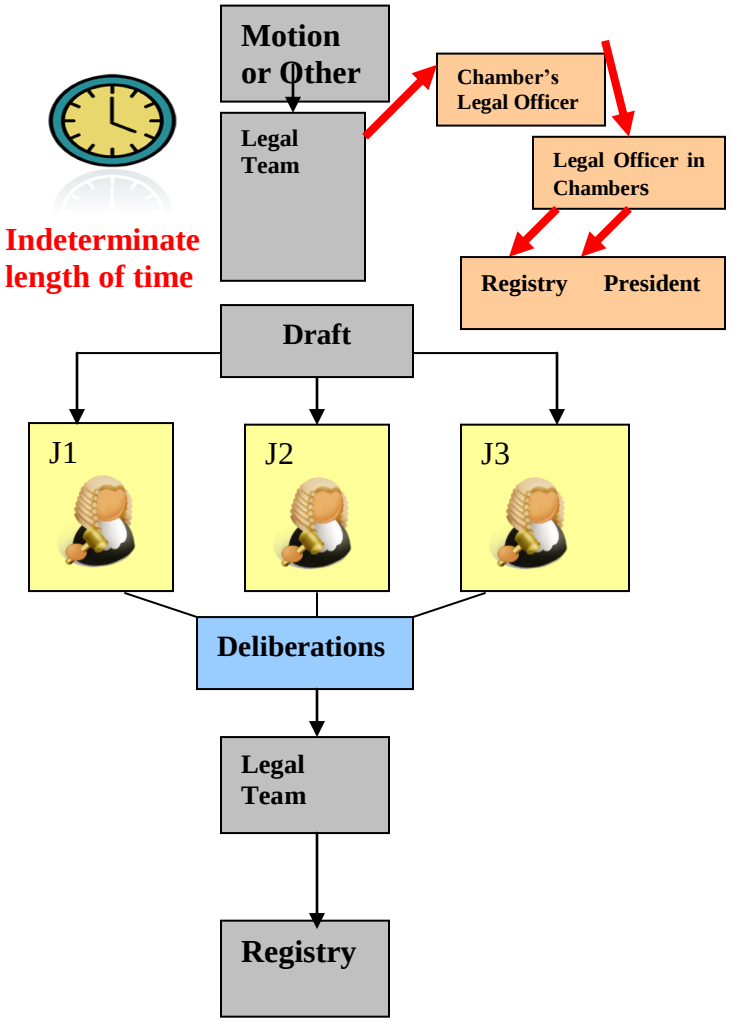
Jean-Claude Antonetti

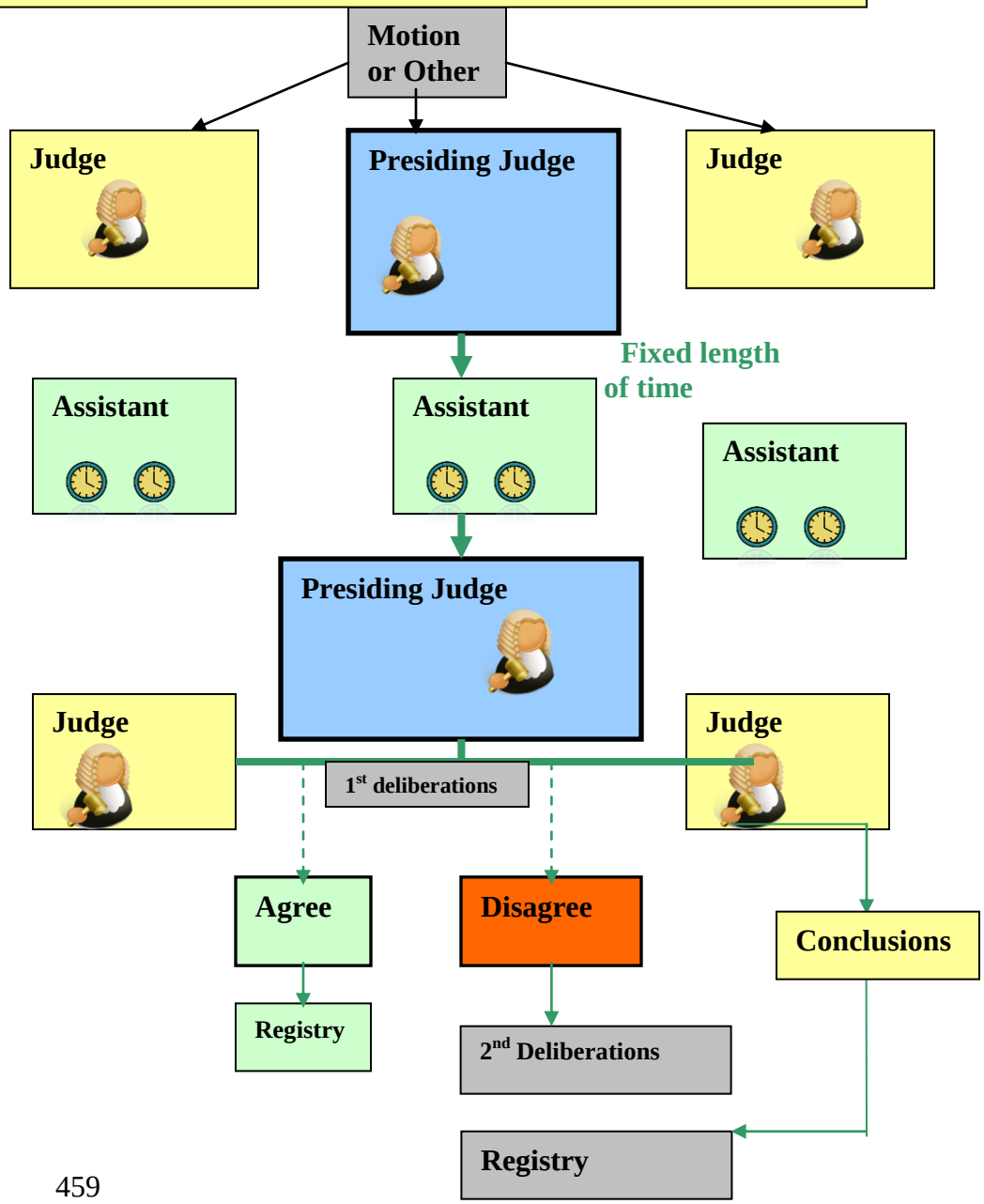
VII. ANNEXES

1. INDICTMENTS AGAINST SERBS ISSUED BY THE ICTY

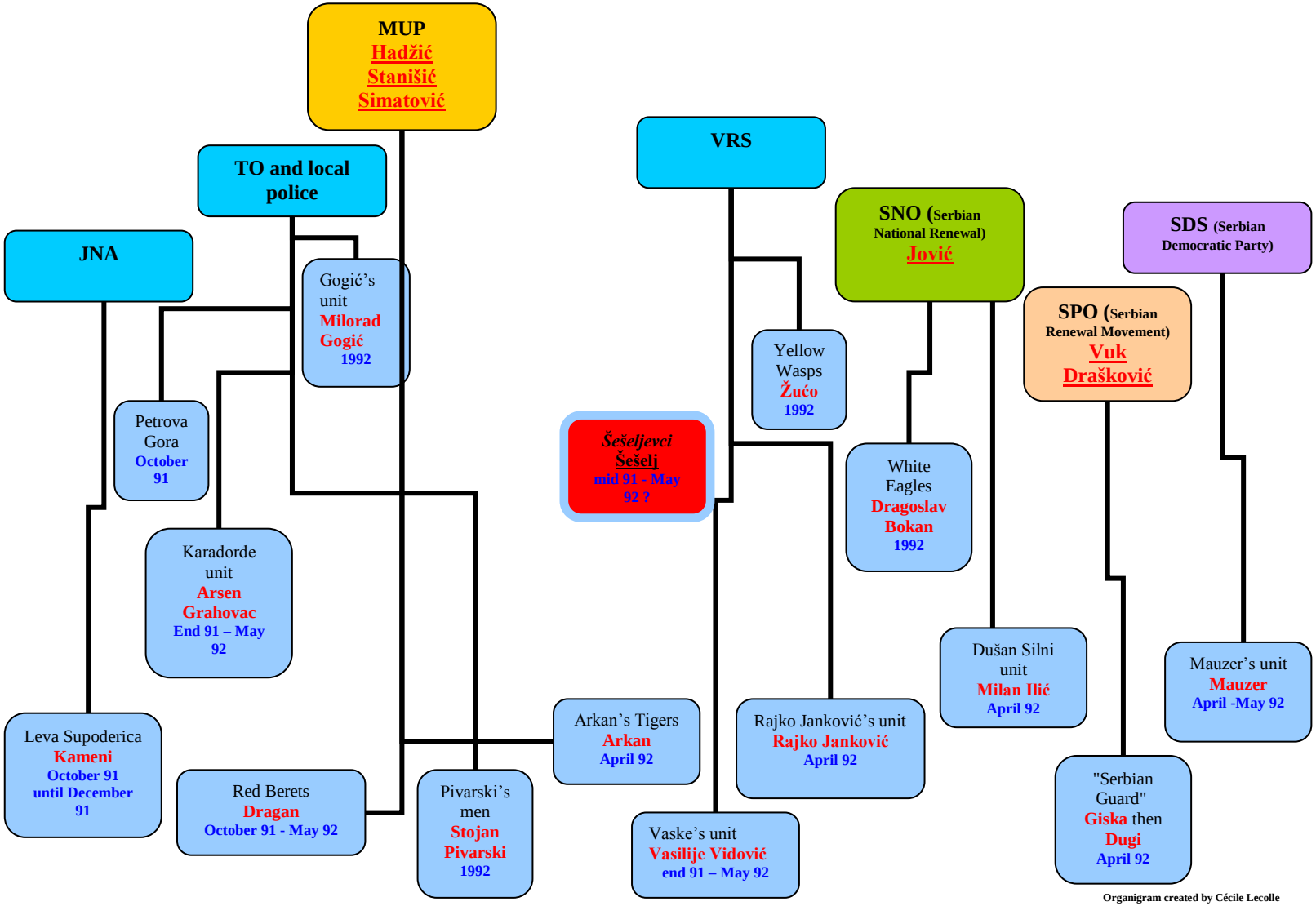
	Talić M. (2001/12/10) Bosnia	Krajišnik M. (2002/03/07) Bosnia	Plavšić B. (2002/03/07) Bosnia	Stakić M. (2002/04/10) Bosnia	Milošević S. (2002/11/22) Bosnia	Martić M. (2003/09/09) Croatia / Bosnia	Babić M. (2003/11/06) Croatia	Brdanin R. (2003/12/09) Bosnia	Milošević S. (2004/07/28) Croatia	**Šešelj V.** (2007/12/07) Bosnia / Croatia / Serbia	Simatović F. (2008/07/09) Croatia / Bosnia	Stanišić J. (2008/07/09) Croatia / Bosnia	Karadžić R. (2009/11/19) Bosnia	Karadžić R. (2009/11/19) Sarajevo	Stanišić M. (2009/11/23) Bosnia	Župljanin S. (2009/11/23) Bosnia	Mladić R. (2011/12/16) Bosnia	Mladić R. (2011/12/16) Sarajevo	Hadžić G. (2012/03/23) Croatia
1 Adžić B.					x	x	x		x	x	x	x							x
2 Babić M.						x	x		x	x	x	x							x
3 Bulatović M.						x			x										
4 Bogdanović R.										x	x	x							x
5 Brđanin R.	x	x	x	x				x							x	x			
6 Drljača S.				x											x	x			
7 Galić S.														x				x	
8 Hadžić G.						x	x		x	x	x	x							x
9 Jović B.					x	x			x										
10 Kadijević V.					x	x			x	x	x	x							x
11 Karadžić R.	x	x	x	x	x	x		x		x	x	x	x	x	x	x	x	x	
12 Kertes M.											x	x							x
13 Koljević N.		x	x										x	x	x	x	x	x	
14 Kostić B.					x	x			x										
15 Kovačević M.				x															
16 Krajišnik M.	x	x	x	x	x	x		x		x	x	x	x	x	x	x	x	x	
17 Mandić M.													x		x	x	x		
18 Martić M.					x	x	x		x	x	x	x							x
19 Milošević D.														x				x	
20 Milošević S.		x	x		x	x	x		x	x	x	x	x				x		x
21 Mladić R.		x	x		x	x	x			x	x	x	x	x	x	x	x	x	
22 Ostojić V.															x	x			
23 Plavšić B.	x	x	x	x	x	x		x		x	x	x	x	x	x	x	x	x	
24 Ražnatović Ž.		x	x		x	x			x	x	x	x	x				x		x
25 **Šešelj V.**					x	x	x		x	x	x	x	x	x			x	x	x
26 Simatović F.					x	x	x		x	x	x	x	x				x		x
27 Simović T.						x			x										
28 Stakić M.				x															
29 Stanišić J.					x	x	x		x	x	x	x	x				x		x
30 Stanišić M.											x	x	x		x	x	x		
31 Stojičić R.					x	x			x	x	x	x							x
32 Talić M.	x	x	x	x		x		x							x	x			
33 Vasiljević A.									x										
34 Župljanin S.				x											x	x			

2. USUAL FUNCTIONING OF THE ICTY AS OPPOSED TO EFFECTIVE FUNCTIONING OF THE ICTY





3. SERBIAN PARAMILITARY UNITS AND CHAIN OF COMMAND



4. PROBATIVE VALUE - *VIVA VOCE* WITNESSES, 92 *BIS*, 92 *TER*, 92 *QUATER*, STATEMENTS

	Witness	Date of appearance	Capacity	Absolute	Very strong	Strong	Fair	Poor	Very poor	None
1.	**Anthony Oberschall**	11, 12, 13 December 2007	**Expert**							
2.	**Goran Stoparić**	15, 16, 17, 22, 23, 24 January 2008	**Insider**							
3.	**Yves Tomić**	29, 30, 31 January and 5 and 6 February 2008	**Expert**							
4.	**VS-004**	7, 12, 13 February 2008	**Insider**							
5.	**Reynaud Theunens**	14, 19, 20, 21, 26, 27, 28 February 2008	**Expert**							
6.	**Mladen Kulić**	4, 5 and 6 March 2008	**Insider**							
7.	**VS-021**	6 March 2008	**Victim**							
8.	**Vilim Karlović**	11 and 12 March 2008	**Victim**							
9.	**Dragutin Berghofer**	12 March 2008	**Victim**							
10.	**Emil Ćakalić**	18 and 19 March 2008	**Victim**							
11.	**VS-1013**	25 and 26	**Victim**							

		March 2008								
12.	**VS-1015**	27 March 2008	**Victim**							
13.	**VS-033**	1 and 2 April 2008	**Insider**							
14.	**Fadil Kopić**	9 April 2008	**Victim**							
15.	**VS-1062**	10 April 2008	**Victim**							
16.	**VS-007**	15, 16, 17 April 2008	**Insider**							
17.	**VS-1065**	22 April 2008	**Victim**							
18.	**VS-002**	6, 7 and 8 May 2008	**Eyewitness**							
19.	**Đuro Matovina**	13 and 14 May 2008	**Victim**							
20.	**Asim Alić**	15, 20, 21 May 2008	**Crime base**							
21.	**Andras Riedlmayer**	21 and 22 May 2008	**Expert**							
22.	**VS-051**	28 and 29 May 2008	**Insider**							
23.	**VS-1111**	3 June 2008	**Victim**							
24.	**VS-1055**	4 and 5 June 2008	**Victim**							
25.	**Perica Koblar**	10 and 11 June 2008	**Victim**							
26.	**Safet SEJDIĆ**	12, 17 and 18 June 2008	**Victim**							
27.	**VS-1012**	18 and 19 June 2008	**Victim**							
28.	**VS-1060**	24 and 25 June 2008	**Victim**							
29.	**VS-1064**	25 June 2008	**Victim**							
30.	**Redžep**	1 July 2008	**Victim**							

	Karižik									
31.	**VS-1051**	2 July 2008	**Victim**							
32.	**VS-1052**	2 July 2008	**Victim**							
33.	**Fahrudin Bilić**	2 and 3 July 2008	**Victim**							
34.	**VS-1112**	8, 9, 10, 15 and 16 July 2008	**Expert**							
35.	**VS-1105**	16 July 2008	**Victim**							
36.	**VS-1022**	17 July 2008	**Victim**							
37.	**Ibrahim Kujan**	22 July 2008	**Crime base**							
38.	**Nebojša Stojanović**	22 July 2008	**Insider**							
39.	**Daniel Saxon**	23 July 2008	**Expert**							
40.	**VS-054 → VS-061**	24 and 25 September 2008	**Eyewitness**							
41.	**VS-038**	1 and 2 October 2008	**Crime base**							
42.	**Aleksa Ejić**	7, 8 and 9 October 2008	**Victim**							
43.	**Franja Barićević**	14 and 15 October 2008	**Victim**							
44.	**VS-1134**	15 October 2008	**Victim**							
45.	**Ewa Tabeau**	21, 22, 23 October 2008	**Expert**							
46.	**Jelena Radošević**	23 October 2008	**Eyewitness**							

47.	**VS-016**	28 and 29 October 2008	**Insider**							
48.	**Vesna Bosanac**	4 and 5 November 2008	**Crime base**							
49.	**Milorad Vojnović**	5 and 6 November 2008	**Crime base**							
50.	**Julka Maretić**	6 November 2008	**Crime base**							
51.	**Davor Strinović**	11 November 2008	**Expert**							
52.	**VS-1093**	12 November 2008	**Crime base**							
53.	**Višnja Bilić**	18 and 19 November 2008	**Expert**							
54.	**Katica Paulić**	19 November 2008	**Crime base**							
55.	**Anna-Maria Radić**	20 November 2008	**Expert**							
56.	**Aleksandar Stefanović**	25 and 26 November 2008	**Insider**							
57.	**VS-1068**	26 November 2008	**Victim**							
58.	**Ljubiša Vukašinović**	27 November 2008	**Insider**							
59.	**Fadil Banjanović**	2 December 2008	**Victim**							
60.	**Sulejman Tihić**	3 and 4 December 2008	**Victim**							
61.	**VS-1028**	9 December 2008	**Victim**							

62.	**Jovan Glamočanin**	10 and 11 December 2008	**Insider**							
63.	**VS-1000**	11 December 2008	**Victim**							
64.	**VS-065**	8 and 9 January 2009	**Insider**							
65.	**VS-1087**	9 January 2009	**Crime base**							
66.	**VS-008**	13 and 14 January 2009	**Insider**							
67.	**Dr Zoran Stanković**	15 January 2009	**Expert**							
68.	**VS-1035**	28 January 2009 and 29 January 2009	**Insider**							
69.	**VS-1066**	3 and 4 February 2009	**Victim**							
70.	**VS-2000**	4 and 5 February 2009	**Crime base**							
71.	**VS-1010**	11 February 2009	**Victim**							
72.	**Alija Gušalić**	4 March 2009	**Victim**							
73.	**VS-027**	7 and 8 July 2009	**Eyewitness**							
74.	**VS-037**	12 and 13 January 2010	**Insider**							
75.	**Vojislav Dabić**	Chamber's Witness 26 and 27 January 2010	**Insider**							
76.	**VS-1067**	Chamber's Witness 2 February 2010	**Insider**							
77.	**VS-053 → VS-067**	Chamber's Witness 16 and 17 February 2010	**Victim**							
78.	**VS-1058**	Chamber's	**Insider**							

		Witness 9 and 10 March 2010								
79.	**VS-1033**	Chamber's Witness 10 March 2010	**Victim**							
80.	**Zoran Rankić**	Chamber's Witness 11 and 12 May 2010	**Insider**							
81.	**Nenad Jović**	Chamber's Witness 6 and 7 July 2010 (Video link)	**Insider**							
82.	**Aleksandar Gajić**	Statements given to the Office of the Prosecutor on 24 and 25 May and 1, 2, 3, 4, 7, 8 and 9 June 2004, 3 and 4 August 2005, and 14 and 19 June 2006	**Insider**							
83.	**Ljubiša Petković**	92 *quater* Decision of 6 November 2008	**Insider**							
84.	**Zoran Dražilović**	92 *quater* Decision of 24 November 2008	**Insider**							
85.	**Aleksandar Filković**	92 *quater* Decision of 2 November 2009	**Crime base**							
86.	**Matija Bošković**	92 *quater* Decision of 9 March 2009	**Victim**							
87.	**VS-1063**	92 *quater* Decision of 23 July 2009	**Victim**							

88.	**Osman Kadić**	92 *quater* Decision of 16 July 2009	**Crime base**							
89.	**Mujo Džafić**	92 *quater* Decision of 13 May 2009	**Victim**							
90.	**Stevan Todorović**	92 *quater* Decision of 17 February 2010	**Insider**							
91.	**Zoran Tot**	92 *quater* Decision of 3 June 2009 and 9 July 2009	**Insider**							
92.	**VS-036**	92 *quater* Decision of 17 February 2010	**Victim**							
93.	**Milan Babić**	92 *quater* Decision of 12 December 2010	**Insider**							
94.	**Miroslav Deronjić**	92 *quater* Decision of 20 January2010	**Insider**							
95.	**Josip Čović**	92 *quater* Decision of 17 June 2009	**Victim**							
96.	**VS-026**	92 *quater* Decision of 20 December 2010	**Insider**							
97.	**Erin Gallagher** (P1105)	92 *bis*	**Expert**							
98.	**Manojlo Milovanović (P1106)**	92 *bis*								
99.	**The Accused (89 C) (P31)**	Decision on admission of 30 October 2007								

5. POSITION OF JUDGE JEAN-CLAUDE ANTONETTI ON THE COUNTS

PERSECUTIONS

Count 1

Crime against Humanity

Form of responsibility	SLAVONIA	BARANJA	WESTERN SREM	ZVORNIK	GREATER SARAJEVO	MOSTAR	NEVESINJE	VOJVODINA (some areas)
	(SAO SBSO)	(SAO SBSO)	(SAO SBSO)	(BIH)	(BIH)	(BIH)	(BIH)	(Serbia)
Planned	No	No	No	No	No	No	No	No
Ordered	No	No	No	No	No	No	No	No
Instigated	No	No	No	No	No	No	No	No
Committed	No	No	No	No	No	No	No	No
Participated in JCE	No	No	No	No	No	No	No	No
Aided and abetted in the planning, preparation or execution	No	No	No	No	No	No	No	No

MURDER

Count 4

Violation of the laws or customs of war

Form of responsibility	VUKOVAR	ZVORNIK	GREATER SARAJEVO	MOSTAR	NEVESINJE
	(SAO SBSO)	(BiH)	(BiH)	(BiH)	(BiH)
Planned	No	No	No	No	No
Ordered	No	No	No	No	No
Instigated	No	No	No	No	No
Committed	No	No	No	No	No
Participated in JCE	No	No	No	No	No
Aided and abetted in the planning, preparation or execution	No	No	No	No	No

TORTURE

Count 8

Violation of the laws or customs of war

Form of responsibility	VICINITY OF VUKOVAR	ZVORNIK	GREATER SARAJEVO		MOSTAR	NEVESINJE
	(SAO SBSO)	(BiH)	ILIJAŠ	VOGOŠĆA	(BiH)	(BiH)
Planned	No	No	No		No	No
Ordered	No	No	No		No	No
Instigated	No	No	No		No	No
Committed	No	No	No		No	No
Participated in JCE	No	No	No		No	No
Aided and abetted in the planning, preparation or execution	No	No	No		No	No

CRUEL TREATMENT

Count 9

Violation of the laws or customs of war

Form of responsibility	VICINITY OF VUKOVAR	ZVORNIK	GREATER SARAJEVO		MOSTAR	NEVESINJE
	(SAO SBSO)	(BiH)	ILIJAŠ	VOGOŠĆA	(BiH)	(BiH)
Planned	No	No	No		No	No
Ordered	No	No	No		No	No
Instigated	No	No	No		No	No
Committed	No	No	No		No	No
Participated in JCE	No	No	No		No	No
Aided and abetted in the planning, preparation or execution	No	No	No		No	No

DEPORTATION

Count 10

Crime against Humanity

Form of responsibility	VUKOVAR	ZVORNIK	GREATER SARAJEVO	NEVESINJE	VOJVODINA (some areas, namely Hrtkovci village)
	(SAO SBSO)	(BiH)	(BiH)	(BiH)	(Serbia)
Planned	No	No	No	No	No
Ordered	No	No	No	No	No
Instigated	No	No	No	No	No
Committed	No	No	No	No	No
Participated in JCE	No	No	No	No	No
Aided and abetted in the planning, preparation or execution	No	No	No	No	No

FORCIBLE TRANSFER

Count 11

Forcible Transfer

Form of responsibility	VUKOVAR	ZVORNIK	GREATER SARAJEVO	NEVESINJE	VOJVODINA (some areas, namely Hrtkovci village)
	(SAO SBSO)	(BiH)	(BiH)	(BiH)	(Serbia)
Planned	No	No	No	No	No
Ordered	No	No	No	No	No
Instigated	No	No	No	No	No
Committed	No	No	No	No	No
Participated in JCE	No	No	No	No	No
Aided and abetted in the planning, preparation or execution	No	No	No	No	No

WANTON DESTRUCTION OF VILLAGES

Count 12

Violation of the laws or customs of war

Form of responsibility	VUKOVAR	ZVORNIK	GREATER SARAJEVO		MOSTAR	NEVESINJE
	(SAO SBSO)	(BiH)	ILIJAŠ	VOGOŠĆA	(BiH)	(BiH)
Planned	No	No	No		No	No
Ordered	No	No	No		No	No
Instigated	No	No	No		No	No
Committed	No	No	No		No	No
Participated in JCE	No	No	No		No	No
Aided and abetted in the planning, preparation or execution	No	No	No		No	No

DESTRUCTION OR WILFUL DAMAGE DONE TO INSTITUTIONS DEDICATED TO RELIGION OR EDUCATION

Count 13

Violation of the laws or customs of war

Form of responsibility	VUKOVAR	ZVORNIK	GREATER SARAJEVO		MOSTAR	NEVESINJE
	(SAO SBSO)	(BiH)	ILIJAŠ	VOGOŠĆA	(BiH)	(BiH)
Planned	No	No	No		No	No
Ordered	No	No	No		No	No
Instigated	No	No	No		No	No
Committed	No	No	No		No	No
Participated in JCE	No	No	No		No	No
Aided and abetted in the planning, preparation or execution	No	No	No		No	No

PLUNDER OF PUBLIC OR PRIVATE PROPERTY

Count 14

Violation of the laws or customs of war

Form of responsibility	VUKOVAR	ZVORNIK	GREATER SARAJEVO		MOSTAR	NEVESINJE
	(SAO SBSO)	(BiH)	ILIJAŠ	VOGOŠĆA	(BiH)	(BiH)
Planned	No	No	No		No	No
Ordered	No	No	No		No	No
Instigated	No	No	No		No	No
Committed	No	No	No		No	No
Participated in JCE	No	No	No		No	No
Aided and abetted in the planning, preparation or execution	No	No	No		No	No

6. SUMMARY OF THE PROBATIVE VALUE OF EXHIBITS IN THE VOJISLAV ŠEŠELJ CASE

Number		Description of exhibit	Date (if known)	Absolute	Strong	Average	Poor	None
1	P00131	Transcript of a video showing an award ceremony with members of the Red Berets, political leaders and military leaders, including Slobodan Milošević, Franko Simatović, Jovica Stanišić and Mihalj Kerteš						
2	P00239	Signed and stamped request by the Novska Territorial Defence to the Ministry for Serbs outside of Serbia and the Serbian Radical Party War Staff for volunteers to be urgently sent to Novska Territorial Defence	(25 November 1991)					
3	P00246	Daily bulletin of the Information Service of the Federal Secretariat for National Defence	(5 October 1991)					
4	P00313	List of Serbian Radical Party volunteers with their dates of arrival and departure						
5	P00340	Transcript of a video recording of a speech by Radovan Karadžić	(15 October 1991)					
6	P00498	Transcript of an intercepted telephone conversation between Radovan Karadžić and Slobodan Milošević	(9 September 1991)					

7	P00513	Intercepted conversation between Vojislav Šešelj and Branislav Gavrilović	(21 April 1992)					
8	P00545	Pay list for members of Pivarski's special unit for the month of May 1992	(1 May 1992)					
9	P00644	Transcript of a video recording of an interview with Vojislav Šešelj for the *Death of Yugoslavia* series	(March 1995)					
10	P00870	Decision on Strategic Objectives of the Serbian People in Bosnia and Herzegovina issued by Momčilo Krajišnik	(12 May 1992)					
11	P00871	Instructions for the Organisation and Activity of the Organs of the Serbian People in Bosnia and Herzegovina in Extraordinary Circumstances (variants A and B), copy no. 100	(19 December 1991)					
12	P00873	Decision on the establishment of the Serbian Municipality of Zvornik, following the instructions of 19 December 1991	(27 December 1991)					
13	P00876	Telex message from Momčilo Mandić, Assistant Minister of the Interior, Republika Srpska	(31 March 1992)					
14	P00888	Certificate confirming that Branislav Vakić took part, with 19 others, in the liberation of Podveležje and in defeating the enemy along the Banjdol, Šipovac and Sveta Gora axis	(28 August 1992)					
15	P00891	Report on the activity of members of the so-called paramilitary units in the territory of the Herzegovina Serbian Autonomous District, from the Trebinje Security Services Centre, and accompanying letter	(4 August 1992)					
16	P00895	Decision to establish an association of municipalities	(27 June 1990)					
17	P00896	Declaration of the sovereignty and autonomy of the Serbian people in Croatia, issued by the Serbian people at the Serbian Assembly	(25 July 1990)					

18	P00898	Statute of the Serbian Autonomous Region of Krajina	(December 1990)					
19	P00901	Decision of the Ministry of Justice of the Republic of Serbia on the registration of the Serbian Radical Party	(12 March 1991)					
20	P00902	Order to mobilise the territorial defence and volunteer units of the SAO Krajina to defend the citizens and the territorial integrity, issued by Milan Babić	(1 April 1991)					
21	P00911	Report on paramilitary units of the Serbian Chetnik Movement and the key role of Ljubiša Petković and Aleksandar Stefanović	(1 July 1991)					
22	P00914	Report on the activities of Ljubiša Petković, (type) signed by Zoran Komarčević	(18 July 1991)					
23	P00916	Letter from Milan Martić to the Croatian Police Department in Split and to the Kijevo Police Station regarding Croatian police stations on their territory	(18 August 1991)					
24	P00921	Confidential report of the Security Organ containing observations on Željko Ražnatović, aka "Arkan"	(1 October 1991)					
25	P00922	Draft minutes of the 143rd sitting of the SFRY Presidency	(1 October 1991)					
26	P00923	Order to mobilise a special police unit to co-operate with the Yugoslav People's Army and TO units, issued by Momir Bulatović	(1 October 1991)					
27	P00924	Statement of the General Staff of the Yugoslav People's Army addressed to the President and Government of the Republic of Croatia and the General Staff	(1 October 1991)					
28	P00926	TANJUG press release of the statement by General Veljko Kadijević, Federal Secretary for National Defence	(4 October 1991)					
29	P00927	Joint session of all the Chambers of the Parliament of the Republic of Croatia	(8 October 1991)					

30	P00928	Minutes of the SDS Council held at the Deputies Club	(15 October 1991)					
31	P00931	Transcript of the meeting of the SDS Deputies Club in the SRBiH Parliament, constituting the Assembly of the Serbian People in Bosnia and Herzegovina	(24 October 1991)					
32	P00932	Strictly confidential report on providing assistance to Serbian districts in Croatia from the Serbian Ministry of Defence to the Serbian Government	(1 November 1991)					
33	P00937	Article from *Velika Srbija*, issue no. 11, "Defence of Serbia through Slavonia, Baranja and Western Srem" regarding the commander of Chetnik volunteers, Branislav Gavrilović, aka "Brne"						
34	P00940	Assembly of the Serbian people in Bosnia and Herzegovina, no. 02-1-68/91, Sarajevo, opinion on the right to self-determination of the Serbian people in Bosnia and Herzegovina	(19 December 1991)					
35	P00943	Decision on proclamation of the Serbian Municipal Assembly of Ilidža, following the instructions of 19 December 1991 (variants A and B)	(3 January1992)					
36	P00944	Records of the 5th session of the Bosnian Serb Assembly, Sarajevo	(9 January1992)					
37	P00946	Letter from Milan Martić to Zoran Sokolović requesting that changes be made in the transfer of finances for the SAO Krajina Territorial Defence and Ministry of the Interior	(10 February 1992)					
38	P00947	Article from *Derventski List* newspaper entitled, "Bridge for Croatian and Bosnian Krajinas"						
39	P00948	Report of the Federal Secretariat for People's Defence on clearing up the battleground and restoring Vukovar and other endangered areas between 23 November 1991 and 20 February 1992						

40	P00949	Records of the 8th session of the Bosnian Serb Assembly adopting the Constitution of the Bosnian Serb State (Republika Srpska) and forming ministries	(25 February 1992)					
41	P00951	Record of the 11th session of the Assembly of the Serbian people in Bosnia and Herzegovina, Sarajevo	(8 March 1992)					
42	P00952	12th session of the Assembly of the Serbian people in Bosnia and Herzegovina held in Pale	(24 March 1992)					
43	P00957	Extract from the Instruction for the Work of the Crisis Staffs of the Serbian People in Municipalities						
44	P00958	Minutes of the National Security Council and Government session	(27 April 1992)					
45	P00959	Decision of the Executive Council of the Serbian Municipality of Zvornik no. 01-023-44/92, signed by Branko Grujić						
46	P00963	Zvornik Provisional Government authorization for payment for volunteers from Loznica	(4 May 1992)					
47	P00964	List of volunteers and receipt issued by the Serb Municipality of Zvornik, signed by Marko Pavlović	(7 May 1992)					
48	P00966	Transcript of the 16th session of the Assembly of the Serbian People in Bosnia and Herzegovina, Banja Luka	(12 May 1992)					
49	P00967	Presidential Decision on the Return of Displaced Persons to the Territory of the Serbian Republic (Republika Srpska) of Bosnia and Herzegovina, no. 03-507	(2 June 1992)					
50	P00968	Information bulletin from the Ilidža SJB						
51	P00970	Report on the combat actions in Dobrinja, Sarajevo, by the Romanija Corps	(17 June 1992)					

52	P00971	RDB Valjevo Centre, Third Section, 7-052, official note on interview with Vladimir Samčević, (type) signed by Operative Drago Šuka	(4 July 1992)					
53	P00975	Serbian municipality of Vogošća – conclusion regarding the payment of Soso's unit under the command of Jovo Ostojić						
54	P00976	Letter from Dragan Lalić, Secretary of the Interior of the Republic of Serbian Krajina, Vukovar, to the Ministry of the Interior of the Republic of Serbian Krajina in Knin	(3 August 1992)					
55	P00977	Report no. 01-16/92, Republika Srpska of Bosnia and Herzegovina, Pale, Ministry of Interior, Crime Police Directorate	(4 August 1992)					
56	P00978	Certificate stating that equipment belonging to the State Security Service (DB) of the Serbian Ministry of the Interior is being used by the Posavina Brigade, Bosanski Šamac - to be brought back by Slobodan Miljković						
57	P00980	Intelligence organ of the Eastern Bosnian Corps report on Brčko and paramilitary formations in this area	(29 September 1992)					
58	P00982	Report on the situation of human rights in the territory of the former Yugoslavia by Mazowiecki, UN Special Rapporteur	(27 October 1992)					
59	P00983	Official note of the talks between representatives of the President of the Republic of Serbian Krajina and President Slobodan Milošević, by the Minister of Defence of the Republic of Serbian Krajina	(12 November 1992)					
60	P00986	Information on the situation at the Bosanski Šamac SJB, the arrest of the SJB Chief by military organs and the closing down of the Krajina - FRY corridor, MUP Bijeljina, signed by Ostoja Minić and Goran Sarić	(19 November 1992)					

61	P00987	Transcript of 22nd session of the Bosnian Serb Assembly	(23/24 November 1992)					
62	P00988	Command of the 2nd Posavina Infantry Brigade, Šamac – confidential report no. 12-3536/92 on certain developments undermining morale of the troops and increasing the complexity of the political and security situation in the brigade						
63	P00989	Report no. 09-1/93 on the work of the Trebinje Security Services Centre between 4 April and 31 December 1992, from Republika Srpska, Ministry of the Interior, Security Services Centre, Trebinje	(13 January1993)					
64	P00990	Main Staff of the Army of Republika Srpska Krajina Security and Intelligence Organ, Strictly Confidential no. 43-2	(20 February 1993)					
65	P00992	Main Staff of the VRS - Analysis of the combat readiness and activities of the RS in 1992						
66	P00993	Ilidža War Presidency decision forbidding the return of Muslims and Croats to Ilidža	(4 April 1993)					
67	P00997	State Security Department Centre, Valjevo – Report on crimes committed by Serbian Radical Party volunteers in Zvornik	(17 October 1993)					
68	P00998	Transcript of the 3rd Congress of the Serbian Radical Party, reproduced in Vojislav Šešelj's book *Srpska radikalna stranka* (*Serbian Radical Party*), Belgrade	(--1995)					
69	P00999	Interview with Chetnik *Vojvoda* Branislav Gavrilović, aka "Brne", published in *Zapadna Srbija* (*Western Serbia*), no. 14-15, July-August 1994, pp. 33 and 34	(July-August 1994)					
70	P01000	*Velika Srbija* article entitled, "The Wartime Road of the Youngest Duke"						

71	P01001	Article in *Velika Srbija*, no. 89, entitled "Ravna Gora in the Plains of Bačka: Biography of Chetnik Duke Zdravko Abramović", pp. 44 to 53						
72	P01002	Interview with Vojislav Šešelj broadcast on TV Trstenik and reprinted in Vojislav Šešelj's book, on the presence of Serbian Radical Party volunteers in Mostar under General Momčilo Perišić						
73	P01003	Excerpt of a video recording: *Đurđevdanski Uranak* /St George's Day celebration/ with Radovan Karadžić						
74	P01004	Video recording of a speech by Radovan Karadžić at the BiH Assembly	(15 October 1995)					
75	P01005	Transcript of a video recording of a speech by Slobodan Milošević	(March 1991)					
76	P01006	Map no. 16 – Six strategic objectives	(December 2007)					
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78	P01010	Record of the 5th meeting of the Supreme Defence Council (FRY)	(7 August 1992)					
79	P01039	Organisational chart relating to the structure of the State Security Services of Serbia and Zvornik/Bijeljina						
80	P01168	Interview with Vojislav Šešelj, entitled: "The Time of Self-Proclaimed Marshals is Over" and republished in *Razaranja srpskog nacionalnog bića* (*Destruction of the Serbian National Identity)*	(15 April 1990)					
81	P01169	Milovan Nedeljkov's interview with Vojislav Šešelj published in *Politika kao izavov savesti* (*Politics as a Challenge to Conscience*)	(25 June 1990)					

82	P01170	Interview with Vojislav Šešelj which appeared in *Vjesnik*, reprinted in *Politika kao izazov savesti* (*Politics as a Challenge to Conscience*)	(1 July 1990)					
83	P01171	Interview with Vojislav Šešelj which appeared in *Tribuna*,reprinted in *Politika kao izazov savesti* (*Politics as a Challenge to Conscience*)	(1 October 1990)					
84	P01172	Transcript of an interview with Vojislav Šešelj broadcast on Belgrade TV's Studio B, published in his book entitled *Televizijski megdani* (*TV Duels*)	(November 1990)					
85	P01174	Transcript of an interview with Vojislav Šešelj broadcast on TV Belgrade, published in *Sizifovska sudovanja* (*Sisyphean Disputes*)	(6 December 1990)					
86	P01175	Transcript of an interview with Vojislav Šešelj for *Osmica*, published in *Razaranja srpskog nacionalnog bića* (*Destruction of the Serbian National Identity*)	(27 December 1990)					
87	P01176	Transcript of an interview with Vojislav Šešelj on TV Politika, published in *Sizifovska sudovanja* (*Sisyphean Disputes*)	(5 April 1991)					
88	P01177	Transcript of a television interview with Vojislav Šešelj for the Novi Sad TV programme "Without an Incision or Anaesthesia", published in *Sizifovska sudovanja* (*Sisyphean Disputes*)	(May 1991)					
89	P01178	Transcript of a Studio B TV's interview with Vojislav Šešelj, published in *Televizijski megdani* (*TV Duels*)	(3 May 1991)					
90	P01180	Transcript of an interview with Vojislav Šešelj on the Novi Sad TV programme *Program Plus*, published in *Sizifovska sudovanja* (*Sisyphean Disputes*)	(June 1991)					
91	P01181	Transcript of an interview with Vojislav Šešelj on TV Politika, published in *Kroz politički galimatijas* (*Through Political Galimatias*)	(25 July 1991)					

92	P01182	Vojislav Šešelj's interview in *Duga*, published under the title, "Whoever is Afraid of Chetniks is an Ustasha" and reproduced in *Partijski bilansi i politički balansi* (*Party Balance Sheets and Political Juggling*)	(13 September 1991)					
93	P01184	Interview with Vojislav Šešelj in *Politika* on the withdrawal of the Yugoslav People's Army to the western Serbian borders	(27 September 1991)					
94	P01185	Transcript of a television duel between Vojislav Šešelj and Zoran Đinđić, published in *Sizifovska sudovanja* (*Sisyphean Disputes*)	(November 1991)					
95	P01186	Interview with Vojislav Šešelj which appeared in *Ratne novine*, published in *Politika kao izazov savesti* (*Politics as a Challenge to Conscience*)	(24 November 1991)					
96	P01187	Interview with Vojislav Šešelj which appeared in *Pogledi*, published in *Politika kao izazov savesti* (*Politics as a Challenge to Conscience*)	(29 November 1991)					
97	P01188	Press conference of Vojislav Šešelj and his Serbian Radical Party	(9 January 1992)					
98	P01189	Transcript of an interview with Vojislav Šešelj for Radio Obrenovac, published in *Sizifovska sudovanja* (*Sisyphean Disputes*)	(11 January 1992)					
99	P01190	Transcript of Vojislav Šešelj's interview with Radio Novi Sad, published as "Man of the Year Ceremony" in *Sizifovska sudovanja* (*Sisyphean Disputes*)	(16 January 1992)					
100	P01191	Transcript of a press conference held by Vojislav Šešelj and the Serbian Radical Party, published in *Milan Panić mora pasti* (*Milan Panić Must Fall*)	(23 January1992)					
101	P01192	Transcript of a press conference held by Vojislav Šešelj on Greater Serbia, volunteers of the Serbian Chetnik Movement, on subordination of the Territorial Defence and the Yugoslav People's Army, published in *Milan Panić mora pasti* (*Milan Panić Must Fall*)	(20 February 1992)					

102	P01193	Transcript of an interview with Vojislav Šešelj and other guests on Belgrade TV, published in *Televizijski megdani* (*TV Duels*)	(6 March 1992)					
103	P01194	Transcript of a television interview with Vojislav Šešelj on *Minimaksovizija*, published in *Televizijski megdani* (*TV Duels*)	(7 April 1992)					
104	P01195	Transcript of a television interview with Vojislav Šešelj and other guests, in which he says that he has never met a good Croat, published in *Televizijski megdani* (*TV Duels*)	(8 April 1992)					
105	P01198	Transcript of a press conference held by Vojislav Šešelj on volunteers, Greater Serbia, material support and the expulsion of Kosovar Albanians	(30 April 1992)					
106	P01199	Three press conferences held by the Serbian Radical Party	(28 May, 4 and 11 June 1992)					
107	P01200	*Borba* article on a pre-election meeting of the Serbian Radical Party in Belgrade	(28 May 1992)					
108	P01201	Transcript of a televised interview with Vojislav Šešelj broadcast by TV Politika, published in *Televizijski megdani* (*TV Duels*)	(12 June 1992)					
109	P01202	Transcript of two press conferences held by Vojislav Šešelj on 6 and 27 August 1992, published in *Milan Panić mora pasti* (*Milan Panić Must Fall*)	(6 and 27 August 1992)					
110	P01203	Transcript of an interview Vojislav Šešelj gave to *Globus*, published in *Aktuelni politički izazovi* (*Current Political Challenges*)	(7 August 1992)					
111	P01204	Transcript of a part of an interview by Serbian Radio Pale with Vojislav Šešelj and Nikola Poplašen, published in *Kroz politički galimatijas* (*Through Political Galimatias*)	(September 1992)					

112	P01205	Transcript of a televised interview with Vojislav Šešelj broadcast by Pale Serbian television	(September 1992)					
113	P01206	Transcript of a press conference held by Vojislav Šešelj, published in his book *Milan Panić mora pasti* (*Milan Panić Must Fall*)	(24 September 1992)					
114	P01207	Transcript of several interviews conducted by Slavoljub Kačarević with Vojislav Šešelj, published in *Televizijski megdani* (*TV Duels*)	(26 November 1992)					
115	P01208	Transcript of a discussion/debate reproduced by Tanjug, published in *Aktuelni politički izazovi* (*Current Political Challenges*)	(7 December 1992)					
116	P01210	Interview with Vojislav Šešelj in NIN, published in *Aktuelni politički izazovi* (*Current Political Challenges*)	(1 January1993)					
117	P01211	Transcript of a press conference held by Vojislav Šešelj, published in *Načelnik generalštaba na kolenima* (*Chief of the General Staff on His Knees*)	(13 January1993)					
118	P01213	Transcript of two interviews with Vojislav Šešelj, one of which was broadcast by Radio Belgrade and the other was shown on TV Politika, both were published in *Kroz politički galimatijas* (*Through Political Galimatias*)	(13 and 23 February 1993)					
119	P01215	Transcript of an interview with Vojislav Šešelj on Radio Banja Luka, published in *Kroz politički galimatijas* (*Through Political Galimatias*)	(20 March 1993)					
120	P01216	Transcript of an interview with Vojislav Šešelj on Radio Belgrade, published in *Kroz politički galimatijas* (*Through Political Galimatias*)	(22 March 1993)					

121	P01217	Interview given by Vojislav Šešelj to *Borba*, dealing with support to Serbs outside Serbia and support to Slobodan Milošević, published in *Aktuelni politički izazovi* (*Current Political Challenges*)	(21 April 1993)					
122	P01218	Interview with Vojislav Šešelj in *Globus* magazine, published in *Aktuelni politički izazovi* (*Current Political Challenges*)	(7 May 1993)					
123	P01219	Transcript of a press conference held by Vojislav Šešelj regarding Dobrica Ćosić, a rally of the Serbian Radical Party in Loznica against the Drina border, the proclaiming of Chetnik *Vojvodas* in Sokolac, Knežina, Mt Romanija, the Kentaur company (Života Panić) and Goran Hadžić	(13 May 1993)					
124	P01220	Interview with Vojislav Šešelj given to a Japanese journalist, published in *Partijski bilansi i politički balansi* (*Party Balance Sheets and Political Juggling*)	(18 May 1993)					
125	P01221	Interview with Vojislav Šešelj for the Belgrade weekly NIN, published in *Kroz politički galimatijas* (*Through Political Galimatias*)	(21 May 1993)					
126	P01222	Yoimyuri Shimbun's interview with Vojislav Šešelj, published in *Partijski bilansi i politički balansi* (*Party Balance Sheets and Political Juggling*)	(24 May 1993)					
127	P01223	Interview with Vojislav Šešelj for *Checkmate Productions*, published in the book *Aktuelni politički izazovi* (*Current Political Challenges*), Belgrade, 1993, pp. 144 to 148						
128	P01225	Interview with Vojislav Šešelj for *Globus*, published in the book *Partijski bilansi i politički balansi* (*Party Balance Sheets and Political Juggling*), Belgrade, 1993						
129	P01226	Transcript of a television programme with Vojislav Šešelj as the guest, published in his book *Pali, žari, dedinjski dizdare* (*Rule the Roost, the Governor from Dedinje*), Belgrade, 1994						

130	P01227	Interview with Vojislav Šešelj broadcast on Radio B-92, reprinted in Vojislav Šešelj's book *Branković je ustao iz groba* (*Branković Has Risen from the Grave*)						
131	P01228	Transcript of a radio interview with Vojislav Šešelj, published in his book *Milošević hapsi radikale* (*Milošević Arrests Radicals*), Belgrade, 1994						
132	P01230	Interview with Vojislav Šešelj entitled "I Am An Optimist", published in *Zapadna Srbija* (*Western Serbia*), November 1993						
133	P01231	Transcript of a radio interview with Vojislav Šešelj, published in his book *Milošević hapsi radikale* (*Milošević Arrests Radicals*), Belgrade, 1994						
134	P01233	Transcript of a radio interview with Vojislav Šešelj, published in his book *Milošević hapsi radikale* (*Milošević Arrests Radicals*), Belgrade, 1994						
135	P01234	Transcript of an interview with Vojislav Šešelj on Radio Šabac, published in his book *Milošević hapsi radikale* (*Milošević Arrests Radicals*), Belgrade, 1994						
136	P01236	Vojislav Šešelj's claim that the Catholic Church served as an intermediary in the exchange of goods in Slavonia (for example, Hrtkovci), reproduced in the book *Miloševićev zajam za preporod Kipra* (*Milošević's Loan for the Reconstruction of Cyprus*), Belgrade, 1994						
137	P01237	Excerpt from a Radio Apatin interview with Vojislav Šešelj in which he says that the Serbian Radical Party was in favour of a civilised exchange of the population with Croatia and wanted to exchange the Croats from Srem (for example, Hrtkovci) where Ante lived						
138	P01241	Transcript of an interview Vojislav Šešelj gave to TANJUG, published in his book *Milošević hapsi radikale* (*Milošević Arrests Radicals*), Belgrade, 1994						

139	P01246	Chapter from Vojislav Šešelj's book reproducing interviews with Mirjana Bobić-Mojsilović entitled, *Dr Vojislav Šešelj u kandžama Mirjane Bobić-Mojsilović, Srpska radikalna stranka guja u nedrima* (*Viper in the Bosom: Šešelj in the Clutches of Mirjana Bobić-Mojsilović*)						
140	P01247	Chapter from Vojislav Šešelj's book reproducing interviews with Mirjana Bobić-Mojsilović entitled, *Dr Vojislav Šešelj u kandžama Mirjane Bobić-Mojsilović, Srpska radikalna stranka guja u nedrima* (*Viper in the Bosom: Šešelj in the Clutches of Mirjana Bobić-Mojsilović*)						
141	P01248	Transcript of an interview with Vojislav Šešelj on TV Politika, published in his book *Preti li nam slobotomija* (*Are We in Danger of a Slobotomy?*)	(1994)					
142	P01249	Transcript of an interview with Vojislav Šešelj on Radio B-92/RTV B-92, published in his book *Preti li nam slobotomija* (*Are We in Danger of a Slobotomy?*)	(1994)					
143	P01251	Interview with Vojislav Šešelj conducted by Siniša Aksentijević, reproduced in Vojislav Šešelj's book *Filipike četničkog vojvode* (*Philippics of a Chetnik Vojvoda*)	(1994)					
144	P01255	Minutes of the founding assembly of the SRS in Kragujevac, published in the book entitled *Srpska radikalna stranka* (*The Serbian Radical Party*)	(23 February 1991)					
145	P01257	Closed Session of the Serbian Assembly	(26 September 1991)					
146	P01258	Closed Session of the Serbian Assembly	(27 September 1991)					
147	P01259	Closed Session of the Serbian Assembly	(17 October 1991)					
148	P01260	Closed Session of the Serbian Assembly	(6 November 1991)					
149	P01263	Interview with Vojislav Šešelj given to *The Voice of Podrinje* and Radio Šabac during the promotion of the Serbian Chetnik Movement in Mali Zvornik	(4 August 1990)					

150	P01264	Various articles and documents from *Velika Srbija*, reprinted in Vojislav Šešelj's book *Srpski Četnički Pokret* (*The Serbian Chetnik Movement*)	(1994)					
151	P01265	Letter signed by Vojislav Šešelj, addressed to the Ministry of Justice of Serbia on the application for registration in the register of political organisations	(25 February 1991)					
152	P01266	Message from Vojislav Šešelj to the Serbs in Knin, Krajina, promising them assistance	(27 February 1991)					
153	P01269	Vojin Vuletić's application form for membership of the Serbian Chetnik Movement	(1 May 1991)					
154	P01270	Communiqué from Vojislav Šešelj on the resignation of Borisav Jović as the President of the Presidency of the Socialist Federative Republic of Yugoslavia	(1 May 1991)					
155	P01272	Article published in *Politika*, quoting from Vojislav Šešelj's press conference on the participation of a Chetnik unit in Borovo Selo	(9 May 1991)					
156	P01274	Article which appeared in *Politika* on the Serbian Radical Party and Vojislav Šešelj's public protests calling for revenge after the death of Vukašin Šoškoćanin	(16 September 1991)					
157	P01275	Article from *Politika* entitled, "What is Hidden behind the Cockade?" on the Chetnik movement, mentioning Borovo Selo and Vojislav Šešelj's call for armed resistance	(26 May 1991)					
158	P01277	Article entitled, "When a Serbian Trumpet Sounds in Borovo Selo", published in *Velika Srbija*	(1 July 1991)					
159	P01280	Article from *Velika Srbija* on Ljubiša Petković, entitled, "The Man at the Helm of the Serbian Radical Party Crisis Committee and War Headquarters"	(4 September 1991)					
160	P01281	Newspaper article on a meeting of the Great National Assembly of the Serbian district of Slavonia, Baranja and Western Srem	(26 September 1991)					

161	P01282	Two articles from *Politika*: one on Vojislav Šešelj's demand for more propaganda, and the other presenting Zoran Đinđić's warning about the militarisation of Serbia and its parties	(3 October 1991)					
162	P01285	Article from *Politika* on Vojislav Šešelj's visit to Šid	(8 November 1991)					
163	P01288	Fax from Vojislav Šešelj to Radovan Karadžić	(9 January1992)					
164	P01289	Article published in *Velika Srbija* (*Greater Serbia*) no. 12 on Serbian volunteers capturing alleged Croatian spies and Ustashas in Slavonia	(February 1992)					
165	P01290	Article entitled "May They Rest in Peace" published in *Velika Srbija* (*Greater Serbia*) no. 12	(February 1992)					
166	P01291	Article entitled "Serbian Vukovar Will Live On" by Bojan Todorović published in *Velika Srbija* (*Greater Serbia*) no. 12	(February 1992)					
167	P01293	Three articles from *Politika* entitled: (1) "The Greatest Tragedy is Discord among the Serbs"; (2) "BH either Divided or in Yugoslavia; (3) "Serbs Will not Accept Jamahiriya"	(2, 6 and 15 March 1992)					
168	P01294	Article from *Politika* on the press conference of the Serbian Radical Party, entitled, "Šešelj Calls for a New Dinar"	(13 March 1992)					
169	P01295	Article from *Borba* on a speech given by Vojislav Šešelj	(20 March 1992)					
170	P01297	Article from *Vjesnik* reproducing a transcript of a Studio B television programme with Vojislav Šešelj	(5 April 1992)					

171	P01298	Article by J. Backović from *Politika* entitled, "Croats Have No Business /Being/ in Serbia"	(5 April 1992)					
172	P01299	Articles by B. Puzović and J. Marković from *Novosti*	(15 April 1992)					
173	P01306	Article from *Borba*, reporting the press conference given by Vojislav Šešelj in which he criticised Dobrica Ćosić and the Vance-Owen plan	(2 April 1993)					
174	P01307	Article published in *Zapadna Srbija* (*Western Serbia*), explaining editorial policies and the idea behind the paper	(June 1993)					
175	P01309	Interview by Jovan Janjić with Miroljub Jevtić, entitled, "There is no Co-Existence with Islam", published in *Srpska Sloga* /*Serbian Unity*/ and reprinted in *Zapadna Srbija* (*Western Serbia*), July 1993	(July 1993)					
176	P01310	Special edition of the Serbian magazine *ON*, no. 56, dedicated to Vojislav Šešelj and reprinted in the book *Slučajne ispovesti i poneka intriga* (*Accidental Confessions and Occasional Intrigue*)						
177	P01311	Article from *Novosti*, quoting Vojislav Šešelj on the expulsion of Ljubiša Petković from the Serbian Radical Party and the behaviour of Serbian Radical Party volunteers	(8 November 1993)					
178	P01312	Article from *Borba*, based on the press conference held by Vojislav Šešelj regarding Željko Ražnatović, aka "Arkan"	(12 November 1993)					
179	P01313	Article published in *Zapadna Srbija* (*Western Serbia*) no. 9, entitled, "Fierce Shell of a Black Mujahid"	(February 1994)					
180	P01315	Cartoon published in *Zapadna Srbija* (*Western Serbia*) no. 10	(March 1994)					

181	P01316	Photograph showing Nikola Poplašen, Aleksandar Stefanović, Tomislav Nikolić and Vojislav Šešelj and cartoon published in *Zapadna Srbija* (*Western Serbia*) no. 10	(March 1994)					
182	P01317	Cartoon published in *Zapadna Srbija* (*Western Serbia*) no. 10	(March 1994)					
183	P01318	Interview given by Branislav Vakić to the *Daily Telegraph*, concerning the training and supplies given to his volunteers by the Yugoslav People's Army	(28 September 1994)					
184	P01319	Article published in *Velika Srbija* (*Greater Serbia*) entitled, "The Duke Defends Serbian Sarajevo" by Rajko Đurđević	(January 1996)					
185	P01322	Open letter from California, entitled "Our Fraternal Greetings and Message to Serbian *Vojvoda* Vojislav Šešelj", published in *Velika Srbija* (*Greater Serbia*), signed by Momčilo Đujić	(18 July 1990)					
186	P01323	Article from *Velika Srbija* (*Greater Serbia*), written by Srećko Radovanović, aka "Debeli", entitled, "Combat Actions of the Kragujevac Chetnik Detachment"	(February 1992)					
187	P01324	Transcript of a press conference held by the Serbian Radical Party and Vojislav Šešelj, published in the book *Milan Panić mora pasti* (*Milan Panić Must Fall*)	(5 March 1992)					
188	P01330	Chapter entitled, "Population Exchange: Vojvodina Croats for Serbs from Croatia", from the book *U vrtlogu balkanske politike* (*In the Whirlpool of Balkan Politics*)						
189	P01337	Foreword to the first edition of Vojislav Šešelj's book *Ideologija srpskog nacionalizma* (*The Ideology of Serbian Nationalism*)	(24 September 2002)					

190	P01339	Interview Vojislav Šešelj gave to the newspaper *Student*, reprinted in the book *Razaranja srpskog nacionalnog bića* (*Destruction of the Serbian National Identity*) entitled "Šešelj and Draža's Guards are Everywhere"	(10 January1991)					
191	P01340	Video recording of an interview given by Vojislav Šešelj to TV Politika	(25 July 1991)					
192	P01362	Closed Session of the Serbian Assembly	(13 December 1991)					
193	P01363	Closed Session of the Serbian Assembly	(8 April 1992)					