

UNITED
NATIONS

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International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-95-11-PT
IT-03-69-PT
IT-03-67-PT
Date: 10 November 2005
Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Carmel Agius
Judge Liu Daqun

Registrar: Mr. Hans Holthuis

Decision of: 10 November 2005

**PROSECUTOR v. MILAN MARTIĆ
PROSECUTOR v. JOVICA STANIŠIĆ AND FRANKO SIMATOVIĆ
PROSECUTOR v. VOJISLAV ŠEŠELJ**

DECISION ON PROSECUTION MOTION FOR JOINDER

The Office of the Prosecutor:

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The Accused:

Mr. Vojislav Šešelj

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I. BACKGROUND

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”)¹ is seized of three identical motions for joinder of the cases of Prosecutor v. Milan Martić, Prosecutor v. Jovica Stanišić and Franko Simatović, and Prosecutor v. Vojislav Šešelj, filed by the Office of the Prosecutor on 1 June 2005 and 19 July 2005 (“Joinder Motion”).²
2. The Prosecution requests that the cases against the accused Jovica Stanišić (“Stanišić”), Franko Simatović (“Simatović”), Milan Martić (“Martić”) and Vojislav Šešelj (“Šešelj”) be joined and tried in a single trial.³
3. Martić is currently charged in an indictment filed on 24 July 1995, amended on 18 December 2002 and amended again on 9 September 2003.⁴ He is charged with individual criminal responsibility pursuant to Article 7(1) of the Statute of the Tribunal (“Statute”) and with superior responsibility pursuant to Article 7(3) of the Statute for crimes against humanity (persecutions, extermination, murder, imprisonment, torture, inhumane acts—including forcible transfers—and deportation) and violations of the laws or customs of war (murder, torture, cruel treatment, wanton destruction of villages or devastation not justified by military necessity,

¹ This Trial Chamber was composed following orders issued by the President of the Tribunal appointing Judges Robinson, Agius and Liu to constitute the Trial Chamber for the purpose of determining the Prosecution Motions for Joinder of the cases of *Prosecutor v. Milan Martić*, *Prosecutor v. Jovica Stanišić and Franko Simatović* and *Prosecutor v. Vojislav Šešelj*. See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Order Reassigning a Case to a Trial Chamber, 7 June 2005; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Addendum to Order Reassigning a Case to a Trial Chamber, 8 June 2005; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Order Reassigning a Case and Referring the Joinder Motion, 4 July 2005; *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Order Reassigning a Case to a Trial Chamber, 7 June 2005; *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Order Reassigning a Case to a Trial Chamber and Referring the Joinder Motion, 4 July 2005; and *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Order Referring the Joinder Motion, 7 July 2005.

² *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Prosecution Motion for Joinder, 30 May 2005; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Prosecution Motion for Joinder, Partly Confidential, 1 June 2005; and *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Prosecution Motion for Joinder, Partly Confidential, 19 July 2005.

³ The Prosecution mentions that it also contemplates joining the accused Hadžić, who is currently at large. Joinder Motion, para. 1.

⁴ *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Indictment, 24 July 1995; *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Amended Indictment, 18 December 2002; and *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Amended Indictment, 9 September 2003 (“Martić Indictment”). See also *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Order for Review in Open Court of the Indictment by the Trial Chamber I (Rule 61 of the Rules of Procedure and Evidence), 13 February 1996; *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision, 8 March 1996; *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision on the Prosecution’s Motion to Request Leave to File a Corrected Amended Indictment, 13 December 2002; *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision on Review of Indictment, 1 May 2003; *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision on Preliminary Motion Against the Amended Indictment, 2 June 2003; and *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision on Prosecution Motion to File Amended Indictment and on Second Motion against the Amended Indictment, 5 September 2003.

destruction or wilful damage to institutions dedicated to education or religion, plunder of public or private property and attacks on civilians). The crimes are alleged to have been committed on or about 1 August 1991 until 31 December 1995, in various parts of Croatia and Bosnia and Herzegovina (“BiH”), namely the Serbian Autonomous Region (“SAO”) Krajina and the city of Zagreb in Croatia, and the Autonomous Region of Krajina (“ARK”) in BiH.⁵ Martić was transferred to the Tribunal on 15 May 2002, and has been in detention since that time. His motions for provisional release were denied.⁶

4. Stanišić and Simatović are currently charged in a single indictment that was filed on 1 May 2003 and amended on 9 December 2003.⁷ On 6 May 2005, the Prosecution filed a motion for leave to amend the amended Indictment.⁸ That motion is still pending. According to the current Indictment, Stanišić and Simatović are charged with individual criminal responsibility pursuant to Article 7(1) of the Statute for crimes against humanity (persecutions, murder, inhumane acts—forcible transfers—and deportation) and violations of the laws or customs of war (murder). The crimes are alleged to have been committed on or about 1 April 1991 until 31 December 1995, in the SAO Krajina, SAO Slavonia, Baranja and Western Srem (“SAO SBWS”) in Croatia, and in several municipalities in BiH.⁹ Stanišić was transferred to the Tribunal on 11 June 2003, and Simatović was transferred to the Tribunal on 30 May 2003. Both accused were granted provisional release by the Trial Chamber on 28 July 2004.¹⁰ The Appeals Chamber confirmed the Trial Chamber decision¹¹ and the accused were provisionally released on 9 December 2004.

⁵ Martić Indictment, paras. 21, 25, 38, 42, 47 and 49 and counts 1-19. The reference in the Joinder Motion to SAO Western Slavonia, SAO Eastern Slavonia, Baranja and Western Srem seems to be an error on the part of the Prosecution. Joinder Motion, para. 3.

⁶ *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision on the Motion for Provisional Release, 10 October 2002; *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR65, Decision on Application for Leave to Appeal, 18 November 2002; and *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision on Second Motion for Provisional Release, 12 September 2005.

⁷ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Indictment, 1 May 2003; and *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Amended Indictment, 9 December 2003 (“Stanišić/Simatović Indictment”). See also *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Review of Indictment, 1 May 2003; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003; and *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Submission of Amended Indictment; Defence Preliminary Motion (Jovica Stanišić); and Motion on Defect in the Amended Indictment (Franko Simatović), 29 January 2004.

⁸ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Prosecution Motion for Leave to Amend the Amended Indictment, Partly Confidential with *Ex Parte* Supporting Materials, 6 May 2005 (“Stanišić/Simatović Proposed Amended Indictment”).

⁹ Stanišić/Simatović Indictment, paras. 19, 23, 59 and counts 1-5; and Joinder Motion, para. 6.

¹⁰ *Prosecutor v. Jovica Stanišić*, Case No. IT-03-69-PT, Decision on Provisional Release, 28 July 2004; and *Prosecutor v. Franko Simatović*, Case No. IT-03-69-PT, Decision on Provisional Release, 28 July 2004.

¹¹ *Prosecutor v. Jovica Stanišić*, Case No. IT-03-69-AR65.1, Decision on Prosecution’s Appeal Against Decision Granting Provisional Release, 3 December 2004; and *Prosecutor v. Franko Simatović*, Case No. IT-03-69-AR65.2, Decision on Prosecution’s Appeal Against Decision on Provisional Release, 3 December 2004.

5. Šešelj is currently charged in an indictment filed on 15 January 2003 and amended on 12 July 2005.¹² He is charged with individual criminal responsibility pursuant to Article 7(1) of the Statute for crimes against humanity (persecutions, extermination, murder, imprisonment, torture, inhumane acts, deportation and forcible transfers) and violations of the laws or customs of war (murder, torture, cruel treatment, wanton destruction of villages or devastation not justified by military necessity, destruction or wilful damage to institutions dedicated to education or religion and plunder of public or private property). The crimes are alleged to have been committed on or about 1 August 1991 until September 1993, in various territories in Croatia and BiH and in parts of Vojvodina in Serbia.¹³ Šešelj was transferred to the Tribunal on 24 February 2003, and has been in detention since that time. His motion for provisional release was denied.¹⁴ Šešelj is representing himself, but a Standby Counsel has been appointed by the pre-Trial Chamber.¹⁵
6. All four accused have filed responses to the Joinder Motion opposing the Prosecution request for joinder. Martić filed his response on 13 June 2005,¹⁶ Stanišić and Simatović on 29 June 2005,¹⁷ and Šešelj on 29 August 2005.¹⁸
7. On 5 July 2005 the Prosecution requested leave to reply to the submissions filed by the accused Stanišić and Simatović, and attached a consolidated reply to its request (“Prosecution Reply”).¹⁹

¹² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Indictment, 15 January 2003; and *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Modified Amended Indictment, 12 July 2005 (“Šešelj Indictment”). See also *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Confirmation of Indictment and Order for the Warrant for Arrest and Surrender, 14 February 2003; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion by Vojislav Šešelj, Challenging Jurisdiction and Form of Indictment, 26 May 2004; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Validity of Appeal of Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 29 July 2004; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Leave to Amend the Indictment, 27 May 2005; and *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Corrigendum to the Amended Indictment Annexed to the Prosecution’s Motion for Leave to Amend the Indictment, 8 July 2005.

¹³ Šešelj Indictment, paras. 6, 15, 18, 28-29, 31, 34 and counts 1-14; and Joinder Motion, para. 9.

¹⁴ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Defence Motion for Provisional Release, 23 July 2004.

¹⁵ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj with His Defence, 9 May 2003; and *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Request of the Accused to Revoke the Ruling of the Trial Chamber to Appoint Standby Counsel (Submissions number 81, 82 and 84), 3 May 2005.

¹⁶ *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Response to Prosecution’s Motion for Joinder, 13 June 2005 (“Martić Response”).

¹⁷ Stanišić filed a motion for leave to file a response to the Joinder Motion which exceeds the page limit. The Trial Chamber grants the motion and takes all the submissions raised in Stanišić’s response into consideration. *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Defence Request for Leave to File a Response to Prosecution Motion for Joinder Which Exceeds the Page Limit, 28 June 2005; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Defence Response to the Prosecution Motion for Joinder (Dated 1st June 2005), 29 June 2005; and *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Defence Response to Prosecution Motion for Joinder, 29 June 2005 (“Stanišić Response” and “Simatović Response”).

¹⁸ *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Submission by Dr. Vojislav Šešelj Opposing the Prosecution Motion for Joinder of Cases, 29 August 2005 (“Šešelj Response”).

¹⁹ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Prosecution’s Request for Leave to File a Consolidated Reply, with Prosecution’s Consolidated Reply to Jovica Stanišić and Franko Simatović’s Responses to the Prosecution Motion for Joinder Annexed Thereto, 5 July 2005.

The Trial Chamber will grant the Prosecution leave to file the consolidated Reply, and takes the submissions made in the Reply into consideration.

II. THE LAW

8. Rule 48 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) provides that “[p]ersons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.” A “transaction” is defined in Rule 2 of the Rules as a “number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan.”
9. If the Chamber decides that the requirements of Rule 48 have been met, it may, based on an evaluation of various factors, decide either to grant joinder or leave the cases to be tried separately. The case law of the Tribunal suggests that the following factors may properly be taken into account in making this determination: (i) promoting judicial economy; (ii) avoiding conflicts of interest that might cause serious prejudice to the accused; (iii) protecting the interests of justice, *inter alia*, by safeguarding the rights of the accused to a fair and expeditious trial; (iv) minimising hardship to witnesses, and (v) ensuring consistency of verdicts.²⁰
10. In deciding whether charges against accused should be joined pursuant to Rule 48, a Trial Chamber should base its determination upon the factual allegations contained in the indictments and related submissions.²¹

²⁰ *Prosecutor v. Momir Nikolić et al.*, Case No. IT-02-53-PT, IT-02-56-PT, Decision on Prosecution's Motion for Joinder, 17 May 2002, para. 14; *Prosecutor v. Željko Meakić et al.*, Case No. IT-95-4-PT, IT-95-81-PT, Decision on Prosecution's Motion for Joinder of Accused, 17 September 2002, para. 24; *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-A, Decision on Request to Appeal, 16 May 2000; and *Prosecutor v. Vujadin Popović et al.*, Case No. IT-02-57-PT, IT-02-58-PT, IT-02-63-PT, IT-02-64-PT, IT-04-80-PT, IT-05-86-PT, Decision on Motion for Joinder, 21 September 2005, para. 8.

²¹ *Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-PT, IT-01-50-PT, IT-01-51-PT, Decision on Prosecution's Motion for Joinder, 13 December 2001, para. 37; *Prosecutor v. Vidoge Blagojević et al.*, Case No. IT-98-33/1-PT, IT-01-43-PT, IT-01-44-PT, Written Reasons Following Oral Decision of 15 January 2002 on the Prosecution's Motion for Joinder, 16 January 2002, para. 17; *Prosecutor v. Momir Nikolić et al.*, supra note 20, para. 13; *Prosecutor v. Željko Meakić et al.*, supra note 20, paras. 23-24; and *Prosecutor v. Vujadin Popović et al.*, supra note 20, para. 8.

III. RULE 48 OF THE RULES

Arguments of the Parties

11. The Prosecution submits that the three cases should be joined because the crimes alleged in the three Indictments were committed in the course of the same “transaction,” as defined in Rules 48 and 2 of the Rules.²²
12. According to the Prosecution, all four accused participated in a Joint Criminal Enterprise (“JCE”) with a common general purpose: the “forcible removal of a majority of the non-Serb population, primarily, Croats and Muslims, from large areas of the territory of Croatia and Bosnia and Herzegovina, through the commission of crimes in violation of Articles 3 and 5 of the Statute.”²³ Although the Prosecution concedes that there are differences in the wording of the JCEs alleged in the three Indictments, it nevertheless argues that these differences are of a semantic nature, and that “[t]he large degree of similarity between the three Indictments as to the object of the JCE overshadows these slight differences in wording.”²⁴ The Prosecution emphasises that it has phrased the JCE allegations against the four accused in similar terms “precisely because it is the Prosecution’s case that they shared a common long-term aim.”²⁵
13. Moreover, the Prosecution argues that additional similarities between the three Indictments—such as the overlap in the time-span of the JCE and the identical wording of the *mens rea* of the accused in the three Indictments—underscore the singularity of the purpose shared by the accused in pursuit of the common scheme. Indeed, the Prosecution submits, all four accused cooperated with each other.²⁶ The Prosecution further points to the large degree of overlap in the names of other participants of the JCE alleged in each Indictment.²⁷
14. The Prosecution also submits that the crime bases of the Indictments of Šešelj and Stanišić/Simatović, and of the Indictments of Martić and Stanišić/Simatović, significantly overlap.²⁸ Although there is no crime-base overlap in the allegations made against Martić and Stanišić/Simatović for events in BiH, the Prosecution argues that the crimes alleged against these accused still form part of the same campaign of persecution.²⁹ Moreover, the Prosecution

²² Joinder Motion, para. 23.

²³ Ibid, paras. 23-24 and 35; and Prosecution Reply, paras. 8-16.

²⁴ Joinder Motion, paras. 23-27; and Prosecution Reply, paras. 4-5.

²⁵ Prosecution Reply, para. 4.

²⁶ The Prosecution refers to certain statements in the pre-trial briefs in support of this submission. See Joinder Motion, para. 24; and Prosecution Reply, paras. 8-16.

²⁷ Joinder Motion, paras. 24-25.

²⁸ Ibid, paras. 28-33.

²⁹ Prosecution Reply, para. 18.

argues that according to the Tribunal's Rules and jurisprudence the fact that the alleged acts and/or omissions of each accused did not occur in the same place should not bar joinder.³⁰

15. Nor, the Prosecution submits, should differences in the alleged form of participation of the accused dissuade a Trial Chamber from joining accused. It is in the very nature of a JCE that high-level participants play distinct roles,³¹ the Prosecution argues, and it is irrelevant whether co-accused played different roles in the hierarchy of command.³²
16. The accused raise various objections to the Prosecution's conclusion that the crimes charged constitute one "transaction" as required by Rule 48.³³ Martić acknowledges that the Indictments "contain largely similar allegations regarding the so-called joint criminal enterprise which may satisfy the same transaction criterion for joinder within the meaning of the term transaction set out in Rule 2 of the Rules and further elaborated in the Tribunal's jurisprudence."³⁴ Stanišić, Simatović and Šešelj, however, object to the wide interpretation given by the Prosecution to the notion of "same transaction", and to the reliance on a very general formulation of the alleged common JCE as a basis for such a transaction.³⁵ According to Stanišić, the differences in the wording of the alleged JCEs are significant, and reflect the different purpose and nature of each alleged JCE.³⁶
17. Stanišić further emphasizes that a decision on whether a "same transaction" exists cannot be based on common purpose solely, but should also be based on factors such as the timing of the events, their geographical location, the means by which the acts of the accused were alleged to have been committed, and the exact wording and description of the allegations within the individual Indictments.³⁷
18. Stanišić and Šešelj submit that according to the three indictments there are differences in the alleged activities and mode of participation in the JCE of each accused.³⁸ Stanišić adds that the Prosecution submissions do not show a hierarchical relationship between the accused, and show

³⁰ Joinder Motion, paras. 1 and 35 citing *Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 13 December 2001, para. 21.

³¹ Prosecution Reply, paras. 7-8

³² Joinder Motion, para. 21 referring to *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 20.

³³ Stanišić Response, paras. 10, 21 and 25; Simatović Response, paras. 3 and 15-16; and Šešelj Response, para. 18.

³⁴ Martić Response, para. 3.

³⁵ Stanišić Response, paras. 4, 6, 8, 10 and 12; Simatović Response, para. 15; and Šešelj Response, paras. 12-13, 16 and 18.

³⁶ Stanišić Response, paras. 7 and 11-18.

³⁷ Stanišić Response, paras. 4-6.

³⁸ Stanišić Response, paras. 17-26; and Šešelj Response, para. 17.

only very little coordination between the activities of the accused.³⁹ Moreover, Stanišić and Simatović refer to the small number of common witnesses as an additional indication that there is very little overlap between the Indictments.⁴⁰ Stanišić also argues that the Indictments differ in relation to the counts charged against the accused.⁴¹ Finally, all four accused submit that the three Indictments differ considerably in their crime bases.⁴²

Discussion

19. The Trial Chamber must first determine whether the crimes alleged in the three Indictments form part of the same transaction, *i.e.* part of a common scheme, strategy or plan. According to the Tribunal's Rules and jurisprudence, acts of the accused can form part of the same transaction even if they are comprised of different crimes, and even if they were carried out in different areas and over different periods of time, provided that there is a sufficient nexus between them.⁴³
20. In this case, the three Indictments charge the accused with participation in a JCE with a similar long-term aim: the forcible removal of non-Serbs from large areas of Croatia and BiH through the commission of crimes under articles 3 and 5 of the Statute; indeed, the accused are alleged to have had contact with one another.⁴⁴ However, the wording of the "common purpose" alleged in each of the three Indictments is not identical.⁴⁵
21. In addition, there is only a partial overlap between the (i) counts and (ii) mode of liability charged against each accused; and (iii) the time-frame and (iv) location of the crimes charged in the three Indictments.

³⁹ Stanišić Response, paras. 18-20, 22 and 24.

⁴⁰ Stanišić Response, para. 35; and Simatović Response, para. 16.

⁴¹ Stanišić Response, para. 27.

⁴² Stanišić Response, paras. 4, 13 and 28; Simatović Response, paras. 16 and 18-21; Martić Response, para. 5; and Šešelj Response, para. 19. See also *infra*, paras. 24-25.

⁴³ Rules 2 and 48 of the Rules, *Prosecutor v. Slobodan Milošević*, *supra* note 30, paras. 20-21; *Prosecutor v. Radoslav Brđanin and Momir Talić*, *supra* note 32, para. 20; and *Prosecutor v. Ntakirutimana et al.*, ICTR 96-10-I and ICTR 96-17-T, Decision on the Prosecutor's Motion to Join the Indictments, February 22, 2001.

⁴⁴ Joinder Motion, paras. 23-24; and Prosecution Reply, paras. 4-5 and 7-15.

⁴⁵ Firstly, the Indictments against Stanišić/Simatović and Šešelj refer to "permanent removal", while the Indictment against Martić refers only to "removal". Secondly, the Indictments against Šešelj and Martić refer to the "removal of non-Serbs from approximately one third of the territory of Croatia and large parts of BiH", while the Indictment against Stanišić/Simatović refers to their "removal from large areas of Croatia and BiH". Thirdly, the Indictments against Martić and Šešelj indicate that the removal of non-Serbs was done "through commissions of crimes under articles 3 and 5 of the ICTY Statute", while the Indictment against Stanišić/Simatović refers to "commissions of crimes of Persecutions, Murder, Deportations and Inhumane acts (forcible transfers)". Moreover, the Indictments against Martić and Šešelj allege that the purpose of the JCE was to make the areas mentioned in the Indictments part of a new Serb-dominated state, while the Indictment against Stanišić/Simatović does not refer to such a purpose. Lastly, only the Indictment against Šešelj refers to the removal of non-Serbs from parts of Vojvodina (Serbia). Joinder Motion, paras. 23 and 26-27.

22. First, with regard to the counts charged, although all four accused are charged with persecution, murder, deportations and forcible transfers,⁴⁶ only Martić and Šešelj are charged with extermination, imprisonment, torture, inhumane acts, cruel treatment, wanton destruction of villages or devastation not justified by military necessity, destruction or wilful damage done to institutions dedicated to religion or education and plunder of public or private property,⁴⁷ and only Martić is charged with the crime of attacks on civilians.⁴⁸
23. Second, with regard to the modes of liability charged, although all four accused are charged with individual criminal responsibility pursuant to Article 7(1) of the Statute for planning, ordering, committing (*inter alia* through participating in a JCE) and aiding and abetting the crimes alleged in the Indictments, only Martić and Šešelj are charged in addition with individual criminal responsibility for instigating the commission of the crimes alleged.⁴⁹ Moreover, the allegation that Šešelj instigated certain crimes is based in part on “speeches” and other “communications” he made, whereas the allegation against Martić is not.⁵⁰ Finally, of the four accused, only Martić is charged with superior responsibility pursuant to Article 7(3) of the Statute.⁵¹
24. Third, with regard to the time-period of the alleged crimes, the Trial Chamber observes that all three Indictments refer to JCEs that came into existence no later than 1 August 1991. However, while Martić, Stanišić and Simatović are charged with crimes that are alleged to have been committed up to August 1995, Šešelj is only charged with crimes that are alleged to have been committed up to October 1993.⁵²
25. Finally, with regard to the location of the crimes with which the accused are charged, the Trial Chamber observes that the Indictments against Martić and Stanišić/Simatović charge the accused with criminal responsibility for events that, with a few exceptions, took place in the same parts of SAO Krajina in Croatia.⁵³ Moreover, the Indictments against Šešelj and Stanišić/Simatović charge the accused with criminal responsibility for events that took place in

⁴⁶ Martić Indictment, counts 1, 3, 4, 10-11 and 15-18; Stanišić/Simatović Indictment, counts 1-5; and Šešelj Indictment, counts 1, 3-4 and 10-11.

⁴⁷ Martić Indictment, counts 2, 5-9 and 12-14; and Šešelj Indictment, counts 2, 5-9 and 12-14.

⁴⁸ Martić Indictment, count 19. Moreover, although the counts charged against Martić and Šešelj may largely be similar, they are related to different events.

⁴⁹ Martić Indictment, para. 3; Stanišić/Simatović Indictment, para. 8; and Šešelj Indictment, para. 5.

⁵⁰ Šešelj Indictment, para. 5.

⁵¹ Martić Indictment, paras. 3 and 9.

⁵² Martić Indictment, paras. 6 and 21; Stanišić/Simatović Indictment, paras. 11 and 19; and Šešelj Indictment, paras. 8 and 15.

⁵³ Martić Indictment, paras. 21, 25-34, 39, 42, 44 and 47; and Stanišić/Simatović Indictment, paras. 19 and 23-32.

Vukovar/SAO SBWS in Croatia, and Zvornik, Bosanski Šamac and Bijeljina in BiH.⁵⁴ However, only Martić is charged with criminal responsibility for events in Zagreb in Croatia, and for events in Bosanski Novi, Bosanska Gradiška, Prnjavor and Šipovo in BiH.⁵⁵ Furthermore, only Stanišić and Simatović are charged with criminal responsibility for events in Doboj, Mrkonjić Grad,⁵⁶ and Sanski Most in BiH.⁵⁷ Finally, only Šešelj is charged with criminal responsibility for events in SAO Western Slavonia in Croatia, in Greater Sarajevo, Mostar, Nevesinje, Brčko in BiH, and Vojvodina in Serbia.⁵⁸ There is, therefore, only a partial geographical overlap between events alleged to entail criminal responsibility for Martić and Stanišić/Simatović, and a partial overlap between events alleged to entail criminal responsibility for Šešelj and Stanišić/Simatović. Moreover, it is noteworthy that there is no overlap at all between the geographical location of events alleged to entail criminal responsibility for Martić and Šešelj.⁵⁹

26. On the basis of the above analysis, the Trial Chamber has to consider whether the crimes alleged in the three Indictments fall within the definition of “same transaction” under Rule 48 of the Rules. The decision of the Appeals Chamber in the *Milošević* case is instructive as to the meaning of the term “same transaction”.⁶⁰

27. The *Milošević* Trial Chamber found the nexus between the crimes alleged in the Indictment regarding Kosovo and the crimes alleged in the Indictments relating to Croatia and Bosnia “too nebulous to point to the existence of ‘a common scheme, strategy or plan’ required for the ‘same transaction’ under Rule 49.”⁶¹ That Chamber based its decision denying joinder on the distinction, in time and place, between the Kosovo Indictment, on the one hand, and the Croatia and Bosnia Indictments, on the other, as well as on the distinction in the way in which the accused is alleged to have acted in each Indictment.⁶²

⁵⁴ Stanišić/Simatović Indictment, paras. 19, 23, 33, 42-48, 57 and 59; and Šešelj Indictment, paras. 15, 17-18, 20-23, 25, 29, 31 and 34.

⁵⁵ Martić Indictment, paras. 21, 25, 38-39, 42, 47 and 49.

⁵⁶ The allegations with respect to Mrkonjić Grad were omitted from the Stanišić/Simatović Proposed Amended Indictment.

⁵⁷ Stanišić/Simatović Indictment, paras. 19, 49-56 and 59. The Prosecution seeks to amend the Indictment to include certain events in Srebrenica, which is not a common crime base. Stanišić/Simatović Proposed Amended Indictment, paras. 19, 23, 55-65 and 68.

⁵⁸ Šešelj Indictment, paras. 15, 16, 18-19, 24, 24, 26-27, 29, 31 and 34.

⁵⁹ The Trial Chamber is aware that the Šešelj Indictment refers to crimes that are alleged to have been committed in the Republic of Serbian Krajina (“RSK”), and alleges that on 19 December 1991 the SAO Krajina proclaimed itself the RSK and on 26 February 1992 the SAO Western Slavonia, SAO SBWS and the Dubrovnik Republic joined the RSK. This, however, does not change the Trial Chamber’s conclusion that there is no overlap between the geographical location of crimes alleged in the Indictments of Martić and Šešelj. Šešelj Indictment, para. 6.

⁶⁰ *Prosecutor v. Slobodan Milošević*, supra note 30, paras. 19-21.

⁶¹ *Prosecutor v. Slobodan Milošević*, supra note 21, para. 45.

⁶² *Prosecutor v. Slobodan Milošević*, supra note 21, paras. 45-46.

28. The Appeals Chamber, however, reversed the Trial Chamber's decision,⁶³ finding that the events alleged in the three Indictments—Kosovo, Croatia and Bosnia—formed part of the “same transaction” pursuant to Rules 2 and 49 of the Rules. It therefore ordered that the three Indictments be joined.⁶⁴

29. For the Appeals Chamber it was sufficient that:

[t]he indictments...when taken as a whole...make it sufficiently clear that the purpose behind the events in each of the three areas for which the accused is alleged to be criminally responsible was the forcible removal of the majority of the non-Serb civilian population from areas which the Serb authorities wished to establish or to maintain as Serbian-controlled areas by the commission of the crimes charged. The fact that some events occurred within a province of Serbia and others within neighbouring states does not alter the fact that, in each case, the accused is alleged to have acted in order to establish or maintain Serbian control over areas which were or were once part of the former Yugoslavia.⁶⁵

30. The Appeals Chamber further found that a “transaction” may be a common scheme, strategy or plan with a long-term aim, and further clarified that:

[a] joint criminal enterprise to remove forcibly the majority of the non-Serb population from areas which the Serb authorities wished to establish or to maintain as Serbian controlled areas by the commission of the crimes charged remains the same transaction notwithstanding the fact that it is put into effect from time to time and over a long period of time as required.⁶⁶

31. Although the Appeals Chamber in the *Milošević* case dealt with a request for joinder pursuant to Rule 49 (joinder of crimes), it found that Rule 49 has to be considered in conjunction with Rule 48 (joinder of accused), because both are based upon acts committed in the course of “the same transaction”, as defined in Rule 2 of the Rules.⁶⁷

32. The very wide interpretation of the notion of “same transaction” adopted by the Appeals Chamber in the *Milošević* case leads the Trial Chamber to the conclusion that the requirement of “same transaction” has been met in this case as well. Indeed, the Appeals Chamber decision makes it very difficult for any Trial Chamber seized of a joinder request alleging that the accused had a “common purpose” to conclude that such a requirement has not been met, even if the common purpose is a very broad and long-term one.

⁶³ *Prosecutor v. Slobodan Milošević*, supra note 30, paras. 19-20.

⁶⁴ *Ibid*, paras. 19-21.

⁶⁵ *Ibid*, para. 20.

⁶⁶ *Ibid*, para. 21.

⁶⁷ *Ibid*, para. 13.

33. Accordingly, the Trial Chamber concludes that in the present case, although the three Indictments reveal differences in the formulation of the “common purpose” of the alleged JCE, the counts and modes of liability charged against each accused and the time-frame and location of the crimes charged, there is a sufficient nexus between them to satisfy the “same transaction” requirement, as that has been interpreted by the Appeals Chamber. The “common purpose” alleged in each of the three Indictments is formulated in largely similar terms and suggests that the accused were involved in a JCE aimed at removing non-Serbs from certain areas through the commission of crimes in violation of Articles 3 and 5 of the Statute.
34. In light of the foregoing, the Trial Chamber holds that the crimes alleged in the Indictments of Martić, Stanišić/Simatović and Šešelj were committed in the course of the “same transaction” under Rule 2 and Rule 48 of the Rules and are therefore eligible to be “jointly charged and tried.”

IV. DISCRETIONARY FACTORS

35. The Trial Chamber will now examine and evaluate the different factors to be taken into account in exercising its discretion to grant or refuse joinder. These factors include: (i) promoting judicial economy; (ii) avoiding conflicts of interest that might cause serious prejudice to the accused; (iii) protecting the interests of justice, *inter alia*, by safeguarding the rights of the accused to a fair and expeditious trial; (iv) minimising hardship to witnesses, and (v) ensuring consistency of verdicts.

Promoting Judicial Economy

36. The Prosecution submits that a joint trial will prevent duplication of evidence. According to the Prosecution, one joint trial will be shorter than the total period required for three separate trials, and will save financial resources as it would allow witnesses and experts to testify only once.⁶⁸ The Prosecution also states that it is willing to consider dropping certain crime base allegations with a view to shortening the trial.⁶⁹
37. All four accused, however, submit that a joint trial will be long and inefficient.⁷⁰ Stanišić argues that if the cases are joined, it will be difficult to find evidence suitable for submission under Rule 92*bis* because of the different roles, acts and liability alleged against each accused.⁷¹

⁶⁸ Joinder Motion, paras. 36-40.

⁶⁹ Prosecution Reply, para. 18; and *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Rule 65*ter* Conference, T. 245, 27 September 2005 (“Rule 65*ter* Conference”).

⁷⁰ Stanišić Response, paras. 33-37; Simatović Response, paras. 17-18, 24 and 26; Martić Response, paras. 4-5, 7 and 13; and Šešelj Response, paras. 8 and 20.

⁷¹ Stanišić Response, para. 32.

Simatović argues that it will be difficult to reach an agreement on any facts, as many facts may be only minimally relevant to one accused while very relevant to another.⁷² Šešelj argues that a joint trial may even increase the amount of evidence, because each accused will have to call more witnesses to defend himself in a joint trial.⁷³ And finally Stanišić and Simatović argue that a joint trial will also be costly.⁷⁴

38. The Prosecution estimates that if the three trials were to take place separately, the total number of Prosecution witnesses in the three cases would be 329 (79 in the Martić case, 120 in the Stanišić/Simatović case and 130 in the Šešelj case), whereas in a joint trial, the number of Prosecution witnesses would be reduced to 274.⁷⁵
39. Even assuming these figures are correct, out of the 274 Prosecution witnesses who would be called in a joint trial only one is common to all the three cases for which joinder is sought. Only 29 witnesses are common to the cases of Martić and Stanišić/Simatović. Only 26 are common to the cases of Šešelj and Stanišić/Simatović. And only two are common to the cases of Martić and Šešelj.⁷⁶ Put another way, Martić would be confronted with 195 witnesses of no relevance to his case; Stanišić and Simatović would be confronted with 154 witnesses of no relevance to their case, and Šešelj would be confronted with 144 witnesses of no relevance to his case.
40. Furthermore, if only the cases of Martić and Stanišić/Simatović were joined, those accused would be confronted with 170 Prosecution witnesses, only 29 of which would be in common, with 91 witnesses being of no relevance to Martić's case, and 50 witnesses being of no relevance to the Stanišić/Simatović case. If only the cases of Šešelj and Stanišić/Simatović were joined, those accused would be confronted with 224 Prosecution witnesses, only 26 of which would be in common, with 94 witnesses being of no relevance to Šešelj's case, and 104 witnesses being of no relevance to the Stanišić's/Simatović's case. Finally, if only the cases of Martić and Šešelj were joined, those accused would be confronted with 207 Prosecution witnesses, only two of which would be in common, with 128 witnesses being of no relevance to Martić's case, and 77 witnesses being of no relevance to Šešelj's case.
41. These figures speak for themselves. They show that although joinder will decrease to a limited extent the total number of witnesses which the Prosecution would call against the four accused, it will also increase considerably the number of witnesses called by the Prosecution against each accused, and, as a consequence, the length of the trial for each accused. This, in turn, means that

⁷² Simatović Response, para. 25.

⁷³ Šešelj Response, para. 8.

⁷⁴ Stanišić Response, para. 36; and Simatović Response, para. 25.

⁷⁵ This estimate is slightly different from the one given by the Prosecution in the Rule 65ter Conference. See T. 267.

it is questionable whether there would be any saving in the overall costs incurred in the event of a joinder.⁷⁷

42. The Prosecution's submission that a substantial number of the Prosecution witnesses in the three cases are proposed Rule 92*bis* witnesses,⁷⁸ and that there are additional common Prosecution witnesses who are proposed Rule 92*bis* witnesses in one case and *viva voce* witnesses in another does not change this conclusion.⁷⁹ In the Trial Chamber's view, decisions on whether evidence could be admitted pursuant to Rule 92*bis* are to be taken at a later stage of the pre-trial process, and it is not therefore in a position to give weight to these submissions in the exercise of its discretion in favour or against joinder.⁸⁰

43. In sum, the Trial Chamber finds that an assessment of the factors relating to judicial economy militate strongly against granting joinder.

Safeguarding the Rights of the Accused, including the Avoidance of Conflicts of Interest

44. The Prosecution submits that joinder of the three cases will not interfere with the right of the accused to a fair trial because joinder will not lead to any significant delay (the three cases are substantially ready for trial)⁸¹ and because a joint trial will not give rise to any conflict of interests that might cause prejudice to the accused.⁸²

45. Stanišić, Simatović and Šešelj, however, submit that a joint trial will create conflicts of interest among the accused.⁸³ Moreover, all four accused submit that a joint trial will prejudice their fair-trial rights.⁸⁴ The four accused argue that the three cases are in different stages of pre-trial preparation, and that this means delays will result.⁸⁵ Stanišić argues that further delays may also be caused by his illness, as well as Šešelj's self-representation and entitlement to translation of

⁷⁶ Joinder Motion, paras. 37-38; and Rule 65*ter* Conference, T. 267.

⁷⁷ For example, it seems that because a joinder would extensively prolong the length of the trial for each of the accused, it would also lead to additional costs for such issues as legal aid, to the extent that the accused have shown eligibility for the payment of such aid.

⁷⁸ Rule 65*ter* Conference, T. 267; and Prosecution Reply, para. 18.

⁷⁹ Joinder Motion, para. 38.

⁸⁰ The Prosecution also submits that it is willing to consider dropping certain crime base allegations. However, the Trial Chamber observes that no further indication is given of allegations it might be willing to drop and that the Prosecution has not stated that it will in fact do so should joinder be ordered.

⁸¹ Joinder Motion, para. 43; and Prosecution Reply, paras. 19-20.

⁸² Joinder Motion, paras. 43-44

⁸³ Stanišić Response, paras. 41 and 44; Simatović Response, para. 22; and Šešelj Response, para. 9.

⁸⁴ Martić Response, para. 12; Stanišić Response, paras. 50-58; Simatović Response, paras. 5, 22 and 26; and Šešelj Response, para. 20.

⁸⁵ Stanišić Response, paras. 52-54; Simatović Response, paras. 5-8 and 26; Martić Response, paras. 8-12; and Šešelj Response, paras. 8 and 14.

all documents into B/C/S.⁸⁶ All four accused submit that if the cases are joined, the accused will have to deal with a huge volume of evidence that will cause the joint trial to be unmanageable.⁸⁷ Stanišić and Šešelj further argue that a joint trial may also make it difficult to conduct a careful detailed assessment of the alleged liability of each accused.⁸⁸

46. With respect to the alleged conflicts of interest, the accused only argue in general terms that conflicts may arise, but provide no support for a finding that a joint trial would cause conflicts of interest within the meaning of the Tribunal's jurisprudence. According to this jurisprudence, conducting joint trials, where co-accused may testify against each other, does not *per se* constitute a conflict of interests between accused. Equally, the mere possibility of mutually antagonistic defences does not in itself constitute a conflict of interest capable of causing serious prejudice. This is because trials at the Tribunal are conducted by professional judges who are capable of determining the guilt or innocence of each accused.⁸⁹ In the Trial Chamber's view, therefore, no convincing argument has been advanced by any of the accused as to the possibility of a conflict of interests that would prohibit joinder.
47. With respect to the right of an accused to be tried without undue delay, the Trial Chamber will consider each accused individually.
48. Martić's case has been ready for trial for some time.⁹⁰ In light of the fact that Martić has been in detention for over 3 years and 4 months, he is entitled to have his trial begin with the shortest possible delay. However, joinder is likely to lead to a further delay in the start of a trial against this accused, as well as to a more complex and lengthy trial, with almost four times as many Prosecution witnesses testifying than if he were to be tried alone.
49. Šešelj has been in detention for over 2 years and 7 months. His case is in a different pre-trial stage from the cases of Martić and Stanišić/Simatović, and does not appear to be ready for

⁸⁶ Stanišić Response, paras. 45-49.

⁸⁷ Martić Response, para. 13; Stanišić Response, paras. 40 and 42-44; Simatović Response, para. 18; and Šešelj Response, paras. 14 and 20.

⁸⁸ Stanišić Response, para. 40; and Šešelj Response, para. 20.

⁸⁹ *Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Defence Motion for a Separate Trial, 25 April 2001, para. 11; *Prosecutor v. Brdanin and Momir Talić*, Case No. IT-99-36-T, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002, para. 21 citing *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on Defence Motion to Sever Defendant and Counts, 15 March 1999; and *Prosecutor v. Vujadin Popović et al.*, supra note 20, para. 32.

⁹⁰ Both the Prosecution and the Defence submitted their pre-trial briefs on 7 May 2004 and 1 November 2004, respectively. *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Partially Confidential Prosecution's Pre-Trial Brief, 7 May 2004; and *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Defence's Pre-Trial Brief Pursuant to Rule 65ter(F) (with a Confidential Annex), 1 November 2004.

trial.⁹¹ Therefore, although joinder may not significantly delay the start of the trial against this accused, it would still adversely affect the length of his trial.

50. Both Stanišić and Simatović are on provisional release.⁹² Their case is in a different pre-trial stage from the cases of Martić and Šešelj.⁹³ Therefore, although a joinder may expedite the start of a trial against Stanišić and Simatović, it would, as previously noted, adversely affect the length of their trial.

51. The Trial Chamber also notes Stanišić's submission that his illness and Šešelj's self-representation may cause further delays. Other Trial Chambers have recognised that an accused's self-representation and health problems may obstruct the proper and expeditious conduct of a trial.⁹⁴ However, it is currently not possible to assess the difficulties that these factors may cause in the future and their impact on joinder. Therefore, the Trial Chamber finds that these factors neither militate in favour nor against joinder.

52. In light of the foregoing, the Trial Chamber concludes that although there is no basis for finding that joinder would result in a conflict of interests, there are strong grounds for concluding that joinder would adversely affect Martić's right to a fair and expeditious trial without undue delay and that joinder would prejudice the rights of all four accused to a fair and expeditious trial.⁹⁵ Although joinder may, to some extent, expedite the start of the trial of Stanišić and Simatović, the Trial Chamber concludes that this advantage does not outweigh the adverse effect that joinder would have on all accused, in that it will unduly prolong the length of a joint trial.⁹⁶ This factor—safeguarding the rights of the accused—therefore militates against joining the three cases.

⁹¹ As previously noted, the Šešelj Indictment was amended on 12 July 2005. However, the Prosecution did not amend its pre-trial brief and the Defence did not submit a pre-trial brief. *Prosecutor v. Vojislav Šešelj*, supra note 12; and *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Prosecution's Pre-Trial Brief, 28 October 2004.

⁹² *Prosecutor v. Jovica Stanišić*, supra note 10; *Prosecutor v. Franko Simatović*, supra note 10; *Prosecutor v. Jovica Stanišić*, supra note 11; and *Prosecutor v. Franko Simatović*, supra note 11.

⁹³ As previously noted, on 6 May 2005 the Prosecution filed a motion for leave to amend the amended Indictment. *Prosecutor v. Jovica Stanišić and Franko Simatović*, supra note 8.

⁹⁴ Regarding the issue of self representation see *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 13; and *Prosecutor v. Momčilo Krajišnik*, Reasons for Oral Decision Denying Mr Krajišnik's Request to Proceed Unrepresented by Counsel, 18 August 2005, paras. 24 and 33. Regarding the issue of health-related difficulties see *Prosecutor v. Radoslav Brđanin and Momir Talić*, supra note 89.

⁹⁵ Articles 20(1) and 21(4)(c) of the Statute. The Tribunal's jurisprudence recognised that the right to an expeditious trial is an inseparable and constituent element of the right to a fair trial. *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-AR73.5, Decision on Interlocutory Appeal by the Accused Zoran Žigić Against the Decision of Trial Chamber I Dated 5 December 2000, 25 May 2001, para. 20.

⁹⁶ The Trial Chamber notes that the European Court of Human Rights ("ECtHR") and the United Nations Human Rights Committee have taken various decisions on what may constitute 'unreasonable time' or 'undue delay'. Among these decisions are *Ledonne (No. 2) v. Italy*, ECtHR, 12 May 1999, para. 23; *Majarić v. Slovenia*, ECtHR, 8 February 2000, paras. 33-39; and *Pélissier v. France*, ECtHR, 25 March 1999, paras. 67 and 74. Communication No. 336/1988: *Bolivia*, UN Doc. CCPR/C/43/D/336/1998, 6 November 1991, para. 6.5.

Minimising Hardship to Witnesses

53. The Prosecution argues that a joint trial will minimise the hardship to common witnesses, many of whom would otherwise be required to give testimony in more than one trial, and that this will enhance their protection.⁹⁷
54. Stanišić, however, claims that the aim of protecting witnesses and minimising their hardship is offset by the fact that there is only a limited number of common crime base witnesses.⁹⁸ Simatović argues that in a joint trial witnesses will have to face cross-examination by several counsel consecutively in one trial.⁹⁹ Šešelj adds that a joinder will increase the discomfort of non-common witnesses because their identity will be revealed to all four accused.¹⁰⁰
55. According to this Tribunal's jurisprudence, protecting and minimising hardship to witnesses is a factor that may or may not favour joinder depending on the circumstances of the case.¹⁰¹ In many cases joinder can minimise hardship to common witnesses because having a single trial means that witnesses will not need to travel to The Hague and give direct testimony more than once. However, in the current case there is only one witness who is common to all three cases and 54 witnesses that are common to two of the three cases. If joinder were refused, this relatively limited number of common witnesses would indeed have to travel to The Hague more than once. However, it is also possible that witnesses would be exposed to consecutive cross-examination by each accused. At any rate, where, as here, the number of common witnesses is so limited, the factor of minimising hardship to witnesses does not clearly militate in favour of a joinder.

Consistency in Evaluation of Evidence, Verdicts and Sentences

56. The Prosecution submits that a joint trial will ensure a consistent approach to the evaluation of evidence, and will ensure uniformity in verdicts and sentences.¹⁰² Stanišić and Šešelj, however, submit that the aim of achieving consistent verdicts and punishments has no validity when there is very little overlap in the criminal enterprise alleged against each accused.¹⁰³

⁹⁷ Joinder Motion, para. 40; and Prosecution Reply, paras. 23-24.

⁹⁸ Stanišić Response, para. 38.

⁹⁹ Simatović Response, para. 24.

¹⁰⁰ Šešelj Response, para. 19.

¹⁰¹ *Prosecutor v. Vujadin Popović et al.*, supra note 20, para. 25.

¹⁰² Joinder Motion, paras. 41-42; and 54 and Prosecution Reply, para. 26.

¹⁰³ Stanišić Response, paras. 33-37 and 39; and Šešelj Response, para. 19.

57. The Trial Chamber is aware that a joint trial can ensure a consistent approach regarding the evaluation of evidence, verdicts and sentences.¹⁰⁴ However, the Trial Chamber is of the opinion that this factor would be more relevant if the overlap between the cases whose joinder is sought were significant. In the present case, where there is only limited overlap between the crime bases of the Indictments and the witnesses to be called, the relevance of this factor is very limited, and consequently it does not support a finding that joinder should be granted.

V. CONCLUSION

58. The Trial Chamber concludes that none of the factors that have been taken into account—judicial economy, conflicts of interest and rights of the accused, minimizing hardship for witnesses and consistency in verdicts—militate in favour of a joinder. Indeed, the factors of judicial economy and rights of the accused argue strongly against a joinder because joinder would substantially increase the length of each accused's trial and in Martić's case further delay its commencement. Accordingly, the Trial Chamber decides to refuse the request for joinder, and to leave the three cases to be tried separately.

¹⁰⁴ *Prosecutor v. Vujadin Popović et al.*, supra note 20, para. 27.

VI. DISPOSITION

59. For the foregoing reasons, and pursuant to Rule 48 of the Rules, this Trial Chamber hereby orders as follows:

- i. The Accused Stanišić is granted leave to file a response to the Joinder Motion which exceeds the page limit;
- ii. The Prosecution is granted leave to file a consolidated reply to the responses of Stanišić and Simatović to the Joinder Motion;
- iii. The Joinder Motion is denied.

Done in English and French, the English version being authoritative.

Dated this 10th day of November 2005,

At The Hague,

The Netherlands.



Judge Patrick Robinson
Presiding

[Seal of the Tribunal]