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**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No: MICT-16-99-A

Date: 29 August 2016

Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Theodor Meron, Presiding
Judge Lee G. Muthoga
Judge Florence Rita Arrey
Judge Ben Emmerson
Judge Ivo Nelson de Caires Batista Rosa**

Registrar:

Mr. John Hocking

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**NOTICE OF FILING OF PUBLIC REDACTED VERSION OF
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The Office of the Prosecutor:

Mr. Mathias Marcussen
Ms. Barbara Goy

The Accused:

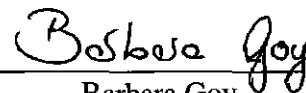
Mr. Vojislav Šešelj

1. The Prosecution hereby files a public redacted version of the Prosecution Appeal Brief, filed confidentially on 18 July 2016, as corrected on 29 August 2016.
2. The Prosecution further files publicly the annex attached to the Prosecution Appeal Brief, filed confidentially on 18 July 2016.

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Dated this 29th day of August 2016
At The Hague, The Netherlands

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No: MICT-16-99-A

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Before: Judge Theodor Meron, Presiding
 Judge Lee G. Muthoga
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 Judge Ben Emmerson
 Judge Ivo Nelson de Caires Batista Rosa

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v.

VOJISLAV ŠEŠELJ

PUBLIC REDACTED WITH PUBLIC ANNEX

PROSECUTION APPEAL BRIEF

The Office of the Prosecutor:

Mr. Mathias Marcussen
 Ms. Barbara Goy

The Accused:

Mr. Vojislav Šešelj

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I. OVERVIEW

1. The Judgement acquitting Vojislav Šešelj, rendered by majority, suffers from grave defects that must be corrected. While no reasonable trier of fact could have acquitted Šešelj on the evidence presented, the most troubling aspect of the Judgement is the uniquely inadequate adjudication of the case.

2. It is not only the Accused, the Prosecution and the Appeals Chamber that need to understand the basis for the conclusions in the Judgement. It is also important that victims, witnesses and the public can be assured that the case has been properly adjudicated. This requires that they can understand the reasons for the surprising findings in the Judgement. They cannot. The Majority gives insufficient reasons why crimes have been proven, or not, and merely provides single sentence bullet-point conclusions without any analysis of the evidence.

3. The victims and the public should be able to understand how the ICTY—after more than 20 years of existence—could arrive at the stunning conclusion that there was no widespread or systematic attack against the civilian population in Croatia or BiH when the massive crimes committed during the ethnic cleansing campaign were the reason for the ICTY's creation. Again, they cannot, because the Majority simply states its conclusion in two paragraphs citing to only two pieces of evidence. This is not due to a lack of evidence of widespread and systematic crimes. On the contrary, one of the most disturbing errors in the Judgement is the lack of discussion of the voluminous evidence of the large number of crimes committed during the ethnic cleansing campaign at the core of this case. A reasoned judgement cannot be rendered without addressing such evidence.

4. The disregard for evidence does not stop there. The Majority does not address evidence clearly relevant to Šešelj's intent. The Majority describes Šešelj's views as mere political aspirations and his statements and deployment of Šešelj's Men as possibly intended only to contribute to the war effort and protect Serbs outside Serbia. The Majority does not address the evidence in the record showing that Šešelj's goals and ideology were explicitly predicated on ethnic cleansing and the forced expulsion of non-Serbs from the areas he claimed. Nor does the Majority address Šešelj's numerous contemporaneous statements infused with calls for expulsion and threats of

revenge against Croats and Muslims which would lead to “rivers of blood”. A reasoned judgement cannot be delivered without addressing this evidence.

5. The Majority misconstrues the Prosecution’s allegations as being that essentially political aspirations were criminal—which the Majority concludes they were not, based on a piecemeal reading of isolated pieces of evidence. This way the Majority avoids addressing the Prosecution’s core liability arguments: that the only reasonable conclusion to be drawn from the evidence that Šešelj and the other alleged JCE members established, controlled and deployed the Serb forces that executed a protracted ethnic cleansing campaign against non-Serbs is the existence of a common criminal purpose.

6. The Majority also fails to set out the substantive law it applies, even when it adopts a novel legal concept—such as a requirement of an “*identité de vues*” between JCE members.

7. The failure to give reasons for its important conclusions, to address key evidence and to address key Prosecution arguments amounts to a failure to issue a reasoned judgement. This constitutes an error of law that invalidates the entire Judgement and is set out in Ground 1. The errors set out in any one of the sections below are sufficient to invalidate the Judgement. In addition, looked at cumulatively, the errors fundamentally undermine any confidence in the Judgement or the approach to adjudication adopted by the Majority.

8. If the Appeals Chamber is of the view that the reasons in the Judgement are adequate, Ground 2 demonstrates that no reasonable trier of fact could find Šešelj not guilty and that his full acquittal occasions a miscarriage of justice.

9. Either way, the Appeals Chamber must intervene as set out in the remedy section at the end of the brief. Letting this wholly inadequate Judgement stand risks seriously undermining the credibility of the ICTY and the MICT.

II. GROUND 1: THE CHAMBER ERRED IN LAW BY FAILING TO DELIVER A REASONED JUDGEMENT

A. Introduction

10. The Judgement should have contained an authoritative judicial decision made in accord with the evidence and arguments of the parties and with established legal standards.¹ It does not.

11. The Majority repeatedly disposed of complex factual allegations with almost no analysis of the record. An uninformed reader of the Judgement could conclude that the Prosecution forgot to tender evidence to substantiate the most important allegations in the Indictment. The uninformed reader would be wrong. The trial record in this case is replete with inculpatory evidence omitted from the Judgement or cited in support of banal findings irrelevant to the purpose for which it was tendered. As a result, there is no assessment of the large body of evidence of crimes, or the intent of the Accused and the named JCE members. While trial chambers need not refer to the testimony of every witness or every piece of evidence,² a judgement surely must address such clearly relevant evidence. Despite the requirement to deal with critical credibility issues,³ important issues relating to the evidence of recanting witnesses and the Accused are left unaddressed.

12. The Judgement falls short of even the most basic standards for a reasoned opinion.⁴ It has a perfunctory two-paragraph discussion dismissing the *chapeau* elements for crimes against humanity in Croatia and BiH and one-sentence bullet points with conclusions on charged war crimes. It misconstrues the Prosecution's core arguments about why the Accused is individually responsible and lacks explanation of the legal basis for novel concepts it introduces. This is not "the most careful of analyses" of the case,⁵ setting out in a clear and articulate manner the Chamber's factual and legal findings that is required.⁶

¹ Mani, p.33. See also *Boldea Case*, paras.28-30; *Suominen Case*, para.37; *Hiro Balani Case*, para.28.

² *Limaj AJ*, para.86, relying on *Kvočka AJ*, para.23.

³ *Ntagerura AJ*, para.174; *Halilović AJ*, para.125.

⁴ See Article 23(2) of the Statute; Rule 98ter(C) of the Rules.

⁵ *Bizimungu AJ*, para.19.

⁶ See *Bizimungu AJ*, para.18, relying on *Hadžihasanović AJ*, para.13. See *Hadžihasanović AJ*, para.13.

13. The Judgement is so flawed that it does not allow the Parties and the Appeals Chamber to understand and review the evaluation of the evidence and findings in the Judgement.⁷ This failure to provide a reasoned judgement constitutes an error of law,⁸ that invalidates the entire Judgement.

B. The Majority fails to address evidentiary issues and clearly relevant evidence

1. The Majority does not address essential evidentiary issues in the case

14. The Majority fails to issue a reasoned opinion on key evidentiary issues in the case relating to the credibility and weight⁹ to be given to the evidence of recanting witnesses, the Accused's testimony in the *Milošević* case¹⁰ and his statement under Rule 84*bis* of the Rules.¹¹

15. The Chamber disregards the vast majority of Šešelj's many contemporaneous public statements in which he openly advocated the expulsion of Muslims and Croats from territory he claimed as part of Greater Serbia.¹² The Chamber instead relies extensively on Šešelj's evidence as a witness in *Milošević*¹³ and his Rule 84*bis* statement,¹⁴ without once assessing the credibility of his self-serving protestations of innocence.¹⁵ The Chamber found that, in espousing the idea of a "Greater Serbia", Šešelj did not intend the commission of crimes.¹⁶ Thus a crucial component of its JCE analysis is almost entirely devoid of other support.¹⁷ This is at least a failure to provide a reasoned opinion.

16. Numerous senior SRS officials gave inculpatory evidence to the Prosecution before recanting their statements in testimony before the Chamber.¹⁸ Judge Lattanzi

⁷ See *Kunarac* AJ, para.41.

⁸ See *Župljanin* AJ, para.142; *Simatović* AJ, para.78; *Perišić* AJ, para.92; *Limaj* AJ, para.86, relying on *Kvočka* AJ, para.23.

⁹ *Ntagerura* AJ, para.174; *Halilović* AJ, para.125; *Muvunyi* AJ, paras.146-147.

¹⁰ Šešelj, Exh.P00031 (public).

¹¹ See Prosecution-FTB, paras.3-7, 639-670. See also Lattanzi-Dissent, paras.1-7.

¹² See below II.B.3.(b).

¹³ See Šešelj, Exh.P00031 (public).

¹⁴ See Judgement, paras.107, 119, 128, 135, 155, 180, 206, 329, fns.5, 14, 29, 32-33, 35-39, 42, 60, 64-65, 69, 73, 75, 85, 87, 91-92, 95-97, 101, 107, 109, 116, 119, 122-124, 131-133, 149, 159-160, 175, 182, 187-188, 207, 228-235, 238-239, 275, 282-284, 309, 369-371, 380-381, 385, 395.

¹⁵ See *Popović* TJ, para.21.

¹⁶ Judgement, para.230.

¹⁷ See below II.B.3 and IV.A.3.(b)(ii).

¹⁸ The recanting witnesses were Zoran Rankić (deputy chief of staff of SRS War Staff), Aleksandar Stefanović (Secretary-General of the SRS), Jovan Glamočanin (Vice-President of the SRS), Nebojša

concludes that these recantations were indicative of “a climate of intimidation, blackmail, threats and fear to which the Prosecution witnesses have been subjected” by the Accused and his associates.¹⁹ The Chamber appeared to agree with this conclusion at earlier stages of the proceedings, finding in 2008 that the explanation provided by Stojanović for recanting his statement “strains credibility”,²⁰ and in 2011 accepting the conclusion of an *amicus* Prosecutor that allegations by recanting witnesses that the Prosecution intimidated them into giving false evidence were “false”, “undermined” by the evidence and “exaggerated”.²¹ The Prosecution argued that the written statements of the recanting witnesses should be credited, and their recanting testimony rejected, as the written statements contain *indicia* of reliability and reliable facts corroborated by other evidence allowing the Chamber to give them weight.²² The Chamber addresses the discrepancies between prior statements and subsequent testimony only once, adopting general jurisprudence at the outset of the Judgement to the effect that live testimony is generally to be preferred.²³ Yet the Majority relies throughout the Judgement on both the recanters’ live testimony and their out-of-court statements, alternating freely between them without assessing the witnesses’ credibility in light of this pattern of recantations.²⁴ While the Majority occasionally acknowledges inconsistencies between the statements and testimony,²⁵ it fails to weigh the contradictions, to express a preference for one version over the other, or even to address whether the numerous recantations affected the rule that oral evidence is to be preferred.

Stojanović, Nenad Jović, Vojislav Dabić, and VS-037. Four other witnesses gave statements then failed to testify: Ljubiša Petković; Zoran Drazilović, VS-026 and VS-034.

¹⁹ Lattanzi-Dissent, para.5.

²⁰ Stojanović Statements Decision, para.15.

²¹ Šešelj Contempt Motion Decision, para.22.

²² Prosecution-FTB, paras.639-670.

²³ Judgement, para.26.

²⁴ Rankić: Judgement, paras.108, 244, fns.58, 87, 175 (relying on testimony); Judgement, fns.65, 86, 87, 95, 104, 113, 118, 175, 182, 183, 213, 348, 363 (relying on statements). Stefanović: Judgement, fns.37, 85 (relying on testimony); Judgement, fns.85, 106, para.244 (relying on statements). Glamočanin: Judgement, paras.244, 263 (relying on testimony); Judgement, fns.259, 275 (relying on statements). Stojanović: Judgement, fns.170 (relying on testimony); Judgement, fns.97, 170, 183-184 (relying on statements). Jović: Judgement, fns.188, 192, 194-195 (relying on testimony); Judgement, para.244, fns.125, 187-188, 192, 194-195 (relying on statements). Dabić: Judgement, fns.128, 130, 176, 207, 209, 212-216 (relying on testimony); [REDACTED]. VS-037: Judgement, fns.26, 110, 177, 187-189, 199 (relying on testimony); [REDACTED].

²⁵ See Judgement, paras.141, 256, 314-315.

17. For instance, the Majority does not even acknowledge that [REDACTED] that Petković, the SRS chief of staff—who was convicted for contempt of court for refusing to testify²⁶—[REDACTED],²⁷ [REDACTED].²⁸ Similarly, it omits that Šešelj was convicted three times for disclosing the identity of protected witnesses—a clear attempt to signal that protective measures granted by the Chamber would be ineffective—and sentenced to nearly five years in prison.²⁹ This conduct should have been of central importance to the Majority’s assessment of the credibility of the recanting witnesses and of Šešelj’s own evidence, in light of his determined effort to obstruct the proceedings. There is no reference to any of these developments in the Judgement.

2. The Majority fails to address the evidence of the mass crimes committed by Serb Forces that was at the heart of the Prosecution’s case

18. Perhaps the most worrying aspect of the Judgement is the absence of discussion of the overwhelming evidence of systematic mass crimes committed by Serb Forces, including Šešelj’s Men (“Šešeljevci”), in large parts of Croatia and BiH—evidence showing that overall, hundreds of thousands of non-Serbs were forcibly displaced from their homes, killed, mistreated, tortured and detained under inhumane conditions and subjected to the worst abuses.³⁰

19. Not only was the massive scale of the crimes relevant, but the crimes also followed a consistent pattern that had to be considered: from August 1991 to the end of 1993, first in Croatia, then in BiH, Serb Forces initiated takeovers of Serb-claimed territory, often forcing the non-Serb population to flee in the process; Serb authorities took discriminatory measures against non-Serbs, creating an atmosphere of fear, and forced many other non-Serbs to leave;³¹ non-Serb civilians and prisoners of war were killed, mistreated and detained in inhumane conditions.³² Many who remained were

²⁶ Petković Contempt TJ, para.80.

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ Šešelj Contempt Judgements.

³⁰ See below II.C.2.(c).

³¹ See e.g. VS-1111, T.7706 (public), [REDACTED]; VS-1055, T.7817-7818 (public). See also Džafić, Exh.P00840, para.3 (public); VS-1060, T.8575-8577 (public); Tot, Exh.P00843, paras.91-92 (public); VS-1013, T.5191-5195 (public); [REDACTED]; Kujan, Exh.P00524, p.5 (public). See also below II.C.2.(c), paras.63-65.

³² See below II.C.2.(c), para.60.

eventually rounded up; able-bodied men were separated and detained, and most, if not all, of the remaining non-Serbs were forcibly displaced to other locations.³³

20. This case could not be adjudicated without considering this large body of evidence. Any meaningful determination of whether there was a widespread or systematic attack against the non-Serb population had to address this evidence. Adjudication of arguments about whether the crimes charged in the Indictment were committed pursuant to the execution of a common criminal purpose required the Chamber to weigh it. And it was indispensable context for assessing the meaning and impact of Šešelj's stream of violent and discriminatory propaganda.³⁴

21. The Judgement extensively discusses the historical background to the conflict in the former Yugoslavia,³⁵ and dwells on political context,³⁶ institutional structures and constitutional issues,³⁷ while the numerous war crimes that were found proven linger decontextualised in one-line bullet point lists.

22. The Majority not only fails to consider the pattern in the war crimes it finds proven, it also expressly rejects evidence the Prosecution was allowed to lead in order to prove a similar pattern of crimes in municipalities outside the scope of the Indictment.³⁸ The relevance of the pattern of crimes, in particular to the *chapeau* element of crimes against humanity and to JCE liability, is not only a matter of logic. Its relevance was recognised at the pre-trial stage by the Chamber (differently composed) and pre-trial Judge Antonetti. He allowed the Prosecution to lead evidence of crimes in municipalities that the Prosecution was ordered to drop from the Indictment to prove *inter alia* the purpose and methods of the JCE and the persecutory campaign in Croatia and BiH.³⁹

23. It is therefore all the more surprising that the Majority excludes pattern evidence from its consideration because it served no other purpose than to "duplicate[] very similar accusations".⁴⁰ This is, of course, exactly the reason why

³³ See also below II.C.2.(c), paras.66-71.

³⁴ See below II.B.3.(b).

³⁵ See e.g. Judgement, paras.31-51.

³⁶ See e.g. Judgement, paras.52-62.

³⁷ See e.g. Judgement, paras.63-102.

³⁸ Judgement, para.29.

³⁹ Rule 73bis Decision, paras.17, 19. See also para.28 (public); Submission Number 311 Decision, p.4.

⁴⁰ Judgement, para.29.

pattern evidence is presented. It is the similarities that prove the pattern and it is from the pattern that inferences are drawn.

24. The Majority likewise disregards a wide range of other evidence showing the widespread and systematic nature of the crimes in Croatia and BiH. For example:

- Independent international observers were fully aware of the crimes as they were committed and documented them in reports entered into evidence. The European Community Monitoring Mission to the Balkans described the campaign by Serb forces in Croatia in the following terms: “Throughout broad areas of territory in innumerable smaller villages Croatian inhabitants are killed or forced to leave after which their villages are bulldozed out of existence [...] they are simply and wantonly destroyed.”⁴¹ Inexplicably, the Judgement cites to this report merely in its discussion of uncontested constitutional developments.⁴² A 27-page report by Helsinki Watch, detailing massive crimes by Serb Forces in Croatia—which states that “[t]he Serbian government has also condoned and, in some cases, supported the formation of at least three paramilitary groups in Serbia which operate in Croatia. What appears to be the most brutal of these groups is led by Vojislav Šešelj”⁴³—is included only in string cites supporting the finding that the destruction of Vukovar was not wanton⁴⁴ and that Šešelj’s Men participated in killing detainees at Ovčara Farm.⁴⁵ The Judgement reserves the same fate for the report of Mazowiecki, Special Rapporteur to the UN Commission on Human Rights.⁴⁶
- While the Judgement frequently cites alleged JCE member Milan Babić,⁴⁷ there is no mention of his evidence that Serb Forces, including the JNA,

engaged in combat operations in such a way that [...] it forced the population and members of the armed forces of the Croatian government and the entire population to withdraw and retreat

⁴¹ Exh.P00412, p.13 (public).

⁴² Judgement, paras.37-39.

⁴³ Exh.P00183, p.2 (public).

⁴⁴ Judgement, para.204(a), fn.172.

⁴⁵ Judgement, para.207(b), fn.184.

⁴⁶ Exh.P00982 (public) *cited only in* Judgement, para.207(b), fn.184.

⁴⁷ Prosecution-FTB, para.124.

from those territories. In this way, the JNA [...] engaged in a war so that the territories it captured would be left without any Croatian inhabitants, or very few of them.⁴⁸

- The Majority even ignores dozens of Adjudicated Facts proving that the takeover of municipalities by Serb Forces in BiH would necessarily entail force and fear⁴⁹ and was routinely accompanied by crimes and harsh repression of non-Serb civilians:

In general, the military take-overs involved shelling, sniping and the rounding up of non-Serbs in the area. These tactics often resulted in civilian deaths and the flight of non-Serbs. Remaining non-Serbs were then forced to meet in assembly areas in towns for expulsion from the area. Large numbers of non-Serbs were imprisoned, beaten and forced to sing Chetnik songs and their valuables seized. This was accompanied by widespread destruction of personal and real property.⁵⁰

This “general” pattern of mistreatment was replicated in Zvornik, Greater Sarajevo, Mostar and Nevesinje. Serb Forces “expelled Muslims on a large scale”;⁵¹ Muslims were “harassed”,⁵² “evicted”,⁵³ “detained”⁵⁴ and subjected to “repressive measures”;⁵⁵ and women and children “including babies” were held for days on end without food or water⁵⁶ before being killed.⁵⁷ Elsewhere in BiH,⁵⁸ “large-scale”⁵⁹ acts of violence were perpetrated against “tens of thousands” of civilians⁶⁰ who were detained in “particularly harsh conditions”⁶¹ without adequate food, water or medical care,⁶² interrogated under “coercive and forced circumstances”,⁶³ “beaten with various objects,

⁴⁸ Babić, Exh.P01137, pp.92-94 (public).

⁴⁹ AFI-104. Again, the Chamber merely referred to AFI-104 in the ‘General Context’ part, *see* Judgement, para.45.

⁵⁰ AFI-172. Despite failing to make reference to this description of widespread criminality in its analysis of the crime base or the common criminal purpose, the Chamber cited it in support of the proposition that an armed conflict existed in BiH during the indictment period. *See* Judgement, fn.160.

⁵¹ AFIV-158.

⁵² AFIV-157, 165.

⁵³ AFIV-176.

⁵⁴ AFIV-135-136, 152.

⁵⁵ AFIV-155.

⁵⁶ AFIV-188-189.

⁵⁷ AFIV-190-192.

⁵⁸ AFI-274-293, 295, 297-298, 300, 314, 324-325, 327.

⁵⁹ AFI-274.

⁶⁰ AFI-325.

⁶¹ AFI-324.

⁶² AFI-297.

⁶³ AFI-289.

such as rifles, metal bars, baseball bats, metal chains, police batons, and chair legs”,⁶⁴ and subjected to “heinous” acts including sexual assault and the “extraction of teeth”.⁶⁵ Likewise in Croatia, “hundreds” of non-Serbs were killed after Serb Forces occupied Vukovar in November 1991.⁶⁶ The “majority of the remaining non-Serb population were expelled from the city.”⁶⁷

25. The disregard for a large body of clearly relevant evidence that goes to key issues in the case, including the *chapeau* elements for crimes against humanity, the existence of the common criminal purpose and Šešelj’s intent, constitutes an error of law⁶⁸ that vitiates the entire Judgement.

3. The Majority fails to address evidence of Šešelj’s intent

26. While the Majority finds insufficient proof that Šešelj’s political objectives entailed the commission of crimes,⁶⁹ it fails to assess the evidence that is the most relevant to his criminal intent and thus to the existence of the common criminal purpose: evidence about the *Chetnik* ideology and goals that Šešelj adopted; about the militant and violent public *persona* he cultivated; and most of his numerous statements infused with incendiary language prompting crimes against non-Serbs.

(a) The Majority does not address evidence regarding Šešelj’s ideology and goals

27. The Majority finds Šešelj’s goal of creating a Greater Serbia to be “*a priori*” political.⁷⁰ However, it never engages with the evidence about the substance of Šešelj’s ideology and goals.

28. The evidence shows that Šešelj adopted the *Chetnik* ideology and goals predicated on ethnic cleansing and the forced expulsion of non-Serb ethnicities.⁷¹ One of the *Chetnik* Movement’s main goals was to create a Greater Serbia without any

⁶⁴ AFI-290, 293.

⁶⁵ AFI-295.

⁶⁶ AFIII-4.

⁶⁷ AFIII-4.

⁶⁸ See *Limaj* AJ, para.86; *Kvočka* AJ, para.23.

⁶⁹ Judgement, para.238.

⁷⁰ Judgement, para.230.

⁷¹ Exh.P00153, p.1 (public).

national minorities.⁷² For the founding leaders of the *Chetnik* Movement, Greater Serbia would require “[r]elocation and exchange of populations, particularly of Croats living in the Serbian areas and Serbs living in the Croatian area”.⁷³

29. Feeding on *Chetnik* traditions, Šešelj promoted himself as a military leader, established a military wing of his party, and created a War Staff when an imminent threat of war was declared in October 1991.⁷⁴ The black *Chetnik* flag carried by his *Šešeljevci*, with skull and cross-bones imagery, was a deliberate revival of the WWII *Chetnik* iconography.⁷⁵ He promoted the *Chetnik* movement’s militaristic traditions,⁷⁶ portrayed himself as a military commander,⁷⁷ revered his *Vojvoda*-title,⁷⁸ together with the SRS sent *Šešeljevci* to Croatia and BiH,⁷⁹ appeared in military attire at frontlines⁸⁰ and bestowed the title of *Vojvoda*⁸¹ on *Šešeljevci*—including those found to have committed serious crimes.⁸²

30. Šešelj bragged about vandalizing the symbols of other groups.⁸³ The magazines of the Serb Radical Party (“SRS”) and the Serbian *Chetnik* Movement (“SČP”), both headed by Šešelj,⁸⁴ celebrated *Chetnik* ideals, ideals that *Šešeljevci* deployed in Croatia and BiH embraced.⁸⁵

⁷² Exhs.P00164, pp.45-46 (public); P01263, pp.1-3, 15 (public); P01170 (public); P00141, p.2 (public).

⁷³ Exh.P00141, p.2 (public).

⁷⁴ [REDACTED]; [REDACTED]; Petković, Exhs.C00011, p.6 (public); C00018, para.39 (public); C00013, p.21 (public); C00014, p.24 (public); [REDACTED]. See also Šešelj, Exh.P00031, pp.1077-1078 (public).

⁷⁵ Exh.P01181, pp.13-14 (public).

⁷⁶ Tomić, T.2995, T.3029-3039; Exh.P01322 (public).

⁷⁷ Exhs.P00154, p.2 (public); P00059 (public); [REDACTED]; Glamočanin, Exh.P00688, para.59 (public); VS-033, T.5510 (public).

⁷⁸ Exhs.P00150, p.3 (public); P00164, pp.57-74 (public); P01213, p.2 (public); P01322, p.1 (public); Theunens, T.4214-4215 (public).

⁷⁹ Exhs.P00185 (public); P01280, p.2 (public); P00644, p.14 (public); P00067, p.1 (public); P00068, p.1 (public); P01263, p.6 (public); Šešelj, Exh.P00031, pp.665, 792-793, 862; Rankić, Exh.P01074, paras.101-113 (public); Exhs.P01230, p.11 (public); P01248, p.6 (public); P01002 (public).

⁸⁰ See e.g. Exhs.P00185 (public); P00184 (public).

⁸¹ Exhs.P00217 (public); P00218 (public). See also Exhs.P00256 (public); P00644, p.14 (public).

⁸² Exh.P00644, p.14 (public). For instance, Šešelj named the commander of the Leva Supoderica Detachment, Kamenji, a *Vojvoda*. Exh.P00217, p.5 (public). See Judgement, para.207(a)-(d).

⁸³ Exh.P01264, p.32 (public). See also p.10; Exh.P01263, pp.2-3 (public).

⁸⁴ Judgement, paras.52, 55.

⁸⁵ Exhs.P01280 (public); P00937 (public); P01289 (public); P01290 (public). Radio interviews: Exhs.P01189 (public); P01190 (public); P01204 (public); P01215 (public); P01216 (public); P01227 (public). Television interviews: Exhs.P01185 (public); P01193 (public); P01297 (public); P01194 (public); P01195 (public); P01201 (public); P01205 (public); P01207 (public); P01226 (public).

31. Moderate politicians like Zoran Đinđić warned of the danger linked to “the verbal and visual militarization” of those like Šešelj and the SRS.⁸⁶

32. The close association of *Chetnik* ideology and crimes was broadly recognised and Šešelj’s SČP⁸⁷ was denied registration as a party because:

It is known from the recent history of Yugoslavia that members of the Chetnik movement in World War II ended the war on the losing side and *their leaders were convicted as war criminals by people’s courts because of massacres and other forms of terror against the peoples of Serbia, Montenegro and Bosnia and Herzegovina.*⁸⁸

33. The Majority’s failure to address clearly relevant evidence is further demonstrated in its treatment of historical expert witness Yves Tomić. The Chamber ignores Tomić’s conclusion that the founders of the *Chetnik* movement sought:

To cleanse the territory of the state of all national minorities and non-national elements [...] To settle Montenegrins (strictly honest, nationally acceptable and poor families) in the areas cleansed of national minorities and non-national elements.⁸⁹

An entire section of Tomić’s report titled “The practice of ethnic cleansing” is missing from the Judgement.⁹⁰ According to Tomić, the founders of the *Chetnik* movement believed that:

Revenge was associated with the policy of restructuring the Yugoslav state. [...] The mapped out territory had to be taken over, [...] and non-Serbian elements were to be cleansed, killing those responsible for the massacres of the Serbs, driving out the Croats to *Croatia and the Muslims to Turkey or Albania.*⁹¹

34. While it does not address this evidence anywhere in the Judgement, the Chamber makes no adverse findings as to Tomić’s expertise or credibility. Indeed, it relies on his evidence nearly two dozen times,⁹² including to substantiate its analysis

⁸⁶ Exh.P01282, p.2 (public). See also Exh.P01258, pp.76-77 (public).

⁸⁷ The SRS adopted the same *Chetnik* ideology, and in fact incorporated the SČP, as Šešelj made clear in his public statements: Exhs.P00153, pp.2, 11-12 (public); P00164, p.85 (public); Tomić, T.2977, 3031-3032 (public); Exh.P00162, para.1 (public); Exh.P00179, p.2 (public).

⁸⁸ Exh.P01264, p.3 (emphasis added) (public).

⁸⁹ Exh.P00164, pp.48-49 (public). See also Tomić, T.2876-2877, 2879, 3005-3007, 3039-3041 (public).

⁹⁰ Exh.P00164, pp.53 *et seq.* (public).

⁹¹ Exh.P00164, p.53 (public).

⁹² Judgement, fns.16, 32-37, 39-41, 43, 83, 92, 229, 256, 278, 385.

of the *Chetnik* movement.⁹³ His report is among the most heavily cited exhibits in the Judgement.⁹⁴ The Chamber does not reject Tomić's inculpatory evidence. Rather, it "completely disregard[s]"⁹⁵ central aspects relied on by the Prosecution.

35. The Majority further describes the mandate of the SRS/SČP Crisis Staff as "limited to humanitarian activities",⁹⁶ omitting that it deployed armed volunteers to Croatia, BiH and to the JNA.⁹⁷ It describes the SRS/SČP War Staff as merely recruiting volunteers to the JNA,⁹⁸ omitting that it also sent volunteers directly to conflict areas where they participated in large scale expulsions of non-Serbs, such as in Zvornik.⁹⁹

(b) The Majority does not address a large number of Šešelj's statements

36. Likewise the Majority does not address numerous statements which Šešelj made freely in interviews, speeches, parliamentary debates and his own published work, which are infused with incriminating statements.¹⁰⁰ These statements were relied on by the Prosecution to establish his discriminatory intent, his adherence to and implementation of the JCE's criminal common purpose, and the fact that he relentlessly instigated the commission of crimes against non-Serbs.¹⁰¹ The content of these speeches is analysed in detail below.¹⁰²

37. For example the Chamber admitted a large number of Šešelj's statements from the bar table,¹⁰³ which it found relevant to "a fundamental issue in the Indictment, that of the Accused's ideology, the concept of the 'Greater Serbia', the discrimination of non-Serbs, the formation and organization of the Serbian Chetnik Movement ('SČP') and of the Serbian Radical Party ('SRS'), the joint criminal enterprise alleged in the

⁹³ Judgement, fn.83.

⁹⁴ Tomić's expert report is the 12th most frequently cited exhibit in the Judgement.

⁹⁵ See *Limaj* AJ, para.86.

⁹⁶ Judgement, para.61.

⁹⁷ [REDACTED]; Rankić, Exh.P01075, para.26 (public); [REDACTED]; Šešelj, Exh.P00031, pp.238-240 (public); Exh.P01187, p.2 (public).

⁹⁸ Judgement, para.61.

⁹⁹ Exhs.P00067, p.1 (public); P00068, p.1 (public); P01263, p.6 (public); P00031, p.793 (public); Rankić, Exh.P01074, paras.101-113 (public).

¹⁰⁰ See also below II.E.1.(a).

¹⁰¹ See e.g. Prosecution-FTB, paras.34, 36, 37, 50-56, 594. See also paras.41-49, 57-61.

¹⁰² See below III.C.

¹⁰³ 19 February 2010 Bar Table Decision, paras.11, 12; 23 December 2010 Bar Table Decision, paras.26-31.

Indictment”.¹⁰⁴ Those statements show that Šešelj (i) euphemistically advocated for “population exchanges”;¹⁰⁵ (ii) emphasized that Serbs and non-Serbs could no longer live together, condemning any negotiations premised on that basis;¹⁰⁶ (iii) propagated a climate of fear using inflammatory language about past victimization and genocide against the Serbs and called for revenge, punishment and retaliation against all Croats as *Ustashas* for fascist atrocities during WWII;¹⁰⁷ (iv) called for an expanded Serbia encompassing all of “Serbdom”, advocating merciless violence and refusing any compromise in order to gain and retain what he considered Serb lands outside of Serbia;¹⁰⁸ (v) promised bloodshed if Croats and Bosnian Muslims were to refuse Serb territorial ultimatums;¹⁰⁹ and (vi) disseminated his hate propaganda, portraying Croats and Bosnian Muslims in a threatening, denigrating, dehumanizing way.¹¹⁰ They are not discussed in the Judgement.

38. These and numerous other similar statements not discussed in the Judgement¹¹¹ show that Šešelj was the architect of a years-long campaign of propaganda designed to cultivate fear among the Serb population¹¹² and rationalize the use of violence against ominous bands of *Ustashas*, and “Muslim fundamentalists”,¹¹³ who represented the “forces of evil and darkness”.¹¹⁴

¹⁰⁴ See 23 December 2010 Bar Table Decision, para.30 (This included statements outside the “indictment period”). See also e.g. Rule 65ter documents 1921 (Exh.P01231), 171 (Exh.P01266), 224 (Exh.P01274), 1083 (Exh.P01297), 1084 (Exh.P01298).

¹⁰⁵ See e.g. Exhs.P01186, p.7 (public); P01189, p.11 (public); P01195, p.3 (public); P01216, pp.17-18 (public); P01297, p.1 (public).

¹⁰⁶ See e.g. Exhs.P01169 p.6 (public); P01174, p.1 (public); P01189, p.18 (public); P01193, p.8 (public); P01195, p.3 (public); P01217, p.5 (public); P01222, p.7 (public); P01227, p.15 (public); P01257, p.55 (public); P01258, p.39 (public); P01297, p.1 (public).

¹⁰⁷ See e.g. Exhs.P01003, p.1 (public); P01169, p.4 (public); P01174, pp.2-3 (public); P01185, pp.7, 22 (public); P01186, p.6 (public); P01189, p.28 (public); P01205, p.1 (public); P01216, p.15 (public); P01220, p.4 (public); P01257, p.54 (public); P01266, p.1 (public); P01274, p.2 (public); P01295, p.3 (public).

¹⁰⁸ See e.g. Exhs.P01169, p.4 (public); P01176, p.6 (public); P01178, p.4 (public); P01186, p.6 (public); P01189, p.26 (public); P01192, pp.1-2 (public); P01200, p.4 (public); P01204, pp.8-9 (public); P01207, p.3 (public); P01216, pp.21-22, 31 (public); P01217, p.5 (public); P01220, p.4 (public); P01222, p.7 (public); P01231, pp.1, 13 (public); P01257, p.54 (public); P01259, p.8 (public); P01266, p.1 (public); P01295, p.3 (public); P01324, pp.1, 3 (public).

¹⁰⁹ See e.g. Exhs.P01186, p.6 (public); P01192, p.1 (public); P01204, pp.8, 10 (public); P01220, p.4 (public); P01222, p.7 (public); P01258, pp.40, 42 (public); P01259, p.8 (public); P01298 (public); P01324, p.1 (public).

¹¹⁰ See e.g. Exhs.P01174, p.2 (public); P01189, p.18 (public); P01195, pp.3-4 (public); P01204, p.4 (public); P01207, p.4 (public); P01220, p.4 (public); P01227, pp.15-16 (public).

¹¹¹ See Judgement, paras.304-343.

¹¹² Exhs.P00353 (public); P00062 (public); P00014 (public).

¹¹³ Exh.P00034, p.6 (public).

¹¹⁴ Exh.P01266, p.1 (public).

39. *Velika Serbia* (Greater Serbia), a magazine founded and directed by Šešelj,¹¹⁵ echoed his speeches. The head of the SRS/SČP Crisis Staff warned the readers of the “blood-sucking virus called ‘GENOCIDE’ which is again breeding in the Ustasha blood” claiming that Serbs were “facing a new wave of extermination, which even Dr. Mengele would envy.”¹¹⁶

40. The Majority also fails to recognize that Šešelj made a large number of these statements in the middle of the ethnic cleansing campaign in Croatia and BiH in which his *Šešeljevci* participated.¹¹⁷ This was clearly relevant context both for the interpretation of the meaning of Šešelj’s statements and to the assessment of their impact.

4. Conclusion

41. By failing to address clearly relevant evidence,¹¹⁸ the Chamber fails to provide a reasoned opinion and thus erred in law.¹¹⁹

C. **The Chamber fails to provide a reasoned opinion for findings regarding charged crimes**

42. The Chamber’s findings on the charged crimes fall blatantly short of a reasoned opinion. There is no way for the Parties or the Appeals Chamber to understand and review the Chamber’s conclusions and its evaluation of the evidence.¹²⁰

1. The Chamber does not give sufficient reasons for its conclusions regarding charged war crimes

43. The Chamber’s findings on war crimes consist of mere one-sentence bullet-point conclusions regarding charged crimes.¹²¹ No analysis or reasons are provided. Moreover, the footnotes accompanying the bullet points contain string-cites to the entire evidence of multiple witnesses and exhibits, without identifying whether the

¹¹⁵ Exhs.P01269, p.2 (public); P01263, p:17 (public).

¹¹⁶ Exh.P01280, p.1 (public).

¹¹⁷ See below II.E.2.(b) and III.C.

¹¹⁸ See *Limaj* AJ, para.86; *Kvočka* AJ, para.23.

¹¹⁹ See *Župljanin* AJ, para.142; *Simatović* AJ, para.78; *Perišić* AJ, para.92; *Limaj* AJ, para.86; *Kvočka* AJ, para.23.

¹²⁰ See *Kumarac* AJ, para.41.

Chamber relies on the witnesses' voluminous testimony or multiple prior statements,¹²² or on which part of lengthy exhibits the Chamber relies.¹²³ Neither the Parties nor the Appeals Chamber have any way to understand the basis for the Chamber's conclusions. These findings fall far short of a reasoned opinion. For those war crimes that the Chamber found proven, the Prosecution agrees with the conclusion; however the Chamber's reasoning is equally deficient.

44. The failure to give sufficient reasons for its findings on charged crimes is a clear failure to provide a reasoned opinion.¹²⁴

2. The Majority does not give sufficient reasons for its conclusion that there was no widespread or systematic attack against the non-Serb civilian population in Croatia and BiH

45. In merely two paragraphs the Majority addresses the key issue of the existence of a widespread or systematic attack against the civilian population in Croatia and BiH. These two paragraphs provide no insight into its analysis, only refer to the evidence of two witnesses, and do not address the large amount of evidence of crimes against non-Serb civilians, including the war crimes the Chamber found proven.

(a) The Majority does not explain what evidence it considered

46. The Majority claims to have reached its conclusion that a widespread or systematic attack was not proved based on "the totality of the evidence in the case

¹²¹ Judgement, paras.203, 204, 207, 210, 213, 216, 219.

¹²² For example Dabić: T.15102-15271 (public and confidential), [REDACTED], [REDACTED] cited in fns.[REDACTED], 176, 208-209, 213-215; Stojanović: T.9669-9729, 9756-9796 (public and confidential), Exhs.P00526 (public), P00527 (public), P00528 (public) cited in fns.170, 183, 184; Tot, Exhs.P00843, P00846 (public) cited in fns.175, 180, 202; VS-037: T.14833-14913, 14926-15050 (public and confidential), [REDACTED], [REDACTED] cited in fns.[REDACTED], 187; [REDACTED], [REDACTED], [REDACTED] cited in fn.[REDACTED]; [REDACTED], [REDACTED], [REDACTED]; VS-034: [REDACTED], [REDACTED], [REDACTED] cited in fns.184, [REDACTED]; VS-032: Exhs.P01077 (public), [REDACTED] cited in fns.187, 192, 194-195; Petković: Exhs.C00011, C00012, C00014, C00016, C00018 (public) cited in fns.182, 184, 188; Riedlmayer: T.7263-7514 (public and confidential), Exh.P01044 (public) cited in fns.177, 180; VS-1067, T.15280-15384 (partly confidential), [REDACTED], [REDACTED] cited in fns.208, 210; VS-1068: T.12266-12279 (public and confidential), [REDACTED], [REDACTED] cited in fns.210-211.

¹²³ For example Šešelj, Exh.P00031 (public) (cited in fns.159-160, 175, 182, 187-188, 207) consists of 1553 pages; Exh.P01045 (public) (cited in fns.177-181) consists of 476 pages; Exh.P00261 (public) (cited in fns.172, 184, 187) consists of 379 pages.

¹²⁴ See Simatović AJ, para.78; Bizimungu AJ, para.18.

file”.¹²⁵ However, it is impossible to know which evidence the Majority actually considered, as there is neither an explanation nor a citation to any of the numerous pieces of evidence in the trial record that prove that widespread and systematic crimes were committed by Serb Forces against non-Serb civilians.¹²⁶ The Majority merely concludes at paragraph 192 “that it did not receive sufficient evidence to irrefutably establish the existence of a widespread and systematic attack against the civilian population”.¹²⁷

(b) The evidence referred to by the Majority does not support its alternative hypothesis

47. The Majority similarly fails to explain what evidence it considered supported its alternative hypothesis,¹²⁸ that the events were legitimate consequences of an armed conflict. Without any reference to evidence on the record, the Majority finds

that the evidence that was presented and examined points rather to an armed conflict between enemy military forces, with some civilian components. The presence of civilian combatants in undetermined proportions in the context of clashes that many witnesses described as street fighting, where every piece of territory, every house was fought for, presents a context which does not support the conclusion that there was an attack directed against civilians.¹²⁹

48. Instead of analysing the evidence in the case, the Majority seeks to blame the Prosecution for not having “clearly demonstrated to the judges that the civilians were targeted en masse, when in fact they were not taking part in the fighting and presented no danger to the Serbian fighters.”¹³⁰ However, because the Majority does not cite to any evidence for this conclusion, it remains unclear why the Prosecution purportedly has not met its burden.

49. The only two pieces of evidence that the Majority does cite do not explain why the Majority had reasonable doubt. Citing to witnesses VS-1022 and [REDACTED], the Majority holds that it is

¹²⁵ Judgement, para.192.

¹²⁶ See below evidence cited in II.B.2.(c). See also Lattanzi-Dissent, para.81.

¹²⁷ Judgement, para.192.

¹²⁸ Bagosora AJ, para.562. See also Tadić AJ, paras.182-183.

¹²⁹ Judgement, para.192.

¹³⁰ Judgement, para.193.

unable to dismiss the argument of the Defence - echoed by many of the witness testimonies - which explains that the civilians fled the combat zones to find shelter in the localities occupied by members of the same ethnic or religious group; that the buses that were provided in this context were not part of operations to forcibly transfer the population, but rather acts of humanitarian assistance to non-combatants fleeing the zones where they no longer felt safe.¹³¹

50. Even if two witnesses had provided evidence that civilians fled because of combat and that buses were provided for humanitarian purposes, their evidence had to be weighed against other evidence in the trial record showing that combat operations were conducted in order to expel non-Serb civilians and crimes were committed against non-Serb civilians,¹³² including those which the Chamber finds proven.

51. Moreover, the Majority misapprehends the evidence of VS-1022 and [REDACTED] by citing excerpts of their evidence out of context. Read in context, their evidence supports, rather than undermines the existence of a widespread or systematic attack.

52. By relying on a truncated portion of VS-1022's testimony to support its finding that civilians were not targeted *en masse*,¹³³ the Majority not only disregards the [REDACTED] described by the witness, but also omits the core of the witness's evidence [REDACTED].

53. The extracts of VS-1022's testimony to which the Majority refers relate to the witness's [REDACTED].¹³⁴ These extracts show that [REDACTED].¹³⁵ The Majority does not even refer to [REDACTED].¹³⁶ [REDACTED],¹³⁷ [REDACTED].¹³⁸

54. The Majority even fails to recognise that most of VS-1022's evidence focuses on [REDACTED]. VS-1022 testified that [REDACTED]¹³⁹ [REDACTED]¹⁴⁰

¹³¹ Judgement, para. 193 (internal reference omitted).

¹³² See above para. 24 and below paras. 66-71.

¹³³ Judgement, para. 193.

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

¹³⁶ [REDACTED].

¹³⁷ [REDACTED].

¹³⁸ [REDACTED]. See Judgement, fn. 148.

¹³⁹ [REDACTED].

¹⁴⁰ [REDACTED].

[REDACTED].¹⁴¹ [REDACTED].¹⁴² [REDACTED]¹⁴³ and [REDACTED]¹⁴⁴
 [REDACTED].¹⁴⁵ [REDACTED],¹⁴⁶ and [REDACTED].¹⁴⁷

55. The Majority’s use of the evidence of witness [REDACTED] is equally worrying. The Majority relies on a single remark in [REDACTED], in which [REDACTED].¹⁴⁸

56. Again, read as a whole, [REDACTED]’s evidence supports, rather than undermines, that there was a widespread or systematic attack against the non-Serb civilian population.

57. The Majority ignores that, in other parts of his evidence, [REDACTED] described that [REDACTED].¹⁴⁹ [REDACTED],¹⁵⁰ [REDACTED],¹⁵¹ [REDACTED],¹⁵² and [REDACTED].¹⁵³ [REDACTED].¹⁵⁴

58. Moreover, the Majority’s alternative inferences cannot possibly be reasonable in light of the evidence on the record that the Chamber did not address.

(c) The Majority does not address the large amount of evidence of crimes against non-Serb civilians, including the war crimes that the Chamber found proven

59. The Chamber does not address the large amount of evidence of crimes against non-Serb civilians. It does not even discuss the large number of war crimes against civilians it finds proven.¹⁵⁵ Moreover, the evidence shows that a large number of acts charged as crimes against humanity were committed in a widespread and systematic way; evidence clearly relevant to the existence of a widespread and systematic attack.

¹⁴¹ [REDACTED].
¹⁴² [REDACTED].
¹⁴³ [REDACTED].
¹⁴⁴ [REDACTED].
¹⁴⁵ [REDACTED].
¹⁴⁶ [REDACTED].
¹⁴⁷ [REDACTED].
¹⁴⁸ [REDACTED].
¹⁴⁹ [REDACTED].
¹⁵⁰ [REDACTED].
¹⁵¹ [REDACTED].
¹⁵² [REDACTED].
¹⁵³ [REDACTED].
¹⁵⁴ [REDACTED].
¹⁵⁵ See Judgement, paras.205-220.

60. The Chamber finds—under war crimes—that Serb Forces committed murder, torture and cruel treatment in Vukovar Municipality,¹⁵⁶ Zvornik Municipality,¹⁵⁷ Greater Sarajevo,¹⁵⁸ Mostar Municipality¹⁵⁹ and Nevesinje Municipality.¹⁶⁰ These

¹⁵⁶ Judgement, paras.207(a) (murder of detainees at the Velepromet warehouse on 19 and 21 November 1991 by Serbian forces, including Šešelj's men, members of the Leva Supoderica Detachment); 207(b) (murder of detainees at the Ovčara farm on 20 November 1991 by members of the Vukovar TO and the Leva Supoderica Detachment); 207(c) (torture and cruel treatment of detainees at the Ovčara farm on 20 November 1991 by Serbian forces, including members of the TO and Šešelj's men members of the Leva Supoderica Detachment); 207(d) (torture and cruel treatment at the Velepromet warehouse on 21 November 1991 by Serbian forces, including Šešelj's men members of the Leva Supoderica Detachment).

¹⁵⁷ Judgement, paras.210(a) (murder of Muslim civilians in the course of the attack on 8 and 9 April 1992, in particular 13 Muslim men by Arkan's men on 9 April 1992); 210(b) (murder of Nesib Dautović, Remzija Softić, Bego Bukvić and Abdulah Buljubašić at Ekonomija farm in May 1992 by members of the White Eagles (or the Kraljevo group), the Loznica group, Arkan's Tigers and SRS volunteers); 210(c) (murder of Muslim detainees including Ismet Ćirak at the Ciglana factory between May and July 1992 by members of the White Eagles (or the Kraljevo group) and the Loznica group); 210(d) (murder of 50 detainees at Drinjača Dom Kulture on 30 May 1992 by Serbian forces, including an unidentified paramilitary group); 210(e) (murder of a large number of Muslim detainees at the Karakaj Technical School between May and the beginning of June 1992 by members of the Serbian forces and the MUP); 210(f) (murder of a large number of non-Serb detainees by Serbian forces at Gero's slaughterhouse on 5 June 1992); 210(g) (murder of a number of Muslims detained at the Čelopek Dom Kulture in June 1992 by members of the Zok group (the Kraljevo group or White Eagles) and the Yellow Wasps, including Repić); 210(h) (torture and cruel treatment of the detainees at the Standard shoe factory in May 1992 by members of the Loznica group); 210(i) (torture and cruel treatment of detainees at the Ekonomija farm in May 1992 by members of the White Eagles (or the Kraljevo group), the Loznica group, Arkan's Tigers and SRS volunteers); 210(j) (torture and cruel treatment of detainees at the Ciglana factory by members of the White Eagles (or the Kraljevo group) and the Loznica group); 210(k) (torture and cruel treatment of detainees in the Drinjača Dom Kulture on 30 May 1992 by the Serbian forces, including an unidentified paramilitary group); 210(l) (torture and cruel treatment of detainees at the Karakaj Technical School around 1 June 1992 by Serbian forces, notably members of the MUP); 210(m) (torture and cruel treatment of detainees in the Čelopek Dom Kulture in June 1992 by members of the Zok group (the Kraljevo group or White Eagles) and the Yellow Wasps, including Repić).

¹⁵⁸ Judgement, paras.213(a) (murder of 17 Muslim civilians, including women and elderly people, and of Hasan Fazlić and Asim Karavdić in the village of Lješevu on 5 June 1992, the murder of Amir Fazlić by Vaske or SRS volunteers, the murder of Arif Omanović and Meho Fazlić during the attack on Lješevu); 213(b) (torture and cruel treatment of approximately 130 detainees in the Iskra warehouse in Podlugovi between June and August 1992 by Serbian forces); 213(c) (torture and cruel treatment of more than 100 detainees in Planja's house between June and October 1992 by the VRS).

¹⁵⁹ Judgement, paras.216(a) (murder of at least 40 civilians, most of whom were of Muslim origin, as well as that of a disabled Croat, at the Uborak dump in mid-June 1992 by soldiers attached to the Zalik TO and Šešelj's men); 216(b) (murder of at least seven civilians in the building of the main mortuary in Sutina in June 1992 by soldiers from the Zalik TO and members of paramilitary units); 216(c) (torture and cruel treatment of around 90 detainees in the locker room of the Vrapčici football stadium from 13 June 1992 by Serbian forces and paramilitaries, some of whom were SRS volunteers); 216(d) (torture and cruel treatment of more than 20 detainees in the building of the mortuary of the Sutina municipal cemetery around mid-June 1992 by local Serbian soldiers from the Zalik TO and paramilitaries).

¹⁶⁰ Judgement, paras.219(a) (murder of villagers from Gornja Bijenja, Postoljani, Kljuna and of Habiba Colaković in Presjeka during the attack on their village in June 1992 by Serbian forces); 219(b) (murder of 27 Muslim men at the Dubravica natural pit in Breza on 26 June 1992 by members of the Nevesinje Brigade 5th Battalion and local Serbs); 219(c) (murder of Muslim women and children who remained at the Kilavci heating factory around 30 June 1992 by Serbian forces); 219(d) (murder of at least six villagers from Hrušta, Luka and Kljuna detained at the Zijemlje School around 27 June 1992 by Serbian forces); 219(e) (torture and cruel treatment of the women and children detained at the Kilavci heating factory from 26 to 30 June 1992 by members of the Red Berets); 219(f) (torture and cruel treatment of 12 detainees at the Zijemlje School from 26 June 1992 by Serbian forces including

incidents were also charged as underlying acts of persecutions¹⁶¹ and the evidence shows that these acts constitute discrimination in fact on the basis of ethnicity and were committed with discriminatory intent.¹⁶²

61. The Majority further does not address evidence showing that numerous other acts of persecutions that were not charged as war crimes—persecutions based on torture, beating and robbery,¹⁶³ as well as on the imposition of restrictive and discriminatory measures¹⁶⁴—were committed against non-Serbs.

62. Serb Forces committed such acts of persecutions by torturing, beating, and robbing non-Serb civilians.¹⁶⁵ In Zvornik, detainees were robbed at Ekonomija Farm,¹⁶⁶ at Karakaj Technical School,¹⁶⁷ and at Čelopek Dom Kulture.¹⁶⁸ Non-Serbs were also mistreated and searched in Kozluk at the beginning of April 1992¹⁶⁹ and robbed in Klisa [REDACTED].¹⁷⁰ In Vukovar, Karlović was tortured and beaten in a house in Petrova Gora,¹⁷¹ and [REDACTED] was severely beaten.¹⁷² In Greater Sarajevo, non-Serbs were beaten and robbed in Lješevu, Ilijaš.¹⁷³ Non-Serbs were also beaten in Vogošća.¹⁷⁴ These crimes were committed by, *inter alia*, members of the JNA/VRS,¹⁷⁵ Serb TOs,¹⁷⁶ the police,¹⁷⁷ and paramilitary groups such as *Šešeljevci*,¹⁷⁸ Yellow Wasps¹⁷⁹ or Arkan's Men.¹⁸⁰

the White Eagles); 219(g) (torture and cruel treatment of detainees in the SUP building in Nevesinje around the end of June 1992 by Serbian forces, including MUP officers and members of the Red Berets).

¹⁶¹ See Indictment, para.17: (a) murder, (b) unlawful imprisonment and confinement, (c) establishment and perpetuation of inhumane conditions, (d) torture, beatings and killings (in detention), (e) forced labour, (f) sexual assaults. The Prosecution does not seek a conviction for crimes against humanity, based on the same conduct as the war crimes that were not found proven.

¹⁶² Exh.P01237, pp.1-2 (public). See also Exhs.P01210, p.8 (public); P01236, pp.3-4 (public).

¹⁶³ Indictment, para.17(h).

¹⁶⁴ Indictment, para.17(g).

¹⁶⁵ See Indictment, para.17(h).

¹⁶⁶ VS-1015, T.5402-5404 (public). See also Prosecution-FTB, Annex, Persecutions, fn.43.

¹⁶⁷ [REDACTED]; [REDACTED]. See also Prosecution-FTB, para.335, Annex, Persecutions, fn.45.

¹⁶⁸ VS-1065, T.6312-6313 (public), [REDACTED], 6319-6320 (public). See also Prosecution-FTB, para.342; Annex, Persecutions, fn.50.

¹⁶⁹ Banjanović, T.12448, 12464 (public). See also Prosecution-FTB, para.307; Annex, Persecutions, fn.41.

¹⁷⁰ [REDACTED]. See also Prosecution-FTB, Annex, Persecutions, fn.39.

¹⁷¹ Karlović, T.4742-4747 (public). See also Prosecution-FTB, Annex, Persecutions, fn.33.

¹⁷² [REDACTED]. See also Prosecution-FTB, Annex, Persecutions, fn.37.

¹⁷³ [REDACTED]; VS-1055, T.7820-7821 (public). See also Prosecution-FTB, Annex, Persecutions, fn.54.

¹⁷⁴ Sejdić, T.8169-8172 (public). See also Prosecution-FTB, Annex, Persecutions, fn.56.

¹⁷⁵ See e.g. [REDACTED]; VS-1065, T.6313 (public); [REDACTED]; [REDACTED].

63. Serb authorities also imposed restrictive and discriminatory measures on non-Serbs, amounting to discrimination in fact. For instance, after the takeover of Zvornik, Serb authorities prohibited the sale of Serb property to non-Serbs.¹⁸¹ They also restricted movement of non-Serbs in Zvornik town¹⁸² and Kozluk.¹⁸³ In the Greater Sarajevo area, in Ilijaš and Vogošća, Serb municipal authorities imposed restrictions of movement on non-Serbs.¹⁸⁴ The Ilijaš SDS Crisis Staff dismissed non-Serbs from jobs in Ilijaš.¹⁸⁵ Serb Forces arbitrarily searched non-Serb houses during the takeover of Grbavica.¹⁸⁶ In Iliđža, the War Presidency prohibited the return of non-Serbs to Iliđža municipality.¹⁸⁷ In Mostar, non-Serbs were removed from positions of authority including in the police force and [REDACTED],¹⁸⁸ and their freedom of movement was restricted.¹⁸⁹ These acts formed part of the coordinated pattern of suppression of non-Serbs by Serb Forces.

64. The perpetrators of these crimes included, *inter alia*, members of the JNA/VRS,¹⁹⁰ police,¹⁹¹ *Šešeljevci*,¹⁹² [REDACTED],¹⁹³ as well as members of the Serbian municipality of Zvornik,¹⁹⁴ Ilijaš SDS Crisis Staff,¹⁹⁵ Vogošća Crisis Staff¹⁹⁶ and [REDACTED].¹⁹⁷

¹⁷⁶ See e.g. Banjanović, T.12476 (public); [REDACTED] Sejdić, T.8170-8172, 8407-8408 (public).

¹⁷⁷ See e.g. Sejdić, T.8170-8172 (public); [REDACTED].

¹⁷⁸ See e.g. Karlović, T.4742-4747 (public); Banjanović, T.12476 (public); VS-1065, T.6313 (public), [REDACTED], 6319-6320 (public); VS-1015, T.5402-5404 (public).

¹⁷⁹ See e.g. Banjanović, T.12428, 12433-12434 (public).

¹⁸⁰ See e.g. Banjanović, T.12428, 12433-12434 (public).

¹⁸¹ VS-037, T.14871 (public); [REDACTED]; Exhs.P00874 (public); P00959, pp.9, 16 (public). See also Prosecution-FTB, para.286; Annex, Persecutions, fn.76.

¹⁸² Alić, T.6992 (public). See also Prosecution-FTB, Annex, Persecutions, fn.78.

¹⁸³ [REDACTED]. See also Prosecution-FTB, Annex, Persecutions, fn.82.

¹⁸⁴ VS-1055, T.7817 (public); Exh.P00975, p.16 (public); Sejdić, T.8172 (public).

¹⁸⁵ VS-1055, T.7816-7817, 7821-7825 (public); [REDACTED]. See also Prosecution-FTB, Annex, Persecutions, fns.88, 90.

¹⁸⁶ VS-1060, T.8573-8581, 8591, 8599-8600, 8602-8606, 8609-8610, 8620, 8627-8628 (public). See also Prosecution-FTB, para.387; Annex, Persecutions, fn.86.

¹⁸⁷ Exhs.P00993 (public); [REDACTED]; [REDACTED]; [REDACTED]. See also Prosecution-FTB, para.426; Annex, Persecutions, fn.94.

¹⁸⁸ See [REDACTED]. See also Prosecution-FTB, Annex, Persecutions, fns.99-101.

¹⁸⁹ Bilić, T.8954-8956 (public), [REDACTED], 8965-8966 (public).

¹⁹⁰ See e.g. VS-1060, T.8573-8581, 8602-8606, 8620 (public); [REDACTED].

¹⁹¹ See e.g. VS-1060, T.8602-8606 (public); Kujan, Exh.P00524, pp.3-4 (public).

¹⁹² See e.g. VS-1060, T.8591, 8620 (public).

¹⁹³ See e.g. [REDACTED].

¹⁹⁴ See e.g. [REDACTED]; Exh.P00874 (public).

¹⁹⁵ See e.g. [REDACTED]. See also Prosecution-FTB, Annex, Persecutions, fn.89.

¹⁹⁶ See e.g. Exh.P00975, pp.16, 28 (public).

¹⁹⁷ See e.g. [REDACTED]; [REDACTED].

65. Systematically, in municipality after municipality, non-Serbs were specifically targeted because of their ethnicity.¹⁹⁸ These acts follow the pattern set by the coordinated conduct of the perpetrators against non-Serbs.¹⁹⁹

66. Serb Forces, including *Šešeljevci*, carried out the forcible displacement of non-Serbs from large areas of Croatia and BiH in a systematic and coordinated manner.

67. The perpetrators intentionally displaced non-Serb victims from locations where they were lawfully present,²⁰⁰ against the victims' will,²⁰¹ and without grounds permitted under international law.²⁰² Serb authorities took discriminatory measures against non-Serbs and created an atmosphere of fear causing many non-Serbs to flee.²⁰³ Those who did not flee the Indictment Municipalities immediately fled as a result of the indiscriminate attacks by Serb Forces as they established control over Serb-claimed areas or were systematically expelled from their homes during and after takeovers. Serb Forces rounded up non-Serbs, separated and detained able-bodied men, and forcibly displaced the remaining non-Serb population to other locations.

68. In Vukovar, non-Serbs were deported in various bussing operations.²⁰⁴ The JNA forced a woman in Bogdanovci to Petrovci and then to Serbia.²⁰⁵ In Borovo Komerč, Serb Forces separated women and children from the 1,500 detainees and sent them to Croatian territory.²⁰⁶ Non-Serb women, the elderly and children were

¹⁹⁸ See e.g. VS-1064, T.8704-8710 (public); [REDACTED]; VS-1013, T.5237, 5239 (public); [REDACTED]; Sejdić, T.8221 (public); Koblar, T.7998, 8006 (public); VS-1060, T.8585-8586 (public); VS-1067, T.15292 (public); [REDACTED]; [REDACTED].

¹⁹⁹ See below paras.141-142.

²⁰⁰ See Popović TJ, para.900.

²⁰¹ See Krajišnik AJ, paras.304, 319; Stakić AJ, para.279.

²⁰² See Popović TJ, paras.901-903. GCIV Commentary, pp.280-281 (regarding Art.49); APs Commentary, p.1473 (regarding Art.17).

²⁰³ See e.g. VS-1111, T.7706 (public), [REDACTED]; VS-1055, T.7817-7818 (public). See also Džafić, Exh.P00840, para.3 (public); VS-1060, T.8575-8577, 8579-8581 (public); VS-1013, T.5191-5195 (public); [REDACTED]; Kujan, Exh.P00524, p.5 (public).

²⁰⁴ Radić, T.11991 (public); [REDACTED]. See also Prosecution-FTB, Annex, Deportation, fn.2; Forcible Transfer, fn.27.

²⁰⁵ Exh.P00183, pp.6-7 (public). See also Prosecution-FTB, Annex, Deportation, fn.12.

²⁰⁶ Filković, Exh.P00857, paras.66, 67 (public). See also Prosecution-FTB, para.151; Annex, Deportation, fn.8.

transferred to Croatian held territory by the JNA.²⁰⁷ Nearly all the population fled Vukovar due to indiscriminate bombardment and shelling.²⁰⁸

69. Large parts of the Muslim population fled Zvornik in advance of Serb Forces who took over the town; those who did not were put on buses and forced to leave or were detained, mistreated and killed.²⁰⁹ [REDACTED], Muslims from Radakovac were forced to surrender their property to Serb authorities, and were put on buses and transported to Serbia and from there to other countries.²¹⁰ Serb Forces also forcibly expelled non-Serbs from their homes in Divić,²¹¹ Drinjača, Kostijerevo, Sopotnik and Devanje,²¹² and in 13 other villages including Setici,²¹³ and from Đulići.²¹⁴ Later in June 1992, Serb Forces expelled the Muslims of Kozluk, thereby effectively completing the ethnic cleansing of Serb-controlled territory in Zvornik.²¹⁵

70. In the Greater Sarajevo area, non-Serbs from Lješevu were forcibly transferred by Serb Forces, fleeing because of the persecutory environment, intense shelling, and civilians' houses set on fire.²¹⁶ Serb Forces also forcibly expelled non-Serbs from Svrake,²¹⁷ Grbavica,²¹⁸ and Ilidža.²¹⁹

71. Between 14 and 26 June 1992, Serb Forces completely ethnically cleansed Nevesinje of its non-Serb population through a campaign of attacks against non-Serbs in Nevesinje area²²⁰ that included killing the remaining elderly and burning down

²⁰⁷ [REDACTED]. See also Prosecution-FTB, Annex, Forcible Transfer, fn.24.

²⁰⁸ [REDACTED]; [REDACTED]; Radić, T.11978 (public). See also Prosecution-FTB, para.148; Annex, Forcible Transfer, fn.29.

²⁰⁹ VS-1062, T.5960-5964 (public); VS-1013, T.5374 (public); Bošković, Exh.P00836, para.21 (public). See also Prosecution-FTB, Annex, Deportation, fn.17; Forcible Transfer, fn.38.

²¹⁰ [REDACTED]. See also Prosecution-FTB, Annex, Deportation, fn.21.

²¹¹ VS-1065, T.6300-6303 (public); Exh.P01347, pp.4-5 (public). See also Prosecution-FTB, para.303; Annex, Forcible Transfer, fn.40.

²¹² VS-1064, T.8698-8704 (public). See also Prosecution-FTB, Annex, Forcible Transfer, fn.42.

²¹³ [REDACTED]. See also Prosecution-FTB, para.305; Annex, Forcible Transfer, fns.44-45.

²¹⁴ [REDACTED]; [REDACTED]. See also Prosecution-FTB, para.306; Annex, Forcible Transfer, fn.46.

²¹⁵ Banjanović, T.12445-12447, 12452, 12459-12460 (public).

²¹⁶ VS-1111, T.7693-7698 7706 (public), [REDACTED], 7717; VS-1055, T.7803-7805, 7817-7818 (public); Džafić, Exh.P00840, paras.2-3 (public). See also Prosecution-FTB, para.378; Annex, Forcible Transfer, fns.49, 53.

²¹⁷ Sejdić, T.8166-8167, 8183-8186, 8344 (public); Exhs.P01346, p.11 (public); P00975, pp.29-30 (public); P00463 (public). See also Prosecution-FTB, para.382; Annex, Forcible Transfer, fn.56.

²¹⁸ VS-1060, T.8573-8577, 8581, 8591 (public); AFIV-157, 158. See also Prosecution-FTB, para.387; Annex, Forcible Transfer, fn.60.

²¹⁹ AFIV-155; Exh.P00968 (public). See also Prosecution-FTB, para.388; Annex, Forcible Transfer, fn.63.

²²⁰ Kujan, Exh.P00524, pp.6-8 (public); Kujan, T.9657 (public); [REDACTED]; Exh.P00029 (public); [REDACTED]; [REDACTED]. See also Prosecution-FTB, Annex, Forcible Transfer, fns.66, 70-72.

homes and entire villages, causing the non-Serb civilian population to flee villages throughout the area.²²¹

72. These displacements were committed through coordinated operations of members of *inter alia* the JNA,²²² VRS,²²³ Serb TOs,²²⁴ paramilitary formations such as *Šešeljevci*,²²⁵ Vaske's unit,²²⁶ Yellow Wasps,²²⁷ Arkans's Men,²²⁸ Brne's and Slavko Aleksić's unit,²²⁹ and the Dragi Lazarević unit,²³⁰ as well as members of the Serb municipal authorities in Zvornik²³¹ and Ildiža.²³²

73. In light of the evidence set out above, the Majority's alternative hypothesis—that buses were used as a humanitarian gesture—shows a shocking disregard for the evidence in the record.

3. Conclusion

74. In sum, it remains unclear how the Majority reached its conclusion on the widespread or systematic attack in Croatia and BiH as well as on the war crimes. This is a clear failure to provide a reasoned opinion.

D. The Majority fails to provide a reasoned opinion on JCE liability

75. The Prosecution's case was that, as Croatia moved towards independence, Šešelj and other JCE members, including Milošević, Kadijević, Stanišić, Simatović, Hadžić and Babić, established parallel Serb authorities, including armed forces, in

²²¹ Kujan, Exh.P00524, pp.6-8 (public); [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]. See AFIV-181, 182. See also Prosecution-FTB, para.470; Annex, Forcible Transfer, fns.67-69.

²²² See e.g. [REDACTED]; Stojanović, Exh.P00528, para.47 (public); Exh.P00183, pp.6-7 (public); Radić, T.11978 (public); AFII-102; VS-1060, T.8573-8577 (public); Sejdić, T.8183-8186 (public).

²²³ See e.g. Banjanović, T.12448-12466 (public); VS-1065, T.6301-6303 (public); Exh.P01347, pp.4-5 (public); VS-1064, T.8698-8703 (public); [REDACTED]; AFIV-181.

²²⁴ See e.g. Exh.P00955, p.3 (public); Banjanović, T.12448-12464 (public); [REDACTED].

²²⁵ See e.g. Exh.P01347, p.7 (public); Kujan, Exh.P00524, pp.6-7 (public); [REDACTED]; Stoparić, T.2519-2521 (public); [REDACTED].

²²⁶ See e.g. [REDACTED]; Džafić, Exh.P00840, paras.13, 15 (public).

²²⁷ See e.g. Banjanović, T.12448-12463 (public).

²²⁸ See e.g. Banjanović, T.12448-12464 (public); Kujan, Exh.P00524, pp.6-7 (public); [REDACTED]; Bošković, Exh.P00836, para.21 (public); Exh.P01347, p.7 (public).

²²⁹ See e.g. VS-1060, T.8591 (public); Exhs.P00999, p.3 (public); P01000, pp.8-10 (public).

²³⁰ See e.g. Exh.P00029 (public).

²³¹ See e.g. Exhs.P00664 (public); P00665 (public); P00666 (public); P01347, pp.4-5 (public); [REDACTED].

²³² See e.g. Exh.P00968 (public).

Serb-claimed areas.²³³ This pattern was repeated in BiH, where Šešelj, together with Milošević, Kadijević, Stanišić and Simatović, cooperated with Serb leaders in BiH like JCE members Karadžić and Mladić in setting up parallel Serb structures in anticipation of BiH's independence.²³⁴ Šešelj openly admitted his extensive cooperation with other JCE members. Referring to the deployment of volunteers—who were so closely associated with him that they were commonly referred to in official documents, by victims and by internationals alike, as the *Šešeljevci*—he stated:

MILOŠEVIĆ would ask us, Radmilo BOGDANOVIĆ would ask us, some general would ask us, DOMAZETOVIĆ for example, or somebody else. They would say: 'We 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.²³⁵

76. The Prosecution did not allege that setting up parallel Serb authorities, including armed forces, and using them to establish territorial control was illegal. The Prosecution's central argument was that there was only one reasonable inference that could be drawn from the cooperation between the alleged JCE members and from the protracted campaign of mass deportation and forcible transfer, murder, beating, mistreatment and detention in inhumane conditions of non-Serbs as well as looting and destruction of property of non-Serbs by Serb Forces established, deployed and controlled by the JCE members. That inference was that the crimes were committed pursuant to a common criminal purpose.²³⁶

77. Instead of addressing the Prosecution's JCE case, the Majority misconstrues the Prosecution's allegations concerning the common criminal purpose, which it finds are not proven based on a piecemeal reading of isolated pieces of evidence. The Majority then embarks on a lengthy discussion of whether a plurality of persons had "the same views" [French original: "*identité de vues*"], an allegation never put forth by the Prosecution and not required by the case law.²³⁷ The analysis concludes with a 15-paragraph series of excerpts from a transcript in the *Milošević* trial, the

²³³ See Prosecution-FTB, paras.68-107 (Croatia).

²³⁴ See Prosecution-FTB, paras.196-246. See also paras.247-274 detailing Šešelj's contributions in BiH.

²³⁵ Exh.P00067, p.2 (public).

²³⁶ See Prosecution-FTB, paras.573, 108-126 (concerning crimes after Croatia declared independence), 275-483 (concerning crimes committed in BiH after it declared independence).

relevance of which remains unclear.²³⁸ The Majority thus does not adjudicate the Prosecution’s JCE case but rather its own made-up version of the case. This does not amount to a reasoned opinion.

1. The Majority misconstrues the Prosecution’s case

78. The Majority misconstrues the Prosecution’s case already in the Introduction to the Judgement where it²³⁹ asserts that “[s]ome of the Prosecution’s written submissions give the impression that the very ideology of a Greater Serbia is criminogenic, while others focus more on denouncing the means of its realisation”.²⁴⁰ It claims that “[t]he Prosecution’s Closing Brief also postulates, *a priori*, that the Serbian military campaign was illegal, thereby rendering futile any distinction between what may have been a legitimate military campaign and its possible criminal derivatives, which are the only acts punishable”,²⁴¹ but cites no particular part of the Prosecution submissions.

79. The Majority returns to its misconstruction of the Prosecution’s case at the start of its findings on the Accused’s JCE liability. It asserts that there were “a whole series of shortcomings and cases of confusion in the Prosecution’s approach”.²⁴² The Majority blames the Prosecution for not having clarified “the meaning of ‘a new Serb-dominated state’”,²⁴³ mentioned in paragraph 6 of the Indictment. It holds that

By presenting the establishment of Serbian autonomous regions in Croatia and BiH as acts that have the nature of a criminal plan for a Greater Serbia, without explaining the broader context of the double secession of Croatia and BiH within which these actions were taken, the Prosecution offers a reading which, at best, obscures the chronology of events and, at worst, misrepresents them [French original: *les dénature*], with regard to the evidence submitted to the Chamber, especially by the Prosecutor himself.²⁴⁴

²³⁷ Judgement, paras.250-280.

²³⁸ Judgement, paras.266-280.

²³⁹ Judge Lattanzi only partially shares the views expressed in the Introduction. *See* Judgement, fn.1.

²⁴⁰ Judgement, para.16. *See also* Lattanzi-Dissent, para.81.

²⁴¹ Judgement, para.16.

²⁴² Judgement, para.226.

²⁴³ Judgement, para.227.

²⁴⁴ Judgement, para.229.

80. The Majority again offers no citations to explain what submissions it has in mind. The Prosecution tendered voluminous evidence regarding the political and military background of the breakup of Yugoslavia as context for the case.²⁴⁵ The Prosecution Final Trial Brief specifically places the formation of parallel Serb structures in the context of the move “towards independence” by Croatia and BiH.²⁴⁶ This theme was picked up in the Prosecution Closing Submissions.²⁴⁷ The Prosecution explained that when first Croatia and later BiH declared independence, the JCE members deployed the Serb Forces they had established and controlled in the areas that they claimed as Serb land.²⁴⁸

81. However, this is a criminal tribunal and it was a criminal trial. Contrary to the impression the Majority seeks to create, the Prosecution did not allege that seeking territorial control or waging war as such can result in criminal liability. Paragraph 6 of the Indictment is clear: “[t]he 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 [...] in order to make these areas part of a new Serb-dominated state”.²⁴⁹ It was the crimes that were committed by members of the Serb Forces under the control of the JCE members as the *means* to achieve the creation of “a new Serb-dominated state” that made the common purpose criminal. The Majority turns the sentence on its head in trying to cast the Prosecution’s case as one which considered the creation of a Serb-dominated state *per se* as criminal.

2. The Majority does not address key evidence presented by the Prosecution to prove the existence of the common criminal purpose

82. The Majority’s common criminal purpose “analysis” is nearly devoid of an assessment of the incriminating evidence relied on by the Prosecution. The Majority fails to explain how the few pieces of evidence it cites in piecemeal fashion have been weighed together with other evidence on the record. In particular, the Majority does not address a vast body of evidence regarding crimes committed by cooperating Serb Forces under the control of the JCE members²⁵⁰ that was at the heart of the

²⁴⁵ See e.g. Prosecution Evidence Motion, para.10.

²⁴⁶ Prosecution-FTB, Sections V.B and V.G.

²⁴⁷ T.17123 (public). See also T.17139 (public).

²⁴⁸ T.17146 (public).

²⁴⁹ Indictment, para.6 (emphasis added).

²⁵⁰ See above II.C.2.(c), below paras.160-169.

Prosecution's case. Moreover, there is no mention of the evidence relied on by the Prosecution to prove Šešelj's intent,²⁵¹ which is integral to an assessment of the common criminal purpose. Most of the other JCE members named in the Indictment are not even mentioned in the common purpose analysis.²⁵²

83. Instead, the Majority spends nearly all of the 25 paragraphs of its common criminal purpose analysis considering whether legal activities looked at in isolation support the finding of a common criminal purpose and, unsurprisingly, concludes that they do not. For instance, it concludes:

- that the evidence does not support a finding “beyond all reasonable doubt” that the proclamation of the autonomy of the Serbian people in Croatia and BiH stemmed from a criminal design;²⁵³
- that recruitment and deployment of volunteers and the cooperation in this respect with other Serbian forces was not illegal under Serbian law,²⁵⁴ and
- that arming of civilians does not prove that “Serbian occupiers – driven solely by the criminal purpose of expelling civilians belonging to other ethnic groups – acted unilaterally”.²⁵⁵

84. However, the Prosecution never alleged that establishing Serb autonomous regions, recruiting and deploying volunteers and arming civilians was criminal *per se*. Rather, the Prosecution showed that Serb Forces established, deployed and controlled by Šešelj and other JCE members systematically committed violent crimes against non-Serbs.

85. The Majority does acknowledge “crimes committed in the various parts of Croatia and BiH”.²⁵⁶ Without citing any evidence or offering any reasons, it concludes however that “these crimes cannot be considered as an inherent element of the

²⁵¹ See above II.B.3, below IV.A.3.(b)(ii).

²⁵² Blagoje Adžić, Radmilo Bogdanović, Jovica Stanišić, Franko Simatović, Radovan Stojičić, Milan Martić, Goran Hadžić, Radovan Karadžić, Momčilo Krajišnik, Biljana Plavšić. See Indictment, para.8(a).

²⁵³ Judgement, para.238.

²⁵⁴ Judgement, para.241.

²⁵⁵ Judgement, para.248.

²⁵⁶ Judgement, para.245.

political plan for a Greater Serbia or to protect the Serbs”.²⁵⁷ The Majority acknowledges that volunteers deployed by Šešelj “*may* have participated or have been indirectly involved”²⁵⁸ in crimes, without determining whether Šešelj’s Men did so.

86. It is only in the last paragraph of its common criminal purpose analysis that the Majority turns to: “The commission of crimes in the field”.²⁵⁹ But this short, eight-line paragraph does not live up to the expectations created by its heading. Instead of addressing the large number of crimes committed by Serb Forces controlled by JCE members, the Majority merely notes that “the bulk of the recorded crimes do not implicate ‘Šešelj’s men’”.²⁶⁰ The Majority does not explain what it means by “recorded crimes”, and there is no assessment of the vast body of evidence showing the pattern of crimes committed by the Serb Forces in coordinated cooperation,²⁶¹ what this pattern means for the existence of a common criminal purpose or what it means for Šešelj’s criminal responsibility that crimes were committed by his men. These were key issues that the Chamber was supposed to have determined.

87. Space does not allow for a detailed explanation of the deeply selective treatment the Majority gives to the few pieces of evidence it discusses in the common purpose section. But one example clearly illustrates the problem: Citing only one witness, Asim Alić, the Majority finds that the “evidence in its entirety” shows that the deployment of volunteers was done to support the war effort.²⁶² Alić was the Assistant Commander of Zvornik’s police station which the Serb police officers had left to set up a Serb-only police station in Karakaj.²⁶³ Alić interrogated four heavily armed Serbs who had been arrested while driving into Zvornik shortly before the Serb takeover.²⁶⁴ Two of them were *Šešeljevci*, and the two others were identified as Arkan’s Men.²⁶⁵ One of the *Šešeljevci* told Alić that they had come to Zvornik to protect the Serbs in Zvornik.²⁶⁶ The Majority offers no explanation how the motives

²⁵⁷ Judgement, para.245.

²⁵⁸ Judgement, para.245 (emphasis added).

²⁵⁹ Judgement, para.249.

²⁶⁰ Judgement, para.249.

²⁶¹ See above II.C.2.(c), below paras.160-169.

²⁶² Judgement, para.242.

²⁶³ Exh.P00438 (public); Alić, T.6964, 6992 (public).

²⁶⁴ Alić, T.7001-7002, 7004-7005 (public).

²⁶⁵ Alić, T.7005-7006, 7009, 7042-7043 (public).

²⁶⁶ Judgement, fn.261. See also Alić, T.7018, 7048 (public).

of one person, who is not a named JCE member,²⁶⁷ is relevant to the existence of a common criminal purpose between the Accused or other JCE members. The Majority does not consider whether a Serb who travelled to BiH to fight in a conflict against Muslims would fully disclose his criminal intentions to the Muslim police officer who was detaining him. There is no indication that Alić's testimony was weighed together with other evidence in the record, including evidence about the takeover of Zvornik during which *Šešeljevci*—together with, among others, Arkan's Men—committed crimes well-documented in the trial record and which the Chamber found beyond a reasonable doubt were committed.²⁶⁸ The Majority even ignores its own findings that these same two volunteers, Žučo and Repić, were the leaders of the Yellow Wasps, who committed numerous serious crimes in Zvornik.²⁶⁹ If anything, this evidence cited by the Majority, when assessed in context, suggests that “protecting Serbs” for some was synonymous with expulsions and other violent crimes against non-Serbs.

3. The Majority engages in a lengthy analysis of “*identité de vues*” between JCE members, an unexplained concept, unsupported in the case law

88. Having failed to address the common criminal purpose alleged in the Indictment, the Majority embarks on a lengthy analysis “[s]ur l'allégation de l'existence d'une identité de vues entre plusieurs personnes”.²⁷⁰ The Majority fails to explain what it understands by “*identité de vues*”. It focusses on different political views, in particular between Šešelj and Milošević, and individual differences between certain JCE members, but the Majority fails to explain how such differences undermine a finding that alleged JCE members had the common goal and shared the intent to achieve Serb-dominated territory through the commission of the crimes alleged. Similarly, the Majority fails to explain how a debate between Judges and Prosecution counsel in the *Milošević* case can impact the JCE analysis in this case.

²⁶⁷ See Indictment, para.8(a). For JCE liability where named JCE members use members of the Serb Forces to implement the common criminal purpose (see Indictment, para.8(b)), the *mens rea*, let alone motives, of the tools used are not determinative. See *Popović* AJ, para.1027; *Tadić* AJ, para.268; *Krajišnik* AJ, para.226; *Karadžić 98bis* AJ, para.79. See also Judgement, para.244.

²⁶⁸ Judgement, para.210. See above para.60, fn.157.

²⁶⁹ Judgement, paras.144, 210(g), (m). See also Alić, T.7006-7008, 7022-7025 (public).

²⁷⁰ Judgement, Section V.A.1.(b)(ii).

(a) The Majority does not explain the concept of “*identité de vues*”

89. It remains unclear what the Majority means by “*identité de vues*”,²⁷¹ since “*identité de vues*” has never been found to constitute an element of JCE liability in the jurisprudence of the ICTY, the ICTR or the MICT, including the *Brđanin* Appeal Judgement referenced by the Majority.²⁷²

90. To the extent that the Majority required identical (political) views between the alleged JCE members, this is not a requirement of JCE liability. Neither a “common criminal purpose”, nor “shared intent” hinge on all JCE members having identical views.²⁷³ Rather, JCE members must have a common purpose that is the same “in terms of both the goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims)”, as held by the *Brđanin* Appeal Judgement in the paragraph referred to by the Majority.²⁷⁴

91. Whether one or more of the alleged JCE members had temporal or geographic goals beyond the scope of the common criminal purpose, had divergent underlying political objectives, or sought to use additional criminal means not contemplated by the other members of the JCE, is not determinative of the existence of the common criminal purpose. In the same vein, the Appeals Chamber in *Martić* rejected the Defence argument that “disagreements within the Serb leadership on the political objectives to be achieved impact[ed] on the Trial Chamber’s pivotal finding related to the common criminal purpose that evolved during the Indictment period”.²⁷⁵

92. It remains therefore unclear why the Majority has adopted this requirement, which is not supported in the jurisprudence, and what this requirement means, in particular as it purports to refer to Prosecution allegations to this effect, without reference to any submissions.²⁷⁶

²⁷¹ Judgement, para.250. The Prosecution notes that in the English translation of the Judgement in paras.250-251 “*identité de vues*” is translated as “shared views”.

²⁷² Judgement, para.250, fn.277 referring to *Brđanin* AJ, para.430.

²⁷³ See *Martić* AJ, para.123.

²⁷⁴ *Brđanin* AJ, para.430.

²⁷⁵ *Martić* AJ, para.123 referring to *Martić* TJ, paras.442, 445.

²⁷⁶ See Judgement, heading before para.250: “On the *allegations* of a plurality of persons sharing the same views” (emphasis added).

(b) The Majority fails to explain how the evidence reviewed undermines a finding of a common criminal purpose or shared intent

93. The Majority engages in a disjointed analysis of the relationships between a few individual JCE members. It points to “considerable differences”,²⁷⁷ lack of open cooperation,²⁷⁸ a “climate of mistrust and suspicion”,²⁷⁹ “discord”,²⁸⁰ “negative influence”,²⁸¹ “troubled relations”,²⁸² and lack of respect.²⁸³ However, the Majority fails to explain how these supposed differences affect the common purpose and shared intent of the JCE members to commit the crimes alleged as means to achieve Serb-dominated territory.

94. Such an explanation was required as disagreements among JCE members do not necessarily undermine a finding of common criminal purpose or shared intent.²⁸⁴ This explanation was particularly important, as the Majority does not address the views of most JCE members named in the Indictment.²⁸⁵

95. Even if the evidence cited supported the conclusion that some JCE members did not share the common criminal purpose and intent for the crimes, there is no explanation why Šešelj was not in a JCE together with the others, such as Stanišić, Simatović, Babić, Hadžić and Karadžić to whom crimes against non-Serbs can be attributed.²⁸⁶

96. Instead of weighing the evidence in its totality, the Majority again considers individual pieces of evidence.

97. Concluding that “[a] lot of the evidence” shows Šešelj’s and Milošević’s collaboration was aimed at defending the Serbs rather than committing the alleged crimes, the Majority only refers to the evidence of a single witness, Tomić.²⁸⁷

²⁷⁷ Judgement, para.253.

²⁷⁸ Judgement, para.256.

²⁷⁹ Judgement, para.258.

²⁸⁰ Judgement, para.260.

²⁸¹ Judgement, para.261.

²⁸² Judgement, para.262.

²⁸³ Judgement, para.263.

²⁸⁴ See above para.91; Martić AJ, para.123.

²⁸⁵ See Indictment, para.8(a): Blagoje Adžić, Radmilo Bogdanović, Jovica Stanišić, Franko Simatović, Radovan Stojičić, Milan Martić, Goran Hadžić, Milan Babić, Radovan Karadžić, Momčilo Krajišnik, Blijana Plavšić.

²⁸⁶ See below para.165 and IV.A.3.

²⁸⁷ Judgement, para.252.

It ignores evidence showing Šešelj and Milošević cooperated in the commission of crimes.²⁸⁸ In any event, Tomić merely explained that “the defence of Serbian interests was a point of agreement between Milošević’s party and the Accused’s party”,²⁸⁹ and did not testify that defending Serbs was exclusive of using criminal means. That Tomić did not mention the commission of crimes in this specific extract of his testimony²⁹⁰ is not conclusive, in particular as he, not being a fact witness, was not questioned on this issue.²⁹¹

98. No explanation is offered for how VS-051’s personal views are relevant to the intent of the JCE members. Moreover, [REDACTED],²⁹² [REDACTED],²⁹³ which hardly undermines the existence of a JCE.

99. The Majority’s analysis of Rankić’s evidence is equally flawed. Rankić’s evidence as to lack of “open cooperation” between Milošević and Šešelj is in fact consistent with the assistance which Rankić explained Šešelj “unofficially” provided to Milošević outside of public view.²⁹⁴

100. Both Drazilović’s evidence that Milošević arrested *Chetniks*²⁹⁵ when they returned to Serbia and evidence that Života Panić, who is not a named JCE member, expressed his dissatisfaction towards SRS volunteers at the end of the alleged JCE period in 1993,²⁹⁶ are consistent with the Prosecution’s argument that the relationship between Šešelj and other JCE members deteriorated.²⁹⁷ Moreover, at a minimum, the evidence had to be considered in light of Drazilović’s evidence that the SRS War Staff recruited volunteers to be incorporated in the JNA/VRS in order to fight in Croatia.²⁹⁸ This shows close cooperation between Šešelj’s formation and Serbian military authorities, which necessarily implied Milošević’s support.²⁹⁹

²⁸⁸ See Exh.P00299 (public); Tomić, T.3104-3107 (public); Exh.P00644, pp.10-11 (public). See also below IILB.

²⁸⁹ Judgement, para.252, fn.278.

²⁹⁰ See Judgement, para.252.

²⁹¹ Tomić, T.3105-3107 (public).

²⁹² [REDACTED].

²⁹³ [REDACTED].

²⁹⁴ See Rankić, Exh.P01074, paras.12, 54, 84 (public). Judgement, para.256.

²⁹⁵ Judgement, para.260; Exh.C00010, para.76 (public).

²⁹⁶ Judgement, para.257 referring to Exh.P01012, pp.56-58 (public).

²⁹⁷ See e.g. T.1833 (open).

²⁹⁸ Exh.C00010, paras.18-21, 23, 28, 34 (public).

²⁹⁹ Exh.C00010, para.36 (public).

101. That some JCE members at times supported peace negotiations is fully compatible with their JCE membership as this support could be offered for tactical reasons,³⁰⁰ which the Majority fails to address. Karadžić, Martić and Krajišnik, all alleged JCE members in this case, were each convicted for their role in a JCE, despite providing support for certain peace negotiations.³⁰¹

102. While Tolimir “condemn[ed] the criminal activities of various paramilitary units, including the SRS”,³⁰² the Majority fails to mention that he objected only to crimes against Serbs.³⁰³

103. Finally, the Majority’s selective analysis of VS-1062 is deeply concerning. It cites her evidence for the proposition that “‘Šešelj’s men’ protected civilians from Arkan’s Tigers”,³⁰⁴ but does not refer to the rest of her evidence which supports, rather than undermines, cooperation between Šešelj’s Men and Arkan’s Men in the commission of crimes against non-Serbs. VS-1062 was hiding in a shelter during the attack on Zvornik when Arkan’s Men broke in, removed the 12 adult Muslim men in the room and “lined them up outside against the wall”.³⁰⁵ A group of *Šešeljevci* followed, taking the women and children into another room at gunpoint.³⁰⁶ One of Šešelj’s Men hit VS-1062 very hard with his automatic rifle.³⁰⁷ The *Šešeljevci* guarded the women and children while Arkan’s Men opened fire, killing the 12 men.³⁰⁸ According to VS-1062, the *Šešeljevci* “pretend[ed] to be good guys”, giving chocolate bars to the children and saying to the women, ‘We are guarding you, whereas Arkan’s men are killing you.’”³⁰⁹

104. In any event, evidence of purported disagreement between JCE members would have to be weighed together with other evidence on the record which shows their close cooperation in establishing, arming, training and deploying Serb Forces

³⁰⁰ *Contra* Judgement, paras.254, 256.

³⁰¹ See generally *Karadžić* TJ, paras.383, 409, 6046; *Martić* TJ, paras.149, 434; *Krajišnik* TJ, paras.950, 1078; *Krajišnik* AJ, para.685.

³⁰² Judgement, para.261 referring to Exh.P00974, p.6 (public).

³⁰³ Exh.P00974, p.5 (public).

³⁰⁴ Judgement, para.263.

³⁰⁵ VS-1062, T.5954-5955 (public).

³⁰⁶ VS-1062, T.5957 (public).

³⁰⁷ VS-1062, T.5957-5958 (public).

³⁰⁸ VS-1062, T.5957-5958 (public).

³⁰⁹ VS-1062, T.5959-5960 (public).

who together committed a pattern of coordinated crimes against non-Serbs in the relevant areas.³¹⁰ No such weighing can be seen.

(c) The Majority is influenced by extraneous considerations

105. The Majority's *identité de vues* analysis culminates in a 15-paragraph discussion of a debate in *Prosecutor v. Slobodan Milošević* mainly between Judges and Prosecution counsel in that case about how the notion of "Greater Serbia" relates to the charges against Milošević.³¹¹ While this discussion was held in the context of Šešelj's testimony in that case, a discussion between Prosecution counsel, Judges and another accused in another case is irrelevant to the adjudication of this case. Such a discussion does not constitute evidence—neither in the *Milošević* case nor in this case—and thus cannot be considered part of a reasoned opinion.

106. Moreover, it is irrelevant to *this* case what the Prosecution, Judges and another accused had to say about the notion of "Greater Serbia" in relation to the charges in the *Milošević* case. The Majority, having considered the Prosecution's position in the *Milošević* case "confused", finds that "[t]his confusion in the *Milošević* case is strongly reflected in this case *and reinforces the judge's doubts in regard to the Prosecution's demonstration of the very existence of such a common criminal plan.*"³¹² While, as demonstrated above,³¹³ the Majority's claim of confusion in the Prosecution's case is incorrect, the Majority does not explain how this "confusion" impacts the present case.

107. By allowing itself to be influenced by extraneous material, the Majority erred in law.

4. Conclusion

108. It remains unclear how the Majority reached its conclusion on Šešelj's JCE liability, a failure to provide a reasoned opinion.

³¹⁰ See above II.C.2.(c); below paras.160-169.

³¹¹ Judgement, paras.267-279.

³¹² Judgement, para.280 (emphasis added).

³¹³ See above II.D.1.

E. The Majority fails to provide a reasoned opinion on instigation liability

109. The Majority fails to engage with the Prosecution's argument that Šešelj's relentless propaganda campaign instigated the commission of crimes against non-Serbs, fails to consider the key evidence presented, and does not assess the evidence in its proper context.

1. The Majority fails to engage with the Prosecution's case

110. The Majority does not engage with the Prosecution's core arguments.³¹⁴ There is no assessment of whether Šešelj's statements, taken together and in their proper context, instigated crimes. The Majority does not engage with the Prosecution's argument that Šešelj's repeated invocation of past crimes against Serbs, denigration of non-Serbs, fomenting fear of a genocide against Serbs, calls for revenge and overt calls for expulsion of non-Serbs from Serb-claimed areas, taken together, amounted to instigation of crimes. Rather, it only addresses a limited number of speeches, without explaining their cumulative effect in the proper context.

(a) The Majority does not assess a large volume of speeches in the record

111. Of the large number of Šešelj's statements admitted into evidence,³¹⁵ the Majority's instigation analysis is limited to only half a dozen speeches given in Vukovar,³¹⁶ Mali Zvornik,³¹⁷ Hrtkovci³¹⁸ and in the Serbian parliament.³¹⁹

112. What other statements the Majority has considered and how they have been assessed is impossible to determine. The Majority excludes from its analysis all statements that it considers "nothing more than support for the war effort" or "electoral speeches".³²⁰ It gives no reasons for its determination and it is impossible to know which statements it considered to fall into these categories.

³¹⁴ Indictment, para.10(b); Prosecution-FTB, paras.589-602, 50-61.

³¹⁵ See above ILB.3.(b).

³¹⁶ Exhs.P01283 (public); P01285 (public); [REDACTED]; [REDACTED]; [REDACTED]. See also Rankić, Exh.P01074, para.69 (public).

³¹⁷ VS-2000, T.13994-13995 (public); Šešelj, Exh.P00031, pp.849-851 (public).

³¹⁸ Exh.P00547 (public); Ejić, T.10357-10358 (public).

³¹⁹ Exh.P00075, pp.4-9 (public).

³²⁰ Judgement, para.303.

113. While the Majority claims to have considered statements relating to “other locations”,³²¹ it disposes of those statements in a single paragraph, but does not address their content beyond “different warnings [...] issued to the Croats” and “statements denigrating non-Serbs”. It offers no reason or analysis.³²²

114. This approach deprives the Prosecution of the opportunity to understand or review the Majority’s analysis.

(b) The Majority does not place Šešelj’s statements in context

115. Despite holding that Šešelj’s statements and their impact on the perpetrators of the crimes must be assessed “in light of the cultural, historical and political context”,³²³ such assessment cannot be seen in the Majority’s analysis. This amounts to a failure to provide a reasoned opinion.

116. Rather, the Majority assesses the speeches in isolation, both from the other speeches and from the ongoing campaign of large scale criminality at the time, in which *Šešeljevci* participated. The Majority makes no reference to Šešelj’s *Chetnik* ideology and goals. Critically, it also does not consider that Šešelj made numerous statements in the middle of the ethnic cleansing campaign in Croatia and BiH in which his *Šešeljevci* participated.³²⁴

2. Conclusion

117. In sum, the Majority fails to provide a reasoned opinion on Šešelj’s criminal liability for instigation.

F. The Chamber fails to explain the substantive law it applies

118. The Chamber fails to provide a reasoned opinion as to the applicable substantive law. Only when a chamber sets out the law it intends to apply to the facts are the parties in a position to understand whether the chamber erred as to the substantive law and able to exercise the right of appeal.³²⁵ While a trial chamber is not

³²¹ Judgement, para.334.

³²² Judgement, para.334.

³²³ Judgement, para.300. *See also* para.334.

³²⁴ For a description of the relevant context, *see below* III.C.

³²⁵ *See Hadžihasanović* AJ, para.13.

required “to discuss at length all of the case-law of the International Tribunal on a given legal issue”, it has “to identify the precedents upon which its findings are based”.³²⁶ By failing to inform the Parties which substantive law it applied, the Chamber fails to provide a reasoned opinion.

119. The failure to set out the substantive law applied is particularly troublesome in a case where one of the Judges forming part of the Majority states in his Separate Opinion that he does not feel bound by the rule of precedent applicable at the ICTY,³²⁷ and where there are strong indications that the Chamber does not apply the correct substantive law.

1. The Majority fails to set out the legal requirements applied in relation to the *chapeau* element for crimes against humanity, the widespread or systematic attack against the civilian population

120. The Majority concludes that the *chapeau* element for crimes against humanity, the widespread or systematic attack against the civilian population, was not proven,³²⁸ without setting out what is required to prove such an attack and its widespread or systematic nature.³²⁹

121. Reasons were particularly necessary in this instance because the Majority seems to have applied a “massiveness” requirement. It finds it not proven that civilians were *massively* targeted while they were not taking part in combat and did not present any threat for the Serb combatants.³³⁰ In this analysis the Majority seems to have ignored that only the term “widespread” refers to the large-scale character of the attack and the number of victims targeted, while “systematic” refers to the organised nature of the acts of violence and the improbability of their random occurrence.³³¹ In light of the evidence in the trial record,³³² had the Majority applied the correct legal standard, it could not have reached the conclusion that there was no widespread or systematic attack against the civilian population.³³³

³²⁶ *Hadžihasanović* AJ, para.13.

³²⁷ See Antonetti-Opinion, pp.136-140.

³²⁸ See Judgement, paras.192-193.

³²⁹ See Judgement, paras.192-198.

³³⁰ Judgement, para.193.

³³¹ See *Blaškić* AJ, para.101; *Kunarac* AJ, para.94.

³³² See above II.C.2.(c).

³³³ See above II.C.2; below III.A.1.

2. The Chamber fails to set out the substantive law regarding war crimes

122. The part of the Judgement dealing with war crimes under Article 3 of the Statute contains no reference to the applicable law. The Chamber rejects allegations of a number of murders, and instances of cruel treatment, torture and plunder and destruction,³³⁴ without setting out the elements of these crimes.³³⁵ This leaves the Prosecution guessing whether the conclusions are based on an erroneous understanding of the law, and—at a minimum—constitutes a failure to provide a reasoned opinion.³³⁶

123. The Majority's conclusion in relation to wanton destruction in Mostar indicates that the Chamber in fact may not have applied the correct law. Despite having concluded that Serb Forces indiscriminately attacked the town of Mostar over 30 hours, the Majority considers that it does not have sufficient evidence to conclude that the ensuing destruction was not justified by military necessity.³³⁷ The Majority cites no law in support of this analysis. A discussion of the applicable law is clearly required for such a finding because it departs from international humanitarian law principles that indiscriminate attacks are prohibited under all circumstances and thus can not be justified by military necessity.³³⁸ Had the Majority properly applied the legal principles, in light of the evidence and the Chamber's factual findings, it would have necessarily established acts of wanton destruction in Mostar.

³³⁴ Judgement, para.203(b)-(d), (f)-(j) (unanimously), para.203(a), (e) (by Majority), para.204 (by Majority). Judge Lattanzi appears to have dissented from the Chamber's findings with respect to murders in Crna Rijeka and torture and cruel treatment at Gero's slaughterhouse in Zvornik. See Judgement, fns.162, 166.

³³⁵ See Judgement, paras.203-220.

³³⁶ See *Hadžihasanović* AJ, para.13.

³³⁷ Judgement, fn.175.

³³⁸ "The principle of military necessity permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by IHL": ICRC Glossary. Indiscriminate attacks are prohibited under IHL regardless of the nature of the conflict: *Galić* AJ, para.130; *Galić* TJ, para.57; Rule 11 ICRC Study.

3. The Majority requires that JCE members have an “*identité de vues*”—an unexplained and unsupported concept

124. As set out above, the Majority adopts an “*identité de vues*” element for JCE liability that is not supported in the case law without explanation of its content.³³⁹

4. The Chamber fails to set out the substantive law for physically committing persecutions through speech

125. The Majority rejects the Prosecution’s allegation of physical commission of persecutions through the Accused’s 6 May 1992 speech in Hrtkovci, without providing any indication of the substantive law it applied.³⁴⁰

126. The Prosecution charged persecutions based on denigration of Croats through Šešelj’s 6 May 1992 speech, which constituted a violation of the right to security.³⁴¹ Without any references, the Majority states that the mere use of insulting or defamatory language is insufficient to amount to persecution.³⁴² It further holds that the Prosecution had not offered any contextual element permitting it “to measure the real significance or impact” of Šešelj’s speech, concluding that persecution based on speech was not proven.³⁴³

127. However, earlier in the Judgement, in the context of the widespread or systematic attack, Judges Niang and Lattanzi find that Šešelj’s 6 May 1992 speech constituted a clear appeal for the expulsion of Croats of Hrtkovci.³⁴⁴ This finding is repeated in the context of instigation.³⁴⁵

128. On the basis of this finding, Šešelj’s speech constitutes an incitement to violence against the Croats of Hrtkovci and thus meets the requirements of the violation of a fundamental right to security which discriminates in fact, set out by the ICTR Appeals Chamber in *Nahimana et al.*:

[S]peech inciting to violence against a population on the basis of ethnicity, or any other discriminatory ground, violates the right to

³³⁹ See above II.D.3.(a).

³⁴⁰ Judgement, paras.282-285.

³⁴¹ Indictment, para.17(k); Prosecution-FTB, paras.561-564.

³⁴² Judgement, para.283.

³⁴³ Judgement, paras.283-284.

³⁴⁴ Judgement, para.197.

³⁴⁵ Judgement, para.333.

security of the members of the targeted group and therefore constitutes “actual discrimination”.³⁴⁶

129. Had the Majority not closed its mind to the totality of the relevant evidence, it would have found that, in the context in which the speech was given, this violation of the right to security was of sufficient gravity to amount to persecution.³⁴⁷

130. Whether Šešelj’s appeals for expulsion were ultimately carried out is irrelevant to the violation of the right to security.³⁴⁸ In any event, the evidence shows that after Šešelj’s speech, Croats in Hrtkovci were subjected to discrimination, harassment and violence forcing them to leave Hrtkovci.³⁴⁹

131. The Majority concludes its persecutions analysis by pointing out—again without any reference to the applicable law—that the Tribunal only has jurisdiction in relation to acts which are “sufficiently massive”.³⁵⁰ “Massiveness” is not a requirement for persecution. Rather, a single act can constitute persecution, provided it is of sufficient gravity and forms part of a widespread or systematic attack against the civilian population.³⁵¹ This suggests that the Majority might not have applied the correct substantive law.

5. The Majority fails to explain or provide legal support for an additional requirement of the *actus reus* of instigation

132. For the *actus reus* of instigation, the Chamber first correctly relies on the *Kordić* Appeal Judgement’s description as “prompt[ing] another person to commit an offence.”³⁵² However, the Majority then adds a requirement, namely to prove that the instigator use different forms of persuasion, such as threats, seduction or promises, towards the perpetrators of the crimes.³⁵³ The Majority does not cite any legal

³⁴⁶ *Nahimana* AJ, para.986 (internal reference omitted).

³⁴⁷ See below III.E.1. See also *Nahimana* AJ, paras.985, 987.

³⁴⁸ *Nahimana* TJ, para.1073. See also *Nahimana* AJ, paras.983-984; Lattanzi-Dissent, para.51. See however *Nahimana* AJ, para.986.

³⁴⁹ See below III.E.1.

³⁵⁰ Judgement, para.284.

³⁵¹ *Vasiljević* AJ, para.113; *Blaškić* AJ, para.135.

³⁵² Judgement, para.295, fn.327.

³⁵³ Judgement, para.295.

support, or provide any explanation for including this proposition, thereby failing to provide a reasoned opinion.³⁵⁴

6. The Majority fails to explain why it disregards certain conduct in its aiding and abetting analysis

133. Under the heading “Applicable law” the Chamber first correctly sets out the elements of aiding and abetting liability. In particular, it defines the *actus reus* as practical assistance, encouragement or moral support that has a substantial effect on the perpetration of the crimes.³⁵⁵

134. Applying the law to the facts, however, the Majority erroneously seems to credit the (potentially) non-criminal nature of the Accused’s conduct. The Majority does not explicitly reject aiding and abetting liability on this basis, nor does it rely on any case law to support its conclusion. This leaves the Prosecution guessing as to the Majority’s understanding of the law and amounts at least to a lack of a reasoned opinion.

135. The Majority states that the recruitment and deployment of volunteers could have been lawful activities,³⁵⁶ and recalls its earlier finding that Šešelj’s nationalist propaganda was not criminal as such.³⁵⁷ This suggests that the Majority disregards this conduct because it was not criminal as such. However, as Judge Lattanzi points out, this is not a relevant consideration and in particular does not impact upon the question of whether the conduct of the Accused amounted to a substantial contribution.³⁵⁸

136. Moreover, in dismissing aiding and abetting liability, the Majority seems to have considered whether the conduct was specifically directed at the commission of the crimes. However, the Majority fails to clearly state whether or not it considered this a required element, and thus fails to provide a reasoned opinion. The Majority

³⁵⁴ The Majority merely cited to the Prosecution-PTB, which in turn relied on the Rwandan Criminal Code. See Judgement, fn.325. However, in its PTB the Prosecution referred to “promises, threats or abuse of power” merely as illustrative examples of instigations, pointing out that “instigation may take many forms”. Prosecution-PTB, para.146.

³⁵⁵ Judgement, para.353.

³⁵⁶ Judgement, para.355.

³⁵⁷ Judgement, para.356.

³⁵⁸ *Blagojević* AJ, para.202; *Popović* AJ, para.1765; *Šainović* AJ, paras.1661-1663. Judgement, fn.414. See also Lattanzi-Dissent, para.137, fn.222.

states that it could not exclude that Šešelj's conduct was simply a legitimate support of the war effort.³⁵⁹ This argument mirrors the rejected approach of the *Perišić* Appeals Chamber, which dismissed a finding of aiding and abetting in light of a "reasonable interpretation [...] that the Army of Yugoslavia ("*Vojska Jugoslavije*") aid facilitated by Perišić was directed towards the VRS's general war effort rather than VRS crimes".³⁶⁰ This analysis reflected its erroneous understanding that the acts of the aider and abettor have to be specifically directed at the crimes.³⁶¹ Subsequent Appeals Chamber jurisprudence clarified that specific direction is not an element of aiding and abetting liability.³⁶² The Majority seems to have ignored these binding precedents. Had it applied the correct law, the Majority would have necessarily found that Šešelj's conduct amounted to aiding and abetting crimes in which *Šešeljevci* participated.³⁶³

7. Conclusion

137. The Majority fails to provide a reasoned opinion in relation to the applicable substantive law, which affects the entire Judgement. As demonstrated above, its application gives rise to serious concerns that a number of the conclusions are not based on a proper understanding of the law.

³⁵⁹ Judgement, para.355. See also Antonetti-Opinion, p.447: "*De plus, il convient d'observer que l'Accusé n'était pas présent sur les lieux des crimes commis et qu'ainsi, il convient d'examiner de manière explicite le lien spécifique*" (emphasis in original).

³⁶⁰ *Perišić* AJ, para.71.

³⁶¹ *Perišić* AJ, para.73.

³⁶² *Šainović* AJ, para.1649; *Popović* AJ, para.1758; *Simatović* AJ, para.106.

³⁶³ See below III.D.

III. GROUND 2: THE CHAMBER ERRED IN FACT BY ACQUITTING THE ACCUSED

138. If the Appeals Chamber is unable to find that the Chamber erred in failing to deliver a reasoned judgement, then the Chamber erred in fact by fully acquitting the Accused. This error of fact occasioned a miscarriage of justice.

A. The Majority erred in fact in finding that the *chapeau* elements of crimes against humanity are not proven

1. The Majority erred in fact in finding that there was no widespread and systematic attack in Croatia and BiH

139. No reasonable trier of fact could have found, as the Majority did,³⁶⁴ that there was no widespread or systematic attack in Croatia and BiH. The Majority's alternative explanation—that civilians were fleeing from legitimate armed conflict between enemy forces—is not supported by the two witnesses on whom it relies.³⁶⁵

140. However, even if the evidence of two witnesses could be construed as supporting that civilians fled combat operations, it cannot outweigh the large body of evidence showing that Serb Forces committed massive protracted crimes in Serb-claimed areas, covering large parts of Croatia and BiH.³⁶⁶

141. For more than two years, Serb Forces victimised hundreds of thousands of non-Serbs through violent crimes, causing the expulsion of a large part of the non-Serb population from Serb-claimed areas of Croatia and BiH.³⁶⁷ The crimes followed a similar pattern, first in Croatia, then in BiH. Serb authorities took discriminatory measures against non-Serbs and deliberately created an atmosphere of fear causing many non-Serbs to flee.³⁶⁸ Serb Forces in many instances indiscriminately attacked

³⁶⁴ Judgement, paras.192-193.

³⁶⁵ See above II.C.2.(b).

³⁶⁶ See above II.C.2.(b).

³⁶⁷ See above paras.66-72.

³⁶⁸ See e.g. VS-1111, T.7706 (public), [REDACTED]; VS-1055, T.7817-7818 (public). See also Džafić, Exh.P00840, para.3 (public); VS-1060, T.8575-8577, 8579-8581 (public); Tot, Exh.P00843, paras.91-92 (public); VS-1013, T.5191-5195 (public); [REDACTED]; Kujan, Exh.P00524, p.5 (public).

non-Serb towns and villages, which often drove out a large part of the civilian population.³⁶⁹ Those who remained after the initial Serb takeovers were often systematically expelled from their homes, killed, imprisoned under inhumane conditions amounting to cruel treatment or victimised through other crimes.³⁷⁰

142. The large scale and number of victims of these crimes³⁷¹ as well as the organised nature and identifiable pattern³⁷² can lead to only one reasonable conclusion: there was a widespread and systematic attack against the non-Serb civilian population in Croatia and BiH.

143. In conclusion, the Majority erred in fact.

2. The Majority erred in fact in finding that there was no link to the armed conflict and no widespread and systematic attack in relation to crimes in Vojvodina (Serbia)

(a) The crimes were “committed in armed conflict”

144. No reasonable trier of fact could have found that the crimes in Hrtkovci, Vojvodina, were not “committed in armed conflict”.

145. The jurisdictional requirement that crimes against humanity be “committed in armed conflict” requires “nothing more than the *existence* of an armed conflict at the relevant time and place.”³⁷³ The scope of an armed conflict for these purposes is “broad”³⁷⁴ and “extends beyond the exact time and place of hostilities.”³⁷⁵ It is not necessary to prove a “nexus between the accused’s acts and the armed conflict”.³⁷⁶

146. Applying these standards to this case in the context of challenges to the Tribunal’s jurisdiction in relation to crimes in Vojvodina, the Appeals Chamber held that the jurisdictional requirement in Article 5 of the Statute requires only that “a widespread or systematic attack against the civilian population was carried out while

³⁶⁹ See above paras.24, 66-72.

³⁷⁰ See above II.C.2.(c).

³⁷¹ See *Blaškić* AJ, para.101.

³⁷² See *Kunarac* AJ, paras.95, 98.

³⁷³ *Tadić* AJ, para.249 (emphasis in original).

³⁷⁴ *Šešelj* Jurisdiction AD, para.13.

³⁷⁵ *Tadić* Jurisdiction AD, para.67.

³⁷⁶ *Tadić* AJ, para.251; *Šešelj* Jurisdiction AD, para.13.

an armed conflict in Croatia and/or Bosnia and Herzegovina was in progress.”³⁷⁷ The Chamber’s own findings support that these requirements are met. The Chamber finds that “an armed conflict existed in Croatia and in BiH in the period covered by the Indictment.”³⁷⁸

147. The requirement that the crimes be sufficiently related to an armed conflict is satisfied.³⁷⁹ Moreover, the crimes in Hrtkovci shared a close “geographic and temporal” link to the armed conflict.³⁸⁰ The Majority fails to consider that the crimes in Hrtkovci were committed at the height of the war in BiH,³⁸¹ and that Hrtkovci is located approximately 50km from Serbia’s border with both BiH and Croatia.³⁸²

148. The Majority’s finding that it could not infer the required nexus from the presence of Serb refugees coming from Croatia to Hrtkovci,³⁸³ ignores that Šešelj himself made this connection between the conflict in Croatia and the presence of ethnic Croats on Serbian soil explicit. For example, on 4 April 1992 at a rally in Vojvodina, he told attendees that Tudman had expelled several hundred thousand Serbs from Croatia, and therefore that Serbs had to “drive all the Croats out of Serbia”.³⁸⁴ Witnesses testified that the refugees had been brutally expelled from parts of Croatia where the armed conflict was ongoing.³⁸⁵ Šešelj confirmed this by putting to witnesses at trial that the refugees [REDACTED]³⁸⁶ or came after the fall of Western Slavonia.³⁸⁷ Witnesses further testified that the arrival of the refugees in Hrtkovci coincided with the onset of violence and an increase in ethnic tensions.³⁸⁸ This shows that their presence in the village was intrinsically connected with the ensuing massive campaign to forcibly displace Croats.³⁸⁹

³⁷⁷ Šešelj Jurisdiction AD, para.14.

³⁷⁸ Judgement, para.201.

³⁷⁹ See Šešelj Jurisdiction AD, para.14.

³⁸⁰ Tadić Jurisdiction AD, paras.67-69. See also Judgement, para.191.

³⁸¹ See above II.C.2.(c) and below III.A.1. See also Judgement, paras.210, 213, 216, 219.

³⁸² Ejić, T.10564 (public); Exh.P00151 (public).

³⁸³ Judgement, para.194.

³⁸⁴ Exh.P01298, p.1 (public).

³⁸⁵ Paulić, T.11896 (public); Baričević, T.10600, 10675, 10679 (public); [REDACTED]; VS-067, T.[REDACTED], 15473-15474, 15552 (public); [REDACTED].

³⁸⁶ [REDACTED].

³⁸⁷ Ejić, T.10510 (public). *Contra* Judgement, para.194.

³⁸⁸ Ejić, T.10467 (public); Baričević, T.10604-10605 (public); Paulić, T.11896 (public); VS-067, T.15431-15432 (public).

³⁸⁹ See below paras.149-156.

(b) The crimes were part of a widespread and systematic attack

149. No reasonable trier of fact could have found that the crimes in Hrtkovci were not part of a widespread or systematic attack.³⁹⁰

(i) There was a nexus between the crimes in Hrtkovci and the attack in Croatia and BiH

150. The Majority erroneously limits its analysis of the widespread or systematic attack to events in Hrtkovci,³⁹¹ although the evidence shows that the crimes in Hrtkovci were part of the wider attack in Croatia and BiH.³⁹²

151. A nexus between the crimes and the widespread or systematic attack requires that the crimes by their nature or consequences objectively be part of the attack.³⁹³ The crimes “need not be committed in the midst of” that attack and may take place “before or after the main attack against the civilian population or away from it”,³⁹⁴ provided they are not “so far removed from that attack” that they amount to isolated acts.³⁹⁵

152. Šešelj’s conduct leaves no doubt as to the nexus between the events in Hrtkovci and the attack in Croatia and BiH, in light of its purpose, nature and consequences. Šešelj believed that Serbia’s rightful North-Western border ran between the Croatian towns of Karlobag, Ogulin, Karlovac and Virovitica (“KOKV-line”)³⁹⁶ and the purpose of the acts of violence which he advocated was to eliminate the border separating Hrtkovci from Serb-claimed areas in BiH and Croatia.³⁹⁷ He addressed crowds in Serbia³⁹⁸ and Croatia³⁹⁹ alike, emphasizing the same key themes as in Hrtkovci.⁴⁰⁰ Just as he used inflammatory propaganda to prompt locals to commit crimes in Hrtkovci, he used the same propaganda to recruit volunteers and

³⁹⁰ *Contra* Judgement, para.196. See also Lattanzi-Dissent, para.42.

³⁹¹ Judgement, para.196.

³⁹² See Prosecution-FTB, paras.542-544, 548.

³⁹³ *Kunarac* AJ, para.99.

³⁹⁴ *Kunarac* AJ, para.100.

³⁹⁵ *Kunarac* AJ, para.100.

³⁹⁶ Exhs.P00026 (public); P00151 (public).

³⁹⁷ See above para.37(iv).

³⁹⁸ See e.g. Exhs.P01298 (public); P01195, pp.3-5 (public), P00180 (public). See above II.B.3.(b). See also Judgement, paras.319-338.

³⁹⁹ Exhs.P00339 (public); P00070 (public); [REDACTED]. See also Judgement, paras.309-318.

⁴⁰⁰ See Judgement, paras.331, 333.

deploy them throughout Croatia and BiH⁴⁰¹ with the intent that they commit crimes in furtherance of a Serb-dominated Greater Serbia.⁴⁰²

153. The “consequences” of Šešelj’s conduct—the expulsion of Croat civilians from Hrtkovci—are the same as in Croatia and BiH, where Serb Forces systematically expelled non-Serbs from areas they deemed to be rightful Serb territory.⁴⁰³ These attacks were ongoing while the crimes in Hrtkovci were committed.⁴⁰⁴ The Majority’s portrayal of the pattern of expulsions in Hrtkovci as a series of private housing disputes,⁴⁰⁵ is contradicted by the systematic targeting of Croat families, which transformed Hrtkovci from a majority Croat village to one that was almost entirely Serb.⁴⁰⁶ This is precisely what took place in municipalities across Croatia and BiH.⁴⁰⁷

(ii) There was a widespread and systematic attack in Hrtkovci

154. The Majority also disregards a large body of evidence proving that the events in Hrtkovci themselves constituted a widespread or systematic attack directed at the non-Serb civilian population in Hrtkovci. The Majority discusses the evidence of only three witnesses in its analysis of the crimes in Hrtkovci: Demographic expert Ewa Tabeau, VS-061 and Aleksa Ejić.⁴⁰⁸ Based on the totality of the evidence—notably the testimony of VS-1134, VS-067, Paulić and Baričević, together with Exhibits P00550, P00551, P00554, P00557 and P00559—no reasonable trier of fact could have failed to conclude that there was a widespread and systematic attack in Hrtkovci triggered by Šešelj’s conduct.

155. The violence in Hrtkovci occurred on a large scale and targeted a significant number of victims.⁴⁰⁹ Before Šešelj’s 6 May 1992 speech in Hrtkovci, sporadic acts of

⁴⁰¹ See Judgement, paras.106-111, 239-245. See below para.161.

⁴⁰² See below IV.A.3.(b)(ii).

⁴⁰³ See above paras.66-72.

⁴⁰⁴ See above III.A.2.(a).

⁴⁰⁵ Judgement, para.196.

⁴⁰⁶ See below para.210.

⁴⁰⁷ AFI-172; AFIII-4; AFIV-158.

⁴⁰⁸ Judgement, paras.195-197.

⁴⁰⁹ See *Blaškić* AJ, para.101. See also *Kumarac* AJ, para.95: “[T]he assessment of what constitutes a ‘widespread’ or ‘systematic’ attack is essentially a relative exercise in that it depends upon the civilian population which, allegedly, was being attacked”.

violence had begun with the arrival of Serb refugees from Croatia.⁴¹⁰ After Šešelj's speech,⁴¹¹ those acts of violence increased dramatically.⁴¹² Nearly the entire Croat population of Hrtkovci—some 700-800 people—fled the village as a consequence of the resulting coercive atmosphere of violence and intimidation.⁴¹³ These acts of violence, together with the forcible displacement that the violence caused,⁴¹⁴ constituted a widespread attack directed against the civilian population.⁴¹⁵

156. The evidence disregarded in the Judgement also shows that the attack directed against the civilian population was systematic.⁴¹⁶ The crimes committed against Croats followed a clear pattern⁴¹⁷ amounting to a “campaign of intimidation”.⁴¹⁸ Baričević, who was a member of the local commune, testified that the “atmosphere” in the village changed after Šešelj's speech as groups of Serbs began breaking into Croat homes.⁴¹⁹ VS-1134 was threatened [REDACTED].⁴²⁰ Šešelj's associates held regular meetings encouraging Serbs to takeover Croat homes⁴²¹ and the local authorities acquiesced or even assisted in the violence.⁴²²

3. Conclusion

157. The Majority erred in fact in finding that the *chapeau* elements of crimes against humanity were not proven. As set out below under Remedy, the evidence shows that the other elements of the crimes against humanity charged are proven beyond reasonable doubt.

⁴¹⁰ Ejić, T.10467 (public); Baričević, T.10604-10605 (public); Paulić, T.11896 (public); VS-067, T.15432 (public); [REDACTED].

⁴¹¹ By generating the attack himself, Šešelj's acts necessarily formed integral part of the attack. See *Kunarac* AJ, paras.99-100. See also *Mrkšić* AJ, para.41.

⁴¹² See below para.207.

⁴¹³ Exh.P0058 (public); P00565, pp.33-34 (public); [REDACTED]; [REDACTED]. See also below para.210.

⁴¹⁴ See below III.E.1.

⁴¹⁵ See *Krajišnik* TJ, para.706.

⁴¹⁶ See *Kunarac* AJ, para.93.

⁴¹⁷ See *Kunarac* AJ, para.94; *Blagojević* TJ, para.546.

⁴¹⁸ Exh.P00559, p.2 (public).

⁴¹⁹ Baričević, T.10626 (public).

⁴²⁰ VS-1134, T.[REDACTED], 10786 (public).

⁴²¹ See below para.209.

⁴²² See below para.209. See *Blaškić* TJ, para.203; *Blagojević* TJ, para.546.

B. The Majority erred in fact in finding that Šešelj is not responsible for crimes as a member of a JCE

158. The Majority erred in fact in finding that a common criminal purpose to permanently forcibly remove non-Serbs from areas of Croatia and BiH through the commission of crimes is not proven.⁴²³ The existence of this common purpose is the only reasonable conclusion on the basis of the totality of the evidence.

159. The evidence discussed above shows that Serb Forces systematically expelled, persecuted, murdered, beat, tortured and detained non-Serbs in large parts of Croatia and BiH over which they established control.⁴²⁴ These crimes lasted for more than two years and were committed by the same perpetrator groups, notably *Šešeljevci* and members of the JNA and the VRS, local Serb TOs and police in Croatia and BiH, Serbian MUP and Red Berets, Arkan's Men and other paramilitary units, as well as members of Serb municipal authorities.⁴²⁵

160. These Serb Forces were established, manned, equipped and controlled by the coordinated action of the JCE members.

161. The *Šešeljevci* were recruited and deployed by Šešelj and the SRS/SČP through its Crisis Staff and War Staff.⁴²⁶ While the Chamber finds no hierarchical link between Šešelj and his men once they were integrated into the structures of the JNA, VJ and VRS, it does find that he retained "a certain moral authority" over them.⁴²⁷ The evidence of recanting witnesses shows that Šešelj had "absolute power"⁴²⁸ over the SRS/SČP⁴²⁹ and everything done by the SRS Crisis/War Staffs as being "by the order of Vojislav Šešelj".⁴³⁰ He used titles such as "Supreme Commander" and

⁴²³ Indictment, paras.6, 8(a); Prosecution-FTB, paras.1, 8. *Contra* Judgement, paras.250, 280. At the end of trial the Prosecution did not seek a conviction of the Accused for crimes in Vojvodina on the basis of JCE liability.

⁴²⁴ See above II.C.2.(c).

⁴²⁵ See above paras 60, 62, 64, 72.

⁴²⁶ Judgement, paras.108-110.

⁴²⁷ Judgement, para.116.

⁴²⁸ Rankić, Exh.P01074, p.38 (BCS) (public). See also Jović, Exh.P01077, para.16 (public); [REDACTED]; Jović, T.16233-16234 (public).

⁴²⁹ Rankić, Exh.P01074, para.19 (public); Exh.P01076, p.5 (public); Petković, Exhs.C00013, pp.26-27 (public); C00018, para.17 (public); Glamočanin, Exh.P00688, paras.28-29, 36, 56, 59, 94-97 (public); Glamočanin, T.12837-12838 (public); [REDACTED].

⁴³⁰ Petković, Exhs.C00013, pp.26-27, 44, 52 (public); C00018, p.8 (public); Dražilović, Exh.C00010, p.7 (public); Rankić, Exh.P01074, paras.26, 33 (public). See also [REDACTED]; [REDACTED]; Glamočanin, Exh.P00688, paras.59, 97 (public); Stefanović, Exh.P00634, para.27 (public).

“Commander (‘Vojvoda’) of the Četnik Operational Units”.⁴³¹ He decided who would be the “Commander” of the Crisis Staff⁴³² and donned military attire in the field.⁴³³ His own admission that he received “exhaustive reports” is corroborated by numerous other evidence in the record.⁴³⁴ He was informed of the “smallest details” of War Staff operations and its staff communicated with Šešelj multiple times daily.⁴³⁵ As seen in a number of videos, Šešelj was clearly revered⁴³⁶ as the leader by his volunteers and his views were echoed in the field.⁴³⁷ *Šešeljevci* were deployed to assist forces controlled by other JCE members such as the TOs in Croatia and BiH and the JNA and VRS.⁴³⁸ While Šešelj assisted other JCE members by deploying volunteers, he received assistance from them to arm his volunteers.⁴³⁹ Moreover, the Serbian Ministry of Defence and the Ministry for Relations with Serbs Outside Serbia financed *Šešeljevci* through the SRS/SČP War Staff and TOs, JNA, and VJ.⁴⁴⁰

162. JNA forces were under the overall command of JCE member General Veljko Kadijević (Federal Secretary of People’s Defence and Chief of Staff of the Supreme Command of the SFRY Armed Forces until early January 1992),⁴⁴¹ and JCE member General Blagoje Adžić (Commander of the General Staff and Chief of Staff of SFRY Armed Forces until he became acting Federal Secretary of People’s Defence and acting Chief of Staff of the Supreme Command by 21 January 1992).⁴⁴² The JNA forces were also under the *de facto* control⁴⁴³ of JCE member Slobodan Milošević as

⁴³¹ Exhs.P00154, p.2 (public); P00059 (public); [REDACTED]; Glamočanin, Exh.P00688, para.59 (public); VS-033, T.5510 (public).

⁴³² Petković, Exhs.C00018, para.12 (public); C00013, pp.15-16 (public).

⁴³³ See e.g. Exhs.P00073 (public); P00185 (public).

⁴³⁴ Šešelj, Exh.P00031, pp.840-841 (public); Rankić, Exhs.P01074, paras.32-33, 122,124-125, (public); P01075, p.16 (public); Petković, Exhs.C00018, para.58 (public); C00016, p.33 (public); Dražilović, Exh.C00010, para.44 (public). [REDACTED]; Exh.P00222 (public); Exh.P01191, pp.6-7 (public); Exh.P00513 (public); Glamočanin, Exh.P00688, para.50 (public); Petković, Exhs.C00011, pp.7-8 (public); C00018, para.58 (public); C00016, p.33 (public); C00015, p.37 (public).

⁴³⁵ Petković, Exhs.C00018, para.39 (public); C00014, p.46 (public); Rankić, Exh.P01074, para.33 (public). [REDACTED]; [REDACTED].

⁴³⁶ Exh.P00256 (public).

⁴³⁷ Exh.P00021 (public); P00057 (public); P00058 (public); P00255 (public).

⁴³⁸ Judgement, paras.85, 109-110.

⁴³⁹ See e.g. Exh.P00342 and repeated admissions to the BBC: Exhs.P00065 (public); P00066 (public); P00067 (public); P00068 (public).

⁴⁴⁰ Judgement, para.117.

⁴⁴¹ Exhs.P00196, pp.3, 83-84 (public); P00246 (public); P00926 (public); Theunens, T.3966 (public). See also Judgement, para.237.

⁴⁴² Exh.P00247, p.2 (public); Theunens, T.3981 (public); [REDACTED]; Exh.P00183, p.1 (public).

⁴⁴³ On Milošević’s role in the JNA’s deployment, see the instructions given to Kadijević: Exh.P00198, pp.5-6 (public); Theunens, T.3694-3695 (public). See also Prosecution-FTB, paras.99, 570. See also Exhs.P00196, pp.3, 83-84 (public); P00246 (public); P00926 (public); Theunens, T.3966, 3981 (public); Exh.P00247, p.2 (public); [REDACTED]; Exh.P00183 (public).

President of the Republic of Serbia.⁴⁴⁴ Whenever JNA and TOs were engaged in joint operations, Serb police forces from Serbia and Croatia, and Serb TOs in Croatia and BiH, were all subordinated to the JNA officer in charge.⁴⁴⁵

163. Following President Milošević's promise to marshal a fighting force from Serbia to assist Serbs outside of the Republic,⁴⁴⁶ he established a special operations unit of MUP Serbia, the Red Berets, led by JCE members Jovica Stanišić (Chief of DB Serbia)⁴⁴⁷ and his deputy Franko Simatović⁴⁴⁸ aka "Frenki".⁴⁴⁹ Simatović also facilitated training of volunteers, including Šešeljevci,⁴⁵⁰ [REDACTED].⁴⁵¹ MUP Serbia controlled the police, and in a state of emergency, was to implement security measures ordered by Milošević.⁴⁵²

164. Local Serb TOs and police were set up in Croatia during 1991⁴⁵³ with the support of Šešelj,⁴⁵⁴ Milošević, Stanišić and Simatović.⁴⁵⁵ These forces were under the control of JCE members Milan Babić (President of the SDS in Krajina, and later the President of SAO Krajina⁴⁵⁶ and the head of its TO),⁴⁵⁷ and Goran Hadžić (Prime Minister of the SAO SBWS, President of the government of the SAO SBWS,⁴⁵⁸ with commanding authority over the SBWS TO).⁴⁵⁹

165. As BiH moved towards independence,⁴⁶⁰ the same pattern was repeated: JCE members, including Radovan Karadžić (President of the SDS⁴⁶¹ and President of the

⁴⁴⁴ AFI-48-50.

⁴⁴⁵ Judgement, paras.76, 78-79. [REDACTED]; Theunens, T.3761 (public).

⁴⁴⁶ Exh.P01005 (public).The additional police forces that Milošević pledged to establish in mid-March 1991 quickly materialised: see Exh.P00131, pp.5-7 (public).

⁴⁴⁷ [REDACTED]; [REDACTED]; [REDACTED]. See also Judgement, para.72.

⁴⁴⁸ [REDACTED]; [REDACTED]; Petković, Exh.C00018, para.47 (public); [REDACTED]; [REDACTED]; Exh.P00644, p.18 (public). See also Exh.P01251, p.5 (public).

⁴⁴⁹ Judgement, paras.72, 129. See also Exhs.P01016 (public); [REDACTED]; P00131, pp.5-7 (public).

⁴⁵⁰ Judgement, paras.130, 133.

⁴⁵¹ [REDACTED].

⁴⁵² Judgement, para.71.

⁴⁵³ Judgement, para.84.

⁴⁵⁴ Šešelj, Exh.P00031, pp.237-238 (public); VS-004, T.3517 (public).

⁴⁵⁵ For TO, see Exh.P00932, pp.1-2 (public). For police commands, see Babić, Exh.P01137, pp.106-109 (public).

⁴⁵⁶ Exhs.P00902, p.1 (public); P01403, p.1 (public); Babić, Exh.P01137, pp.4-5 (public).

⁴⁵⁷ Exh.P01140 (public).

⁴⁵⁸ Exh.P01281, p.2 (public); Rankić, Exh.P01074, para.86 (public); Petković, Exh.C00011, p.8 (public). See also Judgement, para.38; Exh.P00412, p.22 (public).

⁴⁵⁹ Stojanović, Exh.P00528, para.18 (public).

⁴⁶⁰ On the events in BiH while moving towards independence, see Judgement, paras.43-51.

⁴⁶¹ Exh.P00931, pp.2-3 (public).

RS⁴⁶²), set up Serb parallel political institutions such as SDS Crisis Staffs;⁴⁶³ military institutions including Serb TOs;⁴⁶⁴ and RS regular police forces,⁴⁶⁵ over whom Karadžić had control.⁴⁶⁶

166. The VRS⁴⁶⁷ was under the overall command of JCE member General Ratko Mladić (former Commander of the 2nd Military District of the JNA and then Chief of the Main Staff of the VRS)⁴⁶⁸ and Karadžić as its Supreme Commander.⁴⁶⁹ Milošević and the JNA provided logistical, personnel and training support to the VRS.⁴⁷⁰

167. JCE member Željko Ražnjatović, aka Arkan, was the leader of the paramilitary group Arkan's Men and participated in numerous crimes with the above forces.⁴⁷¹

168. Numerous findings show that these forces cooperated closely, often under the control of the JNA, VRS or Serb TOs and Crisis Staffs, in the commission of crimes.⁴⁷²

169. When assessed in its totality, the large scale and systematic nature of the crimes committed by Serb Forces in Croatia and BiH, coupled with the coordinated effort by Šešelj and other key JCE members to establish, equip, man, deploy and control the forces perpetrating the crimes, can lead to no other reasonable conclusion than that the crimes were executed pursuant to a common criminal purpose.

170. Should the Appeals Chamber consider that the Chamber analysed shared intent under the heading "*identité de vues*", the Chamber erred in fact in finding that

⁴⁶² Judgement, para.49; Exhs.P00092, p.4 (public); P00966, p.2 (public); P01110, p.1 (public).

⁴⁶³ Judgement, para.50. *See also* paras.45, 91.

⁴⁶⁴ Judgement, paras.89-91. *See also* para.45.

⁴⁶⁵ Judgement, paras.98-101.

⁴⁶⁶ For the RS TO, *see* Exhs.P00410, p.2 (public); P00871 (public). For the RS police, *see* AFI-119, 137, 138, 193. *See also* Judgement, paras.90, 101.

⁴⁶⁷ On the VRS establishment, *see* Judgement, para.89.

⁴⁶⁸ Judgement, para.93, fn.73. *See also* Theunens, Exh.P00261, pp.142, 160 (public); AFI-186, 188, 197; Exh.P00966, p.2 (public).

⁴⁶⁹ Judgement, para.93; AFI-187, 189, 193.

⁴⁷⁰ Judgement, para.95. *See also* AFI-186-192.

⁴⁷¹ Judgement, para.120. *See also* Exhs.P00229 p.7 (public); P00183, p.2 (public); Exhs.P00132 (public); [REDACTED]; [REDACTED]; [REDACTED]; Rankić, Exh.P01074, para.85 (public); Stojanović, Exh.P00528, paras.23, 30-31(public). For crimes committed by Arkan's Men, *see* Judgement, paras.210(a)-(b), (i); Theunens, T.3759 (public); Banjanović, T.12448-12464 (public); Kujan, Exh.P00524, pp.6-7 (public); [REDACTED]; Bošković, Exh.P00836, para.21 (public); Exhs.P01347, p.7 (public); P00528, para.27 (public).

shared intent was not proven. In light of the above, there can also be no reasonable doubt that Šešelj shared the intent for the crimes charged especially with Milošević, Kadijević, Adžić, Stanišić, Simatović, Arkan, Hadžić, Karadžić and Mladić.

171. In addition, as set out below under Remedy, the evidence shows that all other elements of JCE liability are proven beyond reasonable doubt.

C. The Majority erred in fact in finding that Šešelj did not instigate crimes

172. No reasonable trier of fact could have found that Šešelj's speeches did not prompt violence against the non-Serb population and did not have a substantial effect on the commission of the crimes charged in the Indictment.

1. Šešelj's speeches prompted violence against the non-Serb population

173. The Majority found that some unspecified statements were “nothing more than support for the war effort, [or] electoral speeches”;⁴⁷³ others were aimed at “reinforcing the morale of the troops”;⁴⁷⁴ contributions “to the war effort by galvanising the Serbian forces”;⁴⁷⁵ and “expression[s] of an alternative political programme”.⁴⁷⁶

174. These conclusions are wholly unreasonable and completely ignore the evidence in the trial record. They ignore:

- Šešelj's plain words;⁴⁷⁷
- the violent ideology and persona he adopted;⁴⁷⁸ and
- the extreme ethnic tension and violent crimes that were happening when his statements were made.⁴⁷⁹

⁴⁷² Judgement, paras.45, 50, 78, 89, 91, 95, 96, 110, 117, 149-153, 156, 181, 207, 210, 213, 216, 219, 220. *See above* II.C.2.(c).

⁴⁷³ Judgement, para.303.

⁴⁷⁴ Judgement, para.318.

⁴⁷⁵ Judgement, para.328.

⁴⁷⁶ Judgement, para.338.

⁴⁷⁷ *See above* II.B.3.(b).

⁴⁷⁸ *See above* II.B.3.(a).

On the basis of the totality of the trial record, no reasonable trier of fact could have failed to conclude that Šešelj's speeches prompted violence against the non-Serb population.

175. Šešelj openly stated that no *Ustasha* should be allowed to leave Vukovar alive;⁴⁸⁰ called for the expulsion of Croats;⁴⁸¹ and called, at a minimum,⁴⁸² for his *Šešeljevci* to "clear up Bosnia from the pagans and show them the road to the east where they belong".⁴⁸³ Those statements were in themselves clear calls for the commission of crimes against non-Serbs. They become all the more clear when assessed in the context of each other, in the context of Šešelj's numerous other statements—ignored in the Judgement—calling for crimes and the climate of violence against non-Serbs.⁴⁸⁴

176. Šešelj used well-known propaganda techniques to prompt crimes against non-Serbs. The evidence discussed above⁴⁸⁵ shows that Šešelj propagated the *Chetnik* ideology and goals including the creation of a Greater Serbia, which the evidence shows involved expulsions and subjugation of non-Serbs. He repeatedly invoked past crimes and "warned" that Serbs were in danger of a new genocide against which they had to defend themselves and take revenge.⁴⁸⁶ He threatened that there would be rivers of blood and called on his *Šešeljevci* to clean up BiH from Muslim "faeces".⁴⁸⁷ The message of his statements was amplified by the militaristic, violent *persona* he cultivated and by his deployment of *Šešeljevci* to Croatia and BiH where they participated in the ethnic cleansing campaign.⁴⁸⁸ Indeed, the fact that many of Šešelj's statements were made at a time when Croats and Muslims were being expelled, killed and mistreated removes any doubt about the meaning of his words. Viewed in their proper context, they were calls for violence against the non-Serb population.

⁴⁷⁹ See above II.C.2.(c).

⁴⁸⁰ [REDACTED]; [REDACTED]; [REDACTED]. See also Rankić, Exh.P01074, para.69 (public).

⁴⁸¹ Judgement, paras.333, 335-337.

⁴⁸² Judgement, paras.324, 327.

⁴⁸³ Judgement, paras.324, 322.

⁴⁸⁴ See above II.B.3.(b).

⁴⁸⁵ See above II.B.3.(a).

⁴⁸⁶ See above para.37(iii).

⁴⁸⁷ Judgement, paras.322, 325. See below para.184, fn.516.

⁴⁸⁸ Exhs.P00067, p.1 (public); P00068, p.1 (public); P01263, p.6 (public); Šešelj, Exh.P00031, p.793 (public); Rankić, Exh.P01074, paras.101-113 (public). See also Exhs.P01230, p.11 (public); P01248, p.6 (public); Šešelj, Exh.P00031, pp.665, 862 (public); Exh.P01002 (public).

2. Šešelj's speeches substantially contributed to the commission of crimes

177. No reasonable trier of fact could have failed to conclude based on the evidence in the record that Šešelj's speeches substantially contributed to the commission of the crimes charged.⁴⁸⁹

178. The Majority's own findings show that Šešelj's words *did* have an effect on his *Šešeljevci*. The Majority finds that Šešelj influenced his volunteers, but that his statements were not "criminal" as such.⁴⁹⁰

179. As shown in the previous section, however, no reasonable trier of fact could have concluded that the speeches did not call for the commission of crimes against non-Serbs. The evidence further demonstrates that Šešelj's incendiary statements had an impact on those hearing and reading them, in particular his supporters and volunteers, and prompted them to act. This is well illustrated by the interview with a volunteer in Vukovar who repeated Šešelj's phraseology regarding the KOKV-line,⁴⁹¹ the volunteer interviewed in Sarajevo praising Šešelj as the supreme *Vojvoda* in Belgrade,⁴⁹² and by [REDACTED]⁴⁹³ [REDACTED].⁴⁹⁴

(a) Šešelj instigated crimes in Croatia

180. In April 1991, just weeks before Croatia declared independence, Šešelj promised crowds of cheering supporters in SAO Krajina that "we will avenge Serbian blood", prompting cries of "We will!"⁴⁹⁵ In May, he promoted his "aim to liquidate Croatian citizens in retaliation" should Serbs be attacked in Croatia.⁴⁹⁶ As the war in Croatia escalated, so did his incendiary rhetoric. In August 1991, he implored his followers "not to stop the struggle until we liberate all the Serbian lands, and until we are completely separated".⁴⁹⁷ He called repeatedly for retaliation, declaring that "[t]he time has come for us to avenge all the Serb victims and unite all the Serb lands."⁴⁹⁸

⁴⁸⁹ Judgement, paras.328, 333, 343.

⁴⁹⁰ Judgement, para.344.

⁴⁹¹ Exhs.P00275 (public); P00057 (public); *See also* P00018 (public).

⁴⁹² Exh.P00256. *See also* [REDACTED]; [REDACTED]; Glamočanin, Exh.P00688, para.98 (public).

⁴⁹³ [REDACTED].

⁴⁹⁴ [REDACTED]; *See also* P00016 (public).

⁴⁹⁵ Exh.P00339 (public).

⁴⁹⁶ Exh.P01272, p.2 (public).

⁴⁹⁷ Exh.P01279 (public).

⁴⁹⁸ Exhs.P00355 (public); P00040, p.2 (public).

Crowds of frenzied supporters responded, screaming “Revenge! Revenge! Revenge!” and threatening to kill hated *Ustashas*.⁴⁹⁹

181. Rather than seeking to mollify this mounting anger, Šešelj exploited it, recruiting volunteers “on a larger scale” throughout the summer of 1991,⁵⁰⁰ and allocating “as many volunteers as possible” to the Vukovar TO.⁵⁰¹ In November 1991, he accompanied a group of *Šešeljevci* to Vukovar, stopping *en route* to warn yet again of the “Ustasha hordes who have launched a new genocide against the Serbs”.⁵⁰²

182. Having spent months building a reservoir of hate among his army of volunteers—and then deploying them to locations where conflicts between Croats and Serbs were increasingly likely to erupt—Šešelj lit the fuse by instructing Serb Forces assembled on the frontlines in Vukovar that “No Ustaša should leave Vukovar alive”.⁵⁰³ After repeated exposure to Šešelj’s propoganda, the *Šešeljevci* responded by [REDACTED]⁵⁰⁴ and firing their guns in the air.⁵⁰⁵ [REDACTED].⁵⁰⁶

183. Evidence omitted from the Judgement shows that Šešelj deliberately equated the broader Croatian population with *Ustasha*, declaring publicly that “the Croatian people are entirely Ustasha”.⁵⁰⁷ The Majority’s finding that the Serb Forces could not have intended to harm even Croatian soldiers because they issued a call for “the *Ustashas* to surrender over a megaphone in the streets of Vukovar”,⁵⁰⁸ fails to consider what happened to those soldiers after they surrendered. The Chamber addresses this issue elsewhere in the Judgement, finding that soldiers detained at Velepomet were murdered,⁵⁰⁹ at least some of whom had surrendered in Vukovar.⁵¹⁰ While the Majority finds that Šešelj’s speeches in Vukovar were intended merely to “reinforc[e] the morale of the troops”,⁵¹¹ it cites no evidence in support of this

⁴⁹⁹ Exh.P00178, p.1 (public). *Contra* Judgement, para.338. See also Exh.P01283 (public), p.4.

⁵⁰⁰ Exh.P00030 (public).

⁵⁰¹ Petković, Exh.C00011, p.14 (public).

⁵⁰² Exh.P01283, p.3 (public).

⁵⁰³ [REDACTED]; [REDACTED]; [REDACTED]. See also Rankić, Exh.P01074, para.69 (public).

⁵⁰⁴ [REDACTED].

⁵⁰⁵ Rankić, Exh.P01074, para.69 (public); [REDACTED].

⁵⁰⁶ [REDACTED].

⁵⁰⁷ Exh.P00034, p.7 (public); VS-004, T.3379-3380 (public); Šešelj, Exh.P00031, p.224 (public); Exh.P00005, p.59 (public); Exh.P00043 (public); Rankić, Exh.P01074, para.36 (public); [REDACTED]; Exh.P00062 (public).

⁵⁰⁸ Judgement, para.318.

⁵⁰⁹ Judgement, para.207(a).

⁵¹⁰ Karlović, T.4687-4688, 4735-4736 (public).

⁵¹¹ Judgement, para.318.

conclusion. Against this backdrop, Šešelj's call that "No Ustaša should leave Vukovar alive" made in the presence of his *Šešeljevci* magnified their thirst for revenge and violence,⁵¹² and triggered the crimes in Vukovar. Shortly thereafter, these same volunteers⁵¹³ murdered defenceless Croats at Velepromet and Ovčara, as the Chamber finds.⁵¹⁴ Šešelj's call was thus a direct call to kill civilians and persons *hors de combat*, which no reasonable trier of fact could dismiss as a mere effort to boost the morale of the troops in lawful combat against enemy soldiers.⁵¹⁵

(b) Šešelj instigated crimes in BiH

184. As the prospect of Bosnian independence neared in 1992, Šešelj redirected his inflammatory language toward Muslims and other non-Serbs in BiH with predictably dire results. Throughout February and March, Šešelj repeatedly threatened that "rivers of blood" would follow a Bosnian declaration of independence,⁵¹⁶ which would be "achieved only at graveyards".⁵¹⁷ Days later, Serb takeovers in BiH began and Šešelj's "rivers of blood" materialized—starting with Bijeljina, where large-scale crimes against non-Serbs were orchestrated in part by Mirko Blagojević, president of the SRS board in northeastern Bosnia.⁵¹⁸

185. Šešelj declared in a speech in Mali Zvornik, which the Chamber found took place in mid-March 1992,⁵¹⁹ that the "time has come for us to give the *balijas* tit for tat. ... [L]et us show the *balijas*, the Turks and the Muslims [...] the direction to the

⁵¹² [REDACTED]; Rankić, Exh.P01074, para.69 (public); [REDACTED].

⁵¹³ Many physical perpetrators in Vukovar can be placed listening to Šešelj's speeches, including Šlijančanin, [REDACTED]. See [REDACTED]; Rankić, Exh.P01074, para.67 (public); [REDACTED].

⁵¹⁴ Judgement, para.207.

⁵¹⁵ *Contra* Judgement, para.283.

⁵¹⁶ Exhs.P00395 (public); P00685, p.1 (public); P01324 (public); P01186, p.6 (public).

⁵¹⁷ Exh.P00685, p.1 (public).

⁵¹⁸ Exhs.P00682, p.1 (public); P01242, p.10 (public); AFI-293; AFI-297; VS-1028, T.12717, 12719-12720, 12725-12726, 12736-12739, 12755-12756, 12789-12790 (public); VS-1033, T.15769-15770 (public).

⁵¹⁹ Judgement, para.322; VS-2000, T.13994-13995 (public). The Chamber based its finding on VS-2000's testimony in this case and Šešelj's own testimony in *Milošević*, both of which indicate that Šešelj gave a speech in Mali Zvornik in March 1992 and describe that speech in similar terms. See Judgement, paras.322, 324. The Chamber additionally relied on a Serbian MUP report indicating that Šešelj "did indeed go to Mali Zvornik on 17 March 1992", where he had a brief conversation, "which confirms what VS-2000 said, i.e. that the Accused spoke for five or six minutes." See Judgement, para.326. However, the Chamber failed to refer to an article published in *Velika Srbija* describing a very similar speech that Šešelj gave in Mali Zvornik eighteen months earlier, in August 1990, see Exh.P01264, pp.9-28 (public).

east. That's where their place is."⁵²⁰ In the first week of April, Šešelj twice called "for the expulsion and forcible transfer" of non-Serbs.⁵²¹ On April 8, Serb Forces including paramilitaries initiated the takeover of Zvornik—in BiH, just across the Drina from Mali Zvornik—and almost immediately started killing Muslim civilians.⁵²²

186. When Šešelj publicly indicated at the end of March that he was about to set off to visit "critical points" in Eastern Herzegovina,⁵²³ crimes in Nevesinje and Mostar rapidly ensued, committed by Serb Forces, notably *Šešeljevci*.⁵²⁴

187. Instead of seeking to avoid further bloodshed, Šešelj called on Serbs at a press conference to defend Republika Srpska from "Ustasha and pan-Islamist hordes"⁵²⁵ while the killings in Zvornik were ongoing. Blagojević, the SRS *Vojvoda* in Bijeljina, appeared at Šešelj's side and was praised as the "Commander of the Serbian volunteers [...] who had initiated the combats for the liberation of Bijeljina".⁵²⁶

188. The crimes in Zvornik accelerated. In May 1992, paramilitary groups including *Šešeljevci* detained, tortured and murdered Muslim civilians at the Standard Shoe Factory,⁵²⁷ Ekonomija Farm⁵²⁸ and Ciglana factory.⁵²⁹ Undeterred, Šešelj told a crowd of applauding SRS supporters—on 28 May, while this assault on the Muslim population of Zvornik was still unfolding—that the only thing that remained to be done in BiH was "to clean up the left bank of the river Drina" and "liberate the Serbian part of Sarajevo".⁵³⁰ Two days later, Serb Forces, including paramilitaries, murdered Muslim civilians at the Drinjača Dom Kulture.⁵³¹

189. On June 4, Šešelj railed against "500 years" of Turkish rule over the Serbs and reiterated that "Serbian ethnic borders are on the" KOKV-line.⁵³² That night, SRS *Vojvoda* Vaske and his unit attacked Lješevo, Ilijaš, robbing, beating and killing

⁵²⁰ Judgement, para.322; VS-2000, T.13994-13995 (public).

⁵²¹ Judgement, para.335.

⁵²² Judgement, para.210(a).

⁵²³ Exh.P01296 (public).

⁵²⁴ See Judgement, paras.216, 219.

⁵²⁵ Exh.P00685, p.11 (public).

⁵²⁶ Exh.P00685, p.12 (public).

⁵²⁷ Judgement, para.210(h).

⁵²⁸ Judgement, para.210(b), (i).

⁵²⁹ Judgement, para.210(c), (j).

⁵³⁰ Exh.P01200, p.4 (public).

⁵³¹ Judgement, para.210(d).

Muslim civilians,⁵³³ and [REDACTED].⁵³⁴ On June 5, killings began at the Karakaj Technical School and Gero's slaughterhouse in Zvornik. Hundreds of Muslim civilians were murdered in the days which followed.⁵³⁵ A week later, Serb Forces attacked Muslim civilians and detainees in Mostar⁵³⁶ and Nevesinje.⁵³⁷ Dozens were murdered and hundreds more were tortured. As in Zvornik, Sarajevo and Vukovar, large numbers of *Šešeljevci* were among the perpetrators.

(c) Šešelj instigated crimes in Hrtkovci

190. Likewise, no reasonable trier of fact could have concluded that Šešelj's speeches in Vojvodina did not substantially contribute to the crimes in Hrtkovci.⁵³⁸ Šešelj's speech in Hrtkovci clearly called for expulsion,⁵³⁹ and immediately triggered a campaign of inter-ethnic violence forcing Croats to leave Hrtkovci.⁵⁴⁰ His call was rapidly implemented with the close cooperation of two of his associates who assembled "a programme of expulsion of non-Serbs from Hrtkovci or getting them to move out."⁵⁴¹

3. Conclusion

191. Based on the evidence in the record, no reasonable trier of fact could have concluded that Šešelj's speeches did not have a substantial effect on the commission of the crimes charged in the Indictment.

192. The Majority thus erred in fact in finding that the *actus reus* of instigation is not proven. In addition, as set out below under Remedy, the evidence shows that the *mens rea* for instigation is proven beyond reasonable doubt.

⁵³² Exh.P01199, p.9 (public).

⁵³³ Judgement, para.213(a); VS-1055, T.7803-7805 (public and confidential); Džafić, Exh.P00840, paras.2-3, 13, 15, 20 (public). See Exh.P00644, p.14 (public). See above paras.62, 70.

⁵³⁴ [REDACTED].

⁵³⁵ Judgement, para.210(e), (f).

⁵³⁶ Judgement, para.216.

⁵³⁷ Judgement, para.219.

⁵³⁸ See above para.146.

⁵³⁹ Judgement, para.197.

⁵⁴⁰ See below III.E.1.

⁵⁴¹ VS-067, T.15426 (public). See below para.209.

D. The Majority erred in fact in finding that Šešelj did not aid and abet crimes

193. On the basis of the totality of the evidence, no reasonable trier of fact could have found that Šešelj's conduct did not substantially contribute to the perpetration of the crimes committed by *Šešeljevci*.⁵⁴²

194. Šešelj was involved in the recruitment and deployment of volunteers⁵⁴³ who participated in the commission of a large number of war crimes and crimes against humanity.⁵⁴⁴ Moreover, through his speeches, Šešelj instigated *Šešeljevci* to commit these crimes.⁵⁴⁵ There can therefore be no doubt that Šešelj's conduct had a substantial effect on the charged crimes committed by *Šešeljevci*. Whether his conduct was specifically directed towards the commission of crimes or unlawful *per se* is irrelevant.⁵⁴⁶

195. In finding that Šešelj's conduct did not substantially contribute to the crimes committed by *Šešeljevci*, the Majority erred in fact. In addition, as set out below under Remedy, the evidence shows that the *mens rea* of aiding and abetting is proven beyond reasonable doubt.

E. The Chamber erred in fact in finding that Šešelj did not physically commit persecutions, as well as deportation and other inhumane acts (forcible transfer)

1. Šešelj physically committed persecutions, as well as deportation and forcible transfer in Hrtkovci

196. The Chamber found that Šešelj's speech in Hrtkovci was a clear call for expulsion of Croats.⁵⁴⁷ On the basis of the Chamber's own findings, no reasonable trier of fact could conclude that Šešelj's speech in Hrtkovci did not amount to physical commission of persecutions, based on the violation of the right to security.⁵⁴⁸

⁵⁴² *Contra* Judgement, para.356.

⁵⁴³ *See above* para.161.

⁵⁴⁴ *See above* paras.60, 62, 64, 72.

⁵⁴⁵ *See above* III.C.

⁵⁴⁶ *See above* II.F.6.

⁵⁴⁷ Judgement, paras.197, 333 by majority, Judge Antonetti dissenting.

⁵⁴⁸ *See above* paras.128-130.

197. It is further unreasonable to conclude that Šešelj's call for expulsion was "not accepted, let alone executed."⁵⁴⁹ Thus, no reasonable trier of fact could find that his speech did not amount to physical commission of persecutions based on displacement, as well as deportation and forcible transfer.

198. For the people who left directly because of his speech, the speech itself constitutes the force that drove them out, which makes Šešelj the physical perpetrator. For displacements as a consequence of the violence triggered by Šešelj's speech, his speech was an integral part of the "force" that drove them out, which equally amounts to physical commission.⁵⁵⁰

199. Before Šešelj's intervention, Croats in Hrtkovci felt relatively safe and only a small number of Croat families had left.⁵⁵¹ In his 6 May 1992 speech given at a political rally in front of a large audience—including local Croats,⁵⁵² local Serbs, men dressed in camouflage and *Chetnik* garb, and Serb refugees⁵⁵³—Šešelj ended that sense of safety. His speech prompted violence and triggered displacement crimes. As set out above,⁵⁵⁴ the Chamber found that Šešelj explicitly called for the expulsion of Croats from Hrtkovci.⁵⁵⁵ He said "I firmly believe that you, Serbs from Hrtkovci and other villages around here [...] will promptly get rid of the remaining Croats in your village."⁵⁵⁶ He threatened that if Croats would not leave they would simply be placed on buses and sent to the border.⁵⁵⁷ Following their departure, their houses would be taken by Serbs so they would have "nowhere to return to".⁵⁵⁸ Šešelj either read out a list of Croat residents who should leave Hrtkovci,⁵⁵⁹ or at least supported a list read out by a fellow SRS member.⁵⁶⁰ He pounded his chest⁵⁶¹ and shouted "let

⁵⁴⁹ Judgement, para.284.

⁵⁵⁰ *Gacumbitsi* AJ, para.60; *Munyakazi* AJ, para.135. See also Lattanzi-Dissent, fn.58.

⁵⁵¹ VS-067, T.15461 (public); [REDACTED].

⁵⁵² Paulić, T.11903-11904 (public); Baričević, T.10613-10614 (public).

⁵⁵³ Ejić, T.10496 (public).

⁵⁵⁴ See above II.F.4.

⁵⁵⁵ Judgement, paras.197, 333. See also Ejić, T.10342 (public); Paulić, T.11905-11906 (public); VS-067, T.15405 (public).

⁵⁵⁶ Exh.P00547, p.8 (public).

⁵⁵⁷ Baričević, T.10621 (public); Paulić, T.11905-11906 (public).

⁵⁵⁸ Exh.P00547, p.4 (public).

⁵⁵⁹ Baričević, T.10619-10623 (public); [REDACTED]; [REDACTED]; Paulić, T.11906, 11918-11919 (public); Exh.P00556, p.2 (public).

⁵⁶⁰ Exh.P00031, pp.1304-1305 (public).

⁵⁶¹ Paulić, T.11905-11906 (public).

them go to their homeland”.⁵⁶² His audience reacted with “acclamation, ovations, applause,”⁵⁶³ chanting “Ustashas out” and [REDACTED].⁵⁶⁴

200. That the speech was made at a political rally did not change or negate the effect of the speech.⁵⁶⁵ Rather the character of the political rally reinforced Šešelj’s call for violence. Šešelj’s reputation and political power were such that both his followers and local Croats understood that he was not making empty threats and that his words would be heeded.⁵⁶⁶ The location and date of the speech were not chosen randomly—the majority-Croat village with historic ties to WWII *Ustasha* was a particularly ready target for fuelling ethnic hatred and violence, and the speech was given deliberately on the occasion of a major Serbian holiday.⁵⁶⁷

201. The impact of Šešelj’s speech was reinforced by the dress and appearance of the armed SRS/ŠCP volunteers who mingled with the crowd throughout Šešelj’s speech wearing black WWII *Chetnik* uniforms⁵⁶⁸ as well as by the ethnically divisive and intimidating *Chetnik* music played from a loudspeaker.⁵⁶⁹

202. The content of Šešelj’s speech was disseminated quickly, by word of mouth⁵⁷⁰ and through publication in the newspaper “Borba”.⁵⁷¹

203. The evidence clearly shows that Šešelj’s speech had an impact.⁵⁷² The Chamber itself acknowledges that according to the evidence at least one person left because of Šešelj’s speech in Hrtkovci.⁵⁷³ [REDACTED].⁵⁷⁴

204. Moreover, Baričević—whose testimony the Chamber identified as relevant to the events in Hrtkovci⁵⁷⁵—recounted: “I exchanged houses with [a Serb] because that

⁵⁶² Ejić, T.10343 (public).

⁵⁶³ Ejić, T.10343 (public).

⁵⁶⁴ Ejić, T.10343 (public), [REDACTED].

⁵⁶⁵ *Contra* Judgement, para.196.

⁵⁶⁶ *See e.g.* Paulić, T.11931 (public). *Contra* Judgement, para.284 without reference to any evidence.

⁵⁶⁷ Exh.P00164, pp.88-89 (public); [REDACTED]; Exh.P00547, p.1 (public).

⁵⁶⁸ Ejić, T.10335 (public); Baričević, T.10610 (public).

⁵⁶⁹ Baričević, T.10607, 10609-10610 (public).

⁵⁷⁰ VS-067, T.15403-15405 (public); [REDACTED]; [REDACTED]; Paulić, T.11932 (public).

⁵⁷¹ Baričević, T.10625 (public); Exh.P00556 (public).

⁵⁷² *Contra* Judgement, para.284.

⁵⁷³ Judgement, fn.391.

⁵⁷⁴ [REDACTED]; [REDACTED]. *See also* [REDACTED].

⁵⁷⁵ *See* Judgement, fn.385.

is what was said at the rally”.⁵⁷⁶ In light of the coercive context in which it occurred, Baričević’s references to “exchange of houses” cannot reasonably be understood as suggesting that the witness left out of free will.

205. Šešelj’s speech was perceived as a serious threat and as an “instruction [to] leave Hrtkovci voluntarily while [they] could”.⁵⁷⁷ “[P]eople were very intimidated, frightened, didn’t feel like working anymore [...] houses were taken over [...] everyone only thought about surviving”.⁵⁷⁸ [REDACTED].⁵⁷⁹ According to Paulić, Croats understood Šešelj’s message to be: “You can’t survive here. Get out here - get out of here, save your skin and that of your family”.⁵⁸⁰

206. In addition to making people leave directly, Šešelj’s speech sparked violence, which then drove out more people.

207. After Šešelj’s speech, the violence increased dramatically, as groups of perpetrators singled out ethnic Croats and harassed them by breaking into their property, throwing grenades, and beating, threatening and insulting them. [REDACTED].⁵⁸¹ Hand grenades were thrown at Croat houses,⁵⁸² dogs were killed,⁵⁸³ [REDACTED].⁵⁸⁴ [REDACTED].⁵⁸⁵ Serbs pressured local Croats to give up their houses. [REDACTED], Paulić and Baričević explained that, if Croat owners were away, Serb refugees would simply break in and occupy their houses.⁵⁸⁶ While in other cases, mobs of armed Serbs would tell the Croat occupants to leave, often threatening them with violence or death if they refused.⁵⁸⁷

208. This violence was fuelled by Šešelj’s speech. Baričević recounted how after the speech, inter-ethnic violence increased⁵⁸⁸ and most Croats fled Hrtkovci: “I know

⁵⁷⁶ Baričević, T.10647 (public).

⁵⁷⁷ VS-067, T.15412 (public).

⁵⁷⁸ Paulić, T.11910 (public).

⁵⁷⁹ [REDACTED].

⁵⁸⁰ Paulić, T.11909 (public).

⁵⁸¹ [REDACTED].

⁵⁸² Exh.P00551, p.1 [public]; [REDACTED].

⁵⁸³ Exh.P00559, p.2 (public).

⁵⁸⁴ [REDACTED].

⁵⁸⁵ [REDACTED]; [REDACTED]; Exh.P00557 (public).

⁵⁸⁶ Ejić, T.10328 (public); Paulić, T.11897-11898 (public); Baričević, T.10604 (public); [REDACTED].

⁵⁸⁷ Baričević, T.10626, 10632 (public); [REDACTED]; [REDACTED]; Exh.P00559, p.2 (public).

⁵⁸⁸ Baričević, T.10626, 10632 (public).

that within one month's time after the rally, 300 households had moved out."⁵⁸⁹ [REDACTED]⁵⁹⁰ [REDACTED].⁵⁹¹ [REDACTED].⁵⁹² [REDACTED]⁵⁹³ [REDACTED]⁵⁹⁴ Given that it does not generally dismiss his credibility, the Chamber should at a minimum have relied on VS-061's testimony where corroborated,⁵⁹⁵ as it was here.

209. This violence was carried out at least in part by Serbs with a connection to Šešelj, and sanctioned by the local authorities. After Šešelj's speech, two of his associates, Sibirčić and Čakmak, held regular meetings at which they advised Serbs in Hrtkovci to "break into" houses and draw up "fake contracts",⁵⁹⁶ giving legal cover to what was, at a minimum, essentially an act of burglary. According to VS-067, Sibirčić and Čakmak cooperated in assembling "a programme of expulsion of non-Serbs from Hrtkovci or getting them to move out".⁵⁹⁷ VS-1134, Paulić and Baričević explained how the local police turned a blind eye to these incidents and told Croats they were not authorised to help them.⁵⁹⁸ This evidence was corroborated by Ejić.⁵⁹⁹

210. The end result was that the Croat population of Hrtkovci was almost totally expelled.⁶⁰⁰ Some were displaced across the border to Croatia.⁶⁰¹ The records analyzed by expert witness Tabeau show that in May and June 1992 alone about 472 Croats left Hrtkovci,⁶⁰² while in the four previous months of 1992 only about 74 had left.⁶⁰³ After Šešelj's speech, the departure rate per month thus increased by about 1250%.⁶⁰⁴ While Tabeau does not specify the cause behind the departures⁶⁰⁵—evidence that she was not meant to give as a demography expert—her evidence read

⁵⁸⁹ Baričević, T.10649 (public).

⁵⁹⁰ [REDACTED].

⁵⁹¹ [REDACTED].

⁵⁹² [REDACTED].

⁵⁹³ [REDACTED]. See also [REDACTED].

⁵⁹⁴ [REDACTED].

⁵⁹⁵ *Contra* Judgement, para.195. The Chamber relied on VS-061's evidence in other contexts: see Judgement, paras.194 (fn.150), 196 (fns.155-157).

⁵⁹⁶ Ejić, T.10380 (public).

⁵⁹⁷ VS-067, T.15426 (public).

⁵⁹⁸ Baričević, T.10626 (public); [REDACTED]; VS-1134, T.10786-10787 (public); Paulić, T.11911 (public); Exh.P00559 (public).

⁵⁹⁹ Ejić, T.10328, [REDACTED], 10437-10438, 10535, 10573-10575 (public).

⁶⁰⁰ Baričević, T.10649 (public). See also [REDACTED].

⁶⁰¹ VS-067, T.[REDACTED], 15469-15470 (public); Baričević, T.10640 (public), 10647 (public), 10648-10649 (public). See also [REDACTED].

⁶⁰² Exh.P00565, p.28 (public).

⁶⁰³ Exh.P00565, p.28 (public).

⁶⁰⁴ Exh.P00565, p.28 (public).

⁶⁰⁵ Judgement, paras.195, 333.

together with the other evidence leaves no doubt that Šešelj's speech caused a massive campaign of crimes and intimidation leaving Croats no other possibility than to flee.

211. On the basis of this evidence, and the Chamber's own findings, no reasonable trier of fact could have found that Šešelj did not physically commit persecutions and forcible displacement based on speech, at least with regard to the people who left directly as a result of his speech.⁶⁰⁶

212. For displacements as a consequence of the violence triggered by Šešelj's speech, his speech was an integral part of the "force" that drove them out, and thus amounts to physical commission. The frenetic applause and the promptness of the ensuing violence show that Šešelj had power and influence over his anti-Croat supporters in Hrtkovci.⁶⁰⁷ His leadership role and his personal discriminatory statements including his calls to get rid of the Hrtkovci Croats show that he fully embraced the decision to drive them out.⁶⁰⁸

2. Šešelj physically committed persecutions in Vukovar

213. No reasonable trier of fact could have found that Šešelj's speeches on or about 13 November 1991 in Vukovar that no *Ustasha* should be allowed to leave Vukovar alive,⁶⁰⁹ did not amount to the physical commission of persecutions based on a violation of the right to dignity and security.⁶¹⁰

214. As set out above, no reasonable trier of fact could have found that Šešelj used the term *Ustasha* only in reference to the opposing armed forces.⁶¹¹ Rather, looked at in context, the only reasonable interpretation is that he addressed the entire Croatian population with a term that evoked the memories of fascist atrocities committed against Serbs during WWII,⁶¹² and was acknowledged by the Chamber in its

⁶⁰⁶ See e.g. *Krnjelac* AJ, paras.221-222.

⁶⁰⁷ E.g. VS-067, T.15414 (public). See also VS-061, T.10038 (public). See also *Seromba* AJ, para.171; *Gacumbitsi* AJ, para.60; *Munyakazi* AJ, para.136.

⁶⁰⁸ See *Seromba* AJ, para.171.

⁶⁰⁹ [REDACTED]; [REDACTED]; [REDACTED]. See also Rankić, Exh.P01074, para.69 (public). See *Judgement*, paras.283,285; *Indictment*, paras.5, 15, 17(k) (with reference to para.20).

⁶¹⁰ *Contra* *Judgement*, paras.283-285.

⁶¹¹ See *above* para.183.

⁶¹² VS-004, T.3380, 3624 (public); Exhs.P00027, p.2 (public); P00034 (public). See *above* paras.37(iii), 183.

Rule 98bis Decision as “extremely degrading and pejorative”.⁶¹³ The use of the term *Ustasha* in the midst of escalating ethnic distrust and violence amounts to a violation of the right to dignity⁶¹⁴ of sufficient gravity to amount to persecutions.⁶¹⁵ Moreover, his speeches—calling for destruction of the Croat population without distinguishing between combatants and civilians—prompted violence against the Croats and thus violated their right to security.⁶¹⁶ The particular inflammatory context of these speeches rendered them overt calls for violence against Croats.⁶¹⁷ In failing to conclude that Šešelj physically committed the crime of persecutions through the speech he made in Vukovar, the Chamber erred in fact.

3. Conclusion

215. The Chamber erred in fact in failing to find that Šešelj’s speeches constituted physical commission of persecutions, deportation and forcible transfer. As set out below under Remedy, Šešelj clearly intended these consequences.

⁶¹³ Rule 98bis Decision, T.16863 (public).

⁶¹⁴ See *Nahimana* AJ, paras.983, 986.

⁶¹⁵ See above III.C.

⁶¹⁶ See *Nahimana* AJ, para.986.

⁶¹⁷ See above III.C.2.(a).

IV. REMEDY

216. As demonstrated above, there are major flaws in the adjudication of this case, resulting in a Judgement that does not comply with basic requirements of a reasoned opinion. Large amounts of evidence clearly relevant to the occurrence of crimes, the intent of the Accused and the existence of a common criminal purpose have not been considered. Insufficient reasons are provided for conclusions on crimes, and central Prosecution arguments remain unaddressed. The Judgement fails to explain the substantive law applied, even in instances when it clearly was required. The Appeals Chamber must intervene to correct these fundamental legal errors, each of which invalidates the entire Judgement.

217. In the alternative, the Chamber erred in fact in reaching factual conclusions that no reasonable trier of fact could have reached and which occasioned a miscarriage of justice.

218. The Appeals Chamber should thus grant the Prosecution's appeal. Whether it grants all or part of Ground 1, or Ground 2, the Appeals Chamber must intervene to correct the Chamber's manifest errors.

A. The Appeals Chamber should find Šešelj criminally responsible and sentence him accordingly

219. The Appeals Chamber is in a position to assess the evidence on the record itself and enter the relevant factual findings to assess Šešelj's criminal liability. If necessary, it should order additional briefing.

1. Findings on war crimes

220. The Appeals Chamber should find that there is no reasoned opinion in relation to war crimes (Ground 1), and find, based on the evidence, that the war crimes which the Chamber found established,⁶¹⁸ are proven beyond reasonable doubt: murder

⁶¹⁸ Judgement, paras.205-220.

(Count 4), torture (Count 8), cruel treatment (Count 9) and plunder of public or private property (Count 14).⁶¹⁹

2. Findings on crimes against humanity

(a) The Appeals Chamber should overturn the Majority's findings and enter findings on *chapeau* elements of crimes against humanity

221. The Appeals Chamber should find that there is no reasoned opinion (Ground 1), or, in the alternative, find that no reasonable trier of fact could have found that the *chapeau* elements of crimes against humanity, namely the link to the armed conflict, the widespread or systematic attack and the nexus between the crimes in Croatia, BiH and Hrtkovci (Vojvodina, Serbia) and the attack are not proven (Ground 2).⁶²⁰ In either case, the Appeals Chamber should overturn the Majority's findings and find that the crimes in Croatia, BiH and Hrtkovci were linked to the armed conflict and that there was a widespread or systematic attack in Croatia and BiH of which the crimes in Croatia and BiH and Hrtkovci formed part, and/or that there was a widespread or systematic attack in Hrtkovci itself of which the Hrtkovci crimes formed part.

(b) The Appeals Chamber should enter findings on the *mens rea chapeau* elements of crimes against humanity

222. The Chamber makes no finding on the *mens rea chapeau* elements for crimes against humanity, knowledge of the widespread or systematic attack and knowledge that the crimes form part of the attack. The Appeals Chamber should therefore evaluate the evidence itself, and find that the elements are met. For Croatia and BiH, the same perpetrator groups cooperated over more than two years in the commission of violent crimes which constitute the attack.⁶²¹ There can therefore be no doubt that both the perpetrators and the JCE members, including Šešelj, knew that these crimes formed part of a widespread or systematic attack. In relation to Hrtkovci, Šešelj made it clear that the violence in Hrtkovci formed part of the wider widespread or systematic attack in Croatia and BiH.⁶²² There can also be no doubt that Šešelj and the

⁶¹⁹ For the purpose of correcting the Judgement, the Prosecution does not challenge the Chamber's conclusions that certain war crimes (and the matching crimes against humanity) were not proven.

⁶²⁰ See above II.A.

⁶²¹ See above II.C.2.(c).

⁶²² See above III.A.2.(a) and III.A.2.(b)(ii).

other physical perpetrators in Hrtkovci knew about the widespread or systematic attack in Hrtkovci itself, of which their acts formed part.⁶²³

(c) The Appeals Chamber should enter findings on the underlying crimes against humanity

223. The Chamber makes no findings on the existence of the different crimes against humanity charged in the Indictment, because it finds the *chapeau* elements not proven. The Appeals Chamber should therefore evaluate the evidence itself, and find that the following crimes against humanity are proven beyond reasonable doubt:

(i) Persecutions based on the same underlying acts as the war crimes found by the Chamber

224. The Chamber finds that a number of war crimes are proven.⁶²⁴ The Indictment charged the crime against humanity of persecutions based in part on the same conduct as these war crimes.⁶²⁵ On the basis of the evidence referred to by the Chamber and set out above,⁶²⁶ there can be no doubt that the war crimes found also amounted to underlying acts of persecutions. They therefore amount to persecutions based on murder;⁶²⁷ prolonged and routine imprisonment and confinement;⁶²⁸ establishment and perpetuation of inhumane living conditions;⁶²⁹ killings and repeated torture and beatings;⁶³⁰ forced labour;⁶³¹ and sexual assault.⁶³² They formed part of the widespread or systematic attack as they followed the pattern set by the coordinated conduct of the perpetrators as they targeted non-Serbs.⁶³³

(ii) Persecutions based on torture, beating and robbery and the imposition of restrictive and discriminatory measures

⁶²³ See above III.A.2.(b)(ii).

⁶²⁴ Judgement, paras.205-220.

⁶²⁵ See Indictment, para.17: (a) murder, (b) unlawful imprisonment and confinement, (c) establishment and perpetuation of inhumane conditions, (d) torture, beatings and killings (in detention), (e) forced labour, (f) sexual assaults. The Prosecution does not seek a conviction for crimes against humanity based on the same conduct as the war crimes that were not found proven.

⁶²⁶ See above paras.59-60; Judgement, paras.205-220.

⁶²⁷ Judgement, paras.207(a)-(b), 210(a)-(g), 213(a), 216(a)-(b), 219(b)-(d); Indictment, para.17(a).

⁶²⁸ Judgement, paras.207(c)-(d), 210(h)-(m), 213(b)-(c), 216(c)-(d), 219(e)-(g); Indictment, para.17(b).

⁶²⁹ Judgement, paras.207(c)-(d), 210(h)-(m), 213(b)-(c), 216(c)-(d), 219(e)-(g); Indictment, para.17(c).

⁶³⁰ Judgement, paras.207(c)-(d), 210(h)-(m), 213(b)-(c), 216(c)-(d), 219(e)-(g); Indictment, para.17(d).

⁶³¹ Judgement, para.213(c); Indictment, para.17(e).

⁶³² Judgement, paras.207(c), 210(m); Indictment, para.17(f).

⁶³³ See above paras.141-142.

225. The evidence also shows that underlying acts of persecutions that were not also charged as war crimes—persecutions based on torture, beating and robbery committed during and after arrest,⁶³⁴ as well as on the imposition of restrictive and discriminatory measures⁶³⁵—are proven beyond reasonable doubt.⁶³⁶ These underlying acts of persecution described above⁶³⁷ meet the threshold of crimes against humanity, at least when taken together with the other acts.⁶³⁸ They formed part of the widespread or systematic attack as they followed the pattern set by the coordinated conduct of the perpetrators as they targeted non-Serbs.⁶³⁹

(iii) Persecutions based on forcible displacement, as well as deportation and forcible transfer

226. The evidence further shows that persecutions based on forcible displacement,⁶⁴⁰ as well as deportation and forcible transfer are proven,⁶⁴¹ as combined Serb Forces carried out the forcible displacement of non-Serbs from large areas of Croatia and BiH.⁶⁴²

227. Similarly, the evidence shows that after Šešelj called for their expulsion from Hrtkovci, Croats left because they felt threatened and the campaign of inter-ethnic violence that ensued, forced more Croats to leave Hrtkovci, including across the border to Croatia.⁶⁴³ This also amounts to persecutions based on forcible displacement, deportation and forcible transfer.⁶⁴⁴

⁶³⁴ Indictment, para.17(h).

⁶³⁵ Indictment, para.17(g).

⁶³⁶ See above paras.62-63.

⁶³⁷ See above paras.61-63.

⁶³⁸ See (i) *Kordić* AJ, para.106 (murder); (ii) *Blaškić* AJ, para.155 (unlawful detention and confinement); (iii) *Kvočka* AJ, paras.325 (harassment, humiliation and psychological abuse), 409, 439 (torture); *Krnojelac* TJ, para.447 (imprisonment); (iv) *Kvočka* AJ, paras.409, 439 (torture); *Simić* TJ, paras.68-69 (interrogations and coerced statements); (v) *Krnojelac* AJ, para.199 (forced labour); (vi) *Milutinović* TJ, Vol.1, paras.193 (sexual assault); (vii) *Brdanin* AJ, paras.296-297 (denial of rights of movement and employment); *Simić* AJ, para.134 (denial of medical care); *Krajišnik* TJ, paras.736-741 (arbitrary searches); (viii) *Blaškić* AJ, paras.147, 148 (theft); (ix) *Popović* TJ, paras.989 (deportation and forcible transfer), 1001; *Simić* TJ, paras.56, 456 (forcible takeover of municipalities).

⁶³⁹ See above paras.63, 141-142.

⁶⁴⁰ Indictment, para.17(i).

⁶⁴¹ Indictment, paras.31-32.

⁶⁴² See above paras.66-71.

⁶⁴³ See above III.E.1.

⁶⁴⁴ Indictment, paras.17(i), 33.

228. Šešelj's speeches in Hrtkovci and Vukovar themselves also amount to persecutions based on the violation of fundamental rights of dignity and/or security through denigrating speeches that incited to violence.⁶⁴⁵

229. The forcible transfers charged as underlying acts of persecutions are of a similar gravity to other enumerated crimes against humanity.⁶⁴⁶ These displacements further formed part of the widespread or systematic attack as they followed the pattern set by the coordinated conduct of the perpetrators against non-Serbs.⁶⁴⁷

(d) Conclusion

230. In conclusion, the Appeals Chamber should find that the following crimes against humanity are proven beyond a reasonable doubt: persecutions (Count 1), deportation (Count 10) and forcible transfer (Count 11).

3. Findings on JCE liability

(a) The Appeals Chamber should overturn the Majority's findings and enter findings on the common criminal purpose

231. The Appeals Chamber should find that there is no reasoned opinion (Ground 1), or, in the alternative find that no reasonable trier of fact could have failed to find that a common criminal purpose existed (Ground 2).⁶⁴⁸ In either case, the Appeals Chamber should overturn the Majority's findings and find that a common criminal purpose existed as alleged in relation to Croatia and BiH.⁶⁴⁹

(b) The Appeals Chamber should enter findings on the other elements of JCE liability

232. The Majority makes no findings on the other elements of JCE liability, because it finds the common criminal purpose not proven. The Appeals Chamber should therefore evaluate the evidence itself, and find that the other elements of JCE were proven beyond reasonable doubt:

⁶⁴⁵ Indictment, para.17(k).

⁶⁴⁶ *Krajišnik* AJ, paras.330-331; *Milutinović* TJ, para.170; *See also Kordić* AJ, para.117.

⁶⁴⁷ *See above* paras.65-67, 141-142, 156.

⁶⁴⁸ *See above* III.B. The same applies to shared intent, should the Appeals Chamber take the view that the Majority made a finding in relation to shared intent.

⁶⁴⁹ The Prosecution does not allege a common criminal purpose in relation to events in Vojvodina (Serbia).

(i) Šešelj significantly contributed to the common criminal purpose

233. In assessing whether Šešelj significantly contributed to the common criminal purpose, the Appeals Chamber can, to a large extent, rely on facts that are not in dispute.

234. It is not disputed that Šešelj and his party recruited and deployed volunteers, and cooperated in this respect with members of the other Serb Forces, under the control of other JCE members.⁶⁵⁰ The SRS and Šešelj recruited and sent volunteers in response to requests from other armed forces.⁶⁵¹ Given that during the ethnic cleansing of Croatia and BiH, a large number of crimes were committed, including by the *Šešeljevci*,⁶⁵² such recruitment and deployment significantly contributed to the common criminal purpose.⁶⁵³

235. In addition, as set out above, Šešelj's speeches had a substantial effect on the commission of the crimes, as they instigated violence against non-Serbs which was in fact carried out in the form of the crimes charged in the Indictment in furtherance of the common criminal purpose.⁶⁵⁴ Šešelj thereby also significantly contributed to further the common criminal purpose.

(ii) Šešelj shared the intent for the crimes with other JCE members

236. The Appeals Chamber should find that Šešelj intended the crimes charged. This is proven by ample evidence on the record, including his express calls for the expulsion of non-Serbs from Serb-claimed territory,⁶⁵⁵ his continued use of inflammatory and violent rhetoric well after the conflict and the crimes began,⁶⁵⁶ and his decision to reward notorious perpetrators from the SRS⁶⁵⁷ with the prized status of *Vojvoda*.⁶⁵⁸ On the basis of their cooperation over more than two years, when forces under their control committed widespread and systematic crimes, there can be no reasonable doubt that Šešelj shared the intent that the crimes forming part of the

⁶⁵⁰ Judgement, paras.241, 243.

⁶⁵¹ Judgement, para.110.

⁶⁵² See above paras.60, 62, 64, 72, 161.

⁶⁵³ See *Dorđević* AJ, para.358.

⁶⁵⁴ See above III.C.2.

⁶⁵⁵ See above II.B.3.(b) and III.C.

⁶⁵⁶ See above II.B.3.(b) and III.C.

⁶⁵⁷ Judgement, paras.213(a), 249. See above para.29.

⁶⁵⁸ Exhs.P00217 (public); P00218 (public).

common purpose should be carried out,⁶⁵⁹ especially with Milošević, Kadijević, Adžić, Stanišić, Simatović, Arkan, Hadžić, Karadžić and Mladić. In light of their involvement they were also clearly aware that the conduct of the perpetrators formed part of a widespread or systematic attack against the civilian population.

(iii) The crimes committed in the execution of the common purpose are attributable to JCE members

237. The war crimes found by the Chamber as well as the crimes against humanity set out above,⁶⁶⁰ were committed by members of the Serb Forces,⁶⁶¹ who were either under the direct control of a JCE member or were closely cooperating on the ground with organisations or structures controlled by a JCE member in the execution of the common purpose.⁶⁶² The Appeals Chamber should therefore find that their crimes can be imputed to the JCE members.⁶⁶³

- Crimes committed by the *Šešeljevci* can be attributed to Šešelj in light of his authority over them.⁶⁶⁴ In any event,⁶⁶⁵ as they were fully integrated into the armed forces (JNA/VJ, VRS),⁶⁶⁶ a fact Šešelj confirmed,⁶⁶⁷ or at least directly cooperating with them on the ground,⁶⁶⁸ they can be attributed to Kadijević, Adžić and Milošević, or to Mladić and Karadžić.⁶⁶⁹
- Crimes committed by JNA forces can be attributed to Kadijević and Adžić, as well as to President Milošević.⁶⁷⁰
- Crimes committed by VRS soldiers can be attributed to Mladić and Karadžić.⁶⁷¹

⁶⁵⁹ See *Krajišnik* AJ, para.200.

⁶⁶⁰ See above II.C.2.(c).

⁶⁶¹ See e.g. above paras.60, 62, 64, 72.

⁶⁶² See above paras.160-169.

⁶⁶³ See *Martić* AJ, para.195; *Brđanin* AJ, para.410.

⁶⁶⁴ See above para.161.

⁶⁶⁵ See Judgement, para.116.

⁶⁶⁶ Judgement, paras.63, 76, 85, 94, 110, 115, 116.

⁶⁶⁷ See Judgement, para.114.

⁶⁶⁸ See e.g. [REDACTED]. Many other local Serb leaders in Croatia also requested fighters from the Accused: see e.g. Exhs.P00942 (Sisak) (public); P00264 (Okucani) (public); [REDACTED]; [REDACTED]. Exh.P01347, p.7 (public). Šešeljevci units participated in operations where they were either reinforced by or under the command of the MUP or VRS: Theunens, Exh.P00261, p.349 (in relation to Vaske) (public); Exh.P00970 (public). See also Judgement, para.110.

⁶⁶⁹ See above paras.162, 166.

⁶⁷⁰ See above para.162.

- Crimes committed by Serb municipal authorities, including Serb Crisis Staffs, War Presidencies and local SDS leaders in BiH can be attributed to Karadžić.⁶⁷²
- Crimes committed by the Serb TO can be attributed to Karadžić.⁶⁷³ After the TO's incorporation into the VRS,⁶⁷⁴ they can also be attributed to Mladić.⁶⁷⁵ Crimes committed by members of the SBWS TO can be attributed to Hadžić.⁶⁷⁶
- Crimes committed by members of the Serbian police can be attributed to President Milošević, and crimes by the Red Berets can also be attributed to Stanišić and Simatović.⁶⁷⁷
- Crimes by the RS regular police forces, under the RS MUP, can be attributed to Karadžić.⁶⁷⁸
- Crimes by volunteers and other paramilitary units such as the Leva Supoderica Detachment,⁶⁷⁹ the White Eagles,⁶⁸⁰ the Loznica group,⁶⁸¹ the Yellow Wasps⁶⁸² as well as Vaske's, Brne's and Slavko Aleksić's units,⁶⁸³ can be attributed to Milošević, Kadijević and Adžić or, after the creation of the VRS in May 1992, Karadžić and Mladić.
- Crimes committed by Arkan's Men can be attributed to Arkan.⁶⁸⁴

(c) Conclusion

238. The Appeals Chamber should find that Šešelj is criminally responsible as a member of a JCE for persecutions (Count 1), murder (Count 4), torture (Count 8),

⁶⁷¹ See above para.166.

⁶⁷² See above para.165.

⁶⁷³ See above para.165.

⁶⁷⁴ Judgement, para.92.

⁶⁷⁵ See above para.166.

⁶⁷⁶ See above para.164.

⁶⁷⁷ See above para.163.

⁶⁷⁸ See above para.165.

⁶⁷⁹ Judgement, paras.148, 150.

⁶⁸⁰ Judgement, para.126.

⁶⁸¹ Judgement, para.161.

⁶⁸² Judgement, para.138.

⁶⁸³ Judgement, paras.156, 181.

⁶⁸⁴ See above para.167.

cruel treatment (Count 9), deportation (Count 10), forcible transfer (Count 11) and plunder of public or private property (Count 14).

4. Findings on instigation

(a) The Appeals Chamber should overturn the Majority's findings and enter findings on the *actus reus* of instigation

239. The Appeals Chamber should find that there is no reasoned opinion (Ground 1), or, in the alternative find that no reasonable trier of fact could have failed to find that Šešelj's speeches instigated crimes (Ground 2). In either case, the Appeals Chamber should overturn the Majority's findings, and find that the *actus reus* elements of instigation are met.⁶⁸⁵

(b) The Appeals Chamber should enter findings on the *mens rea* of instigation

240. The Majority makes no findings on the *mens rea* of instigation, because it finds the *actus reus* not proven. The Appeals Chamber should therefore find, based on the evidence, that Šešelj was at least aware of the substantial likelihood that crimes would be committed in the execution of his instigation.

241. The Majority accepted that Šešelj believed that propaganda could influence people and that he had studied the mass psychology of fascism.⁶⁸⁶ Indeed, even during the JCE period, Šešelj recognised: "Words can be a very dangerous weapon. Sometimes they can pound like a howitzer".⁶⁸⁷ Despite having previously admitted knowing that "innocent people get killed during revenge",⁶⁸⁸ his incendiary language about past genocide against the Serbs was often coupled with encouragement for retaliation for those past crimes.⁶⁸⁹ His repeated trips to the frontlines throughout the war⁶⁹⁰ while crimes were ongoing, further prove that he was aware that his followers were implementing what he told them, namely to commit crimes against non-Serbs.

⁶⁸⁵ See above III.C.

⁶⁸⁶ Judgement, para.299.

⁶⁸⁷ Exh.P01215, p.6 (public).

⁶⁸⁸ Exh.P01339, p.5 (public). See also Exh.P00034, p.3 (public) ; Exh.P01177, p.11 (public) (Šešelj declares that when "there is reprisal, when there is revenge, it is blind, and that many innocent Croats will perish, but what can you do?").

⁶⁸⁹ Exhs.P01001 (public); P01003 (public); P00014 (public); P00350 (public).

⁶⁹⁰ Exhs.P01181, p.19 (public); P01207, pp.9-10 (public); Šešelj, Exh.P00031, p.689 (public).

The fact that Šešelj never denied calling for expulsions of non-Serbs⁶⁹¹ and even sought to justify them as lawful because “international law allows for taking revenge”⁶⁹² shows that he had even direct intent in relation to the criminal acts that directly ensued.

(c) Conclusion

242. The Appeals Chamber should find that Šešelj is criminally responsible for instigating persecutions (Count 1), murder (Count 4), torture (Count 8), cruel treatment (Count 9), deportation (Count 10), forcible transfer (Count 11) and plunder of public or private property (Count 14).

5. Findings on aiding and abetting

(a) The Appeals Chamber should overturn the Majority’s findings and enter findings on the *actus reus* of aiding and abetting

243. The Appeals Chamber should find that there is no reasoned opinion (Ground 1), or, in the alternative find that no reasonable trier of fact could have failed to find that Šešelj substantially assisted the crimes in which *Šešeljevci* participated (Ground 2). In either case, the Appeals Chamber should overturn the Majority’s findings and find that the *actus reus* elements of aiding and abetting are met.⁶⁹³

(b) The Appeals Chamber should enter findings on the *mens rea* of aiding and abetting

244. The Chamber makes no findings on the *mens rea* of aiding and abetting, because it finds the *actus reus* not proven. The Appeals Chamber should therefore find, based on the evidence, that Šešelj knew that his acts would assist the commission of crimes by *Šešeljevci*.⁶⁹⁴

⁶⁹¹ T.1939 (public); T.10035-10037 (cross-examination of VS-0061) (public); T.10537 (cross-examination of Aleksa Ejić) (public); T.2145 (cross-examination of Anthony Oberschall) (public); T.16693 (public); T.16805 (Rule 98bis submission) (public). See also T.16844 (public).

⁶⁹² Exhs.P00893, p.21 (public); P00685, p.10 (public); P00075, p.6 (public).

⁶⁹³ See above III.D.

⁶⁹⁴ See *Nahimana* AJ, para.482; *Simić* AJ, para.86.

245. The evidence shows that Šešelj was aware that *Šešeljevci* would probably commit war crimes and crimes against humanity against the non-Serb population.⁶⁹⁵ He even directly intended the crimes to be committed.⁶⁹⁶ His repeated trips to the frontlines throughout the war while crimes were ongoing further prove that he knew that recruitment and deployment of *Šešeljevci*, combined with his calls for violence, would have a substantial effect on the commission of crimes against non-Serbs by *Šešeljevci*.⁶⁹⁷

(c) Conclusion

246. The Appeals Chamber should find that Šešelj is criminally responsible for aiding and abetting persecutions (Count 1), murder (Count 4), torture (Count 8), cruel treatment (Count 9), deportation (Count 10), forcible transfer (Count 11) and plunder of public or private property (Count 14) in which *Šešeljevci* participated.

6. Findings on physical commission of persecutions, deportation and forcible transfer through speech

247. The Appeals Chamber should find that there is no reasoned opinion (Ground 1), or, in the alternative, find that no reasonable trier of fact could have found that Šešelj did not physically commit persecutions (Count 1), deportation (Count 10) and forcible transfer (Count 11) (Ground 2). In either case the Appeals Chamber should overturn the Majority's findings and find that the requirements for physical commission of persecutions (Count 1), deportation (Count 10) and forcible transfer (Count 11) are met.⁶⁹⁸ Šešelj's *mens rea* is clearly established as he was fully aware of and intended the consequences of his actions.

7. The Appeals Chamber should convict Šešelj

248. The Appeals Chamber should convict Šešelj for having committed, as a member of a JCE, persecutions (Count 1), murder (Count 4), torture (Count 8), cruel treatment (Count 9), deportation (Count 10), forcible transfer (Count 11) and plunder of public or private property (Count 14); in the alternative for instigating and/or

⁶⁹⁵ Rankić, Exh.P01074, paras.45, 129 (public); [REDACTED]; [REDACTED]; VS-033, T.5524-5526 (public); Exh.P00031, pp.599 (public). *Contra* Judgement, para.245.

⁶⁹⁶ See above II.B.3.

⁶⁹⁷ See above III.C.

⁶⁹⁸ See above III.E.

aiding and abetting (in relation to crimes in which *Šešeljevci* participated) persecutions (Count 1), murder (Count 4), torture (Count 8), cruel treatment (Count 9), deportation (Count 10), forcible transfer (Count 11) and plunder of public or private property (Count 14).

249. In addition, the Appeals Chamber should convict *Šešelj* for having physically committed, through his speeches, persecutions (Count 1) in Vukovar; and persecutions (Count 1), deportation (Count 10) and forcible transfer (Count 11) in Hrtkovci.

8. The Appeals Chamber should sentence *Šešelj* accordingly

250. Having established *Šešelj*'s criminal responsibility as set out above, the Appeals Chamber should sentence *Šešelj* accordingly. The gravity of the crimes, as well as numerous aggravating factors merit a sentence of 28 years of imprisonment, as requested by the Prosecution at trial.⁶⁹⁹

B. In the alternative, the Appeals Chamber should order a retrial

251. If the Appeals Chamber, however, takes the view that an analysis of the entire trial record without the benefit of having directly heard the witnesses would not allow it to determine the Accused's criminal responsibility,⁷⁰⁰ it should order a retrial.

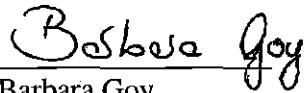
252. Ultimately, the appropriate remedy lies within the Appeals Chamber's discretion. But this remedy has to go beyond merely allowing the Prosecution's grounds of appeal.⁷⁰¹ The interest of justice, including for the victim community and the international community, and the legacy of the ICTY and the MICT require the Appeals Chamber's intervention.

⁶⁹⁹ See Prosecution-FTB, paras.612-632.

⁷⁰⁰ See *Simatović* AJ, para.124.

⁷⁰¹ The situation in this case is not comparable with the situation in *Aleksovski* or *Jelišić* where the Appeals Chamber allowed the Prosecution's appeal in relation to a particular issue but declined to reverse the acquittal. In *Aleksovski*, the material acts underlying the charges affected by the legal error were the same as those for which he was convicted, and it would not have been appropriate to increase the sentence even if the Accused was found guilty on the additional counts: *Aleksovski* AJ, para.153(iii). In *Jelišić*, the Accused had *inter alia* pled guilty to killings and was sentenced to 40 years' imprisonment. A potential retrial would have dealt with a count of genocide, on the basis of killings to which the Accused had already pled guilty. A retrial would thus have been limited to the question whether the Accused possessed genocidal intent: *Jelišić* AJ, para.74.

Word Count: 28,329



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Dated this 18th day of July, 2016
At The Hague, The Netherlands.

V. DECLARATION PURSUANT TO MICT RULE 138

The Prosecutor will exercise due diligence to comply with his continuing MICT Rule 73 disclosure obligations during the appeal stage of this case. As of the date of this filing, the Prosecutor has disclosed, or is in the process of disclosing, to the Accused all material under MICT Rule 73(A) which has come into the Prosecutor's actual knowledge and, in addition, has made available to him collections of relevant material held by the Prosecutor.



Mathias Marcussen
Senior Legal Officer

Prosecution's Glossary

Pleadings, Orders, Decisions etc. from Prosecutor v. Vojislav Šešelj

Abbreviation used in Prosecution's Appeal Brief	Full citation
19 February 2010 Bar Table Decision	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-06-67-T, T.Ch., Decision on Prosecution's Motion for Admission of Evidence from the Bar Table, 19 February 2010 (Public Document with Annex)
23 December 2010 Bar Table Decision	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-06-67-T, T.Ch., Decision on Prosecution's Second Motion for Admission of Evidence from the Bar Table and for an Amendment to the 65 ^{ter} Exhibit List, 23 December 2010 (Public Document with Annex and Partly Dissenting Opinion of Judge Lattanzi)
AFI	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, Decision on the Prosecution Motion to Take Judicial Notice of Facts Under Rule 94(B) of the Rules of Procedure and Evidence, 10 December 2007
AFII	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, Decision on Prosecution Motions to Take Judicial Notice of Facts Concerning the <i>Mrkšić</i> Case, 8 February 2010, Annex A
AFIII	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, Decision on Prosecution Motions to Take Judicial Notice of Facts Concerning the <i>Mrkšić</i> Case, 8 February 2010, Annex B
AFIV	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, Decision on Prosecution Motion for Judicial Notice of Facts Adjudicated by <i>Krajišnik</i> Case, 23 July 2010
Chamber	Trial Chamber in <i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67
Indictment	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67, Third Amended Indictment, 7 December 2007
Judgement	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, T.Ch., Judgement, 31 March 2016
Lattanzi-Dissent	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, T.Ch., Partially Dissenting Opinion of Judge Flavia Lattanzi – Amended Version, 1 July 2016 (English translation)

Antonetti-Opinion	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, T.Ch., Opinion concordante du Juge Jean-Claude Antonetti, Président de la Chambre, jointe au jugement, 31 March 2016
Prosecution-FTB	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, T.Ch., Prosecution's Closing Brief, 5 February 2012 [Public Redacted with Public Redacted Annexes]
Prosecution Closing Submissions	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, Prosecution Closing Submissions, T.17113-17320 (Public and Confidential)
Prosecution Evidence Motion	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, Prosecution's Motion for Admission of Evidence, 26 February 2009
Prosecution Jurisdiction Appeal	<i>Prosecutor v. Šešelj</i> , Case No. IT-03-67-AR72.1, App.Ch., Prosecution's Appeal from the "Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment", 28 June 2004
Prosecution-PTB	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-PT, T.Ch., Prosecution's Final Pre-Trial Brief and Corrigendum to Final Pre-Trial Brief, 1 August 2007 (public)
Rule 73bis Decision	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-PT, T.Ch., Decision on the Application of Rule 73bis, 8 November 2006
Rule 98bis Decision	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, Rule 98bis Decision, T.16826-16991
Šešelj-FTB	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67, T.Ch., Order to File Public Redacted Version of Vojislav Šešelj's Final Brief, 19 July 2012 (English version), Public Document with Public Annex containing the Public Redacted Version of Professor Vojislav Šešelj's Final Brief dated 30 January 2012
Šešelj Contempt Judgements	<i>In the case against Vojislav Šešelj</i> , Case No. IT-03-67-R77.2-A, App.Ch., Judgement, 19 May 2010 (public redacted version); <i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-R77.3-A, App.Ch., Judgement, 28 November 2012 (public); <i>Contempt Proceedings Against Vojislav Šešelj</i> , Case No. IT-03-67-R77.4-A, App.Ch., Public Redacted Version of "Judgement" Issued on 30 May 2013, 30 May 2013
Šešelj Contempt Motion Decision	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, T.Ch., Decision on Vojislav Šešelj's Motion for Contempt against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon and on the Subsequent Requests of the Prosecution, 22 December 2011 (Public Document)

<i>Šešelj</i> Jurisdiction AD	<i>Prosecutor v. Vojislav Šešelj</i> , Case No.IT-03-67-AR72.1, App.Ch., Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004
Stojanović Statements Decision	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-T, T.Ch., Decision on the Prosecution’s Oral Motion Seeking the Admission into Evidence of Witness Nebojša Stojanović’s Three Written Statements, 11 September 2008 (Public Document)
Submission Number 311 Decision	<i>Prosecutor v. Vojislav Šešelj</i> , Case No. IT-03-67-PT, Pre-Trial Judge, Decision on Submission Number 311 Requesting that Chamber III Clarify the Prosecution’s Pre-Trial Brief, 20 September 2007

Other ICTY authorities

Abbreviation used in Prosecution’s Appeal Brief	Full citation
<i>Aleksovski</i> AJ	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-A, App.Ch., Judgement, 24 March 2000
<i>Blaškić</i> AJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-A, App.Ch., Judgement, 29 July 2004
<i>Blaškić</i> TJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-T, T.Ch., Judgement, 3 March 2000
<i>Blagojević</i> AJ	<i>Prosecutor v. Vidoje Blagojević & Dragan Jokić</i> , Case No. IT-02-60-A, App.Ch., Judgement, 9 May 2007
<i>Blagojević</i> TJ	<i>Prosecutor v. Vidoje Blagojević & Dragan Jokić</i> , Case No. IT-02-60-T, T.Ch., Judgement, 17 January 2005
<i>Brdanin</i> AJ	<i>Prosecutor v. Radoslav Brdanin</i> , Case No. IT-99-36-A, App.Ch., Judgement, 3 April 2007
<i>Brdanin</i> TJ	<i>Prosecutor v. Radoslav Brdanin</i> , Case No. IT-99-36-T, T.Ch., Judgement, 1 September 2004
<i>Dorđević</i> AJ	<i>Prosecutor v. Vlastimir Dorđević</i> , Case No. IT-05-87/1-A, App.Ch., Judgement, 27 January 2014
<i>Galić</i> AJ	<i>Prosecutor v. Stanislav Galić</i> , Case No. IT-98-29-A, App.Ch., Judgement, 30 November 2006

<i>Galić</i> TJ	<i>Prosecutor v. Stanislav Galić</i> , Case No. IT-98-29-T, T.Ch., Judgement and Opinion, 5 December 2003
<i>Hadžihasanović</i> AJ	<i>Prosecutor v. Enver Hadžihasanović & Amir Kubura</i> , Case No. IT-01-47-A, App.Ch., Judgement, 22 April 2008
<i>Jelišić</i> AJ	<i>Prosecutor v. Goran Jelišić</i> , Case No. IT-95-10-A, App.Ch., Judgement, 5 July 2001
<i>Karadžić</i> 98bis AJ	<i>Prosecutor v. Radovan Karadžić</i> , Case No. IT-95-5/18-AR98bis.1, App.Ch., Judgement, 11 July 2013
<i>Karadžić</i> TJ	<i>Prosecutor v. Radovan Karadžić</i> , Case No. IT-95-5/18-T, T.Ch., Judgement, 24 March 2016 (public redacted version)
<i>Kordić</i> AJ	<i>Prosecutor v. Dario Kordić & Mario Čerkez</i> , Case No. IT-95-14/2-A, App.Ch., Judgement, 17 December 2004
<i>Krajišnik</i> AJ	<i>Prosecutor v. Momčilo Krajišnik</i> , Case No. IT-00-39-A, App.Ch., Judgement, 17 March 2009
<i>Krajišnik</i> TJ	<i>Prosecutor v. Momčilo Krajišnik</i> , Case No. IT-00-39-T, T.Ch., Judgement, 27 September 2006
<i>Krnojelac</i> AJ	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-A, App.Ch., Judgement, 17 September 2003
<i>Krnojelac</i> TJ	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-T, T.Ch., Judgement, 15 March 2002
<i>Kunarac</i> AJ	<i>Prosecutor v. Dragoljub Kunarac, Radomir Kovač & Zoran Vuković</i> , Case No. IT-96-23 & IT-96-23/1-A, App.Ch., Judgement, 12 June 2002
<i>Kvočka</i> AJ	<i>Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić & Dragoljub Prcać</i> , Case No. IT-98-30/1-A, App.Ch., Judgement, 28 February 2005
<i>Limaj</i> AJ	<i>Prosecutor v. Fatmir Limaj, Haradin Bala & Isak Musliu</i> , Case No. IT-03-66-A, App.Ch., Judgement, 27 September 2007
<i>Martić</i> AJ	<i>Prosecutor v. Milan Martić</i> , Case No. IT-95-11-A, App.Ch., Judgement, 8 October 2008
<i>Martić</i> TJ	<i>Prosecutor v. Milan Martić</i> , Case No. IT-95-11-T, T.Ch., Judgement, 12 June 2007
<i>Milošević</i> Decision on Motion for Judgement of Acquittal	<i>Prosecutor v. Slobodan Milošević</i> , Case No. IT-02-54-T, T.Ch., Decision on Motion for Judgement of Acquittal, 16 June 2004

<i>Milutinović TJ</i>	<i>Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević & Sreten Lukić, Case No. IT-05-87-T, T.Ch., Judgement, 26 February 2009</i>
<i>Mrkšić AJ</i>	<i>Prosecutor v. Mile Mrkšić & Veselin Šljivčanin, Case No. IT-95-13/1-A, App.Ch., Judgement, 5 May 2009</i>
<i>Naletilić TJ</i>	<i>Prosecutor v. Mladen Naletilić & Vinko Martinović, Case No. IT-98-34-T, T.Ch., Judgement, 31 March 2003</i>
<i>Perišić AJ</i>	<i>Prosecutor v. Momčilo Perišić, Case No. IT-04-81-A, App.Ch., Judgement, 28 February 2013</i>
<i>Petković Contempt TJ</i>	<i>In the matter of Ljubiša Petković, Case No. IT-03-67-R77.1, T.Ch., Redacted Version of Judgement Pronounced on 11 September 2008, 9 December 2008</i>
<i>Popović AJ</i>	<i>Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, & Vinko Pandurević, Case No. IT-05-88-A, App.Ch., Judgement, 30 January 2015 (Public)</i>
<i>Popović TJ</i>	<i>Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero & Vinko Pandurević, Case No. IT-05-88-T, T.Ch., Judgement, 10 June 2010 (Public Redacted)</i>
<i>Šainović AJ</i>	<i>Prosecutor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević & Sreten Lukić, Case No. IT-05-87-A, App.Ch., Judgement, 23 January 2014</i>
<i>Simić AJ</i>	<i>Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, App.Ch., Judgement, 28 November 2006</i>
<i>Simić TJ</i>	<i>Prosecutor v. Blagoje Simić, Miroslav Tadić & Simo Zarić, Case No. IT-95-9-T, T.Ch., Judgement, 17 October 2003</i>
<i>Stakić AJ</i>	<i>Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, App.Ch., Judgement, 22 March 2006</i>
<i>Simatović AJ</i>	<i>Prosecutor v. Jovica Stanišić & Franko Simatović, Case No. IT-03-69-A, App.Ch., Judgement, 9 December 2015</i>
<i>Župljanin AJ</i>	<i>Prosecutor v. Mićo Stanišić & Stojan Župljanin, Case No. IT-08-91-A, App.Ch., 30 June 2016 (public with confidential Annex C)</i>
<i>Tadić AJ</i>	<i>Prosecutor v. Duško Tadić, Case No. IT-94-1-A, App.Ch., Judgement, 15 July 1999</i>

<i>Tadić</i> Jurisdiction AD	<i>Prosecutor v. Duško Tadić a/k/a "Dule"</i> , Case No. IT-94-1-AR72, App.Ch., Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
<i>Vasiljević</i> AJ	<i>Prosecutor v. Mitar Vasiljević</i> , Case No. IT-98-32-A, App.Ch., Judgement, 25 February 2004

ICTR authorities

Abbreviation used in Prosecution's Appeal Brief	Full citation
<i>Bagosora</i> AJ	<i>Théoneste Bagosora & Anatole Nsengiyumva v. Prosecutor</i> , Case No. ICTR-98-41-A, App.Ch., Judgement, 14 December 2011
<i>Bizimungu</i> AJ	<i>Augustin Bizimungu v. Prosecutor</i> , Case No. ICTR-00-56B-A, App.Ch., Judgement, 30 June 2014
<i>Gacumbitsi</i> AJ	<i>Sylvestre Gacumbitsi v. Prosecutor</i> , Case No. ICTR-2001-64-A, App.Ch., Judgement, 7 July 2006
<i>Munyakazi</i> AJ	<i>Prosecutor v. Yussuf Munyakazi</i> , Case No. ICTR-97-36A-A, App.Ch., Judgement, 28 September 2011
<i>Nahimana</i> AJ	<i>Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze v. Prosecutor</i> , Case No. ICTR-99-52-A, App.Ch., Judgement, 28 November 2007
<i>Ntagerura</i> AJ	<i>Prosecutor v. André Ntagerura, Emmanuel Bagambiki & Samuel Imanishimwe</i> , Case No. ICTR-99-46-A, App.Ch., Judgement, 7 July 2006
<i>Muvunyi</i> AJ	<i>Tharcisse Muvunyi v. Prosecutor</i> , Case No. ICTR-2000-55A-A, App.Ch., Judgement, 29 August 2008
<i>Seromba</i> AJ	<i>Prosecutor v. Athanase Seromba</i> , Case No. ICTR-2001-66-A, App.Ch., Judgement, 12 March 2008

European Court of Human Rights authorities

Abbreviation used in Prosecution Appeal Brief	Full citation
<i>Boldea</i> Case	<i>Boldea c. Romania</i> , no. 19997/02, paras.28-30, ECHR 2007
<i>Hiro Balani</i> Case	<i>Hiro Balani v. Spain</i> , no. 18064/91, para.28, ECHR 1994
<i>Perinçek</i> Case	<i>Perinçek v. Switzerland</i> [GC], no. 27510/08, para.207, ECHR 2015
<i>Suominen</i> Case	<i>Suominen v. Finland</i> , no. 37801/97, para.37, ECHR 2003

General Sources

Abbreviation used in Prosecution's Appeal Brief	Full citation
APs Commentary	Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Claude Pilloud, et al., eds. (Dordrecht: Martinus Nijhoff Publishers, 1987)
GCIV Commentary	Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, The Geneva Conventions of 12 August 1949, Jean S. Pictet, ed. (Geneva: ICRC, 1958)
ICRC Study	J-M. Henckaerts and L. Doswald-Beck, eds., Customary International Humanitarian Law. International Committee of the Red Cross (Cambridge: Cambridge University Press, 2005)
Mani	V.S. Mani, <i>International Adjudication - Procedural Aspects</i> , (New Delhi: Radiant Publishers, 1980)

Other Abbreviations

Abbreviation used in Prosecution's Appeal Brief	Full citation
Art.	Article
BiH	Bosnia and Herzegovina
Croatia	Republic of Croatia
DB	State Security
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention of Human Rights)
Exh.	Exhibit
Exhs.	Exhibits
fn.	footnote
fns.	footnotes
FRY	Federal Republic of Yugoslavia
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
JCE	Joint criminal enterprise
JNA	Yugoslav People's Army (Army of the Socialist Federal Republic of Yugoslavia)
KOKV-line	Karlobag – Ogulin – Karlovac – Virovitica line
Majority	Judge Jean-Claude Antonetti, presiding, and Judge Mandiaye Niang
MICT	Mechanism for International Criminal Tribunals
MUP	Ministry of the Interior Police

para.	paragraph
paras.	paragraphs
p.	page
pp.	pages
RS	Serbian Republic of Bosnia and Herzegovina, later renamed <i>Republika Srpska</i>
RSK	Republic of Serbian Krajina
Rules	ICTY Rules of Procedure and Evidence
SAO	<i>Srpska Autorna Oblast</i> ("Serbian Autonomous Region")
SBWS	Slavonia, Baranja and Western Srem
SCP	Serbian Chetnik Movement
SDS	Serbian Democratic Party of Bosnia and Herzegovina
Serb Forces	Members of the JNA, later the VJ, the TO of Croatia and of BiH, the army of the <i>Republika Srpska Krajina</i> and the army of the VRS, and the TOs of Serbia and of Montenegro, local Serb, Republic of Serbia and Republika Srpska police forces, including the DB Branch of the Ministry of Interior of the Republic of Serbia, and Serb special forces of the SAO Krajina and the RSK commonly referred to as "Martić's Police", " <i>Martićevci</i> ", "SAO Krajina Police" or "SAO Krajina Milicija" and members of Serbian, Montenegrin, Bosnian and Croatian Serb paramilitary forces and volunteer units including " <i>Chetniks</i> ", or " <i>Šešeljevci</i> "
SFRY	[Former] Socialist Federal Republic of Yugoslavia
SRS	Serb Radical Party (<i>Srpska Radikalna Stranka</i>)
Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia established by the Security Council Resolution 827 (1993)
SUP	Secretariat of Internal Affairs (<i>Sekretarijat unutrašnjih poslova</i>)
T.	Trial Transcript
TO	Territorial Defence

UN	United Nations
VJ	Army of Yugoslavia
VRS	Army of Republika Srpska
VRSK	Army of the Republic of Serbian Krajina
WWII	World War II

ANNEX

ANNEX
LIST OF VIDEOS CITED IN THE PROSECUTION APPEAL BRIEF¹

Exhibit #	Official eCourt Description of Exhibit	Date	Public / Confidential
P00016	Video Clip - Serbian Parliamentary Session		Public
P00018	1 Video Clip - Srpska Radio Televizija - Report on Serbian Radical Party Leadership Visiting Banja Luka, 13 May 1993	13-May-93	Public
P00021	3 Video Clips from the Documentary Film entitled The City of Lost Souls		Public
P00057	Excerpt from Video Footage of Interview of Van Lynden Interview re. Vukovar and Vukovar Hospital	01-Nov-91	Public
P00058	Excerpt of Video Footage from News Report from Martin Bell of the BBC	18-Nov-91	Public
P00062	Excerpt from the Documentary Death of Yugoslavia	March 1995 (see P00177)	Public
P00065	Excerpt of Interview of Vojislav Seselj in Death of Yugoslavia	March 1995 (see P00177)	Public
P00066	Excerpt of Interview of Vojislav Seselj in Death of Yugoslavia	March 1995 (see P00177)	Public
P00067	Excerpt of Interview of Vojislav Seselj in Death of Yugoslavia	March 1995 (see P00177)	Public
P00068	Excerpt of Interview of Vojislav Seselj in Death of Yugoslavia	March 1995 (see P00177)	Public
P00070	Video of Speech of Vojislav Seselj, 21 April 1991	21-Apr-91	Public
P00073	Excerpt from the Documentary Death of Yugoslavia		Public
P00178	Vojislav Seselj Speech at SRS Meeting on 15 May 1991	15-May-91	Public
P00180	Video - Speech of Seselj on 15 May 1991 in front of the Parliament	15-May-91	Public
P00185	Video Clip - Speech of Vojislav Seselj on 23 November 1991	23-Nov-91	Public
P00255	Video Clip C - Appointment of Vojvodas	31-May-93	Public
P00256	Video Clip B - Excerpt from the Documentary Bloody Bosnia by Maggie O'Kane, 7 April 1994	07-Apr-94	Public
P00339	Video showing Vojislav Seselj holding a speech		Public
P00342	Video showing an interview with Vojislav Seselj		Public
P00350	Video showing an interview with Vojislav Seselj		Public
P00355	Video showing a speech held by Vojislav Seselj		Public
P00395	V000-4745 Clip G time code 00:22:46 - 00:23:30		Public
P01003	Video excerpt: Djurdjevdanski Uranak w/ KARADZIC, Radovan	06-May-91	Public

¹ The electronic video files included in this CD Annex are the official Registry versions. The CD also includes the corresponding official transcripts of the videos (which bear the same exhibit number). In some cases the official versions of these video exhibits do not have subtitles. In those cases the Prosecution has added a subtitled version of the exhibit in addition to the Registry version. These files are marked "(OTP Version Subtitles)" at the end of the filename. For instructions on how to enable the subtitle option while viewing these videos, please see the file "How to show subtitles in videos.doc", which is included on the CD Annex.